20 (1979) 2 EHRR 245 at para 62.

21 For example, contrast the strict test in the right to life case of *McCann v United Kingdom* (1996) 21 EHRR 97 with the right to property case of *Lithgow v United Kingdom* (1986) 8 EHRR 329.

22 See for example *Campbell v United Kingdom* (1992) 15 EHRR 137; *Open Door Counselling and Dublin Well Woman v Ireland* (1992) 15 EHRR 244; *Ahmed v United Kingdom* [1999] IRLR 188.

23 *McIntosh v Lord Advocate and another* [2001] 2 All ER 638.

24 *Brown v Stott (Procurator Fiscal, Dunfermline) and another* [2001] 2 All ER 97.

25 *Wilson v First County Trust Ltd* [2001] 3 All ER 229.

26 Another case exemplifying the least drastic measures test in practice is *R v. Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26 (23 May 2001). There it was noted that the policy for searching prisoner's cells, by imposing a blanket rule of routinely excluding prisoners, could not be justified as the objective of that policy could have been achieved by other search methods.

27 [2001] 3 All ER 393.

28 At [51].

29 At [94].

30 *R (on the application of Samaroo) v Secretary of State for the Home Department* [2001] All ER (D) 215, 17 July 2001 at para 19.

31 At [99].

32 At [58].

33 [2001] 1 All ER 1014 at [16].

34 See for example *R (on the application of Samaroo) v Secretary of State for the Home Department* [2001] All ER (D) 215, 17 July 2001 at para 36 where Lord Justice Dyson noted that the Secretary of State should be afforded a significant margin of appreciation in the decision whether to deport a foreign national convicted of serious offences in the UK because the court does not have expertise is judging how effective a deterrent such a policy is.

35 See *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 844.

36 At [36].

37 [2001] UKHL 47

38 At [49].

39 *Libman v A-G of Quebec* (1997) 151 DLR (4th) 385.

40 (1995) 127 DLR (4th) 1.

41 At [99].

42 At [36].

43 At [33].

44 *ex parte Brind* (1991) 1 AC 696 at 766-777.

45 *R (Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622 at 1636B.

46 [2001] UKHL 23 at para 50.

Privacy and celebrity 2

by Michael Tugendhat QC

The author concludes his two-part study of privacy and celebrity by posing the vention of whether claims hsould be brought in libel or confidentiality.

As things stand, the lawyers choose the cause of action depending on what the client says about the truth of the information. If the client says the allegation is false, the claim is brought in libel. If the client says it is true, it is brought in confidentiality. But should the claimant have to say whether he has an eating disorder or not? And what if the publication complained of is a gross exaggeration? Suppose the client has only a small or temporary eating disorder, which cause of action does he choose? Does he have to confirm or deny?

THE PRINCIPLES OF LAW ON PERSONAL INFORMATION

These questions cannot be answered by citation of precedent. Judges will be guided by principle. So there are other prior questions of a higher order. Why has English law hitherto regarded truth as justifying publication of almost all personal information? What are the values of freedom of expression and reputation protected by libel? What are the values protected by privacy laws?

The value of reputation

It is easy to start with libel. The answer has been given by Lord Nicholls in *Reynolds v Times* [1999] 3 WLR 1010, 1023. He said:

'Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society, which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed, choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that

freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others.'

So libel protects a person against humiliation. It also protects society from making choices on a factual basis, which is false.

The value of freedom of expression

The value protected by freedom of expression is as easily explained. In *R v Secretary of State, ex parte Simms* [1999] 3 All ER 400, 407, Lord Steyn has famously said that:

'In a democracy it is the primary right: without it an effective rule of law is not possible... it promotes the self-fulfilment of individuals in society.... The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.'

Lord Steyn was talking about public life. In private life the answers are the same. Freedom of expression deters inappropriate behaviour and encourages good behaviour (see *ex parte Todner* [1999] QB 966, 977; see also *Francome* at 898). Being talked about in the media may bring people honour or shame. People modify their behaviour accordingly. If people do not modify their behaviour, then the public discussion of it can lead to the law being invoked, or to changes in the law.

The great American jurist Richard Posner has a blunter view. He says:

'To the extent that people conceal personal information in order to mislead, the economic case for according legal protection to such information is no better than that for permitting fraud in the sale of goods.' (Cited in R Wacks, *Personal Information Privacy and the Law* (OUP, 1989), p.28).

This is similar to the traditional common law principle that 'the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess'. (*M'Pherson v Daniels* (1829) 10 B & C 263, 272, Littledale J). The PCC public interest test seems aimed to come as close to this view as Article 8(2) allows.

The value of protecting private life

What then is the value of privacy laws protecting personal information? I suggest that the answer is very similar to the one given by Lord Nicholls in respect of defamation. Privacy is as much a part of the dignity of the individual as is reputation. So privacy too protects against humiliation. But there is a difference. It can be put this way:

If libel is necessary to protect the reputation that a person has in the minds of *right* thinking members of society generally, then privacy is necessary to protect the reputation a person has in the minds of *wrong* thinking members of society. Privacy protects the individual against wrongful discrimination. It protects society from making decisions on a factual basis, which is true but irrelevant.

The history of Article 8 supports this approach in *Marckx v Belgium* (1979) 2 EHRR 330, dissenting opinion of Sir G Fitzmaurice, para.7. The most sensitive information about a person concerns their health and sexual life, their religious and political opinions and their record of criminal convictions. This information is sensitive partly because it represents a substantial part of the identity of each of us. We need to develop our identities. We can only do so in private. But that is not the only importance of such information. True information on these topics can be, and has always been, used to discriminate. The worst examples were by the totalitarian regimes whose acts gave rise to the European Convention in 1948.

People are proud of the religious or ethnic groups from which their ancestors came. People hold strong political views. They may be at ease with their sexuality. All this may apply to minority groups. But individuals, and all right thinking members of society, are the losers if prejudiced members of society make decisions based on irrational prejudice.

Members of society are not all right thinking and tolerant people. Anti-discrimination legislation does not cover all fields. It is not always effective in the fields it does cover. If a person is not to be at risk of unfair discrimination by race, religion, sexuality, and political views, then there must be some protection against the disclosure of such information without a person's consent (see *The Future of Privacy* (1998) Demos Perri 6, p.13 p.40ff. For discussions of the value of privacy see Eric Barendt, 'Privacy and the Press', *Yearbook of Media and Entertainment Law* 1995, Vol.1, p.25 at p.29 and *Privacy and Loyalty* (P Birks ed., OUP, 1997). Lord Nicholls said it is in the public interest that the reputation of public figures should not be debased falsely. It is just as much in the public interest that public figures should not be judged on information, which is true but clearly irrelevant to their public lives.

Race and sexuality have cost many careers. Glen Hoddle disclosed his beliefs linking disability to re-incarnation and lost his job with England's football team – see Sir Patrick Elias and Jason Coppel, *Freedom of Expression and Freedom of Information* (J. Beatson and Y. Cripps ed., OUP, 2000). It was hard to see the public interest in that.

Reconciling the values

So it comes down to this. Privacy laws and freedom of expression are both necessary for the dignity of the individual. Privacy prevents discrimination, which is unfair, so long as it is limited to matters which are of no legitimate concern to other members of society. Freedom of expression discourages behaviour which other members

of society consider to be inappropriate or disreputable. It also enables society to establish what behaviour is acceptable, and what is not. Wide ranging discussion in the media is necessary for this.

The question for the judges is then: by what test do they decide what information is to be protected, or whether behaviour is a misdemeanour or disreputable? Two types of answer are possible, one closed, one open. The closed test will draw up a list of topics to be protected, *e.g.* the kinds of information given in the data protection legislation or the Codes. It has the advantage of certainty and clarity. But it risks becoming out of date.

The open test for privacy was favoured by Calcutt and follows the libel model: does the information relate to those aspects of the claimant's life which reasonable members of society would respect as being such that an individual is ordinarily entitled to keep to himself, whether or not they relate to his mind or body, his home, to his family, to other personal relationships, or to his correspondence or documents?

In short, did the claimant have a reasonable or legitimate expectation of privacy? What is private or what is disreputable, like what is defamatory, is sensitive to time and culture, and can be worked out on a case-by-case basis – see Calcutt, para.12.17; David Eady QC [1996] EHRLR 243, 250; Wacks, *Personal Information Privacy and the Law* (OUP, 1989) p.24. Lord Woolf MR also regards detail in this field to be undesirable: *R v BSC, ex parte BBC* [2000] 3 All ER 989, para.12.

THE PRIORITY OF FREEDOM OF EXPRESSION

There are a number of cases where the principles of libel have been held to trump the principles protected by other causes of action. This is an exception to the general principle that a claimant can choose what cause of action to sue on. But where a person's reputation is involved that rule has not been applied. A priority has been given to freedom of expression, which has generally precluded reliance on any causes of action, which a claimant might choose other than libel.

Sometimes the claimant's choice has been respected. The difficulty is that in these cases judges have not recognised that respect for private life is a value which English law upholds. Where freedom of expression has not prevailed the decision has been based on other values (such as the public interest in upholding the institution of marriage, or some illegality on the defendant's part). Changes in society have made it difficult now to identify such values (see *Stephens v Avery* [1988] Ch 449).

The Duchess of Argyll did obtain an injunction [1967] Ch 302, in spite of the fact that the Duke had relied on truth ([1967] Ch at p.309b) – there is no reference to the point in the report of the plaintiff's argument or the judgment. The Duchess conceded that she could not ask for interlocutory relief in respect of statements which were 'merely defamatory', and not confidential. The injunction applied to confidential information. It is implied that the information was defamatory and immoral by the standards of the day. But the confidentiality arose out of the relationship of marriage. The public interest in the institution of marriage prevailed over the principle that truth justifies any publication.

More recently John Francome's choice to sue in confidentiality was upheld. He obtained an injunction preventing defamatory disclosures about him. The information had been derived from illegal bugging of his home, and that illegality was decisive in *Francome v Mirror* [1984] 1 WLR 892, 899.

In *Sim v Heinz* [1959] 1 WLR 313, an actor applied for an injunction to restrain the appropriation of his voice for advertising. The decision prevented the development in England of what the Americans call the tort of appropriation of image. Because no prior restraint injunction is available in libel, the claimant abandoned a libel claim, and relied only on passing off. Interim injunctions are commonly granted for passing off. He argued that it does not matter if the damage in the passing-off action is the same as the damage in the libel action, as he was entitled to the injunction on the basis of his claim in respect of passing off. The Court of Appeal overruled his choice. It held that it would be inappropriate to grant an injunction in passing off, when it would be refused in respect of the same facts if the claim were pursued in libel. A publicity right has since been created on a self-regulatory basis by the Advertising Standards Authority Code, para.13.1 (b).

Woodward v Hutchins [1977] 1 WLR 760, 764, marks the high point of prioritising freedom of expression. In that case the confidential relationship was employment. Lord Brabourne also failed in *Brabourne v Hough* [1981] FSR 79. A group of pop stars seem to have behaved very badly on an aeroplane. They tried to stop their former press agent from revealing to the general public what had occurred. Lord Denning referred to the rule against prior restraint in defamation and applied it to confidentiality saying:

'As there should be "truth in advertising," so there should be truth in publicity. The public should not be misled. So it seems to me that the breach of confidential information is not a ground for granting an injunction.'

It is not clear what Lord Denning meant by 'truth in advertising'. The Advertising Standards Authority Code in para.7.1 imposes such a requirement, but it is not a rule of law. Neither the Code, nor Richard Posner's analogy with fraud in the sale of goods, provides an obvious explanation for the refusal of the injunction in that case.

It is hard to see how prioritising freedom of expression over all other values can be compatible with the ECHR.

As Sedley LJ has said:

'The European Court of Human Rights has always recognised the high importance of free media of communication in a democracy, but its jurisprudence does not – and could not consistently with the Convention itself – give Article 10(1) the presumptive priority which is given, for example, to the First Amendment in the jurisprudence of the United States' courts. (See *Douglas v Hello!* [2001] 2 WLR 992, para.135)

A case such as *Woodward v Hutchins* might now be decided on different principles. A court today might still refuse an injunction on the basis that publicity would discourage disreputable behaviour. Alternatively, an injunction might be granted on the basis that the duties of an employee override his right to freedom of expression (see *Rommelfanger v Germany* (Application 12242/86); *Vogt v Germany* (1995) 21 EHRR 205).

The way to reconcile the competing values is suggested by Griffiths LJ in the obscure case of *Microdata Information Services v Rivendale* [1991] FSR 681, 688. The claim had nothing to do with personal information or celebrity. An injunction was granted to restrain a slander of title over computer software. Lord Griffiths held the court must decide whether the 'principal purpose' of the claimant was to obtain damages for defamation. That subjective and value free test has proved controversial – see *Western Front Ltd v Vestron Inc.* [1987] FSR 66, Peter Gibson J; Gatley para.25.15. But Lord Griffiths added, obiter, words that point a way forward:

'If ... the court is satisfied that there is some serious interest to be protected such as confidentiality, and that outweighs considerations of free speech then the court will grant an injunction.'

Although claimants have not been permitted by the courts to use other causes of action to avoid the principles of the law of libel, claimants who do sue in libel are permitted some measure of choice as to how to put their case within the scope of a libel action. Tom Cruise and Nicole Kidman chose to sue on a publication about their marriage, but not on other parts of the same publication, which concerned their religious beliefs. The courts upheld their right to make that choice ([1999] 2 WLR 327). It would be consistent with that principle, as well as with Article 8, that they should also have been free to choose a cause of action in which truth would not have been an absolute defence. Whether their behaviour as a married couple was of public interest could then be determined in accordance with Article 8(2), as interpreted in the Codes.

LIBEL, FREEDOM OF EXPRESSION AND PRIVACY

It is time to look again at the absolute defence of truth in libel. It is time to look too at those parts of libel law which do already recognise the right to private life.

Right thinking members of society

The most obvious protection that libel gives to privacy is in the test of what is defamatory. The test has been stretched to protect privacy. The test is in principle: do the words complained of lower the claimant's reputation in the minds of right thinking members of society generally? But the test has been found satisfied in cases where the only proper response of a right-thinking person to the publication complained of would in fact be not contempt, but sympathy or indifference. That cannot be right.

In 1934 Princess Youssoupoff was awarded £28,000 (about £600,000 today) for the suggestion in a film that she had been raped: see *Youssoupoff v MGM* (1934) 50 TLR 581.

Elton John has given two more recent examples, both landmarks in the law. Calcutt, para.1.5 and *The Times*, 21 April 2001, p.3, told of a £1 million out-of-court libel settlement in the 1980s, following stories in *The Sun* about Elton John's private life. Calcutt also cited the observation of Sir Louis Blom-Cooper, then Chairman of the Press Council, on jury awards of damages. Sir Louis thought that large awards reflected the juries' disapproval of the improper disclosure by newspapers of intimate details of an individual's private life (Calcutt, para.7.25). Elton John's case may have influenced Calcutt's proposal for the setting up of the PCC.

In 1991 Jason Donovan was awarded £200,000 in an action against a magazine, which had suggested that he was a liar and a hypocrite to deny that he was gay (*The Times*, 4 April 1992, and see Carter-Ruck, *Libel and Slander* (5th ed.), p. 666). But if he had been gay, would he have been a hypocrite if he had not admitted it? If information is personal or private, then, as the *Rehabilitation of Offenders Act* shows, a proper legal response may be that the individual does not have to confirm or deny its truth. Is it really hypocrisy to conceal that which other people have no right to know?

Instead of stretching the test of what is defamatory, it might be better to regard claimants such as these as having suffered an infringement of their privacy, not an injury their reputation. Privacy can be infringed by a false allegation as well as by a true one (Judge Françoise Tulkens, *Conference Reports: Freedom of Expression and the Right to Privacy*, (Strasbourg 23 September 1999 DH-MM), (2000) 7 Council of Europe, www.humanrights.coe.int/media, at p.28-9, the Article 8 privacy right includes the right protection of honour and reputation).

The controversy over truth as an absolute defence

Cases like *Youssuopoff* have troubled committees considering reform of the law of libel (Gatley, para.11.1). They may open the way for a rule that truth is not an

absolute defence in cases where there is an overriding need to protect the private lives of individuals. The ECHR may require that the law be changed if the UK is to fulfil its obligations (see the Sedley LJ, *Freedom, Law and Justice*, The Hamlyn Lecture, Sweet & Maxwell, 1999).

In 1843 the Select Committee of the House of Lords on the Law of Defamation recommended a change in the law. They considered that there were many cases where truth should not be a defence to an imputation relating to some personal defect or error of conduct long since atoned for and forgotten. The requirement to prove public interest was adopted only in respect of criminal libel (Gatley, para.11.1, footnote 5. Some Australian jurisdictions have confined the defence to cases of public benefit or public interest).

In 1948 the Porter Committee considered the hypothetical example of a woman who in her adolescence bore an illegitimate child (Cmd.7536 (1948), paras 74-78 cited the Faulks Report, Cmnd. 5909, para.139). They sympathised with the view that the defendant should show there was a public interest, but rejected it on the ground that the task of the author or journalist would become impracticable. They did not address their minds to the more limited point that the defence of justification could be excluded where to allow it would be an unwarranted interference with a person's private life.

In 1975 the Faulks Committee (Cmnd. 5909 (1975), paras 137-140) recognised that a requirement to show public interest might deter people from resuscitating tales of crimes or misconduct happily long forgotten. They rejected the proposal on the grounds that such a provision would apply generally to all defamatory publications. They did not address their minds to a limited qualification to the defence of justification excluding unwarranted interference with a person's private life. They were concerned about cases such as *Youssoupoff v MGN* (1934) 50 TLR 581, and others involving diseases for which there is no moral responsibility. Though recognising such cases to be a problem, they suggested that 'these unfortunate people' resort to their claim in injurious falsehood if they had none in defamation: an impractical suggestion, given the impossibility of proving malice in most cases.

The defence of fair comment on a matter of public interest has given rise to a number of cases where the courts have had to decide that certain matters relating to public figures are nevertheless part of their private lives, not matters of public interest (Gatley, paras 12.29, 12.39).

The law of libel also recognises the right to privacy in cases concerning evidence admissible in reduction of damages. In *Plato Films Ltd v Speidel* [1961] AC 1090 at p.1125, Lord Simonds said:

'There may, in the result, be cases in which a rogue survives both evidence of general bad reputation and, where he has gone into the witness-box, a severe cross-examination nominally directed to credit, and recovers more damages than he should. But I would rather have it so than that the law should permit the injustice and, indeed, the cruelty of an attack upon a plaintiff for offences real or imaginary which, if they ever were committed, may have been known to few and by them have been forgotten.'

The cruelty and injustice of raking up offences known to few and by them forgotten is referred to in French law as the *'droit à l'oubli'* or the right to be forgotten (see Kayser, *La Protection de la Vie Privé par le Droit* (3rd ed., Economica, 1995), para.118, p.217).

A right to rely on truth, which is qualified where there is an unwarranted interference with the private life of the claimant, appears to be the law in Germany (Birgit Brommerkamp, above. p.96), and France (Kayser, above, para.83 p.168, para.123, p.224), as well as in some Australian jurisdictions (Gatley, para.11.1, footnote 5).

CONCLUSION

All the examples at the start of this two-part article have in fact been taken from libel actions. None are from confidentiality cases. The claims proceeded where the claimants were able and willing to say the allegations were untrue. But if private life is to be respected, we must ask ourselves: is it right that claimants should have to say whether the allegations are true or untrue? Is it right to go on stretching the test of what is defamatory to cover illness or sexual orientation?

It must be right that the values of freedom of expression, respect for private life, and public interest should now be recognised for the principles they are. They should be candidly and explicitly addressed. Until that is done, neither the law of confidentiality, nor the law of libel will be easy to reconcile with Articles 8 and 10.

If the laws of confidentiality and libel are reconciled with the ECHR and with each other, it should make little difference to the standards of the British media. Journalists working in the UK for newspapers and broadcasters are already bound to comply with the Codes. It is hard to see why other writers and artists should be free of any restriction at all.

Celebrity is a democratic honour awarded through the media. Celebrities should not be humiliated or exploited. They should not suffer discrimination based on prejudice. But neither should they enjoy their honour by disreputable conduct and deception. It is the role of the media to ensure that they do not.

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