

Vicarious liability for misuse of private information

25/04/2016

IP & IT analysis: Jonathan Barnes, barrister at 5RB, examines in detail the recent High Court decision in *Axon v Ministry of Defence* and its implications for privacy claims arising from unauthorised disclosure to the media, as well as for vicarious liability and limitation. The judgment is also illustrative of the situation where those in (quasi) public roles are likely to find it difficult to establish a reasonable expectation of privacy in respect of misconduct committed in those roles.

Original news

The Queen's Bench Division, in dismissing a claim for misuse of private information and/or breach of confidence, held that the claimant had not had a reasonable expectation of privacy in any of the information in issue and a source within the defendant Ministry of Defence (MoD) had not owed him (as opposed to the MoD) a duty of confidence.

What was the background to the case?

In 2004, the claimant was the commanding officer of HMS Somerset. He became the subject of complaints that he had bullied junior officers, which were upheld by an Equal Opportunities Investigation (EOI). He was first ordered to hand over temporary responsibility for his ship, but three days later accepted that his position as commanding officer had become untenable and that he did not oppose being permanently removed. He was subsequently reassigned to shore and censured. At the same time, the claimant was being removed from his command, in December 2004, a series of articles appeared in the media, including in particular by the Sun newspaper, under headlines such as 'Mutiny Skipper Sacked: Navy Warship Captain Guilty of Bullying'.

Nine years later, in 2013, the publisher of the Sun, News Group Newspapers Ltd (NGN), disclosed that it had had a source within the MoD who had over about eight years provided information to it in return for substantial payments. In the present context the source had received £5,000 in December 2004 in respect of two stories, one of which had been recorded as 'Mutiny on Gulf Warship'. In due course the source pleaded guilty to conspiring to commit misconduct in public office and was sentenced in 2015 to 12 months' imprisonment. The journalist concerned at NGN was prosecuted for the same offence but was acquitted by a jury.

On realising that the Sun's 2004 stories about him were probably based on information from the MoD disclosed by the source without authority, the claimant sued the MoD for misuse of private information and breach of confidence. The MoD denied liability, but joined NGN as a third party arguing that if it (the MoD) was held liable then it was entitled to be indemnified by NGN in respect of any damages awarded.

What did the court have to decide?

The first question was whether the claimant had a reasonable expectation of privacy or confidence in the information disclosed at the relevant time in 2004. The claimant characterised this information as:

- the fact that members of his crew had complained about his conduct
- the fact that an EOI had been carried out into his conduct
- the fact of his removal from the ship and
- the fact of the outcome of the EOI (being at that stage that he had been reassigned and the possibility that he could be subject to further administrative sanction)

Other issues in dispute were:

- Whether as a matter of fact it had been the source who disclosed the information in question to the Sun?
- Whether the disclosure constituted a breach of confidence or misuse of private information or a breach of article 8 of the European Convention on Human Rights (ECHR)?

- Whether the MoD was vicariously liable for the acts of the source?
- Whether any damage suffered by the claimant was caused as a result of the disclosure (as opposed to having been caused by some other legitimate disclosure or other media coverage)?
- Whether the claim was statute barred under the Limitation Act 1980?
- Could the claimant rely on ECHR, art 8 to the extent any of the damage done was loss of reputation resulting as a foreseeable consequence of his own actions?
- Was the claimant's claim for damage to his reputation in any event an abuse of the court's process?
- As may be appropriate, what is the appropriate quantum of damages?

What did the court say about legitimate expectation of privacy?

The claimant fell at this first hurdle, since the court found that he did not have a reasonable expectation of privacy in the relevant information. The court considered that the claimant's role in 'a very public position' set an important context. It did not accept the claimant's analogy with a 'private' employee's reasonable expectation of privacy in internal employment disciplinary proceedings. Rather, the claimant was discharging a very public function in charge of a warship, which left no ready comparison with private employment and it was the claimant himself who had accepted that he should be removed permanently from command—so emphasising and affirming the seriousness of his offensive conduct.

It was also inevitable, given the extremely unusual circumstances of removing a ship's command during deployment, that the facts would anyway become public. For example, the victims of the claimant's bullying would realise that he had been removed due to their complaints, and be entitled to discuss the matter with their families. Indeed, while not conclusive against the claimant's case as to what his legitimate objective expectations were, the claimant himself conceded in cross-examination that he could not have expected that his 'abhorrent and shameful' conduct as a bully should be kept secret. Even assuming for these purposes that the disclosure made by the source had been wrongful (for which she went to prison), and bearing in mind that the claimant had not consented to the disclosure, when set against all the other factors that did not lead the court to conclude that the claimant did have a reasonable expectation of privacy.

What other issues did the court give obiter comments upon?

For essentially the reason that the claimant did not have a reasonable expectation of privacy, his claims for breach of confidence and with reference to ECHR, art 8 were also dismissed. In the light of his primary finding the judge declined to consider any dispute arising from the characterisation of the claim as one for damage to reputation, and he also chose not to give any indication about quantum. While his discussion of the arguments concerning limitation is illuminating, he did not go on to express any firm conclusions.

The judge did, however, make reasoned obiter decisions in relation to two additional points. First, he found that even in the absence of a 'leak' via the source, the fact of the claimant's removal from command and the reasons for it would have become public knowledge anyway, in the light of the unusual nature of those events. Therefore, the judge considered that the claimant had failed to show the necessary causal link between the wrong he complained of, namely the MOD source's disclosures to NGN, and the harmful media coverage that he suffered in 2004.

Second, since he found as a matter of fact that it had been the MoD source who had made the disclosures complained of, the judge analysed whether the MoD would have been vicariously liable for the source's wrongdoing. The MoD argued that since the source's job, however broadly defined, did not involve dealing with the media, the disclosure by her of information concerning the claimant to the media could not have been in connection with her employment, and so vicarious liability was not made out. The judge however disagreed, because as part of her work the source did have access to security sensitive and confidential information. Since there is always an inherent risk that those entrusted with such information will abuse the trust put in them—that is a reason why vicarious liability should be imposed. Had the disclosure resulted in a finding of liability, therefore, it was sufficiently connected to the source's job for it to be just for the MoD to be vicariously liable.

What should privacy lawyers take from this decision?

For defendant lawyers this is a relatively rare example of a court taking a firm approach to the first stage of the test for a claim for misuse of private information, and examining closely the question whether a prima facie cause of action arises in

the light of a reasonable expectation of privacy being established. If the answer to that question is in the negative, then as this case shows the further defendant arguments about public interest or sometimes public domain may not need to be relied on always in order to win a particular case.

For claimant advisers, and those who advise employers including but not limited to public authorities, the reasoning on vicarious liability is noteworthy. This area historically has been left somewhat opaque by employees being described sometimes in the authorities as 'on a frolic of their own'. It may be natural to think that if an employer has not authorised a particular act by an employee then the employer cannot ever be liable if the employee acts outside her authority. But this case stands as a good example of vicarious liability arising where the ex hypothesi unauthorised conduct of an employee is nevertheless sufficiently connected with her employment relationship, even though it was intentional, prohibited, criminal, committed for the employee's own ends and for these purposes assumed to be tortious. This follows *Lister and another v Hesley Hall Ltd* [2001] [2001] UKHL 22, [2001] All ER (D) 37 (May) (boarding master sexually abusing pupils in his care) and the recent case of *Mohamud v WM Supermarkets plc* [2016] UKSC 11, [2016] All ER (D) 19 (Mar) (petrol attendant assaulting customer), making clear that similar considerations apply where the tort in question is misuse of private information or breach of confidence.

Those advising employers in particular should look carefully at this case, and highlight to their clients the need to assess from the point of view of potential civil liability those areas of their businesses that carry inherent risk, in this context where those entrusted with private or confidential information may betray that trust. That is ordinarily, for example, human resources, financial management or customer data handling departments, and so on.

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