

# SCRIPT-ed

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## **United Kingdom Privacy Update 2003**

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## 1. Introduction

It is perhaps little wonder that the courts in and the government of the United Kingdom (UK) have thus far refused to take up the privacy baton. A wide variety of circumstances can be regarded as impinging on private matters.

UK legislation such as the Regulation of Investigatory Powers Act, 2000 (RIPA), the Data Protection Act 1988 (DPA) and the Human Rights Act 1998 (HRA) all give rise to potential privacy issues. RIPA has been the subject of controversy for some time. The police used the Act to record covertly a conversation between Ian Huntley and his mother, which was allowed in evidence at the Soham trial. If Huntley was not a notorious killer, wider objection (beyond that of the defence team) might have been raised. Civil liberties groups have been arguing that RIPA rides roughshod over the HRA and has severe implications for a person's right to privacy.

The DPA gives rights to living individuals (celebrities and ordinary people alike) and requires the processing of personal data to be in accordance with a number of stated principles. Generally speaking, an individual's consent is needed before personal data can be processed. Exceptions apply but a public interest requirement must be met. Compensation can be awarded under the DPA for damage or distress caused, but awards are generally trivial<sup>1</sup> and it is questionable whether such actions are worth the stress and cost of litigation. The DPA has met with its fair share of criticism and the Information Commissioner has recently promised a package of measures to clarify and give guidance<sup>2</sup>.

The HRA implements the European Convention on Human Rights, Article 8 of which concerns the right to respect for an individual's private life. In the case of *Peck -v- UK*<sup>3</sup>, reviewed below, the Strasbourg Court<sup>4</sup> held that Mr Peck's Article 8 rights had been infringed and that there was no effective remedy under the laws of the UK, thus rendering the UK in breach of its obligations. How will the Government deal with this issue?

The overriding message of the courts in the UK is that there is no separate law of privacy. There have been various judicial pronouncements to the effect that it is not for Judges to create a privacy law but Parliament, most notably, recently in the decision of the House of Lords in *Wainwright*<sup>5</sup>, considered below.

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<sup>1</sup> *Michael Douglas, Catherine Zeta-Jones, Northern & Shell Plc -v- Hello! Limited and Others* (2003) EWHC 2629 (Ch). The First and Second Claimants were awarded £50 each; in *Naomi Campbell -v- Mirror Group Newspapers Limited* (2002) EWHC 499 (QB), at first instance, Miss Campbell was awarded £2,500 damages for both breach of confidence and under the DPA on the basis that there could be no duplication in damages.

<sup>2</sup> Interview with the Information Commissioner, Richard Thomas, BBC Radio 4 Today, 14<sup>th</sup> January 2004. See also the press release of the same date which appears at [www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk).

<sup>3</sup> [2003] EMLR 15

<sup>4</sup> The European Court of Human Rights, in Strasbourg, was set up as part of the mechanism for the enforcement of the obligations set out in the Convention for the Protection of Human Rights and Fundamental Freedoms. The UK has implemented the provisions of the Convention in the Human Rights Act 1998.

<sup>5</sup> [2003] UK HL 53.

The recommendations of the Select Committee on Culture, Media and Sport, which issued its report in June 2003, endorsed the view that the Government ought to bring forward legislative proposals to clarify the protection of individuals from unwanted intrusion (whether from the press or from anyone else) into private lives.<sup>6</sup> The Government's response to this was both swift and unequivocal: there is no intention to introduce specific legislation to protect privacy; it is a matter for the courts. In light of this, it remains to be seen whether the courts will take a different approach in the coming year should an appropriate case come before them.

In the courts, privacy claims often involve well-known celebrities – Naomi Campbell, Gary Flitcroft (certainly well known now, if he wasn't before), Catherine Zeta Jones and Michael Douglas. A number of significant cases in 2003, some involving these individuals, concerned the development of the law of privacy, but important questions remain unanswered. Important cases are considered below and there is likely to be continued debate in this area in the coming year.

At present, while there is no separate law of privacy the courts will use, as far as possible, existing causes of action and legislation to protect private lives. The conventional action for breach of confidence has been broadened to protect areas such as commercial aspects of a celebrity's life. The DPA continues to be used as a head of claim in privacy cases. The ITC, BSC, PCC and Ofcom,<sup>7</sup> as regulators, can also provide some recourse.

## **2. *Douglas v Hello!***

The facts of this case are very well known. Michael Douglas and Catherine Zeta-Jones were married on 18 November 2000. They sold the exclusive photographic rights to OK! magazine. Extensive security arrangements were put in place to ensure that only guests and hired staff were permitted access. However, a paparazzi photographer gained entry and took a number of photographs surreptitiously which were then sold to Hello! magazine, which in turn published these unauthorised photographs in a classic spoiler. OK! and the Douglases initially obtained an injunction to restrain the publication by Hello! in November 2000. On appeal, the Court of Appeal lifted the injunction on the basis that damages would be an adequate remedy if the case was proved at trial.

The trial took place and Mr Justice Lindsay found in favour of the Claimants, on a traditional breach of confidence basis, in April 2003. He held that the pictures contained confidential information and that the photographer had intruded on what was a private event. The fact that the Douglases had made an exclusive deal with OK! rendered the information contained within the photographs a valuable "commercial trade secret".<sup>8</sup>

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<sup>6</sup> (<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmcomeds/458/45802.htm>).

<sup>7</sup> The Independent Television Commission (ITC) was the body responsible for licensing and regulating commercial television services in the UK. The Broadcasting Standards Commission (BSC) was the statutory body for standards and fairness in broadcasting, covering all television and radio broadcasts. These two organisations now fall within the remit of Ofcom. The Press Complaints Commission (PCC) deals with complaints from the public concerning the content of newspapers and magazines.

<sup>8</sup> [2003] 3 AllER 996, at paragraph 180 (ii)

Importantly, Mr Justice Lindsay made clear that there is no law of privacy and the claim brought for breach of privacy was dismissed in keeping with the courts' approach so far (*Naomi Campbell -v- MGN*<sup>9</sup> and *A -v- B*<sup>10</sup>). He further commented that the subject of privacy was better left to Parliament and the fact that "Parliament has failed so far to grasp the nettle does not prove that it will not have to be grasped in the future".<sup>11</sup> In the present circumstances, however, the law of breach of confidence was deemed sufficient to provide a remedy to the Claimants. Mr Justice Lindsay did acknowledge that there were circumstances where the law of confidence may not be adequate and that that inadequacy "will have to be made good and if Parliament does not step in then the courts will be obliged to".<sup>12</sup>

The ruling on quantum was handed down in November<sup>13</sup>. A number of separate claims were made and by far the largest award was in respect of special damages for lost revenue and wasted costs incurred by OK! magazine in bringing forward its exclusive (£1,033,156). The Douglasses were also awarded £7,000 by way of special damages for costs associated with having to rearrange the publication of the official exclusive.

The award for the "privacy" element - for breach of confidence and the distress associated with that - was a far smaller sum: £3,750 to each of the Douglasses. A further nominal amount was awarded (£50 each) for breach of the DPA.

The claim under the DPA was not a stand-alone claim but tagged on to the breach of confidence claim. This has become a common occurrence but, so far, we have not seen large compensation awards under the legislation. The award of £3,750, when compared both to the time and cost involved in this litigation is also minimal. It is suggested that this low amount was awarded because the Douglasses had already sold their "privacy" rights to OK! magazine in any event.

The greatest effect of this case will be on the newspaper and magazine industry. What was previously regarded as a simple matter of competition – spoilers being published by rivals, and therefore accepted as common place, albeit annoying, will now need greater caution.

Where private information is of commercial value, substantial damages can be awarded if loss is proved. This case, whilst initially hailed as likely to be the privacy case of 2003, in its result transpired to be less about privacy and more about the commercial rights of celebrities and publishers. The decision was based on commercial confidence. The decision is being appealed by both sides (Hello! on the liability issue and the Douglasses on the privacy issue).

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<sup>9</sup> [2002] EWCA Civ 1373

<sup>10</sup> *A -v- B & Anor, sub nom Gary Flitcroft -v- Mirror Group Newspapers Limited* [2002] EWCA Civ 337

<sup>11</sup> *IBID.* at paragraph 229 (iii)

<sup>12</sup> *IBID.* at paragraph 229 (iii)

<sup>13</sup> [2003] EWHC 2629 (Ch)

### **3. Peck -v- UK**

In August 1995 Mr Peck was filmed on CCTV walking alone down Brentwood High Street with a kitchen knife in his hand. He then attempted suicide by cutting his wrists, although this was not shown on the CCTV footage. The police were notified immediately and upon arrival disarmed Mr Peck, gave him medical assistance and took him to the police station, where he was later released without charge.

Subsequently, the local Council published press releases, with two still photographs taken from the footage, to illustrate the power of CCTV and its effectiveness. Mr Peck's face was not specifically masked. The story was published by two local newspapers and appeared, with footage supplied by the Council, on Anglia Television and the BBC. The Council orally required that no one should be identifiable from the footage and that all faces ought to be masked. Nevertheless, Mr Peck was recognisable to many of his friends and family who saw the BBC's programme.

Mr Peck complained to the BSC and the ITC alleging unwarranted infringement of his privacy. His complaints were upheld. A further complaint to the PCC in respect of one of the local newspaper articles was rejected on the basis that the events took place in a town high street which was open to public view.

Mr Peck's application for permission to apply for judicial review of the Council's disclosure of the footage was rejected: although Mr Peck had suffered an invasion of privacy, there was no general right of privacy under English law.<sup>14</sup> This led to a complaint to the European Court of Human Rights.

The European Court held<sup>15</sup> that the disclosure of the CCTV footage by the Council was a disproportionate interference with Mr Peck's private life, contrary to Article 8. Further, it stated that "private life" was a broad term and the protection given by Article 8 included the right to identity and personal development.

The mere fact that the footage was taken whilst Mr Peck was in a public street was not sufficient to exclude it from being regarded as a private situation. Mr Peck was not there for a public event nor was he a public figure and the disclosure of the footage to the media meant that the footage was viewed far more widely than Mr Peck could possibly have foreseen. The European Court held that the Council could have obtained Mr Peck's consent prior to disclosure and it could have masked the relevant images prior to disclosure.

This element of the judgment is in itself important in establishing that the mere fact of an individual being in what would commonly be regarded as a public place is not sufficient to render the acts that he carries out as being public beyond those who may be passing by at the time. It was the degree of further disclosure through various forms of media that breached his Article 8 rights.

The European Court also held that Mr Peck did not have an effective remedy in the UK through the process of judicial review because the only relevant ground for review was whether the Council had acted "irrationally". This threshold was too high.

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<sup>14</sup> *R. v Brentwood BC Ex p. Peck*, 1998 EMLR 697

<sup>15</sup> [2003] EMLR 15

Furthermore, as the ITC, BSC and PCC could not award damages, those bodies could not provide an effective remedy.

In addition, Mr Peck did not have an actionable remedy in breach of confidence as it would have been very difficult to establish that the information complained of had the necessary quality of confidence or that it had been imparted in circumstances importing an obligation of confidence. In any event, once the material was in the public domain, its re-publication was not actionable as a breach of confidence. Accordingly, the UK provided no effective remedy to Mr Peck for the violation of his Article 8 rights.

In light of the above, namely the judiciary's reluctance to create a new stand alone privacy law, coupled with the Government's refusal to legislate in this area, the position is left un-addressed. It remains to be seen whether any cases which come before the Court in 2004 force any change but the decision in *Wainwright*, considered below, indicates otherwise.

#### **4. *Wainwright –v- Home Office***

In October 2003 the House of Lords gave judgment in this case which, like *Peck*, did not involve confidentiality but privacy alone; and, once again, had nothing to do with celebrity.

In January 1997, Mrs Wainwright was visiting her son, Patrick O'Neill who was an inmate at Armley Jail in Leeds. Her other son, 21 year old Alan, accompanied her. Alan suffered from cerebral palsy and some mental impairment. Both Mrs Wainwright and Alan were strip-searched on grounds of suspicion of bringing drugs into the prison. The searches were intrusive, humiliating and extremely upsetting to both. Mrs Wainwright suffered emotional distress and Alan suffered from post traumatic stress disorder.

Both sued for trespass to the person and invasion of privacy and Alan also sued for battery. At first instance the Judge had found in favour of both claimants and awarded damages to Mrs Wainwright (£2,600), and to Alan (£4,500). On appeal, all the claims (except the one for battery, which was uncontested) were rejected by the Court of Appeal. The Wainwrights appealed to the House of Lords.

It was specifically argued before the House of Lords that in light of the European Convention, a tort of privacy had to be recognised. This was rejected on the basis that there was no general cause of action in English common law for invasion of privacy and, further, that Article 8 did not require the UK to adopt such a cause of action. What was required was that, here, English law provide an adequate remedy where there has been an unjustified breach of a person's Article 8 rights. The facts giving rise to the claims arose before the HRA came into force. The House of Lords held that the HRA now, in itself, gives a statutory remedy. Once again the Court deferred responsibility to create any tort of invasion of privacy to Parliament, stating that only legislation can reform the privacy laws (or lack thereof).

This case has been widely criticised as being far too conservative - on the facts, if the courts were ever to take on the privacy issue and develop the law in this area, this case would have afforded them the opportunity to do so.

## **5. Conclusion**

There is a marked difference in approach between the UK courts and Strasbourg. However, the UK courts are unwilling to create a wide-ranging privacy law on a piecemeal basis, and Parliament refuses to legislate.

This does not assist cases such as *Peck* and *Wainwright* which do not fit within established causes of action such as breach of confidence. The ITC, BSC and PCC as regulators often deal with pure “privacy” issues but as regulators they are unable to provide the full host of remedies available to the courts.

The *Hello!* appeal is likely to be heard later this year and the *Naomi Campbell* appeal was heard by the Lords on 18 and 19 February 2004. A decision is expected at the end of March. It remains to be seen whether the courts now depart from what is established: there is still no privacy law in the UK.