PRIVACY INJUNCTIONS AND THE MEDIA

A Practice Manual

IAIN GOLDREIN QC

HART PUBLISHING

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Privacy Injunctions and the Media

To Rebecca Anne Goldrein

May the Lord make you as Sarah, Rebecca, Rachel and Leah.

May the Lord bless you, and keep you: May the Lord make his face to shine upon you, and be gracious unto you: May the Lord turn his face unto you, and give you peace.

Foreword

Privacy as a philosophical concept and as a value which society protects is both controversial in scope and content, and it therefore raises many difficult questions. Is it a right, as Warren and Brandeis put it, simply to be 'let alone'[1]? Or is it more than that? Is it a right which should be protected through a law of general application or should it only be protected in narrowly defined and limited circumstances? How should it relate to other rights? Should it, for instance, always trump freedom of expression when they come into conflict, should it always yield or should a balance be struck between them? If a balance should be struck, how should it be struck and in what circumstances?

The law of England and Wales has traditionally taken a narrow approach to privacy, its scope and content. The common law did not develop a general right of privacy, as the Court of Appeal in *Kaye v Robertson* affirmed in 1991,[2] nor did Parliament introduce one, despite many attempts to do so. In the absence of a general law, the common law developed a limited and fact-specific approach, protecting privacy through, for instance, as Lord Cottenham LC noted in *Prince Albert v Strange* in 1849,[3] the law of confidentiality. In 1998 there was, of course, a seismic shift when Parliament enacted the Human Rights Act, and through it incorporated Article 8 of the European Convention on Human Rights into English and Welsh law. This has not, as the House of Lords made clear in *Wainwright v Home Office*,[4] introduced a statutory general right of privacy into English and Welsh law. It has however, as Parliament understood and the government intended during the 1998 Act's passage, provided a very significant spur to the law of privacy's development, as Lord Phillips MR (as he then was) observed in *Douglas v Hello! (No 6)*,

> The enactment of the Human Rights Act 1998 provoked a lively discussion of the impact that it would have on the development of a law protecting privacy. The Government has made it clear that it does not intend to

[1] Warren and Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

[2] (1991) FSR 62 at (66).

[3] (1849) 1 Mac & G 25, 'In the present case, where the privacy is the right invaded, the postponing of the injunction would be equivalent to denying it altogether. The interposition of this Court in these cases does not depend on any legal right; and, to be effectual, it must be immediate.'

[4] [2004] 2 AC 4 at [35].

> introduce legislation in relation to this area of the law, but anticipates that the judges will develop the law appropriately, having regard to the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms : see the comment of Lord Irvine of Lairg LC in the course of the debate on the Human Rights Bill (Hansard, HL Debates, 24 November 1997, col 771) and the submissions of the United Kingdom in Spencer (Earl) v United Kingdom (1998) 25 EHRR CD 105.[5]

In this welcome new book on *Privacy Injunctions and the Media: A Practice Manual*, Iain Goldrein QC provides a clear, insightful and, perhaps most importantly, practical guide to the way in which the courts have developed the law of privacy in the past decade or so. The book provides a readily accessible and properly comprehensive route through the substantive law of privacy as it now stands, its relationship with freedom of expression, and the balance to be struck between them. On its own, and given the ways in which the law has developed, this would be a significant achievement and should, deservedly, see this work become an essential reference work for lawyers, litigants and those generally interested in the law. In addition, Iain Goldrein has provided a detailed guide to the proper conduct of privacy litigation. Anyone wishing to prepare and prosecute a claim effectively ought to pay close attention to this guidance.

In the years to come it is inevitable that the law and practice relating to privacy will continue to develop. Those developments will further define how English and Welsh law deals with issues as to the scope and application of the law of privacy, and the procedure by which respect for privacy is protected and balanced against other substantive rights. That development will undoubtedly be greatly assisted, and shaped, by the insights contained in *Goldrein on Privacy Injunctions*. I commend it to all those who are interested in the development of the law in this important area, and particularly to those who want practical guidance.

Lord Neuberger of Abbotsbury, MR

[5] [2006] QB 125 at [46].

Preface

Purpose

The purpose of this book is to set out best practice in the field of privacy injunctions and the media.

For whom the book is intended

Such best practice is targeted not just at litigators. The intention of this book is also to embrace within its reach those who are the watchdogs of the freedoms of our society, journalists and other organs of the media. In this context, it reflects the agenda set by Lord Neuberger's Report of 2011 (*Report of the Committee on Super-Injunctions*), at p 33:

> 3.7 The Guidance should be available to everyone, not just to specialist lawyers in this area. It should ensure that all litigants, potential litigants, and their advisers, are fully aware of their obligations under the law. (p 33)

This agenda, to provide clarity of law beyond the frontiers traditionally set for legal practice, is part of a broader agenda of the genre struck by this book to provide access to law which is clearly intelligible, and thus to demystify its principles and practice.

Accordingly the book seeks to achieve a balance between the level of detail which meets the demands of the court and litigators, whilst securing sufficient clarity for a broader audience.

Style of writing

It is because of this broader agenda that the book is written in a style which it is intended should break the mould of legal writing.

The text is broken down into easily manageable sections. The fonts used are intended to launch the words off the page onto the reader's retina, rather than leave the impression of impenetrable learning.

These fonts are not just a characteristic of the primary text, but also of the Case Digest in Part 22.

Further to achieve clarity and best practice, checklists and quality-control protocols are a norm. In addition, the law and practice is set out in a way which is intended to be capable of immediate assimilation by trained lawyer and layperson alike.

Case driven

The legal principles and practice management which feature in the primary text are informed directly by the cases in the Case Digest in Part 22.

To facilitate this approach, the leading cases in the field in the last decade are to be found, edited into the Case Digest, which features in the latter part of the book. Thus a paragraph reference in a case cited in the primary text can be immediately cross-referenced with the relevant passage in the judgment, set out in the Case Digest. This brings with it the added advantage that the primary text does not need to be overburdened with citations, because the relevant passages can so readily be cross-referenced with the Case Digest.

Further, the focus has been on including material which is not just the source of legal principle, but rather puts that legal principle into a broader context.

The ease with which the cases can be located is facilitated by their being in chronological order, together with running titles at the top of each page indicating which case is dealt with on the respective page.

Lord Neuberger's Report

The thrust of this work has been immeasurably enriched by Lord Neuberger's Report[1] which provides a sturdy framework for practice in this field. This book is heavily indebted to, and necessarily draws upon, that Report to develop best practice.

Lord Neuberger has also distilled from ***LNR*** a **Practice Guidance: Interim Non-disclosure Orders**, which is included in this book at Part 17.

For ease of reference, through the text, the page and paragraph referencing are to ***LNR***; and if the reference is not to the body of the report, but to

[1] Report of the Committee on Super-injunctions: Super-injunctions, Anonymised Injunctions and Open Justice.

the **Practice Guidance,** that is explicitly stated and the relevant paragraph number in the Guidance set out.

Acknowledgement to the focal judiciary in this arena

This part of the preface would not be complete without fulsome acknowledgment of the contribution made so assiduously by the judiciary to the jurisprudence in this field, and particularly by Eady, Tugendhat and Sharp JJs.

Reading all the judgments intensively and with great care, as one must for a work such as this, brings home the meticulous commitment of these judges to achieving the balance that is demanded in an arena as sensitive as that where there is tension between public interest and privacy.

The work and research that has been invested in their judgments is manifest testimony to the quality of the jurisprudence.

Summary of contents

To ease the reader into the field, the book is divided into 22 Parts:

Part 1: Primary source material and legal principles.

Part 2: Applicant practice management: Article 6 derogations from open justice.

Part 3: The interaction of Articles 8 and 10.

Part 4: Proportionality.

Part 5: Practice principles underpinning an Article 8 application.

Part 6: Case management for Article 8 applications.

Part 7: Applicant proceedings checklist up to (but not including) service.

Part 8: Service checklist for applicants.

Part 9: Defence practice points in response to an Article 8 application.

Part 10: Quality control checklist for the courtroom.

Part 11: Journalists' checklist.

Part 12: Harassment and the media.

Part 13: Derogation from open justice and claims by children for approval of large personal injury awards.

Part 14: Reporting restriction orders in the Family Division together with the monograph *The Family Courts: Media Access and Reporting*. On behalf also of Hart Publishing, we are very grateful to the President of the Family Division, Sir Nicholas Wall, for permission to reproduce this document. That gratitude of course extends also to Adam Wolanski and Kate Wilson for the extensive and thorough work they have so effectively undertaken in writing the monograph. This Part is also used as the vehicle to draw attention to the important decision of Sir Nicholas Wall in *Doncaster v Haigh and others*.

Part 15: Template model statement.

Part 16: Mediation. On behalf also of Hart Publishing, we express our appreciation to the ADR Group—a pre-eminent service-provider in this arena—for the use of its Model Documents.

Part 17: On behalf also of Hart Publishing, we are particularly grateful to Lord Neuberger for his permission to publish his **Practice Guidance** in this Part; that gratitude of course extends to all those on his Committee who played such an important role in its preparation and in particular, Lord Judge CJ.

Part 18: Examples of orders from the cases.

Part 19: CPR provisions.

Part 20: Privacy codes.

Part 21: Key words highlighted in the Case Digest.

Part 22: Case Digest.

As a reading of these Parts will reveal, they begin with a succinct focus on the legal principles of privacy and freedom of expression. As the reader moves forward through that material, increasingly the legal principles are expressed through a procedural prism until, towards the end, the checklists are intensely practical and exclusively procedural.

In this way, it is intended that a clear grip on principle can run hand in hand with an accurate procedural presentation of the case. This should in turn enable material in the book to be readily cross-referenced with a skeleton argument, for ease and speed of preparation and presentation of an application.

Readily understandable

In this arena of privacy injunctions, there is so much room for misunderstanding, with pejorative phrases such as 'judge-made law' and 'gagging orders'.

It is with no disrespect to the media if one sensitively advances the point that they have a virtual monopoly over the dissemination to the public of the decisions in these cases. Such exposure to public attention is inevitable in the realm of an independent media which is much broader than the exposure which the judgments themselves enjoy (freely available though they are on BAILLI).

Lord Judge made the point with characteristic clarity in *R v (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 at para 38:

> In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished.

Indeed, one can readily understand that the nuances of a judgment demand much by way of legal analysis, and a journalist can reasonably and readily be forgiven for saying: *'Do not expect us to understand all the fine tuning; we are not trained lawyers—we are trained in serving the public interest as journalists.'*

And yet there is a tension here, with the courts, for as Tugendhat J said in the *Goodwin* case at para 87:

> So anyone commenting upon this case without reference to the specific evidence before the court will be approaching the issues in a way in which Parliament has not permitted judges to approach them.

Perhaps the time is therefore ripe, particularly in this very special arena, for a book which explains in terms readily understandable by all (trained lawyer or otherwise) what the principles are and how the judges work in practice within those principles.

If further encouragement were needed, it is perhaps to be found in the words of Richard de Bury, penned in 1344:

> Let us consider how great a commodity of doctrine exists in books—how easily, how secretly, how safely they expose the nakedness of human ignorance, without putting it to shame.

> Books are the masters which instruct us without rods, without hard words and anger, without money; if you approach them they are not asleep; if investigating, you interrogate them, they conceal nothing; if you mistake them, they never grumble; if you are ignorant, they cannot laugh at you.

Cost-effective litigation tool

This book is intended to serve a further purpose, namely to provide a cost-effective tool for the litigation process.

Inevitably perhaps, given the profile of so many of the claimants, this legal arena can so readily be regarded as restricted to the 'rich and famous'. It is hoped that with this book, the market can be further opened up, nationwide.

The result should be that those who fall outside the conventional category of 'celebrity' can still cost-effectively achieve a remedy if their Article 8 rights are to be wrongly infringed; and equally, journalists who wish to assert public interest are in this book given the tools to advance such argument, to empower them—where appropriate—to perform their function yet more effectively as a public watchdog.

The richness of diversity and 'One England'

Written as it is for a wider audience, this book is also intended to fulfil a further purpose.

We live in a society which is enriched by diversity. Yet the question can be asked: Are we all living, figuratively speaking, independently in hotel bedrooms? To what extent do the diverse cultures in our society genuinely mix? Do we share, as it were, at least a refectory? What binds us together as citizens?

There is one theme which binds us each to the other, which can afford to us a shared sense of being, of history and of culture, which binds us indeed from womb to tomb, from the clinical negligence action for a baby born with brain damage, to issues touching upon the essence of family life to an argument over a will.

That theme is, of course, the law of England and Wales, with its delightful cadences as reflected in passages in judgments, which have the eloquence to justify a readership much broader than that afforded just by the legal profession.

In its own modest way, this book is intended to tease out of the judgments, those very special cadences, and share them with a wider audience; so that whoever one is, from wherever one may have come, one can share a joint heritage with real pride—the heritage of a judiciary who, spanning the nation's history, have expressed their struggle to achieve the correct balance between individuals in society in language in which we are all stakeholders, and in which we can derive genuine pleasure.

Iain Goldrein QC
Liverpool, Nottingham and London
Trafalgar Day 2011

User's Guide

- Throughout, applicants for injunctive relief are referred to as 'A' and respondents, as R. The reason for the inverted commas vis-à-vis an applicant is to distinguish the reference from what otherwise could, in certain contexts, be misinterpreted as an indefinite article.
- All case references in the body of the text are to EWHC, UKHL, etc. The reason is:
  - These case references are immediately accessible by all users, for BAILLI is free of charge (www.bailli.org); and
  - Further references would clutter the text.

  The cases have been edited down, the earlier cases more than the more recent, to achieve a book of manageable proportions. The intention has consistently been to edit the cases in such a way as not to distort their context or thrust. If there is any issue as to the meaning of what the judge is reported as saying, please go to the full report to access the judgment as a whole.
- Fonts in bold and/or italics are editorial style; when they feature in passages cited from the cases, they are the emphasis of the book, not of the judgment cited.
- The key words set out in Part 21 (and indexed in the Case Digest Keywords Concordance) are highlighted throughout the primary text, and the Case Digest.
- The book is intended to be read as a book, rather than to be dipped into as one would a reference manual. It is advised that before using the book as a reference manual, time is spent going through Parts 1–10 sequentially, to understand how the book works and to assimilate an in-depth understanding of the topics.
- Part 1 is the foundation course for the book, and exclusively sets out principles as distinct from practice. It is therefore printed in a different font, so that it stands out from the rest of the book, which is practice driven.
- In Part 14, there is a template for a model statement, which seeks to provide triggers for the issues that are to be expected to arise in practice.
- Lord Neuberger has provided a Model Order in his Practice Guidance, which is set out in full in Part 17—together with an accompanying Explanatory Note.
- The Codes of Practice are set out (or references to the relevant websites) so that the reader can assimilate them together and have a grip on the policy issues advanced by the Codes.

- In the primary text, all emphases are those of the author, as are virtually all the emphases in the Case Digest.
- There are occasions when there is an appearance of repetition in the text. This however is to be seen in context: as the text unfolds, so different contexts arise.
- Throughout the book there are references to conduct which may be interpreted as reprehensible, eg blackmail, 'tipping off', etc. It should be kept firmly in mind that in the context of interlocutory relief, the court is addressing these issues on a preliminary basis and no final findings have been made.

Table of Cases