

LAW IN PRACTICE

Super-injunctions



Shhhhhhh!

Super-injunctions: now we know what they are, where do we go from here?

On 24 February last year the Commons Committee on Culture, Media and Sport published their report on Press Standards, expressing concern at the confusion which had become apparent the previous autumn over what protection was afforded to reports of Parliamentary proceedings, when there had been disclosure of information otherwise protected by an injunction. The issue had arisen after one of the Committee's members had tabled Parliamentary questions about an injunction obtained against the *Guardian* by the oil trader, Trafigura, to restrain the publication of a draft expert's report in the litigation against the company over their alleged responsibility for the dumping of toxic waste in the Ivory Coast. The injunction granted by Mr Justice Maddison did not just anonymise Trafigura with initials, it also banned any reference to the grant of the injunction. The draconian order was quickly named a "super-injunction", and it stood for a month until Paul Farrelly MP put down his questions in the Commons. Then the anonymisation granted to Trafigura proved counter-productive, since it prevented the Table Office from recognising the case as active litigation and hence considering whether it was caught by the Parliamentary rule preventing the discussion of cases *sub judice*.

The Neuberger Committee

The Commons Committee did not think it right to legislate on privacy, but it did recommend that the Lord Chancellor and the Lord Chief Justice act on concerns regarding injunctions in cases of both breach of privacy and confidence. Within a month the Master of the Rolls had summoned a committee to respond to concerns, such as those expressed by Professor Zuckerman that a procedure had developed "for the entire legal process to be conducted out of the public view and for its very existence to be kept permanently secret under pain of contempt." Those, like myself, who received Lord Neuberger's invitations must have wondered whether Professor Zuckerman was being a trifle alarmist, but the importance attached by the judiciary to stilling public disquiet was not to be under-estimated. The Lord Chief Justice attended the meetings chaired by the Master of the Rolls as an observer, and the Deputy Head of Civil Justice (Lord Justice Moore-Bick) was a member. So, too, was Mr Justice Tugendhat, whose judgment in January 2010 refusing an injunction to the footballer John Terry was generally seen as raising the bar for injunctions, particularly in cases where the nub of the complaint was the protection of reputation rather than private life. Other members of the group included two solicitors from well-known firms acting for claimants. This was subsequently to be a matter of complaint by the *Daily Mail*, but they were matched by in-house lawyers for the *Guardian* and the *Mirror*, who expressed particular concern that the media should be given proper notice of injunction application.

Parliamentary Privilege

The 100-page report of the Committee contains a comprehensive review of the law, and what should be valuable for practitioners and judges alike – two annexes containing a model order and draft Practice Guidance. It was released at a press conference given by Lord Neuberger and Lord Judge on 20 May 2011, the very day after Lord Stoneham had named Sir Fred Goodwin (previously known as MNB) in the Lords as the beneficiary of an injunction. At the time of the Trafigura controversy Lord Judge had made it clear that he could not envisage circumstances in which it would ever be constitutionally proper for a court to make an order limiting the discussion of any topic in Parliament, but after acknowledging that it was wonderful for newspapers, he did not duck the implications of what Lord Stoneham and other Parliamentarians had done. Was it a very good idea, he asked, for our lawmakers to be in effect flouting a court order just because they disagree with it or for that matter with the law of privacy that Parliament has created? It was a good question, given that each one of over 600 members of the Commons and over 700 members of the Lords effectively has the ability to set themselves up as an extra-judicial court of appeal, but without having heard any of the evidence.

Dealing with media reports of Parliamentary proceedings, the Report raised the possibility that they might not be protected by privilege, if they involved flouting court orders and were not published in good faith. As Lord Neuberger confessed, the law on this point was "astonishingly unclear".

The nature of a super-injunction

By the time of the Report's publication there was no doubt that the media had moved the debate on from super-injunctions to the question of whether the right of privacy under Article 8 of the ECHR should ever protect the sex lives of celebrities from kiss-n-tell stories. In all the fuss the rarity of super-injunctions, which had been the cause of the Committee's establishment, was overlooked. A super-injunction properly so-called does not merely prevent the publication of information about the claimant said to be confidential or private, it also bans informing others of the existence of the order and of the proceedings. In other words, a super-injunction was no more than the kind of anti-tipping off order familiar in the commercial world of freezing injunctions, where incidentally there is a standard form of words in the CPR Part 25 Practice Direction. Nor are they new in the context of confidentiality; Mr Justice Hoffmann (as he then was) had granted one in 1989 in *X Ltd v. Morgan Grampian*, a case which ended in the Lords. More recently, Mr Justice Tugendhat in *G v. Wikimedia Foundation (2009)* had described when such orders might be necessary to avoid a tip-off negating the purpose of the primary restraint. In the interval between learning of the

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claimants' intention to bring proceedings and being served with the injunction, the alleged wrongdoer might consider that he could disclose the information and hope to avoid the risk of being in contempt of court. Alternatively he might destroy evidence, including evidence needed to identify him.

Neuberger Committee conclusions

The Neuberger Committee concluded that whatever may have been the concern in January 2010 about super-injunctions being granted too easily, that concern had now been addressed. Since that time only two had been granted: one had been set aside on appeal and the other had been in force for a mere 7 days to ensure that the point of the order was not destroyed. As for the number of privacy injunctions generally, a recent article in the *Daily Telegraph* stated that the paper had been put on notice of 77 since 2002. As is well known, claimants adopt the practice of serving newspapers who are not defendants so that they are effectively bound by the order under the so-called *Spycatcher* rule.

As the entitlement to protect privacy rights has become more widely appreciated, it is perhaps not surprising that the Committee found an increase in the number of cases of anonymised injunctions. Either party can be cloaked with initials – indeed, in one case, *Gray v. UVW*, the claimant was anonymised and the defendant was not. Anonymisation will be necessary where there is a danger of “jigsaw identification”; in other words, if the claimant were to be identified, he or she could be matched to the private information (for example, because it is on the Internet). It was for that reason that in the *Goodwin* case, the Court prevented the claimant being identified as

a banker – a ruling that was later much misrepresented. The other circumstances in which anonymity will be granted is where the claimant is apparently being blackmailed, but this practice is no different from the long-standing practice in the criminal courts.

The debate continues

Since the Neuberger Report was published there has been much debate as to whether privacy injunctions are futile, when the information can be posted anonymously on social networking sites with such ease. The Attorney General indicated on the BBC's *Law in Action* that he might be prepared to intervene if it were necessary in the public interest and proportionate to maintain the rule of law. Another means of policing orders in the teeth of tweets may be *Norwich Pharmacal* orders against service providers – even service providers in the USA who were generally considered immune. In *Louis Bacon v. Automattic Inc (2011)* Mr Justice Tugendhat ordered service by e-mail in the USA (including on Wikimedia) of proceedings ordering the disclosure of the identity of those responsible for defamatory postings. The Judge heard evidence that in California a foreign court's disclosure order may be enforced under the recently enacted Interstate and International Depositions and Discovery Act. Whether it be Parliamentarians or off-shore service providers, the judges are seeking ways of ensuring their orders cannot just be flouted with impunity. ●



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