THE LAW OF UNINTENDED CONSEQUENCES

SUPER INJUNCTIONS, TWITTER, THE PERCEIVED IMPOTENCE OF THE ENGLISH COURTS IN THE U.S. AND SCOTLAND, CRISES IN THE CONSTITUTIONAL SETTLEMENT..... Every day sees a new twist in the ongoing media driven frenzy. For once, this is not just over–hyped tittle tattle, laced with celebrity sex scandals; it is the sharp end of the inherent tension between the individual's right to privacy enshrined in Article 8 of the Human Rights Act and the right to freedom of expression (Article 10.)

There is also the fundamental question of open access to justice. Are the recent rulings of the English Higher Courts out of touch with the modern day and the speed of social media and the reach of the internet? How English Court rulings can possibly be enforced abroad, or even in Scotland, let alone further afield is thought by many to be an issue which has been holding up the domestic Courts to ridicule.

A well known English journalist has been threatened with jail for contempt of Court for revealing the identity of a star whose name had been disclosed variously on Twitter, chanted by football crowds and reported in the media. Alex Salmon, the Scottish First Minister, has defended the editor of Scotland's Sunday Herald's right to report the same information and publish a front page photograph of the individual. Some might see this as a constitutional crisis involving a battle for power between the Judiciary, Parliament and the media. However this is not really a major shift in the tectonic plates of our constitutional settlement, but an inevitable and welcome examination of perennial and fluid themes.

The 103 page Report of the Judicial Committee on Super Injunctions makes for stimulating reading. Published on 20 May, this seeks to reassure by pointing to the recent reduction in use of such injunctions, whilst highlighting the fact that the vast majority related to proceedings in the Family Court where privacy has been regarded as paramount since its inception. But here too, secrecy in the Family Courts is coming under increasing scrutiny from numerous sources.

The Committee helpfully set out definitions which are essential for distinguishing where the important points of principle lie:

"… the term '**super-injunction'** can properly be defined as follows:

an interim injunction which restrains a person from: (i) publishing information which concerns the applicant and is said to be confidential or private; and, ii) publicising or informing others of the existence of the order and the proceedings (the 'super' element of the order).

This is to be contrasted with an '**anonymised injunction'**, which is:

an interim injunction which restrains a person from publishing information which concerns the applicant and is said to be confidential or private where the names of either or both of the parties to the proceedings are not stated.

The distinction between anonymised injunctions and super-injunctions is of obvious importance when claims are made regarding the prevalence of super-injunctions. The term super-injunction is frequently used incorrectly to refer to an anonymised injunction.

The inaccurate use of the term super-injunction to refer to anonymised injunctions, has not only led to a false view that super-injunctions are commonplace. It has also given rise to misconceptions as to how long super-injunctions endure. A claim that a super-injunction has been in place for a number of years adds credibility to the fear that a new law has been created by the judges."

Whilst going some way towards satisfying deep concerns about the way that such injunctions have been used to thwart free speech, the Report is far from being a complete answer, but a helpful contribution to the debate. Although many of the recommendations are to be welcomed, I would highlight serious concerns about secrecy and the right to privacy being privileged over freedom of expression.

I do not believe that the Committee has entirely answered the prescient concerns expressed for example by Professor Adrian Zuckerman that a "Kafkaesque process…. contrary to democratic principles" is undermining the rule of law in the recent rash of "curiosity–suppressant orders" [CJQ Vol 29 Issue 2, 2010 p131-138]. Transparency of court proceedings and proper, responsible reporting reduces the scope for ill informed and malicious criticism of judicial decisions, and protects the Judiciary from ridicule, whilst also permitting the essential development of jurisprudence and precedent.

Super injunctions also prevent the necessary scrutiny by the public, the media, academics, politicians, lawyers (and the judges themselves!) and analysis of the arguments deployed. After all, there ought to be due weight given to the Natural Justice principle that "…justice should not only be done, but manifestly and undoubtedly be seen to be done…" (R v Sussex Justices Ex p. McCarthy [1924] 1KB 256.)

Another game-changer is the unforeseen release by Twitter of confidential contact and account details of an anonymous self-styled whistle-blower calling himself "Mr Monkey". This was prompted by proceedings brought by South Tyneside Councillors in the Californian Courts, the home of Twitter. They allege defamation by Mr Monkey, whilst his tweets allege corruption in Local Government.

Twitter's privacy policy states that it will "…comply with a law, regulation or legal request…" Their Head of European Operations says Twitter will not attempt to withhold user's private details if they are legally required to disclose it. *(The Telegraph, Richard Gray, 28 May 2011)*. This may constitute a watershed in how social media is perceived; with the realisation that it is not a consequence-free zone. This development is to be welcomed, not least on the basis that people should take responsibility for their actions and words. This should obviously be distinguished from the principled stands against oppression and injustice taken by civil rights activists in totalitarian and despotic regimes.

It is salutary to note that the long arm of the English Courts may reach out across the Atlantic to snare Mr Monkey. Closer to home, commentators may have second thoughts about deliberately flouting injunctions, whether supported by MP's under the cloak of Parliamentary privilege or not. Detractors of the Judges will however point to the lessons from King Canute and the failure of the US Authorities to prevent the wholesale and continuing circulation of mass confidential information in the Wiki leaks saga. The whole imbroglio is also reminiscent of the "Spycatcher" purported exposé of MI5's secrets in 1987 by Peter Wright, and the UK Government's relentless but ultimately ill-fated and counter-productive judicial attempts to block publication.

As Gordon Ramsey's Father-in-Law amongst others will doubtless now be reflecting, when going to law to protect privacy or reputation, one universal law that should never be overlooked is the law of unintended consequences.

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