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EU Privacy and the Media
ZXC v Bloomberg and emerging trends in privacy cases

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Recent trends in "disclosure of private information" cases

- **(1) The reasonable expectation of privacy enjoyed by those under investigation for criminal offences**

- **(2) The right to recover reputational loss in "Article 8 torts" aside from defamation**

  - Misuse of private information
  - Data protection
  - Harassment
  - Actions under s.7 HRA 1998

- **(3) The willingness of the courts to grant injunctions even where private information is readily available in the public domain**

ZXC v Bloomberg [2019] EWHC 970 (QB)

- **Facts**

  - C was the CEO of major international company, "X Ltd"

  - X Ltd was the subject of an ongoing investigation by a UK law enforcement body ("UKLEB"), including into allegations of bribery, corruption and possible offences under the Fraud Act 2006

  - A number of those allegations concerned transactions in a foreign country

  - C interviewed under caution in 2016
    - Fact of that interview was reported in a Bloomberg article in Autumn 2016
    - No legal challenge from C at this stage

  - UKLEB sends "confidential letter of request" for mutual legal assistance to government of foreign country
    - Sets out summary of UKLEB's investigation against C and X Ltd so far
    - Expressed UKLEB's tentative conclusions and asked for help in procuring further evidence

- Another Bloomberg journalist subsequently obtains the letter of request
  - Approaches both C and UKLEB for comment
  - Both express concerns over confidentiality but take no pre-emptive action

- Article based on information contained within the letter of request is subsequently published by Bloomberg

1. Reasonable expectation of privacy – criminal investigations

- **Nicklin J at [119]:**

  "It is possible now to say that, in general, a person does have a reasonable expectation of privacy in a police investigation up to the point of charge."

- 2 justifications for this "general rule":

  - (1) The need to preserve the investigation's integrity and operational effectiveness

    - See *ZXC v Bloomberg* at [115(ii)(f)]:

      "It risks jeopardising the investigation by alerting potential suspects to the avenues of inquiry being pursued potentially enabling them to destroy documents or otherwise obstruct the investigation."

  - (2) The "stigma" attaching to those who are named as being under investigation

    - See *Richard v BBC* **[2018] EWHC 1837 (Ch),** at [248]:

      "If the presumption of innocence were perfectly understood and given effect to, and if the general public were universally capable of adopting a completely open and broad-minded view of the fact of an investigation so that there was no risk of taint either during the investigation or afterwards (assuming no charge) then the position might be different. But neither of those things is true. The fact of an investigation, as a general rule, will of itself carry some stigma, no matter how often one says it should not."

2.1 Reputational harm and privacy

- Some degree of reputational harm will often follow when private information or data is disclosed – e.g.

  - *Campbell v MGN Ltd* [2004] 2 AC 457 – Daily Mirror revelations of treatment at Narcotics Anonymous

  - *Mosley v NGN Ltd* [2008] EMLR 20 – NOTW on "S&M" parties (with accompanying video footage)

- C's case in *ZXC v Bloomberg*:

  "Suddenly, the fact that I was a suspect in the criminal investigation and [UKLEB's] beliefs about my actions were shoved into the public domain where anyone, including my family, friends and business contacts, could read them. I do not consider that Bloomberg had any right to publish this information about me, and to have done so online where it was accessible to anyone <u>has been particularly damaging to me as an international businessman</u>".

- See also Lord Hoffman's characterisation of MPI in *Campbell v MGN* as a tort which:

  "... focuses upon the protection of human autonomy and dignity — the right to control the dissemination of information about one's private life <u>and the right to the esteem and respect of other people</u>"

2.2 Reputational damages – do you still need defamation?

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- **(1) The old "rule":** *Lonrho v Fayed (No. 5)* [1993] 1 WLR 1489

  "If the plaintiffs want to claim damages for injury to reputation or injury to feelings, they must do so in an action for defamation, not in this very different form of action. Injury to reputation and to feelings is, with very limited exceptions, a field of its own and the established principles in that field are not to be side-stepped by alleging a different cause of action. Justification, truth, is an absolute defence to an action for defamation and it would, in my judgment, be lamentable if a plaintiff could recover damages against defendants who had combined to tell the truth about the plaintiff and so had destroyed his unwarranted reputation."

- **(2) Cracks emerge…** *Hannon v News Group Newspapers* [2015] EMLR 1

  - MPI claim for (largely) reputational damage caused by publication of articles based on police "tip-off"
  - D contends that the claims ought to have been brought in defamation not MPI, and sought to strike out claim
  - Mann J holds it was *"arguable"* that a claim for damage to reputation could be advanced in *"the developing area of the tort of privacy."*

- **(3) A new orthodoxy?** *Richard v BBC* [2018] EWHC 1837 (Ch)

  "It is therefore quite plain that the protection of reputation is part of the function of the law of privacy as well the function of the law of defamation. That is entirely rational. As is obvious to anyone acquainted with the ways of the world, reputational harm can arise from matters of fact which are true but within the scope of a privacy right… If the protection of reputation is part of the function of privacy law then that must be reflected in the right of the court to give damages which relate to loss of reputation."

2.3 Reputational damages – not all causes of action are equal

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- An award of general damages in defamation serves 3 purposes:

   (1) Compensation for the damage to a claimant's reputation
   (2) Vindication of claimant's reputation
   (3) Compensation for the distress, hurt and humiliation which the claimant feels as a result of traducing of his/her reputation

   (*Elton John v MGN Ltd* [1997] QB 586, per Sir Thomas Bingham MR)

- In *ZXC v Bloomberg*, Nicklin J drew a key distinction between the recoverability of damages under these different heads:

  - (3) is a common element to damages awards in both defamation and MPI (albeit Nicklin J preferred the term "loss of standing" as the trigger for the distress, rather than "loss of reputation")

    "In support of his/her claim for damages in a misuse of private information claim, it is at least arguable a claimant is entitled to rely upon the element of distress and upset caused by his/her belief that the allegations are false and have damaged his/her reputation. The basis for this is that, true or false, it was a misuse of private information for the relevant information to have been published."

  - However, damages for (1) and (2) depend on proof of falsity:

    "To award damages for these elements whilst at the same time holding that the truth or falsity of the information is irrelevant is wrong in principle; insofar as any damages award were to be increased to reflect these aspects, the additional element is an unjustifiable interference with the Article 10 right of the defendant."

    (see also Warby J in the context of data protection claim in ***Rudd v Bridle*** *[2019] EWHC 893 (QB) at [60(5)]*

2.4 Reputational damages – where now?

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- Stand-off between the most prominent Ch Div judge hearing privacy cases and the two most senior Media & Comms Judges in the QBD…

- Close parallels with the increasing tactic of pleading a data protection claim predicated on a publication's asserted inaccuracy as an alternative to defamation proceedings

  - Latter was held to be a proportionate interference with Art 10(1) by Court of Appeal in *Prince Moulay Hicham v Elaph Publishing* [2017] EWCA Civ 29
  - However, even there, Simon LJ warned that an attempt to claim the same (reputational) damage via the DPA claim *"will require some further thought by those advising the Prince"* (at [44])

- *ZXC v Bloomberg* itself goes to appeal this week but the focus is on D's grounds of appeal

- In meantime, if you want to claim general damages for loss of reputation in a MPI or data protection context:

  (1) Clear you must <u>at least</u> plead and prove falsity or else risk having a claim for such damage struck out

  (2) Strong argument, however, that even this will not suffice and only a claim in defamation gives a legitimate right to such damages:

  - Art 8 / Art 10 balance which defamation seeks to preserve is not simply about truth / falsity
  - Also contains wider protections for free expression (honest opinion, qualified privilege, limitation) and other enhanced thresholds (serious harm, single meaning rule)

3. Injunctions and "private" information in the public domain

- Idea that an injunction may still be obtained in MPI even where information is accessible in public domain now well-established:

  - ***PJS v News Group Newspapers Ltd*** [2016] AC 1081 – CA held that whether the availability in the public domain of the same or similar information leads to the conclusion that the claimant cannot have a reasonable expectation of privacy is <u>a matter of fact and degree</u>, to be assessed in the individual case

  - ***Green Corns Ltd v Claverley Group Ltd*** [2005] EMLR 31 - *"the question [is] not whether information was generally accessible, but rather whether an injunction would serve a useful purpose"*

  - C.f. breach of confidence?

- However, ***ZXC v Bloomberg*** is another vivid example of how far this principle now extends:

  - No attempt by C to injunct in advance of publication
  - Post-publication attempt to obtain an interim injunction fails (albeit in circumstances which subsequently became contentious)
  - Once published, article remains accessible on Bloomberg's website for over 2 years until trial

- Nevertheless, Nicklin J took view that (i) a final injunction was the *"natural remedy"*; (ii) it would still serve a useful purpose (only c.11,000 hits); and (iii) the impact of continued publication on C was still significant