

Balancing test in uk law



The Ultimate Balancing Test

This chapter will consider how the UK courts must find a balance between the competing Convention rights of Article 8 and Article 10. In the context of their relationship between the privacy of such individuals and the press, as these two essential and fundamental rights frequently come into conflict and must be analysed and balanced against each other. Whilst referring to the “ultimate balance” as recognised in Strasbourg courts and how it has aided in developing the ultimate balance in UK courts. As such, both rights start off as equal, this can be reflected, for example, in Resolution 1165 of the Parliamentary Assembly of the Council of Europe 1998, where paragraph 11 specifically mentions that, ‘The Assembly reaffirms the importance of every person’s right to privacy, and the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value in a democratic society.’[1]

The conflicting rights

As can be seen by the evidence presented in the previous chapters, the balance between the right to privacy and freedom of expression is one which has influenced much debate, in Strasbourg and in the UK, and as such, they are often found competing against one another, even though they are of equal value. Incorporated within the debate is the view that both rights are completely contradicting, as privacy is strongly founded upon secrecy whilst expression most always involves exposure, thus this is when friction will almost always be formed between the two Convention rights. Consequently,

the friction created by these rights are central to the conflict the courts have been facing, following the incorporation of the HRA and ECHR, much of this friction was formed with the conflicting rights of Article 8 and 10 at the very core.

These rights at first glance appear to stand independent, although the expectation of these rights can however become apparent, thus creating the issue of why the right to privacy and freedom of expression are often in conflict. Furthermore, these two rights have arguably been fought most by two parties, the first party, uses Article 8 which gives a person 'right to respect for his private and family life, his home and his correspondence.'^[2] Phillipson identifies that any individual has a right as a human being to have control over what information a person chooses to disclose to another, and that when the government or the media acquire information without your consent, and publish the information, it violates a person's fundamental right to control such information about themselves. ^[3] Therefore, it makes sense that the second party whom fights for their rights conveyed in Article 10 are most commonly the media, this right states that "Everyone has the right to freedom of expression".^[4] This right includes the freedom to receive and communicate information, thus it would make sense that the second party that fights for their rights are the media - as the media focus highly on communicating information to the public, as such, they are quite commonly known as being the "public watch dog". ^[5] Hence, it could be said that the media are therefore obligated to publish what they believe the public want to know, and it is there that the conflict between the right to privacy and freedom of expression arise; when the media publish information

that a person or persons wanted to keep private. ^[6] Harris has expressed the opinion that the balance between the two rights is a grey area in law, and that there will always be tension between the two, however, it needs to remain that way to differentiate between definitively private information and information that some may see as private, but instead may be important to be covered by freedom of expression. ^[7]

It has been stated by Lord Goff that 'freedom of expression has existed in this country perhaps as long, if not longer, than it has existed in any other country in the world' as such, this statement was maintained by Lord Hoffman when he mentioned that 'A right of privacy may be a legitimate exception to freedom of speech (but) there is no question of balancing freedom of speech against other interests. It is a trump card which always wins'. ^[8] These statements highlight that there once was a strong preference in the courts in favour of freedom of expression. While there is no contrary public interest recognised and protected by the law, the press are free to publish anything they like. Although, when freedom of expression comes into conflict with another interest protected by law, the question of whether there is a sufficient public interest in the publication to justify limitation of the conflicting right comes into play.

However, there is, and will always be a strong desire to know the truth, with many agreeing that freedom of expression is fundamental towards a healthy democracy. Although, this freedom can be essential, it can however, come with responsibilities that the media will often disregard. Thus, the right to freedom of expression stops when it infringes on the privacy of those

involved unless, by keeping such things private, would cause a concern for society, as such “ public interest”. Yet, the issues of which stories are of public interest is a rather grey area in the UK, partly because the divergence between what the public has a right to know and what the public desires to know. In theory, it can be said that everyone is entitled to both right; right to privacy and right to freedom of expression, as far as they do not infringe on anyone else’s rights. Though, this is quite frankly impossible, and as such can only be done by balancing the two rights.

The balancing of the two competing rights

English courts have been influenced by the balance recognised in the Strasbourg courts, and have attempted to reconcile the fundamental underlying values advanced by the right to privacy and freedom of expression through such legal frameworks, as such the balancing of these two competing rights are clearly demonstrated in countless cases. In executing the ultimate balancing test, the courts consider the claimant’s right to privacy as expressed in Article 8 of the ECHR, which provides that “ everyone has the right to respect for his private and family life, his home and his correspondence.” ^[9] Equally, the content of the publisher’s freedom of expression’s rights is established from Article 10 of the ECHR, which safeguards the “ freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” ^[10] With both rights being qualified, they may be restricted under paragraph two, provided that the interference is prescribed by the law, and pursues a legitimate aim and what should be well known by

now, is that it is necessary in a democratic society and is proportionate response to the aim pursued.

- The balance as recognised in Strasbourg

Privacy actions involve the conflict of two rights, most commonly, freedom of expression. The Article 10 jurisprudence discloses that, even though freedom of expression 'constitutes one of the essential foundations of a democratic society', a hierarchy of various types of expression have been developed by the ECtHR, which can be recognised in the previous chapter. These can be political speech, artistic expression and commercial expression,[11]as such this is where the conflict begins. The conflict could begin with Article 8, in regards that the State has failed to appropriately protect the applicants right to privacy - or it could begin with Article 10, in regards to whether the State has infringed the applicant's right to freedom of expression by imposing sanctions aimed at protecting a person's right to privacy.[12]Thus, courts must consider the conflicting rights on the presumption that both Articles are of equal value, rather than considering that the conflicting right is an exception to the principal right, as such the Convention ensures that any restriction that is places on either right is closely scrutinised and a balance is achieved between them. The cases before *Von Hannover* did not endorse the methods of balancing Article 8 and 10, however, following on from this case it can be recognised that neither Article takes precedence over one another.

In the first *Von Hannover* case, as stated in the previous chapter - the court had held that Princess Caroline's Article 8 rights had been infringed by the publication of photographs showing her with her children and with her husband. She brought several actions in Germany for an injunction to

prevent further publications of the various photographs that were taken, the court however stated that the matter was an 'event in contemporary society' and of general interest to the public. Princess Caroline argued that none of the photographs, regardless of the articles that followed with them debated to such public interest in a democratic society, but were there only to satisfy the curiosity of such a reader. As such, this is important as an individual will be more easily able to establish a reasonable expectation of privacy than say an individual in the public eye.

Although, in *Von Hannover (No. 2)* [13] this case involved the publication of a photograph of Princess Caroline and her husband during a skiing holiday, to illustrate the ill health of her father, Monaco's Head of State. The Court maintained the position that 'whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures'[14] Although, they did modify its definition of public figures to also include persons whom could just be simply well known to the public. Consequently, in line with the court's findings, the press could legitimately report on how the Prince's children prepared to accept family duties during the time of the Prince's illness, such as going on skiing holiday. In the view of the court, 'the photos in question, considered in the light of the accompanying articles, did contribute, at least to some degree, to a debate of general interest'. [15] Additionally, the photographs themselves were not offensive to the extent that their prohibition was justified. [16] The court in this case, emphasised that both Articles are of equal value and the margin of appreciation should be the same in both cases, and as such, they

saw fit to develop criteria which other states should follow when considering how to develop a balance between the two rights, these being:

1. Whether the information contributes to a debate of general interest
2. How well known the person concerned is and the subject matter of the report
3. The prior conduct of the individual concerned
4. Content, form and consequences of the publication; and
5. The circumstances in which the photos were taken

When applying, the criteria set out above, in the second case, the Court had found that Germany has changed its approach to privacy considering the first *Von Hannover* judgement, in regards to mentioning that a public interest in being entertained generally was less important than an individual's right to privacy. As such, the courts attempted to narrow the focus when attempting to balance the two equal but competing rights of privacy and freedom of expression.

- The balancing test as recognised by UK courts

Decisions are necessarily fact or case sensitive, given that the Court is required to balance the fundamental rights (right to privacy and freedom of expression) which are often in conflict, the general approach which should be adopted and the principles which apply to these competing rights are now well-established. This main reason for this is that the law is Strasbourg-led. Although the rights do have conflicting aims, their aim was not to confuse the courts in making their rulings but to create a difference between everyone's right to privacy whilst allowing them certain freedoms. The

approach towards balancing these competing rights will be clearly demonstrated in countless cases.

Firstly, it should be mentioned that, Section 12(4) of the HRA enjoins domestic courts to 'have particular regard to the importance of the Convention right to freedom of expression' when they are considering whether to grant relief. Which may indicate that Article 10 is given priority when balancing it against others rights, such as privacy, however, the courts understand that such an interpretation would result in a conflict between Article 8 and 10, thus lacking with the consistency with the Convention rights.

Consequently, the case of *Douglas v Hello! Ltd*, [17] Lord Justice Sedley, recognised that in order to achieve such compatibility with the Convention, when balance the two rights, courts would have to treat the two rights as having equal value,

'The European Court of Human Rights has always recognised the high importance of free media of communication in a democracy, but its jurisprudence does not - and could not consistently with the Convention itself - give Article 10(1) the presumptive priority which is given. [...] Everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court.' [18]

The Campbell case refined this balancing test, as the House of Lords were face with conflict between privacy and freedom of expression when a tabloid took and published photographs of a supermodel as she exited a Narcotics Anonymous meeting - the house was divided in the result with a narrow 3 -2

majority deciding that her privacy rights ought to prevail over freedom of expression in the circumstances of this case. The House of Lords considered what type of information was regarded as confidential and stated that there must be some interest of a private nature that a claimant wished to protect and that the test is whether a person placed in similar circumstances would find the disclosure offensive. ^[19] Fenwick and Phillipson have termed this approach to proportionality, the 'parallel analysis' as it requires the court to consider whether the justifications in favour of protecting speech support the limit on privacy and then to consider, whether the justification in favour of privacy support the limit proposed on freedom of expression. ^[20] Without this parallel analysis, there is a danger that one right would prevail. However, the courts have been conducting various tests to determine the privacy of such certain information, long before *Campbell* founded the balancing exercise which the UK courts now use. Formerly, a limited right of privacy was established in the case of *Coco v AN Clark Engineers Ltd* ^[21] which came under the already established right of "breach of confidence".

The above approach in *Campbell* has subsequently been endorsed, and as such, it has been established in the UK that not one Article is supposed to take superiority over the other, as Lord Steyn summarised in the case of *Re S (A Child)*, ^[22]

"First, neither article has precedence as such over the other. Secondly the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justification for interfering with each right

must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.” [23]

The approach towards balancing these competing rights can be clearly demonstrated in countless cases in the UK courts and through Strasbourg, which become more apparent when the extent of which public interest exists for the disclosure of private information. The case law produced after the introduction of the HRA is ever expanding, with recent concerns coming to light over the issue that the courts have developed a law of privacy and made the necessary balance between the two rights in each case, rather than the Parliament. [24] Thus, these following cases explore the progressively divergent approaches the courts have taken in interpreting and applying the legal tests that have been established.

- How the courts use the balancing test

The decisions made in the cases of *Campbell*, *Douglas* and *Von Hannover* are considered landmark with the considerations that have occurred in the area of privacy over the years. As these cases strengthened the recognition of privacy and re-defined the notion of public interest to exclude mere curiosity and unhealthy interest in individual's lives. [25] It is however, what was decided in these cases that have influenced the way court approach cases that concern “balancing” the right to privacy with freedom of expression. Consequently, the courts must now balance the two conflicting interests by applying the principles mentioned above to the facts of the case, whilst considering the legitimacy of the expectation of privacy, the level of intrusion and the importance of any public interest in publication. Which

allows for the UK courts to mirror the principles that have been laid down by the ECHR and ensure that any interference with privacy and freedom of expression are necessary and proportionate. [26]

Prior to the introduction of the HRA, the right to privacy was relatively underdeveloped, however, much has changed as it can be said that “ the protection of private lives and private information is one of the fastest-developing areas of the law as judges use the Human Rights Act” [27]

An early case of the balancing act after the introduction of the HRA was in *A v B*[28], where the Court held that a claimant’s public profile generates legitimate public interest in his or her personal life, which strengthens the media’s freedom of expression claims. As such, *A v B* defined “ public figures” as “ all those who play a role in public life”, surrounding all persons in the political, social, economic and artistic world.[29]The Court held that the media have elevated freedom of expression claims when reporting on public figures, the court further mentioned that;

“ A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media”. [30]

This case suggested that the public interest in such publications extends to private information about various public figures to which can be of curiosity to the public interest. Though, the courts can have very different views on the approach to the balancing of competing rights. For example, in the case <https://assignbuster.com/balancing-test-in-uk-law/>

of *Mosley v News Group Newspapers* ^[31], where the court determined that the right of the claimant was protected by Article 8. In this case, the defendant published a story with the title ' F1 BOSS HAS SICK NAZI ORGY WITH 5 HOOKERS' which was accompanied with pictures, and had been made available on their website with an added video, which concerned Mosley and five other women engaged in sadomasochistic sexual activities and role play. ^[32] The article involved suggested that these " sessions" had a Nazi theme and that the role playing had mocked the way that Holocaust victims had been treated whilst in concentration camps. The footage of the " session" was recorded by one of the women by a hidden camera that was supplied by *NGN*. As mentioned earlier, when these two rights are in conflict, the court will not give an automatic trump statute on one right over the other. Therefore, the court had the difficult task of balancing the interests of Mosley's right to privacy with the interests of *NGN*'s right to freedom of expression. The court decided that since they could not find evidence to suggest that he mocked victims of the holocaust, there was no interest to the public. However, the court stated that if they had published the story without the photographs and video, they would have allowed for freedom of expression to prevail over right to privacy. Thus, this case confirms that the courts are willing to protect an individual's right to privacy when freedom of expression is not justifiable.

The court of Appeal in the case of *Murray v Express Newspapers* [33] followed in the steps of *Von Hannover* in holding that routine activities carried out in public could arguably attract a reasonable expectation of privacy. Whilst holding that leisure activities, such as a café expedition could be

characterised as part a person's private recreation time.[34]Although the Court failed to define what types of activities would qualify as 'recreation time' and instead stated that the enquiry is highly contextual. As such, the Court further stated given that the publicity of such activities would adversely affect family recreation time in the future, the Court held that the claimant had a reasonable expectation of privacy. The way this case was approached by the Courts signals that a potential separation from the decision that was laid out in *Campbell*, where it was held that privacy law did not protect innocuous public activities.[35]

In the case of *Weller*, Judge Dingemans did not expressly address the strain between the *Von Hannover* and *A v B plc*, which offered little to clarification if the UK court's approach to public figures under the misuse of private information. However, in approaching the balancing test, Judge Dingemans adopted the *Von Hannover* conception of a "debate of general interest", [36]he considered that the photographs did not contribute to a debate of public interest, despite the considerable public profile of the children's parents. As such, given that the photographs would have satisfied the public interest definition in *A v B*, given that there is a strong curiosity in *Weller's* family life, and as such *Weller* employed a more confined definition of "general interest" in line with the ECtHR. Although, Dingeman's concern for the consequences of prohibiting the publication on the newspaper industry, suggests that the Court doesn't fully adopt the approach set out in *Von Hannover*. However, Dingemans stated that the photographs in question should be given freedom of expression weight as there is a public interest in having a 'thriving and vigorous newspaper industry'[37]and the ability to

publish such things due to public interest was considered important to the commercial wellbeing of the media, as previously stated the media's role is to act as a 'public watchdog'. However, despite acknowledging the distinction in this argument, Dingemans considered that the media's interest did not outweigh the children's right to privacy in the Weller's case.[38]

The recent case and much anticipated case of *PJS* [39] where a famous figure won the right not to be publicly named in England and Wales over an alleged marital threesome, also known as a super injunction, despite his identity being known elsewhere. At first, the interim injunction was refused, however, the Court of Appeal allowed an appeal and restrained publication of the relevant names and such details.[40] Despite steps taken by PJS's solicitors to remove the story from the internet, despite their best endeavours, the court concluded that there remains a "significant body of internet material identifying those involved by name".[41] Thus, NGN applied to Court of Appeal to then set aside the injunction as the information was already in the public domain and the injunction was no longer fulfilling its purpose, and interfered unjustly with their Article 10 rights of freedom of expression. [42] However, the Supreme Court reinstated the injunction saying that without a proven public interest in the content, there is no free-standing public interest in publication. The court can't sanction for one media outlet what it believes, on balance, will be deemed unlawful at trial, even if others have published the material already. As such, Mance mentioned;

" For present purposes , any public interest in publishing such criticism [of PJS] must, in the absence of any other, legally recognised, public interest, be effectively disregarded in any balancing exercise and is incapable by itself of

<https://assignbuster.com/balancing-test-in-uk-law/>

outweighing such article 8 privacy rights as the appellant [PJS] enjoys.”

(Emphasis added)[43]

Rea argues that this case points out the dilemma courts face daily, especially in the digital age, as such media on the internet cannot be controlled as largely as print or television media. As such these cases illustrate the balancing test in action, and how to courts use that to prevent one right from prevailing the other.

References

Thompson K, 'Balancing Privacy and Free Speech: A Critique Of English Privacy Law Under The Human Rights Act' (MJur, Durham Law School 2013)

Horsey K and Rackley E, *Kidner's Casebook Of Torts* (12th edn, Oxford University Press 2015)

British Broadcasting Corporation, 'The Public Interest, The Media And Privacy' (BBC 2002) accessed 16 February 2017

Harris C, 'Charlotte Harris: "Freedom Of Speech And Privacy Are Naturally At Odds With Each Other." Can You Balance Freedom Of Speech And Privacy?' (*Mishcon Graduates* , 2017) accessed 23 February 2017

Tibbetts G, 'Max Mosley Admits Passion For Sadomasochistic Sex' (*Telegraph. co. uk* , 2008) accessed 26 February 2017

Phillipson G, 'Why Should We Have A Right To Privacy?' (*BBC Religion & Ethics* , 2013) accessed 21 February 2017

Dyer C, ' Celebrities To Clarify Privacy Law' (*the Guardian* , 2006) accessed 24 February 2017

[1]Kirsty Horsey and Ericka Rackley, *Kidner's Casebook Of Torts* (12th edn, Oxford University Press 2015) at para 138.

[2]The Human Rights Act 1998, art. 8 (1).

[3]Gavin Phillipson, ' Why Should We Have A Right To Privacy?' (*BBC Religion & Ethics* , 2013) accessed 21 February 2017.

[4]The Human Rights Act 1998, art. 10 (1).

[5] *Thorgeirson v Iceland* [1992]14 EHRR 843 at para 63.

[6]British Broadcasting Corporation, ' The Public Interest, The Media And Privacy' (BBC 2002) 19-20 accessed 16 February 2017.

[7]Charlotte Harris, ' Charlotte Harris: " Freedom Of Speech And Privacy Are Naturally At Odds With Each Other." Can You Balance Freedom Of Speech And Privacy?' (*Mishcon Graduates* , 2017) accessed 23 February 2017.

[8] *R v Central Independent Television plc* [1994] Fam 192 at 203.

[9]The Human Rights Act 1998, art. 8 (1).

[10]The Human Rights Act 1998, art. 10 (1).