Privacy and celebrity 1

by Michael Tugendhat QC

In this two-part article, Michael Tugendhat QC discusses the issues surrounding the disclosure of personal information in the media.

INTRODUCTION

Celebrity is an honour. In a democracy it is normally a reward for success. Sportsmen and artists earn it by skill. Businessmen and TV personalities earn it by wit. Politicians earn it by votes. Anyone can aspire to it. It is the public who confer celebrity. The media stimulates the public. But in the end celebrity is conveyed by the public's choices as consumers and electors. There is also a type of celebrity, which is more or less involuntary. Princes and Princesses acquire it by birth or by marriage. Other people acquire it by their chance involvement in newsworthy events. Privacy can cover a variety of legal concepts. For today I am concerned with only one of these concepts. It is informational privacy – the disclosure of personal information in the media.

Celebrity mimics friendship. We know the faces of celebrities as well as we know the faces of our friends and acquaintances. Friends exchange personal information about each other. So the public expects to know as much about a celebrity as they know about their friends. But celebrities do not know the public. There is no natural exchange of information. Celebrities try to control the personal information that is disclosed about them.

THE ISSUE

How much control should they have? That is the question. Stimulated by ECHR, Art. 8 the courts have begun to develop a new law to protect privacy. They have done this by developing the law of confidentiality. But it seems to me that any future development of a law of privacy will have to take account of the law of libel. I also question whether a law protecting the disclosure of personal information can develop without some changes in the law of libel.

The ideas in this talk arise from having to answer questions asked by journalists and celebrities alike. The questions concern stories, or intended stories, on personal topics. For example: the state of a couple's marriage or other relationship, some past incident of a sexual nature, unusual religious or philosophical beliefs, eating disorders or more serious matters of health. Can the story be published or stopped by injunction? If it is published, can there be a claim for damages?

Some have claimed that there was no English right of privacy in this sense (*Malone v Metropolitan Commissioner* [1979] Ch 344, 372 and also *Kaye v Robertson* [1991] FSR 62, 66, Court of Appeal). That was only ever true in part. It is true that publication of personal information about an individual has not been unlawful simply because it was personal or private, at least until this year.

But personal and private information has been protected in a number of cases, not because it is private, but for other incidental reasons. These reasons include:

- confidentiality;
- libel;
- various privacy statutes; and
- the self-regulation of the press.

It is necessary to consider these.

COMMON LAW CLAIMS

Confidentiality

Confidentiality is a cause of action that can be used to protect personal information. But confidentiality did not protect personal information because it was personal. It protected it if and because the person disclosing the information was subject to an obligation of confidence arising out of a relationship. Two celebrity cases are Prince Albert's etchings of the Royal family in *Prince Albert v Strange* (1849) 1 Mac & G 25 (affirming (1848) 2 De G & Sm 652, and the sensational revelations which the Duke and Duchess of Argyll made or wanted to make about their marriage in *Duchess of Argyll v Duke of Argyll* [1967] Ch 302. In Prince Albert's case the relationship arose out of the provision of services to him. In the *Argyll* case the relationship was husband and wife. In the *Argyll* case the judgment gives no detail of the information at all. The fact that the information was personal plays little part in the court's reasoning. Confidentiality gave the same legal protection to information, which is purely commercial, such as a trade secret. That was the position until the decision of Butler-Sloss P in *Venables v NGN* [2000] 1 All ER 908.

Reported cases where confidentiality involved personal information are rare. And in many of them the claim has failed. One difficulty for a claimant is the defence of public domain. Once a fact has been published, so it is said, there is no longer any confidentiality for the law to protect. Public domain gives a clear defence in confidentiality cases, which involve trade secrets and government secrets. Public domain is also a defence in cases of personal

information, but its scope is not so clear. In addition to public domain, public interest is also a defence in confidentiality. But what is meant by public interest has never been defined. There is a further difficulty with the law of confidentiality. It is unclear how confidentiality works when the information is, or may be, untrue.

Libel

The law that is normally invoked to protect personal information - and invoked extensively by celebrities - is not confidentiality, but libel. Libel *does* sanction the disclosure of personal information because it is personal. Libel looks at what is said. It does not require any prior relationship between the claimant and the defendant.

In libel the words or images complained of must refer to the claimant. It does not matter to what part of the claimant's life the publication complained of relates. It may relate to something deeply private, such as health or sexual life. It may relate to business or politics. But the subject of a libel action must always be information that is personal in the sense that it refers to an identifiable person who is the claimant. Celebrity libel actions commonly do involve health, sex and relationships.

In libel there is no defence of public domain – it does not matter that the publication may have been made previously, however often or however widely. There are public interest defences, known as privilege. But privilege protects publications, which the defendant is not alleging to be true. So public interest is very narrowly defined. Unless the publication relates to certain defined subjects, such as proceedings in court or in Parliament, defendants must generally show that they were under a duty to make the publication and that the intended publisher had a corresponding interest in receiving the publication. In *Reynolds v Times* [1999] 3 WLR 1010, it was recognised a duty to make disclosure to the public in general. It is still not an easy defence to make good, because the defendant has to prove that he has acted responsibly.

In so far that it has been so good for the libel claimant, there are however, two catches, which limit the use of libel in the protection of personal information. The first catch is that the publication must be false. Or rather, the information published may be true, but the defendant must not be able to prove that it is true. The burden of proof is notoriously on the defendant. Journalists resent this burden of proof. They point to libel cases, which have succeeded when the publication was true, but there was no legal proof available at the time of the trial. This effect of the burden of proof in libel can also be seen as a crude and limited protection to the private life of claimants. But falsity is not enough to found a libel action. The second catch in libel is that the publication must be defamatory: it must tend to lower the claimant's reputation in the view of right thinking members of society.

The overriding principle in the law of defamation is that truth justifies any publication at all. If a publication can be proved true, then it does not matter how private the information may be, or how humiliating it may be. It does not matter how lacking in public interest it may be. Subject to any confidential relationship, no publication of personal information can be unlawful provided it is true. This is a central principle of the law of libel.

It is this priority given to truth as the public interest in freedom of expression that has limited the development of a law of privacy (*Malone v Metropolitan Police Commissioner* [1979] Ch 344, 357). The degree of priority given to truth has long been controversial. The justification for it needs consideration in the light of modern developments.

PRIVACY STATUTES AND SELF-REGULATION

While the common law gives this absolute priority to truth, many statutes do not. Most statutes were prompted by the development of modern technology such as telecommunication, broadcasting and computers. See the *Wireless Telegraphy Act* 1949, s.5, the *Interception of Communications Act* 1985 and the *Regulation of Investigatory Powers Act* 2000.

Broadcasting

The *Broadcasting Act* 1996, s. 107(1)(b), requires that unwarranted infringement of privacy be avoided as is similarly undefined in article 9 of the French Code Civil. What is meant by privacy and justifications for any interference with it, are left undefined by the statute. But a body of law is being developed. There are adjudications of the Broadcasting Standards Commission and the Independent Television Commission. Some of these have been judicially reviewed.

Data Protection

Computers gave rise to another statute. Personal information on databases was subject to the *Data Protection Act* 1984, re-enacted in 1998. This was based on the 1981 Council of Europe Convention. That Convention in turn implemented ECHR, Art. 8. ECHR, Art. 8 has now been incorporated into Community Law affecting the rights of individuals as between one another under the Convention for the Protection of Individuals with regard to Automatic: Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 [1995] OJ L281/31 Processing of Personal Data, which was opened for signature on 28 January 1981.

ECHR, Art. 8(1) provides that:

'Everyone has the right to respect for his private and family life, his home and his correspondence.'

The public interest exception in Article 8(2) requires that any interference with private life must be:

'...necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for

the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

The data protection legislation is a comprehensive privacy code. It covers almost all personal information kept in a computer, or in any form of structured files. The effect of the data protection legislation is to introduce a new statutory tort of unfair use of personal information. The central requirement of the data protection legislation is that personal information cannot be disclosed unless the collection, disclosure (and any other processing of the information) is done fairly and lawfully. Fairness almost always requires the consent of the subject of the information. Consent must be fully informed consent – *Data Protection Act* 1998, Sched. 1, Pt. 1, para. 1 and Sched. 2, para. 1. The publication does not have to be defamatory. It is irrelevant whether it is true or false, or confidential or not. All that is required is that the information be contained in a database or in a structured file, and relate to a living individual.

The 1984 Act applied only to computers. In the early 1980s it was mainly governments and large companies that used computers. Today computers are everywhere, and the field of application of the statute has followed. Almost every book, newspaper and broadcast is now produced with computer technology. The result is that what was originally a law of privacy confined by technical criteria just to mainframe computers, has become of very general application. The field to be covered by any common law of privacy is correspondingly reduced.

In data protection legislation there is a very limited public domain defence. It applies where information has been made public as a result of steps deliberately taken by the person to whom it relates – *Data Protection Act* 1998, Sched. 3, para. 5. There are some public interest defences, but they are narrowly defined, too narrowly in my view, to comply with ECHR, Arts 8 and 10.

The data protection statute has a special category of 'sensitive' information – section 6 of the *Data Protection Act 1998*. This relates to racial or ethnic origin, political opinions or religious or other beliefs, trade union membership, physical or mental health or condition, sexual life, the commission or alleged commission of criminal of any offence. This last category includes any proceedings for any offence committed or alleged to have been committed, the disposal of such proceedings or the sentence of any court in such proceedings.

Rehabilitation of Offenders

An earlier and narrower privacy statute was the *Rehabilitation of Offenders Act* 1974. Under that Act, criminal convictions become spent after specified periods. When they are spent, the convicted persons do not normally have to disclose their convictions. If questions are asked about previous convictions, they are treated as not relating to spent convictions under section 4(2). There is an analogy with information which is exempted from the provisions of the *Freedom of Information Act* 2000. A public authority need neither confirm nor deny whether it has exempt information. To make the *Rehabilitation of Offenders Act* work, the law of libel had to be altered. Spent convictions can be relied on in a plea of justification, but uniquely in the law of libel, the defence of justification is defeated by proof of malice under section 4 (5) – see Gatley on Libel and Slander (9th ed.), para. 17.16. If a spent conviction is protected by Article 8, then the availability of the defence should not depend on malice, but on an assessment of the competing public interests for and against publication).

The Press Complaints Commission

Notoriously, the newspaper and book media have not been subjected to the privacy legislation applied to broadcasters. There have been many private members Bills. There have been inquiries by the Calcutt Committee (for which see the Report of the Committee on Privacy and Related Matters Cm. 1102 and several committees before Calcutt mentioned in para.1.4). None resulted in legislation. One reason for this was that in the 1970s and 1980s there was little consensus as to what personal information should be protected, or what defences should be available. There was little practical experience of privacy in England.

All that has changed. Calcutt led to the setting up of the self-regulatory regime of the Press Complaints Commission. But what is more important is the life and death of the greatest celebrity of all: Princess Diana. During her life she attracted immense public attention. The media ceaselessly published personal information about her, whether with, or without, her consent. It was often hard to tell. The possibility of this attention being turned on her two children had to be prevented. As a result the PCC Code was amended. From 1998 it incorporated almost verbatim Article 8(1) of the ECHR. It went further. It gives its own interpretation of Article 8(1) in numerous respects. Specific restrictions apply to children, to victims of accidents and to details of race, colour, religion, sex and physical or mental impairments under paras 5, 6, 12 and 13 of the PCC Code. The right to privacy is expressed to apply to places where there is a reasonable expectation of privacy. This has been held under Code art. 3, *Hello!* PCC Report 43 1998, to apply to a celebrity in a church, which is open to the public.

Other provisions of the PCC code are less favourable to celebrities. The public interest provision is crucial. Here the PCC Code does not repeat the words of Article 8(2). It gives its own interpretation, which includes:

'(i) Detecting or exposing crime or a serious misdemeanour,

(ii) Protecting public health and safety,

(iii) Preventing the public from being misled by some statement or action of an individual or organisation.'

Compare the ITC Code para 2.1 which adds '(iv) exposing significant incompetence in public office' and para 2.3 which refers to 'disreputable behaviour'. The BSC Code, para. 14 is similar in wording to the ITC's: instead of 'serious misdemeanour' it speaks of 'disreputable behaviour'– the disclosure of disreputable behaviour is in the public interest.

Clearly the public interest exception does not just apply to politicians and those involved in governmental affairs. Any celebrity can behave disreputably and mislead the public. The phrase 'disreputable behaviour' is an interpretation of the words 'protection of health or morals', which appears in ECHR, Art. 8(2). Disreputable behaviour implies a low threshold for satisfying this test. Public interest is the media's justification for many disclosures. These would be harder to justify if Article 8(2) raise a higher threshold. Such justification does not always succeed (see *The Sunday Mail* PCC Report No. 41 1998, *The Sunday People* PCC Report No.43 1998 and *The Sunday Mail* PCC Report No.43 1998).

Since the death of Princess Diana, there have been increasing numbers of adjudications, by the PCC, the BSC and the ITC. These represent a sort of jurisprudence on the interpretation of Article 8. Whether or not these adjudications are all correct, or even consistent, is open to debate. But what cannot be denied is that they show what problems arise from privacy laws protecting personal information. They point the way for the judges to follow.

Examples are the adjudications on the defence of public domain. Public domain has been held not to justify:

- the repetition of material which has been extensively published in the press, or in a previous broadcast (see *R v BCC, ex parte Granada* [1995] EMLR 163, 168, BSC *on The Cook Report Update*, Carlton TV, 4 June 1996 and 16 December 97; ITC *Central News at Six,* October 1999); or
- the broadcast of a person's names and date of birth (see BSC on *Ed Stewart Show*, BBC Radio 2, 10 July 1998; BBC Producers' Guidelines Chap. 4, para.7); or
- the broadcast of an inappropriate photograph without permission (see BSC on Serena Shand, *Meet the In-laws,* ITV, 14 November 1998, but *cf.* Gena Dodd, *Panorama: The Surrogate,* BBC, 3 November 97).
- The PCC has held there to be an infringement of privacy where a newspaper published details of a child's medical condition although it had been mentioned in open court (see *The Hastings and St Leonard's Observer,* Report 41, 1998).

The extent to which public domain is a defence in cases of personal information remains unsettled. A view expressed by Lord Keith is that the defence should really focus on whether there would be harm. Would the republication cause harm that was not caused by the earlier publication? (See *Spycatcher, Att-Gen v Guardian Newspapers (No.2)* [1990] 1 AC 109, 260f-g). In most cases a test of proportionality also has to be applied (*Z v Finland* (1997) 25 EHRR 371, paras 99, 112). So the fact that a person has put one particular part of her life in the public domain does not mean that the press can then publicise every other part her life (*Ashworth v MGN* [2001] 1 All ER 991, 1002j §54; *Ms Pirie* PCC Complaint 23 January 2000; *cf.* Gatley para.12.29).

European case law

In 1999 Professor Barendt surveyed the national laws of other European countries and the European Court of Human Rights itself (Conference Reports: *Freedom of expression and the right to privacy*, Strasbourg 23 September 1999, DH-MM (2000) 7 Council of Europe, p.57, http://www.humanrights.coe.int/media – for a recent review of German law see Birgit Brommekamp, *Yearbook of Copyright and Media Law* 2000 (OUP)). He was able to derive a list of examples of subjects for privacy. The list is not dissimilar from sensitive information in the data protection legislation. The examples included: anonymity in certain types of legal proceedings; information about a person's physical or mental health; membership of (or donations to) churches, political parties and other associations; intimate personal photographs; in addition to data protection rights and what the Americans call 'false light' (false portrayal, sham interviews and distorted photographs). Our courts may derive guidance from this survey.

CONFIDENTIALITY – THE NEW LAW

Lord Woolf MR has said that privacy is not an area in which the courts are well equipped to adjudicate (*R. v BSC, ex parte BIBC* [2000] 3 All ER 989, para.14). Most journalists agree. They place more trust in the self-regulatory bodies than in judges. So if the courts are going to enlarge the legal protection for personal information, the adjudications of the self-regulatory regimes are sources which English judges can use as a guide. The *Human Rights Act* 1998, s.12 now requires the courts to have regard to the Codes, in deciding the competing claims of freedom of expression and respect for private life. Judges can also look to the statutes and foreign laws I have mentioned. All of these are ultimately derived from Article 8 of ECHR.

Venables v News Group Newspapers [2000] 1 All ER 908, marks an important development. Most judgments in this area of the law are interlocutory, but this was a final judgment by a leading judge. In *Venables*, Dame Elizabeth Butler-Sloss was compelled to develop the common law to protect the new identities given to two child murderers. As she explained, the Codes cannot prevent a threatened publication, and where publication may endanger a person's safety, a remedy after publication is not enough ([2000] 1 All ER 908, para. 96). She might have added that the Codes do not cover books or imported publications. So the Codes do not guarantee protection of confidential information, even if they are complied with by

those to whom they apply – see Gitta Sereny, *Cries Unheard: The Story of Mary Bell* (Papermac, 1998). There will also be cases where compensation is appropriate, and the Codes do not provide for that.

What the President of the Family Division has held is that no pre-existing relationship is required to give rise to confidentiality. An injunction may restrain the disclosure of true personal information if it is necessary to do so to uphold another human right. As she has stated the law, a duty of confidence does already arise when confidential information comes to the knowledge of the media, in circumstances in which the media have notice of its confidentiality ([2000] 1 All ER 908, para. 81).

In *Venables* it was ECHR, Arts 2 and 3 that prevailed over Art. 10. It was not an Article 8 case. But the right to private life under Article 8 is capable of prevailing over freedom of speech in an appropriate case (paras 48-51 following of Sedley LJ in *Douglas v Hello!* [2001] 2 WLR 992, paras 133-4). This is recognised in Article 10(2).

There are many uncertainties in how *Venables* will apply in Article 8 cases. What circumstances will give the media notice that confidentiality applies? An example given in *Venables* is medical information. Will the same apply to such information as to racial or ethnic origin, political opinions or religious or other beliefs, trade union membership, physical or mental health or condition, sexual life, the commission or alleged commission of criminal of any offence? What public domain defence will be available for personal information? Will the public domain defence be unqualified (as it is for trade and government secrets)? Or will it be limited to cases of consent, as in data protection, or to cases of harm, as suggested by Lord Keith?

To answer these questions, we must resolve the conflicting principles of new law of confidentiality, where truth is not a defence, and the law of libel, which gives priority to the defence of truth. Suppose we take a case like Elton John's ([1997] QB 586). The claimant is said to be suffering from an eating disorder. The libel jury awarded Elton John £350,000 in damages which was substituted with £75,000 by the Court of Appeal. But what was infringed? Was it his reputation or his private life? Should the claim be brought in libel, or confidentiality?

In the following article, Michael Tugendhat QC discusses further the conflicting principles of the law of confidentiality and the law of libel.

The situation of preferred shareholders in France, Belgium and Germany

Frank Wooldridge

by Frank Wooldridge

Public companies in European countries, as well as in Commonwealth countries and the United States, frequently find it necessary to have more than one class of shares. They may thus issue preference shares (which are sometimes not granted voting rights) in addition to ordinary shares. Founders' shares, which are called *parts bénéficiaries* in Belgium, now appear rare, but some companies in the United Kingdom and Germany continue to have more than one class of preference share. In the United Kingdom, the company's memorandum, articles or terms of issue largely determine the rights of preference shareholders. In some countries, provisions contained in the company's statutes or specific statutory provisions governing preference shares supplement terms of issue. Such provisions exist in other European countries such as France, Belgium and Germany. However useful they may be in settling certain questions, the volume of United Kingdom litigation concerning the rights of preference shareholders tends to lead one to the view that such provisions are unlikely to settle all questions regarding the rights of such shareholders. However, the relevant legislation is of some interest for comparative lawyers.