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Foster, S.

Original citation & hyperlink:
Foster, S 2018, 'TV reality shows and the balance between privacy and public interest broadcasting' Nottingham Law Journal, vol. 27, no. 1, pp. 103-110.

ISSN 0965–0660

Publisher: Nottingham Trent University Law School

TV REALITY SHOWS AND THE BALANCE BETWEEN PRIVACY AND PUBLIC INTERST BROADCASTING

Ali v. *Channel 5 Broadcast Ltd*
[2018] EWHC 298 (Ch)
High Court, Chancery Division
Arnold J

INTRODUCTION

Reality TV is hugely popular in the UK and globally and private individuals sell their privacy, often for large sums of money, in return for public fame. Such individuals run the risk of acquiring some form of public status and thus expose themselves to greater intrusions into their private life in the future; at least until their fame dies down. Other individuals however are not willing participants and may be the subjects of reality TV for reasons other than pure entertainment. Programmes exposing certain individuals for their criminal or anti-social behaviour are now watched by millions of viewers, justified by the argument that is it in the public interest to expose such individuals.

The following questions need to be asked: "Should such programmes be broadcast irrespective of the harm or embarrassment caused to that individual?"; and "Do the individuals concerned have recourse to redress if they are caught on camera and discussed on national or international television?" If the programme in question damages their reputation, they may have a case to sue in defamation. However, in many cases it is unlikely that such individuals will have much of a reputation to defend.[1] In addition, a television company may face contempt of court proceedings if the programme were to seriously prejudice a forthcoming criminal trial.[2] Alternatively or in addition, individuals may also seek to bring claims based on breach of privacy,[3] complaining that the broadcast is a misuse of their private information as well as a violation of their right to private life under Article 8 of the European Convention on Human Rights 1950.[4]

A recent decision of the High Court,[5] has reminded us that such actions are possible and that broadcasting companies need to be careful to balance individual privacy with their desire to inform the public on matters of public interest, however loosely defined in certain cases. This commentary reviews the potential implications of the decision on future programmes and legal actions. It will also re-examine *Peck v United Kingdom,*[6] a case which had rather different facts,but which nevertheless reminded broadcasting and public authorities that they owe duties under the European Convention.[7]

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*Principal Lecturer in Law, Coventry University.

[1] A claimant must prove that their reputation has been lowered in the eyes of right-thinking members of society: *Sim v Stretch* (1936) 52TLR 669

[2] Section 2, Contempt of Court Act 1981

[3] *Campbell v MGN Ltd* [2004] 2 AC 457. This case established the action of misuse of private information, developed from the common law action in confidentiality.

[4] As given effect to by the Human Rights Act (UK) 1998

[5] *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch)

[6] (Application No.44647/98). Decision of the European Court of Human Rights, 28 January 2002

[7] Implemented under the Human Rights Act 1998. Only the state can be liable for a breach of the Convention brought before the European Court of Human rights; although the state will be liable for the actions of both

THE FACTS AND DECISION

In this case, the claimants brought an action for damages against the defendant television production company for misuse of their private information. As a result of rent arrears, the claimants' landlord had obtained a possession order for the property they occupied and the local housing authority advised them to wait until eviction before they could be rehoused. The landlord obtained a High Court writ of possession and when enforcement officers attended the property to evict the claimants they were accompanied by the defendant's film crew; the landlord's father also attended. The first claimant, who was the voluntary media secretary of a Muslim political party, was awoken as they entered the property and was given an hour to vacate. The second claimant returned after taking her children to school. Various exchanges took place during the hour, but shortly before they vacated the first claimant agreed to be interviewed. Subsequently, the landlord's father posted on social media two videos he had recorded of the eviction. The defendant then broadcast edited footage as part of a series of programmes called "Can't Pay? We'll take it away". The programme containing the claimants was seen by 9.65 million viewers and the claimants' daughter suffered bullying at school, as a consequence. The claimants accepted that the writ was a public court order and that the defendant was entitled to broadcast the fact that they had been evicted, but contended that the programme included filming of them in their home, in distress and being taunted by the landlord's father, and was thus in breach of their right to respect for private and family life under article 8 of the Convention. In defence of that claim, the defendant argued that the programme addressed matters of real public concern, namely the public reporting of increased levels of debt, dependence on housing benefit and the effect of enforcement of writs of possession by High Court enforcement officers.

In the High Court, judgment was given in favour of the claimants. The Court first considered whether the claimants had a reasonable expectation of privacy. In the court’s view, the claimants did indeed have a reasonable expectation of privacy in respect of the information in question and thus their article 8 rights were engaged. The property had remained their home until the writ was executed, which was at the expiry of the hour allowed for them to vacate. In the court’s view, the principle of open justice did not justify the broadcasting of information beyond the bare fact of the eviction; what happened when the warrant was executed was not part of the court proceedings and thus could not be regarded as a public process or event. Nor, in the court’s view, could the impact on the claimants' children be justified by reference to open justice. The broadcasting of the information was not a foreseeable consequence of the claimants' failure to comply with the possession order.

The court also found that the first claimant's rights were not significantly weakened by his political activity; he had no official position and his political activities were not mentioned in the programme. Although the claimants and their children had already suffered damage to their privacy as a result of the social media postings, that did not mean that broadcasting the programme either could not or did not inflict further damage given the substantial scale and duration of the broadcasting. Further, they did not cease to have a reasonable expectation of

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public and private bodies by not safeguarding Convention rights. Under the 1998 Act, only public authorities can be directly liable, although the courts must ensure that private bodies and individuals do not violate Convention rights.

privacy in respect of the small part filmed on the street; as that was a single sequence of events. [8]

The court then considered the question of whether the claimants had consented to the filming and thus the intrusion into their private life. On this issue the Court found that at no stage during the eviction had anyone informed the claimants that the film crew was filming a programme for the defendant television company. The first claimant having been woken up was clearly drowsy and confused and had not been in a fit state to give informed consent. Although he was in a fit state to do so by the time he agreed to be interviewed, he could not be taken retrospectively to have given his consent to the broadcasting of material filmed when he was not in a position to consent. The first claimant had agreed to be interviewed only after twice objecting to filming without avail and this did not amount to true consent; in effect it was an agreement to participate under protest. In any event, he made it clear in a later telephone call to the defendant that he objected to being on television. To the limited extent that he had given consent, he had unequivocally withdrawn it prior to first broadcast of the programme.[9]

The Court then proceeded to balance the claimant's article 8 rights with the defendant's rights under article 10 to freedom of expression. On this issue, although the court accepted that the programme contributed to a debate of general interest, it found that the inclusion of the claimant's private information went beyond what was justified for that purpose. In the court's view, the programme's focus was not on the matters of public interest, but on the drama of the conflict between the claimants and the landlord's father. Moreover, that conflict had been encouraged by one of the enforcement officers to "make good television." The claimants had not established that the programme was unfair or inaccurate and the defendant had editorial discretion as to the way in which it told the story, but that discretion did not extend to its decision to include the private information of which the claimants' complained unless it was justified as contributing to a debate of general interest. On the facts the balance came down in favour of protecting the claimants' article 8 rights and the defendant had failed to convince the court that this intrusion was justified and proportionate.[10]

Having upheld the claimant's case, the court then considered the appropriate level of damages, and applying the standards that had been laid down in the case of *Gulati v MGN Ltd*,[11] awarded each claimant £10,000. This was to compensate the claimants for the distress caused by the broadcasting of the eviction; the court accepting that the programme involved the disclosure of the claimant's private information to 9.65 million viewers and that while the information in question was not of the highest degree of sensitivity, it was fairly sensitive and the Programme had a voyeuristic quality. The court also stressed noting that a higher figure would have been awarded if it had not been for the social media posting by the landlords.[12]

BALANCING PRIVACY AND THE RIGHT TO KNOW: THE DECISION IN PECK

[8] *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch), at paragraphs 145, 158, 162-163, 169.
[9] *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch), at paragraphs 172-173, 175, 177-178. The court also found that the second claimant had independently objected to being filmed at the time.
[10] *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch), at paragraphs 195, 203-206, 210).
[11] [2015] EWHC 1482 (Ch)
[12] *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch), at paragraph 220. This was because the court accepted that a great deal of distress had been caused by this posting, which was not of course, the fault of the defendants.

The balance between the right to privacy and the right and duty to report on and broadcast matters of public interest was considered in the landmark decision of the European Court of Human Rights in *Peck v United Kingdom*,[13] a decision concerned with CCTV footage taken by and then distributed by a local authority. Although the circumstances of this case and *Ali* are different, an examination of the earlier case may be useful in estimating the impact of the recent decision.

The applicant, Geoffrey Peck, was suffering from depression. In August 1995, he was walking down Brentwood High Street with a kitchen knife in his hand and attempted to commit suicide by slitting his wrists. Unbeknown to the applicant, he was being filmed by closed-circuit television, although the footage did not show him cutting his wrists. Police and medics were called to the scene and the applicant was later detained for a short period under the Mental Health Act 1983, but released and taken home. In October 1995, the Council issued a press feature in their CCTV News, containing two photographs from the footage along with an account of the incident. The applicant's face was not specifically masked and the article explained that the applicant had been spotted with a knife in his hand and that he was clearly unhappy but not looking for trouble. Three days later the local newspaper – the *Brentwood Weekly News* - used a photograph of the incident on a front page article about the closed circuit television system and again the applicant's face was not specifically masked. The next day an article entitled 'Gotcha' appeared in another local newspaper – the *Yellow Advertiser* with a circulation of approximately 24,000 - containing a photograph from the footage and describing how the police had defused a potentially dangerous affair. A follow-up article was published three days later, using the same photograph and there was evidence to suggest that a number of people recognised the applicant.

One day after the publication of the last article, Anglia Television broadcast a programme to approximately 350,000 people containing extracts of the footage although the applicant's face had been masked at the Council's request. The applicant became aware of these articles and programmes in late October but chose not to take any legal action because of his depression. The footage was then supplied to the producers of the BBC programme 'Crime Beat', which had on average 9 million viewers. The Council imposed a number of conditions relating to its showing, including that no one should be identifiable and that all faces should be masked. However, in trailers for the programme the applicant's face was not masked and although the producers assured the Council that his face was masked in the main programme, several of his friends and family recognised him from the programme.

The applicant then made a number of television appearances to complain about the situation and also complained to the Broadcasting Standards Commission regarding the programme on the BBC, alleging an unwarranted infringement of his privacy and the Commission upheld his complaints. The applicant also complained to the Independent Television Commission concerning the Anglia television programme and the Commission found that there had been a breach of the Commission's Code as his face had not been properly obscured. As a result of the finding, an apology was given by Anglia TV. The applicant's complaint to the Press Complaints Commission regarding the article in the "Yellow Advertiser" was dismissed, on the basis that the incidents had taken place in a public place and no criminal stigma had been attached to the applicant. An application for judicial review of the Council's decision to

[13] (Application No.44647/98). Decision of the European Court of Human Rights, 28 January 2002

release the footage was also unsuccessful.[14] The High Court found that the Council had an implied legal power to release such information to other bodies when that was necessary to fulfil its statutory power to operate the scheme, and that the Council had not acted irrationally in conveying this particular information to the relevant bodies in the manner that it did.

The applicant applied under the European Convention, invoking article 8 before European Court of Human Rights, and claiming that the use of the footage was an unjustified interference with his right to private life. With regard to the claim under article 8, the Court observed that the disclosure of the footage had resulted in the applicant's actions being observed to an extent far exceeding any exposure to a passer-by or to security observation and to an extent surpassing that which the applicant could have foreseen. Accordingly, the disclosure by the Council of that footage had resulted in a serious interference with the applicant's right to respect for private life. Having satisfied itself that the interference was prescribed by law and had a legitimate aim,[15] the Court then held that the reasons for the interference with the applicants' rights were neither relevant nor sufficient so as to be considered as necessary in a democratic society.

The Court stressed that the disclosure of private intimate, information could only be justified by an overriding requirement in the public interest and that the disclosure of such information without the consent of the individual called for the most careful scrutiny by the European Court.[16] In the Court's view, the aims of the coverage and its release could not justify the direct disclosure by the Council to the public of stills of the applicant in "CCTV News" without it obtaining the applicant's consent or masking his identity. Neither could it justify its disclosure to the media without it taking steps to ensure so far as possible that his identity would be masked. Particular scrutiny and care was needed given the crime prevention objective and the context of the disclosures. The disclosure of the material in CCTV News and to the Yellow Advertiser, Anglia Television and the BBC were not accompanied by sufficient safeguards. This constituted a disproportionate and unjustified interference with the applicant's private life under article 8. In arriving at that conclusion, the Court held that the applicant's voluntary media appearances after the initial coverage did not diminish the serious nature of the interference, neither did they reduce the need for care concerning disclosures. The applicant had been the victim of a serious interference with his right o privacy. Further, it could not be held against him that he had later tried to expose and complain about that wrongdoing through the media.[17]

THE EFFECT OF ALI ON BROADCASTING AND PRIVACY

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[14] *R v Brentwood Council, ex parte Peck* [1998] CMLR 697.

[15] The Court was satisfied that this interference was prescribed by law in that s.163 of the Criminal Justice and Public Order Act 1984, which enabled local authorities to operate such schemes, together with s111 of the Local Government Act 1972, which allows local authorities to anything to facilitate the discharge of their functions, was sufficiently clear and certain to be acceptable within the terms of article 8(2). The Court also considered that the powers bestowed on the Council under that provision served a legitimate aim in that such powers were necessary for the detection and deterrence of criminal activities and that the publication of such footage served the legitimate aims of public safety, the prevention of disorder and crime and the protection of the rights of others.

[16] *Z v Finland* (1997) 25 EHRR 371

[17] The Court also noted that at the relevant time the applicant did not have an actionable remedy in breach of confidence, the information in question not having the necessary quality of confidentiality required by the law at that time, and re-publication of confidential information would have been classed as information in the public domain. Accordingly, the applicant had been left with no effective remedy for breach of his Convention right of private life and there had been a violation of article 13 ECHR – the right to an effective remedy.

The decision in *Peck* provides useful guidance on how broadcasting authorities, and the media and public authorities generally, need to accommodate the right of individual privacy when carrying out their broadcasting and other duties. The key, of course, is proportionality, and a careful balancing of conflicting interests, so as to show that any interference is necessary in a democratic society, as required by the qualifying provision in Article 8(2).

Apart from these general considerations, a key factor in determining whether the interference is proportionate and necessary on the facts (assuming that the claimant can satisfy the court that they had a reasonable expectation of privacy) is the extent to which the broadcast or other public dissemination serves the public interest. In this sense, the court's finding in *Ali* that the programme, albeit made for public interest purposes (an investigation into debt), was not focussed was on those matters of public interest, but rather on the drama of the conflict between the claimants and the landlord's father, is interesting; and of great concern to broadcasters. In the present case the court accepted that the conflict between the tenants and the landlord had been encouraged by one of the enforcement officers to "make good television" - thus reducing the genuine public interest in making and broadcasting the programme.

This distinction, it is submitted, will be very difficult to maintain in practice, as many public interest stories are presented with mixed motives – to inform the public and to score political or personal points – and provided the media or other publisher has not lost sight of their duty to inform the public the law will offer a defence. In the context of television programmes such as the one in this case, it is inevitable that the programme is being made for both informative and entertainment purposes, and for the courts to try and ascertain which of those purposes dominated in a particular case will be both difficult and potentially unfair.

The *Ali* decision does attempt to impose standards of responsible broadcasting on programme makers and that in itself is unobjectionable. Such standards are imposed by broadcasting authorities; and by the courts in areas such as defamation, contempt of court and indeed in privacy actions generally.[18] The decision in the present case merely takes into account that the purpose of the programme is to entertain. In reducing the public interest nature of the broadcast, and provided programmes made by certain companies (and broadcast on certain channels) are not assumed to have been made for purely financial or prurient reasons, then the courts should be able to avoid making decisions that are unfair or unprincipled. Of course, there will always be an argument about the distinction between what is in the public interest and what the public are interested in, but free speech jurisprudence firmly accommodates that distinction in any case.[19] Such a distinction is necessary to safeguard against unconscionable interferences with privacy, as well as the protection of true and worthy democratic speech. Nevertheless, the decision in *Ali* will likely be met with great concern by programme makers who seek to combine public education and entertainment.

THE ASSESSMENT OF DAMAGES

In the present case, in awarding damages of £10,000 to each claimant the Court took into account the principles established in the case of *Gulati and others v MGN Ltd*.[20] In that case the claimants, all persons in the public eye, such as actors and sportsmen or people associated with them sued the defendant newspapers who then conceded liability for infringements of

[18] *Campbell v MGN Ltd*, note 3 above
[19] See *Van Hannover v Germany* (2005) 40 EHRR 1.
[20] [2015] EWHC 1482 (Ch)

privacy rights and misuse of private information by obtaining confidential or private information from phone hacking and private investigators. The claimants gave evidence as to their horror, distaste and distress at discovering that the defendant's journalists had been frequently listening to aspects of their personal, medical and professional lives by hacking into their voicemails, describing the effect on their lives caused by the distrust that the defendant's newspapers' activities had engendered in them and those around them. The High Court was then required to assess the damages payable to claimants for infringements of privacy rights arising primarily from the phone hacking by the defendant newspaper proprietor, and to give guidance on damages payable in other cases.

The court began by stating that a regime in which damages were confined to damages for distress would, to a degree, render privacy rights illusory and fail to provide an effective remedy for breach of article 8. Further, to award damages to reflect infringements of privacy rights in themselves would not amount to the wrongful reintroduction of vindicatory damages; such damages would be truly compensatory. Thus, compensation could be given in these cases not only for distress and injury to feelings, but also for infringements of privacy rights in themselves, so far as the defendant's acts had impacted on the values protected by the rights contained in article 8. The Court then gave some guidance on how damages in these cases should be assessed, stating that damages in privacy cases should compensate not merely for distress but also, if appropriate, for the loss of privacy or autonomy. That might, in the Court's view, include a sum to compensate for meaningful damage to dignity or standing, so far as that was not already within the distress element.[21]

The Court proceeded to lay down the following principles:

(1) the disclosure of certain types of private information was more significant than others;

(2) information about mental and physical health and significant private financial matters attracted a *higher* degree of privacy, and therefore compensation;

(3) information about social meetings attracted a *lower* degree of privacy and compensation;

(4) information about matters internal to a relationship would be treated as private, and disclosures which disrupted a relationship or were likely to adversely affect a couple's attempts to repair it were likely to be treated as a *serious infringement* deserving *substantial* compensation;

(5) the appropriate compensation would depend on the nature of the information, its significance as private information, and the effect on the victim of its disclosure; the effect of repeated intrusions by publication could be cumulative;

(6) in relation to distress, the "egg-shell skull" principle applied, so that a thinner-skinned individual might be caused more upset, and therefore receive more compensation, than a thicker-skinned individual who was the subject of the same intrusion.

The damages awarded in *Gulati* were particularly high – ranging from £75-150,000 –due to the serious and prolonged nature of the hacking offences committed against high profile individuals. The sums awarded in *Ali* are obviously more modest, and had been reduced as the claimants had already suffered the inevitable stress of their plight being publicised on social media. Nevertheless, they are high enough to send a warning to programme makers

[21] [2015] EWHC 1482 (Ch). at paragraph 45

who might in future fall foul of privacy laws when making programmes for public education and entertainment.[22]

CONCLUSION

The decision in *Ali* is a reminder to broadcasters, and the media generally, that they must carry out their duties in a responsible manner and mindful of an individual's privacy and Convention rights. This is spelt out in various broadcasting codes and is part of their ethical training; although legal actions and awards of damages tend to concentrate the mind more than such codes and general principles.

It is suggested that this was, as in *Peck*, one of those cases where it was appropriate to interfere with the editorial judgment of the media and thus protect individuals from an unreasonable and unnecessary intrusion into their private lives. Provided these cases are rare, which they will be if the media practice responsible reporting, then actions such as the one in *Ali* should not intrude too greatly on broadcasting freedom and the public right to know.

DR STEVE FOSTER*

[22] In contrast to previous cases, in *Campbell v MGN Ltd.*, Naomi Campbell received £2,500 plus £1,000 aggravated damages for the publication of details of her drug therapy sessions and photographs of her leaving such sessions; and in *Weller v Associated Newspapers* [2014] EWHC 1163, £5,000 was awarded to a 16 year old girl for publication of unauthorised photographs, with £2,500 being awarded to younger siblings.