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Freedom of Expression –v- The Multiple Publication Rule

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FREEDOM of EXPRESSION

Freedom of expression has long been held to be the cornerstone of a democratic society. Historically it was one of the first human rights to be demanded and indeed to be guaranteed in law whether constitutionally, as in the US[1] or by judicial enactment, as in the UK.[2] The press in particular have received special constitutional guarantees throughout the World, in particular against censorship.

The media is now big business. In the UK alone there are 1,301 regional and local newspapers[3] and the British are considered amongst the most avid newspaper readers.[4] The media continue to fuel our ever-growing obsession with news using the timeless appeal of sex, power and fame. But the medium through which our attention is channelled has changed beyond recognition. It is no coincidence that the press is currently experiencing a massive positive renaissance, to coincide with the explosion of the Internet and the debut of Generation Y.[5] The Internet by its very nature has the potential to allow an unfettered and exponential rise of the right of freedom of expression, at the expense of other fundamental rights and freedoms. An online news presence is now considered essential to most regional and national publications as an effective marketing tool and to meet the demand for real time information. This particular media revolution is being driven by Generation Y, sharing as they do the insatiable thirst for information. “Considered connected...*Marketing research repeatedly describes them as technologically adept, info-savvy, a cyber-generation, a wired generation, the clickeratti*”. [6]

Utilised for private or commercial purposes this information is potentially accessible to all, with or without the correct www. address. The sheer accessibility and extent of the information available by the Internet communication creates a conflict between freedom of expression and individual rights that may not be addressable on a case by case or even on a country by country basis. As the “clickeratti” exercise their individual rights and ‘hit’ the web, they do more than download information - they unwittingly create a legal quagmire that encompasses continents, challenges hard fought legal rules and threatens long cherished principals, including the freedom of expression.

This quagmire arises even as the web page is “hit”, as the downloaded information is then transmitted and read and copied in any jurisdiction. Different jurisdictions have different legal tools to determine the legal effect of a ‘hit’, which ultimately impacts on connected legislation. The information may be virtual but the potential impact on the freedom of expression and other individual rights is very real.

This paper proposes to consider just one small cog in the information wheel, to illustrate how just

one ill considered decision in one jurisdiction can reverberate throughout the whole of the principals tentatively governing the net. That cog is the Publication Rule- the theory behind what happens in law when the clickeratti hit a press web site. As will be demonstrated, this one cog has the potential to not only grossly undermine that foundation of all democratic society- the freedom of expression but also to threaten the usefulness of the web as a valuable media forum.

Questions

Is the UK's or the Us position the best way forward for the Internet, should we be moving away from long-established rules used for traditional forms of publication looking for new solutions to the challenges and peculiarities of press publication on the web? Does creating a legal framework enhance or suppress freedom of expression- and if so- must it inevitably be at the expense of individual rights?

If the courts were to overturn the ruling on 'the hit' is it maintaining freedom of speech and access to information? Recent case law has highlighted the difficulties that are involved in deciding an appropriate legal structure for the Internet so that all individuals and newspapers have an equal access of protection afforded. What is a constructive way forward? The writers believe that a solution lies in short with the conception of the publication rule.

Publication - the law

Proving that Internet communication is a publication is not a difficult task. Any web page that is accessible by a computer user and which is capable of being read and understood, constitutes a publication. Cases proceeding on the back of Internet publications are not new. In the Australian defamation case *Rindos v Harwick*[7] an author of a defamatory computer message was found liable in damages. If, however, the material was to be delivered in a non-readable form then this could not constitute a publication. [8]

The Limits

The importance of the publication date is that it starts the running of various legally recognised dates, *inter alia* for defamation and for contempt. It is only upon publication that an action can arise. The Internet has demonstrated the difficulties that arise when the concept of limitation crosses jurisdictions and legal principals.

Limitation is the concept that is used the world over to limit the number of claims that would otherwise be innumerable and spreading over unlimited periods of time. It is essentially the period in which a claimant can bring an action, and each jurisdiction has its own legislature to deal with this. [9] Common to generally all jurisdictions is rules of justice that can allow a claimant to bring a claim outwith these periods if the requirements of interests of justice demand it.[10]

The Single Publication Rule

The US rule is set out in §577A Restatement of Torts, 2d (1977) which is headed Single and Multiple Publications. This explains what is considered a single communication and the rule in relation to damages.[11] It was this concept of *all* publications of the offending material being held liable for damages as '*one publication*' that the coined expression of single publication essentially arose.

The Multiple Publication Rule

It was a sad day indeed for the media when the Court of Appeal decided in *Loutchansky -v- The Times Newspapers Limited 2001*[12] that they would reject a Single Publication rule for web publication and instead find in favour of a Multiple Publication Rule. The irony is that the courts

could find it appropriate to incorporate a rule dating back to 1849, to govern publication in a forum that could not then even have been conceived. Generation Y was to the 1800's what "The Next Generation."® would have been to Mr Spock.

DEFAMATION

THE DUKE

More than 150 years ago, the Duke of Brunswick[13] sued for liable in respect of defamatory allegations, some 17 years after the original publication was made. The Duke sent his servant to buy back issues of The Weekly Dispatch, which he had heard contained a defamatory article of and about him. The servant obtained one copy from the Weekly Dispatch's office and the other from the British Museum. The Duke sued on both. The Weekly Dispatch argued that the cause of action was time barred, relying on the original publication date. The Court held that the delivery of the two copies constituted two fresh publications and that the Duke was accordingly entitled to sue. For hard copy publication this decision was problematic enough, but for some reason very few, if any claimants appeared to take advantage of it.

THE DOCTOR

In *Loutchansky –v- The Times Newspapers Limited 2001*,[14] the Court of Appeal extended this Multiplication principal to web publication. When considering the principals of qualified privilege, the Court held that the privilege that was accorded to the hard copy publication did not extend to successive publications on the web, or otherwise. This decision was effectively a warning to all publishers that just because privilege could be claimed at the time of the original publication, it does not necessarily follow that the defence would be available for subsequent republication. It was necessary to consider the circumstances as they existed at the first publication extended to the Internet publications.

The qualified privilege at the time of the hard copy publication was predicated by the newspaper's duty to publish material in the public interest and that duty justified publication even in the absence of an honest belief that an article was true. The defence could not apply to archive stories that were untrue, as there was by then no public interest to justify publication. It would therefore appear that this particular defence is available only once. The court went still further and confirmed that the process of putting the article on the web became a new form of publication when the site was hit and therefor considered published anew. To decide this they gave regard to the Duke of Brunswick and so arose the Multiple Publication Rule on the web. With this decision the UK courts rejected the more pragmatic Single Publication Rule, adopted in the US, which states that publication on the web occurs on one instance only. And so a rule enters into the UK legal system that not only overlooks the concept of Generation Y and the increasing amount of archive material to be found on the web, but has potentially far reaching consequences for the media and ultimately for freedom of expression.

Jurisdictional issues

Publication on the web raises the question of jurisdiction and in the last year it has been made clear that courts in all jurisdictions will not hesitate to give consideration to actions raised in their own jurisdictions, if harm can be proven there. The most recent case of *Gutnick v Dow Jones*,[15] heralded a landmark ruling on the question as to *where* Internet material is considered to be published. Mr Joseph Gutnick was a businessman residing and having business headquarters in Victoria. He brought proceedings against Dow Jones, the printers and publishers of the Wall Street Journal and Barron's Digest, as well as being operators of WSJ.com. Once again it was necessary for the courts to strike a balance between freedom of expression and an individuals right to reputation in the jurisdiction where the damage occurred.

Firstly, the courts of Australia rejected the US single publication rule and relied upon the line of line of authority which began with the Duke of Brunswick.[16] It went on to decide that publication in an online environment occurs in the jurisdiction where the article was *downloaded*, irrespective of where the publisher server resided or the material was originally uploaded. The court went on to caution that if a publisher publishes in a multiplicity of jurisdictions it should understand and accept that it runs the risk of liability in each of those jurisdictions. This decision was greeted with some dismay, but no surprise. It clearly illustrates the difficulties which inevitably arise when the law attempts to solve modern legal conundrums using Victorian principals.

When the foregoing is considered in light of the judgement arising out of *Godfrey -v- Demon Internet Limited*,[17] the potential scale of the problem perhaps becomes clear. Now, not only is there a possibility of a *multiplicity of suits* in different jurisdictions but, also, a *suit each time* there is access to a defamatory article on the net.

Firth v State of New York

The single publication rule is of course not without it's challenges. Consider the case of *Firth v State of New York 2002*. [18] The claimant was formerly employed by the Department of Environmental Conservation as a Director of law enforcement. In December 1996 a report was issued called "*the Best Bang for their buck*", which was a critical piece on his managerial style. On the same day the State Education department posted an executive summary which contained a link to the report , on its Government locator indicator. One year later the claimant filed an action saying that the report defamed him and the State moved to dismiss the case on the grounds that it was time barred. The arguments centred around the single publication rule and its applicability to website archives.

The court held that the traditional rules should apply so as to encourage the free flow of information and ideas on the web and to enforce the webs uniqueness. The court stated that immaterial modifications were irrelevant, and did not constitute a new publication, as the very nature of websites required that were continually being updated. The court held that a publication can consists of thousands of copies widely distributed and in use at any one time, but the legal effect of this is that there is only ever one publication. this one publication could only give rise to one cause of action and the applicable statute of limitation would run from the date of that publication.

The court conceded that a republication could be occur which could re set the limitation date[19] but that the addition of unrelated material was not a republication, merely a delayed circulation of the original edition. The difficulty with this ruling is that the court gave no guidance as to what could constitute a republication in the Internet context . Is it a question of changing the Web Page's URL, or simply revising the actual material.?

It is interesting to consider what would happen if Mr. Firth was to move to the UK, and was thereafter directly affected by the website – the principals in *Gutnick* mean that the jurisdiction is where the harm occurs. He could then bring an action in the UK, although by doing so he would be barred from proceeding thereafter in the US. He would not, however be barred from raising in Australia, if he was then to decide to move there!

US penalised by using the Single Publication Rule? Is there any fall back?

Americans can turn to the first amendment to protect them from foreign judgements against their freedom of speech, in the US. The draft Hague treaty permits a court to ignore a judgement that is manifestly incompatible with public policy, (although it must meet a very strict criteria), and the US courts may chose to use this policy to reject outright censorship judgements. In *Yahoo against Nazi memorabilia in France*, *Yahoo*[21] decided to concede to the three panel ruling and accept the French courts decision. The First Amendment however will not protect US companies form the enforcement abroad of orders issued by courts outside the US.

It would appear that between the Australian, English and French decisions of late that foreign courts are penalising US based companies for perceived harms arising from the accessibility and publications on the website. Thus US companies need to reconsider the risks and opportunities that the foreign courts are providing, is it better for the US courts to adopt the multi-publication rule? Would it work considering the more sensational news available and attitude to freedom of speech.

Is the multi publication Rule good or bad?

However, can the multiple publications rule be considered unfair. Imagine the following scenario arising - a 5 year old website is accessed and action of defamation results.

Can this action be defended? Will the journalists be able to use their notebooks to defend such actions, will they still even have their notebooks?. Does the journalist have to maintain their notes for a 5 year or even a 10 year archive for their notebooks? And how does this fit with the data protection principals? What happens if they are destroyed? What about witness memories and if the author cant be traced? How can the limitation period and multi-publication rule work? How can a newspaper hope to defend such an action without the benefit of defences long denied them by the mere passage of time? And how does this sit with the fundamental right to a fair hearing? And where does this leave the limitation principals as they were designed to protect against exactly such scenarios.

Indeed The Neill committee recognised, even before the 1996 Defamation Act came into force, the difficulties faced by newspapers to defend hard copy publications years after ‘memories fade, journalists and their sources scatter and become not infrequently, untraceable. Notes are retained only for short periods, not least because of limitations on storage.’ [22]

On the other hand the individuals right to a reputation has to be balanced with the newspapers right to publish. Consider the situation where someone goes travelling for over three years and during this time defamatory allegations are published. On their return to England they find their employment prospects dashed because a potential employer discovers this information on the Internet, and chooses not to employ them. That person no longer has a right of action in respect of hard copy publications, even though their most valuable asset and their inherent right to work has been tarnished. Under the multi-publication rule, however, they do have rights- so long as publication is made on the web.

CONTEMPT OF COURT

In *Ex P. the Telegraph Plc* [1993] 1 W.L.R. 980 Lord Taylor C.J. stated, at 987E, that "*the court should also bear in mind that the staying power and detail of publicity, even in cases of notoriety, are limited*". *Reliance is also placed upon the principle that "the growth both in range and intensity of mass media coverage in modern times carries with it a greater liability to transience in its hold on the public mind. What is news today is no longer news tomorrow."*

However, the multi publication rule changes this theory.

The Contempt of Court Act 1981 makes it an offence to publish a "*publication [which] includes any speech writing, broadcast, cable programme or other communication in whatever form, which is addressed to the public at large, or any section of the public.*" [23] Where such a publication, "*creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.*" [24] This rule only applies during the period that the case is ‘active’. The offence attracts strict liability.

Since the Human Rights Act 1998 [25] came into force on 2nd October 2002, no newspaper in Scotland has been successfully prosecuted for contempt. The Scottish courts have been forced to address the issue of online contempt through the case of *HMA v Beggs*, [26] which created a

precedent and opened the floodgates for the future.

The case of William Beggs is known as the '*limbs in the loch*' case. The question that the court had to deal with was whether publication of material on the Web amounted to contempt of court. The police did not issue a warrant for Beggs arrest for some weeks and during this time the media took advantage of this and Begg's life was laid before the public in its entirety. Some of the material contained references to previous convictions usually considered contempt if found to be in active proceedings.

In 2001, Beggs was convicted of '*handcuffing, injuring, sexually assaulting and murdering*' Barry Wallace before dismembering his body. His Counsels position was that it would be impossible for him to ever receive a fair trial, as the information was so widely available and in the public eye. The materials that were put before the court were articles from the website of the Guardian, extracts from an Internet publication Gay Today (USA), Sunday Times and Sunday Herald. Consideration had to be given to whether the material had been published and whether it was prejudicial.

It is clearly evident that, in this case the court decided that material in archives was considered published, and to decide this it looked to defamation law on the Internet. It could be said that the court was forced to use defamation as a guideline as judgements on the Internet are few. This may not have been necessarily a wise move; firstly, defamation is a civil remedy and so why have the courts used it as a parameter for contempt which is a *quasi*-criminal matter?

Therefore the material on the archive was considered published, but was it a risk? To summarise the court's decision it was clear that Lord Osborne did not feel that there was a 'serious prejudice'. The tests^[27] that were used by the court in establishing if a story would create a 'substantial risk' of serious prejudice, was through time,^[28] proximity,^[29] initial impact^[30] and residual impact^[31].

The Begg's case took into account the principles set out in *Attorney General v MGN Limited*,^[32] which govern the assessment of the risk of prejudice. These observations were, however, framed with the form of printed material in mind, not internet publication. In the consideration of 'substantial risk' it was necessary to consider the likelihood of the publications coming to the attention of a potential juror, and the suggestion was that this was very small. However, the *Sarwar* ^[33] case makes it clear that even a very small circulation could still create a risk even though few jurors were likely to read it. But as it was pointed out '*the Scotsman considered itself a national newspaper*'^[34] and the Lord Justice General held that there would be a 'material risk of serious prejudice' if even *one* juror had read the article and was affected by it. The test of '*serious*' has been taken as '*a real impediment or prejudice to the course of justice*' (the common law real test risk). The court in the Begg's case, however did not adequately address this issue.

The ruling on the question of substantial risk was whether the web was an '*obvious place to look?*' Lord Osborne deemed that whilst the articles were an accessible publication, there was not a substantial risk.

This is because

- (a) the jurors would have to use a search engine to find the offending material,
- (b) the juror's attention would be focused by listening to the evidence over a prolonged period and,
- (c) the jurors will do as they are told.

The court decided that - although access and use of computers is now commonplace, they are not as common as reading newspapers etc, and therefore have a limited impact. Whilst this decision appears to wholly fail to acknowledge the existence of Generation Y, the authors are prepared to give the benefit of the doubt to the judge. The emphasis was accordingly placed by the judge on substantial risk precisely because the judge fully appreciated the difficulty of the multi publication rule online contempt. The alternative was to consider introducing an entirely separate rule for publication online and contempt.

The *Beggs* case has actually shown that it is difficult, if not impossible for contempt of court to occur in Scotland. Further, it heralds a great advantage to newspapers for their Internet archives, in that they are extremely unlikely to be found in contempt. Whilst the benefits to newspapers, to the internet and to the freedom of expression is obvious, it should be remembered that there never was a problem in the laws of contempt, concerning internet archives. This problem arose *only* on the introduction of the multiple publication rule. However, Publishers and the press remain concerned about the potential of being found in contempt in respect of archive material, whilst a fully considered judgement is awaited. It should be borne in mind that the Internet now also includes sound and picture coverage which is of course extremely significant when the question of identification of persons on trial arises.

In the meantime they await the Courts' acknowledgement that Generation Y or indeed Z may well be sitting on the jury, who *do* in fact fully realise the ease of access to networks and the Internets important characteristics[35], even if the court does not. In ten years time, if the court was to be presented by the circumstances of *Begg*, surely it will be accepted by then that the Internet presents very low entry barriers, which barriers are identical for users and readers. At that time the real problem of the multiple publication rule will be inescapable.

Is there a case of establishing one rule for genuine archives and quite another for material that is placed deliberately online contemporaneously with active proceedings, as a possible resolution? Either way, the need for a complete overhaul of the 1981 Act which has been left idle for more than two decades is well over due, in particular with regards to its application for Archived Internet publications. The current suggestion by the Law Commission in 2002 that the present law adequately addresses contempt online and is not to be considered an area of reform. Is this really the case and are they being serious?

DATA PROTECTION

In the past, journalists would expect to encounter most challenges to their work only at the *post* publication stage and the press has paid the price in damages, fines and costs when what was published stepped outwith the bounds of legality. Major technological advancements, however, have facilitated an unprecedented increase in the ability of the press to collect, collate and publish data and these changes have awakened legislators at home and abroad to the need for greater protection for the individual, for privacy and data protection. Modern newspaper procedures for the acquisition and processing of personal data have accordingly come under increasing scrutiny by the courts and by their own regulatory bodies.[36] The concepts of data protection and freedom of expression are accordingly always likely to conflict, but this paper intends to consider to what extent does the multiple publication rule have meaning in the context of modern newspaper procedures for the acquisition and processing of personal data?

The legal framework for data protection, confidentiality and freedom of expression

Article 10[37] of the European Convention on Human Rights and Fundamental Freedoms upholds the right to freedom of expression and the right to privacy is similarly guaranteed by Article 8.[38] In the UK, the Data Protection Act 1998 was forged out of the protection of private life guaranteed under Article 8.[39] Its predecessor, The Data Protection Act 1994, had little impact on the conduct of journalists and the business of newspapers. Not so the 1998 Act. Whilst the Directive was self avowedly concerned with the protection of the convention right to privacy, it neither purports to set up this right nor suggests that it should be exercised as a priority over other rights.[41] Article 9 provides for derogation to the principals, for the processing of data for purely journalistic purposes.[42]

Judicial interpretation

Recent cases under the Data Protection Act have also included a claim for breach of confidentiality, as both claims are intrinsically linked. The UK legislators have shied away from creating a separate law of privacy, preferring instead to extend the law of confidentiality.[43] Recent judicial consideration of the law of confidentiality was given by Lord Woolf in *A v B and C (C.A.)*.[44] Gary Flitcroft, a second division football player, sought an injunction to prevent publication of details of his extra marital affairs. Lord Woolf laid down a guideline test, which has subsequently been upheld [45]. He acknowledged that a balance had to be struck between the 2 fundamental freedoms in that “The existence of a free press is in itself desirable and so any interference with it has to be justified”[46], but that nevertheless, an individual was entitled to a private life.

The Supermodel

It was not until *Campbell v Mirror Group Newspapers [2002] EWHC 499 (QB)*[47] that the High Court of Justice, before Mr. Justice Morland, could give the Act full judicial consideration[48]. Naomi Campbell, an internationally renowned fashion model and celebrity raised an action for damages for breach of confidentiality and for compensation under Section 13 of the Data Protection Act 1998 against the Mirror Group Newspapers. The action was raised in respect of two articles with accompanying photographs published in the Daily Mirror in February 2001. Her claim was that, as a result of publication, she suffered distress, embarrassment and anxiety, which were aggravated by later publications in the Mirror and by the defendant’s conduct at the trial.

The articles revealed that, contrary to her previous false assertions, Campbell was a drug addict who was attending meetings of Narcotics Anonymous to treat her addiction. Details of the meetings were published together with photographs of her leaving a meeting in Chelsea. The article was sympathetic, acknowledging her commitment to therapy, but highlighting the fragility of her state of recovery.

In considering her claim for breach of confidentiality, the court applied the test as laid down in *A v B and C*[49] and concluded at first instance that the newspaper was indeed in breach. They held that the *details* of her attendance at Narcotics Anonymous did have the necessary “badge or mark of confidentiality”[50] as they were obtained surreptitiously, assisted by covert photography. Further, as the information was “*easily identifiable as private it was worthy of protection*”[51] and the newspaper was accordingly “*clothed in conscience with the duty of confidentiality.*”[52]

As a decision on the law of breach of confidence, the judgement is fairly unremarkable. The real importance of the finding of breach of confidentiality was that it made publication unlawful, and it was this that was to greatly assist Campbell in her claim under the Data Protection Act.

Through the thicket

To reach their decision the court were obliged to pick their way painstakingly through the intricacies of the Data Protection Act 1998, described cruelly, but nevertheless aptly, as a “*thicket*”.[53]

The court had no difficulty in ruling that the information published, including the photographs was “personal data consisting of information as to (her) physical or mental health or condition”[54] and accordingly was “sensitive personal data” under Section 2. It thereafter followed that there had there been a contravention of the first data protection principle under Section 4(4) as the details were published unlawfully, being in breach of confidence. Somewhat interestingly, it was conceded that publication of the newspaper constituted ‘processing’.[55] The issue was whether the newspaper was able to take advantage of the Section 32[56] exemption. In deciding in the negative, so arose the difficulty and ultimately the absurdity. The real question was whether the exemption applied to both the *collation* and collection of the “data” and to the *publication* of that data. To decide this, the court considered the intention behind Directive 95/46 EC and the inherent right to derogate, given in Article 9. Regard was had to the wording of the Act, in particular to the words “with a view to publication”[57], and that “publication would be in the public interest.”[58]. In all the circumstances,

the court held that the wording of the section dealt only with *pre-publication* processing and was aimed only at preventing overly restrictive injunctions. It could not be relied upon after publication.

If the exemption did not apply, then the processing was not allowable under the act because the "commercial publication of newspapers is not the exercise of a function of a public nature within Condition 5(d)."[59] Even if it did apply, publication of the *details* of the therapy was an unwarranted intrusion and the newspaper was therefore not able to rely upon Condition 6(1), that "the processing is necessary for the purposes of legitimate interests." Processing of "sensitive personal data" could only take place where disclosure was in "the substantial public interest"[60] and disclosure of details of the claimant's therapy could not meet these requirements.[61]

There was also no possibility of a Section 13(3) defence, given that Piers Morgan had gone on record to say that he considered that Campbell had given up her right to privacy. Campbell was awarded damages for distress and injury to feelings caused by the unjustified publication of details of her therapy and for publication in breach of confidence. Her total award was £2500, in addition to which she was also held entitled to aggravated damages of £1000 for being "trashed as a person"[62] thereafter.

The beast in the thicket

For the principals of common sense, this decision was frankly, absurd. For freedom of expression, the effect of the decision was staggering. It is difficult to conceive of any information that could be of interest to the public concerning celebrities not being considered to be sensitive personal data, which would then be actionable on publication. It has to be borne in mind that the Act imposes liability for damage, including distress under section 13. The claimant is not obliged to aver or prove patrimonial loss. Whilst the intention of the Directive was not to give pre-eminence to either right, clearly freedom of expression had been badly undermined. MGN appealed[63] which was heard on 14th October 2002. Firstly, the appeal court did not accept that the *details* of the therapy constituted confidential information as it was held to be not particularly significant to add to the *fact* of addiction that her treatment consisted of attendance at meetings of Narcotics Anonymous. Indeed, it was recognised that these details were essential for the articles' credibility, to the extent that not to print them would have "bordered on the absurd." [64] The court accordingly overturned the earlier decision that the information had been published in breach of confidentiality.

The real issue for the Appeal court was, of course, to correct the acknowledged absurdities that arose out of The Data Protection Act - "Without the consent of the data subject, a newspaper would hardly ever be entitled to publish any of the information categorised as sensitive without running the risk of having to pay compensation....." [65]

The problem with publication

The Appellants firstly sought and obtained leave to withdraw their original concession that publication of their newspaper constituted 'processing'. [66] They thereafter sought to argue that the Act ought not to apply to newspaper publication at all. The basis of their submission was that it was virtually impossible for journalists to comply with the requirements of the act.

The court refused to accept this proposition, as this would automatically exempt publication of *any* hard copy documents, created through the processing of data, from the requirements of the Act. To decide thus would have negated much of the purpose and effect of the Act. Further, the Court of Appeal anticipated that difficulties would in any event have arisen, should Campbell have complained of both the collation *and* the publication. In this event the Appellants would have certainly fallen foul of the Act. The court acknowledged the difficulties, but realised that the solution was not to disapply the Act.

The solution was found in section 32. As it was virtually conceded that, "unless they fell within the

s.32 exemption, the appellants were not in a position to satisfy the conditions imposed by the Act" [67], the court was under considerable pressure to apply the exemption, just to avoid the absurdity. The court refused to accept that the section 32 defence applied only pre publication. Whilst the appeal court is to be applauded in their pragmatic approach, it is respectfully doubtful that their decision is supported by the legal authorities they referred to.[68]

The basis of their reasoning was that Sub-sections (1) to (3) *must* apply to publication. If they did not, then the provisions had no purpose.[70] But the real reason behind their decision was grounded more in common sense, than in judicial interpretation : "Furthermore, it would seem totally illogical to exempt the data controller from the obligation, prior to publication, to comply with provisions which he reasonably believes are incompatible with journalism, but to leave him exposed to a claim for compensation under s.13 the moment that the data have been published." [71]

The court accordingly held that the exemption was of general application, and that it applied to the facts of the case. Further, as the details of the therapy had not been published unlawfully, the Appellants were able to take advantage of the exemption. Campbell was ordered to pay the appellants costs, including 80% of the appeal, and to pay £100,000 on account of costs within 28 days.

A victory for common sense

A victory indeed, but only by virtue of the somewhat strangulated and inventive arguments of the Court of Appeal. The reality is, however, that Morland J cannot be faulted for his reasoning. Whilst it *is* absurd that a journalist who collects data for the purposes of publication can rely on the section 32 exemption only up until his purposes have been fulfilled by publication and not thereafter, nevertheless that is exactly what section 32 appears to say. It is perhaps not surprising to know that it was introduced to the Bill at the last minute at Christmas 1997.[72] Clearly the legislators had other things on their mind.

The Actors

The Act in fact first came under judicial scrutiny in a passing reference by Brooke L.J in *Douglas v Hello! Limited* [2001] Q.B.967[73], when he recognised that newspapers may run into serious difficulties arising out of the provisions of the Act. He held that the Act applied equally to photographs as to copy. The claimants were unsuccessful and their appeal to the House of Lords was heard at the beginning of 2003. The judgement was issued on Friday 11th April 2003[74]. Catherine Zeta Jones and Michael Douglas were successful in their challenge to the decision at first instance that their confidence had not been breached when Hello! stole a march on rival magazine OK! and printed advance photographs of their wedding. Whilst it may seem surprising that the appeal court felt that the rights of two individuals who had sold their wedding to the likes of OK! required protection from the actions of a rival, it was in fact precisely because the rights to the wedding had been sold that the duty arose in the first place. Firstly, the court were satisfied that the purpose behind the deal was to prevent a "media frenzy", only one of many steps taken to protect their privacy.

The court decided that Hello! broke their own industry's Code and that they could not rely upon the public interest defence. The publication was unlawful and therefor in breach of confidence. The appeal court also considered what would amount to publication and concluded that as the data (the photographs) had appeared in hard copy only after using automatic processing equipment (the ISDN line transferring the information), then they were published in breach of the Act.

The wounded beast in the thicket

The difficulty is that the press, to take advantage of the exemption in section 32, they must fulfil its many stringent requirements. Further, the section raises more questions than it answers. Editors and

legal advisors alike are given no guidance on what are "special purposes", what is intended by "with a view to publication" (does it include general research or must the journalist have a particular story in mind?). Further, it is difficult to imagine a data controller successfully convincing a court that he can avail himself of the protection of section 32, some months or years after the article was archived. [75] It was argued before the court at first instance that the wording of section 32 is "offensive to Article 10"[76]. To this it can be added that it must also be incompatible with the Directive. Morland J refused to accept this argument, as in his view he would then be according pre-eminence to the freedom of expression. It is here that his judgement is flawed.

The wording of the section is so complex and ambiguous that it must inevitably favour the status quo, being the right to privacy. Surely it is precisely because neither Article has pre-eminence that the exemption for the freedom of expression ought not to be phrased in these terms? Add to these difficulties the fact of web publication and there is a recipe for disaster. Clearly the Act must apply to web publication in the same way it applies to hard copy publication, although this has not been specifically stated as such. But consider this- who is the data controller? In Campbell he was presumed to be the editor. In Zeta Jones it was decided that it was all three defendants. If this is the case, however - is the editor still the data controller in respect of web publication? How can this be - surely the service provider ought to assume this role, on the basis of *Laurence Godfrey v Demon Internet* [1999] 4 All ER 342[77] Further, who is the data controller in respect of archive material? Clearly, no real thought has been applied. "Having regard in particular to the special importance of the public interest and freedom of expression" – what exactly does this mean? What is meant by "the public interest"- is it the wider test that emerged from *A v B and C*, or is this case to be confined to applications for injunction/ interdict? Is the correct test to be applied that used in respect of defamation, or contempt?[78] Really, the only guidance that an editor can rely upon is to ensure that he has had proper regard to the PCC Code of Practice. And what does the PCC say about "the public interest"? Very little. The PCC leave this to the judiciary, and indeed with very little problems to date. It is perhaps rather petty to point out at this stage that this is precisely how an editor would have approached the matter prior to the Act.

The melting pot

When it is considered that publication now occurs in the laws of the UK every time the clickerati hit the web, the difficulties faced are stark. In Zeta Jones, brief reference is made to the fact that the photographs appeared on the defendants website, but surprisingly no further guidance was given as to whether this would also amount to publication. It has to be assumed, and it would certainly be the logical conclusion that it does- and it is here that the difficulty with the multiple publication rule arises. The court held that each photograph is a separate item of data.[79] This, combined with the publication rule, would tend to suggest that each time an item of copy or a photograph is "hit" on the web, not only will it be considered to be published anew, it will also be considered to be processed of new. The data controller would then face a claim for civil damages and criminal prosecution, presumably for an unlimited period of time ad infinitum. The decision in Campbell, even after appeal, that publication amounts to "processing" has far reaching consequences, in particular with regard to the web.

It is perhaps not surprising that the UK alone has given effect to the Directive in this way. The German Federal Data Protection Act 1990[80] provides for an almost wholesale exemption for the press.[81] The individual is left to protect their rights using the federal laws of confidentiality and privacy and not the German Data Protection Act. A similar position exists in Austria[82], and in the Netherlands[83]. The Dutch rely upon their equivalent of the PCC to lay down a Code of Practice. This practice is repeated throughout Europe, including Sweden and beyond, including Australia[85]. In light of the difficulties likely to be experienced here in the UK, this would appear to be a sensible way to proceed.

Conclusion

No decision has yet been made as to the award in Zeta Jones, but the only consolation to be taken from the decision in Campbell was the smallness of the award made.[87] Hers was at best a pyrrhic victory. The courts are clearly not prepared to consider past jury awards for defamation as being comparable for a breach of the act or for breach of confidentiality. Further, the publicity to arise from her action was huge and most of it was negative. The press had a field day, able, as they were to rely upon the defence of absolute privilege to print the evidence that emerged. She would perhaps have been better advised to pursue redress through the PCC code and this may well be a warning to others. After appeal, the expenses awarded against her makes it clear that the risks far outweigh any potential gain. Accordingly it is likely to be only the very stupid, the very rich or the very determined that would seek to redress their rights under the Data Protection Act, whether for hard copy or web publication.

Nevertheless, the threat of multiple actions under the Multiple Publication rule may make the average editor think twice before publication of sensitive personal data. It is this hesitancy that strikes at the principals of freedom of expression. The Data Protection Act has led to a patent absurdity at first instance being corrected by the kind of strangled reasoning that only the Court of Appeal stuck between the rock of common sense and the hard realities of publication, could justify. It is only a matter of time before a litigant grabs the sickle of data protection and the scythe of the multiple publication rule and mounts a challenge to the press, in seeking to uphold their data protection rights. Make no mistake- any such challenge will have at it's heart, the very principal of freedom of expression. And in the meantime- there is no guidance for the press as to how to fulfil their duties and avoid such a challenge. More importantly, the freedom of expression, that cornerstone of democratic society is left floundering in the wake of an ill conceived act and a house of lords decision that wholly failed to appreciate the effects of publication on the web.

SUGGESTIONS FOR THE FUTURE

Internet users have the right to “*receive and impart information and ideas*”[88] and the freedom of expression is considered “one of the essential foundations of a democratic society and one of the basic conditions for its progress.”[89]

Should we allow the common law to continue to develop upon the foundations of Brunswick, or should there be a statutory review? Can the ECHR be utilised to prevent online multi-publication rule from spiralling out of control, creating litigation and the threat of criminal prosecution at every turn?

The Alternative being that the multipublication rule should be allowed to continue on this basis unchecked, is surely liable to create chaos, not only in respect of already on the web, but also information to follow. The problem is that rules such as this (when coupled for instance with the jurisdictional rule, which arose out of Gutnick) are likely to lead to publishers exercising caution when considering of the type of information that they put on the web.

It has to be remembered that there are cost implications for publishers for the monitoring and updating of archive material on the web. The additional onus on publishers to take into consideration all of the separate rules, relating to jurisdiction may mean that the maintaining of archives becomes a thing of the past. Reuters have a two tier system for filing a extra-judicial material in the domestic and an overseas forum. This system is designed to prevent dissemination of certain information in certain jurisdictions. If these reports were to find themselves back in the UK they could be open to contempt proceedings. This is however, a form of censure, which could arise as a result of Gutnick. If it is accepted that the web a free forum for information then all forms of censure, that is not necessarily required should be surely be avoided.

In *Vereinigung Demokratischer Soldaten Osterreichs and Gubi v Austria* (1994) 29 ECHRR the Court concluded that the failure of the state to distribute Der Igel to Austrian soldiers while

distributing other magazines for soldiers was a violation of Article 10. Considering this in an online context, could this suggest that preventing online users from accessing their own 'States' online material is a breach of Article 10(1), being the right to access and the right to receive information.

Could the prevention of accessing archives be contrary to Article 10, if the individual can prove that they have a right to receive? It has been accepted that victims can be newspaper or television readers, [90] and by logical extension, web users. Rules such as the multipublication rule, by preventing access, lead us back to the conundrum of which right should have supremacy, the right to receive and access information, or one of the other rights of an individual. Surely it is not a question of supremacy of a particular right more a balancing of the various conflicting rights.

The Law Commission[91] report in 2002, contained key recommendations for a review of the multiple publication rule in relation to online archives. They also recommend looking at the interaction with the limitation period, but as for immediate reform, there were no suggestions. The fourth annual survey of 'e-government' by Accenture, 2003[92] revealed that many governments are amongst the more prolific users of the web. It is therefore surprising that the government do not take a stronger position in attempting to create a legal structure that is appropriate.

There has been a suggestion of creating a body of court that has the capability to create or interpret the law for the Internet, instead of leaving national laws struggling alone in the dark to create some legal skeleton. Scotland like many jurisdictions does not have the resources available to create a framework of law for the Internet. This results in the application of existing law in an attempt to deal with legal issues arising from the Internet.

While the issues are complex and controversial they are always subject to change. There are no easy answers and the start of reform will be precarious. The policy of waiting to see how other jurisdictions react, is rife, but adopting such a laissez faire attitude is neither a positive action nor appropriate. This courts have to accept that this is not a technical problem unique to the web - but a legal problem caused by inherited law, used in an inappropriate context. The writers feel that the best way forward is through harmonisation, looking to the Single publication rule as the most effective tool. However, a safeguard should be provided in the national laws in relation to limitation, allowing for an inherent right to appeal to an objective body which decides on the facts of each case.

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[1] Bill of Rights

[2] The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted into the law of Scotland on the enactment of The Scotland Act 1998, in the form of The Human Rights Act 1998. The rest of the UK was a little slower in taking up the mantle of human rights, but the Act was nevertheless incorporated into UK law in October 2000.

[3] Including 25 mornings (19 paid-for and 6 free), 75 evenings, 21 Sundays, 535 paid-for weeklies, and 645 free weekly newspapers, *Source: NS database/Reaching the Regions; Henley Centre; TGI, Future Foundation.*

<http://www.newspapersoc.org.uk/facts-figures/ataglance.html>

[4] Since 1999, regional press coverage has grown by 1.4%, and total readership has increased by 907,000 readers, *Source: BMRB/TGI 2001.*

[5] "Marketers know them and love them as **Generation Y** or the Echo Boom, a cohort that is more than 50 percent larger than the 45 million strong Generation X."—Julie Connelly, "A Ripe Target for Web Retailers, Teens Keep Heading to the Mall," *The New York Times*, September 22, 1999. Also known as the *baby-boom echo*.

[6] http://www.thestate.com/mld/thestate/news/columnists/claudia_smith_brinson/3644474.htm

[7] W Aust Supreme Ct No 1994 of 993

[8] *R v Fellows; R v Arnold* [1997] 2 All ER 548 the UK Court of Appeal decided that pornographic images downloaded to a bulletin board could be a photograph for the purposes of the Protection of Children Act 1978 and that the data was distributed or shown, even though it was merely made available for downloading.

[9] The UK has the Limitation Act 1980, giving England a 1 year limitation and Scotland 3 years. The US has a 1 year limitation, with exception. Canada both libel notice and limitation periods are not triggered until the plaintiff has knowledge of the alleged libel.

[10] In order to prevent Injustice a claimant with a reasonable excuse for delay has (S.32A) in the Limitation Act 1980 provides a discretion by which the court can permit claimants to issue outside the one year limit. The object of the libel limitation rule (imposed by Section 4A of the Limitation Act 1980) is to ensure that defamation claims are brought promptly

[11] (1) Except as stated in Subs (2) and (3) each of several communications to a third person by the same defamer is a separate publication

(s) A Single communication heard at the same time by two or more third persons is a single publication

(3) Any on edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.(4) As to any single publication , a) only one action for damages can be maintained , (b) all damages suffered in all jurisdictions can be recovered in the one action, and (c) a judgement for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.

- [12] [2001] EWCA Civ 1805
- [13] INSERT
- [14] [2001] EWCA Civ 1805
- [15] Dow Jones & Company Inc v Gutnick [2002] HCA 56 (10 December 2002)
- [16] Duke of Brunswick and Luneberg v Harmer [1894] 14 QB 184 at para 60 in Gutnick.
- [17] Godfrey v Demon Internet Ltd, QBD, [2001] 201
- [18] 3 No. 87 George Firth Appellant, v State of New York respondent, 2002 NY Int 88, July 2, 2002
- [19] Morning and afternoon editions have nevertheless been considered as republications in the US20 as have hard and paperback copies of the same book.
- [21] Yahoo Inc v La Ligue Contr Le Racis et L'Antisemitisme 169 F. Supp 2d 1181 (N.D Calif 2001)
- [22] Supreme Court Procedure Committee, Report on Practice and Procedure in Defamation July 1991, p.81 para VIII2
- [23] S 2 (1) CCA 1981
- [24] S 2 (2) CCA 1981
- [25] The Scotland Act 1998 brought into partial affects the Human Rights Act 1998.
- [26] HM Advocate v Beggs (No 1), 2002 SLT 135; HM Advocate v Beggs (No2), 2002 SLT 139.
- [27] See for a fuller example <http://www.newsdesk-uk.com/>
- [28] The longer the time between the story being published and the jury retiring to reach its verdict the less chance there is of the story being in contempt If the story is published, for example on the night before the trial opens then the risk of contempt is higher than if it were published months previously.
- [29] The court will weigh up the chances of a juror having actually read the offending story.
- [30] Presuming, the story is likely to have been read by a potential juror then the court will try to assess the impact the story would have had on him, looking at how novel was the way it was presented, i.e. was it front page
- [31] The theory is that if a juror listens in court to all the evidence, and hears all the witnesses cross-examined, and then is guided by the trial judge on what is, and is not, important then any initial prejudicial impact the story might have had will fade away as the juror concentrates on the actual evidence.
- [32] [1997] 1 All ER 456 at pages 461-462
- [33] 1999 SLT 466, 468
- [34] ibid 470
- [35] See the Federal District Court in Philadelphia ACLU v Reno
- [36] The Press Complaints Commission,(PCC), in the UK
- [37] Article 10:- "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and to impart information and ideas without interference by public authority and regardless of frontiers."
- [38] Article 8 establishes that "Everyone has the right to respect for his private and family life, his home and his correspondence."
- [39] To give effect to the convention, the Council of Europe adopted Directive 95/46/EC 40 on 24th October 1995, with the requirement for implementation within the member states by 24th October 1998. It was not implemented in the UK until 01 march 2000, with the passing of The Data Protection Act 1998.
- [41] The objective of the Directive is stated within Article 1, which states: -" 1. In accordance with this Directive, Member States shall protect the fundamental rights and freedom of natural persons, and in particular their right to privacy with respect to the processing of personal data "
- [42] " for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression"
- [43] but for a passing suggestion in Douglas v Hello!,at first instance supra, that a new genus of law had been created, there is no authority that a new law of privacy has been created.in fact on appeal it was made clear that a new genus had not been created.
- [44] A V B plc and Anthr 10th sept 2001, rept in the times on nov 2nd 2001 (QB div)(at first

instance). The appeal was heard on 11th march 2002. The decision at first instance to grant the injunction was over turned on appeal. This case is also authority for the proposition that the public interest defence has in fact been expanded.

[45] See Campbell and Zeta Jones, below

[46] Paragraph 11(iv)

[47] 27TH March 2002

[48] passing ref was given to the act at first instance, in Douglas V Hello!, below.

[49] Justice Morland in fact refrained from issuing his judgement until this judgement was released, but then effectively ignored it.

[50] Paragraph 70

[51] He referred to the guideline test given by Lord Woolf C.J. in A.v.B and C. (C.A. 11th March 2002) at paragraph 11(vii) and concluded that it was obvious that there existed a private interest worthy of protection

[52] paragraph 2

[53] by counsel for MGN, at para 66

[54] section 2(b)

[55] in accordance with article 2

[56] The relevant parts of Section 32 read: - “(1) Personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if- (a) the processing is undertaken with a view to the publication by any person of any journalistic literary or artistic material, (b) the data controller reasonably believes that having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and (c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes”

[57] section 32 (4)(b)

[58] section 32 (1)(b) and s 32 (3)

[59] para 110

[60] Schedule 3 Condition 10 and Statutory Instrument is 2000 No 417 paragraph 3(1)

[61] It was held that these conditions were cumulative requirements, which the defendant failed to meet.

[62] para 164

[63] Naomi Campbell v MGN Ltd [2002] EWCA Civ 1373 (

[64] paragraph 64

[65] At para 92

[66] in accordance with article 2

[67] At para...93

[68] I. On 2 February 1998, in moving the second reading of the Data Protection Bill, Lord Williams of Mostyn⁶⁹ had this to say about what was to become s.32 of the Act: “Following the meetings to which I referred, we have included in the Bill an exemption which I believe meets the legitimate expectations and requirements of those engaged in journalism, artistic and literary activity. The key provision is Clause 31. This ensures that provided that certain criteria are met, *before publication* – I stress “before” – there can be no challenge on data protection grounds to the processing of personal data for the special purposes. The criteria are broadly that the processing is done solely for the special purposes; and that it is done with a view to the publication of unpublished material.

Thereafter, there is provision for exemption from the key provisions where the media can show that publication was intended; and that they reasonably believe both that publication would be in the public interest and that compliance with the bill would have been incompatible with the special purposes.”

[70] The data controller would be able to "obtain a stay of any proceedings under the provisions of sub-sections (4) and (5) without the need to demonstrate compliance with the conditions to which the exemption in subsections (1) to (3) is subject"- para 122

[71] para 129

[72] Tugendhat, supra points out in a footnote at page 116 that Section 32 was introduced in the Bill at the last minute at Christmas 1997 (H.L. Debs .2 Feb 1998 Col 442)

[73] at page 983

- [74] Douglas and Zeta Jones et al v Hello! Ltd et al [2003] EWHC 786 (Ch)
- [75] This is of course absurd and the Americans spotted this sometime ago and brought in the “single publication rule” to get round the difficulty. Nevertheless, this rule remains the law of the UK.
- [76] Mr Browne at paragraph 98
- [77] in this case the service provider was held liable for defamatory material published on the web.
- [78] It has yet to be decided that A v B and C, supra is of general application, or whether it is to be confined to applications for injunction.
- [79] para 233
- [80] BGB1.I 1990 S.2954), amended by the law of September 14th 1994 (BGBl.I S.2325)
- [81] The relevant exemption for the press is stated as follows:-“For personal data used by enterprises or auxiliary enterprises in the press or film sector or by auxiliary enterprises in the broadcasting sector exclusively for their own journalistic or editorial purposes, only Section 5 and 9 of this Act shall apply.”(s 42)
- [82] The Federal Act Concerning the Protection of Personal Data (Datenschutzgesetz 2000) the “BSG 2000”, Section 48
- [83] the Personal Data Protection Act 1999-200084
- [85] 86.The Australian Privacy Act 1988
- [87] She was awarded only £3500 and this was to include aggravated damages.
- [88] Art 10 (1)
- [89] Handyside v United Kingdom (1979-1980) 1 EHRR 737, 754
- [90] Open door Counselling and Dublin Well Woman v Ireland (1992) 15 EHRR 244
- [91] set up by the Law Commission Act 1965 to promote the reform of law/
- [92] <http://news.bbc.co.uk/1/hi/technology/2928597.stm>