

INFORM'S BLOG

The International Forum for Responsible Media Blog

Upholding celebrities' privacy and problematising news media claims to freedom of expression: Sir Cliff Richard v BBC – Jelena Gligorijević

JULY 29, 2018 / INFORM / 2 COMMENTS

Amidst considerable media attention, and the continuing attention of legal commentators, Sir Cliff Richard won his [privacy case](#) against the BBC for its coverage of a raid on his home during a police investigation of historic sex offence allegations against him, and its naming of him as the suspect. Mann J confirmed Sir Cliff's strong privacy right in the circumstances, and criticised the national broadcaster's over-zealous journalistic practices in running that story.



This decision offers new insight into judicial reasoning about the privacy of public figures receiving negative attention, and the news media's claims to freedom of expression, in the English tort of misuse of private information. No longer does it appear public figures begin with a weaker privacy right relative to other claimants. Nor does it appear that media defendants will (implicitly) receive a degree of deference vis-à-vis their claims to the fundamental right to freedom of expression. Mann J emphasised the seriousness of the privacy breach, linking it to the BBC's "desire to protect the scoop".

While Mann J adhered to the prescribed methodologies of the two-stage privacy tort – the holistic analysis of whether there is a reasonable expectation of privacy, and the "ultimate balancing test" between the Convention rights to privacy and freedom of expression – two aspects of Mann J's reasoning stand out:

- It appears the facts that Sir Cliff was a public figure and the criminal allegations were particularly serious strengthened, not weakened, his privacy right. In this context the Judge confirmed, as a matter of legal principle, a *prima facie* reasonable expectation of privacy for suspects in police investigations over the details of the investigation, including their identity, and that there was no public interest in reporting those details.
- The Judge examined and criticised the BBC's specific motivations and actions in running this story, including its "significant degree of breathless sensationalism". That Mann J's reasoning about freedom of expression was influenced by his assessment of the BBC's behaviour and the form its broadcast took indicates freedom of expression does not automatically shield journalists from exposure to detailed judicial criticism of their work.

Privacy of public figures receiving negative attention

Mann J accentuated Sir Cliff's predicament as a public figure facing serious criminal allegations (but no charges). In this context, the Judge confirmed a previously unsettled point of law: suspects in criminal investigations have a *prima facie* reasonable expectation of privacy (see Professor Callender-

Smith's [Inform post](#)). It was “understandable and justifiable (and reasonable)” that suspects do “not wish others to know” about investigations concerning them “because of the stigma attached”, and it was “not necessary” for anyone outside the police to know.

Though the Judge cited recent decisions supporting his proposition, he may have been influenced by his assessment of how strong Sir Cliff's privacy right was in the context. That the allegations were of such a serious nature strengthened that privacy right, owing to the damage such allegations can do to the individual concerned.

Mann J made another statement of general legal principle, at the rights-balancing stage, which will also narrow the scope for reporting of such investigations: it is not in the public interest to reveal a suspect's identity. Again, the Judge may have been influenced by the specific circumstances, including his concern, in particular, to protect Sir Cliff's privacy: although it was in the public interest to report allegations of historic child sex abuse, coverage of the raid (including by helicopter), and revelation of Sir Cliff's identity, did not “contribute materially to the genuine public interest in the existence of police investigations in this area”.

It appears the fact Sir Cliff was a public figure advantaged rather than disadvantaged him: although part of Sir Cliff's public role included promoting his Christian beliefs (the BBC argued that eroded his reasonable expectation of privacy vis-à-vis these allegations), Mann J was influenced more by the intrusive harm Sir Cliff had suffered, as a well-known person, because of the BBC's actions. It could be gleaned from the Judge's reasoning that individuals, whose lives are already in the spotlight, require a stronger privacy right than do ordinary people, when facing serious allegations. In the rights-balancing exercise, Sir Cliff's public persona did not elevate the public interest element and strengthen the freedom of expression right: though it “might appeal to...the prurient”, it did not justify interfering with his privacy right. Public figures were “not fair game for any invasion of privacy”.

Freedom of expression and news media behaviour

Mann J's criticism of the BBC's attitudes and actions in running the story permeate his judgment, and, alongside his focus on the broadcast's form and content, clearly influenced his balancing of rights.

The Judge held that, although not all journalistic subterfuge was unjustified, this story's importance had motivated the journalists to pursue it with so much zeal as to affect their judgment. The broadcast's high viewing figures did not evidence public interest, but, rather, substantiated the finding that BBC journalists had a strong "desire to prevent a leak of the exclusive story". Mann J highlighted a journalist's near obsession with scooping rivals, and traversed internal email traffic confirming the broadcaster's keenness to make the most of the story. Although the Judge did not consider the journalists were fundamentally dishonest, he concluded their zeal had gotten the better of them: they allowed others (including police) to have false impressions about how the story would run, and, contrary to their assertions, were not concerned about Sir Cliff's right of reply. The Judge also found the journalists were aware of and probably fostered the police's fear of premature reportage, which he found had motivated the police to give the BBC information about the investigation. Significantly, the Judge criticised the BBC's decision "to add further colour and sensationalism to the story", exacerbating the intrusion: "the BBC went in for an invasion of Sir Cliff's privacy rights in a big way".

The BBC's behaviour weighed against it in the privacy-freedom of expression balancing exercise. The Judge's detailed and critical focus on its attitude and actions materially weakened its freedom of expression right, relative to Sir Cliff's weighty privacy right. This close examination and bold criticism of journalistic behaviour is uncommon. Mann J's approach indicates news media cannot rely upon the generic proposition that freedom of expression is of such fundamental importance to the press in a free and open society that the fourth estate is due some deference in its newsgathering and reporting activities, and that interferences with its freedom of expression should be handled with caution.

It is established that freedom of expression has no presumptive priority in privacy cases, but judicial reasoning has previously not been as detailed and critical of specific journalistic activities as in this case. Mann J followed

up his close critical examination of the BBC's activities with the confirmation that acknowledging the normative importance of freedom of expression was insufficient to resolve the rights-conflict: "The freedom of expression recognised in Article 10 is clear. The question is how it is balanced against a right of privacy. That debate is not assisted by a reference to a "duty" to publish. The balancing exercise invokes more refined concepts than that."

A new trend for rights adjudication in media law?

Mann J's attention to Sir Cliff's predicament and recognition of the need for strong privacy protection, alongside his unhesitant, detailed critical assessment of the BBC's attitudes and actions vis-à-vis this privacy-intrusive broadcast, is evidence of a changing approach to rights reasoning in the English tort of misuse of private information. This adjustment in approach could already be perceived in *PJS*, in which the Supreme Court focussed upon the intrusive harm suffered by the claimant and took a robust, critical approach to the defendant's invocations of freedom of expression. Mann J's reasoning echoes Lord Neuberger's sentiment in *PJS* that it is "unlikely that the heavens will fall" if the Court upholds a celebrity claimant's privacy right and suppresses the press's story. Indeed Mann J thought the BBC was "overstating the constitutional importance of this case", and recalled that, as a matter of constitutional law, the freedom of expression right is subject to legitimate limitations, and whether it is upheld in a particular case must be determined by the courts through prescribed balancing and proportionality tests.

Since *PJS*, and now also since *Sir Cliff Richard v BBC*, a new path appears to be being forged for privacy and freedom of expression. Mann J's reasoning indicates English judges consider themselves, in cases of the privacy tort, to be rights adjudicators with the responsibility unreservedly and closely to examine the operation of fundamental rights (privacy *and* freedom of expression), as well as the position and actions of the rightholders, in the context of the particular case. When fundamental rights conflict, it is not enough simply to refer to the respective rights' normative importance and to arrive at an impressionistic decision on which right prevails in the circumstances. The courts appear to be more detailed and critical in their

reasoning, whether in terms of articulating and emphasising the nature of privacy-intrusive harms 'even' for celebrities, or closely examining and criticising privacy-intrusive practices of journalists.

While news media may call this unjustified editorialising from the Bench, Mann J's more engaged approach to *both* the privacy right *and* the freedom of expression right looks more like a judge taking rights seriously in a difficult case of a rights-conflict. It will be interesting to see whether this is reflected in any appeals of Mann J's decision.

Jelena Gligorijević, PhD candidate; Trinity College, Cambridge.

[Broadcasting](#), [Freedom of expression](#), [Media](#), [Privacy](#)

◀ JELENA GLIGORIJEVIĆ ◀ SIR CLIFF RICHARD

PREVIOUS POST

Canada: Reforming the Access to Information Act for better open government – Sabrina Wilkinson

NEXT POST

Law and Media Round Up – 30 July 2018

0 Comments

2 Pingbacks

1. [Inform is taking a Summer Break | Inform's Blog](#)
2. [Top 10 Privacy and Data Protection Cases of 2018: a selection | Inform's Blog](#)

Leave a Reply

© 2023 INFORM'S BLOG

THEME BY ANDERS NORÉN – UP ↑