Twitter and the Law

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The recent controversy over the availability of injunctions poses several significant questions for the law, Parliament and the courts. In the most famous ongoing case, CTB, the claimant is a footballer who had a sexual liaison with Imogen Thomas, a model and reality TV star. The coverage must be understood in the context of a longer term campaign by the media and various parties against the perceived restrictiveness of English law in the area of defamation and privacy law. These claims are brought in respect of privacy, through claims for the wrongs of breach of confidence or misuse of private information. In such cases, the Human Rights Act 1998 requires the court to balance the competing interests of the qualified rights to private life of the claimant and freedom of expression of the media. There is a distinction between what is in the public interest and what interests the public.

Last week, a Committee chaired by Lord Neuberger reported on the use of injunctions and super-injunctions. 'Super-injunctions' are very rarely awarded: the Report identifies only two known cases where such injunctions have been granted in the past year. A super-injunction properly so-called is where the newspaper is restrained from both

(i) publishing information which concerns the applicant and is said to be confidential or private;
and (ii) publicising or informing others of the existence of the order and the proceedings.

Thus, the first and second rules of a super-injunction are that you do not talk about the super-injunction.

In the majority of the cases, the fact that the existence of the order can be reported means that it is not a super-injunction. Rather, it is an anonymised injunction, where the claimant is anonymised but the fact of the injunction, and some of the details (except those which would tend to identify the claimant) can be reported.

After his name was widely publicised on social networks and the foreign media, the CTB case took two further turns over the weekend. Firstly the Sunday Herald published a picture of the player on its front-page. In the House of Commons on Monday, John Hemming, the Liberal Democrat MP for Birmingham Yardley, named the footballer who had been identified on Twitter as allegedly being the claimant behind the injunction. Within a matter of hours, the websites of most national newspapers were reporting the identification.

Mr Hemming was immediately rebuked by the Speaker of the House of Commons, not least because he may have been in breach of the internal rules of the House concerning disputes currently before the courts. Furthermore, his statement is necessarily ignorant of the full circumstances of the case, which may involve blackmail (as detailed in Mr Justice Eady's judgment). That said, however ill-judged Mr Hemming's intervention may have been, he would be immune from prosecution or a lawsuit from the footballer, because of Article 9 of the Bill of Rights 1689:

'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.'

This fundamental constitutional principle protects MPs such as Mr Hemming. What is not clear is whether the fact that a claimant has been identified in Parliament can be reported by the press, without being held to be in contempt of court. This is because the same extensive protection – or 'privilege' – does not apply. Such a reporter is only protected if the statement is reported in good faith and without malice. But, given that John Hemming MP deliberately named the alleged claimant in breach of a court order, it may be that any subsequent repetition cannot be in 'good faith'.

When considering whether to grant anonymity, one question which has not received much scrutiny is the relevance of the interests of other people about whom there may be speculation, given the limited details which are released. An example is the JIH case, an 'unidentified well known sportsman, in an apparently monogamous relationship', about whom there had previously been a reported allegation of infidelity, now accused of a sexual liaison with a second person. More than one sportsman fits that description, and so the publicity of the anonymised injunction may encourage speculation regarding the lives of others. It might therefore be that there is a stronger argument in favour of identification of the claimant but restraint of the information concerned.

Common to many of these cases has been the use of Twitter to reveal the identity of the person protected by the anonymised privacy injunction. Culture secretary Jeremy Hunt MP recently remarked that Twitter stands accused of 'making an ass of the law.' The basic issue is that a court-issued injunction simply does not fit the new model of citizen journalism that Twitter represents; rather than a self-contained number of employed people under one company, Twitter boasts 175 million users. It was reported last Friday that CTB is suing both Twitter and those users of it who are responsible for the publication of injunction-bound information. Some might suggest that the lawsuit is optimistic. The injunction, naturally, only has effect in the issuing court's jurisdiction – it cannot restrain the world. The content on Twitter (the tweets) lives on servers located in the US, owned by a US company. It may be argued that because Twitter directs its activities towards the UK, and has country-specific advertising, it should therefore be bound by its privacy laws, but this is unlikely to succeed. Even if an English court does rule against Twitter, CTB's lawyers would still have to attempt to enforce that judgment in the US. Lord Judge, the Lord Chief Justice, recently admitted that the law on enforcement was ill-equipped to deal with injunctions broken on the internet, and suggested that greater regulation of the technology itself may be the answer:

'It is now possible for the police to track down people who have access to child pornography. Don't assume it won't be possible to get some greater control over Twitter and the internet.'

Privacy law issues on the internet, as well as copyright and freedom of speech, have recently been debated at the G8 summit. It will be interesting to see what conclusions are drawn, especially given the fundamental difference in thinking between Europe and the US on the importance of internet freedom.

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Links:

Report of the Committee on Super-Injunctions (http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf) TSE & Anor v News Group Newspapers Ltd (http://www.bailii.org/ew/cases/EWHC/QB/2011/1308.html) CTB v News Group Newspapers Ltd & Anor (Eady J) (http://www.bailii.org/ew/cases/EWHC/QB/2011/1326.html) CTB v News Group Newspapers Ltd & Anor (Tugenhadt J) (http://www.bailii.org/ew/cases/EWHC/QB/2011/1334.html) JIH v News Group Newspapers Ltd (Rev 1) [2011] EWCA Civ 42 (http://www.bailii.org/ew/cases/EWCA/Civ/2011/42.html)

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