

Breach of Confidence & The Public Interest

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Outline of the talk

- Public interest in the action for breach of confidence
- Influence of the Human Rights Act 1988
- Public interests re requests made under the Freedom of Information Act and Environmental Information Regulations

Gurry – and the position in around 1982

Identified two main areas of public interest:

- *Gartside v. Outrem* – no confidence in disclosure of iniquity
- The public interest in proper administration of justice

A flavour of the many cases ...

- *Initial Services v. Putterill* – crimes, frauds and misdeeds
- *Gartside v. Outram* – early whistle-blowing case
- *Hubbard v. Vosper/Church of Scientology v. Kaufman* – medical quackeries and dangers to the public
- *Schering Chemicals v. Falkman* – Primodos drug no longer available
- *Woodward v. Hutchins* – Tom Jones and the principle of “truth in publicity”

In summary, prior to the HRA 1998 ...

- Defence of public interest narrowly construed
- Defence had to go beyond merely “what was of interest to the public”
- Information had to be made of current information
- Public interest might be served by disclosure to someone with an interest rather than public at large

Article 8 ECHR**Article 8 – RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE**

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10 ECHR**Article 10 – FREEDOM OF EXPRESSION**

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Some post-HRA 98 cases

-*Theakston* – children's presenter visits brothel

-*A v. B. v C* – Premiership footballer has affairs with two women

-*Re S (A Child) (Identification: Restriction on Publication)* – neither Art 8 nor Art 10 takes precedence – the inquiry is fact-sensitive

-*McKennit v. Ash* – applied *Von Hannover*
 -consider the weight of the particular public ints
 -beyond merely disclosure of iniquity
 -but misleading the public on its own not enough unless serious misleading/behaviour

Max Mosley

-“F1 BOSS HAS SICK NAZI ORGY WITH 5 HOOKERS”.
 -EXCLUSIVE: MOSLEY HOOKER TELLS ALL: MY
 NAZI ORGY WITH F1 BOSS

-Applied *Re S* guidance – balancing Art 8 and 10 rights

-no room for generic arguments – “intense focus on facts”

-on the facts of this case, no evidence of public interest in parodying the Holocaust

John Terry v. Persons Unknown (LNS v. Persons Unknown)

- Super-injunctions!
- Tugendhat J critical of procedural measures
- Substantive public interest arguments outweighed private interests

Freedom of Information Act 2000

- Anybody has the right to info from a public authority (wide definition) within reasonable time (20 days)
 - Narrow provisions relating to repeated/vexatious requests
 - There are various exemptions, but most are "qualified exemptions" which require public authority to consider whether public interest in using the exemption outweighs the public interest in releasing the information.
- If applicant unhappy he can request an internal review, then complain to the Information Commissioner, then appeal to the First Tier tribunal.
- The FOIA is retrospective and applies to info that came into being before 2005.

Environmental Information Regulations 2004

- A sub-set of FOI requests, treated under regs that implement the UK's obligations under Directive 2003/4/EC
- Info relates to the state of flora, fauna, emissions and discharges, policies relating to these, state of human health, the food chain, etc
- Scheme similar to FOI requests, though must be dealt with under EIR
- Again, a number of exemptions and most are qualified by the requirement for the public authority to consider the public interest



Conclusions

- Pre HRA 98, the public interest was narrowly interpreted
- Following HRA 98, Courts seemed to go to the other extreme, and hold that public interest = any freedom of expression
- Now, a clearer methodology has emerged – balance Art 8 and 10 rights, and extremely fact-sensitive
- Also in FOIA and EIR context, public interest developing as fact sensitive factor
