Mosley v News Group Newspapers Limited

Anyone who follows developments in media law will be familiar with the facts of the Mosley case, even if they have no detailed knowledge of the legal issues involved. The notoriety which the Mosley case attracted was inevitable, given the audacity involved in covertly obtaining the titillating images and the scandalous accusations raised by the defence, not to mention the prominence of the plaintiff.

The *Mosley* case concerned a videotape of Max Mosley (President of the *Federation Internationale de l'Automobile*) participating in sado-masochistic role-play with several women. The video was secretly recorded by one of the women, using a camera concealed in her clothing. The video was displayed on the defendant's website and images from the video were published in *News of the World*. Significantly, the article printed with the images claimed that the activities recorded were of a Nazi theme or that they involved the humiliation of individuals wearing "death camp" uniforms.

Although the material might well have led to an action in defamation, the plaintiff's cause of action was for breach of privacy. This illustrates the increasing significance of this relatively new tort. Privacy law in the UK can be viewed as a descendant of the traditional common law tort of breach of confidence and judgments in this area have tended to make reference to obligations of confidence when giving reasons for finding the existence of a cause of action. One of the interesting aspects of *Mosley* is that the judgment of Eady J. places greater emphasis on Article 8 of the *European Convention on Human Rights and Fundamental Freedoms* and the "Strasbourg jurisprudence".

The convention being the instrument relied upon as the basis for the cause of action for breach of privacy, the court was obligated to engage in the exercise of balancing the plaintiff's right to privacy under Article 8 against the right to freedom of expression protected by Article 10.

The judge's deliberation involved two essential elements: a consideration of whether the plaintiff had a reasonable expectation of privacy in the particular circumstances; and whether the extent of intrusion into the plaintiff's privacy was proportionate to the public interest served by that intrusion.

In assessing "a reasonable expectation of privacy", Eady J. clearly stated that activities of a sexual nature are inherently private and especially so when conducted on private property between consenting adults. That being the presumption, the degree of public interest served by the intrusion must be extremely high to justify a finding that the right to free expression over-rides the right to privacy. In making this point, Eady J. referred to the case of *Tammer v Estonia*, a decision by the European Court of Human Rights involving the reporting of a sexual relationship between a Prime Minister and a political aide. In that case the imposition of criminal penalties for the reporting was found not to be a breach of Article 10.

Having emphasised that there is a reasonable expectation of privacy with regard to sexual activity between consulting adults in private, thereby satisfying the test for a breach of privacy, the judge's reasoning focussed on whether there was public interest in reporting the plaintiff's activities sufficient to invoke Article 10 of the Convention.

To justify their defence under Article 10, the defendants claimed that the activities depicted involved Nazi role-play and that, since the plaintiff is a prominent public figure, it was in the public interest that the video be published. Consequently, the judge went into some detail in assessing the degree to which the activities recorded were "Nazi" in character. The judge rejected the defendant's assertions that the behaviour was in any sense "Nazi", describing it as "judicial" or "prison" scenarios.

In the course of considering whether the public interest claimed by the defendant was sufficiently great as to justify the intrusion into the plaintiff's privacy, Eady J. drew a distinction between simply reporting the facts and publishing detailed images or recordings. He cited a number of precedents to support his view that, even where it is in the public interest for conduct to be reported, such as where it reveals wrong-doing, that does not necessarily justify the making of clandestine recordings, nor does it necessarily justify the publication of detailed imagery. Thus, in circumstances where there might otherwise be an arguable defence under Article 10, that defence would very likely be defeated if the published material included gratuitous or salacious detail or graphic images or if it involved clandestine recording.

Once the court rejected the defendant's claim that the plaintiff's conduct involved Nazism the defendant's argument that the publication of the images was a legitimate exercise of free speech under Article 10 collapsed. Without the Nazi aspect there was little or no justification for the public interest assertion. The intrusion into the plaintiff's privacy having been so profound and the public interest component being so flimsy, the judge was obligated to find in favour of the plaintiff.

There are two aspects of the *Mosley* decision that are instructive for Australian media professionals and those concerned with reforms to privacy law currently being considered in the wake of the ALRC's recommendations. First, the reasoning process of the judge in this case illustrates the crucial importance of having a statutory or constitutional protection for freedom of speech to complement any statutory or common law protection of personal privacy. The protection of privacy and the protection of free speech should be seen as two arms of a delicately balanced structure. No state ought to consider one in the absence of the other.

Secondly, as actions for breach of privacy increase in frequency in Australia, publishers and broadcasters would be well advised to ensure that there is a strong public interest component involved in any story where there is likely to be an invasion of personal privacy. The greater the degree of intrusiveness, the higher the threshold likely to be imposed to satisfy a public interest test. If there is little public interest to be served, publishers should tread cautiously to avoid any intrusion into the personal privacy of individuals.

One piece of advice that should not be necessary for any truly responsible journalist is that the use of covert surveillance devices or the recording of private sexual activity is ill-advised at any time, public interest or not.

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