Privacy, the internet and social media *by Godwin Busuttil, Gervase de Wilde and Felicity McMahon*

The ascendancy of social media poses acute challenges for privacy. Internet-based services such as Facebook and Twitter can confer major advantages on users in terms of access to information, ease of communication, and opportunities for network-building. But the ordinary concomitant is a significant surrender of personal privacy. Participation generally entails the disclosure of, and the ceding of control over, one's personal data. In order to join the community a person must establish at a minimum an online contact point and identity, typically by transferring some version of his or her actual, real-world, identity online. Many, of course, go much further than this, sharing—possibly oversharing—any manner of private information concerning themselves, often with complete strangers.

In most cases this will prove harmless, but from time to time individuals may make themselves a target. A person's online identity can easily become a reference or focal point for the unauthorised dissemination of sensitive information and intimate photographs, and a lightning-rod for the activities of harassers, stalkers, bullies, and trolls.

The internet, and social media in particular, have created unprecedented opportunities for wrongdoing of this kind. Such misconduct may have serious consequences for those affected by it. Given the distinctive characteristics of publication via social media, it is apt to produce in its victims powerful feelings of humiliation and despair, not least on account of the perception that their embarrassment is being served up for the gratification of thousands of others. Its effect can be characterised as a unique fusion of the twin phenomena of disclosure (or, maybe, 'exposure') and intrusion discussed in *Goodwin v News Group Newspapers Ltd* [2011] EWHC 1437 (QB).

The potential for unwanted interference with privacy contingent upon engagement with social media is so great that it has caused some observers to query whether participation is incompatible with the maintenance of personal privacy: as Mark Sableman, a US-based commentator, put the point, the notion of 'privacy in social media is pretty close to [being] an oxymoron'. The English court, however, does not approach such issues in black and white. The decision to grant or withhold remedies in privacy cases, especially injunctions, is always a question of fact, degree and proportionality. The task of judges in relation to the 'enormous challenges' that have been thrown up by the internet was identified by Sir James Munby P in *Re J (A Child)* [2013] EWHC 2694 (Fam):

> The law must develop and adapt, as it always has done down the years in response to other revolutionary technologies. We must not simply throw up our hands in despair and moan that the internet is uncontrollable. Nor can we simply abandon basic legal principles.

The legal means by which the court seeks to protect individuals against unwarranted infringements of privacy online are the same as those it deploys in other situations. Misuse of private information, breach of confidence, harassment, data protection, defamation, copyright, and human rights and anti-discrimination legislation all have a role to play. The statutory tort of harassment (PHA) might be said, however, to have a special place in the armoury. The fact that it confers on the court the power to grant injunctions to restrain any form of alarming or distressing behaviour, including speech, means it is the most flexible and effective weapon in putting a stop to the activities of a persistent online wrongdoer. As for the Data Protection Act 1998 (DPA), it remains doubtful whether it provides for any general power to grant an injunction to restrain unlawful processing of personal data. Nonetheless, the landmark decision of the ECJ in the *Google Spain* case [2013] EUECJ C-131/12 appears to have breathed new life into ss 10 and 14 DPA as a means to obtain injunctive relief against ISPs. Injunctions in

the torts of misuse of private information and defamation, meanwhile, need to be tailored to particular information or words, which can cause difficulties in the online sphere where the information and words may easily change. This highlights another advantage of the PHA, since injunctions in harassment are addressed directly to the objectionable *conduct*, regardless of the precise form it takes. Such conduct may include the public disclosure of personal information, but it need not do so for a victim's Article 8 rights to be engaged.

Some of the advantages of the tort of harassment in this field are illustrated by *Law Society v Kordowski* [2011] EWHC 3185 (QB). The case concerned an application for a final injunction to restrain the defendant from continuing to publish a website on which members of the public were encouraged to post derogatory remarks about lawyers. Many availed themselves of the opportunity, often anonymously. In granting the injunction, Tugendhat J held that it was reasonable to infer that each individual listed on the website would have had his or her attention drawn to the website, either directly, via a search engine, or by third parties, on two or more occasions and thereby suffered such distress and alarm on at least two occasions. This was enough to satisfy the requirement imposed by s 1(1) of the PHA that the defendant must have engaged in a 'course of conduct'. He also held that even if an allegation posted on the website happened to be true or honest comment, the defendant's harassment could not conceivably be justified by the defences in s 1(3).

In principle, therefore, in order to become liable for harassment, a person need do no more than post offensive or distressing material online and decline to take it down when asked. Naturally enough, though, this may not be *sufficient* to ground a case in harassment: all will depend on the precise facts of the case. Furthermore, reliance on harassment may in some cases avoid the need for the court to debate the truth or falsity of the speech in question. While it is clear that the same governing principles of law will apply to infringements of privacy however and wherever they occur, there can be no question but that infringement of privacy on the internet

gives rise to a number of idiosyncratic legal issues. It is with these that the balance of this chapter of *The Law of Privacy and the Media* is concerned.

This is the first in a series of three abridged extracts from the 3rd edition of The Law of Privacy and the Media *(OUP), the leading reference work on the subject. The 3rd edition, edited by Sir Mark Warby and Dr Nicole Moreham, brings the work up to date, addressing developments in privacy and other related areas of law over the last five years, and incorporates substantial new material. For further information and to order, please visit the OUP website.*