

Max Mosley's win against The News of the World ***The end of investigative journalism, or business as usual?***

The judge who decided *Max Mosley v News Group Newspapers Limited* [2008] EWHC 1777 went out of the way to note that there is nothing “landmark” about the decision. Elements of the media in the UK have nevertheless decried the decision as importing European law to attack British freedoms and marking the end of investigative journalism. This note summarises the case and discusses its true significance.

The News of the World's exclusive “Nazi Orgy” publication

Max Mosley is the President of the Fédération Internationale de l'Automobile, known as the FIA, the organisation responsible for operating Formula 1 motor racing. On 30 May 2008 the News of the World newspaper published a front page story headed “F1 BOSS HAS SICK NAZI ORGY WITH 5 HOOKERS”, with the subheading “Son of Hitler-loving fascist in sex shame”.

The story continued on the front page with “Formula One motor racing chief Max Mosley is today exposed as a secret sado-masochist sex pervert. The son of infamous British wartime fascist leader Oswald Mosley is filmed romping with five hookers at a depraved NAZI-STYLE orgy in a torture dungeon. Mosley...barks ORDERS in GERMAN as he lashes girls wearing mock DEATH CAMP uniforms and enjoys being whipped until he BLEEDS.” Inside the story continued with passages such as “Evil father was a Hitler wannabe”, and references to “beating”, “punishment”, “torture”, “Auschwitz” and “Nazi uniforms”. Various photographs were displayed along with captions (eg “SO SICK In the midst of one beating, a panting Mosley watches one hooker take off her Nazi uniform”; and “SINISTER Hooker in mock death camp clothes is gagged”).

A red star on the page drew attention to the fact that video footage of the event (“the shocking video”) could be viewed on the newspaper's website, which it was, hundreds of thousands of times.

The source of the published information

The newspaper had obtained the material on which it based the story from one of the women (“Woman E”) who took part in the event. The newspaper had spoken to her and her husband beforehand, and had fitted a hidden camera into the military jacket that she planned to wear at the private event. It was still images taken covertly with that camera that were subsequently published in the newspaper (with private parts discreetly blanked out, in one instance by a chequered flag); and video clips taken by that camera that were published on the newspaper's website.

Mr Mosley's claim

Mr Mosley sued the publisher of the newspaper for breach of confidence and/or unauthorised disclosure of personal information, said to infringe his rights of privacy as protected by Article 8 of the European Convention on Human Rights and Fundamental Freedoms (“the Convention”).

In order to provide a remedy for breaches of privacy the Courts in the UK historically extrapolated from traditional equitable principles concerning breaches of confidence and the protection of confidential information in order to arrive at a cause of action now commonly described as infringement or breach of privacy. Because of its historical genesis in actions for breach of confidence, UK privacy decisions have had to consider whether the particular circumstances of the case give rise to an enforceable duty of confidence, which in turn has tended to involve contrived and artificial findings to satisfy that requirement. (New Zealand readers should keep in mind that a different approach has been adopted in

New Zealand, involving the recognition by the Court of Appeal in the *Hosking* case of the existence of a separate tort of breach of privacy). More recently as a result of the Human Rights Act 1998 the UK Courts have been concerned in this area with the balancing of competing Convention rights; in this case the right in Article 8 to respect for private life, and the right in Article 10 to freedom of expression.

Mr Mosley contended that the content of the published material was inherently private in nature, consisting as it did of the portrayal of sado-masochistic acts and also some sexual activities. Because of the way (referred to above) in which such claims have traditionally been founded in the UK, Mr Mosley also contended that there had been a pre-existing relationship of confidentiality between the participants (by reason of an “unwritten rule” in “the scene” that people are trusted not to reveal what has gone on); that Woman E had breached that trust; and that the journalist concerned must have known that she was doing so. The Judge noted that the claim was accordingly partly founded on old-fashioned breach of confidence by way of conduct inconsistent with a pre-existing relationship. He then went on to refer to the “new methodology” prompted by the Human Rights Act 1998 (UK) and the Convention, and in particular Articles 8 and 10. This new methodology is to determine whether there was a reasonable expectation of privacy; and if so to weigh the relevant competing Convention rights in light of an “intense focus” on the facts of the individual case, and in particular whether some countervailing consideration of public interest justified any intrusion that had taken place. The judge noted that this balancing test turns to a large extent upon proportionality, ie whether the intrusion was proportionate to the public interest being served by it.

It is interesting to compare this new methodology with the New Zealand approach. The first step is essentially the same (ie to consider whether there is a “reasonable expectation of privacy”). The second step however remains quite different – in New Zealand the question is whether publicity given to those facts would be considered “highly offensive” (or perhaps substantially offensive – the judges in *Hosking* were not consistent on the appropriate test) to an objective reasonable person. In the UK the public interest is a matter to be weighed in deciding whether there has been a breach of privacy. In New Zealand there is a public interest defence if there is a legitimate public concern in the information; and the Court of Appeal has indicated that the limits imposed on free speech by a privacy tort must not exceed those justified in a free and democratic society (echoing s.5 of the New Zealand Bill of Rights Act 1990).

The newspaper’s defence

The newspaper argued that Mr Mosley had no reasonable expectation of privacy in relation to the information, photographs and video material; and alternatively that Mr Mosley’s right to privacy was outweighed by a greater public interest in disclosure, and that the newspaper’s right to freedom of expression should prevail. The “public interest” argument began on the basis that the public had an interest in knowing that the events involved Nazi or concentration camp role play; but shifted to include a contention that what took place was partly illegal, based on arguments that offences such as assault and brothel keeping had taken place.

The finding of breach of privacy

The judge considered together the questions whether there was a reasonable expectation of privacy or a duty of confidence (ie the new and the traditional approaches), and decided that Woman E had committed an “old fashioned breach of confidence” as well as a violation of the Article 8 rights of all those involved.

The failure of the public interest defence

The question then turned to whether there was a public interest to justify the intrusion. The judge found that if it were the case that Mr Mosley had for entertainment and sexual gratification been mocking the way in which Jews were treated or parodying Holocaust horrors there could have been a public interest

in that being revealed at least to those in the FIA to whom he was responsible, as it would call seriously into question his suitability for his FIA role.

The principal factual matter in dispute was whether the event did in fact have a “Nazi” theme. While it had certain German and military elements the judge found that there was nothing specific to the Nazi period or concentration camps about those matters; nor was there any “mocking” of the victims as had been suggested in the publication. Explanations for the German elements were given which were not specifically Nazi (eg “Woman D” gave evidence that she was turned on by the thought of being interrogated while she was in a submissive role by people using a foreign language which she did not understand). Having found that the “Nazi” and “mocking” allegations had not been substantiated, the judge was unable to identify any legitimate public interest to justify either the intrusion of secret filming or the subsequent publication.

The judge then considered and rejected on the facts the other public interest arguments based on alleged commission of crimes and brothel keeping. He also considered whether sado-masochistic and other admitted aspects of the event could in themselves be matters of legitimate public interest, and essentially concluded that it is not for individual judges to make moral judgments, and that where the law is not breached the private conduct of adults is essentially “no-one else’s business”.

The judge confirmed that it is for the Court to decide whether a particular publication was in the public interest, but gave consideration to the extent to which the contrary professional judgment of the editor or journalist was relevant, and noted that there may be scope for paying regard to the concept of “responsible journalism”, by analogy with the law of defamation, and the guidelines outlined in the *Reynolds* case. (New Zealand readers should note that New Zealand Courts have taken a different course in relation to the “Reynolds” defence of responsible journalism, which is available in the UK but is not – at least on the basis of current authority – available in New Zealand. That is not however to say that it would not be appropriate to take similar responsible journalism guidelines into account in New Zealand when considering the scope of a public interest defence to an action for breach of privacy.) The judge considered the events leading up to publication, including in particular the fact that the material had not been properly checked for Nazi content and the spoken German had not even been translated, and concluded that the view taken by the journalist and editor that there was a “Nazi element” had been casual and cavalier, which would have ruled out any responsible journalism defence.

Obiter comments on photographs taken in public places

In an interesting aside, the judge commented on the difficulties involved in satisfying the high test necessary to justify infringements of a person’s Article 8 rights, and noted that it had yet to be determined how far the doctrine would be taken in the UK courts in relation to photography in public places (“If taken literally, it would mean a very significant change in what is permitted. It would have a profound effect on the tabloid and celebrity culture to which we have become accustomed in recent years”). In New Zealand the question of photographs taken in public places was considered *Hosking*, and it will not generally be considered a breach of privacy in New Zealand to photograph someone in a public place (although there will still be some limits in New Zealand on the extent to which film taken in a public place may be published – eg the *Andrews* decision, in which footage taken of a roadside accident included communications of a private and intimate nature between the plaintiffs in respect of which there was held to be a reasonable expectation of privacy).

Whether exemplary damages are available for infringement of privacy

The judge had to consider whether exemplary damages might be available in claims for infringement of privacy, and followed various judicial statements to the effect that the availability of exemplary damages ought not to be further extended, in particular because such an extension would fail the tests of necessity and proportionality.

The approach taken to compensatory damages

The judge who decided the *Mosley* case was Mr Justice Eady, a recognised authority and arguably pre-eminent judge in the field of defamation. He noted several times in the judgment that Mosley's claim was not a libel claim. One of the consequences of this was that the case was not directly concerned with compensating for injury to, or vindicating, reputation; but was to protect such matters as "personal dignity, autonomy and integrity" (although it should be noted in this regard that "integrity" comes close to being a reputational issue). In New Zealand, the Court of Appeal has said that the harm protected by the tort of breach of privacy is humiliation and distress.

The judge was concerned to ensure that any damages awarded were proportionate and not open to criticism of arbitrariness, and accordingly considered by analogy damages awarded in personal injury cases (a comparison that could not be directly made in New Zealand by reason of the Accident Compensation scheme, which might therefore necessitate a different and not so useful analogy with accident compensation payments), and also by comparison with the tariff applied over the last 10 years so far as defamation awards are concerned (which is a potentially problematic comparison for reasons discussed later below). At one point in the discussion the judge referred to "the right to dignity" protected by Article 8, which seems to be an extrapolated description (possibly based on European jurisprudence) of the actual right protected by Article 8 (ie "Everyone has the right to respect for his private and family life, his home and his correspondence", there being no express reference to "dignity").

The judge noted that it may be appropriate that a claimant's conduct be taken into account, in that it is part and parcel of human dignity that one must take at least some responsibility for one's own actions, but he did not appear to consider that to be a factor in this case. The judge also rejected the suggestion that damages should be increased in order to have a deterrent effect.

While recognising that no amount of damages could fully compensate Mr Mosley for the damage done, he awarded damages of £60,000, to acknowledge the infringement, and to compensate ("to some extent") for the injury to feelings, embarrassment and distress caused.

A possible further claim in defamation

In a fascinating postscript, Mr Mosley has since apparently indicated that he now intends to bring a further action against the publisher of the newspaper for defamation. That is possible because there has been no ruling between the parties on that issue, and because the Court stressed that the damages awarded in this case were not compensating Mr Mosley for damage to his reputation. The fact however that Mr Mosley has been compensated in his privacy action for the injury to his feelings, embarrassment and distress, by analogy with the tariff applied in defamation awards, will nevertheless raise interesting damages issues in any future defamation claim; as will the fact that his reputation has to a great extent now been vindicated in the privacy action, by the Court's finding that there was no factual basis for the "Nazi" or "mocking" allegations made against him.

As they concern different wrongs, and should compensate for different damage, it will be necessary for Courts to guard carefully against the possibility of double-recovery if claimants are to adopt the practice of bringing separate proceedings for infringement of privacy and defamation.

The significance of the decision and key matters to note

Elements of the media in the UK have decried the decision as importing European law to attack British freedoms, and marking the end of investigative journalism. The judge however went out of the way at the end of his judgment to note that there is nothing "landmark" about the decision and that it is simply the application to rather unusual facts of recently developed but established principles. The Human

Rights Act 1998 (UK) required the UK courts to acknowledge and apply the values protected by the Convention, which is what this and earlier cases have accordingly done.

It is clear that this case would still have succeeded if the Court had merely been applying the traditional breach of confidence law – the judge held that Woman E had committed an “old fashioned breach of confidence”.

The newspaper lost as it was not able to make out any public interest defence, essentially because its publication was centred around serious and sensationalist allegations of “Nazi” and “mocking” conduct which it was then unable to substantiate and which it had not sufficiently carefully checked before publication. The newspaper’s judgment that these elements existed had been “casual” and “cavalier”.

The decision does not therefore mark the end of responsible investigative journalism. The judge would have been prepared to find that there was a proper public interest involved if Mr Mosley had in fact been behaving as the newspaper had suggested, ie if the “Nazi” and “mocking” allegations had actually been true. In his conclusion the judge commented that it could not seriously be suggested that the case is likely to inhibit serious investigative journalism into crime or wrongdoing “where the public interest is more genuinely engaged”. The judge himself expressed a degree of concern about the potential impact of Convention rights on the ability of the media to publish photographs taken in a public place; but that is unlikely to be as great an issue in New Zealand by reason of the *Hosking* decision.

Key matters for the media to take from the decision are:

1. Careful judgments need to be made both at the initial stage of carrying out intrusions into the private lives of individuals, and at the later stage of publication, regarding whether there is a reasonable expectation of privacy, and if so whether there is a genuine public interest such as to justify the intrusion and the publication.
2. The decision is helpful regarding the kinds of matters which may or may not be of genuine public interest. There is no public interest in sexual conduct or personal relationships as such; but public interest defences should be able to be raised for investigations into crime or wrongdoing, or publication of information which makes a contribution to a debate of general interest.
3. What is published needs to be carefully checked for accuracy (“No public interest is served by publishing or communicating misinformation”).
4. The extent of any publication also needs to be justified by the public interest (note for example that even if the “Nazi” elements had been established in this case it may not have been proper for the defendant to have published them as prominently and sensationally as it did, including on its website, as opposed to bringing them to the attention of the FIA).
5. The Court was critical of some of the conduct of the relevant journalist, who had appeared to threaten the other women concerned that unless they co-operated by allowing him to interview them for a follow up article (albeit in exchange for money) their identities would be revealed in the newspaper the following week, which the judge noted could amount to blackmail.
6. In New Zealand, it will be necessary to consider whether the publicity would be considered highly (or perhaps substantially) offensive to an objective reasonable person.

For responsible investigative journalists this should all largely be business as usual.

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