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Injunctions and public figures: the changing value in injunctions for privacy protection

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ABSTRACT

Injunctions are a contentious issue between the judiciary and the press. What the press wishes to publish has sometimes been restricted by the judiciary through the issuing of injunctions. Nonetheless, there have been instances in which injunctions have not been respected. First, members of the House of Commons and the House of Lords have used parliamentary privilege to name individuals. The development of technology also means that information travels quicker and without the hindrance of borders. As a consequence, the second way in which injunctions can be undermined is by information being published in other jurisdictions. Thirdly, identities can be revealed on social media. This article states that, despite these instances undermining injunctions, they are still valuable. This is due to their changing nature from protecting secrets to protecting individuals from intrusion and therefore there is still value in injunctions remaining in place to protect public figures from media frenzies.

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Introduction

Public figures often find themselves involved in stories that they would prefer to keep hidden. Whether these stories involve extra-marital affairs, substance abuse, or embarrassing photographs, there can be no denying that the public figures in question would much rather keep their private lives out of the press than face publicity. Public figures have been defined by the Council of Europe as ‘people holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain’.¹ As Wragg has noted, this is quite a broad definition, offering

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¹Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the Right to Privacy.

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scope for any individual who has piqued the media's interest to be classed as a public figure. The judiciary has consistently held that someone who does not hold public office can be seen as a public figure.²

While this is the case, those in the public eye with certain responsibilities can expect to have a lower right to privacy than private individuals.³ The courts have stated that the level of responsibility someone has should play a contributing factor as to whether or not they are considered to be a public figure.⁴ The courts have held that individuals, such as the former manager of the England football team⁵ and other sporting figures, can be considered to be public figures.⁶ In certain judgments, the courts have held that these individuals can also be seen as role models whose behaviour might be copied by others and therefore should be subject to increased scrutiny.⁷ The role model argument has proven to be controversial with scholarly debate⁸ and certain judgments questioning its validity.⁹ Despite certain judges questioning its usefulness, it has continued to appear in certain cases, in particular those concerning footballers.¹⁰ Indeed, Hughes has argued against the public figure doctrine, claiming that it is unfair for courts to use 'the fact that the applicant was a public figure to devalue or curtail the right to privacy'.¹¹

Many public figures have suffered at the hands of the press divulging information that they would have preferred to keep private, including: supermodel Naomi Campbell;¹² footballers Ryan Giggs,¹³ John Terry¹⁴ and Rio Ferdinand;¹⁵ TV and radio presenter Jamie Theakston;¹⁶ and former Royal Bank of Scotland Chief Executive Sir Fred Goodwin.¹⁷ The focus on public figures and injunctions is due to the controversy that surrounds them. In particular, public figures with injunctions tend to be reported on more than private individuals who do not seek the limelight. This is because the granting of injunctions often leads to speculation of whom the individual

²Paul Wragg, 'The benefits of privacy-invading speech' (2013) 64(2) Northern Ireland Legal Quarterly 187, 200.

³*Campbell v MGN Ltd* [2004] UKHL 44 [148].

⁴*A v B & Plc* [2002] EWCA Civ 337 [11xii].

⁵*McClaren v News Group Newspapers Ltd* [2012] EWHC 2466 (QB).

⁶*Spelman v Express Newspapers plc* [2012] EWHC 355 (QB).

⁷*A v B & Plc* (n 4).

⁸Gavin Phillipson, 'Judicial reasoning in breach of confidence cases under the Human Rights Act: not taking privacy seriously?' (2003) (Special issue: privacy) European Human Rights Law Review 54; Tanya Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases and Materials* (Oxford University Press 2017); Raymond Wacks, *Privacy and Media Freedom* (Oxford University Press 2013).

⁹*McKennitt v Ash* [2006] EWCA Civ 1714; *Campbell* (n 3).

¹⁰*Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB); *LNS v Persons Unknown* [2010] EWHC 199 (QB).

¹¹Kirsty Hughes, 'The Public Figure Doctrine and the Right to Privacy' (2019) 78(1) Cambridge Law Journal 70, 98.

¹²*Campbell* (n 3).

¹³*CTB v News Group Newspapers Ltd* [2011] EWHC 1232 (QB).

¹⁴*LNS* (n 10).

¹⁵*Ferdinand* (n 10).

¹⁶*Theakston v MGN Ltd* [2002] EWHC 137 (QB).

¹⁷*Goodwin v News Group Newspapers Ltd* [2011] EWHC (QB).

with the injunction could be. Predominately, this is because there is a public intrigue to know who the public figure is and what they are hiding, alongside certain contempt from particular members of the press that these individuals can use their wealth to cover up stories, as shall be emphasised within this article.

This interest in public figures' private lives was enhanced following the tabloidization of the press.¹⁸ Such stories have remained prominent since tabloidization accelerated in the 1960s, with entertainment stories recognised as the third biggest news value in the United Kingdom (UK) in a study by Harcup and O'Neill.¹⁹ The Cairncross Review into a sustainable future for journalism acknowledged how the industry had altered as a consequence of financial pressures and the need to generate advertising on online websites. As a way to do this, there has been an increase in clickbait stories. These stories typically feature sensationalistic headlines to encourage the reader to click onto them and read more. The Cairncross Review warned of the dangers of such actions, noting that 'while journalists should think carefully about how to grab people's attention, there is a fine line between presenting readers with news items that justifiably interest them, and showing them titillating headlines and vacuous stories'.²⁰ The Review acknowledged that celebrity stories are the ones that are most frequently visited by readers.²¹ Fenton has warned that the increase in this type of journalism of clickbait has the potential to impact the role that the press play, noting that there is now a move away from journalists treating their readers as citizens and playing the watchdog, fourth estate role to journalists treating their readers as consumers and vying for their business with stories that they want to read and that grabs their attention. Judging by their popularity, celebrity stories fall into this category.²²

On occasions, public figures have attempted to stop these types of stories from being published by seeking injunctive relief. Injunctions are granted dependent on circumstances, such as how widely the information has been disseminated or whether or not the information is in the public interest to discuss. Despite this, interim injunctions in particular have been defied in a number of ways. For example, Members of the House of Lords and the House of Commons have used parliamentary privilege to name certain individuals who have been granted injunctive relief. The use of social media and the ability to publish information in other jurisdictions has also meant that those with injunctive relief have been named in defiance of court orders.

¹⁸Jeremy Tunstall, *Newspaper Power: The New National Press in Britain* (Oxford University Press 1996).

¹⁹Tony Harcup and Deirdre O'Neill, 'What is News? News values revisited (again)' (2017) 18(12) *Journalism Studies*, 1470.

²⁰Dame Frances Cairncross, *The Cairncross Review: a sustainable future for journalism*, February 2019, 42.

²¹*ibid* 16.

²²Natalie Fenton, 'Regulation is freedom: phone hacking, press regulation and the Leveson Inquiry – the story so far' (2018) 23(3) *Communications Law* 118, 120.

While these actions undermine the value of the injunction, this does not render the injunction completely ineffective. This is due to the fact that the nature of injunctions has changed as the right to privacy has changed, moving away from protecting only secrets towards protecting individuals from intrusive behaviour from the press.²³

This paper will begin by explaining this changing nature of injunctions from protecting secrets to also protecting individuals from intrusion. It is important to recognise when injunctions are not appropriate and henceforth other remedies, such as damages, are more suitable. Nonetheless, damages are unlikely to make up fully for a public figure's embarrassment, their loss of information, or injury to their reputation in having private information published. These are the scenarios when damages are awarded.²⁴ Following this initial discussion of remedies to protect privacy, the discussion will then turn to when injunctions have been undermined. In particular, it will examine how individuals have been named due to the reasons set out above. In these instances, the undermining of injunctions pertains to undermining the rule of law. However, despite this constant undermining of injunctions they still hold value due to the difference between printed speech and online speech, with the former causing more harm than the latter due to the fact that printed speech in newspapers is available nationwide. In addition to this, newspaper coverage can cause further intrusion into an individual's private life and therefore injunctions can help prevent this from happening. One way to combat the undermining of injunctions would be to adopt pre-notification requirements, the practicalities of which will be discussed.

However, while injunctions are valuable, the press has fought back, arguing that injunctions themselves are a threat to freedom of speech. This argument shall be acknowledged and emphasis will be placed on how freedom of speech is not an absolute right and needs to be balanced with the right to privacy, which injunctions can help to protect. This paper will conclude by emphasising that injunctions still hold value despite attempts to undermine them. While they might not be effective in protecting identities, they still have a positive impact in protecting individuals from press intrusion.

Remedies to protect private information

Injunctions

This article is particularly concerned with injunctions that are issued to prevent information from being published by the press. In particular, this

²³*PJS v News Group Newspapers Ltd* [2016] UKSC 26 [57]–[58].

²⁴Ian Clarke, 'Damages for Misuse of Private Information – Part 1: General Damages' (1 *Chancery Lane*, 09 July 2020) < <https://1chancerylane.com/damages-for-misuse-of-private-information-part-1-general-damages/> > accessed 02 February 2021.

article will have a focus on interim injunctions which are granted pre-trial and before the court has fully had an opportunity to consider the legal issue. The majority of analysis in this article will focus on anonymised injunctions. These are the types of injunctions that have often been undermined by the various reasons that shall be discussed. Indeed, in order for someone to obtain an interim injunction, there are a number of factors that have to be taken into consideration. For example, section 12(3) of the Human Rights Act 1998 states that the claimant must show that they are likely to obtain an injunction at trial for an interim injunction to be granted.²⁵ Furthermore, the courts have to take into consideration whether the material in dispute is, or is about to be, placed into the public domain. They also have to consider whether or not there is a public interest in the material being published when deciding whether they should offer injunctive relief.²⁶

While this paper is predominately focused on cases concerning anonymised injunctions, there is another type of injunction that is often mistaken with these. This is the super-injunction. This injunction prohibits the reporting on *anything*, including the fact that an interim injunction has been obtained.²⁷ Anonymised injunctions do not do this. The press often declare that public figures have sought super-injunctions when in fact they have only sought an anonymised injunction. This conflation between the two has been set out here as it shall be shown throughout this article how the press has used the terms interchangeably. Indeed, the Committee on Super-Injunctions has reported that they are only aware of three cases concerning the use of super-injunctions.²⁸

With this distinction clear, it is important to note that the role of anonymised injunctions has shifted throughout case law. It is necessary to discuss this shift because privacy has moved away from solely protecting secrets. It now also protects individuals from intrusion. It is this shift which still gives injunctions their value in today's society, despite them being undermined.

The changing nature of privacy: from protecting secrets to preventing intrusion

This changing approach to the issuing of injunctions to protect individuals' privacy from intrusion can be witnessed in the case of *CTB*.²⁹ The case concerned the footballer Ryan Giggs who had attempted to obtain a court order to prevent news of an extra-marital affair from spreading. It was not argued

²⁵Human Rights Act 1998, s12 as emphasised in *Cream Holdings Limited v Banerjee* [2004] UKHL [22].

²⁶*ibid.*

²⁷Committee on Super Injunctions, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions & Open Justice* (2011).

²⁸*ibid* iv.

²⁹*CTB* (n 13).

that it was in the public interest for the information to be published as a consequence of the fact that kiss-and-tell stories are rarely found to be in the public interest.³⁰ However, while Giggs was referred to as CTB, due to anonymisation, his identity was subsequently revealed on the social media platform *Twitter*. Following this, the defendants appealed the initial judgment, arguing that they should now be permitted to name Giggs. However, Eady J remained firm, stating that ‘the modern law of privacy is not concerned solely with information or “secrets”: it is also concerned importantly with *intrusion*’.³¹ Once again, the defendants returned to court and applied for anonymity to be lifted. While Giggs’s identity was now, clearly, common knowledge, Tugendhat J continued to refuse to lift the injunction, stating that:

It is obvious that if the purpose of this injunction were to preserve a secret, it would have failed in its purpose. But in so far as its purpose is to prevent intrusion or harassment, it has not failed.³²

This approach towards protecting individuals from intrusion continued in the case of *PJS*.³³ PJS had been involved in a ‘threesome’ with AB and CD. PJS was someone considered to be well-known to the public and was married to YMA, who was also well-known. Initially, the trial judge refused to grant injunctive relief, but the Court of Appeal allowed the claimants to challenge this judgment and it was consequently overturned. While the court order remained in place, this did not stop the identity of PJS from being published in other jurisdictions, most notably Canada, the United States (US) and Scotland. Articles were also published on the internet. Despite the information spreading, the Supreme Court remained firm in upholding the injunction. In particular, it was stated that Article 8 of the European Convention on Human Rights (ECHR), the right to privacy, should be protected.³⁴ Lord Mance and Lord Neuberger acknowledged that there are two key elements that make up this right: confidentiality and intrusion.³⁵ It was held that claims to respect for private life do not necessarily rely solely on confidentiality. Indeed, intrusion can be another way to invade someone’s private life. Intrusion, as stated in the case, concerned ‘unwanted access to [or intrusion into] ... one’s personal space’.³⁶ There was clear concern from the Supreme Court that if the applicant’s sexual activities were published there could be even more intrusive reporting

³⁰ *ibid* [26].

³¹ *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 [23].

³² *CTB v News Group Newspapers Ltd* [2011] EWHC 1334 [3].

³³ *PJS* (n 23).

³⁴ Article 8 (1) European Convention on Human Rights and Fundamental Freedoms 1950.

³⁵ *PJS* (n 23) [27]–[29] and [58].

³⁶ *ibid* [58] quoting Moreham and Christie.

through, what they coined to be, a ‘media storm’.³⁷ The case emphasised that protection from intrusion is an element of someone’s right to privacy.³⁸

While an injunction can be perceived as the ideal remedy to protect private information and to prevent intrusion, there are certain instances when information is so widespread and the intrusion has already happened. In these cases, an injunction is seen as being inadequate and other remedies considered more suitable, such as damages. While the European Court of Human Rights (ECtHR) stated in *Mosley v UK*³⁹ that damages are an adequate remedy, it is doubtful that the damage caused through invasions of privacy can be outweighed through monetary compensation,⁴⁰ as shall be emphasised with a recent example in the following section.

Insufficient alternative remedies: damages

In 2019, the cricketer Ben Stokes condemned a front-page story that had been published by the *Sun* surrounding his family’s private life. The story focused on intimate details about his mother’s private life prior to his birth. The story was published due to Stokes’s familial link and the fact that he found himself at the centre of press attention as a result of his role in the England Cricket World Cup winning team. The information published by the *Sun* had previously been published in New Zealand in the 1980s, but there was limited information surrounding the events. As a consequence of the *Sun*’s actions and publishing the news, it became much more widespread and placed into the public domain in the UK. Consequently, rather than seeking injunctive relief to prevent publication of the story, Stokes’s remedy would lay in damages. However, as Coe acknowledged, ‘it is obvious that the damage caused by the publication will far outweigh any level of compensation that can be awarded’.⁴¹ While the *Sun* has offered their sympathy to Stokes and his mother for what they went through, they

³⁷ *ibid* [35].

³⁸ Sara Mansoori and Aidan Wills, ‘Case Comment: *PJS v NGN*, Supreme Court restores interim injunction in landmark privacy case’ (*Inform’s Blog*, 26 May 2016) <<https://inform.org/2016/05/26/case-comment-pjs-v-ngn-supreme-court-restores-interim-injunction-in-landmark-privacy-case-sara-mansoori-and-aidan-wills/>> accessed 12 July 2020.

³⁹ *Mosley v UK* (2011) EHRR 30 [120].

⁴⁰ See for discussion on remedies: Amber Melville-Brown, ‘Camera shy – the interaction between the camera and the law of privacy in the UK’ (2008) 22(3) *International Review of Law Computers & Technology* 209; Sophie Matthiesson, ‘Who’s Afraid of the Limelight? The Trafigura and Terry Super-Injunctions, and the Subsequent Fallout’ (2010) 2(2) *Journal of Media Law* 153; Catherine Fehler and Eleanor Steyn, ‘LNS v Persons Unknown: the footballer, the lingerie model and the super-injunction that never was’ (2010) 21(4) *Entertainment Law Review* 125; Tom Iverson, ‘Landmark ruling in the “celebrity threesome” case’ (2016) 27(6) *Entertainment Law Review* 202.

⁴¹ Peter Coe, ‘Ben Stokes, The Sun and the notion of responsible journalism’ (*Inform’s Blog*, 26 September 2019) <<https://inform.org/2019/09/26/ben-stokes-the-sun-and-the-notion-of-responsible-journalism-peter-coe/>> accessed 19 July 2020.

have held firm that the story was already in the public domain in New Zealand and therefore was not private information.⁴²

This echoes the 2008 case involving the former president of the FIA, Max Mosley. Mosley had been filmed engaging in sexual activities with prostitutes.⁴³ A video of the activities was published on the now defunct *News of the World* website. The story was also published alongside images in their print publication. The *News of the World* claimed that there was an element of 'Nazi roleplay' and they considered this to be in the public interest to disseminate. However, the argument was not proven and was found to be unconvincing.⁴⁴ Eady J, in the High Court, had to consider whether or not Mosley should be granted an interim injunction to remove the video from the website.⁴⁵ He, rather reluctantly, refused to issue such an injunction. He questioned how the information could be considered to be private as it had been viewed numerous times.⁴⁶ In particular, he acknowledged that while an order may be 'desirable ... there may come a point where it would simply serve no useful purpose ...'.⁴⁷ Mosley's reasonable expectation of privacy had been damaged beyond repair and intrusion into his private life had already occurred on a vast scale. Therefore damages were found to be an adequate remedy, despite Mosley no doubt preferring an injunction to damages.⁴⁸

Indeed, Mosley's reasonable expectation of privacy was destroyed as a result of the video being viewed numerous times. This is a consequence of the development of technology, with online news articles now able to publish videos and photographs alongside written copy. This often pertains to greater invasions of privacy being able to take place because once something is published online it can be shared on social media and seen by numerous people. This development of technology can have other impacts, such as undermining injunctions. The changing nature of injunctions being issued to protect individuals from intrusion can still provide them with some privacy when injunctions are undermined, as the case of *PJS* emphasised. This changing nature of injunctions gives them an important function in today's society, as shall be discussed. However, if an injunction's sole purpose were to remain as protecting secrets then it would be seen as ineffective. This is due to the advancement of technology and the use of parliamentary privilege. This shall briefly be explored in the following section.

⁴²BBC Sport, 'Ben Stokes describes Sun story about family as 'immoral and heartless' (*BBC News*, 17 September 2019) <<https://www.bbc.co.uk/sport/cricket/49726913>> accessed 19 July 2020.

⁴³*Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB).

⁴⁴*ibid* [232].

⁴⁵*Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB) [1].

⁴⁶*ibid* [29].

⁴⁷*ibid* [34].

⁴⁸*ibid* [36].

Undermining injunctions

House of Commons and House of Lords: interference in legal proceedings

Members of the House of Commons and the House of Lords have previously used parliamentary privilege to name public figures who have been granted court orders. For example, in October 2018 Lord Hain used parliamentary privilege to name Sir Philip Green as a businessman who had been involved in ongoing legal proceedings. The injunction he had obtained had been issued to prevent allegations of misconduct from being published after non-disclosure agreements (NDAs) had been signed by a number of his former employees.⁴⁹ Prior to his naming, speculation of who the businessman could be circulated on social media. However, Lord Hain named Sir Philip Green before these allegations could result in jigsaw identification taking place.⁵⁰

Due to absolute privilege, members of the House of Commons and the House of Lords cannot be held liable for what is said in each respective chamber.⁵¹ Lord Hain stated his reasoning for naming Green stemmed from, in his own words, a want to ‘promote justice and liberty’.⁵² Other MPs and Members of the House of Lords have also used absolute privilege to name other public figures with injunctions. For example, Lord Stoneham, on behalf of Lord Oakeshott, named the former Chief Executive of the Royal Bank of Scotland, Sir Fred Goodwin. Prior to his naming, he had been known only as MNB.⁵³ Footballer Ryan Giggs also found his identity being revealed by the Liberal Democrat MP John Hemming. Hemming used his parliamentary privilege to name Giggs after discovering that the footballer had intended to take legal action against those who had named him on *Twitter*.

There can sometimes be a public interest in the revelation of these incidents. For example, there is no denying that there is a public interest in exposing the behaviour of Green. Exposing a rich male who has abused his power during the time of the #MeToo movement gives clear evidence of being in the public interest. On the other hand, what seems to have been lacking in consideration is the argument that there was also a public interest in protecting the confidentiality that had been granted by the NDAs.⁵⁴ In addition to this, Lord Hain did not have the complete picture about what Green had been accused of

⁴⁹*ABC & Others v Telegraph Media Group Limited* [2018] EWCA Civ 2329.

⁵⁰Rebecca Moosavian, ‘Jigsaws and curiosities: The unintended consequences of misuse of private information injunctions’ (2016) 21(4) *Communications Law* 104, 107; *Goodwin v News Group Newspapers Ltd* [2011] EWHC 528 [33].

⁵¹Joint Committee on Parliamentary Privilege, *Parliamentary Privilege* (2013–14 HL30, HC100) para.3.

⁵²Michael Savage, ‘Lord Hain named Philip Green ‘to promote justice and liberty’ (*The Guardian*, 27 October 2018) <<https://www.theguardian.com/business/2018/oct/27/philip-green-to-lodge-complaint-against-peer-who-named-him>> accessed 20 July 2020.

⁵³*MNB v News Group Newspapers Ltd* [2011] EWHC 528.

⁵⁴*ABC & Others* (n 49) [24].

due to a lack of access to evidence. While the Court of Appeal had stated that the allegations appeared to be ‘reasonably credible’,⁵⁵ this is not an indication that they were the entire truth and Hain’s naming of Green prevented further scrutiny of the NDAs from taking place.⁵⁶

For the most part, politicians have expressed an unease with injunctions being issued by the courts to cover up particular stories. The example of the Trafigura affair indicates this. This example concerns a super-injunction which was issued against *The Guardian* to prevent the newspaper from publishing the Minton Report, the contents of which concerned toxic-dumping taking place on the Ivory Coast. MP Paul Farrelley had intended to ask a parliamentary question to reveal its existence, but the law firm representing Trafigura stated that *The Guardian* should not publish what was said during parliamentary proceedings.⁵⁷ Despite this, a number of *Twitter* users posted Farrelley’s question and by the next morning the information was available widespread in national publications and blogs.⁵⁸

A number of MPs expressed disdain that their colleague had attempted to be gagged into silence as a result of a super-injunction.⁵⁹ The former Prime Minister David Cameron also admitted that he felt ‘uneasy’ about the creation of super-injunctions without the approval of Parliament.⁶⁰ While MPs might feel that their use of parliamentary privilege is justifiable, issues do arise as they can appear to be undermining the rule of law. Lord Burnett of Maldon argued this to be the case and stated that: ‘The instances of abuse of parliamentary privilege happily are rare. Yet the scope for abuse, not only in the context of the defiance of court orders, is great indeed in the absence of appropriate self-restraint or effective rules determined and enforced by Parliament itself.’⁶¹

Alongside undermining the rule of law, there can be consequences from the naming of individuals in parliament through the use of parliamentary privilege. For example, while the case of *A v United Kingdom* did not contain an injunction, it is a good example to use when discussing the

⁵⁵ibid [33].

⁵⁶Paul Wragg, ‘Lord Hain and Privilege: When power, wealth and abuse combine to subvert the rule of law’ (*Inform’s Blog*, 27 October 2018) <<https://inform.org/2018/10/27/lord-hain-and-privilege-when-power-wealth-and-abuse-combine-to-subvert-the-rule-of-law-paul-wragg/>> accessed 20 July 2020.

⁵⁷Staff Reporter, ‘How the Trafigura story came to be told’ (*The Guardian*, 16 October 2009) <<https://www.theguardian.com/world/2009/oct/16/trafigura-carter-ruck-the-guardian>> accessed 19 July 2020; David Leigh, ‘Trafigura drops bid to gag Guardian over MP’s question’ (*The Guardian*, 13 October 2009) <<https://www.theguardian.com/media/2009/oct/13/trafigura-drops-gag-guardian-oil>> accessed 19 July 2020.

⁵⁸ibid.

⁵⁹ibid.

⁶⁰Dominic Casciani, ‘Q&A: Super-Injunctions’ (*BBC News*, 20 May 2011) <<http://www.bbc.co.uk/news/mobile/uk-13473070>> accessed 19 July 2020.

⁶¹Lord Chief Justice of England and Wales, The Right Hon. The Lord Burnett of Maldon, ‘Parliamentary Privilege – Liberty and Due Limitation’ (2019) *21st Commonwealth Law Conference, Livingstone, Zambia*.

impacts that the use of parliamentary privilege can have.⁶² In this case, a woman had been named by an MP as a ‘neighbour from hell’. She took her case to the ECtHR to challenge the use of parliamentary privilege as an absolute defence to claims involving defamation. While she lost her case, she recalled how journalists and reporters asked her to respond to the comments made by the MP. She also received hate mail and abuse from strangers she saw in the streets.⁶³ Certainly, the consequences of naming people publicly can be damaging. Indeed, this is one of the reasons why, even though Giggs was named in the House of Commons, his injunction remained in place. Tugendhat J made clear why this was the case:

The fact that a question had been asked in Parliament seems to me to increase, and not to diminish the strength of his case that he and his family need that protection. The order has not protected the claimant and his family from taunting on the internet. It is still effective to protect them from taunting and other intrusion and harassment in the print media.⁶⁴

The injunction remained in place to stop the media from reporting on Giggs’s private life, not only protecting his privacy, but also his family’s privacy. Hence, while there can be consequences for individuals who are named in legal proceedings, such as risking pending court trials, there is still some value in an injunction remaining in place to prevent media intrusion. Indeed, it will be noted in the above excerpt that Tugendhat J distinguished between what is written online and what is written in the press, with more emphasis being placed on the danger that the latter can cause. However, such an approach might be considered outdated to a certain extent. The UK News Consumption has recently revealed that the majority of adults now receive their news online as opposed to through print newspapers. In their summary of findings it was stated that 65% of adults now go to the internet for news as opposed to 35% who use newspapers.⁶⁵ While this might be the case, there is still value in injunctions being issued to protect individuals from media intrusion, an argument that this article maintains. However, it has to be acknowledged that online speech has become increasingly important. The development of technology now means that information can flow freely from country to country and this has the potential to reveal the identities of those who have injunctive relief. Whether this information is published in different jurisdictions and/or on social media, the development of technology has shown that identities can easily be revealed as a consequence.

⁶²*A v United Kingdom* (2003) EHRR 51.

⁶³*ibid* [15]–[17].

⁶⁴*CTB* (n 32) [3].

⁶⁵Ofcom, ‘News Consumption in the UK: 2020’ (*Ofcom*, 13 August 2020) < https://www.ofcom.org.uk/_data/assets/pdf_file/0008/201320/news-consumption-2020-overview.pdf>.

Development in technology

Public figures, such as Jeremy Clarkson, have complained that injunctions do not work as a consequence of identities being revealed on *Twitter*.⁶⁶ This happened to Clarkson when he attempted to gain a gagging order to prevent rumours of an extra-marital affair surfacing once he had remarried.⁶⁷ Ryan Giggs also found his identity revealed on *Twitter* and also published in other jurisdictions' publications. While his legal team threatened legal action against *Twitter* and those who had used the site to name him, the famous publicist Max Clifford stated that this was an unwise decision.⁶⁸ MP John Hemming concurred with this notion. He stated that by suing those using *Twitter*, Giggs attracted attention to himself,⁶⁹ causing the Streisand Effect.^{70 71}

PJS is another individual who has had their identity revealed on social media and in other jurisdictions. While PJS has not been publicly named in the press or by MPs, one does not need to search for long on the internet or social media to find their identity. However, it is important to note that someone who does publish their identity would be held in contempt of court.⁷² Practically, however, it is difficult to prosecute someone for such an action. For example, consider the Giggs case. The information about Giggs 'was broken by at least one Twitter user and the information repeated as many as 75,000 times'.⁷³ As MP John Hemming acknowledged, 'it is obviously impracticable to imprison them all'.⁷⁴ While the Joint Committee on Privacy suggested that the Attorney General pursue legal action against those who are found to be in contempt of court for naming those with injunctions, the reality of doing this is quite difficult.

In addition to the difficulties of prosecuting all those who have used social media to name individuals with injunctions, there are jurisdictional issues as information can spread to other jurisdictions and subsequently be published

⁶⁶Michael Seamark, 'Jeremy Clarkson lifts the gag on his ex-wife: She claims she had an affair with Top Gear star after he remarried' (*MailOnline*, 27 October 2011) <<https://www.dailymail.co.uk/news/article-2053800/Jeremy-Clarkson-injunction-Top-Gear-star-lifts-gag-ex-wife-Alex-Hall.html>> accessed 14 May 2020.

⁶⁷*AMM v HXW* [2010] EWHC 2457 (QB).

⁶⁸Channel 4 News, 'Ryan Giggs 'only exposed because he took on Twitter' (*Channel 4*, 24 May 2011) <<https://www.channel4.com/news/ryan-giggs-only-exposed-because-he-took-on-twitter>> accessed 15 May 2020.

⁶⁹*ibid.*

⁷⁰Moosavian (n 50) 106.

⁷¹Mario Cacciottolo, 'The Streisand Effect: When censorship backfires' (*BBC News*, 15 June 2012) <<https://www.bbc.co.uk/news/uk-18458567>> accessed 17 May 2020: The Streisand Effect is defined as 'the act of trying to suppress information but simply making it more widespread as a result'

⁷²Contempt of Court Act 1981.

⁷³Joint Committee on Privacy and Injunctions, *Privacy and Injunctions* (2010–12 HL273, HC1443) 29.

⁷⁴Brian Wheeler, 'Profile: Lib Dem MP John Hemming' (*BBC News*, 24 May 2011) <<https://www.bbc.co.uk/news/uk-politics-13518160?>> accessed 20 July 2020.

by publications there. In particular, this occurred in the case of *PJS* when the Supreme Court cited the Court of Appeal and stated the following:

... the difficulty about any submission of defiance was that “the Internet and social networking have a life of their own”; furthermore, that an English court “has little control over what foreign newspapers and magazines may publish”.⁷⁵

In order to address jurisdictional issues, The Joint Committee on Privacy recommended that interim injunctions that are granted in one jurisdiction in the UK should be enforced in the other jurisdictions in the UK.⁷⁶ The Attorney General stated at the time that it would be possible to ensure that there was ‘cross-border enforcement’ for interim injunctions within the UK. However, there was opposition to this approach. The Society of Editors and Lawyers for Media Standards argued that if this were to happen then it would be viewed as ‘undermin[ing] respect for the law’ in the respective jurisdictions. In addition to this, there were concerns about the cost of applying for an injunction in three separate jurisdictions.⁷⁷

The fact that individuals have been named in other jurisdictions, on social media, and by Members of the House of Commons and the House of Lords raises concerns about the effectiveness of injunctions. In the cases discussed, had an injunction been issued solely to protect a secret then it would have failed in each instance. In order to address these issues, an argument was raised by Mosley before the ECtHR that publications should inform individuals that they intend to publish a story about them when private information is concerned. This idea is known a pre-notification requirement. Such a requirement would allow an individual to respond to the publication and, if they so wish, seek injunctive relief. It would be a guarantee to ensure that time is given for them to take this course of action. In Mosley’s case, this would have been likely to have been beneficial as the story would not have come to light.

Pre-notification requirements: a solution to the problem?

In his case before the ECtHR, Mosley argued that privacy could not be fully protected if injunctive relief could not be granted following private information being so widely disseminated. This is because the damage has already been caused. Mosley highlighted the ‘dangers of allowing journalists to be the sole judges as to where the balance between the right to freedom of

⁷⁵*PJS* (n 23) [17] (iv).

⁷⁶Joint Committee on Privacy and Injunctions (n 73) 24.

⁷⁷*ibid.*

expression and the right to respect for private life lay' when using their own judgment to decide whether or not a story should be published as the press is usually hostile towards Article 8 ECHR.⁷⁸

While Mosley lost his case due to concerns of the chilling effect that a pre-notification requirement would have on freedom of speech,⁷⁹ arguments have formed that such a requirement could be beneficial. For example, Phillipson has argued that when newspapers do not notify individuals of their intention to publish private information and give them time to seek injunctive relief then it is difficult for an individual's Article 8 right to be protected.⁸⁰ Such a point is emphasised by the fact that former journalists, such as Piers Morgan, have stated that they would run a story before notifying someone to prevent them from obtaining an injunction.⁸¹ A solicitor from Schillings also testified before the House of Commons Culture, Media and Sport Committee and stated the following:

There have been a number of examples recently where the media knew or suspected that they were going to be publishing something which a court would injunct because it was invasive of somebody's privacy and they decided, 'Well, if we run this and we tell the target they will probably get an injunction and we will not be allowed to run it. Let's run it anyway'.⁸²

While pre-notification requirements are a novel idea, there are concerns that they could stifle certain types of journalism, such as investigative journalism as these stories need to be published quickly before they lose their public interest value.⁸³ As Foster has argued, it might not be 'practical or appropriate for notification to be given' for these types of reporting.⁸⁴ Furthermore, a journalistic investigation could be halted because the costs of challenging such a requirement could act as a disincentive to continue the investigation, going against the spirit of Article 10 and placing additional financial pressures on the press. The journalism industry is already struggling to engage in investigative journalism due to its vast time consumption and expense.⁸⁵ In addition to this, there is a question of who would be bound by pre-notification requirements. For example, would bloggers, citizen journalists or individuals participating in

⁷⁸Mosley (n 39) [80].

⁷⁹ibid [129].

⁸⁰Gavin Phillipson, 'Max Mosley goes to Strasbourg: Article 8 Notification and Interim Injunctions' (2009) 1(1) *Journal of Media Law* 73.

⁸¹Piers Morgan, *The Insider: private diaries of a scandalous decade* (Ebury Publishing 2005).

⁸²House of Commons Culture, Media and Sport Committee. *Press standards, privacy and libel* (2009–10 HC 362-I) 29.

⁸³Mosley (n 39) [129].

⁸⁴Steve Foster, 'Case Comment: Balancing privacy with freedom of speech: press censorship, the European Convention on Human Rights and the decision in Mosley v United Kingdom' (2011) 16(3) *Communications Law* 100, 102.

⁸⁵Dame Frances Cairncross (n 20).

chatrooms be bound by them?⁸⁶ Practically, it would be difficult to enforce them against all types of media as numerous other individuals and online organisations report on matters involving private lives. As Coe acknowledged, the ‘new media has become an increasingly important source of news’.⁸⁷

It is possible that the remit of pre-notification requirements could be extended to cover press regulators, such as the Independent Press Standards Organisation (IPSO) and the Independent Monitor for the Press (IMPRESS).⁸⁸ Both regulators were set up following the conclusion of the Leveson Inquiry. While IMPRESS has been recognised as an official regulator by the Press Recognition Panel (PRP) for meeting the criteria of the Royal Charter, IPSO is not officially recognised as an official regulator. Many of IPSO’s members are national publications, while IMPRESS predominately regulates regional newspapers and specialist magazines. However, while these self-regulatory bodies could adopt the use of pre-notification requirements, publications join these bodies voluntarily. Therefore, if a pre-notification requirement were to become enforced, then they may decide to leave the organisation and opt for in-house regulation or join another regulator.⁸⁹ In addition, this would not solve the issue of regulating the new media environment⁹⁰ and therefore there would be nothing to prevent them from publishing a story without seeking a pre-notification requirement. Such a position seems particularly unfair according to Coe who questions: ‘Surely, if citizen journalists are acting as media they should then be subject to the same regulatory schemes as traditional journalists?’⁹¹ Coe has stated that this is a question that needs to be addressed, especially since the Alliance of Independent Press Councils of Europe (AIPCE) has noted an increase in the number of individuals complaining about privacy invasions by online blogs and citizen journalists.⁹²

While invasions of privacy by the new media is clearly becoming an increasing problem, the fact remains that the judiciary has consistently held that online speech is not as damaging as speech that is printed in the media. Speech printed in the media is considered more intrusive and

⁸⁶Andrew Scott, ‘Prior Notification in Privacy Cases: A Reply to Professor Phillipson’ (2010) 2(1) *Journal of Media Law* 49.

⁸⁷Peter Coe, ‘Redefining ‘media’ using a ‘media-as-a-constitutional-component’ concept: An evaluation of the need for the European Court of Human Rights to alter its understanding of ‘media’ within a new media landscape’ (2017) 37(1) *Legal Studies* 25, 34.

⁸⁸Louisa Taylor, ‘Balancing the right to a private life and freedom of expression: is pre-publication notification the way forward?’ (2017) 9(1) *Journal of Media Law* 72; Phillipson (n 80).

⁸⁹*ibid* 89.

⁹⁰Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press*, November 2012, 171.

⁹¹Peter Coe, ‘(Re)embracing social responsibility theory as a basis for media speech: shifting the normative paradigm for a modern media’ (2018) 69(4) *Northern Ireland Legal Quarterly* 403, 431.

⁹²*ibid* 427.

damaging.⁹³ This is a distinction that will be analysed in the following section. Henceforth, when it comes to enforcement, based on the court's reasoning, it seems logical that pre-notification requirements should only, as things stand, be applicable to printed publications. While it might be that these publications then choose to renounce their membership of a press regulator, Phillipson has suggested another method that could be used, namely that pre-notification requirements could be introduced as a rule of common law.⁹⁴ In order to enforce the requirements, there is a suggestion that if no notification is sought, there could be an increase in damages that are awarded. In a sense, this would act as a deterrent.⁹⁵ The Culture, Media and Sport Committee ruled out mandatory pre-notification requirements, but they did recommend that the PCC give guidance for pre-notifying individuals, subject to a public interest test.⁹⁶

While the idea of a pre-notification requirement *could* prevent private information, such as that in the case of *Mosley*, from being released, there are concerns raised in this paper that it might not be completely effective. For example, if a public interest test were to be used, it has to be acknowledged that there is no common agreement on what is in the public interest. A pre-notification requirement, for example, in the case of *Mosley*, might not have been sought by the *News of the World* if they believed there to be a public interest in the information being revealed. For example, the *News of the World* initially claimed that there had been a Nazi roleplay element in Mosley's behaviour. It could be argued that there was a public interest in revealing this information due to Mosley's family history. While this public interest argument was weak,⁹⁷ and the Nazi element discredited, it could be that the *News of the World* believed there to be a public interest in publishing the story and henceforth would not seek a pre-notification requirement. As a consequence, paying higher damages might punish them, but again, the damage has already been done. Mosley's privacy has still been invaded. On the other hand, had this case taken place in the current financial climate surrounding the journalism industry, then the *News of the World* might have decided to seek a pre-notification requirement out of concern for having to pay higher damages. As has been acknowledged, the journalism industry is suffering financially, as highlighted by the Cairncross review.⁹⁸ It is unknown what would have happened in this scenario. Nonetheless, the addition of a pre-notification requirement being required when private and sensitive personal information is concerned, as Phillipson

⁹³*Goodwin* (n 17) [125]; *CTB* (n 31) [24].

⁹⁴Phillipson (n 80) 96.

⁹⁵*ibid.*

⁹⁶House of Commons Culture, Media and Sport Committee (n 82).

⁹⁷*Mosley* (n 45).

⁹⁸Dame Frances Cairncross (n 20).

advocated, *could* provide an added layer of protection and give individual's time to seek injunctive relief.

Nonetheless, individuals who have been discussed, such as PJS, Giggs and Goodwin, have had their identities revealed *despite* having injunctive relief. Surely, just like injunctions, pre-notification requirements could be undermined? For example, instead of an MP outing someone with an injunction, who is to say that an MP cannot out someone with a pre-notification requirement instead?

While pre-notification requirements are a novel idea and their weaknesses can be addressed in certain circumstances as has been laid out within this section, they are unlikely to be welcomed into the journalism industry any time soon to strengthen the protection of Article 8 rights. Nonetheless, injunctions, despite their undermining, still provide a valuable role to society in preventing public figures from being subject to media intrusion.⁹⁹ Predominately, this privacy protection is still offered due to the fact that the courts consider that there is a difference between publication of private information in the press and publication online and in other jurisdictions.

The value in injunctions: the difference between online and printed publications

A point that has been emphasised by the judiciary in cases such as *CTB*, *PJS* and *Goodwin* is that there is a difference between online publications and national news publications. It is found that the latter has the potential to cause more harm and invasions of privacy than the former. In the case of *Goodwin*, while Sir Fred Goodwin's identity was revealed due to parliamentary privilege, Tugendhat J refused an application from News Group Newspapers to have the injunction altered to name the colleague he had been involved with. In particular, the woman, VBN, had previously had her identity protected and Tugendhat J was wary to remove such protection. As he commented, while select people might know who VBN is from her job description, this would be something that others who did not know her would have to search for. Indeed, while her name had been published online, Tugendhat J succinctly stated that she should still be granted privacy as there is a difference between her name being made publicly available in print and broadcast media and having to search for her identity online through information of her job description. Furthermore:

... there are many people who would not be sufficiently interested in the story to learn VBN's name unless it were exposed in the *Sun* ... once a person's name appears on a newspaper or other media archive, it may well remain

⁹⁹*CTB* (n 32) [3].

there indefinitely. Names mentioned on social networking sites are less likely to be permanent.¹⁰⁰

This is an opinion that has been echoed within the case of *CTB* when Eady J stated:

It is fairly obvious that wall-to-wall excoriation in national newspapers, whether tabloid or “broadsheet”, is likely to be significantly more intrusive and distressing for those concerned than the availability of information on the Internet or in foreign journals to those, however many, who take the trouble to look it up.¹⁰¹

The Supreme Court also recognised this distinction between speech online and press dissemination of private information, seemingly placing more emphasis on the dangers that the latter can cause. Lord Mance noted that publishing such private information would likely cause a ‘media storm’.¹⁰² He also went on to echo Eady J by stating that one has to search online for information, unlike information in the press that can be seen easily, such as by walking past a newsagents with front pages of newspapers on display.¹⁰³ There appears to be a general consensus amongst the judiciary that private information online is not as damaging as being disseminated in the press.

To a certain extent, there is a growing issue with this approach in today’s society. Moosavian has argued that it seems to suggest that the judiciary has not taken into consideration how easy it is to look information up online.¹⁰⁴ There is very little difficulty in doing this as a consequence of the development of modern technology. Furthermore, whether or not the debate surrounding the permanence of records online is accurate can be called into question. Rumours and stories that are published online can be delinked through the use of the General Data Protection Regulation (GDPR) if the criteria for delinking are fulfilled.¹⁰⁵ But certain public figures remain concerned about the permanence of stories existing on the internet. The singer Charlotte Church expressed this during the Leveson Inquiry:

The effect of publication in a newspaper is further widened by endless online sites, blogs and social media. The lie becomes public ‘fact’ and in the age of the internet, it remains available for all to see using a simple Google search from anywhere in the world. It also remains for decades to come, for other writers to

¹⁰⁰*Goodwin* (n 17) [125].

¹⁰¹*CTB* (n 31) [24].

¹⁰²*PJS* (n 23) [35]–[37].

¹⁰³Moosavian (n 50).

¹⁰⁴*ibid.*

¹⁰⁵Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1, Article 17.

add to and comment upon and for family, friends and audiences to see and believe to be true.¹⁰⁶

Arguably it is easier to look up stories online than it is to spend time trawling through archives of previous print publications. Furthermore, numerous celebrities have spoken out about the impact that social media can have on their lives, including being cyberbullied and having to cope with the impact of negative comments.¹⁰⁷ In addition to this, many newspapers now often use their social media channels to publish links to breaking news stories on their websites. The impact that comments on social media can have can be quite detrimental. O'Reilly has examined such impacts in relation to adolescents and has noted that it can cause low self-esteem, anxiety and depression.¹⁰⁸ Certainly, the impacts of online speech can be damaging, nonetheless, there are still differences between information published online and in national publications. One such difference is that public figures can choose to have a social media account, while they cannot choose not to be front page news. It is their choice as to whether they wish to engage with comments that are made online about their private lives.

In comparison, there is a difference between someone sat behind a screen typing a tweet and photographers waiting outside of your house to capture images, or the national press publishing your face and story all over their front pages. The Supreme Court in the judgment of *PJS* might have been considering such consequences that national publication of private information can have, but this is not entirely clear when they stated that the differences could simply cause a 'media storm'.¹⁰⁹ Further clarification on this point would have been helpful.

Indeed, the impact that press intrusion can have can be quite harrowing, as discussion from the Leveson Inquiry revealed. It is worth, briefly, recounting some of these personal experiences in order for it to be emphasised how injunctions can help to protect individuals from such intrusion.

The value in injunctions: impact of press intrusion

A number of public figures and private citizens came forward to testify in front of the Inquiry as to how press intrusion had an impact on their lives. For example, the singer Charlotte Church recounted how she had experienced

¹⁰⁶Charlotte Church, 'Witness Statement of Charlotte Maria Church' (*Discover Leveson*, 10 November 2011) <https://www.discoverleveson.com/evidence/Witness_Statement_of_Charlotte_Church/5853/media> accessed 18 August 2020.

¹⁰⁷BBC Radio One, '9 Celebrities who have struggled with the pressures of social media' (*BBC Radio One*, Unknown Date) <<https://www.bbc.co.uk/programmes/articles/3pLyvKfqtVkm5qSfrx9S2C/9-celebrities-who-have-struggled-with-the-pressures-of-social-media>> accessed 19 August 2020.

¹⁰⁸Michelle O'Reilly, 'Social media and adolescent mental health: the good, the bad and the ugly' (2020) 29(2) *Journal of Mental Health* 200.

¹⁰⁹*PJS* (n 23) [45].

persistent press scrutiny from a young age, with members of the press often waiting outside her home and stalking her.¹¹⁰ She discussed how intimate details of her private life were published, such as her sexual experiences with her ex-boyfriend. She explained how she felt hunted by the press and how she lost friends as a result of the publicity that followed her around.¹¹¹

J.K. Rowling stated how she had been pursued by the paparazzi and driven out of her home.¹¹² She moved to the Scottish countryside hoping to live a quiet and peaceful life without press scrutiny.¹¹³ Despite this, details about where she had moved to were published in the press, leading to, as she put it: ‘unwanted distress and anxiety to me and my family’.¹¹⁴ Steve Coogan, who had been the subject of numerous kiss-and-tell stories, also recalled the impact that the publication of such stories could have on family and friends:

While some regard the personal sexual exploits of celebrities as, quote ‘tittle-tattle’ and entertainment, when you are the subject of such a story it is not ‘harmless fun’. It can be harmful, difficult and of course both damaging and upsetting to innocent third parties caught up in it.¹¹⁵

Garry Flitcroft also spoke about how, from the time he gained an injunction to the time it was set aside, the press was constantly attempting to reveal his identity without naming him. He stated that he ‘was constantly on edge and under immense pressure’ and wanted to protect his wife from the media. He stated that once the injunction had been set aside, he and his ‘family instantly became the target of a horrible media circus’.¹¹⁶

The impacts of press intrusion can be quite damaging, as the select examples have shown here. In particular, the intrusion not only has an impact on individuals, but on their family members. There can be negative consequences when an injunction is lifted. This is particularly emphasised in the case concerning Garry Flitcroft when the footballer himself stated:

Following the lifting of the injunction, the national press ran a series of follow-up articles revealing the nature of the injunction and the subject matter behind the injunction. As a result of the Sunday People having sparked so much

¹¹⁰Charlotte Church (n 106).

¹¹¹ibid.

¹¹²J.K. Rowling, ‘Witness Statement of Joanne Kathleen Rowling’ (*Discover Leveson*, 2 November 2011) <https://www.discoverleveson.com/evidence/Witness_Statement_of_JK_Rowling/5882/media> accessed 20 August 2020.

¹¹³ibid.

¹¹⁴ibid.

¹¹⁵Steve Coogan, ‘Witness Statement of Steve Coogan’ (*Discover Leveson*, 9 November 2011) <https://www.discoverleveson.com/evidence/Written_evidence_given_by_Steve_Coogan/5854/media> accessed 20 August 2020.

¹¹⁶Garry Flitcroft, ‘Witness Statement of Garry Flitcroft’ (*Discover Leveson*, 22 November 2011) <https://www.discoverleveson.com/evidence/Witness_Statement_of_Garry_Flitcroft/8390/media> accessed 20 August 2020.

speculation about who was behind the injunction over the preceding months, when the injunction was lifted, there was a feeding frenzy in the press.¹¹⁷

While the case of *A v B* saw Flitcroft's injunction lifted, one has to question whether or not this would have happened had the case come before the courts today. Since 2002, the role model argument has predominately been discussed and discredited by certain members of the judiciary, as has been mentioned within the introduction.¹¹⁸ Furthermore, since the case of *A v B*, the courts have predominately been more inclined to offer privacy protection to those who have found themselves involved in sexual activities. A string of case law has proven this to be the case.¹¹⁹

If the media had been permitted to name PJS then it is likely that PJS would have been subject to the level of intrusion that individuals, such as Flitcroft, had been subjected to in the past. Consequently, this changing nature of allowing injunctions to stay in place to protect individuals from press intrusion is good for privacy protection, particularly so when a story concerns sensitive and personal information that is not in the public interest to be disseminated. Nonetheless, the decision to protect PJS's privacy has caused some distaste from certain members of the journalism industry, who are concerned that injunctions undermine free speech.¹²⁰ This argument shall be contextualised in the following section.

Injunctions: undermining freedom of speech?

While PJS's injunction remains intact, certain journalists expressed concern that the rich and powerful are able to use their wealth to gain injunctive relief. This is clearly seen through particular comments from journalists. An article in *The Guardian*, following the publication of PJS's identity in Scotland, noted how the newspaper's editorial chose to state that they had named PJS because, if they did not, then they 'would only encourage people – possibly celebrities, more probably tycoons and politicians – with something to hide to attempt to hide it behind a court order'.¹²¹

Other newspapers also had a similar attitude. The *Sun* protested against the judgment, claiming that the gagging order was a 'farce'¹²² and that the

¹¹⁷ibid.

¹¹⁸*McKennitt* (n 9); *Campbell* (n 3).

¹¹⁹*CC v AB* [2006] EWHC 3083 (QB); *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439.

¹²⁰Michael Hamilton, 'Canada can tell ... but we still can't; 3-WAY GAG FARCE' (*The Sun*, 13 April 2016) Available via Nexis: <https://www.nexis.com/results/enhdocview.do?docLinkInd=true&ersKey=23_T28649568749&format=GNBFI&startDocNo=0&resultsUrlKey=0_T28649568751&backKey=20_T28649568752&csi=234674&docNo=15> accessed 19 March 2020.

¹²¹Libby Brooks, 'Scottish newspaper reveals the identity of superinjunction couple' (*The Guardian*, 11 April 2016) <<https://www.theguardian.com/uk-news/2016/apr/10/scottish-newspaper-reveals-identity-superinjunction-couple>> accessed 20 July 2020.

¹²²Michael Hamilton (n 120).

restriction compromised their freedom of speech.¹²³ The *Daily Mail* also published the full article that had been published in the US, but the identities of the parties had been redacted.¹²⁴ A comment piece in the *Sun* went on to examine how the identities of public figures are being revealed on social media. However, instead of lambasting this undermining of the law, the columnist revels in the news:

Twitter threatens to put their spurious claims into the open ... those with any sense will now do the decent thing, abandon their high-handed court actions, show some humility and emerge in public. Before they are dragged into the spotlight as the hypocrites they really are.¹²⁵

Such a statement shows evidence of a lack of sympathy for public figures and seems to advocate for public figures to go on some form of ‘PR offensive’.¹²⁶ Undertaking such an action would entail public figures admitting what they had done, i.e. leaking their own story before the press can publish it. By doing this, they would be able to keep control over some aspects of their privacy, as they are the ones setting the narrative on what to discuss. However, one has to question if this is fair. If the information is not in the public interest and the individual holds no role that would result in the information to be viewed as such, then why should they be forced to divulge their private information? Furthermore, the idea that the press seems to be encouraging public figures to do this or they will have their injunction breached regardless due to social media is also concerning. This is echoed in a quote from Wragg: ‘This episode [PJS coverage] serves to show the press as mean-spirited, vindictive and ruthless: it conveys the very clear message that those who obtain injunctions will be hounded until either they or the law submits’.¹²⁷

There is no denying that there have been particular instances in which there has been a public interest to reveal information about those in the public eye. However, the courts should be the ones to judge this. They have all of the information they need in order to decide whether or not a matter is in the public interest. The public and MPs are not usually privy to such information. Nonetheless, the courts have not always protected private information. For example, they have stated that there can be a public interest in revealing hypocritical behaviour alongside correcting false images that have been presented to the press.¹²⁸ There can often be

¹²³ *ibid.*

¹²⁴ Paul Wragg, ‘The value of a privacy injunction when “everybody knows”. A comment on *PJS v News Group Newspapers*’ (2016) 21(2) *Communications Law* 25.

¹²⁵ Trevor Kavanagh, ‘Roar of free speech has just got louder; AS HYPOCRITE FAILS TO MUZZLE PRESS’ (*The Sun*, 11 May 2011) Available via Nexis: < https://www.nexis.com/results/enhdocview.do?docLinkId=true&ersKey=23_T28675850809&format=GNBFI&startDocNo=0&resultsUrlKey=0_T28675850811_&backKey=20_T28675850812&csi=234674&docNo=7 > accessed 19 March 2020.

¹²⁶ Fehler and Steyn (n 40); Matthiesson (n 40).

¹²⁷ Wragg (n 124) 27.

¹²⁸ *Campbell* (n 3) [24].

benefits to such privacy-invading speech, in particular, in relation to discussing social norms. It ‘may be said to encourage self-reflection, persona growth and maturity in its audience, particularly where it is disapproving of celebrity excess’.¹²⁹ The former editor of the *Daily Mail*, Paul Dacre, stated that by publishing such stories, this allows for ‘the media to take an ethical stand’ by discussing social norms.¹³⁰ While there can be benefits in privacy-invading speech, it must be acknowledged that harm can be caused by such speech, as has been discussed. Therefore, the courts are in the best position to judge when privacy should be limited as they have all of the necessary facts.

In addition to the harm that can be caused by privacy-invading speech, it is important to note that freedom of speech is not an absolute right. As per Article 10(2) ECHR, there are times when it can be restricted, in particular ‘for the rights and freedoms of others’. Henceforth, when the right to privacy is engaged under Article 8 ECHR, these two rights have to be balanced against each other. Again, the courts are in the best position to do this because they have all of the facts. They take into consideration the harm that can be caused to an individual if the information were to be published alongside whether or not there was a reasonable expectation of privacy over the information and, if so, whether there was a public interest in revealing the information.

While the press might see injunctions as undermining freedom of speech, particularly when identities have already been revealed, the fact remains that if the information is not in the public interest then it should not be published as privacy outweighs freedom of speech in these circumstances.

Conclusion: the remaining value in injunctions

If an injunction’s sole purpose is to protect an individual’s identity, then clearly their purpose is limited and has often failed in the past. Giggs, Goodwin and PJS have all had their identities revealed through different means. However, injunctions still have value in today’s society. Despite an individual’s name being known or published online in other jurisdictions, by keeping in place an injunction a chain of events can be prevented. For example, without judicial intervention, the press might continue reporting on the individual’s every day activities after revelations are published. In addition to this, photographers might follow them and their families in an attempt to take their pictures to sell on to an agency. As Eady J argued: ‘with each exposure of personal information or allegations, whether by way of visual images or verbally, there is new intrusion and occasion for distress or embarrassment’.¹³¹

¹²⁹Wragg (n 2) 197.

¹³⁰Paul Dacre, ‘The threat to our press’ (*The Guardian*, 10 November 2008) <<https://www.theguardian.com/media/2008/nov/10/paul-dacre-press-threats>> accessed 14 July 2020.

¹³¹CTB (n 31) [24].

Such intrusive reporting can have harrowing consequences, as the Leveson Inquiry brought to light. Lord Justice Leveson summed this up in the following excerpt:

The Inquiry has heard how the disclosure in the press of embarrassing personal details not only impacts on the self-esteem and reputation of the person involved, but also affects others around them as well. For example, the spouses and children of witnesses have been subjected to bullying and abuse as a consequence of stories written about them.¹³²

By keeping injunctions in place, despite identities being revealed online or by other means, the type of behaviour that is discussed above is avoided. While injunctions certainly serve a purpose in today's society, as has been highlighted, there are still certain issues. The ways in which injunctions have been undermined have been discussed, in particular through parliamentary privilege and the development of technology. In relation to the former, Members of the House of Lords and MPs should be encouraged not to name individuals with injunctions, particularly so if they have only interim injunctions. In giving evidence to the Joint Committee on Privacy and Injunctions, Lord Grabiner QC and Dr Kirsty Hughes suggested one way in which this can be done:

... both Houses implement a standard procedure, which first decides whether the conduct complained of constitutes an abuse of the member's privilege, and if it does, then refers the case to the courts for consideration and, where necessary, punishment. The introduction of such a procedure would, we believe, be an effective deterrent to the abuse of parliamentary privilege.¹³³

Furthermore, technology has also developed and the fact remains that online publication is growing increasingly popular, with a rise in citizen journalism and online blogs emphasising this. While injunctions can prevent intrusive behaviour from the press, the revelation of private information on online platforms can also have detrimental impacts on individuals, as has been shown. Indeed, this is potentially a point that the judiciary will need to consider in the future, particularly if print publications continue to decline in revenue and sales while online news becomes more popular. If this were to be the case then it might be put forward that those acting online as journalists should be regulated, as Coe suggested.¹³⁴ Encouragement could be given to persuade them to sign up to these self-regulatory bodies, such as IPSO or IMPRESS, which in turn were set up to promote ethical journalism.¹³⁵ This could prevent injunctions being undermined in online

¹³²Lord Justice Leveson (n 90) 485.

¹³³Lord Grabiner QC and Dr Kirsty Hughes. *Joint Committee on Privacy and Injunctions: Oral and Written Evidence* 354.

¹³⁴Coe (n 91)

¹³⁵Chris Frost, *Journalism Ethics and Regulation* (Routledge 2015)

publications. In addition to this, the implementation of pre-notification requirements might add another layer of protection to people's privacy, but they have yet to be implemented or even considered by press regulators. Furthermore, they might also be undermined just as injunctions have been, for example, through the use of social media or parliamentary privilege. Indeed, as a consequence of this, the practicalities of them are called into question.

Social media is another issue that must be dealt with. As has been acknowledged, it would be difficult to prosecute all those who name an individual with an injunction on social media. However, social media companies have developed ways to flag fake news and remove harmful content from their sites, as Lord Grabiner QC and Dr Hughes noted.¹³⁶ This is perhaps something that could be replicated when it comes to individuals who publish the identities of those with injunctions. As they acknowledged:

Enforcing privacy injunctions on social networking sites (and their future equivalents) should not be dismissed as technologically impossible. It may, for instance, be feasible for internet service providers to censor tweets and blogs. No doubt they do something similar already to prevent or monitor the publication of illicit material.¹³⁷

While it would not be possible to stop other jurisdictions publishing stories that have been restricted in England with injunctive relief, the above measures are possible suggestions as to how injunctions can be prevented from being further undermined. Nonetheless, while changes might take place in future years, this article believes that 'it is important that the courts should not allow the challenges presented by the internet to undermine the rule of law'.¹³⁸ Indeed, if injunctions were simply put aside as a consequence of private information spreading on the internet or being published in other jurisdictions then this would simply undermine the rule of law further. Finally, injunctions still serve a useful purpose in today's society to protect individuals from intrusive press behaviour and, as discussed, this is of the utmost importance as the consequences can be harrowing.

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¹³⁶Lord Grabiner QC and Dr Kirsty Hughes (n 133) 352.

¹³⁷*ibid.*

¹³⁸*ibid.*

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