

MOUNTBATTEN JOURNAL OF LEGAL STUDIES

Incorporating the Southampton Solent University Law Review

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Editorial

This is my last editorial after 22 years as editor of the MJLS. I hope the new rejuvenated journal will carry on with continued success for many years to come, and I send all my good wishes to my successor.

This issue is an interesting combination of articles, cases and legal comment on the broad theme of the individual. The first article considers the individual from the perspective of the protection of personal image. The article provides a close argument on the various legal options and their efficacy when applied to the deepfake phenomenon. The author concludes that we should consider Article 9 of the French Civil Code to provide wider protection than that available under the common law, which is based on commercial publicity rights. The author states that ‘the protection of one’s image is not just about making money, as the European Court of Human Rights recognised in the Princess Caroline case’.

The second article considers academic freedom in a long overdue discussion of the immunity of the academic in examining a student’s work after a period of instruction within a university. University fees are not insubstantial in 2018 and the paying student has every right to have their work assessed with unbiased professionalism. This is particularly important for research students when examiners disagree. How can two individual examiners who do not agree on the outcome of the thesis both be right? Under some university regulations it is the external examiner whose academic judgement cannot be challenged, which provides them with enormous power and indicates a lack of confidence on behalf of the university in their own procedures. The article itself considers many cases of students challenging results of both undergraduate and postgraduate examination, with the inevitable outcome that ‘academic judgement’ cannot be challenged, and questions whether it is time for some reassessment of this situation.

The next article considers the private law protection of personal privacy. The author uses the Philip Green case to discuss the conflict between court judgements and parliamentary privilege with great effect, and concludes that there are now two torts in respect of violations of privacy which citizens should be aware of: i) the misuse of private information; and

ii) a tort of invasion of privacy where there is unwarranted intrusion. The question is whether this distinction is being applied? The author concludes that it is not, based on the *Sir Cliff Richard v BBC & the Chief Constable of South Yorkshire Police* case.

The Legal Opinion explores the harmonisation of the right of quotation in copyright law and the right to freedom of expression. The author identifies that ‘where human rights or constitutional rights address copyright and intellectual property rights there is no standard for states to measure themselves by apart from a vague wording from the Berne Convention [for Literary and Artistic Works 1979]’.

The Sir Cliff Richard case is in fact the subject of the Case Review where the author poses a number of questions and thence offers an argument that Parliament should introduce new legislation in order to provide a clear road forward in response to such questions.

The Book Review considers the seventh edition of *Medical Law and Ethics* by Jonathan Herring which looks at ethical issues concerning the patient and their personal rights.

Addendum

It is with great pleasure that the editor and Editorial Board congratulate the Law School at Solent University for coming fifth in *The Guardian* League Table of UK Law Schools, after Cambridge, Oxford, UCL and Dundee. Well done all involved.

Patricia Park

Emerita Professor

Editor

The Deepfake Phenomenon and the Law – Finally Time to Legislate to Protect Image?¹

Mark Wing

Abstract

With the production and dissemination of the ‘FakeApp’ software, realistic-appearing digitally altered moving images are now possible with the computer power available to many individual home users. What was once the province of high-end digital effects companies is now a reality for millions, with all the consequences and mischiefs this entails. Fake news reports can have national and global political repercussions, while celebrities whose images are used in pornographic ‘fan’ films may suffer considerable personal distress. In the UK, the courts have steadfastly refused to expand various laws to create image rights. So, what legal remedies might be available to fill this lacuna? This article provides an overview and appraisal of the various legal options and their efficacy when applied to the deepfake phenomenon.

Keywords: intellectual property; tort; image rights; artificial intelligence; fake news; defamation; passing off; privacy; freedom of expression; data protection; copyright; remedies.

Introduction

Unlike many jurisdictions, both common law and civil law, the United Kingdom (UK) has no specific legislation aimed at protection of image. As Kitchin LJ noted in the Rihanna case: ‘There is in English law no “image

¹ My thanks to Dimitra Angelopoulou, Phil Jones and Louis Mancini for their kind and constructive comments on this work. Any remaining errors are entirely my own.

right” or “character right” which allows a celebrity to control the use of his or her name or image.’²

Internationally, even where protection exists, there is no common definition or even *raison d’être* for protection of image rights. Some legal systems derive their approach from largely commercial reasons and, thus, in those countries the rights protecting image are sometimes referred to as publicity rights. While not an absolute rule, protection in common law-based systems often has this emphasis, including several US State Laws. Conversely, other jurisdictions’ protection for image derives from inalienable personal rights that include privacy. Again, while not an absolute rule, civil law countries such as France tend to adopt this approach.³

In the UK in relatively recent times various areas of law have been called upon with some success to provide protection to celebrities in specific instances, such as passing off, breach of confidence and defamation. An individual’s human rights, especially the right to privacy, may be influential. Into this rather complex maze of rules comes the deepfake.

It has been possible for some time, using high-end computer technology, to digitally create or manipulate a human image to represent a different person or different version of a person in a film. The limiting factor for this has been that such software tools – and more importantly the powerful hardware to run the tools – have been a factor limiting the proliferation of such abilities to film studios and other specialist video effects (VFX) organisations. These include household names such as Industrial Light and Magic. An actor’s facial features are often superimposed on the head of a stunt double, and more recently, in the 2016 film *Star Wars Rogue 1*, an extremely realistic computer-created representation of the actor Peter Cushing (who died in 1994) played a starring role,⁴ along with a slightly less convincing representation of the then 19-year-old actress Carrie Fisher. In *Captain America Civil War*, actor

² *Fenty v Arcadia (No.2)* [2015] F.S.R. 14 at [29], *per* Kitchin LJ.

³ Article 9 French Civil Code: everyone has the right to respect for his private life. Without prejudice to the right to recover indemnification for injury suffered, judges may prescribe any measures, such as sequestration, seizure and others, suited to the prevention or the ending of an infringement of the intimate character of private life; in case of emergency those measures may be provided for by summary proceedings.

⁴ Catherine Shoard, ‘Peter Cushing Is Dead. Rogue One’s Resurrection Is a Digital Indignity’. <https://www.theguardian.com/commentisfree/2016/dec/21/peter-cushing-rogue-one-resurrection-cgi>. Accessed 08/06/18.

Robert Downey Jr., via this digital magic, was rejuvenated by 30 years.⁵ Many other examples exist and it has been suggested that the practice is more widespread than is in fact appreciated, with many celebrities' perceived flaws being given a 'digital touch up'⁶ in post-production, much still, media images have been 'photoshopped' (or, in pre-digital times, 'airbrushed') in the fashion industry for years.

Now the power to produce convincing altered footage of celebrities alive and dead has passed from high-end VFX production companies to the internet, with all the attendant consequences and mischiefs of democratisation. Introduced in January 2018 as free software, a tool called FakeApp, which is based on open-source TensorFlow software⁷ written by Google, is responsible. This allows anyone with a PC, time on their hands and a little skill to produce, depending on that skill, what can be a quite convincing fake video – a 'deepfake'. The name derives from deep – referring to the 'deep learning' artificial intelligence (AI) behind the substitution of images – and fake, which speaks for itself. A deepfake might be a fake video of a statement by a politician or other public figure, a parody of a celebrity or a film itself, or – human nature perhaps being what it is – most commonly altered images of celebrities engaged in sexual acts. Roose puts the matter in a relatable and pithy manner:

So, O.K. Here I am, telling you this: An A.I. program powerful enough to turn Michelle Obama into a pornography star, or transform a schlubby newspaper columnist into Jake Gyllenhaal, is in our midst. Manipulated video will soon become far more commonplace.⁸

Others identify equally or even more serious potential consequences beyond the considerable personal distress of those unfortunate enough to fall victim of this technology.⁹ Very convincing fake videos of former US President Barack Obama exist, admittedly produced with higher-end computing and

⁵ Carolyn Giardina, 'How "Captain America: Civil War" Turned Robert Downey Jr. Back into a Teen'. <https://www.hollywoodreporter.com/behind-screen/how-captain-america-civil-war-892387>. Accessed 08/06/18.

⁶ *Ibid.*

⁷ <https://www.tensorflow.org/>. Accessed 07/06/18.

⁸ Kevin Roose, 'Here Come the Fake Videos, Too'. <https://www.nytimes.com/2018/03/04/technology/fake-videos-deepfakes.html>. Accessed 07/06/18.

⁹ Jon Christian, 'Experts Fear Face Swapping Tech Could Start an International Showdown'. <https://theoutline.com/post/3179/deepfake-videos-are-freaking-experts-out>. Accessed 07/06/18.

tools than are available to individual users at present,¹⁰ and voice-reproduction technology is more advanced than perhaps many people realise.¹¹ Imagine, for example, a scenario where a politician announces that they have launched an attack or declared war on a neighbour when this is not in fact the case. The implications from a scenario like this do not bear thinking about, and illustrate that this is something to be treated with the utmost seriousness.

Lawyers may be called upon to deal with this issue on an increasing basis. The question arises, therefore, whether existing law can do anything for distressed celebrities or does the law need reform to deal with these issues? As this article will demonstrate, it is by no means certain that, in England at least, any particularly satisfactory legal or technical solution exists. Better legal solutions may exist, however, in other jurisdictions. This article will therefore provide a succinct overview of the various legal and technical remedies which may be of assistance in English law.

1. Defamation and the Deepfake

A defamation requires that there is an oral statement (slander) or written statement (libel) made which, firstly, tends to lower the claimant in the estimation of right-thinking or reasonable members of society or substantially affect in an adverse manner the attitude of others towards the claimant, and, secondly, causes or is likely to cause serious harm to the claimant's reputation.¹²

The closest analogous existing case dealing with altered celebrity images and defamation is the well-known 'Harold and Madge' case – *Charleston v News Group Newspapers Ltd.*¹³ The claimants, two well-known actors appearing in the television serial *Neighbours*, appealed against a Court of Appeal decision that faked photographs of them engaged in sexual acts, published by the defendants, were not defamatory. The House of Lords dismissed the appeal. A cornerstone of the appellants' argument –

¹⁰ BBC News, 'Fake Obama Created Using AI Video Tool'. <https://www.youtube.com/watch?v=AmUC4m6w1wo>. Accessed 10/06/18.

¹¹ BBC News, 'Adobe Voco "Photoshop-for-voice" Causes Concern'. <https://www.bbc.co.uk/news/technology-37899902>. Accessed 21/06/2018; WaveNet: A Generative Model for Raw Audio. <https://deepmind.com/blog/wavenet-generative-model-raw-audio/>. Accessed 21/06/18; <https://lyrebird.ai/>. Accessed 17/07/18.

¹² The requirement for serious harm introduced by Section 1 of the Defamation Act 2013.

¹³ *Charleston and Another v News Group Newspapers Limited and Another* [1995] 2 A.C. 65.

that a casual reader would see the headline and accompanying photograph but not read the accompanying text, and this would constitute defamation – was rejected. The main obstacles to the claimants’ success were, firstly, a long-established rule in defamation that, subject to limited exceptions, an article has to be read as a whole and with its full context,¹⁴ so, while certainly the altered picture and headlines were capable of being defamatory, the accompanying text made it clear that these were faked photographs and, thus, there was no damage to the reputation of the claimants. Lord Bridge noted:

Whether the text of a newspaper article will, in any particular case, be sufficient to neutralise the defamatory implication of a prominent headline will sometimes be a nicely balanced question for the jury to decide and will depend not only on the nature of the libel which the headline conveys and the language of the text which is relied on to neutralise it but also on the manner in which the whole of the relevant material is set out and presented. But the proposition that the prominent headline, or as here the headlines plus photographs, may found a claim in libel in isolation from its related text, because some readers only read headlines, is to my mind quite unacceptable.¹⁵

Secondly, and closely related to the above, while their Lordships considered that it would be the case that some readers would indeed skip an accompanying text (what Lord Bridge termed the ‘limited reader’¹⁶), defamation could not be viewed by those persons’ standards, but instead had to be viewed by the standard of the ordinary, reasonable, fair-minded reader, a long-held standard in defamation law, and such a reader would read a whole article; and, thus, a headline with, for example, an accompanying faked picture which was capable of bearing a defamatory meaning (‘the bane’) could have the damage to the claimants’ reputation removed by the accompanying text (‘the antidote’). As Lord Nicholls noted in his speech:

Accordingly, when the ordinary reader put down the *News of the World* on 15 March 1992, he or she would have thought none the worse of the two actors who are well known for their roles in the *Neighbours* television serial. The ordinary reader might have

¹⁴ *F Chalmers v Payne* (1835) 2 CM. & R. 156, 159, Alderson B.

¹⁵ *Supra*, note 13, p. 73.

¹⁶ *Ibid.*, p. 70.

thought worse of the producers of the pornographic computer game, and of the *News of the World*, but that is a different matter.¹⁷

This ‘bane and antidote’ reasoning could unfortunately prove possibly fatal in some instances. Roose notes that deepfakes are often accompanied by an ‘antidote’ title like ‘Not <insert celebrity name>’ on pornography-sharing sites.¹⁸ Even if linked to them directly, such a title would be prominent and the hypothetical ‘ordinary, reasonable, fair-minded reader’ would not think that the fake was real. Where the deepfake was a ‘fake news’ item purporting to be from a politician, it would surely be possible to distinguish Charleston, as an ordinary fair-minded browser could be fooled,¹⁹ and there would not necessarily be any antidote to the poison. Indeed, any antidote may render the fake news aspect irrelevant.

A provision of the Defamation Act 2013 is also quite pertinent here. On the matter of ‘Operators of Websites’ (in this context most frequently organisations providing hosting of video content which can obviously include deepfakes), section 5 of the Act provides a defence to a defamation action where the host did not post the content on the website.²⁰ The section then goes on to provide:

... for the defence to be defeated if the claimant can show that it was not possible for him or her to identify the person who posted the statement; that they gave the operator a notice of complaint in relation to the statement; and that the operator failed to respond to that notice.²¹

Subsection (4) interprets subsection (3)(a) and explains that it is possible for a claimant to ‘identify’ a person for the purposes of that subsection only if the claimant has sufficient information to bring proceedings against the person.²²

If, as already alluded to, other countries have laws that are perhaps more favourable to a claimant than the UK’s, and as a publication on the internet would potentially be to a worldwide audience, would it be possible

¹⁷ *Ibid.*, p. 74.

¹⁸ *Supra*, note 8.

¹⁹ *Supra*, note 13.

²⁰ Section 5(2) Defamation Act 2013.

²¹ Section 5(3) Defamation Act 2013.

²² Explanatory Notes to the Defamation Act 2013.

<http://www.legislation.gov.uk/ukpga/2013/26/notes/division/5/5>. Accessed 04/07/18.

to take legal action in another country? This is often known colloquially as ‘Libel forum shopping’. Formerly the Court of Justice of the European Union (CJEU) had held that action could be taken in each member state of the EU in respect of the damages in that member state,²³ but it would appear that at a European level the ability to do this has been quite restricted by two key cases, *E-Date*²⁴ and *Bolagsupplysningen OU*.²⁵ In *Bolagsupplysningen OU* the CJEU noted:

a legal person claiming that its personality rights have been infringed by the publication of incorrect information concerning it on the internet and by a failure to remove comments relating to that person can bring an action for rectification of that information, removal of those comments and compensation in respect of all the damage sustained before the courts of the Member State in which its centre of interests is located.²⁶

The practical effect of these two rulings is that the state where the libel action is taken will most often tend to be the claimant’s home state,²⁷ though the CJEU did note that an action could also take place in another state where they have significant business interests.

2. Human Rights and Deepfakes – Confidentiality and Privacy

Article 8 of the European Convention on Human Rights provides that everyone has a right to respect for private and family life, and any interference with that must be in accordance with the law and necessary in a democratic society.²⁸

In the famous Princess Caroline case²⁹ the European Court of Human Rights stated:

²³ *Shevill v Presse Alliance SA* (C-68/93).

²⁴ *E-Date Advertising GmbH v X* (C-509/09).

²⁵ *Bolagsupplysningen OU v Svensk Handel AB* (C-194/16).

²⁶ *Ibid.*, paragraph 44.

²⁷ Samuel Peace, ‘Online Defamation – “Centre of Interests” and Member States’ [2018] *EntLR* 60.

²⁸ Article 8 European Convention on Human Rights 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is 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.

²⁹ *Von Hannover v Germany (No.1)* [2004] E.M.L.R. 21.

.... the Court has stated that a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof.³⁰

Thus, what at face value may appear to be a human right largely aimed at prevention of state intrusion into an individual's private life can also be utilised to protect image. The key point that a court must consider is: 'Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.'³¹

As alluded to above, however, the approach of the English courts has been to try as far as possible to frame Article 8 ECHR rights in terms of existing causes of action, rather than give any specific dedicated law related to protection of image.³² If image rights are to be given *sui generis* protection, then that will require legislation.

Confidentiality

It is by no means clear that the traditional approach to confidentiality is of any particular utility in protection of celebrities against deepfakes. In this approach the information must be said to have circumstances of confidentiality surrounding it as a key requirement.³³ In the case of a deepfake, it is unlikely that the merged data forming the final deepfake would often have these circumstances surrounding it, unless, for example, there was a 'revenge porn' element. The main image would typically be from an existing released film which would not be confidential, while the AI superimposed face would come from another, already released film or photographic source, itself not confidential. However, since the enacting of the Human Rights Act 1998, the UK courts have been willing to entertain at least a much wider definition of confidentiality to include misuse of

³⁰ *Von Hannover v Germany (No.1)* [2004] E.M.L.R. 21, 69.

³¹ *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 A.C. 457, Lord Nicholls, paragraph 21.

³² *Supra*, note 2.

³³ *Coco v A.N. Clark (Engineers) Limited* [1968] F.S.R. 415.

private information, which is more in line with that of the European Court of Human Rights.

Privacy

In *Campbell*³⁴ and *Douglas*³⁵ the court did not go so far as to create a general tort of privacy or tort of misuse of private information, instead preferring to incorporate them into existing causes. For example, in *Campbell* it was said: ‘The time has come to recognise that the values enshrined in [the ECHR] articles 8 [privacy] and 10 [freedom of expression] are now part of the cause of action for breach of confidence.’³⁶ More recently, in *Vidal-Hall v Google*,³⁷ for narrow purposes of service out of jurisdiction, the Court of Appeal was prepared to classify misuse of private information as a tort in its own right. Whether this is of more general application remains to be seen, though there is hope that the law is developing in that direction:

The result ... has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information ... the new approach takes a different view of the underlying value which the law protects. Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people.³⁸

Being seen espousing opinions which are not in fact the speaker’s, or being seen engaged in sexual acts, would both appear to be against autonomy and dignity. What is clear is that, while there has obviously been progress in the UK in protecting privacy through a wide definition of confidentiality, we are still not quite there in implementing the wide scope of privacy elaborated in the Princess Caroline case as a stand-alone cause of action.

³⁴ *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 A.C. 457.

³⁵ *Douglas v. Hello! Ltd (No 1)* [2001] QB 967.

³⁶ *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 A.C. 457, Lord Nicholls, paragraph 17.

³⁷ *Vidal-Hall and Others v Google Inc* [2015] EWCA Civ 311 [2016] Q.B. 1003.

³⁸ *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 A.C. 457, Lord Hoffmann, paragraph 51.

3. Passing Off and Deepfakes

Passing off requires what has become known as the ‘classic trinity’ from Lord Oliver in the *Jif Lemon* case, namely, a claimant must prove (1) goodwill, (2) a misrepresentation and (3) damage.

The tort of passing off has a long history of providing at best variable support for protection of celebrities,³⁹ and only in relatively recent times, following *Irvine*⁴⁰ and *Rihanna*,⁴¹ has relief been granted. *Irvine* concerned an altered photograph of the claimant which suggested holding a portable radio, to which the words ‘Talk Radio’ had been added. Laddie J, in a careful and well-reasoned judgement, extended the law to cases of false celebrity endorsement, while being careful not to overextend the limits of passing off beyond those of the particular facts of the case. In this instance, for example, Laddie J did not feel compelled to discuss either privacy or the right to property in Article 1, First Protocol of the ECHR and how they might affect the position:

Had I come to the conclusion that passing off had not developed sufficiently to cover false endorsements it would have been necessary to go on to consider whether this new strand of law was effective, to use the words of Sedley LJ in *Douglas v Hello! Ltd* [2001] FSR 732, to ‘give the final impetus’ to reach that result. As it is, for reasons set out above, I have come to the conclusion that the law of passing off secures to Mr Irvine the protection he seeks and no recourse needs to be had to the provisions of the Act.⁴²

Rihanna took this one step further, applying the principles of *Irvine* to a more standard merchandising case – the claimant’s image being used on clothing sold by the defendant. In an early part of his judgement Birss J was, like Laddie J in the *Irvine* case, at pains to point out that English law did not recognise the concept of image rights:

It is important to state at the outset that this case is not concerned with so called ‘image rights’. Whatever may be the position elsewhere in the world, and however much various celebrities may

³⁹ Peter Jones, ‘Manipulating the Law Against Misleading Imagery: Photo-montage and Appropriation of Well-known Personality’ [1999] *E.I.P.R.* 28, 29.

⁴⁰ *Irvine and Another v Talksport Ltd* [2002] EWHC 367 (Ch).

⁴¹ *Fenty v Arcadia Group Brands Ltd (No.2)* [2014] F.S.R. 5.

⁴² *Supra*, note 40, paragraph 77.

wish there were, there is today in England no such thing as a free standing general right by a famous person (or anyone else) to control the reproduction of their image.⁴³

Further, Birss J noted that not every merchandising case would come within the scope of passing off, but, given all the facts of this particular case, it was proven.⁴⁴ The comments from both Laddie J and Birss J reflect a general well-founded caution over extending passing off from its role as a protector of goodwill to a wider misappropriation role, a concern shared by many academic commentators.⁴⁵

In some cases passing off might be useful to deal with deepfakes in the case where the fake is being used to sell something, as this might typically be in the form of an endorsement and so fit comfortably within the reasoning in *Irvine*. However, in the case of pornography, it would not normally be the case that any endorsement or, indeed, merchandising are suggested or implied on the part of the producer, and the risk of confusion between the activities of the claimant and defendant, necessary to establish a misrepresentation under the classic trinity, would also probably not be present, unless, perhaps paradoxically, the claimant was themselves a porn star!

4. Registered Trade Marks and Deepfakes

To register a trade mark the law requires compliance with sections 1, 3 and 5 of the Trade Marks Act 1994. Infringement is dealt with by section 10 of the 1994 Act.

Registered trade marks are of rather limited utility in dealing with deepfakes. First, the celebrity needs to secure registration. There are considerable practical and legal obstacles to this. In *Re Elvis Presley Enterprises*⁴⁶ the Court of Appeal confirmed that the name and signature of the then deceased celebrity was not registrable and this was confirmed in the later *Diana* case.⁴⁷ The chief difficulty here for the applicants, in both cases the estates of the deceased, is that the name, or indeed the likeness, of

⁴³ *Fenty v Arcadia Group Brands Ltd (No.2)* [2014] F.S.R.7.

⁴⁴ *Ibid.*, paragraph 75.

⁴⁵ Catherine Walsh, 'Are Personality Rights Finally on the UK Agenda?' [2013] *E.I.P.R.* 253, 255; Hazel Carty, 'Advertising, Publicity Rights and English Law' [2004] *I.P.Q.* 209.

⁴⁶ *ELVIS PRESLEY Trade Mark Case* [1997] *R.P.C.* 543.

⁴⁷ *Executrices of the Estate of Diana, Princess of Wales' Application* [2001] *E.T.M.R.* 25.

a celebrity does not generally indicate the trade origin of goods but just identifies the person, and so fails under s.3(1)(b) and/or s.3(1)(c) and is liable to be refused. The court in both cases noted that as the deceased would be unlikely to protect their names or images in life it would be legally unconscionable to allow registration after death. Laddie J noted:

Just as Elvis Presley did not own his name so as to be able to prevent all and any uses of it by third parties, so Elvis Presley Enterprises can have no greater rights. Similarly, Elvis Presley did not own his appearance. For example, during his life he could not prevent a fan from having a tattoo put on his chest or a drawing on his car which looked like the musician simply on the basis that it was his appearance which was depicted. For the same reason under our law, Enterprises does not own the likeness of Elvis Presley. No doubt it can prevent the reproduction of the drawings and photographs of him in which it owns copyright, but it has no right to prevent the reproduction or exploitation of any of the myriad of photographs, including press photographs, and drawings in which it does not own the copyright simply by reason of the fact that they contain or depict a likeness of Elvis Presley.⁴⁸

However:

In certain circumstances, personalities may move beyond endorsement to use their own name or image as the trade mark of products related to what they do. Provided that the public are educated to perceive the name or image as indicating trade origin then such persons have joined the ranks of trade mark owners.⁴⁹

Even assuming that a celebrity, through extensive use, had established that their image was capable of being a trade mark (for example, the image of Colonel Sanders used by Kentucky Fried Chicken⁵⁰), would an infringement be found?

Depending on the type of activity of the defendant, various grounds exist. However, one ground which seems especially suitable in the deepfake scenario is s.10(3). This applies to both similar or dissimilar goods and services, and does not require any form of confusion, but instead requires that a claimant possesses a reputation and the use is taking ‘unfair advantage

⁴⁸ *ELVIS PRESLEY Trade Mark Case* [1997] R.P.C. 543, 547.

⁴⁹ *Kerly's Law of Trade Marks and Trade Names*, 16th Ed. 10-339.

⁵⁰ <https://trademarks.ipo.gov.uk/ipo-tmcase/page/Results/1/UK00002423318>. Accessed 02/07/18.

of, or detrimental to the distinctive character or repute of the mark’. The key authority on s.10(3) is the controversial case, *L’Oreal v Bellure*.⁵¹ In this case, cheap ‘smell alike’ perfumes – marketed as such by stating that they smelt like an established brand, which were also registered trade marks – were found to be an infringement of the registered trade mark; they were ‘taking unfair advantage of, or detrimental to, the distinctive character or repute of the trade mark’ – clearly should a celebrity image pass the difficult hurdles of registration, its repute in particular could be harmed by being incorporated into a deepfake.

5. Copyright and Deep Fakes

Copyright protects films⁵² and broadcasts⁵³ along with their included content, including the spoken word⁵⁴ and music.⁵⁵ In the case of copyright law and the deepfake, at least, there would appear to be a clear cause of action. Unfortunately, except in very limited circumstances, the cause of action would not vest in the individual complainant or protect their image as they will not typically own any copyright. In the case of a faked political broadcast there would still be an underlying real broadcast that has been substantially copied⁵⁶ and, hence, an infringement. In the case of an adult film, this again would typically be a copyright work owned by the original producer and contributors to the film,⁵⁷ and again a substantial copy would be made. The production process for deepfakes involves AI substituting the facial features in an existing film and/or broadcast for equivalent images that the software recognises through its AI as similar in expression, and this takes place on a frame by frame level – typically 24 frames per second. Copyright law has provided for some time⁵⁸ that a single frame of a film can, nonetheless, be a substantial part⁵⁹ and, hence, an infringement. Thus, a finalised deepfake, combining as it does at least two sources, could be a

⁵¹ *L’Oreal SA v Bellure NV* (C-487/07) EU:C:2009:378; [2010] *Bus. L.R.* 303.

⁵² S.5B Copyright Designs and Patents Act 1988.

⁵³ S.6 Copyright Designs and Patents Act 1988.

⁵⁴ S.3 Copyright Designs and Patents Act 1988.

⁵⁵ S.3 Copyright Designs and Patents Act 1988.

⁵⁶ S.17 Copyright Designs and Patents Act 1988.

⁵⁷ Peter Jones, *op. cit.*, 31.

⁵⁸ *Spelling Goldberg Productions Inc v BPC Publishing Ltd* [1981] R.P.C. 283.

⁵⁹ S.17(4) Copyright Designs and Patents Act: ‘Copying in relation to a film or broadcast includes making a photograph of the whole or any substantial part of any image forming part of the film or broadcast.’

clear infringement of the film or broadcast containing the body image component, and also (though potentially much more difficult to identify a source) the face image component. In the case of a satirical or comedy deepfake, a possible defence of caricature, parody or pastiche might be available under the recently introduced section 30A of the Copyright Designs and Patents Act 1988.⁶⁰

6. Data Protection and Deepfakes

Formerly it had been hypothesised that section 10 of the Data Protection Act 1998 might provide some remedy for a celebrity who had been subject to image manipulation,⁶¹ provided that the information being processed ‘causes the individual unwarranted and substantial damage or unwarranted and substantial distress’, the remedy typically being the processor would be required to cease processing – which in this context would mean removal of any fakes from a website. This provision has now been repealed and replaced by the much wider-ranging section 47 of the Data Protection Act 2018 (DPA 2018).⁶²

Section 47 requires the erasure or restriction of data that is in breach of one or more of the data protection principles found in sections 35, 36(1) to (3), 37, 38(1), 39(1), 40, 41 or 42. Likely potential grounds here in the deepfake scenario could be several of those mentioned immediately above: for example, those in s.35 (processing must be lawful and fair), s.36 (the purpose the data is collected for must be legitimate), s.37 (processing must be adequate, relevant and not excessive related to the purpose) and s.38 (personal data processed must be accurate).

As it is a celebrity’s face that is inserted into other content, this begs the question whether facial features are personal data. Section 3(3) of the DPA 2018 defines ‘Identifiable living individual’ (the key component of

⁶⁰ The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (S.I. 2014/2356).

⁶¹ Peter Jones, *op. cit.*, 31.

⁶² Data Protection Act 2018, section 47 – Right to erasure or restriction of processing: (1) The controller must erase personal data without undue delay where – (a) the processing of the personal data would infringe section 35, 36(1) to (3), 37, 38(1), 39(1), 40, 41 or 42, or (b) the controller has a legal obligation to erase the data. (2) Where the controller would be required to erase personal data under subsection (1) but the personal data must be maintained for the purposes of evidence, the controller must (instead of erasing the personal data) restrict its processing. (3) Where a data subject contests the accuracy of personal data (whether in making a request under this section or section 46 or in any other way), but it is not possible to ascertain whether it is accurate or not, the controller must restrict its processing. (4) A data subject may request the controller to erase personal data or to restrict its processing (but the duties of the controller under this section apply whether or not such a request is made).

being a data subject) as ‘a living individual who can be identified, directly or indirectly, in particular by reference to s.3(3)(b) by one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual’. As facial features are typically an individual’s key identifying physical feature, they would surely constitute personal data.

Is creating and hosting a deepfake processing and, so, subject to the DPA 2018?

One of the criticisms levelled at the Data Protection Act 1998 and the 1995 Directive on which it was based⁶³ was that they were insufficient to deal with data protection and the internet,⁶⁴ though it became clear fairly quickly that providing data on the web would constitute ‘processing’ for the purposes of the Directive.⁶⁵ Section 3(4) of the 2018 Act defines ‘processing’ of information as meaning an operation or set of operations which is performed on information, or on sets of information and includes s.3(4)(b) (adaptation or alteration) and s.3(4)(d) (disclosure by transmission, dissemination or otherwise making available). It would seem, therefore, that both the creator and hosts of deepfakes may be caught as processors.

It was unclear if damages for breach of data protection rules were confined to pecuniary losses. If this were the case, it would greatly reduce its utility to someone seeking to get compensation for distress caused by a deepfake. *Vidal-Hall v Google*⁶⁶ has confirmed, however, that damages can also be awarded for non-pecuniary losses including distress.

7. Prevention of Deepfakes, Technical and Legal Remedies

As has been demonstrated above, limited causes of action in limited circumstances might be available for an individual wishing to prevent or punish the producer or publisher of a deepfake. However, the existence of a legal right which cannot be practically enforced is worth little.

⁶³ Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

⁶⁴ C. Bessant, ‘The Application of Directive 95/46/EC and the Data Protection Act 1998 When an Individual Posts Photographs of Other Individuals Online’, in *European Journal of Law and Technology*, vol. 6, no. 2, 2015.

⁶⁵ Criminal Proceedings against Lindqvist (C-101/01) CJEU.

⁶⁶ *Vidal-Hall v Google Inc* [2015] EWCA Civ 311; [2016] Q.B. 1003.

The capacity of individuals to produce deepfakes depends on the availability of the software – in this instance FakeApp – to be able to carry out its operations on at least two video sources. So, no FakeApp or similar software, no deepfakes. Drawing parallels with the war on digital piracy, copyright owners attempted to prevent the spread of peer-to-peer client software in the 1990s and early 2000s. While they certainly stopped individual services such as Napster⁶⁷ and Grokster,⁶⁸ the internet displayed its hydra-like character (if you cut off one head, another appears in its place).⁶⁹ It is suggested that a section of the internet community would treat any attempted legal ban on software as simply a challenge to be overcome and would simply make the problem worse. There is also a problem here on the legal basis for a ban, in that FakeApp, through all its potential mischiefs, also has substantial legitimate uses, for example, parodies, themselves permitted in UK copyright law.⁷⁰ Although this goes to the root of the problem, the chances of removal of this software – given, especially, distributed peer-to-peer software like Bittorrent and services like the Piratebay (who ignore ‘take down’ requests as a matter of policy, or lack thereof) – are practically nil.

Many hosting organisations will have terms and conditions and policies which can be used to prevent non-consensual pornography and fake news; indeed, Reddit’s policies⁷¹ on this resulted in the deepfake subreddit being deleted. The producers of the software simply moved it to its own site, and how-to guides appeared on YouTube. A deepfake would almost certainly breach several of YouTube’s terms of service,⁷² made up as it is of existing copyright works and possibly being defamatory or in breach of other civil law. A simple complaint to the hosting website about some legal or terms of use infraction will sometimes get content removed but this requires constant vigilance. Setting up a Google alert would be a first stage here, though Google does not index all sites on which undesirable content exists. However, not all hosts of deepfakes – either streamed or torrent

⁶⁷ *A&M Records, Inc. v. Napster*, 239 F.3d 1004 (9th Cir. 2001).

⁶⁸ *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁶⁹ Mark Wing, ‘The Digital Copyright Time Bomb in the BRIC Economies: Some Ideas from the UK for the Indian Market’, *Int. J.L.M.*, vol. 54, no. 4, 2012, pp. 302–310, 305.

⁷⁰ S.30A, Copyright Designs and Patents Act 1988.

⁷¹ <https://www.redditinc.com/policies/content-policy>, paragraph 3. Accessed 17/07/18.

⁷² <https://www.youtube.com/static?gl=GB&template=terms>, particularly paragraphs 5–7. Accessed 17/07/18.

downloads – are so easy to control. This leaves legal remedies as a last resort, and even these may be ineffective.

A *Norwich Pharmacal*⁷³ order could be sought which would require a hosting company to disclose the details, including, potentially, IP addresses of persons posting deepfakes. However, it is not particularly difficult for a creator or poster of a deepfake to cover their tracks by using fake information to sign up to a content hosting site, and to use, for example, free Wifi and a laptop to make their location via IP address very difficult to discern. Even if an IP address were obtained and was traceable back to a computer at a fixed address via an internet service provider, that IP address will often be shared among several users, further requiring inspection of individual computer equipment. The individual user will typically be a ‘man of straw’ from whom compensation will not be readily recoverable. An injunction or damages could be sought against a hosting company based on various possible infractions outlined above, but in the case of defamation, section 5 requires the hosting company to be given an opportunity to take the illegal content down first. Although other areas of the law do not have an equivalent of section 5 of the Defamation Act, there is a general duty on litigants under the Civil Procedure Rules to avoid litigation if possible,⁷⁴ and adverse costs consequences against a claimant may result if they do not try and resolve matters informally.⁷⁵ Pre-action protocols also exist in various areas which require attempted informal resolution first, the most relevant in the deepfake area being defamation.⁷⁶ *Vidal-Hall v Google* recently confirmed that damages for distress could also be awarded for breach of the Data Protection Act.⁷⁷

As a preventative measure against fake news-type deepfakes, it has been suggested that news organisations could utilise a blockchain to verify the veracity of news, or hosting companies could use a form of artificial intelligence to catch artificial intelligence-altered content.⁷⁸

⁷³ *Norwich Pharmacal Company & Ors v Customs and Excise* [1973] UKHL 6, [1974] AC 133.

⁷⁴ Civil Procedure Rules Part 1, Rule 1.4.

⁷⁵ *Dunnett v Railtrack Plc* [2002] EWCA Civ 303.

⁷⁶ See in particular paragraph 3.2 which requires a letter of claim with specified content.

⁷⁷ *Vidal-Hall v Google Inc* [2015] EWCA Civ 311; [2016] Q.B. 1003.

⁷⁸ Coldfusion.tv, ‘Deepfakes – Real Consequences’. <https://youtu.be/dMF2i3A9Lzw>. Accessed 17/07/18.

Conclusion

To conclude, the disparate variety of possible causes of action and remedies, many of which are of limited application to particular circumstances, harks back to calls by some academics, judges and practitioners for a specific image protection law. The rise of this deepfake phenomenon simply adds more weight to these calls. A right, based around inalienable human rights, such as Article 9 of the French Civil Code, would provide wider protection than the commercial publicity rights-orientated approach of many of the existing common law measures. Sometimes protection of image is not just about making money, as the European Court of Human Rights recognised in the Princess Caroline case.

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Challenging Academic Judgement and Other University Decisions

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Abstract

The challenging of academic judgement has been a controversial topic over the years. There are two broad types of university decisions, namely, those based on academic judgement and those not involving academic judgement. The Education Act 2004 actually precludes the Office of the Independent Adjudicator from looking at matters that involve academic judgement, some examples of which are decisions concerning the marks awarded in examinations or other assessments, decisions on the class of degree awarded to a student, etc. This paper aims to add to the literature, firstly, by considering not only whether academic judgement can be challenged but also whether it ought to be challenged, and, secondly, by analysing the challenge of other university decisions on grounds relating to procedural impropriety, bias, negligence, etc. In doing so, the authors focus on the subject area (or discipline) of law. After defining academic judgement and distinguishing it from other university decisions, the authors consider various issues relating to the two types of challenges, and suggest some measures to help improve the present position.

Keywords: academic judgement; Education Act 2004; university decisions; Office of the Independent Adjudicator; breach of contract; negligence; judicial review.

Introduction

Challenging academic judgement has been a contentious topic over the years.¹ It has been widely debated, argued in court and written about.² The controversy still rages. One issue is whether a university should be immune from suit for decisions that are made under the remit of academic judgement – where does this leave the rights of a student?

There are two broad types of university decisions: (a) those based on academic judgement; and (b) those not involving academic judgement. This separation is replicated in the law. Part 2 of the Higher Education Act 2004,³ which deals with student complaints, states that a student can only raise a complaint against an institution if that complaint is a ‘qualifying’ one:

s.12(1) In this Part ‘qualifying complaint’ means, subject to subsection (2), a complaint about an act or omission of a qualifying institution which is made by a person –

(a) as a student or former student at that institution, or

(b) as a student or former student at another institution (whether or not a qualifying institution) undertaking a course of study, or programme of research, leading to the grant of one of the qualifying institution’s awards.

(2) A complaint which falls within subsection (1) is not a qualifying complaint to the extent that it relates to matters of academic judgement.

So, the HEA 2004 divides student complaints into those that can be brought, and those that cannot; for example, admissions issues are also not permitted to be brought before the Office of the Independent Adjudicator. So, it is necessary to assess this divide, and then to focus on those complaints relating to academic judgement.

¹ A poetic and succinct version of the points in this paper can be found in Robert E. Rains, ‘The Cautionary Ballad of Susan M’, *Journal of Legal Education*, vol. 40, no. 4, 1990, pp. 485–6.

² See, for example, S. Varnham, ‘Copping Out or Copying? Do Cheats Prosper? An Exploration of the Legal Issues Relating to Students’ Challenging Academic Decisions’, *Australian and New Zealand Journal of Law and Education*, vol. 7, no. 1, 2002, pp. 21–37; Mark Davies, ‘Challenges to “Academic Immunity” –The Beginning of a New Era?’, (2004) *Education and the Law*, vol. 16, nos 2–3, June/September, pp. 75–96, p. 75; Neville Harris, ‘Editorial: A Matter of “Academic Judgement”’, (2013) *Education Law Journal*, p. 161; D.J. Farrington, ‘Student Complaints in Higher Education’, (1998) *CIL*, vol. 3, no. 3, pp. 194–219.

³ Hereafter HEA 2004.

This paper aims to add to the literature, firstly, by considering not only whether academic judgement can be challenged, but also whether it ought to be, and secondly, by analysing the challenge of other university decisions. In doing so, the authors focus on the subject area (or discipline) of law. After defining academic judgement and distinguishing it from other university decisions, the authors consider various issues relating to the two types of challenges, and suggest some measures to help improve the present position.

Before looking at the impact of case decisions in certain areas of law, it is necessary to look at the contextual issues, that is, what is meant by ‘academic judgement’, and to whom can a student complain if they wish to contest this judgement.

Office of the Independent Adjudicator⁴

The HEA 2004 sought to establish an independent organisation to deal with student complaints – the OIA has been fulfilling this role since 2005. The OIA is the alternative dispute resolution (ADR) body for higher education and notes that its role is ‘to review individual complaints by students against higher education providers’ and that it ‘ha[s] no regulatory powers over providers and cannot punish or fine them’.⁵ Essentially, it can investigate ‘qualifying complaints’ as defined in the HEA 2004. Further, the OIA Rules⁶ state:

We cannot consider matters which have already been decided by the courts. We cannot consider complaints where the matter is or becomes the subject of court or tribunal proceedings which have not been stayed (adjourned or put on hold). If any part of the complaint is being dealt with in the courts or by another body then the student and the higher education provider should tell us.⁷

Thus, a student can complain to the OIA, and maybe avail themselves of ADR, on a matter that is deemed to be a qualifying complaint. However, the OIA cannot usurp the jurisdiction of the courts, so the student can ultimately

⁴ Hereafter, OIA.

⁵ <http://www.oiahe.org.uk/about-us.aspx>. Accessed 14/11/18.

⁶ <http://www.oiahe.org.uk/about-us.aspx>. Accessed 14/11/18). Six Scheme Rules are available at <http://www.oiahe.org.uk/media/120486/oia-rules-april-2018.pdf>. Accessed 14/11/18. The Guidance Notes on the Scheme Rules are available at <http://www.oiahe.org.uk/media/122161/guidance-note-rules-april-2018.pdf>. Accessed 14/11/18.

⁷ OIA Guidance Note on OIA Scheme Rules April 2018 – Note 32.1. Note 32 deals with legal proceedings and Note 33 references their role as an ADR body.

seek redress through litigation. It follows then that the nature of a qualifying complaint needs to be addressed.

Qualifying Complaints and Academic Judgement

As noted above, section 12(2) of the HEA 2004 denies matters of academic judgement from being qualifying complaints. This clearly supports the earlier judicial pronouncement of Sedley LJ, when he said:

[T]here are issues of academic or pastoral judgement which the university is equipped to consider in breadth and in depth, but on which any judgement of the courts would be jejune and inappropriate.⁸

The OIA can certainly look at matters falling outside of ‘academic judgement’. The OIA Scheme Rules at 4.1 states that ‘[A] student or former student can complain to us about anything their higher education provider has done or failed to do.’ Aside, of course, from matters of academic judgement! This general provision, which apparently gives a student the capacity to complain about ‘anything’, is actually limited by the following rules. Rule 5 refers to complaints that the OIA cannot review – and this is a long list including, inter alia, matters relating to admissions, academic judgement and student employment, or matters that are subject to other legal or ADR proceedings. A cynic may well argue that these are the substantive issues that students would want to be able to complain about.

There may be matters relating to a university’s decision being tainted by procedural irregularity, etc. In relation to this, OIA Note 30.3⁹ specifically mentions ‘decisions about the fairness of procedures, whether they have been correctly interpreted, what the facts are, how a university has communicated with the student, whether an opinion has been expressed outside the areas of competence, the way evidence has been considered, whether there is evidence of bias or maladministration’.¹⁰

These matters pertain to procedural aspects, but what of more substantive aspects? The issue may be that the courts are not permitted, or willing, to interfere with decisions by universities that can be considered to be clear and based on the reasonable exercise of skill and judgement. Only

⁸ *Clark v University of Lincoln and Humberside* [2000] 1 WLR 1988 at 1992.

⁹ OIA Guidance Note on Scheme Rules 2018.

¹⁰ www.oiahe.org.uk/rules-and-the-complaints-process/guidance-note-on-the-oias-rules.aspx#Rule2. Accessed 14/11/18.

when reasonable care has been lacking can the courts or OIA be permitted to consider the matter. This is perhaps consistent with Lord Diplock's statement in *Saif Ali v Sidney Smith Mitchell & Co*, when he said:

No matter what profession it may be, the common law does not impose on those who practise it any liability from damage resulting from what in the result turn out to have been errors of judgement, unless the error was such as no reasonably well-informed and competent member of the profession could have made.¹¹

Putting this statement together with that of Sedley LJ, and noting that matters of academic judgement are not suitable as qualifying complaints within the HEA 2004, one may be forgiven for assuming that the nature and scope of academic judgement can be clearly identified. However, this is far from certain, as the Parliamentary Under-Secretary of State for Education and Skills observed back in 2004:

Any Minister who could define the parameters of academic judgement would be doing exceptionally well. The best I can do is give examples. Academic judgement is used to decide the marks awarded in examinations or other assessments, and ultimately to decide the class of degree. Only examiners are in a position to make such decisions, and to change that would be a serious infringement of their autonomy on academic matters.¹²

Farrington and Palfreyman¹³ have noted this statement, and raised the concern that this does not actually help to ascertain what is 'reasonably competent academic judgement', nor does it help in deciding who decides that question. They observe that the statement made by Mr Lewis in the debate was undermined when he later added that scrutiny of academic judgement would not protect 'a lecturer who plainly was not giving good lectures or was not qualified to give the lectures in question'.¹⁴

One interesting point noted by Farrington and Palfreyman is that immunity from judicial scrutiny of academic judgement is generally found

¹¹ [1980] AC 198 at p. 220.

¹² Hansard, Mr Ivan Lewis, speaking in Standing Committee H of the House of Commons on 12/2/200 (cols 94–5).

¹³ D.J. Farrington and D. Palfreyman, *The Law of Higher Education* (Oxford: OUP, 2012), p. 361, fn. 153.

¹⁴ *Ibid.*

in all common law countries, and many civil law countries.¹⁵ However, it has occurred to the authors that there seems to be a discrepancy here. The cases noted above refer to the exercise of reasonable skill and judgement made by a member of a profession. That approach would fit with the trends in other areas, such as the removal of an advocate's immunity in negligence.¹⁶

What seems to be a problem is the confusion of two viewpoints. Assuming that academic judgement can be ascertained, should liability only arise where a lack of exercise of reasonable skill and care in making such judgements can be identified? This would be consistent with the judicial statement above. Secondly, can an immunity for decisions on academic judgement be identified simply because the professional making the judgement is an academic? This approach – while supported by the courts and Parliament, and the scope of OIA powers – appears to suggest that it is the nature of the judgement that is important, not the manner in which that judgement was made. Am I, as an academic, granted immunity from suit for judgements made simply because they are academic? Where is the review of reasonable care and skill that is the basis of liability elsewhere? Further, why does such immunity only attach itself to academic professionals?

'Academic judgement' is a matter which the Higher Education Act 2004 specifically precludes the OIA from looking at. That is, s.12(2) states that matters of academic judgement cannot be regarded as 'qualifying complaints'. However, there does appear to be a lack of clarity here, with any legal immunity for academic judgements being defended solely on policy or historical reasons. These justifications can perhaps be questioned when set alongside the recent removal of immunity for expert witnesses, an immunity that had existed for hundreds of years.¹⁷

Academic judgement, according to the OIA, is not any judgement made by an academic, but rather 'a judgement that is made about a matter where only the opinion of an academic expert is sufficient'.¹⁸ The OIA indirectly notes possible confusions by stating that it cannot investigate judgements relating to academic grading, as it cannot put itself in the place of the

¹⁵ *Ibid.*, p. 360.

¹⁶ See *Arthur JS Hall & Co v Simons* [2000] 3 All ER 673, overturning the principle of a barrister's immunity from suit, arising from *Rondell v Worsley* [1969] 1 AC 191.

¹⁷ See *Jones v Kaney* [2011] UKSC 13, where the Supreme Court (by a majority) overturned expert witness immunity that was upheld by the Court of Appeal as recently as 2000 in *Stanton v Callaghan* [2000] QB 75 (CA).

¹⁸ See <http://www.oiahe.org.uk/glossary.aspx>. Accessed 14/11/18.

examiners. However, it can investigate any improper processes, including those relating to assessment, marking and moderation procedures.¹⁹

This is also stated by Rule 5.2 of the Scheme Rules of the OIA. Rule 5.2 also acknowledges that, because academic judgement is a term mentioned by Part 2 of the Higher Education Act 2004 – that is, a statutory term – interpretation of it is eventually a matter for the courts. There is no definition of academic judgement in the Act itself. We will look below at how the courts have interpreted these matters.

Examples of issues of academic judgement include decisions regarding assessments, degree classification, procedures for marking or moderation, fitness to practice, research methodology, course content or outcomes, etc. (These examples were actually given by a Guidance Note to OIA Scheme Rules: Note 30.2.) Because of the above-mentioned preclusion, the OIA has no power to act as examiner, so as to re-mark a student's work or make comments on marks awarded to a student.²⁰

The procedure followed by the challenger, as the cases to be discussed below will show, is usually as follows:²¹ first, the university's own appeals procedure is followed; then an application for review by the OIA may be made; and, finally, the challenger may choose to go to court if, in his/her view, there is no satisfactory resolution of the matter. The OIA states:

We normally expect students to follow their higher education provider's internal procedures to their conclusion before complaining to us. This gives the higher education provider the opportunity to investigate and, where appropriate, put things right.²²

This obviously refers to those complaints that the OIA perceives to be within its remit. For matters of academic judgement, it is prudent to suggest that a similar approach to exhausting internal mechanisms also exists. However, there is the possible problem that higher education providers may not provide, in their internal regulations, for challenges to academic judgement

¹⁹ *Ibid.*

²⁰ The OIA Scheme Rules 2018 identify three scenarios for complaints that they can review. This is tempered in Rule 5 by nine scenarios of complaints that they cannot review, and a further three scenarios of complaints that they may decide not to review (Rule 6). So, the general powers of review in Rule 5 are seriously limited by the subsequent rules. We may ask why this is the case?

²¹ See OIA Scheme Rules 2018 at Rule 7 for guidance.

²² OIA Guidance Note on Scheme Rules 2018 at Note 36.

matters. Given that these challenges are also denied by the HEA 2004 and by the OIA Scheme Rules, it would seem that the only course of action for a student is to apply to court. That in turn leads to the question of how the courts are to view such matters, given the apparent immunity afforded to academics, and the clear reluctance to even consider such matters as viable complaints.

Challenging Academic Judgement

As already stated, the Education Act 2004 actually precludes the OIA from looking at matters that involve academic judgement, a preclusion acknowledged by Rule 5.2 of the OIA Scheme Rules.

OIA Guidance Note on Scheme Rules at 30.4 states that ‘decisions about whether a student’s work contains plagiarism’ involves academic judgement, but that the judgement must be evidence-based. It states further, in Note 30.5, that ‘whether a student has reached the necessary professional standards and is fit to practise’ is likewise a matter of academic judgement, but any judgement has to be reasonable following correct and fair procedures. There are numerous ways for checking alleged plagiarism, and the provision of evidential support may be easily attainable. Similarly, proper procedures can be provided for and monitored in ensuring reasonableness of outcomes.

The issue here is why such similar reasonableness tests are not provided for in relation to academic judgements pertaining to assessment grading and moderation. The inclusion of such tests and, thus, the placing of academic judgement within the remit of the OIA may be more compatible with the previously noted case decisions in *Clark*²³ and *Saif Ali*.²⁴

Challenges to academic judgement may well be considered appropriate by some students and their supporters.²⁵ But, the problem with it is the approach of the courts. The courts have traditionally viewed academic judgement as immune from challenge, reflecting the positions of HEA 2004 and OIA. This is the so-called concept of ‘academic judgement immunity’.

²³ *Supra*, fn. 8.

²⁴ *Supra*, fn. 11.

²⁵ OIA Guidance Note on Scheme Rules 2018 at Note 30.2 and 30.3 – apply a reasonableness test here!

A case in which the issue arose is *R (on the application of Alexander) v OIA*.²⁶ The facts were as follows: Mr Mark Alexander started to study law at King's College London (KCL) in 2007. Three months before his final exams he was arrested in connection with his father's death. He was subsequently tried and convicted of murder and sentenced to life imprisonment, with a minimum term of 15 years and five months. KCL asked him, while he was on bail, whether he wished to write his planned final exams in May or June 2010, and gave him an application form for special arrangements. He responded that he wished to postpone the exams to the following year (2011). KCL, in October 2010, informed him that it had terminated his registration in accordance with College Regulation A2, paragraph 12.2, which allowed termination of a student's registration without notice if a specific breach of the law would render them ineligible for continuing on their programme.

He sought to appeal against that decision but was informed in November 2010 that he had no right of appeal, except that he could make written representations to KCL. Although he made those representations in December 2010, KCL informed him some six months afterwards that it stood by its decision. KCL also explained that, because he had not been provided with proper teaching support, it was the college's academic judgement that he would be put at a significant disadvantage in relation to other students and that would be unfair to him.

He then complained to the OIA. But the OIA followed its own rules (here Rules 3, 6 and 7) and found his complaint not justified – the issue of whether he could sit his exams without having completed his studies was a matter of academic judgement, and was, therefore, outside the OIA's remit – and that, overall, KCL had acted reasonably and fairly.

Mr Alexander's subsequent application for judicial review of the OIA's decision was refused on the papers for not showing any arguable ground/s for judicial review. His appeal against that refusal, too, suffered a similar fate for the same reason in the Court of Appeal.

Another case confirming academic judgement immunity is *Clark v University of Lincolnshire and Humberside*.²⁷ This case is looked at in more detail below, under 'Suing for breach of contract'). Moreover, in other cases (for example, *Abramova v Oxford Institute of Legal Practice*,²⁸ *R (Wilson)*

²⁶ [2014] EWCA Civ 1566.

²⁷ [2000] 3 All ER 752; [2000] 1 WLR 1988.

²⁸ [2011] EWHC 613 (QBD).

v OIA and Hull University,²⁹ *R (on the application of Mustafa) v Office of the Independent Adjudicator for Higher Education*,³⁰ and *R (Cardao-Pito) v Office of the Independent Adjudicator*³¹), judicial pronouncements have been made supporting the principle that academic judgement cannot be challenged in the courts.

Before moving onto a review of other case law in this area, it is pertinent to consider, first, the arguments in favour of retaining academic judgement immunity, and, second, those that seek to challenge the continued use of such immunity.

Reasons for Upholding Academic Judgement Immunity

The concepts of individual academic freedom and the desirability of autonomy for academic institutions are well accepted and date back many centuries.³² This could give rise to an argument that the judgements of academics are traditionally to be protected, and seen as an aspect of public good. Farrington and Palfreyman³³ note that academic judgement is clearly indicative of attitudes towards academic freedom, and also of the core operations of universities, and, thus, not to be second-guessed by courts. Therefore, is the notion of the maintenance of tradition a valid argument for justifying judicial immunity for academic judgements?

A flaw in this approach is the fact that the world changes – society sees entry to, and performance at, university much differently nowadays than in the past. The roles of university tutors and of students themselves have all changed greatly over the past few decades. Traditional immunities from suit may not be seen as valid when placed against the changing social and educational environments. This point is again noted by Farrington and Palfreyman as they state:

Will this convenient privilege of and immunity for academe continue? Is it threatened by HRA and ECHR, by the expansion of judicial review, by the developments in the application of consumer law, by the growth of discrimination law, by the commodification and marketization of HE, by the growing presence of for-profit commercial HE providers, by the students paying much higher tuition fees from 2012/13 and deserving better

²⁹ [2014] EWHC 558 (Admin), [2014] ELR 273, [2014] All ER (D) 47 (Mar).

³⁰ [2013] EWHC (1379 (Admin), CO/13044/2010, per Males J. at paragraph 49.

³¹ [2012] EWHC 203 (Admin), per HHJ Gilbert QC at paragraphs 96–97.

³² See E. Barendt, *Academic Freedom and the Law: A Comparative Study* (Oxford: Hart Publishing, 2010).

³³ Farrington and Palfreyman, *op. cit.*, p. 360 *et seq.* Note also chapter 13 of the text on academic freedom.

consumer protection? Can the privilege continue in the context of HE that is increasingly commodified, commercialized, corporatized, and consumerized?³⁴

The scale of the issues noted here would suggest that any reliance on tradition as a justification for academic judgement immunity is sorely misplaced.

Before moving on, it should be noted that the Higher Education and Research Act (HERA) 2017 removed the office of Director of Fair Access to Education. There is now the Office for Students³⁵ and it is to be noted that amongst its general duties is the ‘need to protect the institutional autonomy of English higher education providers’.³⁶ Section 2(3) of this Act refers to the requirement of the Office for Students to have regard to guidance given to it by the Secretary of State.³⁷ The main point to be made is, by virtue of s.2(5)(a–c), any such guidance provided must not relate to particular parts of courses of study, the content of such courses, nor the manner in which they are taught, supervised or assessed.

This would suggest that, in the latest legislation, the traditional arguments relating to academic freedom are still being utilised to preserve the immunities around academic judgement.³⁸

What, then, of the more legalistic approach? That is to say, is such academic immunity based on the viable ground of public policy? In considering this ground, it is to be noted that arguments based on policy often appear to blend with the tradition-oriented viewpoints.³⁹

Public policy grounds for preserving academic judgement immunity can be seen as a response to such a question as whether an individual, or university, should be the subject of any investigation and, further, whether it is in the public interest that such investigations be permitted? However, it is important to note that any such immunity can only attach to decisions that relate to delivery or assessment of student work. It would not be permitted,

³⁴ *Ibid.*

³⁵ Under s.1 HERA 2017, with general duties of the OfS listed in s.2.

³⁶ *Ibid.*, at s.2(1).

³⁷ We can quibble here as to how such a requirement actually protects institutional autonomy, but that is outside the scope of this article.

³⁸ H.G. Beh, ‘Student Versus University: The University’s Implied Obligations of Good Faith and Fair Dealing’, (2000) 59 *Maryland Law Review*, 183, where the author suggests that universities, and individual academics, are overly protected by the courts, to the detriment of student interests.

³⁹ An interesting case to note is the employment case of *Buckland v Bournemouth University* [2010] EWCA Civ 121. This case involved a claim for constructive dismissal based around the university’s approach to re-marking a set of examination papers, originally marked by the claimant. The claim for constructive dismissal was upheld, based, inter alia, on the infringement of the individual’s academic freedom. Sadly there was little discussion by the courts of the impact of the grading by the individual, and then by the university, on the students themselves.

for instance, if the academic can be shown to have acted in an unreasonable – perhaps capricious or arbitrary – manner. Is immunity from suit based on policy reasons inviolable? As Lord Dyson stated in *Jones v Kaney*:

The mere fact that the immunity is long established is not a sufficient reason for blessing it with eternal life. Circumstances change as do attitudes to the policy reasons which underpin the immunity. The common law develops in response to these changes.⁴⁰

Note that Lord Dyson is questioning both the tradition-based and policy-based justifications for immunity. The arguments in favour, or not, of maintaining an immunity from suit for professionals (in this case barristers) was considered very carefully in the House of Lords in *Arthur JS Hall & Co v Simons*.⁴¹ Interestingly, the court sat as a body of seven in order to fully consider the seriousness of the issues.

The judges made several pertinent observations on the nature and scope of policy grounds as justifications for professional immunity. Lord Hope of Craighead stated that ‘public policy is not immutable’,⁴² while Lord Hutton suggested that arguments based on policy should be assessed ‘in the light of modern conditions and having regard to modern perceptions’.⁴³ Lord Hobhouse elaborated on this further when he noted that: ‘Since the question of public policy is based not upon some higher moral imperative but upon a pragmatic assessment of what is justifiable in our society that assessment may change as circumstances change.’⁴⁴

This shows that the notion of any immunity based on public policy is itself open to alteration, based upon changes in society and indeed upon the perceptions of the public. Thus the fact that academic judgement immunity has been upheld in the past is not an absolute justification for the continuation of such immunity.

Lord Hobhouse does note an issue that would be in favour of the retention of the immunity. He states: ‘[t]he role of Parliament must also be taken into account. Parliament is the primary guardian of the public interest. In most areas of public policy, Parliament will be the sole arbiter and the courts should not allow themselves to trespass into them.’⁴⁵

⁴⁰ [2011] UKSC 13, removing such immunity for expert witnesses.

⁴¹ *Arthur JS Hall & Co v Simons* [2000] 3 All ER 673.

⁴² *Ibid.*, p. 709.

⁴³ *Ibid.*, p. 727.

⁴⁴ *Ibid.*, p. 734.

⁴⁵ *Ibid.*, p. 735

It has already been noted that the HEA 2014 and the OIA have accepted the nature of academic judgement immunity. However, it is also noted that neither of these two actually define the meaning of the term. As Lord Hobhouse further noted: ‘one of the problems of any immunity is determining its boundaries.’⁴⁶ This leads to the conclusion that an immunity can be justified, as long as it is clearly defined, and the justifications for it are transparent. Regarding this point, Lord Hobhouse further stated: ‘It is also accepted that any immunity must be justified as being necessary in the public interest, otherwise it cannot survive.’⁴⁷

Since academic immunity is not clearly defined, in legislation nor in OIA Rules, it is hard to identify the ways in which it can be justified in the public interest. The Guidance Notes to OIA Rules do provide some assistance, in that academic judgement is stated as being one where only the expert opinion of the academic will suffice. However, a challenge to the nature of any expertise is thus not permitted, since this would be an academic judgement issue. Similarly, a decision made by the expert cannot be challenged since that is also within the remit of academic judgement. So, to avoid legal entanglements, a university has to merely define any decisions as those of an academic expert. To follow Lord Hobhouse above, how is this justified in the public interest? It is perhaps regrettable that the recent Higher Education and Research Act 2017 did not provide assistance by providing any clearer guidance on the nature of academic immunity.

Another justification for the continuation of academic judgement immunity can be found in the ‘floodgates’ argument.⁴⁸ Harris has stated the issue very clearly:

The rationale for excluding matters of academic judgement relates to the risk of widespread challenges to examination outcomes on such a scale that the examination and awards system would be undermined and unable to function. Moreover, in terms of utility, one would have no better guarantee that a mark awarded on a re-examination would be more appropriate than the original mark.⁴⁹

Is this really a likely outcome of the removal of immunity? Not every student contests academic grades, and, moreover, the recent changes to higher education in terms of delivery and assessments suggest that academic tutors are now more open to the idea of providing directed feedback on

⁴⁶ *Ibid.*, p. 743.

⁴⁷ *Ibid.*, p. 735.

⁴⁸ Note that the Law Lords in *Hall v Simons* were quite unanimous in dismissing this line of argument.

⁴⁹ Neville Harris, *op. cit.*, 16.

grades, thus eliminating the need for almost all appeals. Students are able nowadays to look online for guidance on the nature of university grading systems, and to even check the system used at their particular university.⁵⁰ Greater transparency may be afforded through the use of such (contentious?) monitoring systems as the teaching excellence framework.⁵¹

Allied to floodgates arguments is the notion that the judicial scrutiny of an academic result is simply impracticable, following the reasoning within Clark's case where Sedly LJ noted that substituting a judge's grade for that given by a tutor is simply unfeasible. This would seem logical, and it may be that only grading decisions that throw up some of the factors for consideration can be challenged. Is there a distinction between purely academic decisions (for example, grading) and a flawed decision-making process (for example, bias)? As Sedley J, as he then was, noted in *R v HEFC, ex parte Institute of Dental Surgery*⁵²:

[P]urely academic judgements, in our view, will as a rule not be in the class of case ... where the nature and impact of the decision itself call for reasons as a routine aspect of fairness. They will be in the ... class, where some trigger factor is required to show that, in the circumstances of the particular decision, fairness calls for reasons to be given.⁵³

Reasons for Permitting Challenges to Academic Immunity

Mark Davies has, in an excellent review of pertinent issues, noted that (considering the decision in *Arthur Hall*, the disability discrimination and Human Rights legislation) the 'continued refusal of the courts to look behind pure academic decisions – imparting a *de facto* immunity on academics – is untenable'.⁵⁴ It is useful, then, to consider the potential reasons that could be given for supporting any legal challenges to academic judgement immunities.

⁵⁰ See, for example, <https://www.thestudentroom.co.uk/showthread.php?t=411997>; and <https://staff.brighton.ac.uk/reg/acs/docs/Undergraduate%20marking-grading%20scale.pdf> (a random example). Accessed 14/11/18.

⁵¹ <https://www.timeshighereducation.com/student/news/what-tef-results-teaching-excellence-framework>. Accessed 14/11/18.

⁵² [1994] 1 All ER 651.

⁵³ *Ibid.*, p.670. In Canada, according to *Yen v Alberta* [2010] ABQB 380, 'the courts have no power to intervene merely because it is thought that the standards are too high, or that the students' work was inaccurately assessed, in the absence of a denial of natural justice'. Cited in Theresa Shanahan *et al.*, *The Handbook of Canadian Higher Education* (School of Policy Studies, Queen's University of Kingston, Canada, 2015).

⁵⁴ Mark Davies, *op. cit.*, p. 91.

There is a possible justification for removal of any immunity within the human rights legislation.⁵⁵ There would be two initial points to note on this. Firstly, is a university a ‘public body’ against which a human rights claim can be made? Universities have been identified as public bodies for the purpose of judicial review and, it would seem, that similar reasoning ought to apply to their classification under human rights law.⁵⁶ The second issue concerns the substantive right to education.⁵⁷ While this article provides a right to education, it makes no reference to the manner of education.⁵⁸ Further, it was not always clear whether the article actually related to university or higher education. However, it has been clearly stated that:

A more appropriate view of the extent of Art. 2 of protocol 1 might be that university education is covered by the Article, but that the courts should recognize the special requirements of HE and the nature of such courses as advanced study with a consequent requirement for a minimum standard of achievement to justify continued participation.⁵⁹

This brings us to a substantive right – that under Article 6 of the Convention – which states ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’⁶⁰ The point here is whether the purported immunity for academic judgement can be seen as a denial of Article 6 rights (and possibly those under Article 2 of protocol 1).

The provision of university rules and regulations, perhaps as part of the contract with the student, ought to set out any guidance on hearings, etc., relating to any complaints or grievances. Certainly, it is usual that Article 6 rights would be identifiable if a matter was to come to court. However, the problem for students is that the use of an immunity may actually prevent a university from investigating a complaint and, following *Clark* above, the court may decline to interfere on the grounds that the matter relates to academic judgement. So where does that leave the student?

⁵⁵ Human Rights Act 1998.

⁵⁶ *Clark v University of Lincolnshire and Humberside* [2000] ELR 345; *R v Manchester Metropolitan University, ex parte Nolan* [1994] ELR 380.

⁵⁷ See Art. 2 protocol 1 of ECHR; and, further, Art. 28 UN Declaration of Human Rights 1948.

⁵⁸ *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252.

⁵⁹ See Kevin Kerrigan and Philip Plowden, ‘Human Rights and Higher Education’, [2002] *Education Law Journal*, 17, for a very impressive review of these issues.

⁶⁰ Art. 6(1) ECHR; see, further, ‘Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial’ (2018) Council of Europe, available at www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf, Accessed 5/10/18.

In *R v Higher Education Funding Council, ex parte Institute of Dental Surgery*⁶¹ it was argued that universities ought to provide clear reasons for decisions – this would aid in the development of a tortious ‘fair and reasonableness’ test, and this can be extended to matters of academic judgement. However, the court noted that where there was a decision of academic judgement, it was not unfair not to provide reasons. Davies has noted the ambiguity that this throws up: ‘The court expects reasons to be available, but will not look behind academic judgement or ask for the reasons – unless extraneous factors had been taken into consideration by the decision maker.’⁶² Of course, this may raise a problem of identifying any ‘extraneous factors’ if no reasons need to be given for the decision in the first place. Is the lack of reasons for a decision, and a lack of means of challenging the decision, not a clear breach of the right afforded under Article 6?

As noted above, the courts have shown willingness in recent times to remove immunity from professionals, to the extent that their actions and decisions can be challenged – both in court and via some internal review body. Thus, there is an argument for suggesting that academic judgement immunity be removed from academics in order to permit student challenges, as this would otherwise leave academics with a singular exception within law.⁶³ Davies notes the issue of whether academics are actually ‘professionals’ in noting the absence of, for example, a designated professional body.⁶⁴ The removal of immunity from professionals can perhaps be justified by the existence of regulatory controls exerted by professional bodies. However, we as academics would be complacent to accept that academic judgement immunity exists, without recognising that aspects of self- or university-based regulation, allied to judicial tests of fairness and reasonableness,⁶⁵ may lead to the conclusion that the academic role is susceptible to review, and that clear reasons may be required to justify decisions within academic judgement.

Students pay large fees for their tuition, they have a contract with the university, and are, thus, regarded as consumers of educational services. The Consumer Rights Act (CRA) 2015, s.49(1) informs us that ‘every contract to supply a service is to be treated as including a term that the trader must

⁶¹ [1994] 1 WLR 242 QBD.

⁶² Davies, *op. cit.*, p. 78.

⁶³ See above discussion on *Arthur JS Hall & Co v Simons* (2000) and *Jones v Kaney* (2011).

⁶⁴ Davies, *op. cit.*, pp. 92–93.

⁶⁵ For example, as propounded in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; and with more reference to education, see *D’Mello v Loughborough College of Technology*, *The Times*, 16 June 1970.

perform the service with reasonable care and skill.’ Further, s.50 of the Act provides that any representations made to a student (for example, in prospectuses, open days, etc.) which induce the student to enter into a contract with the university must be fairly observed, otherwise there may be a breach of the contract.⁶⁶ A simple example would be the promised availability of courses or modules of study which are later withdrawn.

Do these provisions give a right vis-a-vis academic judgement?⁶⁷ It would appear that universities are to make decisions, utilise procedures and provide services, and that these ought to be conducted with ‘reasonable care and skill’. As already noted, a method for provision of reasons could help to establish such care and skill, and, thus, compliance with the 2015 Act. What of decisions coming within the term ‘academic judgement’? They appear to still be covered by the apparent immunity. The CRA 2015 did nothing to alter the remit of the OIA in relation to appropriate complaints and academic judgement.⁶⁸ Thus, the CRA 2015 may provide an effective route to remedy for a student complaint about delivery of university services, but not for academic judgement issues.

In *Alexander v OIA*,⁶⁹ a law student argued that academic judgement should be subjected to review by the OIA. In that case Kitchin LJ stated:

Mr Alexander seeks to contend that the OIA was never properly equipped to address the fundamentals of his complaint as a result of deficiencies in the statutory scheme. He argues that the scope of the OIA’s review should be extended to include resolution of complaints of the nature of those which he has had and, more generally, that the OIA should concern itself with complaints regarding the legal rights and obligations of persons such as him and that its remit should be extended to include, amongst other things, matter of academic judgement and perhaps even whether or not the regulations and procedures of the institution in question are reasonable or appropriate.

Unfortunately, the court did not really consider these questions, and contented itself in finding that the university and the OIA had acted within their respective remits, and that it was not possible for the court to go beyond the provision of the statutory scheme. This is a major flaw. The OIA and

⁶⁶ See Competition and Markets Authority, *Undergraduates: Your Rights under Consumer Law* (2015), and s.5, Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

⁶⁷ See Consumer Rights Act 2015, s.54 for consideration of breach and potential remedies.

⁶⁸ See G.R. Evans, ‘The Competition and Markets Authority: Higher Education Providers and Students as Consumers’, [2015] *Ed Law*, p. 22.

⁶⁹ *R (on the application of Alexander) v OIA* [2014] EWCA Civ 1566, already mentioned under ‘Challenging Academic Judgement’, above.

courts will not review the statutory scheme, nor consider academic judgement issues, because they feel they do not have jurisdiction. However, the basis of that lack of jurisdiction is not clearly defined. Students who want to complain about things that materially matter to them – lack of academic service and poor marking, resulting in non-satisfactory degree awards – are effectively excluded from complaints. This is a source of confusion for students – they pay large fees but are prevented from making complaints about the issues that matter.⁷⁰

It has been clearly stated that a student has a contract with the university:

The student–HEI legal relationship is essentially contractual, albeit with elements of public law and hence the possibility of judicial review ... and with the further possibility that tort law or discrimination law will impact upon this relationship.⁷¹

This may suggest a number of routes to legal relief, and it is timely, then, to look at some of the case law in these areas to assess the judicial interpretation of academic judgement.⁷²

Analysis of Legal Challenges to University Decisions

A perusal of the decided cases revealed three broad strands of cases – where there is:

- (a) a breach of contract by the university;
- (b) an action against the university for negligence (for example, negligent teaching or negligent provision of education); and
- (c) an application for judicial review.

(a) Suing for breach of contract⁷³

Although issues of academic judgement may not be considered by the courts, where there is a breach of contract by a university not following its own appeal procedure, etc., that could be looked into by the courts. An

⁷⁰ See S. Whittaker, 'Judicial Review in Public Law and in Contract Law: The Example of Student Rules', [2011] *Oxford Journal of Legal Studies*, p. 193.

⁷¹ Farrington and Palfreyman, *op. cit.*, pp. 347–8; see footnotes 111–114 for an interesting historical account.

⁷² No consideration of discrimination law is provided as it is assumed that any discriminatory behaviour would automatically negate any purported immunity.

⁷³ According to Edwin Peel, *Treitel, The Law of Contract*, 14th ed. (London: Sweet and Maxwell, 2015), p. 1, a contract is 'an agreement giving rise to obligations which are enforced and recognised by law'.

illustration of this is *Clark v University of Lincolnshire and Humberside*.⁷⁴ That case concerned a humanities student whose final examination included submission of a paper. But one day before the submission deadline, she lost all the data from her computer's hard disk. So she could only put together some notes she copied from a textbook. She was failed for plagiarism by the university's Examination Board. She appealed to the Academic Appeals Board which asked for her paper to be remarked. But the Examination Board awarded her a zero mark (0). She appealed again to the Appeals Board but the Examination Board did not change its position, so she appealed to the Governors' Appeal Committee. That committee considered that a '0' was not an inappropriate academic response and the student's assessment was sent back to the Academic Appeals Board which rejected it because that mark was permissible, providing the paper had been treated by the examiners as a failure (but not as plagiarism).

The student had one more chance, under the university's student regulations, to get her degree, except that Regulation 6.5.4 provided that, after a second attempt at an examination for a classified degree, a student could normally not get more than a third-class degree. So, after successfully resitting her finals, she was awarded only a third-class degree. She then sued the university in contract. The judge struck out the case as pleaded. But the Court of Appeal ruled, among other things, that the judge rightly struck out the case as pleaded but was wrong in striking out the case also on the ground that the entire relationship between the student and the university was not justiciable. Whereas issues of academic judgement (for example, what class a student should be awarded) could not be challenged in the courts, the courts could adjudicate pleaded allegations of breach of contractual rules. The Court of Appeal, therefore, concluded that the High Court should hear the student's claim of breach of contract.

Similarly, in *R (Crawford) v Univ. of Newcastle-upon-Tyne*⁷⁵ Andrew Grubb J. held, inter alia, that a student has contractual rights against his university because he pays fees as a student; at least, there is an implied term in that contract that the university will act fairly in applying its academic appeal procedure.

Therefore, because of the existence of a contractual relationship between a higher education institution (HEI) and a student, where the institution has not followed its own rules or procedures correctly, for

⁷⁴ [2000] 3 All ER 752; [2000] 1 WLR 198.

⁷⁵ [2014] ELR 110.

example, its assessment, marking and moderation procedures, there can be an action against the HEI for breach of contract.⁷⁶

A case that concerned both a breach of contract and negligence is *Abramova v Oxford Institute of Legal Practice*.⁷⁷ That case is looked at in the next part.

(b) Suing for negligent delivery

To be able to sue in negligence, the claimant must show that he/she was owed a duty of care, that the duty was breached, and that damage or loss was caused by that breach of duty.⁷⁸

In *Abramova v Oxford Institute of Legal Practice*,⁷⁹ the claimant, a Russian lady, sued the defendant (Oxford Institute) for damages for breach of contract relating to the institute's provision of educational services for her. While on the Legal Practice Course (LPC) which the institute provided, she failed all three core (that is, compulsory) subjects (including Property Law), as well as other subjects. The students were required to self-mark their mock papers in Property Law and Private Client. She failed the LPC because of her third failure of a core subject, Property Law. After her second failure of the Property Law paper the subject tutor gave her routine feedback. The Law Society, in its routine assessment of the institute's course, had criticised the practice of self-marking and recommended that feedback be given to the students.

The claimant argued that the institute's manner of delivery of the course violated its duty under s.13 of the Supply of Goods and Services Act 1982 because: (1) its practice of requiring students to self-mark their mock examinations was negligent as it was an approach that was flawed, that was not used by other providers of the LPC, and that the assessors of the Law

⁷⁶ An institution's failure to follow its own procedures or rules can also lead to a complaint by the student to the OIA, as happened in *R (Gopi Krishna) v Office of the Independent Adjudicator* (OIA) [2015] EWHC 207 (admin.); [2015] E.L.R. 190, a case where there was a breach of the university's own procedures. The applicant failed her second-year medical school examination at Leicester University. The university then terminated her course, the reason being that she had no sufficient prospects of successfully completing it. She complained to the OIA, arguing that the decision to terminate her course was unfair because: (a) the university criticised her year-one performance without hearing her mitigating circumstances; and (b) the University Panel did not follow the university's rule that her personal tutor should be contacted first. The OIA declined to consider the matter because it was one of academic judgement. But the court held that the two failings (namely, failure to hear her mitigating circumstances and failure to follow the university's rule) took the matter outside the scope of academic judgement immunity, so the matter must go back to the OIA to consider.

⁷⁷ [2011] EWHC 613 (QBD).

⁷⁸ These are the three elements of the tort. See, for example, W.E. Peel and J. Goudkamp, *Winfield and Jolowicz on Tort*, 19th ed. (London: Sweet and Maxwell, 2014), p. 78.

⁷⁹ [2011] EWHC 613 (QBD).

Society had criticised; and (2) there was inadequate teaching in examination techniques and the institute did not alert her to problems with her performance by calling her in for feedback.

But Burnett J. gave judgement for the institute on two grounds. First, a contractual claim based on s.13 of the Act of 1982 could be approached practically the same way as a negligent claim, and that required the claimant to establish breach of a duty of care that satisfied the ‘deliberately and properly high standard’ test set by *Bolam v Friern Hospital Management Committee*.⁸⁰ The self-marking was not shown to be unreasonable by the Law Society assessors’ criticism, and the claimant did not challenge the institute’s assertion that self-marking was supported by academic research. Therefore, she had not established that self-marking was unreasonable and negligent. Secondly, it was not unreasonable to expect adult graduate students to be responsible for their own learning in circumstances where clear guidance had been outlined in the course documents, as well as stressed by the course director at the start of the academic year. Good quality assurance was both available and given to the applicant after her first and second attempts at the paper in Property Law, the tutor of which subject had appropriately given her feedback. The fact that the overwhelming number of students taking the course succeeded showed that the quality of the teaching was good. Accordingly, there had been no breach of duty by the institute.

Another case about an action for negligence (as well as breach of contract) is *Winstanley v Sleeman*.⁸¹ In that case the defendants made an application to strike out a claim by a research student for damages for negligence and breach of contract relating to their provision of education to him. After the viva voce (examination) of his PhD thesis in Mathematics, the examiners reported that the thesis had failed. The student promptly appealed and succeeded because the university had not given him adequate or satisfactory supervision. Therefore, his fail was set aside and he was allowed to revise and resubmit his thesis within 12 months to be examined by different examiners. However, he was unhappy and started proceedings, arguing that either his thesis was worthy of a PhD or the thesis had failed because the university breached its tortious or contractual duties by not giving him adequate supervision, not preparing him adequately for his viva, and choosing as his examiners persons who did not have expertise in his area of research. The defendants’ application to strike out the claims was

⁸⁰ [1957] 1 WLR 582.

⁸¹ (2013) Queen’s Bench Division District Registry (Leeds) 13 December 2013.

granted, but only in part. First, the exercise of academic judgement by an educational institution cannot be challenged by the court; and, as a university's selection of examiners of a thesis is a matter of academic judgement, the court would not interfere with it. Secondly, however, the claim in tort would not be crossed out because it was arguable that the university owed the student a duty at common law to use reasonable care and skill in the way or manner in which it prepared him and also his thesis for assessment, and in the process of that assessment. It was, in addition, arguable at any rate that, in the event of a university's failure to take proper care of the career of a student by inadequately providing those processes (of preparation for assessment and the actual assessment), it was foreseeable that some loss or injury would be suffered by the student concerned.

Moreover, according to *Siddiqui v University of Oxford*,⁸² if a student sues an educational institution for negligent teaching, for example, the fact that such claims are notoriously not easy to win should not be a good reason to exclude the existence of a duty of care or to conclude that the student's case has no real prospects of success.

Also, regarding research students, although submission of a thesis by a student is supposed to be on the basis that the thesis is ready for submission, if a supervisor advises that more work is required before submission, but the student chooses to ignore that advice and goes ahead to submit his/her thesis, he/she cannot successfully sue the supervisor or the university because: (a) there will have been no breach of duty; and/or (b) the student will be deemed to have been the author of his/her own misfortune (see *R (on the application of Kwao) v University of Keele*⁸³).

(c) Judicial review

The difference between the challenge to the decision (which may be fairly termed academic judgement) and the challenge to the decision-making process (which ought to be fair and reasonable) must be noted here. However, to what extent do HEIs and the courts treat the process as part of 'academic judgement' decision-making?

Here, the student asks the court to look again at the university's decision-making process and strike it down. So this is different from suing in contract or tort. The grounds for judicial review include unfairness (or bias), unreasonableness, acting ultra vires (in excess of authority), and

⁸² [2016] EWHC 3150 (QB).

⁸³ [2013] EWHC 56 (Admin), CO/5577/2012.

breach of the rules of natural justice (where the institution does not give the complainant a right to be heard, etc.).

*R (on the application of Clarke) v Cardiff University*⁸⁴ illustrates the position where there is bias against the student. The claimant/applicant in that case was a student doing the Bar Vocational Course (BVC) at Cardiff University, which had a franchise from the Bar Council to provide the course. While a general investigation into exam cheating was being carried out, the student was questioned by two course tutors before she took her assessment in Negotiation. As she became unsettled before that assessment, she applied for extenuating circumstances after it. She was adjudged to have failed two subjects, namely, Negotiation and Advanced Criminal Law, at the end of the course. That caused her not to meet the criteria required to pass the course. She challenged the way in which the Criminal Law paper was marked. Though she passed the resit of the Negotiation assessment, her mark was reduced as it was her second attempt. The Extenuating Circumstances Committee rejected her application for extenuating circumstances. The two tutors who had questioned her before the Negotiation assessment were also members of that committee. She appealed to the Exam Board against the committee's decision but that was not successful. However, those tutors were present at the time that the Exam Board made its decision. When her Advanced Criminal Law paper was remarked, she was awarded a competent grade that resulted in her passing the BVC. Still, she applied for judicial review. She argued that the decision of the Extenuating Circumstances Committee should be quashed, while the university submitted, among other things, that the proceedings were merely academic because the applicant had already been awarded a competent grade and, so, had passed the BVC, a fact that the proceedings could not alter.

The court, nevertheless, allowed the application for judicial review and quashed the Extenuating Circumstances Committee's decision, as well as the decision of the Exam Board regarding the claimant's application for extenuating circumstances. To the court, there was some bias against the applicant because the two tutors who had questioned her before the Negotiation assessment also took a full part in the decision-making process, during which they also gave information to the decision-makers, information that had the effect of making the student's credibility doubtful. That was, therefore, unfair to the student/applicant.

⁸⁴ [2009] EWHC 2148 (Admin).

Another illustration is where a university fails to follow its own rules. In such a situation, for there to be judicial review, that failure must cause material disadvantage to the student. In *R (Crawford) v Univ. of Newcastle-upon-Tyne*⁸⁵ there was no such disadvantage to the student, and so Andrew Grubb, Deputy H-Ct Judge, held that there could not be judicial review of the matter.

It is worth noting here that in *R (on the application of Kwao) v University of Keele*,⁸⁶ where the student unsuccessfully applied for judicial review of his university's decision to award him only a master's degree instead of a doctorate in education (EdD), the court found that there had been no unfairness to that student in the university's appointment of the supervisors and examiners of his thesis. In addition, as the student did not go first to the OIA before applying for judicial review, his claim for judicial review failed.⁸⁷

Conclusion

In her powerful text, Amy Gadja states, in relation to a growth in litigation and the risks of judicial attitudes to academic freedom:

[t]he challenge is to shun the alternative extremes of wholesale immunity and unbridled oversight and to define terms for court intervention that balance interests in nondiscrimination against legitimate interests in academic freedom and autonomy.⁸⁸

The question is, then, whether academic immunity ought to survive as a concept and, if so, whether it may be necessary to define it so that the fair parameters of such immunity can be clearly identified. While a lack of clarity around the issue persists, students will not feel that legitimate complaints against HEIs will be taken seriously by the courts or the OIA. Can the OIA provide a more acceptable approach to dealing with a potentially growing area of complaints?

⁸⁵ [2014] ELR 110.

⁸⁶ [2013] EWHC 56 (Admin).

⁸⁷ There was also no unfairness to the student in *R (Wilson) v Office of the Independent Adjudicator for Higher Education and Hull University* (2014) ELR 273; (2014) EWHC 558 (Admin.), nor in *R (on the application of Alexander) v OIA* [2014] EWCA Civ 1566.

⁸⁸ Amy Gadja, *The Trials of Academe: The New Era of Campus Litigation* (Cambridge, MA: Harvard University Press, 2009), p. 80. A nice book review of this exists by Joseph D. Mandel in 61 *J. Legal Educ.* 166 (2011–2012).

What of an ADR solution? Cooper and Boice-Pardee,⁸⁹ noting the nature of Gajda's arguments on these matters, observe that it is necessary that:

colleges find ways to diffuse disputes before they evolve into legal complaints. In general, middle managers [at HEIs] should be familiar with, and engage, university human resource personnel, ombudspersons, or other professionals trained in mediation or conflict resolution before employing costly legal counsel.

On this, it would be timely to remind ourselves that the OIA is a designated ADR body for HE. Perhaps, then, the OIA can have a more structured approach to dealing with matters of academic judgement, focused within ADR, which would allow student complainants a right to complain and not to be denied a review of their complaint on the currently accepted grounds that matters are 'jejune and inappropriate'.

While an ADR approach may prove the most effective process for resolving disputes, that still leaves us with the problem relating to the lack of clarity in defining academic judgement. Harris has noted:⁹⁰

While the judicial and OIA guidance is making the picture much clearer, there is a case for incorporating a definition into the rules of complaints schemes, especially the OIA scheme, but perhaps also the legislation itself.

He goes further in stating that any purported definition, while unlikely to be complete and prescriptive, and always being subject to interpretation, could be enhanced simply by utilizing the phrase 'academic judgement includes ...'⁹¹

Thus, the use of a clearer definition of academic judgement, allied to a more ADR-focused approach to dealing with complaints, would allow the courts to remain distant and not become embroiled in purely academic matters, but would also provide an appropriate mechanism for students who have legitimate complaints.

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⁸⁹ Mary-Beth Cooper and Heath Boice-Pardee, 'Managing Conflict from the Middle', (2011) *New Directions for Student Services*, no. 136, Winter 2011 (Wiley); online at www.wileyonlinelibrary.com. Accessed 24/07/18.

⁹⁰ Neville Harris, *op. cit.*

⁹¹ *Ibid.*, p. 163.

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Private Law Protection of Privacy

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Abstract

There is no single, overarching private law right to privacy in English law. Instead there are three private law wrongs that can arise for a violation of privacy. There is breach of confidence (an equitable doctrine) and misuse of private information (a tort). These were held to be separate wrongs in *Google Inc v Vidal-Hall and others*.¹ The courts can grant interim injunctions to prevent these wrongs being committed prior to trial. This article will examine these two wrongs in light of the Court of Appeal's decision in *ABC & Others v Telegraph Media Group Ltd*² and the Supreme Court's decision in *PJS v News Group Newspapers' Ltd*³ in which a new tort of invasion of privacy was recognised.

Key words: privacy; breach of confidence; misuse of public information; invasion of privacy; European Convention on Human Rights; interim injunctions.

Introduction

It was thought that there was no tort of invasion of privacy known to the common law as there was high authority that held the development of such a tort would be a pointless exercise as the existing law was sufficient.⁴ Thus privacy relating to homes and other property is protected by the law of property and the tort of trespass while personal privacy is protected by the law of crime and the tort of trespass. Confidences and private information are protected by action for breach of confidence and action for misuse of private information. Reputation is protected by an action for defamation. According to the House of Lords the gaps in this law could be filled by the

¹ [2015] EWCA Civ 311.

² [2018] EWCA Civ 2329.

³ [2016] UKSC 26.

⁴ *Wainwright v Home Office* [2003] UKHL 53.

Human Rights Act 1998 (HRA).⁵ What this fails to take into account is that the HRA does not apply directly against purely private bodies, hence the need for the courts to develop a tort of invasion of privacy when applying the indirect horizontal effect of the HRA.

Breach of Confidence Doctrine

The equitable doctrine of breach of confidence seeks to prevent the disclosure of confidential information. The policy reasons for its existence are that it encourages trust, good faith and candour in legal relationships. There are three elements that must be satisfied if a claim for breach of confidence is to succeed. First, the information has a confidence quality – there is the telling of private matters with mutual trust. Second, the information has been imparted with an obligation of confidence. Third, there has been unauthorised use of the information. However, the doctrine is subject to public interest defence in that an injunction will not be granted if it would not be in the public interest to do so.

The doctrine was in issue in *ABC & Others v Telegraph Media Group Ltd* where a senior business executive and two claimant companies obtained an interim injunction to prevent him being named as the person accused of discreditable conduct against five employees. The employees' claims had been settled with substantial payments and the parties entered into non-disclosure agreements in which both sides agreed to keep confidential the subject matter of the allegations and details of the pecuniary settlement. The employees had independent legal advice prior to the agreements and the agreements did not prevent them making legitimate disclosure such as criminal offences. A *Daily Telegraph* journalist contacted the claimants for comments on a story about the employees' allegations (some of whom had contacted the paper) and the non-disclosure agreements. The claimants obtained an interim injunction preventing publication pending a full trial on the issues. Two of the employees supported the injunction.

The Court of Appeal (on appeal from the High Court) made both a closed judgement and an open judgement, with the former setting out the background of the case and the reasons for the decision in full. The closed judgement is confidential and has not been published so that confidence could be maintained pending trial. In the open judgement it is made clear that the obtaining of details of the allegations was a breach of contract and

⁵ *Ibid.*, at paragraphs 15–51 *per* Lord Hoffmann.

a breach of confidence.⁶ The issue for the court was whether the public interest in publication outweighed the confidentiality attaching to the accusations pending a speedy trial. When could the *Telegraph* rely on the public interest defence? Prior to the HRA coming into force on 2 October 2000, general guidance on the public interest defence was given by Lord Goff in *Att-Gen v Observer Ltd*,⁷ to the effect that there is a public interest that confidences should be preserved but the law allowed a public interest defence where there are exceptional circumstances which justified disregarding any confidentiality. The exceptional circumstances exist where the confidentiality is used to conceal a wrongdoing (the ‘iniquity rule’⁸), such as a crime or a tort, but also where it is vital to the public interest to publish confidential information.⁹ So before the HRA came into force the circumstances where the public interest overrode a duty of confidence were very limited.

The Human Rights Act 1998

Today the test is different. In short, it is whether a restraint of freedom of expression is, in the circumstances, in the public interest because such restraint is necessary in a democratic society. It is a test of proportionality where the court, having regard to the information and the circumstances, considers if it is legitimate for the information to be kept confidential or whether it is in the public interest that the information should be made public.

The test is different because the HRA creates in English law the Convention rights that are listed in section 1(1) and schedule 1. These rights are most of the rights contained in the European Convention on Human Rights (the Convention). The Convention rights that are engaged in *ABC & Others v Telegraph Media Group Ltd* are Article 10 – freedom of expression and Article 8 – right to a private life. The claimants could not pursue a remedy based on a right to respect for private life in Article 8 of the Convention. This is because section 6(1) of the HRA states that it is unlawful for a public authority to act in a way which is incompatible with a Convention right, but the *Telegraph*, as part of the commercial press, is not a ‘public authority’ as it is not a standard public authority or functional public body, but rather a purely private body. In addition, there is no statute

⁶ No. 2 at [32].

⁷ [1990] 1 AC 109 (the spy catcher case) at 282.

⁸ *Gartside v Outram* (1856) 26 LJ CH 113.

⁹ *Lion Laboratories Ltd v Evans* [1985] QB 526.

to be interpreted in a compatible way with the Convention as required by section 3 of the HRA. However, the Convention remains relevant because the Court of Appeal is a public authority and it is obliged to develop domestic private law in a way which is compatible with Convention rights. This is known as an indirect horizontal effect of the HRA.

The claimants' cause of action for trial was for inducement of breach of contract and of breach of confidence. Where a third party (the *Telegraph*) has acquired confidential information in breach of contract, he will come under a duty of confidence which is parasitic on the duty owed by the person imparting the information. The claimants required an interim injunction preventing a further breach of contract and breach of confidence pending trial, thus preventing the *Telegraph* publishing details of the senior business executive's discreditable conduct.¹⁰

Article 10(1) of the Convention states that '[e]veryone has the right to freedom of expression' including 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority'. This right is one of the foundations of a free press which were laid down after the Second World War and is vitally important to our democratic way of life. However, it is qualified by Article 10(2) which states, inter alia, that:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 8(1) provides that: 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

What the claimants were seeking was 'prior restraint' of the press. Both the common law and the Convention recognise that restraining the press can undermine the public interest of having a free press that is able to exercise the right to freedom of expression. But prior restraint has its place when it protects information that is really confidential. Thus, Convention jurisprudence allows for prior restraint but national courts must achieve a fair balance between Articles 10 and 8.¹¹ Section 12(4) of the HRA provides that the court must have particular regard to the importance of Article 10

¹⁰ It was not a super-injunction where revelation of the existence of an injunction is a contempt of court.

¹¹ *Editions Plon v France* (2006) 42 EHRR 36.

and requires the court to take into consideration whether the story is likely to be available to the public, the public interest in publication, and any privacy code, such as the ISPO code which came into force in January 2016 (the Telegraph Group is subject to the code). Section 12(3) of the HRA states that no interim injunction is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish at trial that publication should not be allowed. A permanent injunction at trial would be needed to prevent a further breach of contract and breach of confidence. The Court of Appeal allowed the claimants' appeal and granted an interim injunction pending trial. The court held that the non-disclosure agreement was important when considering whether it was in the public interest to allow publication. The agreement had been made with the benefit of expert independent legal advice, the bargain was not disproportionate and the court could only refuse to enforce it on ordinary contractual or equitable grounds. Thus, the non-disclosure agreement did not constitute a disproportionate interference with the *Telegraph's* Article 10 rights and Article 10(2) permits restrictions on those rights for the protection of the reputation and rights of others. The claimants were likely to succeed at trial. 'Likely' in this context means the claimants will probably succeed at trial.¹²

There were a number of reasons for this decision.¹³ First, important parts of the information which the *Telegraph* wished to publish were obtained in breach of contract and in breach of confidence, and the *Telegraph* was aware of these breaches. Second, the most serious allegations had been denied by the claimants and their truth needed to be tested in a trial. These most serious allegations were not in the public domain. Third, non-disclosure agreements have a legitimate role in the consensual settlement of disputes, especially in employment relationships. The obligation of confidence is enhanced by an express contractual agreement. Fourth, there was no evidence that the agreements were obtained by bullying, harassment or undue influence by the claimants. The employees received independent legal advice, and disclosure was allowed to avoid wrongdoing. Fifth, two of the employees supported the claimants' application for an interim injunction. Lastly, there was a real prospect that publication by the *Telegraph* would cause serious harm not only to the senior executive but also to the claimant companies, and that could have implications for their current employees. Thus, it was not in the public interest to allow publication.

¹² *Cream Holdings Ltd v Banerjee* [2004] UKHL 44.

¹³ No. 2 at [32]–[51].

Parliamentary Privilege

After the reasoned judgement of the Court of Appeal in the *Telegraph* case, Lord (Peter) Hain, using the parliamentary privilege of free speech, in the House of Lords named the senior business executive as Sir Philip Green. The question is, what is the privilege of free speech and was Peter Hain right to use it to name Sir Philip? Parliamentary privilege is those rights and immunities that the Houses of Parliament and their members enjoy which enable them to effectively carry out their parliamentary duties. This protection allows Parliament to hold the executive to account and to be a forum for discussing issues that concern constituents. It should not be abused. The courts decide whether a privilege exists and Parliament decides whether it has been breached.¹⁴ Freedom of speech is the most important privilege of the Houses of Parliament. It means that no legal action can be taken against peers or MPs for spoken words or actions in Parliament. In Article 9 of the Bill of Rights 1689 it is stated 'that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'. The result of Article 9 is that no peer or MP may be liable in the courts for what is said or written in debates or other proceedings in Parliament. This is the privilege that Lord Hain took advantage of in a debate in the House of Lords. Thus, he could not be prosecuted for contempt of court or sued for libel for breaching the interim injunction.

Was this an abuse of privilege? There is a public interest in revealing rich and powerful public figures who are responsible for wrongdoings, especially where there is credible evidence of the wrongs. The argument is that the rich and powerful should not use non-disclosure agreements to silence victims. This was why Lord Hain felt it right to name Sir Philip. But there is also a public interest in maintaining confidentiality especially after a reasoned decision of a court which had all the facts before it. The Court of Appeal explains:

Provided that the agreement is freely entered into, without improper pressure or any other vitiating factor, and with the benefit (where appropriate) of independent legal advice, and (again, where appropriate) with due allowance for disclosure of any wrongdoing to the police or appropriate regulatory or statutory body, the public policy reasons in favour of upholding the obligation are likely to tell with particular force, and may well

¹⁴ *Pepper v Hart* [1993] AC 595 at 645 *per* Lord Browne-Wilkinson.

outweigh the article 10 rights of the party who wishes to publish the confidential information.¹⁵

All of the five non-disclosure agreements satisfied these requirements. The agreements were valid and the requirements ensured equality of bargaining power. The employees knew what they were signing and if they had wished to go to the mass media then they should not have signed. After considering all the facts, the Court of Appeal concluded that it was in the public interest to maintain confidentiality pending a speedy trial. Now Sir Philip has been named it is not clear whether that trial will take place, although the *Telegraph* did induce some of the employees to break their contracts and confidences.

Lord Hain not only named Sir Philip but also disclosed the allegations of sexual harassment and racist abuse against him. It is unclear how Lord Hain obtained the facts. The *Telegraph* was represented by Gordon Dadds LLP, with whom Lord Hain is a consultant. Lord Hain maintains that he did not know this, which begs the question as to whether he has read the open judgement of the Court of Appeal which has reference to Gordon Dadds on the first page of the judgement in bold print. What is clear, however, is that Lord Hain was not in a better position to judge the public interest in naming Sir Philip than the Court of Appeal. It should also be remembered that two of the employees supported the application for an interim injunction.

Sir Philip is a powerful, controversial public figure, but the allegations against him have not been fully tested in a court of law. Of course, Sir Philip did not want a trial because the allegations would then have been made public, hence the non-disclosure agreements, but if there is a trial, he is entitled to a fair trial under Article 6(1) of the Convention. That was to be the purpose of the speedy trial. Lord Hain seems to think that Sir Philip, by signing the agreements, has admitted the allegations. But that is not necessarily so as it is not known why Sir Philip signed the agreements, and he can now only deny the allegations because he is prohibited by the agreements from fully stating his response to the allegations. Lord Hain's naming of Sir Philip has deprived him of a fair trial and instead left him to face trial by the mass media, not just the *Daily Telegraph*. When Lord Hain named Sir Philip, the gloves were off because the mass media are entitled to report proceedings in Parliament, thus making the interim injunction ineffective. That was not in the public interest.

¹⁵ No. 2 at [24].

Lord Hain's naming of Sir Philip conflicts the separation of powers and the rule of law. The parliamentary privilege of free speech is intended to enable peers and MPs to be able to contribute to debates without the fear of being sued for libel or found in contempt of court. But it is not supposed to be used to flout reasoned judgements and orders of the court. Lord Hain abused privilege and broke the parliamentary rule of *sub judice*.¹⁶ He said to peers that he had been contacted by a person intimately involved in the case of a powerful businessman using non-disclosure agreements and substantial payments to conceal the truth about serious and repeated sexual harassment, racist abuse and bullying which is compulsively continuing. If that was true, it would have come out in the trial. Lord Hain's naming was gratuitous and made a mockery of the judges and the separation of powers. The procedure committees of the Commons and Lords should consider what has happened and put forward changes so that the practice and procedure of both Houses are amended, so that the revelation of injuncted information is not protected by privilege. Also, ministers have announced a consultation on the use of non-disclosure agreements in employment disputes. It should also consider the role of peers and MPs in challenging injunctions.

There will be cases of alleged breach of privacy not involving a pre-existing relationship of confidentiality and this is where the law of tort has a role to play, which will be considered in the next section.

Misuse of Private Information

The scope of this tort is wide. It can be used against the mass media where information is published as a result of hacking into social media accounts, e-mails or private voicemails. It can also be used where private information was simply passed to the mass media or put online. To establish whether the tort has been committed, the courts use the following test. First, has the claimant a reasonable expectation that the information disclosed would be kept private? Second, in answering that question, the court must balance the

¹⁶ The rule prevents reference being made in proceedings in the Chambers of both Houses or in committees to cases which are active in the courts. The rule does not apply when the Houses are considering primary or secondary legislation, and the Speaker and the Lord Speaker have discretion to disapply it on other occasions. Two reasons are put forward for the rule: the need not to prejudice court proceedings (which applies also outside Parliament, where it is enforced by the law of contempt of court), and the principle of 'comity', whereby it is considered undesirable for Parliament to act as an alternative forum to decide court cases.

claimant's private life rights under Article 8(1) and the defendant's right of freedom of expression under Article 10(1) of the Convention.

What constitutes a reasonable expectation of privacy? Most of us reasonably expect that our private information should not be published in the mass media. This is straightforward. But the more difficult case is where a public figure holds themselves out as having a very wholesome drug-free image, but is then discovered to be attending Narcotics Anonymous meetings. This is what happened in *Campbell v Mirror Group Newspapers Ltd*¹⁷ where supermodel Naomi Campbell sued MGN after it had published stories telling the public about her attendance at Narcotics Anonymous meetings. She claimed damages for breach of confidence and compensation under the Data Protection Act 1998.

However, the House of Lords held that the case concerned one aspect of invasion of privacy: misuse of private information.¹⁸ The House indicated that, following the HRA and the need to align English law with the Convention, it was no longer necessary to show that the information was confidential, it being enough that there was a 'reasonable expectation of privacy' which does not require a pre-existing relationship of confidentiality.¹⁹

The House also held that the correct approach to cases involving the mass media and privacy was to consider the relationship between Articles 8 and 10 of the Convention and the starting point is that they are equal rights, so that one does not have priority over the other. They are qualified rights in that both are subject to restrictions which are 'in accordance with the law' or 'prescribed by law', as set out in the second part of the articles, and that includes the 'rights of others'. These restrictions must be 'necessary in a democratic society' – that is to say, a proportionate restriction of a right and a fair balance between the competing interests. The House balanced the competing rights and held that Ms Campbell's right to privacy under Article 8 outweighed the MGN's freedom of expression under Article 10. The publication of the fact that Ms Campbell had taken drugs and was seeking treatment was necessary to set the record straight, given what she had said in the past. However, details of the treatment – for how long, how frequently and at what times of day she had been receiving it; the nature of it; the extent of her commitment to the process; and the visual portrayal by means of

¹⁷ [2004] UKHL 22.

¹⁸ *Ibid.*, at [12].

¹⁹ *Ibid.*, at [134]. Contrast breach of confidence.

photographs of her when she was leaving the place where treatment had been taking place – were disproportionate intrusion into her private life. ‘The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity.’²⁰

The majority of the House held that the information was highly offensive and objectionable to a reasonable person of ordinary sensibilities, and that therefore Ms Campbell had a reasonable expectation of privacy in respect of that information. The decision in *Campbell* is high authority for the proposition that in private law the tort of misuse of private information is different from breach of confidence as the former does not require an existing confidential relationship. In addition, actions for misuse of private information can readily attract tortious damages which are as of right, although restitution is not possible, while those for breach of confidence may receive damages only as an equitable remedy within the discretion of the presiding judge. The decision can be regarded as a recognition of a right to privacy based on misuse of private information.

There are two defences to a claim for misuse of private information. First, the information was already in the public domain. Newspapers frequently use this defence when a claimant is objecting to photos being published of themselves or their family. An example of where this was raised is *Rocknroll v News Group Newspapers Ltd*²¹ where the claimant, Ned Rocknroll, who married the actress Kate Winslet in 2012, obtained an injunction preventing the publication by the *Sun* newspaper of photos of the claimant at a fancy-dress party in which he was partially naked and acting in a way that he would not do in public. The photos were taken by a friend and (with the claimant’s consent) appeared on the friend’s Facebook page, initially only to his 1,500 friends; but when the privacy settings changed, they became available to the public. By the time of the hearing the photos had been removed. NGN claimed that the photos were in the public domain and there was nothing by way of privacy left to be protected by injunction. The High Court disagreed, holding that the photos had not come into the public domain by their posting on Facebook and there was something by way of privacy left to be protected by the injunction, as the photos were not easily accessible – an internet search of the claimant’s name would not have found them. Someone had tipped the *Sun* off.

²⁰ *Ibid.*, at [99].

²¹ [2013] EWHC 24.

Second, there is the defence that publication is in the public interest. For example, in *McClaren v News Group Newspapers Ltd*,²² the claimant was a former manager of the England football team and applied for an injunction prohibiting the reporting in the *Sun* of an extra-marital affair. The claimant submitted that there was no public interest in the mass media publishing a story about the private life of a football manager and his relationship with a woman who was not his wife. The High Court refused the injunction, holding that there was a public interest in publishing the story as the claimant belonged to the category of people from whom the public could reasonably expect a higher standard of conduct. It could be argued that *Green*, *Campbell* and perhaps *Rocknroll* come into this category and there is a lack of judicial consistency, but every case turns on its own facts.

The question is whether the law has now developed a new tort of invasion of privacy based on intrusion and free from the requirements of the tort of misuse of private information. This will be considered in the next section.

PJS v News Group Newspapers Ltd

In *PJS v News Group Newspapers Ltd*,²³ PJS successfully applied to the Supreme Court for the continuance of an interlocutory injunction preventing News Group Newspapers (NGN) from publishing, in England and Wales, a newspaper story identifying PJS as a famous celebrity who had engaged in sexual activity involving two other people when he was in a civil partnership with YMA (whom he married in 2014). This was despite the fact that the identity of PJS and his sexual activity are readily available on the internet and a hard copy of the story had been published in a Scottish newspaper. The Supreme Court allowed the injunction to remain in place by a 4:1 majority. The majority were Lord Mance, Lord Neuberger, Lady Hale and Lord Reed. The dissenter was Lord Toulson.

As in the *Telegraph* case, PJS could not pursue a remedy based on a right to respect for his private life in Article 8 of the Convention. This is because section 6(1) of the HRA states that it is unlawful for a public authority to act in a way which is incompatible with a Convention right but NGN, as part of the commercial press, is not a 'public authority'. In addition, there is no statute to be interpreted in a compatible way with the

²² [2012] EWHC 2466.

²³ See note 3 above.

Convention as required by section 3 of the HRA. However, the Convention remains relevant because the Supreme Court is a public authority and is obliged to develop domestic private law in a way which is compatible with Convention rights. This is another example of the indirect horizontal effect of the HRA.

It was expected that the wrong that would be committed if the story was published would be misuse of private information (a tort). But Lord Mance (who gave the leading judgement) appears to create new law when he says:

Every case must be considered on its particular facts. But the starting point is that (i) there is not, without more, any public interest in a legal sense in the disclosure or publication of purely private sexual encounters, even though they involve adultery or more than one person at the same time, (ii) any such disclosure or publication will on the face of it constitute the tort of invasion of privacy, (iii) repetition of such a disclosure or publication on further occasions is capable of constituting a further tort of invasion of privacy, even in relation to persons to whom disclosure or publication was previously made – especially if it occurs in a different medium.²⁴

The question is whether this creates new law as before this case there was no tort of invasion of privacy known to the law. This cannot be stated with complete confidence as, when Lord Mance is discussing what damages would be available for the wrong, he refers to misuse of private information.²⁵ It may be that Lord Mance is referring to the tort of misuse of private information and that tort and the tort of invasion of privacy are the same. Lord Neuberger (who agreed with Lord Mance) refers to an individual's rights in respect of confidentiality and intrusion, and while the injunction could not preserve the confidentiality of the identity of PJS (and of his spouse YMA and children), it could prevent intrusion or harassment.²⁶ Publishing the story in print could lead to intrusion as newspapers have greater impact and credibility than the internet. This points to a tort of invasion of privacy (as it is now to be called) based on intrusion. Whether this is to be regarded as a development of existing law or new law is a moot point. In his dissent, Lord Toulson states that the story is so porous that an

²⁴ *Ibid.*, at [32].

²⁵ *Ibid.*, at [42].

²⁶ *Ibid.*, at [62] & [63].

injunction is pointless and there is no difference between publication on the internet and in the print media.²⁷ It is submitted that there is a difference for the reasons of greater impact and credibility of the printed mass media.

The injunction is not permanent and can only be made permanent after a trial. Section 12(3) of the HRA states that no interim injunction is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed. A permanent injunction is needed to prevent the tort of invasion of privacy and the Supreme Court majority obviously believed that PJS was likely to establish that at a forthcoming trial.

If NGN published the story there would be no breach of PJS's Article 8 rights by NGN because it is not a public authority, but publication could constitute the tort of invasion of privacy by NGN. The purpose of the injunction is to prevent the tort, but the trial court as a public authority will have to balance PJS's right to respect for his private and family life against NGN's right to freedom of expression under Article 10 when deciding to make the injunction permanent. As in the *Telegraph* case, section 12(4) of the HRA applies and it provides that the court must have particular regard to the importance of Article 10 and requires the court to take into consideration whether the story is likely to be available to the public, the public interest in publication, and any privacy code, such as the ISPO code which came into force in January 2016. But section 12 does not give greater weight to Article 10 as 'each right has equal potential force in principle, and the question is which way the balance falls in the light of the specific facts and considerations in a particular case' per Lord Neuberger.²⁸

In view of the majority decision in the Supreme Court, at trial the balance is very likely to come down in favour of PJS's Article 8 rights because of the intrusion that would be caused by a print publication (not only to PJS but also to YMA and their children), so that a permanent injunction would be required to prevent the tort of invasion of privacy by NGN.

Not surprisingly the Supreme Court decision caused a storm in the print mass media: 'Arrogant judges and cowardly politicians must not threaten free speech' (*Daily Telegraph*, 20 May 2016). If the Supreme Court has got the balance wrong and the law is an ass, it will be for Parliament to

²⁷ *Ibid.*, at [86] & [89].

²⁸ *Ibid.*, at [51].

amend section 12 to make it clear that greater weight must be given to Article 10 rights.

Some will argue that the purpose of the law of tort is to provide compensation for harm committed, not to prevent harm, and thus no interim injunctions should be issued and cases should just go to trial. The counter argument to this is that, in the area of privacy, this could lead to lives being ruined, as in the case of Max Mosely where no amount of compensation would return him to the position that he was in prior to publication.

Conclusion

The law on breach of confidence is certain so that citizens have clear guidance – after, if necessary, legal advice – as to the circumstances in which it can be committed, so that they can judge their future behaviour. In the *Telegraph* case the abuse of parliamentary privilege by Lord Hain is inexcusable, especially as he maintained, without having all the facts, that it was in the public interest to reveal Sir Philip Green as the senior business executive when the Court of Appeal, with all the facts, reached the opposite conclusion and issued an interim injunction pending trial. Sir Philip is to complain to the House of Lords authorities alleging breach of privilege by Lord Hain.

The law on misuse of private information was clearly set out in *Campbell* but in *PJS* the Supreme Court seems to indicate that there is a tort of invasion of privacy based on intrusion separate from the misuse tort. *Clerk & Lindsell on Torts* maintains that a separate tort of invasion of privacy was recognised by the Supreme Court in *PJS* and that the case recognises ‘the difference between protecting confidentiality/secretcy and protecting privacy, in particular highlighting the protection from intrusion that can be involved in privacy claims’.²⁹ It can be concluded from that statement that there are now two torts in respect of violations of privacy which citizens should be aware of – the misuse of private information tort (which does not require an existing confidential relationship) and a tort of invasion of privacy (where there is unwarranted intrusion). The question is whether this distinction is being applied. It appears not – consider *Sir Cliff Richard v BBC & the Chief Constable of South Yorkshire Police*³⁰ where

²⁹ Chapter 27: ‘Breach of Confidence and Privacy, Section 3 – The Action for Breach of Personal Confidence/Privacy’, in *Clerk & Lindsell on Torts*, 22nd ed., main volume (London: Sweet & Maxwell, 2017).

³⁰ [2018] EWHC 1837 (Ch).

Sir Cliff won his privacy case against the BBC (having settled with South Yorkshire Police) over its coverage of a police raid on his home in respect of historical child sexual assault claims which involved the BBC flying a helicopter over his home so that the raid could be filmed. This was clearly a case of unwarranted intrusion and therefore the tort of invasion of privacy, but the trial judge awarded damages for the tort of misuse of private information. Also, Sir Cliff could have pursued a remedy based on a right to respect for his private life in Article 8 of the Convention as both the BBC and South Yorkshire Police are public authorities, although damages would not have been available as of right. The case law is becoming confused, making the law in this area unclear and unsettled.

Postscript

In February 2019 Sir Philip Green dropped his legal action against the *Telegraph* and the interim injunction was revoked. He said that there was no point to the action after Lord Hain had named him as the businessman behind the injunction. This is not completely true because he could have pursued the claim for inducement of breach of contract and of breach of confidence. In April 2019 Lord Hain was cleared of breaching the parliamentary code of conduct as the Commissioner for Standards accepted his assertion that he was unaware of Ince Gordon Dadds' involvement as he had not read the open judgement. Hain explained to the Commissioner that 'I am not a surrogate lawyer and I was not acting as one. I was not challenging the court in that sense ... I was not trying to second-guess the court, the lawyers or the judiciary at all.' He maintained that his decision to name was based on moral considerations rather than on legal grounds. This beggars belief because he was trying to second-guess the judiciary and he ought to have read the open judgement before he decided to name Sir Philip. Most parliamentarians, having read that reasoned judgement, would not have named Sir Philip. Also, in April 2019 the Lord Chief Justice Lord Burnett, in a speech to the 21st Commonwealth Law Conference in Zambia, said that 'parliamentarians who invoke privilege and then defy court orders are becoming a "one-person court of final appeal"' and that is not compatible with the rule of law. He went on to say that 'the freedom of speech in Parliament was guaranteed to protect parliamentarians in the exercise of their functions, rather than to enable the open defiance of court orders.' This was clearly aimed at Lord Hain. Lord Burnett suggested that Parliament should follow the recommendation of Lord Pannick QC and

amend its standing orders so that a parliamentarian should not disclose information that he or she knows to be protected by a court order without first seeking and then complying with a ruling by the relevant speaker.

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Legal Opinion

Fact or Fallacy? Harmonisation of the Right of Quotation in Global Copyright Law

Sebastian Graves-Read

Abstract

This article explores the harmonisation of the right of quotation in copyright law internationally, starting with the Berne Convention and then moving to look at EU and US systems more carefully. The conclusion of the article is that, for a truly successful market, we need more enforced harmonisation to ensure that there are no discrepancies amongst the different signatories globally in their approach to quotation in copyright law.

Keywords: EU law; US law; copyright; Berne Convention; quotation; harmonisation.

This essay will seek to answer the question of whether there is a right of quotation under international copyright law. It will start by considering international conventions, and then it will move to more closely consider the application of this across different jurisdictions and the effectiveness of it. Finally, it will argue that a more harmonised approach to the quotation right will better protect fundamental freedoms in expression.

Beginning with international conventions, there are two which are worth mentioning. The first is the WIPO Copyright Treaty which establishes that all member states must conform to Articles 1 to 21 of the Berne

Convention.¹ Article 10 of the Berne Convention allows for a quotation right of works as long as the work has already been legally made available to the public, and this use must not be taken further than a justified use of the work. The question here is how binding this convention is – although in theory member states who are signed to it have to enact it, there is still the issue of how they do this. Article 9(2) of the Berne Convention gives a three-step test: that the right of reproduction will be retained exclusively for authors; that in extremely special cases national legislatures will have the right to retain exceptions to this; and that it will apply to sound and visual recordings. Article 11(2) also gives an allowance for domestic legislatures to limit the extent that quotations can be used. It does this by giving the discretion of working and enactment to the member states' domestic legislation. There is little doubt that this is due to a desire for compliance – therefore, by allowing member states to retain their sovereignty through a discretionary application, they would come up against less political strain than if they codified exactly how quotation should be allowed.² One area where the convention does codify a precise definition is within Article 12,³ where authors are granted the exclusive rights in adaptations, arrangements and any alterations to their works. This extra protection seems exceptional when the looser definition of quotation and the allowance of quotation is considered, where the altered arrangement, etc., is so clearly stated, with no allowances for interpretation.

One block of countries that are largely signatories of the Berne Convention is the EU member states. The EU has its own law on quotations which was written to implement the WIPO Copyright Treaty, namely the InfoSoc Directive.⁴ Article 5 of the Directive gives an exhaustive list of potential exemptions to the rights conferred in Articles 2⁵ and 3⁶ of the directive. The exemption for quotations for the press and news, and quotations for criticism and review can be found in Article 5(3)(c)–(d). One of the more significant differences between the InfoSoc Directive and the Berne Convention is that member states in the EU have the option to enact exemptions to the InfoSoc Directive (such as the quotation exemption), whereas there is no such option for exception in the Berne Convention. However, as EU law is supreme to EU member states, it is more likely that

¹ Berne Convention for Literary and Artistic Works 1979.

² Georges Koumantos, 'The Future of the Berne Convention', [1986] 11 *Colum-VLA J.L. and Arts*, 225, p. 227.

³ *Supra.*, note 1.

⁴ Directive 2001/29/EC.

⁵ Article 2 of the directive generally deals with the right of reproduction.

⁶ Article 3 of the directive generally deals with the right to communicate works to the public and the right of making available other subject matter to the public.

they will follow the EU option of optional exceptions than the Berne Convention's more severe approach. This is partly because it allows them to keep some level of sovereignty, as previously indicated, but also because international treaties are often seen more as non-binding than binding obligations, with a proclivity throughout the years of breaking them.⁷ The difference in the EU scenario is that it is centrally regulated by Brussels, and there is far more buy-in to the EU ideal than there is to any international treaty. The principle behind the InfoSoc Directive was towards more harmonisation between member states,⁸ which has been argued to be a true failure. This is because of the optional exceptions which are set out in Article 5(3). In the case of *Eva-Maria Painer v Standard VGH and Others*⁹ it was ruled that, although there is a public policy consideration which can be taken into account when quoting the work of another (this can only be done by a public body), when it is a newspaper assisting in a manhunt, as in the case, they must still make every effort to give credit to the original author of the work. It is only when there is sufficient proof that this was investigated and the author still could not be identified that a private entity can use another's work without credit. The idea behind this is to promote the commercial efficacy of the Union and the internal market.¹⁰ This leads to a very un-harmonised approach within the EU, where each member state has unique discretion in which exceptions to implement and which to not. For instance, in the UK the Copyright Designs and Patents Act 1988 has implemented a new amendment in section 30(1ZA) which allows for quotations in commercial use, though this has not been tried as in practice there may be some cost tied to quoting for commercial uses. In practice this is seen to potentially be a mirror of the US system of fair use¹¹ and interestingly this provision brings the UK closer to actually following the *mandatory* regulation in the Berne Convention.¹² This is something we cannot yet know, however, as no cases have been tried using this section of the statute. Even more liberal than this is the Irish approach in their Copyright Act¹³ where section 54(2) essentially states that, as long as there

⁷ Sterling E. Edmunds, *Lawless Law of Nations* (Washington, DC: John Byrne, 1925), pp. 186–7.

⁸ Eleonora Rosati, 'Non-Commercial Quotation and Freedom of Panorama: Useful and Lawful?', (2017) 8 *JIPITEC*, 311, paragraph 1.

⁹ C-145/10, EU:C:2013:138.

¹⁰ See the preamble for the Treaty of the Functioning of the European Union 1992.

¹¹ Lionel Bently and Tanya Aplin, *Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism*, 6 February 2018, University of Cambridge Research Paper No. 34/2018.

¹² *Supra*, note 1, Article 10.

¹³ Copyright and Related Rights Acts 2000, OJ 28/2000.

is no prejudice to the original author, anyone can use information that is publicly available for any use.

Interestingly, still considering the European context,¹⁴ there is a fundamental rights-based approach to copyright and quotations. This can be found in *Ashby Donald and Others v France*.¹⁵ This case concerns two fashion photographers who were invited to several fashion houses to take photographs of the works of the designers. They then attempted to sell these photographs on a website. This was appealed all the way up through the French courts and referred to the ECHR on the argument that the French courts had violated the freedom of expression rights¹⁶ of the photographers. In fact, the court ruled that the intellectual property rights¹⁷ of the designers should take precedence over the photographers' freedom of expression rights on the grounds that the protection of the commercial interest from the monopoly that designers enjoy is paramount in comparison. This approach to commerce over expression is likely one to hold, especially when one considers the three-tiered approach that the ECHR operates under. The decision must be reasonable, proportionate and necessary, and with the intellectual property of the individual enshrined in human rights law it is likely that other cases will follow a similar direction. Further on this point, Article 10(2) ECHR states an exception when there is interference in the rights of another. This means that freedom of expression is only valid where another's rights are not being infringed, such as in the context of copyright. This means that any quotations must be proportionate, reasonable and necessary for the work they are held in and will likely require acknowledgement of the author to ensure that the right of the author is not unfairly prejudiced. Fascinatingly, there does not seem to be the tension between copyright law in the EU and fundamental rights. Conversely, it seems that one compliments the other rather than being a competitor – this can be heavily contrasted with US law.

Following from this idea of rights, the US has a rights-based approach stemming from its constitution under the first amendment for freedom of speech and the press, which is then complemented by the US Copyright

¹⁴ Or specifically signatories of the ECHR (not all signatories are European countries).

¹⁵ App. No. 36769/08.

¹⁶ European Convention of Human Rights and Fundamental Freedoms 1953, Article 10.

¹⁷ *Ibid.*, at Protocol 1, Article 1.

Act.¹⁸ The US Copyright Act 1976 holds within it a clause which allows ‘fair use’ of a work.¹⁹ Fair use is set out with four considerations:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.²⁰

This clearly shows that US law is already closer to the enactment of the Berne Convention, as it allows any fair use of works as long as they comply with the above requirements (including quotations). There have been tensions, however, between copyright law and constitutional law – namely, whether the first amendment undermines the copyright act by allowing ideas to be protected, rather than simply the expression of the ideas themselves. *Triangle Publications Inc v Knight-Ridder Newspapers Inc*²¹ is a case where the first amendment protected the defendant after they copied C’s work. Although this could have been achieved through fair use, the nexus between the idea and the expression of the idea (a TV guide) was so intrinsic that it meant that copyright law may not have protected it. Herein lies the issue and highlights the tension:²² can defendants turn to the first amendment when the information is in the public interest, such as in this case? What does the public interest mean? Does it mean that one could quote the entirety of a book if it was ‘in the public interest’? It is accepted in *Mara v Colombia Broadcasting Sys Inc*²³ that fair dealing in quotations for things such as newspaper articles and other broadcasted works is well established, and as long as some recognition to the author is given, quotations can be copied.

However, in his article Melville Nimmer concluded that the close nexus of idea and expression relying on the first amendment as a backstop

¹⁸ 17 USC (1976).

¹⁹ *Ibid.*, at 107.

²⁰ *Ibid.*

²¹ 445 F. Supp. 875 SD. Fla. 1974.

²² Celia Goldany, *Copyright Infringement and the First Amendment*, Nathan Burkan Memorial Competition: National First Prize, 1979.

²³ 245 F. Supp. 587 (SDNY 1965).

defence is problematic as it would be more common than we expect.²⁴ He gives the example of a graphic work and argues that it especially should have first amendment privilege in the public interest. The issues with this were twofold: the first is simply that the first amendment attaches no such public interest exemption in other applications, so to suddenly start applying it would be inconsistent with previous jurisprudence. Second, if it was judged using the first amendment then there would be two extremes that would be considered, the first being that the first amendment privilege would be dependent on the subjective view of the judiciary in terms of the public interest right, and the second being that we would see everything as having some significance in the public interest.²⁵ Both scenarios are distasteful and would not promote the economic growth originally intended by Congress in the Act.²⁶ In the first scenario we would have judicial uncertainty as each judge would decide the cases based on a varied case law, at the same time as being an expression of that judge's own politics. In the second we would have a case where all quotations would be in the public interest purely from them being copyrighted works and would therefore fall prey to the first amendment. This sufficiently highlights significant uncertainty in the US law of copyright and how it reconciles with their constitution, an issue that both EU member states and ECHR signatories also appear to be facing.

The issue seems plain here: where human rights or constitutional rights address copyright and intellectual property rights as a whole, there is no standard for states to measure themselves by apart from a vague wording in the Berne Convention. For reliable application of copyright rules on an international basis – as intellectual property rights are inherently international due to the monopolising effect they have on the expression of ideas such as quotations – they should have a higher level of harmonisation at the international level. The EU jurisprudence in preserving the internal market should inform further harmonisation with the principle of ensuring fair and smooth trade, but on a global scale. If the member states of the Berne Convention can come together and further harmonise this copyright law, then there is the potential for smooth copyright rights when it comes to quotations. It would allow for academics, journalists and any who wish to use quotations for commercial use to have a much clearer understanding on exactly when and how they can quote works. This would encourage people

²⁴ Melville B. Nimmer, 'Does Copyright and the First Amendment Abridge the First Amendment Guarantees of Free Speech and Press?', (1970) 17 *UCLA L REV*, 1180.

²⁵ Leonard Wang, 'The First Amendment Exemption to Copyright: A Proposed Test', (1977) *Wis. L Rev.* 1158.

²⁶ House of Representatives Report 94-1476, 47, 51 (1976).

to publish more intellectual creations and would spur on commerce – two principles which come from US jurisprudence and EU jurisprudence. The two ideas need not be mutually exclusive and proper harmonisation could bring them together effectively.

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Case Review

Sir Cliff Richard OBE (Claimant)

v

*The British Broadcasting Company;
The Chief Constable of South Yorkshire
Police (Defendants)*

[2018] EWHC 1837 (Ch)

Philip Jones

Facts

In 2014, Cliff Richard (CR) became the subject of investigations by the South Yorkshire Police (SYP) into allegations of historic sex abuse. At this stage CR was unaware of the investigations and was, at the material time, away from his normal residence, being abroad in Portugal.

A British Broadcasting Company (BBC) journalist, Daniel Johnson, found out about the investigations into CR from a confidential source. Johnson contacted SYP and was informed of a potential search of CR's residence. Following discussion with SYP (media office) he was informed that he would be given advance notice of the search. At trial, Johnson claimed that this indicated co-operation between the SYP and the BBC. However, Mann J. found that the SYP explanation, that Johnson was informed of the search and given advance notice of the event, was intended merely to prevent early publication of the details on the ongoing investigation into CR. That would have undermined the actual investigation, and possibly jeopardised the gathering of any evidence.

The search of CR's premises took place on 14 August 2014. The BBC, in the form of Johnson and a TV helicopter, was present and provided coverage of the search event. There was live and extensive coverage of the story on BBC news bulletins throughout the day. Once the BBC had broken the story other media outlets inevitably sought to develop the story themselves, leading to widespread dissemination of the main aspects of the case.

CR remained under investigation until June 2016 when it was announced that no charges were to be brought.

CR complained to SYP, and brought proceedings under privacy laws and the Data Protection Act 1998 (DPA). Before the trial SYP had already admitted liability and agreed to pay CR damages in the sum of £400,000 plus costs. Thus, the liability of SYP was not an issue at the trial, but what was an issue was any potential contribution to be made by the BBC, and vice versa, to those damages for which they might both be liable.

CR sued the BBC in privacy and under the Data Protection Act 1998 for publicly disclosing those facts and covering the search in various broadcasts in August 2014. He claimed that those wrongful acts caused him great personal distress, damaged his reputation and had a huge adverse impact on his life. The trial, consequently, was focused on the possible liability of the BBC.

Mann J., in the executive summary of the judgement of 18 July 2018, noted that the main area of dispute revolved around the alleged dealings between the BBC and the SYP. Essentially, the question was whether information was proffered by the SYP voluntarily to the BBC, or, as Mann J. held, that the SYP offered information because of a realistic concern that if it did not do so there would be prior publication of the story – a concern known to and probably fostered by the journalist Johnson.

Issues

The case raised a number of possible legal claims, not least being the question of whether a claim can be brought for invasion of privacy – is this a viable tortious action? Mann J. (at paragraph 225 of the judgement) summarised the issues arising, and the first of these was whether there was a 'legitimate expectation of privacy' by CR. That would then be balanced,

according to the current tests, against any rights to freedom of expression claimed by the BBC.

A second major issue was the possible breach of the Data Protection Act provisions, relating to the unauthorised disclosure of information. At the trial the judge did not fully consider this issue, as it was felt that such a ground did not add anything to the privacy claim. Mann J. did not feel it was ‘necessary or proportionate’ to consider the data protection issues. It can be noted that the DPA issues were a feature of the settlement reached by CR and the SYP.

Much of the judgement by Mann J. relates to the determination of compensation, relating to both special and general damages. He reviewed sample instances in the claims in order to determine the likelihood of success. He ultimately found in favour of CR on these issues.

Held

Mann J. stated:

I therefore find that the BBC is liable for infringing Sir Cliff’s privacy rights when it disclosed, by broadcasting, the fact that Sir Cliff was the subject of an investigation for historic sexual abuse and that his property was being searched in connection with that investigation (paragraph 323).

The Judgement

This was a long judgement by Mann J., in which he diligently covered a broad range of issues. A simple breakdown of paragraph numbers gives an indication of the depth of the reasoning process;

P 6–31 Review of credibility and reliability of witnesses from all three parties, with only BBC witnesses being found to be unreliable.

P 32–148 Review of main facts and the media coverage involved.

P 149–152 Consideration of the immediate aftermath, looking at the nature of the dispute between the SYP and the BBC.

P 153–159 Consideration of the aftermath and the impact upon CR.

P 160–223 Main disputed areas of fact – the reasons for any co-operation between the SYP and the BBC.

P 224 Summary of findings of fact.

P 225–276 The issues arising – privacy and DPA.

P 277–322 A clear focus on the development of privacy protections.

P 323–454 The determination of liability and damages in the case.

On Privacy

Mann J. commenced his review of the privacy claim by stating both Article 8 and Article 10 of the European Convention on Human Rights, as introduced into English law by the Human Rights Act 1998. He then noted the current judicial test for dealing with potential conflicts between these two rights, as expressed in *McKennitt v Ash* [2008] QB 73, and he noted the statement of Buxton L.J. in that case:

Where the complaint is of the wrongful publication of private information, the court has to decide two things. First, is the information private in the sense that it is in principle protected by Article 8? If no, that is the end of the case. If yes, the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by Article 10? The latter enquiry is commonly referred to as the balancing exercise.

There was little dispute as to the legal elements of privacy claims and the operation of Article 8. Mann J. was consistent in reviewing the relevant case law.¹ In the present case, CR pleaded that both the fact of the investigation and the search were matters in which he had a legitimate expectation of privacy. Mann J. noted that the question of whether there can be a reasonable expectation of privacy in a police investigation is a fact-sensitive issue, and one not capable of a universal answer one way or another.²

One case of clear importance was the decision by the Grand Chamber of the European Court of Human Rights in *Axel Springer AG v Germany*.³

¹ Including *In re JR38* [2016] AC 1131; *Murray v Express Newspapers plc* [2009] Ch 481; *Hannon v News Group Newspapers Ltd* [2015] EMLR 1; *PNM v Times Newspapers Ltd* [2014] EMLR 30; *ERY v Associated Newspapers Ltd* [2017] EMLR 9; *ZXC v Bloomberg LP* [2017] EMLR 21.

² See *ZXC v Bloomberg*.

³ [2012] EMLR, 15.

This case concerned the publication of the public arrest and conviction of a well-known figure in Germany. Mann J. reviewed sources, including the Leveson Inquiry,⁴ to determine that a public figure, or any other suspect, has a reasonable expectation of privacy in relation to a police investigation. Otherwise, it would seem, the normal presumption of innocence would be set aside. Further, following the decision in *Rocknroll v News Group Newspapers Ltd*,⁵ it was noted that a public figure is not, by virtue of that status, denied a legitimate expectation of privacy.

Sadly, Mann J. did not elaborate further in considering these issues in connection to the general freedom of the press and the nature of public interest matters, although he did return to the latter point in the judgement. He did note (at paragraph 259) that an expectation of privacy is not removed or revised merely because information has come into the hands of the media.

Thus, having seen that a reasonable expectation of privacy was set out, Mann J. then turned to the balancing exercise, to review privacy in respect of free expression rights. Again, he provided a good review of case decisions.⁶ He focused on the *Axel Springer* criteria relevant for the balancing exercise (at paragraph 276), these being as follows:

- (a) Contribution to a debate of general interest.
- (b) How well known is the person concerned and what is the subject of the report?
- (c) Prior conduct of the person concerned.
- (d) Method of obtaining the information and its veracity.
- (e) Content, form and consequences of the publication.
- (f) Severity of the sanction imposed.⁷

Mann J. noted the ‘two-edged sword’ (paragraph 286) whereby the nature of the investigation into a celebrity may become more intrusive simply because of that celebrity’s status. One has to look at the underlying allegations and set aside the celebrity status of the person under investigation. The fact of celebrity can, of itself, create the newsworthy nature of the story being investigated. He then noted (paragraph 288) that:

⁴ Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (London: Stationery Office, 2012).

⁵ [2013] EWHC 24 (Ch).

⁶ Including *McKennit v Ash* (*supra*); *Campbell v MGN Ltd* [2004] 2 AC 457; *In re S* [2005] 1 AC 593; *Sunday Times v The UK* (1979) 2 EHRR 245.

⁷ It is beyond the scope of this case note to evaluate the appropriateness of these criteria.

The Court in *Axel Springer* made it clear that a journalist's right of freedom of expression was subject to the proviso that the journalist is acting in good faith and on an accurate factual basis, providing 'reliable and precise' information in accordance with the ethics of journalism.

It was noted by Mann J. that the information published in this case was accurate – thus it would prove difficult for an action in defamation to succeed, as the BBC was aware.⁸ What was of significance here was the manner in which the information was obtained and published (paragraph 302).

In determining an invasion of privacy it is also necessary to consider other factors, beside those noted in *Axel Springer*. The Human Rights Act 1998 s.12(4)(b) should be noted, as it relates to the BBC's Editorial Guidelines which, according to the section of the Act, qualify as a 'relevant privacy code'. It was noted that the guidelines state that 'people in the public eye may, in some circumstances, have a lower legitimate expectation of privacy'. Mann J. had already ruled that this was not the case in the present circumstances.

Then there is the question of 'public interest' (paragraph 309) which, the guidelines noted, was not capable of clear definition. Mann J. ruled that the guidelines offered useful factors or examples for consideration, but were not determinative. That function was his alone. Mann J. concluded (paragraph 317) that:

The main point urged in favour of disclosure is the public interest point ... I acknowledge a very significant public interest in the fact of police investigation into historic sex abuse, including the fact that those investigations are pursued against those in public life. The public interest in identifying those persons does not, in my view, exist in this case. If I am wrong about that, it is not very weighty and is heavily outweighed by the seriousness of the invasion.

Thus, as in the *Campbell* case, the manner of the intrusion into privacy was seen as a more weighty matter than the question of whether there was an infringement; and, further, that the manner of invasion can outweigh matters of public interest.

⁸ Thus, while serious harm may be established under s.1 Defamation Act 2103, the defences of truth and honest opinion in ss.2 and 3 would be available.

A final point to note here is the question of ‘freedom of the press’. Counsel for the BBC had stressed the constitutional importance of this and suggested that any infringements on press freedom were rightly a matter for Parliament through legislation, not through the courts.⁹ Mann J. noted that if the position of the press was curtailed by virtue of Article 8, then this was due to the implementation of the Human Rights Act and not the approach of the courts.

Comment

It is to be noted that the recent case law on these issues has been prolific, with the courts being used to develop aspects of privacy law protection that were not afforded via legislation.¹⁰ In *Kaye v Robertson*¹¹ Glidewell L.J. stated clearly:

It is well known that in English law there is no right to privacy and accordingly there is no right of action for breach of a person’s privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.

The cases noted by Mann J. show a trend in favour of developing a tort of privacy, in the absence of legislative action. However, the development has been rather piecemeal and, while Mann J. is correct in utilising the current ‘balancing test’ for Article 8 and Article 10 rights, it does leave a number of issues to be determined when considering the tortious side of developments.

For example, at paragraph 262, Mann J. states that: ‘Article 8, *and the English tort which essentially gives effect to it*, include a right for respect to the home.’¹² Here the judge is noting the nature of laws of trespass and showing that these torts can provide for an element of privacy protection. However, it is confusing to see a general right to privacy being premised on such grounds. A clear flaw in the recent judicial pronouncements on privacy protections, whether they establish a tort or not, is the apparent

⁹ For media reaction to this, see <https://www.bbc.co.uk/news/uk-44870190> and <https://www.bbc.co.uk/news/uk-45199964> where the BBC and Society of Editors lament this aspect of the decision.

¹⁰ Notwithstanding the statements in the Younger Report of the Committee of Privacy (1972) which argued for appropriate legislation almost fifty years ago.

¹¹ [1991] FSR 62.

¹² My emphasis added in italics.

inconsistency, and often lack of any clear identification, of the parameters of the tort.

A number of basic questions arise when seeking to establish the nature of any new tortious action here – and these are things that the courts can do better in terms of assessing and defining. Or perhaps they ought to be placed within a statutory framework?

Thus, in tort law, one needs to identify a defendant. Human rights are actionable against a public body – would a new tort be so limited, or would it be available against anyone?

The nature of harm would need to be established – what is the harm for invasion of privacy? Given the difficulties in defining privacy itself, can we be clear as to what forms of harms are protected?¹³

What would be the basis of liability for such a tort – is it to be premised on intent, faulty or strict liability terms?

What are the likely remedies – while compensation may be available, are injunctions more appropriate?

What defences can be brought into play – if freedom of expression and public interest can be set aside in favour of the individual's right to privacy, where does this leave the investigating journalist and media outlets?

What is the impact of this new tort on the existence and scope of existing torts? In the present case CR was afforded damages which included damage to his reputation – where does that leave the tort of defamation? Notably here, an invasion of privacy may meet the requirements of truth and honest opinion which are clearly identified as defences to defamation. Invasions of property and trespass, as noted, can also be the basis of privacy protection – but would such torts, and others such as nuisance, be affected by the extension of a privacy tort?

There are also the areas of legal protection that may be afforded to persons where the (mis)use of information is concerned. Thus, Mann J.'s failure to consider the Data Protection Act 1998 aspects of the case may seem problematical. There are also the concurrent developments of the tort

¹³ On the definition of privacy, see, for example, S.D. Warren and L.D. Brandeis, 'The Right to Privacy', (1890) 4 *Harv LR* 193; R. Jordan, 'The Appropriate Balance Between Privacy and Freedom of Expression Under UK Law: Just Where Does It Lie When Considering the Actions of the Press?', (2016) 7 *QMLJ*, 16; D. Solove, "'I've Got Nothing to Hide" and Other Misunderstandings of Privacy', (2007) 44 *SDLR*, 745.

of misuse of private information to be considered.¹⁴ Allied to this are the established tort of breach of confidence, and the possible usage of the Computer Misuse Act 1990.

So, skirting around the issues to find compensation in specific cases does not suggest a structured and clear approach to the development of tortious protections. Perhaps, as with the legislative provisions that directly emanated from the celebrated case of *Donoghue v Stevenson*¹⁵ in the area of consumer protections, the courts may be at the start of the journey, while Parliament is waiting in the wings. The courts are adopting a rather piecemeal approach to developing tortious protection in this area. It may be that a legislative approach, as favoured by many commentators, is the correct road forward, if only to provide clear guidance on such basic questions.

While the courts are developing privacy protections, we may be left waiting for the next importance case to see how and where that protection is to be placed. However, it has been noted that:

It might be charitable to say that the common law of privacy in the UK is currently in a transitional state, but perhaps more brutally accurate to say that it is confused; an internally contradictory mess.¹⁶

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¹⁴ See *Campbell v MGN* (above) and *Cooper v Turrell* [2011] EWHC 3269 (QB).

¹⁵ [1932] AC 562.

¹⁶ L. Edwards, 'Switching Off the Surveillance Society', in S. Nouwt *et al.* (eds), *Reasonable Expectations of Privacy* (The Hague: TMC Asser Press, 2005), p. 108.

BOOK REVIEW

***Medical Law and Ethics* (7th ed.) by Jonathan Herring, Oxford University Press (2018)**

Paperback (641 pages + preface and index)

Dr Benjamin Andoh

This seventh edition of Jon Herring's *Medical Law and Ethics* is a much updated version of the sixth edition. It covers the following topics: Ethics and Medical Law; the Structure of the National Health Service and the Rationing of Healthcare Resources; Medical Negligence; Consent to Treatment; Confidentiality; Contraception, Abortion and Pregnancy; Reproduction; Organ Donation and the Ownership of Body Parts; Dying and Death; and, lastly, Mental Health Law. It is very nicely written, easy to understand and painstakingly thorough in its coverage of the various issues.

The first chapter is titled 'Ethics and Medical Law'. After noting the narrowness of the earlier definition of medical law as being in essence concerned with the relationship between healthcare professionals and patients, it states clearly that medical law comprises bits from different branches of the law such as criminal law, tort, human rights, contract, property law, public law and family law. It then shows the close connection between law and ethics and looks at the nature of illness, the scope of medicine, some health statistics, general ethical principles and the notion of rights (a rights-based approach to medical law, including relevant rights such as the right of autonomy and the right to dignity). Next to be focused on are patients' obligations and the approach known as 'principlism', which is a set of principles applicable to any bioethical issue, those principles being

respect for autonomy, non-maleficence, beneficence and justice. Various other aspects of ethics – for example, feminist medical ethics, care and ethics, and virtue ethics – are also looked at.

Chapter 2 first covers the structure of the National Health Service (NHS), which is ever-changing depending on the government of the day. Also covered is the issue of the rationing of healthcare resources, often referred to as the allocation of resources. Rationing is necessary in any government-funded enterprise or establishment, but it is also controversial. There is then a focus on policy-making and central planning in the NHS, quality control within the NHS, the commissioning and planning of services, the issue of charging supported by express legal provision/s, the main bodies providing care (for example, NHS Trusts and Foundation Trusts) and so forth. Among other things, the chapter also looks at how rationing occurs in the NHS today, the role of the National Institute for Health and Care Excellence (NICE), judicial review of decisions of resource allocation, how some patients try to use European law to support their cause (as happened in *R (on the application of Yvonne Watts) v (1) Bedford Primary Health Care Trust (2) Secretary of State for Health* [2003] EWHC 2184 (Admin)), and how the present system may be improved – a difficult question indeed. The author's treatment of this knotty area of medical law is deemed excellent.

Starting with an overview of the law and medical practice, chapter 3 moves on to consider the three requirements of negligence: duty of care, breach of duty and damage (causation as a matter of law, where the but-for test is used, and causation as a matter of fact, which requires that the damage must be reasonably foreseeable). Throughout the chapter the author very commendably discusses the impact of the leading cases, especially, those decided by the Supreme Court (formerly the House of Lords). Examples of such cases are *Bolitho v City and Hackney Health Authority* [1988] AC 232, *Chester v Afshar* [2004] UKHL 41, and *Montgomery v Lanarkshire Health Board* [2015] UKSC 11. The chapter then looks at NHS Redress Act 2006 which deals with claims of up to £20000 and offers alternatives to litigation that can be costly and lengthy. The no-fault compensation scheme in New Zealand is also considered.

The very important topic of consent to treatment, without which any treatment may be a crime or a tort (trespass to the person), is considered in chapter 4. Here the position of adults capable of consenting (that is, those who have 'capacity', as defined by the Mental Capacity Act 2005) and those

not so capable is focused on. Also looked at are the position of children who can consent and those who cannot, and the reasons why, the notion of autonomy of patients, when a patient can be treated without consent, the advance directive (which may loosely be defined as a decision made by a competent adult that he should not be given a particular treatment if he later becomes ill), and various ethical issues surrounding it. Again there is a rich presentation of the case law (for example, *Montgomery v Lanarkshire Health Board* [2015] UKSC 11) and a comprehensive coverage of the topic at hand.

Chapter 5 deals with confidentiality. A brilliant introduction identifies two opposing pillars, namely: (a) the idea of a doctor's non-disclosure of a patient's sensitive information is deeply embedded, being in accordance with the Hippocratic Oath; and (b) modern healthcare systems would not work without one doctor being able to divulge medical information about patients to other medical professionals. The chapter then goes on to consider the legal basis of confidentiality (noting *Campbell v MGM Ltd* [2004] UKHL 22), the denial or breach of confidentiality at common law (for example, where there is consent) and under general and special statutory provisions (for example, the Human Rights Act 1998 and the Public Health (Control of Disease) Act 1984), and some problem areas relating to confidentiality (for example, giving genetic information to relatives, to insurance companies, etc.). Not overlooked by the chapter are how statutory provisions allow access to medical records, the legal remedies available in cases involving confidentiality, and the arguments for and against confidentiality.

In chapter 6, before looking at the ultra-controversial topic of abortion, the chapter deals with contraception, noting its use and common forms, the question of its reliability, its availability, the distinction between contraception and abortion, children and contraception, and the law on the sterilisation of persons who do not have capacity (a topic in which the best interests of the patient is a very important consideration). Next, the chapter considers tortious liability and contraception, and other ethical issues that concern contraception, where feminist perspectives and religious are discussed. On abortion, which the author rightly identifies as one of the most controversial issues today, the various forms are noted and some statistics are presented before an in-depth discussion of the law thereon. The criminal law is the starting point here: without a common law or statutory defence, abortion is a crime. The regulation of abortion by the Abortion Act 1967 is fully discussed, as well as the involvement of non-doctors (for example,

nurses) in abortions and conscientious objection to abortion (clarified by s.4, Abortion Act 1967, and the Supreme Court's decision in *Greater Glasgow Health Board v Dougan* [2014] UKSC 68, an account of which is given in the chapter). Also looked at are actions by husbands or men partly responsible for the pregnancy to prevent abortion, abortion and adults without capacity, minors and abortion, whether there is a right to have an abortion, the legal position of the foetus and the ethical issues surrounding the question of when life begins, and very or particularly controversial abortions (for example, late abortions, abortion and disability, and abortion and sex selection, etc.).

The introduction to chapter 7, which is on reproduction, is stimulating because it posits some eye-catching headlines (for example, '21-year-old fathers seventh child'). First looked at are infertility, reproductive autonomy (and the case for and against it), a critique of assisted reproduction, the various techniques of assisted reproduction and regulation of it by the Human Fertilisation and Embryology (HFE) Act 1990, problems concerning access to assisted reproduction (financial restrictions, the welfare of the child, etc.), the complex question of parentage (that is, the child's mother and/or father), and how children born using donated sperm/gamete can discover the identity of the donor. Also discussed are surrogacy and the arguments for and against it, the issue of pre-implantation genetic screening (selecting which embryo/s to implant into a woman and the reasons for that), cloning and its regulation by statute (the Human Fertilisation and Embryology Act 2008), and, lastly, genetic enhancement and eugenics (the manipulation of an embryo's genetic make-up before it is implanted). Again, as in the earlier chapters on controversial issues, a feminist perspective is presented.

Chapter 8, titled 'Organ Donation and the Ownership of Body Parts', is fraught with ethical issues and controversies. The author first notes the scandals at Bristol Infirmary and the Royal Liverpool Children's Hospital in 1999/2000 (regarding the retention of body parts and organs of dead children without their parents' consent, etc.), following which the Human Tissue Act 2004 was passed. The Act was aimed at providing a clear and consistent statutory framework for the donation of whole bodies and the removal, storage and use of human organs and tissue. The Act also covers who can give consent for the storage and use of bodily material. Part 2 of it established the Human Tissue Authority to, inter alia, provide a licence for various activities relating to human tissue. Thus, to conduct such activities without a licence is an offence and a licence may be revoked for violation

of its terms. Other criminal offences were also created by the Act. The author notes the limitations of the Act and comments on that extensively. The chapter goes on to look at organ transplantation and donation of organs by persons alive, organ transplants from dead persons, xenotransplantation (transplanting the organs of one species into another species), the sale of organs, and the law relating to the living body as property. Again the various ethical issues are not excluded.

In chapter 9, which covers dying and death, the controversy continues and so does the ethical debate. Should there be a right to die when a person did not create himself or herself in the first place? Should there be a right to help someone to die at his/her own request or to save him/her from further suffering? These are some of the issues discussed in this chapter. It starts with the definition of death, legally and otherwise, the criminal offences relating to death, and a thorough discussion of the right to die. Euthanasia (mercy killing) and its link with the right to die and notions of autonomy and the sanctity of life are also comprehensively looked at. Reform of the present law is, in addition, duly considered. Again, throughout the chapter, relevant ethical issues are discussed and an account is given of the key cases (decided by the Supreme Court, etc.).

The final chapter is devoted to mental health law. After the introduction, where, among other things, the author notes correctly that the vast majority of mental illness is treated voluntarily (that is, without formality of any sort) in the community, some statistics are presented, followed by an analysis of the Mental Health Act 1983, as amended. Involuntary admission to hospital in its various forms (under sections 2, 3 and 4, Mental Health Act 1983), as well as keeping voluntary/informal patients in hospital under section 5(2) and (4), Mental Health Act 1983, are looked at as well. Next, the treatment of compulsory involuntary patients, the issue of consent to treatment, guardianship, the treatment of informal/voluntary patients in hospital, the Code of Practice 2008 (drawn up after the Mental Health Act 2007), the discharge of patients from hospital, care in the community, community treatment orders, and the issue of law reform are all considered. In addition, various key cases are presented and the important matter of human rights, as well as other issues including problems in mental health practice, are all included in the discussion.

As already mentioned, this seventh edition presents a very good coverage of the gamut of medical law and discusses various socio-political, philosophical and other contexts surrounding the law. The questions and

further reading at chapter endings will foster deep learning, in contrast with surface learning, by students. Moreover, permeating the work are various boxes (covering key cases, European angles, feminist perspectives, reality checks, public opinion, topics to ponder, etc.), aimed at helping the reader to grasp the wide range of opinion as well as understand some of the main debates and tensions in medical law and ethics. To complement all this, there is a comprehensive bibliography that is available online.

Overall, the author has done a very good job of producing such an excellent text on this fast-growing area of law. Without reservation, I recommend it to academics, practitioners, students and other readers with an interest in medical law.

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NOTES FOR CONTRIBUTORS

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