Privacy vs. Freedom of the Press

Institute of Bill of Rights Law at the William & Mary Law School

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PRIVACY VS. FREEDOM OF THE PRESS

What limits should there be on the ability of the press to report on the private lives of citizens? The recent death of Princess Diana has raised anew the issue of the privacy rights of individuals versus the rights of the press to do its job.

Panel Discussion Featuring:

Nadine Strossen
President, American Civil Liberties Union

John Browne
Former Member of Parliament
Sponsor of Legislation Imposing Civil Liability on the Press for Invading Personal Privacy

Stephen Hess
Brookings Institution, Senior Policy Fellow
Former Presidential Advisor

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EXPLANATORY MEMORANDUM

The Bill recognises that there are two competing interests—that of freedom of information and that of the protection of individual privacy. It seeks to confer remedies for the public misuse of private information rather than a general right for the protection of privacy. It acknowledges the international human rights in respect of privacy obligations already accepted by the Crown.

Clause 1 creates a statutory tort of breach of privacy where private information has been used publicly without consent. It allows the plaintiff, or someone acting on his behalf, to bring proceedings either to obtain an injunction to prevent public misuse or to seek damages for it. No special procedures are required. It defines persons who may be liable for committing a breach: the person or persons (including corporate bodies) who carry out the act which constitutes a breach; anyone knowingly involved in such a breach; and anyone who knowing there has been a breach either benefits from it or causes individual loss.

Clause 2 recognises the competing interests of freedom of information and the protection of individual privacy. It provides a hurdle, or test, for the plaintiff. A defendant may rely on a defence of public interest or public benefit but he must satisfy the court that it is a genuine one. If the court is so satisfied, the plaintiff must then persuade the court that the public interest or benefit in favour of the protection of his privacy is of greater weight. Where this balance is evenly weighted the court will rule in favour of freedom of information and the legal action will fail. It provides guidance to the court in considering what factors to weigh in the balance such as: (a) the extent and nature of the publication; (b) the manner in which such private information was collected; and (c) the time which has passed since the events which are the subject of the information occurred.

Clause 3 provides other defences, so that there will be no breach of privacy if this is inadvertent, when common sense would indicate that the breach was not deliberate; or the plaintiff authorised or consented to the publication of private information; or the breach was committed for reasons of self protection, or in circumstances which would attract a defence of absolute privilege (e.g. Parliamentary and legal proceedings) or qualified privilege (e.g. fair comment or the giving of a reference), similar to the law of defamation; or the defendant was acting under legal authority or a duty of disclosure.

Clause 4 outlines the standard tort remedies: (a) damages; (b) injunction; (c) the defendant to account to the plaintiff for profit; and (d) the return of articles or documents. It gives guidance to the court in assessing damages including: (a) physical damage; (b) psychological damage; and (c) mitigation.

Clause 5 limits the period in which action may be brought to three years from the date of discovery of the breach.

[Bill 14]
Clause 6 clarifies that remedies under this Bill are additional to any other legal remedies and that a court shall not award double damages if more than one actionable wrong arises out of the same event.

Clause 7 identifies those areas of a person's life which most reasonable people would regard as private, and which are protected by virtue of the Crown's international human rights obligations. These are: personal communications; home; personal relationships; personal behaviour; health and personal financial affairs. It defines 'personal' as meaning the private, as opposed to the official, capacity of an individual. It defines public use and public disclosure as making private information known to people other than those to whom it relates. It defines dissemination by means of printed matter or broadcast material. It ensures that restrictions on freedom of information are no greater than they need to be to enable private life to remain private. It maintains the principle of open justice, so that the disclosure of court proceedings shall not be a breach of privacy unless the court in question was sitting in chambers or in camera. The Bill will not inhibit a court's general power to keep particular matters private. It defines proceedings and makes it clear that action can be brought in civil courts throughout the United Kingdom.

Clause 8 contains technical amendments for the Bill to operate in Scotland.

Clause 9 ensures that no action can be brought by a plaintiff upon a matter arising before the Bill comes into force.

Clause 10 binds the Crown. It defines the short title as The Protection of Privacy Act 1989: and it provides for the Bill to come into force on 1st January 1990.