Privacy and celebrity: an update

by The Honourable Mr Justice Tugendhat

The author considers new developments in a topic that was the subject of a previous two-part article in *Amicus Curiae*.

In the Hunterian Art Gallery in Glasgow there is a picture painted in 1894–1895 by James McNeil Whistler entitled "Brown and Gold". It is also entitled "Portrait of Lady Eden". But you cannot see Lady Eden's features. This picture was the subject of one of the early French privacy cases: *Eden c/Whistler,* Cass Civ, 14 mars 1900 (*arret de rejet*), D 1900I497 note Planiol. In that case it was established that the artist could be restrained from exhibiting the sitter's image without her consent. There had been a dispute about payment, and Whistler refused to deliver the portrait. The Edens failed in their attempt to obtain delivery up of the portrait. But Whistler was restrained from making any use of the picture, public or private, or letting it look like Lady Eden.

In art galleries throughout Europe there are pictures of prominent men surrounded by their families, often royal families. I have particularly in mind a family portrait of King George III, Queen Charlotte and their children painted in 1770. This is an image of a royal family in a style typical the 18th century. The King stands above the Queen, who is seated surrounded by children. The emphasis is on the power of the throne and the security of the succession. But in a few years George III had lost his American subjects, and the succession was not secure. By the early the 19th century most of the European monarchs had lost their thrones.

A different image of monarchy emerged. It is represented in the picture by Edwin Landseer "Windsor Castle in Modern Times", which hangs in the Royal Collection.

At the time of the accession of Victoria to the throne, and for much of her reign, republicanism had strong support in England, and the prospects for the survival of the monarchy remained uncertain. Queen Victoria projected an image of herself which was more consistent with the increasingly democratic spirit of the times. This is an intimate portrait of private life. The style would be acceptable to Hello! magazine. The emphasis is on intimacy and luxury.

Engravings of this picture were published in 1851. *Prince Albert v Strange* (1849) 1 H & TW 1, 1302 was decided in 1848. In that case the Prince was seeking to prevent exploitation by a private publisher of illegally obtained copies of drawings that he and the Queen had made of each other, of their children and of the family pets. Would an application to discharge the injunction have succeeded once the engravings of Landseer's picture had been published? Or in the words of the government that I shall quote again: could it be said that the Queen and Prince Albert (or George III and Queen Charlotte) had invaded their own privacy? That might make a subject for a moot.

These cases illustrate a point. It is the rich and famous who are likely to bring cases in which the common law (or French judge made law) develops. Ordinary people will not normally be able to afford the risk, at least in an age where there is little access to public funding. There is nothing unusual about this. The rich and powerful are responsible for much of the reported case law in the law of contract and other fields of the law. It is the deep pockets of news publishers and broadcasters that have paid for most of the cases in which the public's right of freedom of expression has been established.

The royal pictures illustrate a second point. The protection of the privacy of people in public life has a constitutional dimension. It may not be in the public interest that a monarch or politician who permits any photograph of his or her family to be published should then be said to have waived or forfeited the right to privacy. If, as a result, such people permit no pictures of their families, the public may, as a result, be less well informed, and their right to receive information be interfered with.

RECENT DEVELOPMENTS

The Department of Culture, Media and Sport has published its reply to the Select Committee's Fifth Report on *Privacy and Media Intrusion* ((HC 458) para 111 and Cm 5985 the Government's response to the Fifth Report of the Culture, Media and Sport Select Committee, on Privacy and Media Intrusion (TSO Ref HC 458–1), published on 16 June 2003, para 23). The Committee recommended that the Government bring forward legislative proposals to clarify the protection that

individuals can expect from unwarranted intrusion by anyone – not the press alone – into their private lives. This, the Committee said, is necessary fully to satisfy the obligations upon the UK under the European Convention of Human Rights.

This is the Government's response:

> *"The debate over whether to introduce specific privacy legislation is a legitimate one. There are several reasons, however, why we believe more legislation is not only unnecessary but undesirable. We need to ask what would be the purpose and benefits of such legislation. First of all, various aspects of privacy are already protected by legislation – for example, the Data Protection Act – and there is the over-arching impact of the 1998 Human Rights Act's (HRA) provisions on the right to respect for private life. However, Section 12 of the HRA makes provision for substantial protection for the historic right to free speech, and there is a balance to be struck between freedom of expression and the right to privacy. We believe that that balance is not always to be found at the same point because, in effect, some people can be said to have invaded their own privacy by, for example, granting access to photographers, and thereby making public details of their private lives. The weighing of competing rights in individual cases is the quintessential task of the courts, not of Government, or Parliament. Parliament should only intervene if there are signs that the courts are systematically striking the wrong balance; we believe there are no such signs".*

Not everyone was surprised by this response. Where does it leave us?

Exactly four months later the House of Lords gave its decision in *Wainwright v The Home Office* [2003] UKHL 53. The Wainwrights' case had nothing to do with the press or the disclosure of information, and has not altered the law on that topic. The case was about the strip searching of two people visiting a prison. Significantly, the events in question were in 1996. Lord Hoffmann's words echo those of the Government. He said:

> *"There are a number of common law and statutory remedies of which it may be said that one at least of the underlying values they protect is a right of privacy. Sir Brian Neill's well known article 'Privacy: a challenge for the next century' in* Protecting Privacy *(ed B Markesinis, 1999) contains a survey. Common law torts include trespass, nuisance, defamation and malicious falsehood; there is the equitable action for breach of confidence and statutory remedies under the Protection from Harassment Act 1997 and the Data Protection Act 1998. There are also extra-legal remedies under Codes of Practice applicable to broadcasters and newspapers. But there are gaps; cases in which the courts have considered that an invasion of privacy deserves a remedy which the existing law does not offer. Sometimes the perceived gap can be filled by judicious development of an existing principle. The law of breach of confidence has in recent years undergone such a process: see in particular the judgment of Lord Phillips of Worth Matravers MR in* Campbell v MGN Ltd *[2003] QB 633. On the other hand, an attempt to create a tort of telephone harassment by a radical change in the basis of the action for private nuisance in* Khorasandjian v Bush *[1993] QB 727 was held by the House of Lords in* Hunter v Canary Wharf Ltd *[1997] AC 655 to be a step too far. The gap was filled by the 1997 Act."*

The House of Lords did not perceive any gap in the law which they considered needed to be filled to create a remedy for the distress suffered by the Wainwrights. It was held to be significant that their claim to privacy was based on distress alone, without other damage. There was of course a remedy for the unlawful touching in the claim in trespass.

Clearly Lord Hoffmann was not excluding any future filling of other perceived gaps by judicious development of existing principle. But his message was mixed. He recommended reading of Sir Robert Megarry V-C's judgment in *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 372-81. He endorsed the statement (at [20]):

> *"It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown's treaty obligations, or to discover for the first time that such rules have always existed".*

To illustrate the course Sir Robert had recommended, Lord Hoffman referred to the remedy subsequently provided by Parliament in the form of the Interception of Communications Act 1985. Similarly, Lord Hoffmann noted that the absence of a tort of intentional harassment had been remedied by Parliament in the Protection from Harassment Act 1997. Lord Hoffmann also doubted whether that Act would have provided a remedy for the Wainwright's complaint, even if it had been in force, because (in s1(1)) it defines harassment as a "course of conduct". On that basis there might be a perceived gap in the law for harassment consisting of what he called 'one boorish incident'.

However, Lord Hoffmann did not rule out development of the common law. On the contrary, he said "any development of the common law should show similar caution", that is to say, caution similar to that shown by Parliament in its limited definition of harassment. He did not say that because Parliament had spoken, no development of the common law could occur at all.

Although the events in question had occurred in 1996, Lord Hoffmann made some observations about the post Human Rights Act world. He said (at [34]):

> *"...the coming into force of the Human Rights Act 1998 weakens the argument for saying that a general tort of invasion of privacy is needed to fill gaps in the existing remedies. Sections 6 and 7 of the Act are in themselves substantial gap fillers; if it is indeed the case that a person's*

rights under article 8 have been infringed by a public authority, he will have a statutory remedy".

The reference to *Malone* and to the remedy subsequently provided by Parliament in the form of the Interception of Communications Act 1985 is a reminder of both the strengths and the limitations of reliance on Parliament to provide effective remedies required by the ECHR.

As is well known, the Interception of Communications Act 1985 did not in fact succeed fully in its legislative purpose. It was drafted to address interception of communications in public telecommunications systems. It failed to address interception on systems outside the public network. As a result the UK lost yet another case in Strasbourg: *Halford v UK* (1997) 24 EHRR. The upshot was that new legislation was required in the Regulation of Investigatory Powers Act 2000. Whether that Act has covered all the requirements of ECHR Article 8 in this field remains to be seen.

Protection of privacy is an area of the law which undoubtedly benefits from the procedures available to the legislature, which are not available to the courts. There is opportunity for full consultation with interested parties. There can be debate in Parliament. There is opportunity for the harmonisation of our law with that of other countries.

But it does not follow from this, that development of the common law should be arrested. As the President said (at [100]) in *Venables v NGN*:

"Although the dictum of Lord Eldon in Iveson's case 7 Ves 251 ('you cannot have an injunction except against a party to the suit') has been generally followed for nearly 200 years, in light of the implementation of the Human Rights Act 1998, we are entering a new era, and the requirement that the courts act in a way that is compatible with the Convention, and have regard to European jurisprudence, adds a new dimension to those principles. I am satisfied that the injunctive relief that I grant should, in this case, be granted openly against the world."

The Court of Appeal has returned to the point this year, in a case concerned with the court's inherent jurisdiction to protect children. Since the case did not involve a claim in confidentiality, various newspaper groups made a submission to the effect that they were not public authorities, and so that they were not bound by Article 8. It was argued that the court can only strike a balance between the countervailing rights of individuals under Articles 8 and of the media under Article 10 in an action for breach of confidence. Hale LJ rejected this in *Re S (A Child)* [2003] EWCA Civ 963, [47]–[48] saying:

"That cannot be right. An action for breach of confidence cannot be the only context in which the courts have to strike a fair balance between the rights of individuals under Article 8 and Article 10. While the courts cannot invent a new cause of action between private persons, the same issues arise whenever it has jurisdiction to restrain publication. If anything, the current context is stronger than the purely private law context of an action for breach of confidence (such as arose in Campbell v MGN Ltd *[2003] EWCA Civ 1373; [2003] 2 WLR 80)".*

It is to be wondered whether a development of the common law which might have met Ms Halford's complaint would have appeared impossible in 1996, as it plainly did, if at that time the modern approach had been available to the courts before the implementation of the HRA. As the Government and Lord Hoffmann have both pointed out, there are other statutes in this field. So far as publication of information is concerned, there is the data protection legislation (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), and the Data Protection Act 1998). The courts have been cautious in applying the DP legislation outside the field of databases such as the electoral register or the files of credit reference agencies. There have been a number of cases in which the legislation has been held to be applicable outside that sphere, but in none of them has it affected the result materially: see *Campbell v MGN Ltd* [2003] EWCA Civ 1373 [72–138], *Ellis v Chief Constable of Essex Police* [2003] EWHC 1321 (Admin) [29] and *Douglas v Hello!*, both in the Court of Appeal and in the judgments on liability and damages of Lindsay J [2003] EWHC 786 [230]–[239].

This legislation now merits further attention for a number of reasons. But it is first of all to be noted, that like the Interception of Communications Act 1985, the DP legislation illustrates the continuing need for the development of the common law.

The reason for this is that the DP legislation is so drafted as to bite only upon information recorded in a particular form: effectively on a computer. Now the major development in the common law in relation to privacy was made in a case which had nothing to do with computers. In *Venables v NGN* [2001] 2 WLR 1038, para 81, the President first broke the link between the law of confidentiality and any pre-existing relationship. This was inspired by the reasoning of Sedley LJ in *Douglas v Hello!*, which is referred to by Lord Hoffmann in Wainwright. But whereas Sedley LJ had merely expressed views on the occasion of an interim application, the President had to make a final injunction. It has never, to my knowledge, been questioned that she was right both in that case, and in the very similar case of Mary Bell and her daughter decided in April 2000 (*X and Y v NGN* [2003] EWHC QB 1101).

This judicious development of the common law was also confirmed in *A v B* [11(ix)] where Lord Woolf CJ said :

"A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy

to be protected. (See Lord Goff of Chieveley, in Attorney General v Guardian Newspapers Ltd *[No. 2] [1990] 1 AC 109 at 281.)"*

Although those cases were expressly stated to have been decided under the law of confidentiality, that word is used in its legal and not in any ordinary sense. The injunction in *Venables* would apply to information obtained in a public street, where no question of confidentiality could arise. Suppose that at some time Venables were to find himself, by co-incidence, living opposite an old neighbour. Suppose the old neighbour of Venables happened to recognise Venables in the street. There could be no question of a breach of confidence in the ordinary sense of that word, if the neighbour were to report what he had seen to the public. But the President's injunction would clearly be effective to stop the neighbour from publicising what he had discovered of the present whereabouts of Venables.

The need for protection of Venables' identity is something which is not related to modern means of communication. The DP legislation would undoubtedly bite on any internet based communication in Europe, and on any communication by a newspaper produced using the electronic techniques by which almost all modern newspapers are produced. But there are other ways in which individuals can be identified by and to large numbers of people. The identities, and present whereabouts, of paedophiles, or suspected paedophiles, sometimes need protecting. In those cases we have all seen pictures of crowds gathering carrying placards. The present name and address of Venables, or of Mary Bell, or of a suspected paedophile, could be put on a placard and carried round a town without the need of any technique that would bring the DP legislation into play.

The *Venables* line of decisions thus shows clearly the need for continued judicious development of the common law. They also show what a stimulant the HRA has been to such development. It is to be wondered whether the President would have felt able to make the development of the law that she did make (explicitly by reference to convention rights), but for the Act and Sedley LJ's comments upon its effect. It is to be wondered what Sir Robert Megarry would have done if Malone had been seeking an injunction to prevent disclosure of his name in circumstances where (perhaps as a police informer) his life would have been endangered by the disclosure.

The Court of Appeal has followed the President's lead in developing the common law under the inspiration of the Human Rights Act. I have already mentioned *Re S (A Child)* [2003] EWCA Civ 963. In *D v L* [2003] EWCA Civ 1169 [19]–[20] the Court of Appeal held that:

"As long ago as 1913 in Ashburton v Pape [1913] 2 Ch 469 475 Swinfen Eady LJ said: 'The principle upon which the Court of Chancery has acted for many years has been to restrain the publication of information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged' Thus either surreptitious behaviour or breach of a confidential relationship can give rise to a duty of confidence which would be protected by the court… An obligation of confidence can be imposed by conduct. If a person takes a photograph in a private place, knowing that he or she is not allowed to do so, then subject to certain public policy justifications, an obligation not to publish that photograph will be imposed" .

In both those cases, in *Re S(A Child),* and *D v L*, although the courts found a basis for granting an injunction, nevertheless, in each case the court declined in fact to grant the injunction. This followed, because the courts had regard to freedom of expression and Article 10. The fact that the court holds that it has power to protect privacy does not mean that it will automatically do so.

Those cases also illustrate the need for the continuing development of the common law. No doubt on the facts of each, a substantial degree of protection might in principle have been obtainable under the DP legislation. But the protection would not have been complete. *D v L* was decided as an application of the principle in *Lord Ashburton v Pape.* Lord Ashburton's case was decided long before computers, and the surreptitious means used to obtain information in his case, by removal of a piece, or pieces, of paper is as much a possibility now as it was then.

Nevertheless there are solid reasons for paying more attention to the DP legislation. These have now been emphasised in the judgment European Court of Justice on 6 November 2003 in Case C-101/01, a reference to Luxembourg on a prosecution of a Mrs Lindqvist. The facts of the case have a certain charm:

"In addition to her job as a maintenance worker, Mrs Lindqvist worked as a catechist in the parish of Alseda (Sweden). She followed a data processing course on which she had inter alia to set up a home page on the internet. At the end of 1998, Mrs Lindqvist set up internet pages at home on her personal computer in order to allow parishioners preparing for their confirmation to obtain information they might need. At her request, the administrator of the Swedish Church's website set up a link between those pages and that site.

The pages in question contained information about Mrs Lindqvist and 18 colleagues in the parish, sometimes including their full names and in other cases only their first names. Mrs Lindqvist also described, in a mildly humorous manner, the jobs held by her colleagues and their hobbies. In many cases family circumstances and telephone numbers and other matters were mentioned. She also stated that one colleague had injured her foot and was on half-time on medical grounds.

"Mrs Lindqvist had not informed her colleagues of the existence of those pages or obtained their consent, nor did she notify the [Swedish equivalent of the Information Commissioner] of her activity. She removed the pages in

question as soon as she became aware that they were not appreciated by some of her colleagues".

Some may recall the observations of Lord Denning MR in *Bulmer v Bollinger* [1974] Ch 401 on the impact of the Treaty of Rome on English law, which he made just after the passing of the European Communities Act 1972. He said (at 418):

"The first and fundamental point is that the Treaty concerns only those matters which have a European element, that is to say, matters which affect people or property in the nine countries of the common market besides ourselves. The Treaty does not touch any of the matters which concern solely England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers."

One of the questions raised in the reference to the ECJ was whether Mrs Linqvist's activities fell within or outside the scope of Community law. The answer is that they did fall within the scope of Community law. Could Lord Denning ever have supposed that the incoming tide would go so far as to flood the village church? Once it had been decided that the activities did fall within the scope of Community Law, it was inevitable that it would also be held that the information about the injured foot and the person on part time work on medical grounds would be held to constitute sensitive personal data.

The important question in the case was whether the provisions of the Directive, which implement Article 8 of the ECHR, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are are enshrined in, *inter alia*, Article 10 of the ECHR.

This was a question that had troubled the media when the Data Protection Bill was being debated in Parliament. The result of the intervention of the media was the late inclusion in the Bill of what became section 32 of the 1998 Act, the so-called media exemption.

The answer to this question, given by the ECJ, was that

"...the provisions of Directive 95/46 do not, in themselves, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the European Union and are enshrined inter alia in Article 10 of the ECHR. It is for the national authorities and courts responsible for applying the national legislation implementing Directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order" (Case C-101/01 [90]).

The ECJ emphasised that any sanction for an interference with private life must respect the principle of proportionality. One can only wonder at what sanction would be small enough to be proportionate to Mrs Lidqvist's breach of the law.

This outcome is encouraging. It is encouraging to the media, because it makes clear that they do not need to rely only on section 32 of the DPA 1998 for protection of their right of freedom of expression. It is encouraging for the rest of us, because only the media are protected by section 32, and it would be unfortunate if no one else's right of freedom of expression were respected.

The Lindqvist case also seems to me to be encouraging for judges. It means that if the Directive applies to a case at all (and it almost always will apply to a case involving the media), then it may no longer be necessary to decide what is, or is not, a permissible development of the common law. Such difficult terrain will need to be crossed only in cases such as *Venables* where relief under the DP legislation would not suffice.

Where does that leave celebrities? The important cases in which the common law has developed are cases where lives, and health and well being of ordinary people were at risk: Venables, Mary Bell, the child in *Re S* – ordinary people in the sense of people from ordinary backgrounds who did not seek celebrity, or use celebrity to earn their livings. While in one sense Venables and Mary Bell and her daughter are celebrities, they are untypical celebrities. They were seeking anonymity. They truly want to be let alone. For them the DP legislation is, as I have shown, inadequate. Their identities were always at risk of being disclosed by a fanatic with a placard.

The celebrities who do seek control over the disclosure of information about them, whether in image or written form, will receive all the protection that they need. If the court is asked to approach the matter through the DP legislation, it will not be necessary to decide whether an image recorded in Brentwood High Street was confidential. It will be recalled that Mr Peck's image recorded there in 1994 did not enjoy the protection of the 1995 Directive and the 1998 Act.

It will not be necessary to introduce from the USA, or Australia, concepts not previously found in English law, in particular the concept of offensiveness. It will not be necessary to reconsider the introduction from America of the "public figure", whose recognition was rejected in England in relation to libel As Sir David Eadyhas said (in a speech at a seminar in Gray's Inn on 12 December 2002 to celebrate the publication of *Privacy and the media*, eds Tugendhat and Christie OUP, 2002):

"I very much take the view that individual citizens should not be separated out into different classes when it comes to the application of the law."

The attempt to persuade the House of Lords to adopt the American public figure defence had failed in *Reynolds v Times Newspapers* [2001] 2 AC 127. The fact that the DP legislation is part of Community Law reduces the scope for

appeals to the Court of Appeal. There is no appeal from a judgment of the ECJ. The law as stated in Mrs Lindqvist's case is not just something to which the English courts must have regard under HRA section 2. It has the binding force of Community Law.

The fact that the DP legislation is part of Community Law removes the need for the courts to enquire whether, and to what extent, Article 8 has horizontal effect. The Directive enacts that it does. The DP Act 1988 also addresses the point on which the Wainwrights failed in the House of Lord. Where there is a breach of the Act which causes no more than distress, the claimant is entitled to compensation against a media defendant, although against any other defendant he will have to prove that he has also suffered damage.

Reliance on the DP legislation means that it will not even be necessary to talk of a law of privacy at all. The word privacy has such negative connotations to some, that any endorsement of it by the courts would attract public controversy. The real issues in so-called privacy cases are generally ones of freedom of expression. Article 10 of ECHR gives a clear and flexible basis for deciding whether or not information can or cannot be published. So long as the Courts address those issues as they did in *Re S (A Child)* and *D v L*, there should be nothing to fear. A finding of a right to protect personal information does not automatically lead to the imposition of an injunction or an award of damages.

In addition, there is a body of Strasbourg law which has explored the different types of speech and the degree of protection that they attract. The cases are well known.

Of course, it may turn out that in cases brought under the DP legislation the courts cannot provide an effective remedy in cases where they considers there should be a remedy. If the common law cannot be developed to fill the gap in such cases, then at least it will be clear where the legislature should be invited to intervene. The government and the House of Lords should be taken at their words, and the existing remedies tested.

I will conclude with a final reminder of a beautiful dark haired celebrity who has contributed more than anyone to the development of the law of privacy. Her name will forever be associated with it.

Caroline – formerly Princess of Monaco, now of Hanover – will soon obtain another decision on Article 8 from Strasbourg. If she succeeds, ordinary people may have reason to be grateful that she has been prepared to pay for the development of the law, and if she loses so too will the media. Adam Smith's invisible hand works at the common law.

- This article is based on a lecture given at the Institute of Advanced Legal Studies on 24 November 2003. Michael Tugendhat's previous two-part article appeared in issues 37 and 38 of *Amicus Curiae* in 2001.

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