

Notes for RNZ slot from Ursula Cheer (Associate Professor) Canterbury University, 12 October 2011

1. Today I am going to talk about the recent Rio Ferdinand decision, a privacy case from the High Court in the UK. This is the latest in a line of cases involving footballers wanting to prevent publication of or seeking damages for newspaper kiss and tell stories, usually about their adultery of some kind. Ho hum. The reason I want to talk about it is that it seems to revive an earlier judicial approach which accepted that footballers are role-models and therefore there is public interest in their every activity, including tedious adulterous affairs. I think breathing life into this approach is not a good idea.
2. In *Ferdinand*, the well know footballer complained that the *Sunday Mirror* published an article under the headline "My Affair with England Captain Rio" and a very similar article also appeared on the website www.mirror.co.uk in April 2010. The stories were about Mr Ferdinand and a Ms Carly Storey whom he had met in 1996 or so when they were both teenagers. The two had an on again off again relationship which was sexual but later involved mostly text messages by early 2010. They did not meet again. On 5th February 2010 Ferdinand was appointed captain of the England football team. Immediately after, Ms Storey sent him a text about the appointment. He sent her a short response the same day. There was no further contact between them.
3. The story which was published shortly afterwards was about this on-off affair, and was illustrated by an old photo showing the two of them in a hotel bedroom, fully clothed and not even engaging with each other, with Mr Ferdinand speaking on a mobile phone. The article also used extracts from texts sent between the couple. So this was an article about an old relationship which was published after Ms Storey had taken on the services of Max Clifford, the well known publicist. As the judge said, it was a "kiss and paid for telling" story.

4. Unfortunately for Ferdinand, he had a wild past, involving other women, a missed drugs test and a sex tape. But when his girlfriend, a Ms Ellison, had become pregnant, Ferdinand made moves to change his ways. Part of this plan was to get his agent to set up an interview with the *News of the World* in which he confessed past mistakes. He contrasted his past behaviour with where he was in the present - older, more mature, and, critically, in a stable family relationship with Ms Ellison. The article was accompanied by a picture of the two of them together. She was heavily pregnant and he was cradling her 'bump'. The picture reinforced the message of the article: Rio Ferdinand is now a family man and has given up the ways of his past including 'cheating' on Ms Ellison.

5. To return to the present, Mr Ferdinand won the first part of his privacy claim in that the judge accepted he had a reasonable expectation of privacy in the information in the article, even the photograph which apparently showed nothing untoward but was taken in a private place. The judge accepted that the matter of sexual relationships is at the core of privacy although information like this will not automatically be seen as private.

6. However, Mr Ferdinand's case came apart in relation to the matter of public interest in the information. Because Ferdinand had projected an image of himself as a reformed man, and that image persisted, the judge held there was a public interest in demonstrating that the image was false. This is consistent with the Naomi Campbell case where the *Mirror* had been able to publish the fact that Ms Campbell was a drug addict because she had denied this in the past and the *Mirror* was entitled to put the record straight. I think that approach is right. There is indeed public interest in knowing of the hypocritical behaviour of public figures.

7. However, Justice Nicol also thought a further factor in the public interest case was Ferdinand's appointment as captain of England, first, on a temporary basis, in March 2008 and then in replacement of John Terry in February 2010. This is where the role model idea was revived. It had been raised previously, in a case called *A v B* which involved the adultery of a footballer. There, Lord Woolf CJ spoke of a public figure who:

"may hold a position where higher standards can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely will that be the position. Whether you have courted publicity or not, you may be a legitimate subject of public attention. If you have courted public attention then you have less ground to object to the intrusion which follows. In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information."

8. So the court in Ferdinand endorsed the position in the *A v B* case that footballers are role models and undesirable behaviour on their part can set an unfortunate example. Mr Justice Nicol then went on to talk all sorts of nonsense about how Ferdinand voluntarily assumed the role of England captain, a job that carried with it an expectation of high standards. He quoted the Chief Executive of the Football Association, and the Sports Minister, Gerry Sutcliffe, speaking of John Terry, the previous England captain who had also been in difficulties over infidelities, and who had also lost a privacy case:

"On the field John Terry is a fantastic player and a good England captain, but to be captain of England you have got to have wider responsibilities for the country, and clearly if these allegations are proven - and at the moment they are only allegations - then it does call into question his role as England captain."

9. However, in another case involving a claim by the chief executive of the Royal Bank of Scotland (which collapsed as part of the recent financial crisis in the UK) Sir Frederick Goodwin, another judge, Justice Tugendhat said Goodwin was an exceptionally forceful business man and hence a true public figure, which was different from sportsmen and celebrities in the world of entertainment. This would suggest that footballers are not true public figures. But in *Ferdinand*, Nicol J rejected this approach and concluded that many would indeed see the captain, at least, of the England football team, as a role model.

10. The problem with such an approach is that the notion of a role model is almost impossible to define and requires judges to moralise rather than make judgments involving the balancing of rights. So in *Ferdinand*, you can see the judge tying himself in knots trying to work out just how important or what sort of role model the Captain of the England football team is. He even jokingly notes that during the course of the hearing he actually asked the parties whether it was incumbent on him to decide whether Ferdinand *was* fit to be England captain and said thankfully, they agreed that it was not. He eventually sidestepped the difficulties by deciding the issue was whether the Sunday Mirror article reasonably contributed to a debate as to Ferdinand's suitability for that role, which just assumes in a circular way, that footballers are role models and therefore there is public interest in the matter.

11. So Ferdinand lost his claim at the end of the day, because the disclosure of details of an ancient affair demonstrated that he was not the good role model he was required to be as captain of the England football team.

12. What is the relevance of this for New Zealand? Well, I've always argued the role model idea should not take hold, here or anywhere. Listeners will probably recall that there is a tort of privacy in NZ. Our leading case is

Hosking v Runting which held that for a plaintiff to succeed in an action for invasion of privacy, you need to show:

(1) Facts in respect of which there is a reasonable expectation of privacy [private facts]; and

(2) Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

There is a public interest defence, as in the UK, described as a legitimate public concern in the information.

13. In a NZ case called *Andrews*, the High Court accepted that the morality and behaviour of the plaintiff can be taken into account, with appropriate varying effects on any reasonable expectation of privacy, even to the extent of its total destruction. So the role model idea, if adopted, could be used to determine whether or not you actually have a right of privacy to begin with. I have always argued against that idea, because I think that blameworthy behaviour by the plaintiff should only have impact on any public interest defence, and then only if it is actually relevant. I use the example of the *Peck* case, where a suicidal man was caught on CCTV on a public street late at night having tried to commit suicide, with a knife in his hand. He is the kind of person, very vulnerable, who might have a privacy interest in public. But suppose because he was disturbed, he had also damaged property, or threatened someone. Although that is culpable behaviour, it would be unjust for him to lose privacy rights because of this behaviour.

14. Now, in *Ferdinand*, the judge in fact took the same position as me - he accepted that the question of role model behaviour was only relevant in relation to the question of whether the defendant can successfully argue that publication is in the public interest. But I would like the issue of role models to be laid to rest completely and not used at all, even in this respect. I think we might be quite sceptical about the concept in NZ in any event. You may remember in the *Weatherston* appeal I discussed recently, the Court of Appeal expressed the somewhat cynical view that there are today few, if any, "authority figures" whose views are unquestionably followed by anyone in NZ, when talking about who might

influence juries! So perhaps we would say that even All Blacks are not role models.

15. The problem with this concept is that it allows judges to moralise. That is not their job any longer, as was recognised in the *Max Mosley* case where Justice Eady recognised that extreme sexual behaviour carried on in private is nobody's business so long as it is consensual and no major criminal activity is involved. And if judges can't moralise, then I don't think media should do so either, though Paul Dacre would not agree, I'm sure.

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