PJS V NEWS GROUP NEWSPAPERS LTD, CONFIDENTIALITY AND INTRUSION: BUILDING STORM DEFENCES RATHER THAN TRYING TO HOLD BACK THE TIDE

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Abstract: This case note discusses the intrusion-based approach to the tort of misuse of private information adopted by the Supreme Court in *PJS v News Group Newspapers Ltd*. It argues that the approach avoids the "King Canute" criticism of privacy injunctions based on confidentiality or secrecy in favour of a more geographically modest remedy, building storm defences rather than attempting to hold back the tide. In doing so, it abandons an abstract notion of information in the "public domain" in favour of more concrete notions of harm caused by the misuse of private information and should be welcomed.

The image of King Canute trying to hold back the tide is a popular one used to critique attempts by national courts to restrain the publication of private information in the face of a global and online media. The truth, or at least the allegation, will out. The issue is certainly not a new one. The futility of an injunction in England and Wales, given extensive publication out of the jurisdiction, played a key role in the Spycatcher litigation in the late 1980s. Such futility is a feature of confidentiality or secrecy: the tide of information cannot be held back in an information age. In *PJS v News Group Newspapers* [2016] UKSC 26, the Supreme Court, endorsing an approach developed by the High Court in several earlier authorities, distinguished between protecting confidentiality and preventing intrusion as twin rationales for the tort of misuse of private information. The intrusion of a pending media storm in the jurisdiction, repeating allegations already widely available, was a further misuse of private information and could usefully be restrained in England and Wales. Even where confidentiality had already been lost, privacy injunctions could continue to play a useful role as a defence against the significant additional intrusion, at least where it could be practicably restrained, and the pending media storm which would accompany a lifting of the injunction represented one such case.

The defendant made an application to set aside an interim injunction restraining the publication of details of alleged extra-marital sexual activities between the claimant and another couple. The claimant and his partner were well-known in entertainment and had two young children. He had successfully obtained an interim injunction in January 2016. However, by April 2016 the details had been published in print and online media by news organisations in the USA, Canada and Scotland and were also widely available on social media. The defendant argued that the injunction now served no further useful purpose and was an unjustified interference with the defendant's Article 10 ECHR rights. The relevant private information was now in the public domain.

The majority of the Supreme Court distinguished between the protection of confidentiality and the prevention of intrusion. Lord Neuberger commented that had confidentiality or secrecy been the basis of the case, then an application for an injunction "would have substantial difficulties" (paragraph 57). However, he distinguished confidentiality from intrusion and held that "claims based on respect for privacy and family life do not depend on confidentiality (or secrecy) alone" (paragraph 58). Lord Mance held

that the repetition of private information was "capable of constituting a further tort of invasion of privacy, even in relation to persons to whom disclosure or publication was previously made" (paragraph 32).

The Supreme Court endorsed the approach developed by the High Court in a number of authorities emphasising the role of intrusion in the "repetition of known facts" (*JIH v News Group Newspapers Ltd* [2010] EMLR 9, paragraph 59, per Tugendhat J). Lord Mance, at paragraph 29, endorsed paragraphs 23 to 26 of Eady J.'s judgment in *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB), in which he said that "the modern law of privacy is not concerned solely with information or 'secrets': it is also concerned importantly with intrusion… so long as the court is in a position to prevent *some* of that intrusion and distress, depending on the individual circumstances, it may be appropriate to maintain that degree of protection". Similarly, Lord Mance quoted with approval Tugendhat J. in *CTB v News Group Newspapers Ltd* [2011] EWHC 1334 (QB), at paragraph 3, where he said "if the purpose of this injunction were to preserve a secret, it would have failed its purpose. But in so far as its purpose is to prevent intrusion or harassment, it has not failed". MacDonald J. had also approved of these comments in *H v A (No 2)* [2016] 1 FCR 338, paragraph 47. Lord Neuberger also referred to a range of High Court decisions concerning intrusion to demonstrate a "clear, principled and consistent approach at first instance" by "highly respected" judges who were mainly "highly experienced in media law and practice" (paragraphs 58 to 60). He also endorsed their approach.

I argue that placing emphasis on the role of the tort of misuse of private information and privacy injunctions in preventing intrusion into private life has two important and desirable effects and should be welcomed.

First, the endorsement by the Supreme Court of a broadening of the purpose of the tort of misuse of private information beyond confidentiality or secrecy to intrusion secures a more modest but realistic remedy. Privacy injunctions are only enforceable within the jurisdiction. A focus on intrusion within the jurisdiction results in a more realistic treatment than attempts to limit global disclosure which are not backed by adequate enforcement mechanisms. A focus on intrusion avoids the "King Canute" criticism by focusing on a more achievable objective. The majority held that the injunction would continue to serve a useful purpose in preventing the further intrusion that would result from the "media storm" that would otherwise follow in *England and Wales* (paragraph 35). It therefore sought to relieve the claimant of intrusion only within the jurisdiction, to the extent it could, in particular by focussing on print media and online publishers based in England and Wales. The Court also recognised that an injunction would not stem the flow of information forever, even to the claimant's children (paragraph 9). Recognising the value of a local respite, the more modest remedy, is a positive development.

Secondly, a shift from confidentiality or secrecy to intrusion permitted the court to move from a rather abstract notion of the "public domain" to a more concrete notion of the harms that disclosure in a particular location and medium would do to the claimant and his family.

The majority's adoption of an intrusion-based approach allowed it to focus in a concrete manner on the harm that the claimant and his family might suffer. Lord Mance pointed to the "further unrestricted and extensive coverage in hard copy as well as other media in England and Wales" (paragraph 1) that would result from setting aside the injunction. He added that it would "add extensively, and in a qualitatively different medium" (paragraph 1) to the invasion of privacy suffered by the claimant and his family. Lord Mance considered

that “open hard copy exposure, as well no doubt as further internet exposure, is likely to add significantly to the overall intrusiveness and distress involved” (paragraph 25). There was a “qualitative difference in intrusiveness and distress likely to be involved” (paragraph 35). For Lord Mance a national print “media storm” would “add a different and in some respects more enduring dimension to the existing invasions of privacy being perpetrated in the internet” (paragraph 45).

Lord Neuberger took a similar view of the difference between internet dissemination and national print media:

> It is one thing for what should be private information to be unlawfully disseminated: it is quite another for that information to be recorded in eye-catching headlines and sensational terms in a national newspaper, or to be freely available on search engines in this jurisdiction to anyone searching for PJS or YMA, or indeed AB, by name in a different connection. (paragraph 68)

For Lord Neuberger “the perception that a story in a newspaper has greater influence, credibility and reach, as well greater potential for intrusion, than the same story on the internet” (paragraph 69) was an important consideration.

By contrast for Lord Toulson in dissent, the fact that confidentiality had been lost was decisive as “the court needs to be very cautious about granting an injunction preventing publication of what is widely known, if it is not to lose public respect for the law by giving the appearance of being out of touch with reality” (paragraph 88). For Lord Toulson, the “world of public information is interactive and indivisible” (paragraph 89).

The judgments highlight the conceptual differences underlying the intrusion and confidentiality approaches. For the focus on confidentiality, the “public domain” is global, interconnected and abstract. Information is either “out there” or it is not and once it is “out there” it is futile to attempt to intervene. This encourages an all or nothing approach to injunctions. Intrusion focusses on the local and concrete harm to the claimant at a particular time. It is more sensitive to where, when and how that repetition occurs and the harm it entails to the particular claimant. This encourages a more nuanced and sensitive approach.

Although privacy injunctions may not be able to hold back the tide, they can provide defences to provide time and space, free from the intrusion of a media storm, for private and family life. Rather than fear that public respect for the law will be weakened, this modest but realistic remedy aimed at concrete relief should do much to strengthen respect for the law.

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