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Celebrities' families and privacy: the need for enhanced self-regulatory protection

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Abstract

The role of journalism has altered in recent decades. The Cairncross Review highlighted how reader demand has changed the types of news stories that people are interested in reading, alongside how they read them. Indeed, celebrity stories are still found to be particularly popular. The reporting of celebrity stories can have negative impacts, not only on celebrities, but on their families. The Leveson Inquiry highlighted how harrowing these impacts can be. Following the conclusion of the Inquiry, the Independent Press Standards Organisation (IPSO) was formed and the Press Complaints Commission (PCC) disbanded. However, despite IPSO's regulation, this article concludes that invasions of celebrities' families' private lives are still taking place following recent complaints by celebrities on behalf of their families. As a consequence of this, there are concerns that such invasions are still occurring as IPSO is perceived as an ineffective regulator. This argument shall be considered within this article before offering recommendations as to how IPSO can better protect celebrities' families' privacy.

Keywords: Right to privacy. Leveson Inquiry. Press self-regulation. Celebrities. IPSO.

Introduction

Following the conclusion of the Leveson Inquiry in the United Kingdom (UK), recommendations were made by Lord Justice Leveson to encourage more ethical reporting through improved self-regulation.[1] The Inquiry revealed that press regulation had not been fit for purpose and unethical invasions of privacy had been taking place.[2] Both private citizens and public figures testified how invasive reporting had impacted their lives. The intrusion into celebrities' private lives was well documented in the Inquiry, with individuals such as Hugh Grant[3] and Steve Coogan[4] recounting their experiences. In addition to this, celebrities also discussed how intrusive reporting had impacted their families, as shall be emphasised within this article.

In turn, while these incidents have been documented, celebrities' family members are still finding aspects of their private lives published in newspapers. Examples of this include cricketer Ben Stokes' mother, actress and activist Jameela Jamil's mother, and singer Lisa Moorish's daughter. Stokes opted to take legal action against the *Sun* following their publication of a story in 2019 concerning events that had taken place in his mother's life in New Zealand some thirty years ago.[5] With regard

to Jamil, her now deleted tweet stated that her mother had been harassed by a *MailOnline* journalist.[6] Moorish also stated her annoyance on the social media site at how her daughter, Molly, had been the feature of an article in the *Sun*.[7] Furthermore, more recently, Martha Hancock, the wife of former Health Secretary Matt Hancock, has found herself the subject of press scrutiny following revelations that her husband had been engaged in an extra-marital affair.

These recent incidents highlight how privacy protection can be improved. In particular, the focus of this piece will be on the Independent Press Standards Organisation's (ISPO) Editors' Code of Practice. This is because the majority of publications, including the aforementioned in the examples, publish celebrity gossip stories. Indeed, the 2021 Press Recognition Panel (PRP) report on the recognition system acknowledged that 88 publishers have joined IPSO. These 88 publishers cover 2,600 titles.[8] However, IPSO recently claimed that this number is higher, stating that they regulate 93 publishers both in print and online.[9]

Nonetheless, the Independent Monitor for the Press' (IMPRESS) Standards Code will be referred to, albeit briefly, to compare it to IPSO's Editors' Code of Practice. IMPRESS, according to the PRP report, currently regulates 104 publishers who produce 174 titles.[10] These two new self-regulators were set up following the completion of the Leveson Inquiry and the closure of the Press Complaints Commission (PCC). The main difference between the two regulators is that IMPRESS has been recognised as an official regulator by the PRP. IPSO has not achieved such recognition, nor is it seeking it.[11] The PRP was established by Royal Charter with the main role of ensuring that any regulator seeking official status meets the list of criteria that has been set out in the Royal Charter. In particular, it has to ensure that any organisation wishing to regulate the press is properly funded, able to adequately protect the public and is independent. There has been much written by academics, such as Cathcart,[12] Fenton[13] and Wragg,[14] alongside organisations such as Hacked Off[15] and the Media Standards Trust,[16] concerning issues with the composition of IPSO. In particular, the PRP Report highlights these concerns, specifically in relation to its composition, its lack of willingness to adhere to the Royal Charter and the role that the Regulatory Funding Company (RFC) plays.[17] However, IPSO has rebutted these claims, stating that it is independent alongside critiquing the PRP's comments:

> …The PRP prefers to uncritically present consultation responses it has received from third parties that present an incomplete, and in some instances misleading, picture of IPSO's work and governance arrangements.[18]

Furthermore, as things stand, there is very little incentive for IPSO to become recognised as an official regulator due to the subsequent cancellation of Leveson 2. This second phase of the Inquiry would have examined the relationship between the press and the police. The cancellation of Leveson 2 also saw section 40 of the Crime and Courts Act 2013 shelved. Section 40 would have seen the publishers who did not belong to a recognised regulator, potentially, have to pay the other side's costs in a legal case, even if they won. While section 40 is not planned to go ahead, it has not been repealed and it remains dormant on the statute books. The reason behind the

creation of section 40 was to persuade publications to join an official regulator.[19] However, the then Culture Secretary, Matt Hancock, stated that Leveson 2 should not proceed due to changes in the media landscape, arguing that "we've seen significant progress from publications, from the police and from the new regulator."[20]

Without section 40 there appears to be no incentive for publications to join an officially recognised regulator. However, even when section 40 had been on the table, numerous publications viewed the section sceptically, with the former *Sun* editor noting that it was a form of 'blackmail.'[21] It is evident that tensions exist between the numerous bodies concerning whether or not IPSO is an effective regulator. However, this article recognises that it is unlikely that IPSO will seek official regulator status. They have made this position particularly clear.[22] Academics, such as Wragg,[23] have argued that for meaningful change to take place, IPSO needs to engage with the Royal Charter. Indeed, Wragg has also argued that mandatory regulation is needed as voluntary regulation is fundamentally flawed, as has been discussed above in relation to independence and concern that the public is not being properly protected. This latter concern can perhaps be attributed to publishers not fearing breaking the code that they are governed by. Indeed, this is because the regulator has no leverage according to Wragg:

> In any contract, the decision to perform one's obligations are a matter of choice. It is an exercise in risk based upon the cost-benefit analysis of compliance compared to non-compliance. If the cost of non-compliance is less than the cost of performance, then breaching the contract becomes the more attractive option.[24]

For example, if the sanction is something that the publisher does not like then this could also cause tension and the potential for the disciplined newspaper to leave the regulator completely.[25] Furthermore, as Wragg has also noted, this perhaps is the reason why between 2014 and March 2019 IPSO did not fine any publication, despite 1,702 violations of its code.[26] Put simply, the regulator will always be on the back foot. However, despite these criticisms and calls for mandatory regulation, the self-regulatory landscape and IPSO's lack of willingness to engage with the Royal Charter remains.[27]

Firstly, this article will begin, briefly, by examining how the role of the press has changed in recent decades with the increased publication of celebrity news and the justification for its publication and popularity. Secondly, it will examine how this changing role of the press has had an impact on celebrities' families' privacy with emphasis on testimonies from the Leveson Inquiry. Thirdly, it will explore how the right to privacy is protected. Both the regulatory and legal landscape shall be considered within this section. Finally, it will make tentative recommendations on how IPSO's Editors' Code of Practice can be altered to provide better privacy protection for celebrities' family members through reconciliation with judgments handed down in court cases.

With the aforementioned issues concerning IPSO and its unwillingness to change or sign up to the Royal Charter, it could perhaps be questioned if any of the recommendations that are to be put forward would even be considered or enforced. Nonetheless, following the Leveson Inquiry and celebrities' complaints about the way their families are treated, it seems imperative that IPSO at least attempts to address these issues in their Editors' Code of Practice considering the implications that press intrusion can have and the fact that they have no intention to sign up to the Royal Charter. It is a discussion that is worth having because of the consequences press intrusion can have on family members and because it is not one that has been raised by the press regulator itself in its own Code of Practice.

The Role of the Press

Firstly, the changing role of the press shall be examined in order to emphasise the popularity of celebrity news stories and explore the impact that these stories can have on family members. As Sparks remarked: "Newspapers in Britain are first and foremost businesses…they exist to make money, just as any other business does."[28] As a consequence of this, publications often compete against each other and this competition fosters an "inbuilt tendency to attempt to gain 'scoops' in those areas known to be attractive to readers."[29] As Harcup and O'Neill have noted, entertainment is the third biggest news value in a number of publications, including the *Mail, Metro, Sun, Express,* and the *Times.*[30] The popularity of celebrity news stories has been well documented by numerous academics who have noted that the increase in tabloidization over the years has been a driving force behind its popularity.[31] Indeed, remaining commercially viable is a necessity and it is something that publications have struggled with following the increase in the number of people turning to online news. However, in order to remain profitable, news publishers have adapted to how people read their news online, noting that they read stories in a 'superficial way':

> Although more people now look for news online than ever bought it in print, and people see news in more ways than they used to do, the evidence suggests that they spend less time with news, and the ubiquity of news online means that they feel overloaded, reading news in a more superficial way than they did in the heyday of newspapers. The ease with which readers flick between one headline and another means that publishers have to work even harder to grab attention quickly.[32]

Indeed, as the Cairncross Review also noted, these types of stories can be considered 'clickbait' where "sensational headlines [are published] to generate a higher number of clicks."[33] In turn, this higher number of clicks was hoped by news publishers' to be able to increase their online advertising revenue. This strategy has had mixed success, but it is simply one way that news publishers have sought to remain commercially viable.[34] While the press performs other roles in society, such as the watchdog role,[35] there is no denying that in order to survive they have to remain financially viable as a business. This is something that Lord Woolf recognised in the case of *A v B* when arguing that stories that the public are interested in, such

as celebrity stories, should be published to keep newspapers commercially viable and allow them to publish other types of stories:

> The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest.[36]

This drive to remain profitable has impacted the diversification of media companies. As society becomes increasingly digital, publications with online platforms tend to perform better than their print counterparts.[37] These online platforms do not face the same restraints as their print counterparts. For example, online platforms allow publications to publish numerous photographs and videos. With this ability, there is also the potential for further invasions of privacy to take place. However, the development of technology and how it impacts individuals' right to privacy has been a concern for many years. Warren and Brandeis in their *Harvard Law Review* article expressed concern that, at the time in 1890, the instant taking of photographs could invade privacy.[38] Since then, technology has developed further, yet the worries surrounding invasions of privacy remain. For example, Moosavian expressed concern that images can be considered particularly invasive because they show exactly what is happening and can offer more context than words.[39] Adding to this, online news can be published instantaneously. This allows numerous stories to be published daily. Furthermore, rival publications also find themselves vying for the attention of readers as they do not want to recycle another publication's story. Instead, they want to be the first to publish a story.[40] This competition can have ethical implications as journalists often push boundaries and become more willing to invade people's privacy for a story.[41]

Celebrity news stories are also said to play an important role in society. Alongside helping publications remain financially viable, it has been argued that their publication also allows us to discuss moral standards in society.[42] However, this argument has been criticised by Wragg[43] and Solove[44] who have questioned why we cannot simply discuss moral standards *without* the involvement of celebrities, arguing that oftentimes their inclusion in these stories detracts from the issue at hand. This is also the position that the courts have adopted. This can be seen in relation to cases concerning extra-marital affairs and sexual activities that have come before the High Court and, in particular, before Justice Eady. For example, as Justice Eady stated in the case of *CC v AB*:

> Judges need to be wary about giving the impression that they are ventilating, while affording or refusing legal redress, some personal moral or social views, and especially at a time when society is far less homogenous than in the past.[45]

Justice Eady reaffirmed this position in the case of *Mosley v News Group Newspapers Ltd*.[46] This case concerned the former FIA president, Max Mosley, who had been filmed partaking in sexual activities with prostitutes. Images were disseminated in the *News of the World*, with claims that Mosley had engaged in a role-play, of which

a Nazi element featured. An edited video was also published on the *News of the World's* website. Mosley denied the Nazi element and in his judgment, Justice Eady stated that, while Mosley's activities might have been atypical, there had been no justification for his private life to be invaded:

> Of course, I accept that such behaviour is viewed by some people with distaste and moral disapproval, but in the light of modern rights-based jurisprudence that does not provide any justification for the intrusion on the personal privacy of the claimant.[47]

That is not to say that these types of stories concerning extra-marital affairs and sexual activities should never be published. If it is found that there is a public interest in the information being revealed, such as if someone's sexual relationship impacts on the role they hold in public life, then the courts tend to agree that publication of such a story is necessary.[48] Nonetheless, if there is no public interest, then this type of information is usually found to be private and should be protected, as per Justice Eady's judgment.

However, this position has been criticised by some in the journalism industry, including the former editor of the *Daily Mail,* Paul Dacre.[49] Dacre has stated that Justice Eady is "ruling that – when it comes to morality – the law in Britain is now in effect neutral, which is why I accuse him, in his judgments, of being "amoral"."[50] Yet, moral standards are not fixed because they are constantly changing. In addition to this, there is a question over whether or not we truly care about discussing these stories. An anonymous professional footballer questioned this in relation to footballers' private sexual lives: "Do we even care? Do you get to the end of a tabloid story along these lines and think: "I really enjoyed reading that"? Probably not, I'd guess."[51]

In some instances, the argument has also been made that celebrities have their privacy invaded to expose their behaviour because they are considered to be a role model and therefore it is the role of the press to expose their immoral behaviour to correct this image that they have presented to the public.[52] Frost has summed up this position in the following excerpt:

> Those of high status and celebrity can be role models whether they want to be or not; we look at their lives as desirable and see them as desirable and therefore as social boundary shapers. We not only want to know what they are doing in the intimate areas of their lives, but also may need to know in order to help us understand what is or is not acceptable to society generally.[53]

This argument purported by Frost links back to the argument that these individuals should have their private lives scrutinised not only because they are role models but because their status as a role model allows us to discuss what is acceptable in society. Nonetheless, this role model argument has been discredited in some court cases.[54] Furthermore, scholars such as Phillipson,[55] Whittle and Cooper,[56] Wacks[57]

and Hughes[58] have also argued that this line of thinking is particularly flawed because there is no evidence that the immoral behaviour of a celebrity has an impact on individuals.

Furthermore, when these moral issues are discussed, it is not only the celebrity in question who has their privacy invaded, but their families' privacy can also be violated. This article is predominately concerned with these violations, however, before discussing how family members could be better protected, the impact that press intrusion can have on them shall be discussed.

The Impact of Press Intrusion on Celebrities' Family Members

Max Mosley, in a documentary aired by the BBC, recounted the impact that the *News of the World* story had on his family: "What people often don't realise is that the effect on the individual is bad, but it's far worse on their family."[59] As Wragg articulated: "What is not always recognised, although is well-understood by those unfortunate enough to have experienced it, is that this sort of unwanted press attention is frightening."[60] As Sanders has also stated, it is those ordinary members of the public who do not court fame who can be the most harmed.[61] Celebrities' family members can fall into this category. These family members tend to find themselves at the centre of press attention for either one of two particular reasons. Firstly, the celebrity they are related to, or have relations with, is pulled into the spotlight for a particular reason and they themselves are subsequently pursued by the press. For example, when a public figure has an extra-marital affair the press often pursues their spouse. Secondly, they might find that they themselves are the centre of a story, but are only considered newsworthy because they have a link to someone famous. For example, this happened to Ben Stokes' mother.

In relation to the first category, this can be seen in examples documented within the Leveson Inquiry. For example, actor Hugh Grant recalled how his previous partners had found themselves subject to press scrutiny when they started to date him.[62] In particular, he spoke about how one of his partners had been hounded by the press while she was with his child, despite asking to be left alone. She was forced to apply for injunctive relief under the Protection from Harassment Act 1997.[63] Footballer Garry Flitcroft also revealed the impact that the publication of his extra-marital affair had on his family following the lifting of his injunction in the case of *A v B*.[64] As summarised by Lord Justice Leveson:

> Garry Flitcroft described the abuse directed at his children at school following the publication of stories in the press about him. He detailed how abuse by rival fans was so hurtful and offensive that his father could no longer watch him play football; he also believes that this ultimately contributed to his father's suicide.[65]

With regard to the second category, that of celebrities' family members becoming the centre of a story due to their familial link, Charlotte Church recounted how this had happened to her parents. She detailed how news of her father's extra-martial

affair had been published. She explained how this had a negative impact on her mother's mental health.[66] She stated: "I just really hated the fact that my parents, who had never been in this industry apart from in looking after me, were being exposed and vilified in this fashion."[67]

Certain journalists and scholars, such as Neil Wallis, editor of *People*, and Joshua Rozenberg, argued that these stories were justified in being published, referring to the Flitcroft example. Rozenberg stated that "the refusal of the Court of Appeal to uphold the injunctions obtained by Garry Flitcroft is to be admired" questioning "why should a law designed to protect a person's family cover adulterous affairs?"[68] In summarising evidence given by Wallis, Lord Justice Leveson acknowledged: "Although Mr Wallis implied that publication had beneficial consequences for Mrs Flitcroft because it resulted in her discovery of her husband's affair, his comment only reinforced the view that no proper consideration had been given, before or after publication, to the real consequences of publishing this story."[69] An argument can be made that the spouse often "has the strongest interest in receiving" information concerning an extra-marital affair.[70] However, as Lord Justice Leveson noted in relation to Mrs Flitcroft: "Mrs Flitcroft did discover her husband's affair, but in the gaze of the tabloid press, hounded by photographers, and forced to hide from public. It is difficult to believe that she would thank the newspaper for its service."[71]

As has just been examined within this section, the press can often publish celebrity gossip stories to the detriment of celebrities and their family members. While an attempt has been made to justify such invasions of privacy with regard, for example, to discussing moral standards, this argument is not entirely convincing as the judiciary has emphasised.[72] Indeed, the consequences of the publication of such stories can clearly be seen as harrowing. But, it is important to recognise, as mentioned, that some privacy-invading stories are in the public interest to be published. Therefore, the following section shall examine how the right to privacy is balanced with freedom of expression through both ethical codes of conduct and the law.

The Right to Privacy

Ethical Regulation

As Frost has noted, privacy is one of the main ethical dilemmas that journalists face. It often conflicts with the right to freedom of expression and both rights have to be balanced accordingly.[73] Ethically, privacy is protected due to the numerous benefits it provides individuals. For example, privacy can allow us to develop as individuals,[74] alongside allowing us to present different images of ourselves to different people.[75] It gives us the opportunity to pick and choose who we reveal certain pieces of information to in order to build relationships.[76] It also allows us to be left alone when we need seclusion.[77]

Ethical codes set out guidance on when there can be justifications to invade people's privacy. For the purpose of this article, IPSO's Editors' Code of Practice will

predominately be examined. This is due to the fact that most of the larger publications that publish celebrity gossip are under their remit, such as the *Daily Mail, Daily Mirror,* the *Sun, Daily Express, heat* magazine and *OK!* magazine. IMPRESS, on the other hand, predominately has smaller publications, such as regional newspapers and specialist magazines, under its regulation.

Privacy is protected under clause 2 of the Editors' Code of Practice.[78] Clause 2i of the Editors' Code of Practice states the following: "Everyone is entitled to respect for their private and family life, home, physical and mental health, and correspondence, including digital communications."[79] Clause 2ii goes further to state that editors will be required to justify intrusion into an individual's private life if they have not gained prior consent.[80] Factors that are taken into consideration will include whether or not the person had a reasonable expectation of privacy, the extent to which the information was already publicly available, or will become available, and whether or not the complainant had previously disclosed the information in question.[81] Clause 2iii is the final clause that explicitly concerns photographs and states that individuals should not be photographed without consent in public or private places, if they have a reasonable expectation of privacy.[82]

With regard to the reasonable expectation of privacy test, the Editors' Code of Practice uses the concept to discuss whether or not photographs should be taken in a public or private place.[83] This is emphasised in further guidance provided by the Editors' Codebook. The Codebook, in relation to the reasonable expectation of privacy test, states that numerous questions have to be considered, including: "Did the picture show anything that was essentially private?; Was the picture taken in a public or private place where there was a reasonable expectation of privacy? Was the photograph in the public interest?"[84]

Finally, invasions of privacy are permitted if there is an overriding public interest. IPSO has given clear examples of what can be classed as being in the public interest, such as the protection of public health or safety. However, there is no exhaustive list of what is in the public interest and each case must be judged on its own merits. IPSO has even stated that "there is a public interest in freedom of expression itself" – a phrase that gives them flexibility surrounding the concept.[85]

However, while the concept of the public interest is flexible, IPSO has warned editors that they have to take it seriously and that "it is not a Get Out of Jail card to be played after flouting the rules or dropping a clanger."[86] The Codebook also states that the public interest is not synonymous with what the public is interested in.[87] Indeed, many stories concerning celebrity gossip have little public interest value. For example, they are rarely published to protect public health and safety or to expose crime. Celebrity gossip stories tend to be published for entertainment value and IPSO has stated that this is permitted so long as the Code is not breached.[88] These types of stories that catch public attention, as the Cairncross Review noted, are popular for publications as they help them remain commercially viable, even if they might not be considered public interest stories.[89] As has also been stated, the main

role of the newspaper industry is to make a profit. Wacks has reaffirmed that oftentimes the media use the public interest defence to achieve this aim:

> The concept of public interest all too easily camouflages the commercial motives of the media. Worse, it masquerades as the democratic exercise of consumer choice: we get the sensationalism we deserve. Moreover, both forms of cynical 'tabloidism' neglect the consequences for individuals who happen to be public figures who are unfortunate enough to be catapulted into the public eye.[90]

Clearly, there are issues with regard to the use of the public interest in Wacks' view. Indeed, these issues with the public interest test are emphasised further in the following section where legal regulation is considered.

Legal Regulation

Following the implementation of the European Convention on Human Rights (ECHR) into UK law through the Human Rights Act 1998, Article 8(1) ECHR, which protects the right to privacy, must be take into consideration when pursuing stories on individual's private lives.[91] Concerns have been raised about Article 8's broad scope, particularly by Monti and Wacks.[92] In particular, Wacks[93] has warned against conflating privacy with harassment, particularly so as the latter has its own legislative and regulatory protection.[94] Furthermore, we have witnessed the right to privacy develop to include protection of reputation[95] and also to encompass a physical element, namely to protect individuals from intrusion.[96] Prior to these developments, Frost had emphasised the importance of separating privacy and intrusion, noting that: "Breach of privacy is the publication of private matters; intrusion is the way those enquiries are carried out."[97] Nonetheless, the case of *PJS* expanded invasion of privacy to include a physical element.

While Article 8(1) protects the right to privacy, Article 8(2) can limit this right for numerous reasons, but this article is particularly concerned with it being limited for "the protection of the rights and freedoms of others."[98] This is because it can be limited for other rights within the Convention, such as the right to freedom of expression. This right is found under Article 10(1) ECHR,[99] but just like Article 8(1), Article 10(1) can also be limited in certain situations, as stipulated in Article 10(2).[100] These two rights must be balanced when they come into conflict. In the UK, it has been explicitly stated that neither article takes precedence over the other: both are given equal weighting.[101] When it comes to balancing these two rights, the courts ask two questions.

The first refers to the reasonable expectation of privacy. However, unlike IPSO, the courts consider factors that pertain to both photographs *and* information. These factors include the following:

> The attribute of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of

> the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purpose for which the information came into the hands of the publishers.[102]

A reasonable expectation of privacy usually exists in relation to intimate details such as sexual activities, financial records and medical records.[103] When it comes to photographs, the courts have explicitly stated that a reasonable expectation of privacy does not exist if someone is pictured in a public setting and they are not engaged in a private activity.[104] However, if they are in a public place and engaging in a private activity, then they may have a reasonable expectation of privacy. For example, Naomi Campbell had a reasonable expectation of privacy when she was photographed leaving a Narcotics Anonymous meeting as this was deemed to be a private activity.[105]

Alongside consideration of the aforementioned questions, the courts also have to ask if the information of photograph(s) in question is already in the public domain, or is about to be made public, as per section 12(4)(a)(i) of the Human Rights Act.[106] However, the courts have recently stated that, even if information is in the public domain, this is not the sole deciding factor when deciding if someone's right to privacy has been eroded. The case of *PJS* confirmed this.[107] In this case, a celebrity had been involved in a 'threesome' and their identity had subsequently been revealed in other jurisdictions, such as Scotland, and they were also identified online. Even though the information was, to a certain extent, in the public domain, the Supreme Court upheld the decision to keep PJS's injunction intact. This decision was reached to prevent the press in England from intruding not only on PJS's private life, but also on their family's private lives.

If a reasonable expectation has been established, the second test in the balancing stage is the public interest test. The courts have stated that there is no solid definition of the public interest and each judgment is made on a case-by-case basis.[108] However, they have emphasised that there is a difference between what is in the public interest and what the public are interested in.[109] Despite this, Wacks remains concerned that the media still attempt to abuse the notion of the public interest, as emphasised earlier in this article.[110]

Nonetheless, the courts have consistently maintained that there is a hierarchy of speech, with some types of speech more likely to be protected than others. At the top of this hierarchy of speech is political speech that is likely to be protected as being in the public interest. At the bottom end of this hierarchy is 'vapid tittle-tattle'.[111] The courts have consistently held that kiss-and-tell stories are more likely to be at the bottom of this hierarchy too.[112] Nonetheless, despite this hierarchy, Wragg has cited issues, in particular with the concept of the public interest:

> By conceiving of it as an audience-orientated right, we immediately lose the capacity to make objective determinations about its value. We are then forced back to the unsatisfactory position of using ad hoc and (typically)

> paternalistic judgements: "*this* sort of speech is important, *that* sort of speech is unimportant'.[113]

In turn, one way of rectifying this issue would be to consider using proportionality. As Wragg has argued:

> …We should consider proportionality the only analytical tool available to the regulator (or judge) once the public interest expression is established. Consequently, claims should be determined according to the impact upon the claimant and not the significance of the speech. In this way, the regulator has no need to make any ad hoc judgements about the weight of the expression. Instead, the regulator should focus on the necessity of the specific aspects of the privacy-invading expression and the relationship between the information disclosed and the public interest claimed.[114]

Nonetheless, despite these issues and possible solutions, the public interest test remains and certain types of speech are given greater weighting than others. However, there can be instances when speech that is not given a high weighting is in the public interest. For example, the courts have previously stated that if someone has lied to the press then the press usually has the right to set the record straight.[115] Furthermore, if someone is considered to be in a position of power or a 'role model' then there might be a public interest in revealing their private information too. However, as has been acknowledged, the role model argument has proven to be contentious.[116] Despite this, it continues to be used by certain members of the judiciary to justify some pieces of information being in the public interest, particularly in cases before the High Court.[117]

This section has detailed how privacy is protected in the UK, both by IPSO and the courts. The following section shall examine how both IPSO and the courts specifically consider celebrities' families' privacy.

Relatives of Celebrities

Frost has categorised different groups of people as having different levels of privacy afforded to them.[118] With regard to those related to celebrities, Frost places them in the category of individuals who have been "introduced to public life by accident."[119] This is because these individuals tend to be "those dragged into public life against their will."[120] When it comes to relatives of celebrities, it is imperative to understand that children are given the upmost protection as they are considered to be one of the most vulnerable groups in society.[121] Children have little to no autonomy over their actions and are more likely to feel distressed when faced with press attention. Barendt noted that the courts take into consideration the conduct of parents when examining if their child has a reasonable expectation of privacy too.[122] The courts have predominately dealt with cases concerning images of children being published when they have been photographed in public places with their parents. For example, the case of *Weller* concerned the children of the musician, Paul Weller.[123] It was held that photographs published on the *MailOnline* of him and his children on a family

trip out in Los Angeles (LA) violated their Article 8 right to privacy. The Court of Appeal emphasised that children's privacy should be protected because the fame of their parents could risk their safety.[124]

The protection of children from invasive press was again considered in *Murray* when the author J.K. Rowling claimed that there had been an invasion of privacy after she had been photographed with her son and his father.[125] Images were published in the *Sunday Express.* The case reached the Court of Appeal where it was stated that children should be protected from "intrusive media attention."[126] The more recent case of *PJS* also demonstrates how children's privacy is given the upmost protection. The Supreme Court kept PJS's injunction intact and Baroness Hale acknowledged how the children's privacy should be considered as publication of the story would have profound impacts on their lives.[127]

Just as the courts have stated that children should be granted privacy protection, IPSO has done the same. Clause 6 of the Editors' Code of Practice states that children should be given certain protections, with clause 6v stating that: "Editors must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child's private life."[128] IPSO also takes the parent's behaviour into consideration as they acknowledge that some parents might be more comfortable discussing their child/children than other parents.[129]

While it is clear to see that both the courts and IPSO offer protection to children, attention should also be paid to other relatives. For example, a number of cases that were discussed during the Leveson Inquiry concerned extra-marital affairs that have an impact on families. In these cases, the courts have stated that the *entire* families' right to privacy under Article 8 ECHR needs to be considered.[130] They have also stated that:

> It will rarely be the case that the priority rights of an individual or of his family will have to yield the priority of another's right to publish what has been described in the House of Lords as "tittle-tattle about the activities of footballers' wives and girlfriends."[131]

Unlike the courts, IPSO has not entirely addressed the issue of invasion of privacy on other family members as they have done with children. They did adjudicate on a case concerning Jemma Solomon, the sister of TV personality Stacey Solomon.[132] Jemma had complained about images taken on her wedding day, which showed her in her wedding dress. Other images showed children and her sister, Stacey, outside the venue. IPSO agreed that there had been no public interest in the images being published, but they did not emphasise the status of Jemma as someone not in the public eye, despite Jemma having raised this argument herself.

Further guidance on the protection of celebrities' family members would be welcome from IPSO. This is due to the fact that during the Leveson Inquiry numerous celebrities spoke about how it was not just their own privacy that had been invaded, but the privacy of their families. Henceforth, the following section shall make

tentative recommendations as to how the Editors' Code of Practice can be adjusted to offer privacy protection for these individuals.

Recommendations

Academics, as mentioned within the introduction, have stated that changes should be made to the composition and the running of IPSO.[133] Indeed, Wragg has also made the recommendation that IPSO should be more engaged with would-be interviewees.[134] For example, having the body act as an intermediary between the interviewee and journalist. This would be similar to the manner in which the advisory, conciliatory and arbitration service (ACAS) works.[135] Nonetheless, while these are all recommendations to reform IPSO, this article is specifically concerned with the issues surrounding IPSO's privacy clause in relation to celebrities' families.

Firstly, who is covered by the remit of IPSO should be considered. As Frost has noted, the journalism industry has seen an increase in freelancers due to cutbacks in newsrooms and therefore a reduction in the number of permanent members of staff.[136] In turn, "this is likely to be an increasing problem, particularly as freelancers have more to gain by being more intrusive and have a higher commercial imperative to get the story."[137] IPSO considers the role that freelancers play within the clause concerning harassment. They state that: "Pictures and stories from freelance contributors that are obtained by harassment will not comply with the Code."[138] This is something that should also apply to the privacy clause. It could be mentioned there that stories that invade someone's privacy or photographs taken where someone had a reasonable expectation of privacy shall also not comply with the Code.

It would also be beneficial for IPSO to better align itself with court judgments. In a sense, this is what IMPRESS does in its document: Guidance on the Standards Code.[139] In particular, it makes reference to judgments that have been handed down by the courts, such as *PJS*, so that its Code is aligned to legal rulings. Should IPSO adopt this approach then, when it comes to journalists seeking information, they would have reference to judgments that have already been made in law. Indeed, as Carney has stated, there is a belief that ethical standards codes are designed to give journalists and publishers guidelines to help them avoid breaking the law.[140] By bringing the law into the code, this performative role of the Codebook can be enhanced. In addition to this, it would also be beneficial for IPSO to make explicitly clear that the reasonable expectation of privacy test should be regarded in relation to information and not just photographs.

Nonetheless, as has been discussed, there are a number of issues with the approach adopted by the courts. For example, the broadening remit of Article 8 has been discussed, alongside the issue with the public interest test.[141] Therefore, perhaps IPSO could consider the impact that publication of privacy invading stories would have on celebrities' family members, which is similar to the proportionality test purported by Wragg.[142] As has been emphasised within this article, the impact that the publication of private information can have on an individual can be harrowing.

Therefore, it would be beneficial for IPSO to ensure that journalists consider the potential impact on the entire family in the guidance that they offer alongside questioning if the story is in the public interest.

As has also been stated, celebrities' families tend to be impacted by stories in either one of two ways. Either they find themselves the centre of a story due to their relative's fame, or they are subjected to press attention because of their relative's action. With regards to the first matter, children of famous parents have their privacy taken into consideration. A recommendation could be to offer such protection to adult family members. For example, take the case concerning Ben Stokes. Had Stokes not found renewed fame due to his position in the World Cup winning team, would the *Sun* have published the article about his mother's past? Stokes suggested not. Indeed, the example concerning Charlotte Church and her father's story during the Leveson Inquiry is echoed in Stokes' experience. Church's father's story was published due to her fame, just as Stokes's mother's was.

However, the information surrounding Stokes' mother was in the public domain through old press cuttings. As has been discussed, if information is in the public domain then IPSO is unlikely to find an invasion of privacy has occurred. The courts, however, offer further guidance, emphasising that it depends on how widespread the information is, as the case of *PJS* emphasised. This is perhaps something that IPSO can take into consideration and offer further guidance on, just as IMPRESS does in its Guidance on the IMPRESS Standards Code document. Again, this would also bring IPSO into line with court judgments too. In relation to the news concerning Stokes' mother, it had been widely published in New Zealand, but not in the UK.[143] As a consequence of this, IPSO could then consider the public interest alongside the impact that publication of the information might have too. Therefore, while the information might have been in the public domain, it was published a number of years ago and was not widely available. Furthermore, was it in the public interest to publish the story thirty years following the incident? It is doubted. In addition to this, were the harms that its publication could cause to Stokes' mother considered? This question is impossible to answer as the motivations of the journalist are unknown, but if the harms were not considered then they should have been. This is due to the fact that we have seen the impact that such privacy-invading stories can have on relatives. By adding an additional clause to state that family members of celebrities should not have their privacy invaded due to familial links and encouraging journalists to take into consideration the harms that are caused by these stories, then perhaps the *Sun* might have thought twice about publishing the story.

With regard to the second type of story, where family members are caught up in press attention due to a relative's actions, the suggestion is also made here that the entire families' right to privacy should be considered, not just the celebrity in question. This would follow the courts approach where they have stated that if there is no public interest then the right to privacy of the family will usually be protected. Furthermore, if it is found that the public has a right to know of this information, then the level of detail given should be considered. This echoes Wragg's earlier argument for considering the proportionality in revealing such information.[144] For

example, while the press might argue that there is a public interest in revealing that a public figure had an extra-marital affair, we do not need sordid details discussing the nature of the affair. As has been witnessed, particularly in the Flitcroft case, these stories can be damaging to family members. It would be prudent of IPSO to offer guidance on how the family's right to privacy should be considered alongside discussing the amount of detail that should be given if a journalist believes a story to be in the public interest to disclose.

These recommendations would encourage journalists to consider the impact that intrusive reporting can have on celebrities' family members. In turn, by issuing such guidance, celebrities' families would be granted better privacy protections and consequences such as those described at the Leveson Inquiry can help to be avoided in the future.

However, as has been noted within the introduction, there are concerns that have been raised that publications have the upper hand over the regulator and therefore have no fear when they break the code of conduct.[145] Therefore, these changes could be put forward, but the concern remains that these clauses could be ignored and no consequences suffered. Clearly, the argument for greater change within the regulatory landscape is compelling to offer better protection to individuals. However, this is unlikely to happen, as has been acknowledged, with section 40 being shelved and IPSO unwilling to engage with the Royal Charter. However, the fact remains that celebrities' families can be particularly vulnerable to press intrusion and therefore IPSO should be doing more to offer guidance as to how they should be protected. The only concern remains that if breaches do occur, nothing will change, but the discussion surrounding the treatment of celebrities' families is one that is worthwhile, as this article has discussed. The purpose of this article has been to raise attention to the fact that, as things stand, celebrities' family members are not protected or mentioned in IPSO, despite concerns for the impact that press intrusion can have on them.

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