

Article by **Dominic Crossley**, Dispute Resolution partner and privacy law specialist, at **Payne Hicks Beach** first published online in Legal Week on 17 November 2015

<http://www.legalweek.com/legal-week/blog-post/2435171/no-name-no-claim-the-sun-the-hiv-exclusive-and-the-privacy-law-implications>



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## No name, no claim? The Sun, HIV and the privacy law implications



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**The media furore over the HIV status of a Hollywood celebrity raises important privacy law questions, as Payne Hicks Beach partner **Dominic Crossley** explains**

"**Superstar womaniser has HIV - Hollywood rocked**" screamed *The Sun's* headline last week. The actor was not named in the article, but certain descriptive details were provided and, in particular, an illustration pointing to six sexual partners each with their own brief potted biographies. It was enough to get the guessing game started and, as I write, US and UK publishers are now naming the actor and he has just made an announcement on the subject.

While the article quoted an unnamed "showbiz insider" who described the news as "common knowledge" (as of last week) it was billed in sensationalist terms and Radar Online described it as a "**bombshell world exclusive**". Just the sort of thing that might help a news website - recently freed from its paywall - catch up with the all-conquering Mail Online.

The article describes how the publishers had decided not to name the actor. It also contains no images that could identify him. It is not known whether these precautions were

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taken in response to correspondence from the actor's lawyers, or whether they were taken based upon its own assessment of the legal, regulatory and ethical considerations.

It was right not to name the actor or his alleged sexual partners. To have done so without consent would have immediately exposed *The Sun* to very significant legal risk. Nevertheless, while there may not have been any legal consequences (yet) from the article, it caused significant waves across the media, new and old.

Criticisms from HIV campaigners have been particularly acute, with one describing the piece as an "insidious headline grab" and many pointing a return to the dark days of stigma, ignorance and fear of HIV and Aids. Certainly, the issue is highly sensitive and the growing privacy law jurisprudence recognises that information concerning an individual's health and sex life are within a sphere that should be protected, except in the event of consent or an overwhelming public interest argument.

No such public interest argument appears to be available to *The Sun* here. While reference is made to potential civil claims against the actor, this publication can hardly be justified as protecting the sexual health of the public.

The indirect but entirely predictable consequence of the article was the social media gossip and speculation that spread like wildfire following publication. The social media naming of the actor and many others thought to fit the profile described by *The Sun* puts not just the publishers of *The Sun* at risk but also those individuals who make the postings. These individuals, unlike *The Sun*, do so without training or legal advice and have been exposed to a risk of privacy and libel claims such as those pursued in the wake of the 2013 BBC Panorama broadcast. After watching Panorama, Sally Bercow among others used Twitter to identify Lord McAlpine as the suspected paedophile referred to but not named in that broadcast. It should be noted that the BBC and Bercow each paid substantial libel damages to McAlpine to settle his claims.

*The Sun's* pre-publication calculations would have included whether the actor would be prepared to sue to protect his privacy because, in doing so, he would increase the potential of being identified and adding oxygen to the story. This self-defeating approach to a legal action is sometimes referred to as the 'Streisand effect' after Barbara Streisand's attempts in 2003 to assert privacy rights in photographs which inadvertently gave them further publicity. The presumption of open justice can be departed from in this jurisdiction. In a privacy claim concerning a claimant's medical condition, a court is likely to sympathise and allow the court file to be sealed and for the claimant's name to be replaced with the now-familiar three letter initials. But, as Ryan Giggs will testify, a Court's discretion and sympathy is no guarantee that a claimant's anonymity will be protected in the online world.

The fact that the actor's name has now entered the public domain via other publications and the actor's decision to make a public announcement will change the dynamic considerably. No longer will the Streisand effect be a deterrent to legal action. To what extent will this actor hold *The Sun* responsible for forcing his hand? *The Sun's* lawyers may be about to find out whether they have done enough to protect themselves from a claim.

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