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The Legal Protection of Privacy and Free Expression

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Dominic Crossley, Dispute Resolution partner and Privacy Law Specialist attended as an expert speaker at the University of Stirling Human Rights Law Conference 2016. Dominic gave a speech on "The Legal Protection of Privacy and Free Expression".

Speech at the University of Stirling Human Rights in Law Conference 2016

The Legal Protection of Privacy and Free Expression

By Dominic Crossley, Payne Hicks Beach Solicitors

I am delighted that my old friend Dr Rowan Cruft asked me to speak to you today. It is a rare and slightly daunting honour to be asked to speak by a doctor of philosophy and in front of such an esteemed and learned group. As a lawyer, I am used to argument but rarely to academic analysis, so I hope you will be forgiving.

In the emails that were exchanged in the build-up to today, Anabelle Lever kindly sent me her enormously impressive paper entitled “Privacy, democracy & freedom of expression”. Her first sentence poses a question: must privacy and freedom of expression conflict? She then describes the raging battle between those arguing for press reform in the UK and the press’ continued determination for self-controlled regulation notwithstanding the findings of Lord Justice Leveson.

That battle continues and I thought I could use some of the time afforded to me to describe how I came to be drawn in to that battle and where I think we are today. I am a lawyer, a Partner at the London firm Payne Hicks Beach, and I hope my practical experience of acting in contests between freedom of expression (established in Article 10 of the European Convention on Human Rights) and privacy (as set out in Article 8) will be of value to this conference.

I would like to start by addressing Anabelle’s question: must privacy and freedom of expression conflict. My answer to that is no, they needn’t always conflict and in my experience a failure to respect privacy can have a direct impact upon freedom of expression. Two personal examples:

- The newspaper sting operation. There is rarely much sympathy for politicians caught up in lobbying or corruption scandals. Often these politicians (including those who have sought my help) are caught out by a hidden camera operated by journalists pretending to be part of a far eastern investor looking to make an influential appointment. Putting aside the characterisation of the exchanges and conduct of the journalists, I have witnessed politicians becoming

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increasingly wary and unwilling to engage openly with the public or indeed business as a result of, or for fear of, being caught up these stings. In my view we need to radically reconsider our expectations of being entitled to private information concerning politicians if we wish for normal human beings to a) run for office and b) be able to express themselves effectively when they reach office. This week has seen David Cameron revealed as looking into private education for his children and George Osborne under pressure to disclose his tax return. If we expect our politicians to have no privacy, we should not be surprised when we find that those seeking election are a strange breed of other-worldly narcissists.

- The dissemination of private images. If any of you have Googled me in advance of today to find out who the hell the solicitor is, you will know that I have acted for Max Mosley, who was well known through his career in motor-sport. His case, unfortunately for him, has been paradigm in so many different ways. The misery of having to cope with private images being published and then forever available by search engines has curious unforeseen consequences. In his case, the consequences included inhibiting his work promoting road safety across the world. No matter what your view of Mr Mosley may be, it cannot be doubted that his work in this field has saved countless lives. Even for a man as confident and eloquent as Mr Mosley the effect of the privacy invasion means that whoever he meets, wherever in the world, he has to wonder whether they have searched his name and been taken to the images that first emerged in the News of the World article published almost exactly eight years ago.

Although I had been involved in some interesting libel and privacy cases before being instructed by Max Mosley, it is inevitably his case that thrust me to the fore of the debate. In that case, like so many before the High Court in London, the public interest argument for publication, which would allow Article 10 to trump Article 8, was paper-thin. Every newspaper responded to Mosley's victory with howls of derision. The Sun headline screamed: "Freedom takes a spanking" and Paul Dacre used his speech to the Society of Editors that year to attack the judge as amoral. "Some revile a moralising media" he told us, "others, such as myself, believe it is the duty of the media to take an ethical stand.

Either way, it is a choice but Justice Eady - with his awesome powers - has taken away our freedom of expression to make that choice."

I have never quite understood the ethical value of a front-page sex expose. But the truth of this case is that the News of the Wolrd's already weak case collapsed at trial such that even as a pessimist, I could not see how our case could fail. Whilst I have happily taken the plaudits for succeeding in this case, the reality is that it was no triumph and did little to further privacy rights. Why? The Mosley case emphasised the futility of the legal mechanisms to protect privacy. Not only were the damages awarded (although a record at the time) far too small to amount to an effective deterrent but, as we argued later in Strasburg, the absence of any obligation to notify in advance of publication renders subsequent litigation largely futile and, in any event, beyond the means of 99% of the population. It is currently in the interests of any newspaper to publish without notifying the proposed subject, given that whilst many would consider an injunction or threat of an injunction if notified in advance, most people would rather crawl under a proverbial rock after being subject to a tabloid sting than pour money into high profile litigation. Litigation is likely to be considered adding insult to injury. Mosley has spoken of the remedy of Court proceedings for privacy like asking a doctor to treat a broken leg, only to have the doctor break the other leg in the process. For all that he remains a satisfied client, I promise.

The Mosley case followed earlier High Court battles that saw the courts establish the balancing exercise between Article 10 and Article 8, in particular the House of Lords decision in Campbell v MGN [2002] EWHC 499 (QB). In Lord Hoffman's judgment he makes it clear that "both are vitally important rights. Neither has precedent over the other". But newspaper commentators saw the courts as favouring privacy over freedom of expression and developing the law contrary to the intention of parliament. In fact the courts were doing exactly what was envisaged by parliament. Lord Irvine, the Lord Chancellor said in the House of Lords debate that privacy law would be better established by Judges because they would have to balance Article 8 and Article 10 in the circumstances presented to them. The courts developed a two stage process: first it must decide whether the subject matter of the threatened publication would give rise to a "reasonable expectation of privacy" and then weigh up Article 8 with countervailing rights, usually Article 10. These considerations are most intense in the

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context of privacy injunctions and it is the rise of these injunctions, in particular for Premier League footballers, which made privacy an increasingly dirty word.

It is worth noting that there were plenty of examples of unsuccessful injunctions. Sir Fred Goodwin failed to maintain his injunction after the judge decided that there was a public interest in revealing his affair with his colleague given the importance of a public discussion into whether it was appropriate for a chief executive of a major bank to have an affair with a senior colleague. Poor Sir Fred got little sympathy. Even more tenuously, in my view, Steve McLaren the hapless England football manager, also failed to secure an injunction on the basis that he was public figure who was expected to apply high standards of conduct. These injunction attempts and in particular those by John Terry and Ryan Giggs established privacy as the preserve of the wealthy and over-sexed.

This would all change as a result of the phone hacking scandal and what was revealed of the press' own conduct. No longer could Dacre and his editor friends have exclusive use of the moral high-ground. Just as the Mosley/NGN trial was concluding, James Murdoch and his team at News International were paying huge sums of money to secure what they hoped would be a confidential settlement of the first civil claim for phone hacking. The revelation of this scandal and emergence of a wealthy, organised and determined group of campaigners meant that, for the first time in my lifetime, the media reform debate was not being controlled entirely by the newspaper lobby. The story about Milly Dowler and her family being hacked meant that this campaign found support amongst politicians and the public.

It was Lord Justice Leveson's Inquiry that reacquainted me with Rowan, I was acting for the Core Participant Victims and Rowan was giving valuable academic evidence, and it may be that this reunion is the only concrete outcome of that dramatic Inquiry. Whilst some of my clients, who gave evidence of the effect of press-misconduct, could be (wrongly) dismissed as "whinging celebrities" some of the most startling evidence was from those with no public profile before being victims of crime, such as the Watsons from Glasgow and Kate and Gerry McCann. All of those who gave evidence did so despite the trauma of being witnesses in such a high-profile event and (for those in the public eye) the likelihood of further media hostility. Even though we were restrained from referring to the evidence of phone hacking, given the imminent criminal trials, the evidence of press misconduct was sufficiently compelling for the Judge to give a damning verdict and suggest a significant new basis for press regulation.

Although Leveson's proposed regulator was never likely to have a pre-publication role or replace the Court's function regarding privacy injunctions a recognised regulator as proposed by Leveson would have played an important role holding newspapers to account and upholding its code on privacy. IPSO, the major publisher's own regulator set up in defiance of the judge's recommendation and the cross-party agreement does little to inspire confidence in complainants. It seeks to regulate its members, the worst offenders amongst national newspapers, whilst the FT, Guardian and Independent prefer to go it alone. Impress, a Leveson compliant regulator is applying for charter recognition and it will be interesting to see whether large numbers of publishers join Impress and benefit from the protections afforded to participants of a recognised regulator. Given my role in Leveson, I have a close interest in Impress and for those interested in this subject I highly recommend its efforts despite the odds stacked against it.

What Leveson sought to achieve was a system that emasculated bullies on both sides of the argument. I am very sympathetic to small publishers who simply cannot withstand the financial risk of a litigation threat from a wealthy individual or organisation. The greatest impediment to asserting privacy rights or indeed rights to freedom of expression is usually financial constraints.

Another impediment is the threat posed by anonymous bloggers or social media sites. The internet provides extraordinary opportunities for free expression. Nearly 50% of the world's population have access to the internet. But it also provides extraordinary opportunities for unlawful publication. In the somewhat dated US Supreme Court case of Reno v ACLU [1997] it was put in this rather quaint way: "Through the use of chat rooms, any person with a phone line can become a town crier with a voice

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that resonates farther than it could from any soapbox".

The challenges of the internet and protecting privacy (in this case the identity of a child) were considered by Sir James Munby in Re J (A Child) [2013] EWHC 2694 (Fam):

"First, the internet allows anyone, effectively at the click of a mouse, to publish whatever they wish to the entire world – or at least to everyone who has access to the internet. No longer does the campaigner have to persuade a publisher, newspaper or broadcaster to disseminate the message. So there is very little editorial control. The consequence is that the internet is awash with material couched in the most exaggerated, extreme, offensive and often defamatory terms, much of which has only a tenuous connection with objectively verifiable truth. Second, material once placed on the internet remains there indefinitely and, because of powerful search engines, is easily accessible by anyone wanting to track it down. Third, internet providers are often located outside the jurisdiction, in countries where practical difficulties or principled objections stand in the way of enforcing orders of this court."

My instructions are now far more likely to be in connection with an online publication than a newspaper article. Sometimes "revenge porn" or scurrilous tweet. I also have a case where a client has been the victim of what is likely to be a state sponsored online reputational attack. Anonymous websites set up using proxy web hosts and social media sites. Mischievous or malicious bloggers are becoming increasingly sophisticated and potential claimants have the uncertain option of repeated third party disclosure applications under the process established by the case Norwich Pharmacal [1974] AC 133. But having obtained your Order in the UK you then have to persuade (usually) US ISPs to comply.

Of course, the ubiquitous camera phones, the culture of selfies and "oversharing" online can mean that we can enjoy our absolute freedom of expression and invade our own privacy at the same time. Often, no conflict between these rights will emerge, but one's own publications can be turned against us. The unfortunate Facebook photograph from university days will inevitably be unearthed during a job interview. Likewise, if one (in later life) needs to seeks the protection of privacy rights, evidence of past self-exposure (whether a Hello photoshoot or revealing selfie) will be used in evidence against you.

Two recent decisions arising from the European Data Protection Directive have had a significant impact on this area. In Vidal-Hall v Google Inc. ([2015] EWCA Civ 311) the Court of Appeal held that there can be a claim for compensation under the Data Protection Act without pecuniary loss and that misuse of private information is a tort, not an equitable wrong. The judgment also contains important holdings about the meaning of "personal data" within s1 (1) of the DPA. Whilst most of us in this room are unlikely to "over-share" images or information on social media, by using the internet we are disclosing valuable personal information whether we like it or not. Vidal-Hall concerns Google's gathering of users' data for advertising purposes. The Court held that the data was "personal data" within the provisions of the act "because identification for the purposes of data protection is about data that 'individuates' the individual, in the sense that they are singled out and distinguished from all others. It is immaterial that the BGI (Browser Generated Information) does not name the user. The BGI singles them out and therefore directly identifies them for the purposes of section 1(1) (a) of the DPA…" ([115]). This case has reignited the DPA and seen it deployed in cases where it was never before considered. I have a case going to the Court of Appeal in November (Prince Moulay-Hicham v Elaph Publishing Limited) in which the Claimant has sought to replace his struck out libel claim with a claim under the Data Protection Act.

The other highly significant case is Google Spain v AEPD and Mario Costeja Gonzalez [2014] C-131/12 which was handed down by the Grand Chamber of the European Court of Justice on 14 May 2014. The court held that search engines are responsible for ensuring that search results are compatible with the rights of individuals under the Data Protection Directive. The court stressed that search results amount to "a structured overview of the information relating to an individual that can be found on the internet – information which potentially concerns a vast number of aspects of his private life… and thereby to establish a detailed profile of him [80]". It held that, in most cases, the rights of the data subject outweighed the rights of the internet user. This case has probably had the greatest impact on internet freedom of expression (and therefore arguably all freedom of expression) given Google's pre-

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eminence as our means of obtaining information on people. Upon the finding of the ECJ Google had to implement an online mechanism by which we can all remove websites from search results. As Google explain within their take-down page:

"When you make such a request, we will balance the privacy rights of the individual with the public's interest to know and the right to distribute information. When evaluating your request, we will look at whether the results include outdated information about you, as well as whether there's a public interest in the information –for example, we may decline to remove certain information about financial scams, professional malpractice, criminal convictions or public conduct of government officials."

The process led to great excitement among lawyers and Google have had to deal with thousands of requests. Given their size and wealth I think that they are well able to do so. But the process is something of a mess at the moment. First-hand experience of using the process has seen inconsistent or contradictory responses, delays and confusion. This is perhaps no surprise. What was usually the task of an experienced judge, to weigh up the competing rights and public interest considerations, is now been done on a huge scale by anonymous Google employees. One inevitably pictures a disinterested spotty nineteen year old in California conducting what the courts have described as an "intense focus" between competing rights. Whilst the ICO has not yet been flooded with complaints, I suspect that we will see significant cases emerge for publishers and data subjects.

I am conscious that my speech has done little to disguise my bias in considering the two rights. My appreciation for the importance of privacy is emphasised by the experience of being with clients as they face a potential publication or deal with the consequence of a publication or other intrusion. The consequences of a serious privacy invasion are often particularly severe for family members. But I think we have come a long way in the last 6 years and there is now a more mature discussion about the importance of privacy and how it should interact with freedom of expression. No longer is privacy a dirty word or the preserve of footballers. In addition to the phone hacking scandal's impact on victims of crime, every school kid is likely to be aware of the threat of privacy invasion whether by a malicious tweet or misuse of private images. The explosion of free mechanisms of expression has required further awareness of and protection for privacy. It is for this reason that I think Michael Gove (a former Times journalist and friend of the Murdochs) is wrong to see the UK Bill of Rights he is working on as a means of favouring freedom of expression over privacy.

Whilst, as the only practicing lawyer at today's gathering, I have felt compelled to include some law, I have been anxious not to over-burden you with law and legal procedure. Laws concerning privacy and freedom of expression other than those already mentioned include civil liabilities in harassment, breach of confidence, defamation and copyright, and criminal liabilities under Regulation of Investigatory Powers Act, the Criminal Justice and Courts Act, and Malicious Communications Act. I am also conscious that I have concentrated on publication rather than the gathering of information. The unseen gathering of information, whether by a social media site or an investigatory journalist can have unsettling repercussions and give rise to a right to compensation as seen in Vidal-Hall and the important and phone-hacking damages decision in Gulati [2015] EWCA Civ 1291 recently endorsed by the Court of Appeal.

But I have taken enough of your time. I hope that I have given you some idea of the framework for the contests in which I become involved. The law remains young in this area but despite its youth it struggles to maintain pace with innovation in communication and information. Whilst Michael Gove may have an idea to curb privacy rights, it is certainly true that the law on privacy is strengthening for those who have access to it. But we all have access to the internet and the ever more creative platforms it provides for communication, so our freedom to express ourselves has never been greater.

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