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from Harassment

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# Flash Flood or Slow Burn?: Celebrities, Photographers and Protection from Harassment

Andrew Scott\*

**Abstract:** In recent months, a number of female celebrities have been awarded court orders under the Protection from Harassment Act 1997 to constrain the excessive behaviour of the paparazzi. This is a novel, but unsurprising, use of the statute. Indeed, what has been most startling in this development is the fact that the statutory cause of action has never formerly been deployed in this way. The aim of this paper is to assess why this has been the case. In doing so, it reflects upon opposing perspectives on the interaction between celebrities and the media; details the origins of the 1997 Act, its requirements, and their application to the newsgathering context; reviews the jurisprudential forebears to the recent actions that suggested that the Act could be deployed in a newsgathering context come the appropriate case, and considers the operation, strengths, and putative weaknesses of alternative regulatory options (in particular, that offered in this respect by the Press Complaints Commission). The paper concludes by highlighting a combination of factors that may explain why the Act has been used only now, by musing on the ramifications for celebrities and the paparazzi, and by reflecting on the likely future interplay between the legal and regulatory avenues oriented towards combating the problem of harassment by photographers and other journalists.

## INTRODUCTION

In May of this year, lawyers acting for singer Amy Winehouse confirmed that she has been awarded a court order to prevent members of the paparazzi from following and photographing her. The order was based upon the Protection from Harassment Act 1997. Winehouse is not the first embattled celebrity to take this route in recent times. Both actress Sienna Miller and media personality Lily Allen

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have likewise received the protection of the courts. The Act criminalises engagement in a ‘course of conduct that amounts to harassment’. It also allows victims to sue for damages and other remedies in the hope of preventing recurrence. These three instances leave it clear that repeated over-vigorous newsgathering activities and paparazzi excess can amount to the requisite course of conduct. The Act has taken its place alongside the tort of misuse of private information in the developing legal arsenal available to public figures keen to preserve their privacy. Where the former is focused on harms to privacy caused by publication, however, the statutory option is concerned with the immediate distress caused by more physical intrusions.

The manner in which these celebrities have used the Act to constrain photographers is unprecedented. That said, it is not surprising in itself. It was always expected that the very general terms of the harassment law might be used against the more outrageous elements of the press pack. Princess Diana was said to have welcomed the prospect before her untimely, and in this sense ironic, death. While it has been used to deter violent spouses, jilted lovers, and animal rights protestors, however, in its first ten years of operation the Act was never used against the paparazzi. In consequence, the theme receives only minimal treatment in leading texts on media law.<sup>1</sup> It is therefore the relative tardiness of this development that is noteworthy.

The aim of this paper is to question the seemingly belated blooming of this legal option. In doing so it outlines, first, the difficulties posed to some public figures in their daily encounters with the paparazzi as agents of the wider media, and considers the appropriateness of applying the 1997 Act to their experiences. Secondly, it discusses the origins and basic features of the 1997 Act and related powers. Thirdly, it reviews a number of instances that – although not directly involving interplay between public figures and photographers – suggested that the Act could well be deployed in a newsgathering context come the appropriate case. Fourthly, the paper presents an examination of the reasons why, in light of this possibility, the Act has only now begun to be used in the newsgathering context. To do so, it considers the operation and the putative weaknesses of the alternative regulatory option offered in this respect by the Press Complaints Commission. The paper concludes with reflections on the future interaction between the legal and regulatory avenues in combating the problem of harassment by photographers and other journalists.

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<sup>1</sup> H. Fenwick and G. Phillipson, *Media Freedom Under the Human Rights Act* (Oxford University Press, 2006) 716-717; G. Robertson and A. Nicol, *Media Law* (London: Sweet & Maxwell, 2007) 310-312; M. Tugendhat and I. Christie (eds), *The Law of Privacy and the Media* (Oxford University Press, 2002) 466-469.

## CELEBRITIES AND PHOTOGRAPHERS: SYMBIOSIS OR 'STALKERAZZI'?

To elicit comment or acquire photographs, journalists and others working directly or indirectly for media organisations sometimes intrude repeatedly and unremittingly into the personal space of individuals unfortunate enough to warrant acute media attention. Such intrusions might consist of any number of behaviours including repeated “door-stepping” of interviewees, physical encampment and opportunistic photography at business or domestic addresses, pursuit from location to location, and even physical endangerment or assault. This depiction is perhaps overly prosaic. Put bluntly, the behaviour of a minority of paparazzi is amoral, debased, animalistic, predatory, ruthless, degrading, abusive, inhumane, and perhaps inhuman.

For many people, the spectacle of the massed horde of photographers jostling on street corners waiting to descend on some willowy blonde – the “media scrum” - has become the leitmotif of media malpractice. It is the snarling mask of the metaphorical “feral beast” lambasted pointedly by Tony Blair during his last speech as Prime Minister.<sup>2</sup> Type the name of any female celebrity in the search box on *YouTube* and one will likely be faced with multiple scenes of truly oppressive, even terrorising behaviour. The problem has been exacerbated by the ubiquity of high-specification digital cameras: anyone can be a paparazzo, and the potential rewards are such that increasing numbers are trying their luck. Moreover, because many of the “new” paparazzi are relatively unskilled and use only short lenses, they are obliged to “get close” to their subjects in order to acquire useable images. Keira Knightly has complained, repeatedly and bitterly, that the paparazzi exercise ‘a very predatory force’. Nick Stern, a veteran photographer, was moved to resign from his agency in protest at the aggressive tactics adopted by many of his contemporaries towards singer Britney Spears.<sup>3</sup> Kate Middleton’s experiences surrounding her twenty-fifth birthday resulted in a select committee investigation. From this viewpoint, protecting celebrities and other public figures from harassment occasioned by aggressive photographers seems an obvious regulatory objective.

Courts too have expressed a visceral distaste for the manner in which media organisations sometimes acquire their content. Most famously, in *Von Hannover v Germany* the European Court of Human Rights lamented that ‘photos appearing in the tabloid press are often taken in a climate of continual harassment which

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<sup>2</sup> The speech was delivered at Reuters, London on 12 June 2007, and together with the ensuing ‘question and answer’ session is reproduced as ‘Tony Blair’s ‘Media’ Speech: The Prime Minister’s Reuters Speech on Public Life’ (2007) 78(4) *Political Quarterly* 476.

<sup>3</sup> D. Ponsford, ‘Pap quits over hounding of Britney Spears’, *Press Gazette*, 1 February 2008. Stern was quoted as explaining: ‘the paps are completely out of control. It’s not unusual to have 20 or 30 cars pursuing her at any one time. It’s become acceptable to drive at 80mph down the wrong side of the street into oncoming traffic. I was horrified at what goes on. It’s so aggressive, there are fights and crashes and slashed tyres. I felt I needed to say something’.

induces in the person concerned a very strong sense of intrusion... or even of persecution'.<sup>4</sup> While accepting that the case primarily concerned harms caused by publication, the judges found themselves unable simply to disregard the experience endured by many public figures.<sup>5</sup> It may have been this perception that prompted the court to deliver what some see as an over-generous ruling to Princess Caroline. Consonant views have been expressed often by British judges. In *Campbell v MGN Limited*, for example, Lord Nicholls expressed a measure of sympathy for the claimant whom he considered had been 'hounded' by the newspaper involved.<sup>6</sup> In granting an injunction to Sienna Miller to prevent a photographer further distributing illicitly gained nude photographs, Mr Justice Eady acknowledged the 'constant climate of harassment and intrusiveness which she has had to suffer, particularly from the paparazzi in frightening and relentless attempts to get photos of her, exceeding what could possibly be expected to be tolerated'.<sup>7</sup> The problem has also occupied intergovernmental organisations.<sup>8</sup>

There is, however, an alternative perception; one that for some adherents may be based on *schadenfreude* alone, but which arguably does have deeper roots. This is the idea that celebrities and the media are locked in symbiosis, and that in consequence those who benefit from the media spotlight must accept paparazzi attention as the "price of fame". From this viewpoint, individual fame and notoriety – celebrity – is a vehicle created and exploited by the cultural industries in order to manipulate demand for products.<sup>9</sup> Celebrities are complicit in the manufacturing of cultural output, and benefit financially from the creation of a mirage of perfection. In some measure, the paparazzi assist in this myth-making. They provide aspects of the visual accoutrements to enliven superficial content. However, they also pose a threat to the celebrity's orchestrated participation in the circus. Should a photographer obtain unglamorised, "bad hair day" images or expose errant behaviour, this may dissipate the aura of perfection that is weaved around the celebrity. By catching the celebrity off-guard, a paparazzo can quickly undermine carefully constructed public images. Alternatively, they can chart and

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<sup>4</sup> (2005) 40 EHRR 1 at [59].

<sup>5</sup> *ibid* at [68].

<sup>6</sup> In that instance, however, he remained in the minority and was not ultimately persuaded to find in the claimant's favour – see [2004] UKHL 22 at [30].

<sup>7</sup> R. Pearson, 'Sienna Miller wins court order against nude snapper', *Press Gazette*, 17 January 2008.

<sup>8</sup> For example, in Resolution 1165 (1998) of the Council of Europe, state governments were called upon to ensure that legislation served to prohibit 'following or chasing persons to photograph, film or record them, in such a manner that they are prevented from enjoying the normal peace and quiet they expect in their private lives or even such that they are caused actual physical harm' (para 14(v)).

<sup>9</sup> Cultural theorists classify celebrity in different ways, distinguishing between such types as 'heroes' or 'public figures', 'stars' or 'celebrities', and 'quasars' or the 'inadvertently famous'. The first category comprises individuals who become known in the public sphere on account of their talent in some sphere, or their undertaking of a public role. 'Stars' or 'celebrities' embrace the industry to become famous more for their personal lives and lifestyles than their professional roles (irrespective of whether they first achieved fame due to their talent). 'Quasars' or the 'inadvertently famous' enter the media spotlight only briefly on account of their involvement in some relationship or event. These categories are porous, and quite where any given individual might be placed in the scheme will be open to debate – see G. Turner, *Understanding Celebrity* (London: Sage Publications, 2004) ch.1; E. Cashmore, *Celebrity Culture* (London: Routledge, 2006).

perhaps to some extent cause an unbalanced celebrity's psychological disintegration. Of course, for some celebrity figures a measure of notoriety may be actively sought.

From this vantage, the consumer of paparazzi images has an interest in receiving such fayre on the basis that it exposes the reality behind the saccharine presentation. It arguably serves the public by allowing them to appreciate the "misrepresentation" of unsullied moral virtue or impossible beauty. From this perspective, the celebrity's concern with paparazzi harassment might be best explained not by fear of physical or psychological injury, but by an imperative desire to retain control over representations of oneself. The 1997 Act may offer a device to preserve commercial value; it would not be the only legal tool to have been deployed in this way.<sup>10</sup> This may prompt some to suggest that the Act should be available to celebrities only in cases of significant risk of injury.

### **THE SCHEME OF THE PROTECTION FROM HARASSMENT ACT 1997**

The Protection from Harassment Act 1997 was passed by Parliament in response to newly widespread perceptions that the practice of "stalking" had become a significant social problem, and one that was inadequately covered by the existing law.<sup>11</sup> The common understanding of the mischief to be caught by the legislation was that it involved the obsessive pursuit of another individual, usually motivated by some combination of ardour and animus. The Act introduced a civil remedy (section 3) and two criminal offences (sections 2 and 4) that could be invoked where a person pursued a course of conduct which amounted to harassment of another. Further criminal offences were introduced to apply in case of breach of any civil or criminal restraining orders imposed by the courts. The Act came into force in June 1997.<sup>12</sup> Its coverage has since been extended by the Serious Organised Crime and Police Act 2005, while related powers were introduced in the Criminal Justice and Police Act 2001.

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<sup>10</sup> Consider, for example, the use of the law of confidence in the *Douglas v Hello* litigation, or the threat of a libel suit made by Nicole Kidman against the *Daily Telegraph* on account of its suggestion that a perfume she advertised for Chanel was not in fact her favourite – see L. Holmwood, 'Kidman takes action against the Telegraph', *Guardian*, 30 November 2007.

<sup>11</sup> The passage of the Bill was notable for its rapidity. In the House of Commons, the Bill passed through its Second Reading, Committee, Report and Third Reading Stages in the course of only two days (297 HC Deb vol 297 col 781-853, 965-988). Sections 1-7 and 12 of the Act apply in England Wales, and ss. 8-12 in Scotland. Provision for extending equivalent law to Northern Ireland is envisaged under s.13. On the origins of the Act, see E. von Heussen, 'The Law and "Social Problems": The Case of Britain's Protection from Harassment Act 1997' (2000) 1 WebJCLI; E. Finch, *The Criminalisation of Stalking: Constructing the Problem and Evaluating the Solution* (London: Routledge, 2001). For general guidance on its operation, see Crown Prosecution Service, *Legal Guidance: Protection from Harassment Act 1997* (London: CPS, 2007); N. Addison, and T. Lawson-Cruttenden, *Blackstone's Guide to the Protection from Harassment Act 1997* (London: Blackstone Press, 1997).

<sup>12</sup> Protection from Harassment Act 1997 (Commencement) (No. 1) Order 1997 SI 1997/1418.

While some have suggested that ‘freedom of expression is the dog that did not bark in the development of UK law on harassment’, at least since the advent of the Human Rights Act this can no longer be the case.<sup>13</sup> The actual and potential impact of the domestication of Convention rights – and in particular, Articles 8 and 10 ECHR – is important. Notably, in the context of physical media intrusion, the privacy interests at stake are somewhat different to those that arise where causes of action are based on control of personal information alone. They are substantive, as opposed to informational, in character, and engage directly with individual dignity, autonomy and psychological well-being. The interest in freedom of expression encompass both those of the photographers and journalists producing copy for media organisations, and those of the public in receiving news.

### THE PROHIBITIONS

As originally framed, the Act prohibits a person from pursuing a ‘course of conduct’ which amounts to the ‘harassment of another’,<sup>14</sup> which that person ‘knows or ought to know’ will amount to harassment of that other.<sup>15</sup> The reach of the legislation was extended through the insertion of a second prohibition by the Serious Organised Crime and Police Act 2005.<sup>16</sup> This entails that the conduct in question on the separate occasions need not be directed at one and the same individual.<sup>17</sup>

The concept of “harassment” is not defined in the Act, although it is said to include alarming a person or causing a person distress.<sup>18</sup> The concept was imported from section 5 of the Public Order Act 1986.<sup>19</sup> It requires more than the generation of mere ‘negative emotion... annoyance or worry’,<sup>20</sup> or ‘irritation caused by inconvenience’.<sup>21</sup> There is no need for the victim to be distressed or alarmed by every interaction with the perpetrator; such an approach would be ‘artificial’.<sup>22</sup>

As regards the applicability of the 1997 Act to newsgathering practices that impinge upon public figures, a further as yet theoretical point can be drawn from the literature. It has been suggested by commentators that many public figures will be inured by experience to alarm or distress caused by persistent newsgathering activities, and so may not be able to build a sustainable harassment action.<sup>23</sup> More

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<sup>13</sup> B. Hepple, ‘Freedom of Expression and the Problem of Harassment’ in J. Beatson and Y. Cripps (eds) *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams*. (Oxford University Press, 2000) ch. 10, 177.

<sup>14</sup> s.1(1)(a).

<sup>15</sup> s.1(1)(b).

<sup>16</sup> s.1(1A).

<sup>17</sup> The amendment was designed to ensure that the strategy of animal rights and other protesters to target disparate employees of companies in order to influence corporate policy was also covered by the Act.

<sup>18</sup> s.7(2).

<sup>19</sup> *per* Michael Howard MP, HC Deb vol 287 col 784, 17 December 2006.

<sup>20</sup> *Director of Public Prosecutions v Ramsdale* [2001] EWHC Admin 106.

<sup>21</sup> A.T.H. Smith, *Offences Against Public Order* (London: Sweet & Maxwell, 1987) para 7.07.

<sup>22</sup> *per* Mr Justice Eady, *Howlett v Holding* [2006] EWHC 41 (QB) at [22].

<sup>23</sup> Tugendhat and Christie, n 1 above, para 11.55.

finely, it might be suggested that the Act will be available to celebrities only in cases of fear of violence or significant risk of injury (essentially, the section 4 offence only). On one hand, this may well be true of some public figures in some circumstances.<sup>24</sup> Certainly, this would accord with the “price of fame” perspective. On the other hand, and notwithstanding the invitation to cynicism at the motives of those occupying the celebrity world, the contention cannot be universally – or even often – true. Moreover, the repercussions of certain newsgathering activities do not always fall just on the public figure alone, but also on less suspecting family members, friends and neighbours. In sum, this would be a brave point to test in court. Certainly, by no means could it be introduced as a general rule precluding all actions in this context.

The conduct impugnable under the Act can include speech,<sup>25</sup> and other forms of communication such as the sending of letters or emails,<sup>26</sup> flying banners from aeroplanes or dropping leaflets,<sup>27</sup> making telephone calls or leaving voicemail,<sup>28</sup> sloganeering using a megaphone,<sup>29</sup> and publishing newspaper or Internet-based articles.<sup>30</sup> The “course of conduct” required before the Act will apply must comprise at least two separate interactions.<sup>31</sup> Conduct can be imputed to a third person as well as the actual perpetrator where that third party has aided, abetted, counselled or procured such conduct.<sup>32</sup> This raises the possibility, for example, that an editor or media organisation may be found liable where a journalist has been in some way directed to undertake the impugned course of conduct.

A further, as yet untested, point can be derived from the scholarly literature in this respect. It has been mooted that ‘the taking, developing, printing, distribution and sale of the photograph... might be divisible into “conduct on several occasions”’, with the result that someone engaging in this sequence on one

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<sup>24</sup> A parallel point has been widely made in criticism of the award of a broadly based injunction to RWE npower where those said to be at risk of alarm or distress were experienced ex-military security operatives, and the conduct involved was fairly anodyne – see, G. Monbiot, ‘A glut of barristers at Westminster has led to a crackdown on dissent’, *Guardian*, 6 March 2007. A further parallel can be drawn with the case of *DPP v Oram* [1988] 3 All ER 449 in which it was confirmed that a policeman could be a person caused harassment, alarm or distress for the purposes of s.5 of the Public Order Act 1986, but that ‘very frequently, words and behaviour with which police officers will be wearily familiar will have little emotional impact on them save that of boredom’ (*per* Lord Justice Glidewell, 451).

<sup>25</sup> s.7(4).

<sup>26</sup> *Alexander Baron v Crown Prosecution Service*, unreported, Queen’s Bench Division, 13 June 2000 and *CC v AB* [2006] EWHC 3083 (QB) respectively. In *Ferguson v British Gas Trading Limited* [2009] EWCA Civ 46, the Court of Appeal determined that it was at least arguable that a course of conduct comprising the sending of a number of unjustified bills and threats of legal action could comprise a course of conduct amounting to harassment.

<sup>27</sup> *Howlett v Holding*, n 22 above.

<sup>28</sup> *Kelly v DPP* [2002] EWHC 1428 (Admin).

<sup>29</sup> *Silberton v Gravett*, unreported, Queen’s Bench Division, 19 October 2001.

<sup>30</sup> *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233; [2001] All ER (D) 246.

<sup>31</sup> s.7(3). Interestingly, in *Kelly* (n 28 above), it was held that it was not unreasonable for magistrates to conclude that three separate and distinct telephone calls made over just a five minute period comprised a course of conduct. The appropriateness of this finding has been disputed: D.C. Ormerod, [2003] *Jan Criminal Law Review* 45, 47.

<sup>32</sup> s.7(3A). In this case, the third party’s knowledge is presumed to be that which was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring.



occasion only would become liable under the Act.<sup>33</sup> At first glance, this argument seems untenable. The events interspersed between the taking and the publication of the photographs do not involve any interaction between the putative perpetrator and victim, and so could not each comprise aspects of a course of conduct amounting to harassment. There may be a sustainable argument, however, that the taking and the subsequent publication of a photograph by the same person amount to two distinct events justifying intervention under the Act. It is no doubt feasible to contrive some factual scenario in which this would be the case.<sup>34</sup> Nonetheless, the preferable view is that this would involve too mechanistic an understanding of a course of conduct. It would stretch the concept too far. It would also raise the prospect of criminal liability arising in some circumstances and not others by reference to quirks of factual circumstance (such as whether the taking of the photograph could properly be attributed to the writer or publisher of the subsequent article). Furthermore, a preferable course may be to bring proceedings under a more obviously available head, such as the tort of misuse of private information or the Data Protection Act 1998.

The central difficulty in responding to stalking behaviour under the pre-existing criminal law was the requirement to prove some degree of intent to cause harm. The 1997 Act overcame this by relying on either the actual knowledge or attributable knowledge of the protagonist. In this second regard, all that is required is that the course of conduct would be viewed as harassment by a ‘reasonable person in possession of the same information’ as the alleged perpetrator.<sup>35</sup> The hypothetical reasonable person should not be endowed with the specific characteristics of the perpetrator, such as a recognisable mental disorder.<sup>36</sup> To ascribe such characteristics would remove from the protection of the Act a very large number of victims, and would thus risk significantly thwarting the legislative purpose.

## THE CRIMINAL OFFENCES

The 1997 Act introduced two primary criminal offences. Section 2 prescribes the less serious of these measures. Unexcused breach of either the section 1(1) or section 1(1A) prohibitions is made a summary offence, punishable by a fine and/or imprisonment for a term not exceeding six months. The more serious crime is detailed in section 4(1), and covers the scenario where the person subject

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<sup>33</sup> J. Morgan, ‘Privacy, Confidence and Horizontal Effect: *Hello ‘Trouble’* (2003) 62(2) *Cambridge Law Journal* 444, 463.

<sup>34</sup> In circumstances where the photograph is acquired in intrusive and upsetting circumstances, publication – which of course may or may not occur – might compound this distress. Alternatively, publication of photographs that depicted intimate events would no doubt be distressing in itself, but where publication also manifested a previous physical invasion – for example, if the photograph could only have been acquired by means of intrusive surveillance at a private location – appreciation of this trespass could itself be devastating in retrospect.

<sup>35</sup> s.1(2).

<sup>36</sup> *R v Colohan* [2001] EWCA Crim 1251; [2001] All ER (D) 230 (May).

to the harassment is put in fear that violence will be used against him. Again, there is no requirement that an intention – here, to cause the evoking of fear – be proven.<sup>37</sup> This more serious offence can be punished by a fine and/or a term of imprisonment of up to five years.<sup>38</sup> To date, there has been no prosecution of a journalist or paparazzo under either head. Neither is it clear how often purported victims of newsgathering harassment call upon the police to intervene in their favour on the occasions in question. Journalists should be open to prosecution under section 4 only in the most unusual of circumstances.<sup>39</sup> Section 32(1)(a) and (b) of the Crime and Disorder Act 1998 created racially or religiously aggravated forms of the section 2 and section 4 offences.

In addition to any sentence imposed following conviction under sections 2 or 4, the court may impose a restraining order.<sup>40</sup> This was a novel concept in criminal enforcement and apes the civil injunction. The power to make orders was afforded to the court under the Act in order to avoid the necessity of a victim having to endure a second hearing in a civil court to gain a preventative order to constrain future harassment.<sup>41</sup> The aim of a restraining order must be to protect the victim of the offence or any other person mentioned in the order from further conduct that amounts to harassment or that will cause a fear of violence.<sup>42</sup> The purpose of the order is protective, not punitive. The contents of the order are at the court's discretion, subject to their contribution to the purpose of avoiding future harassment. Breach of such an order without lawful excuse is itself a criminal offence punishable to the same extent as the section 4 offence.<sup>43</sup>

## THE CIVIL CAUSE OF ACTION

Alongside the two criminal offences, the 1997 Act provides a civil remedy to persons who have suffered or apprehend harassment in breach of the section 1(1) or section 1(1A) prohibitions.<sup>44</sup> On hearing such a case, the court may grant an

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<sup>37</sup> s.4(2).

<sup>38</sup> s.4(4)(a). In fact, Home Office research has found that almost half of convictions under both sections of the Act result in conditional discharge – J. Harris, *An Evaluation of the Use and Effectiveness of the Protection from Harassment Act 1997* (Home Office Research Study 203, London: Home Office, 2000) 36. These figures did not vary hugely depending on whether a s.2 or s.4 offence was under consideration.

<sup>39</sup> Such a prosecution is conceivable however. A number of instances of celebrity 'hounding' by paparazzos have involved damage to property (including damage to vehicles occasioned during use), some have culminated in prosecution of photographers for offences to the person (see, for example, PA Mediapoint, 'Photographer sentenced for Mills-McCartney assault', *Press Gazette*, 16 August 2007), while the most notorious of all such incidents saw the paparazzi carry partial blame for a number of deaths – PA Mediapoint, 'Jury: "Paparazzi and Henri Paul to blame for manslaughter of Diana"', *Press Gazette*, 8 April 2008.

<sup>40</sup> s.5(1).

<sup>41</sup> *per* Michael Howard, HC Deb vol 287 col 785, 17 December 2006.

<sup>42</sup> s.5(2).

<sup>43</sup> s.5(5)-(6).

<sup>44</sup> s.3(1) and s.3A(2) respectively. In the latter case, the action can be brought either by any person suffering harassment or the person whose behaviour the perpetrator ultimately wishes to influence. This latter person can be a company, although s.7(5) clarifies that only individuals are capable of being harassed. Section 3(3)-(9) applies to both section 1 prohibitions.

injunction for the purpose of restraining the defendant from pursuing the course of conduct. In this context, the standard of proof is that of the balance of probabilities, albeit applied with the strictness appropriate to the seriousness of the matters to be proved and the implications of proving them for the parties to the claim.<sup>45</sup> Should the claimant consider that any such injunction has been breached he or she may apply for the issue of a warrant for the arrest of the defendant.<sup>46</sup> Breach of an injunction imposed under the Act by proceeding with restricted behaviour without lawful excuse is both a contempt of court in the normal way and a stand-alone criminal offence under section 3(6). The civil remedy became available from June 1997,<sup>47</sup> although the special arrest and prosecution powers under subsections (3)-(9) were brought into force only from September 1998.<sup>48</sup> Aside from the restraint of the defendant by means of injunction, a claimant alleging breach of the section 1(1) prohibition may be awarded damages for any anxiety caused by and any financial loss resulting from the harassment. Damages may also be awarded for other demonstrable harms caused.

### EXCLUSION OF THE PROHIBITIONS

The section 1 prohibitions do not apply where it can be demonstrated that the course of conduct in question benefits from a lawful excuse. Hence, the threat of neither civil nor criminal liability arises. Three such justifications are stated in section 1(3): (a) that the course of conduct was pursued for the purpose of preventing or detecting crime; (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, and (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.<sup>49</sup> It is also open to the Secretary of State under section 12 to issue a certificate to exclude the application of the Act to a specified person with respect to anything done on a specified occasion.

The first and third of the section 1(3) defences may be pertinent to the journalism context. Both subsections must be interpreted by the courts in the light of the right of the wider population to receive information on matters of public importance derived from Article 10 ECHR. The section 1(3)(c) exclusion will clearly apply in many situations in which a journalist is accused of harassment

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<sup>45</sup> This question was at issue in *Jones v Hipgrave* [2004] EWHC 2901 (QB); [2004] All ER (D) 217 (Dec). The appellants contended that the civil remedy under s.3 is akin to an application for an anti-social behaviour order under the Crime and Disorder Act 1998, and that on the strength of this analogy any action thereunder should be viewed as civil proceedings to which the criminal standard of proof applies (as *per* the House of Lords decision in *R v McCann* [2002] UKHL 39). Mr Justice Tugendhat rejected that analogy.

<sup>46</sup> s.3(3).

<sup>47</sup> Protection from Harassment Act 1997 (Commencement) (No.2) Order 1997 SI 1997/1498.

<sup>48</sup> Protection from Harassment Act 1997 (Commencement No 3) Order 1998 SI 1998/1902.

<sup>49</sup> Justifications equivalent to clauses (a) and (b) are also available in respect of the section 4 offence - s.4(3). In that context, however, the third justification is more limited, applying only in circumstances where the course of conduct was reasonable for the protection of the perpetrator or some other person, or for the protection of property.

under the Act. The assessment of whether a journalist's newsgathering activities were reasonable will take account of their consonance with the appropriate media code of practice, and the societal interest in media freedom.

By contrast, it is not clear how far the section 1(3)(a) exclusion is available to journalists. It was introduced into the Bill explicitly as a 'special provision' designed to avoid various 'police activities' being caught by the prohibitions.<sup>50</sup> The openness of the statutory language, however, arguably leaves scope for anyone whose purpose is to prevent or detect crime to exploit the defence. It is easy to see how, at first glance, this might be deployed by investigative journalists.<sup>51</sup> Robertson and Nicol consider that 'there is no reason why an investigative reporter in appropriate circumstances should not also be able to prove that he had the same purpose and was therefore entitled to the defence'.<sup>52</sup> The availability of section 1(3)(a) may be important because it includes no explicit requirement that conduct should be reasonable.<sup>53</sup> In *Howlett v Holding*, however, Mr Justice Eady suggested that only the generic reasonableness defence set out in section 1(3)(c) would cover journalists' investigations.<sup>54</sup> Notwithstanding this ruling, the point arguably remains open.<sup>55</sup>

## RELATED POWERS

The Criminal Justice and Police Act 2001 contains further powers closely related to the harassment offences that may impact upon the freedom of journalists and paparazzi to approach a person at his or her home. Section 42 of the Act empowers a police constable to give a direction to any person who is outside or in the vicinity of any premises that are used by an individual as his dwelling.<sup>56</sup> Such a

<sup>50</sup> *per* Michael Howard MP, HC Deb vol 287 col 784, 17 December 2006.

<sup>51</sup> A. Hudson, 'Privacy: a right by any other name' (2003) *European Human Rights Law Review*, Supp (Special issue: privacy 2003) 73, 82. For countless illustrations of the value of investigative reporting in exposing criminal activities and other abuse of power, see R. Cook, *More Dangerous Ground: The Inside Story of Britain's Best Known Investigative Journalist* (Rev.edn., London: Book Guild, 2007); P. Goddard et al, *Public Issue Television: World in Action 1963-98* (Manchester University Press, 2007).

<sup>52</sup> Robertson and Nicol, n 1 above, 310.

<sup>53</sup> Some judges have suggested, however, that reliance on the paragraph (a) defence by a private citizen must involve, objectively judged, some rational basis for the course of conduct – see *Howlett v Holding* n 22 above at [33] (*per* Eady J); *KD v Chief Constable of Hampshire* [2005] EWHC 2550 (QB) at [144] (Tugendhat J).

<sup>54</sup> *ibid.*

<sup>55</sup> As noted by Mr Justice Eady, on the facts of *Howlett v Holding* the section 1(3)(a) was not available. Moreover, the judge readily accepted that there were two views on the legal point, and that his own may be incorrect. It is noteworthy in this respect that the Crown Prosecution Service maintains in its guidelines that 'it is possible that [the section 1(3)(a) defence] could... also be raised by individuals... such as investigative journalists... who claim that their activities are for the purpose of detecting or preventing crime' – see Crown Prosecution Service, n 11 above. The last revision of the guidelines post-dates *Howlett v Holding*, taking place in December 2007.

<sup>56</sup> s.42(1)(a). This power is not unconstrained. First, a direction may be given only where the police constable believes on reasonable grounds that the person in question is present there for the purpose of representing to or persuading the resident (or another individual) either that he should not do something that he is entitled or required to do, or that he should do something that he is not under any obligation to do (s.42(1)(b)). Secondly, the police constable must also believe on reasonable grounds that the presence

direction can require the person to whom it is given to do all such things as the police constable specifies as necessary to prevent the harassment of, or causing of any alarm or distress to, the resident.<sup>57</sup> This can include the obligation to leave the vicinity and not return for a specified period of up to three months.<sup>58</sup> Ostensibly, this measure is intended to address protests outside homes which may become intimidatory, but it is not difficult to appreciate the analogy with the “media scrum” or even with persistent media attention on a smaller scale. Notably, there is no requirement that there be a course of conduct. Failure to comply with a requirement of a direction amounts to an offence for which the person concerned will be liable on conviction to imprisonment for up to three months and/or to a fine.<sup>59</sup> It is not clear how often such powers have in fact been invoked in respect of journalists or paparazzi.<sup>60</sup> Clearly, the disincentive for them to fall on the wrong side of these measures is significant.

## REFLECTIONS

It is clear that the parameters of the section 1 prohibitions have been designed to be pragmatic, so as to encompass a broad range of more or less well-defined situations. For some commentators this is troubling. It has been argued that the courts should be slow to expand the scope of the course of conduct that amounts to harassment given that criminal liability is potentially in question. The fear is that “creative interpretations” could amount to retroactive criminalisation of behaviour; the diagnosis is defective drafting, and the prescribed treatment is revising legislation.<sup>61</sup> The legislative approach does leave significant room for judicial interpretation, but it is not altogether obvious that this critical conclusion is justified. The Parliamentary record demonstrates that the open contours of the prohibition were fully intended. Moreover, it is not self-evident that this approach has resulted in deleterious outcomes. Where specific problems, usually technical deficiencies in coverage, have been identified they have been addressed by amending legislation. When applying the prohibitions, interpreting the available defences and determining the breadth of any restraining orders or injunctions, the courts must certainly pay strict regard to the competing rights and interests that will often be affected by their determinations. There is not substantial evidence that they have systematically failed to do so.

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of that person amounts to, or is likely to result in, the harassment of the resident, or is likely to cause alarm or distress to the resident (s.42(1)(c)).

<sup>57</sup> s.42(2).

<sup>58</sup> s. 42(4). It is open to the police constable to include exceptions to the obligations that he sets out. He may, for example, impose an exclusion zone of a given distance around the property, or – where the directions are given to a number of people simultaneously – indicate the number and identities of persons who can remain in situ – s.42(5).

<sup>59</sup> s.42(7).

<sup>60</sup> This has happened on at least one occasion known to the author.

<sup>61</sup> Morgan, n 33 above, 462-464; D.C. Ormerod, ‘Commentary on *R v Hills*’ [2001] Apr *Criminal Law Review* 318.

### **WALK THIS WAY: EXPECTATIONS AND APPLICATION OF THE ACT IN THE BROADER MEDIA CONTEXT**

There was always an expectation that the Protection from Harassment Act 1997 would be deployed in a range of situations beyond that of stalking *simpliciter*. In the ten years after the Act first came into force, it was in fact deployed creatively in a number of wider contexts: employer's liability,<sup>62</sup> curbing public protest,<sup>63</sup> restraining domestic violence.<sup>64</sup> In Parliament, it was stated explicitly that the provisions may well be used to constrain journalistic investigations and paparazzi behaviours. Indeed, this may have been thought by some to be a desirable prospective application of the new law. This expectation has since been reiterated in the pertinent scholarly and practice-oriented legal literature. What has been surprising, then, is the total dearth of successful actions brought in respect of newsgathering activities in the first decade of the Act's operation. Nevertheless, the recent cases involving paparazzi harassment do have some jurisprudential forbears, albeit that these derive from somewhat different factual scenarios or involve journalistic activity on which no serious statute-based cause of action could be pursued. In the round, these Parliamentary, scholarly and jurisprudential indications together suggested that there would be no legal barrier to actions in the newsgathering context should an appropriate case be brought to court.

#### **ORIGINAL AND CONTINUING EXPECTATIONS**

It was understood by parliamentarians that the proscriptions contained in the Bill that they passed were sufficiently broad as to encompass not merely stalking, but also a wider range of behaviours that included some journalistic practices. When the Government introduced its proposals in early December 1996, it did so in preference to supporting a Private Member's Bill that was also designed to deal with the problem.<sup>65</sup> As Home Secretary, Michael Howard explained that this was due in part to the fact that the alternative proposal did not include any 'safeguards for journalists or others whose legitimate activities were similar to the actions that amounted to stalking'.<sup>66</sup> In contrast, the Government's Bill included a general defence designed to protect behaviour that was reasonable in the attendant circumstances.

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<sup>62</sup> See, for example, *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34.

<sup>63</sup> See, for example, *Director of Public Prosecutions v Moseley*, unreported, Queen's Bench Division, 9 June 1999.

<sup>64</sup> See, for example, *R v Miller* [2007] EWCA Crim 2852.

<sup>65</sup> The alternative Stalking Bill had been introduced by Janet Anderson MP on 6 March in the previous Parliamentary Session, but its Second Reading was deferred after it failed to obtain Government support (HCDeb vol 277 col 609, 10 May 1996).

<sup>66</sup> HCDeb vol 287 col 781, 17 December 2006.

Notwithstanding the inclusion of this defence, voices were raised during the legislative phase to highlight the possibility that undertaking some common newsgathering practices would expose journalists to civil and criminal liability. Concern was expressed that a journalist's potential liability would depend on interpretations of a concept of "reasonableness" applied by others with the benefit of hindsight,<sup>67</sup> and that the measures would interfere with the ability of serious investigative journalists to conduct important research as a result.<sup>68</sup> By implication, unreasonable journalistic activity would fall within the ambit of the section 1 prohibitions and it was considered to be unclear quite where the dividing line would be drawn. An editorial in *The Times* echoed these concerns,<sup>69</sup> while members of the paparazzi – although adamant that they weren't engaged in stalking their subjects – were resigned to the fact that the law would be deployed against them.<sup>70</sup>

Leading legal commentators have affirmed, and in some cases expressed similar anxiety at, the likely repercussions of the statute's introduction for journalists' practice. Tugendhat and Christie explain that 'the boundaries of this legislation are not yet established but it clearly has the potential to create new "privacy-type" rights which may be an effective weapon against the press'.<sup>71</sup> Fenwick and Phillipson concur that 'the Act remains untested at present in relation to its application [to cases involving journalistic pursuit]', but its 'potential applicability to journalists is obvious [and]... at least in extreme cases, might turn out to be significant'.<sup>72</sup> Others have been more definite: 'the Act has serious implications for investigative journalists, freelancers or anyone who may persist in contacting an unwilling subject over a relatively short period of time'.<sup>73</sup>

## JURISPRUDENTIAL INDICATIONS

While the Act had not been deployed directly to constrain repetitive, over-vigorous newsgathering intrusions, three distinct lines of cases did suggest strongly that the Act could properly be used to do so should an appropriate case come to court. The first line of cases confirmed, as one might expect, that the mere fact that an impugned course of conduct involved the exploitation of the perpetrator's

<sup>67</sup> HCDeb vol 287 col 805 and 810, 17 December 2006 (*per* Rupert Allason MP and Andrew Bennett MP respectively).

<sup>68</sup> HCDeb vol 287 col 806-7 and 813, 17 December 2006 and HLDeb vol 577 col 924, 24 January 1997 (*per* Kevin McNamara MP, Janet Anderson MP and Lord Thomas of Gresford respectively).

<sup>69</sup> 'Its Bad to Stalk', *The Times*, 19 October 1996.

<sup>70</sup> A. Travis, 'Di's Revenge: Snappers in Jail', *Guardian*, 15 July 1996.

<sup>71</sup> Tugendhat, Michael and Iain Christie, n 1 above, para 11.55.

<sup>72</sup> Fenwick and Phillipson, n 1 above, 716-717. Similarly, Professor Colin Munro has commented that: 'it has always been possible to envisage some circumstances in which the more intrusive or more determined activities of photographers could involve liability, but the new Act... widens these circumstances quite significantly, so that liability is quite readily foreseeable' – 'Photographs and Legality' (1997) 8(6) EntLR 197, 200.

<sup>73</sup> M. Davies, 'Good News All Round? The Protection from Harassment Act 1997' (1997) 8(6) EntLR 191, 191.

rights to freedom of expression would not be a bar to a harassment action. The message: journalists beware. Most notably, this line of cases includes *Thomas v News Group Newspapers Ltd*,<sup>74</sup> and *Howlett v Holding*.<sup>75</sup> A second line of cases indicates that where restrictions in orders granted under the Act in non-media cases are so overbroad as to constrain journalists in the exercise of their legitimate freedoms, the courts will be willing to revisit their scope. The message: journalists take heart. Combining these two categories of case, it is possible to discern a judicial consciousness of the need for, and the limits of, a space for performance of legitimate journalistic functions. The final line of cases comprises instances in which the courts have acknowledged explicitly the potential for the Act to apply in newsgathering cases, albeit that they rejected its use in the given case on the specific facts with which they were presented.

The first line of harassment cases includes that which is perhaps most well-known to media lawyers. While drawn from the media context, however, *Thomas v News Group Newspapers Ltd* involved a purported course of conduct based on publication of a series of newspaper articles and not on repeated newsgathering intrusion.<sup>76</sup> The argument before the Court of Appeal centred upon the failure of the judge at first instance to strike out a civil action brought under the 1997 Act, or to give summary judgment in favour of the appellants. The original action had been based upon publication in the *Sun* newspaper of two articles and a series of readers' letters accompanied by an editorial note that referred to actions of a civilian police worker. The woman had reported allegedly racist comments made by a number of police officers, resulting in their demotion. The tenor of the articles and letters was that this was an example of political correctness "gone mad" at the instigation of the claimant. Lawyers for the *Sun* accepted that these publications were 'strident, aggressive and inflammatory'.<sup>77</sup> They were said to have caused the police worker distress and anxiety, and - by referring to her as a "black clerk" - to have invited racist hostility against her. She did receive racist hate mail addressed to her place of work in consequence of the articles.

With respect to the requirement for a course of conduct, the appellants had contended before the court at first instance that this concept did not extend to include publication of articles in a newspaper. They considered that such an application would involve an illegitimate restriction of media rights to freedom of expression. Counsel revised this approach before the Court of Appeal, and accepted that harassment by repeated publication was conceivable in exceptional cases. The outcome of the *Thomas* case then rested on whether the course of

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<sup>74</sup> n 30 above.

<sup>75</sup> n 22 above.

<sup>76</sup> n 30 above. For discussion, see E. Finch, 'The Relationship Between Freedom of Expression and Harassment' (2002) 66 *Journal of Criminal Law* 134; J. Coad, 'Harassment by the Media' (2002) 13(1) *EntLR* 18. Interestingly, on a number of occasions the PCC has refused to adjudicate on complaints alleging harassment by means of publication – see *Muddassar Arani v Daily Express and others* (PCC Report 78; issued 20/10/08); *Entwistle v Worktop Guardian* (PCC Report 77; issued 29/09/08).

<sup>77</sup> A. Rusbridger, 'Courting Disaster', *Guardian*, 19 March 2001.



conduct could be excused as reasonable under section 1(3)(c).<sup>78</sup> In reaching their conclusions, the members of the Court clearly had in mind the interests of society in media freedom. Lord Phillips MR stated that in general ‘press criticism, even if robust, does not constitute unreasonable conduct’.<sup>79</sup> This default position did admit, however, of extreme circumstances in which harassment by publication might be impugned. An example of such extreme publication offered by counsel was that of the newspaper editor who uses the platform available to conduct a campaign of vilification against a former lover.<sup>80</sup> A further example agreed by the parties was that where the purpose of the series of articles was to invite racist hostility against the subject. Unfortunately for the appellants, the Court of Appeal considered that whether this was the situation with which they were faced was arguable on the facts of the immediate case. In light of this, it was concluded that the judge at first instance had therefore been correct not to strike out the action or to dismiss it summarily. The case was returned to the High Court.

A further, vivid confirmation that a course of conduct involving the deployment of one’s own rights to freedom of expression should not be expected to exclude the application of the 1997 Act can be seen in the case of *Howlett v Holding*.<sup>81</sup> In that case, the defendant had - over a period of four or five years - occasionally flown banners from an aircraft addressed or referring to the claimant in abusive, derogatory and defamatory terms. He had also dropped leaflets from time to time over the surrounding areas, and had placed her under “surveillance”. He was explicit that his aim was to ‘cause her hell’ and to enjoy his ‘payback time’ after she had spoken against a planning application while acting as a local councillor.<sup>82</sup> Mr Justice Eady concluded that the section 1(3)(c) defence was not available as there was ‘no reason at all’ to view the respondent’s behaviour as reasonable in the circumstances.<sup>83</sup>

The consequence of the Court of Appeal ruling in *Thomas* was the opening of a potential “second front” for media organisations in their contemplation of risk under the Protection from Harassment Act. One commentator has suggested that use of the available cause of action in such circumstances ‘is now becoming increasingly common’ to the point where it is almost ‘a replacement for libel claims’.<sup>84</sup> It is difficult to assess whether this is the case in practice, but it would seem overblown. Admittedly, at least one subsequent decided case has seen this course pursued, albeit that the requisite course of conduct was not demonstrated

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<sup>78</sup> So much is implicit in the structuring of the judgment – consideration of the key arguments under the heading ‘the nature of reasonable conduct’, and most particularly in discussion reflected in para 50 of the judgment.

<sup>79</sup> n 30 above at [34].

<sup>80</sup> *ibid* at [36].

<sup>81</sup> n 22 above. The contention was also aired, and rejected, in *Silverton v Gravett* (n 29 above)

<sup>82</sup> *ibid* at [7].

<sup>83</sup> *ibid* at [35].

<sup>84</sup> D. Lamont, ‘Media law: the harassment of press freedom’, *Guardian*, 5 March 2007. The article reported that the Act was also used by a ‘top union official’ in order to restrain the *London Evening Standard* from publishing further critical articles concerning him. The approach may be adopted in order to avoid the difficulties of obtaining an interim injunction in libel law.

on the relevant facts.<sup>85</sup> Moreover, at least one leading claimant law firm invites as clients persons who have suffered harassment by way of publication. In terms of its relevance for the application of the Act to newsgathering practices, the key point that this line of cases offers is that unreasonable and harassing behaviour will not be redeemed as legitimate on account of its contribution to the informing of a wider public. Media freedom is not an unqualified social good.

The second line of cases that presaged the recent celebrity use of the Act involves the scenario where a journalist wishes to challenge the breadth of behavioural restrictions imposed by a court under section 3 after a finding of harassment has been made against some third party. In such circumstances, the constraint exerted by the order may extend inappropriately to journalists' behaviours. Precisely this scenario arose in the case of *RWE npower plc v Carroll*.<sup>86</sup> The background to the case was that RWE npower had obtained planning permission to dispose of pulverised fuel ash from a coal-fired power station on a site in Radley that had formerly been used as gravel pits, but which had subsequently been flooded to form lakes becoming a local beauty-spot. The company had obtained an injunction under the 1997 Act against a number of named protestors, but also vicariously against 'all protestors conducting activities against the claimants' intended use [of the site].<sup>87</sup> Under the order, "protestors" were understood to be the named parties, any person acting in concert with the six named parties to perform any act prohibited under the Order, and also 'any other person who has been given notice of [the] order'. Under paragraph 6.2 of the order, protestors were precluded from 'photographing or videoing the protected persons or their vehicles'. Under paragraph 6.3, they were required not 'to publish by any means whatsoever names... photographs or any other material serving to identify a protected person'. The company maintained that the order was not intended to restrict media reporting.<sup>88</sup> Wither the truth of this assertion, this explanation would seem to contradict the clear wording of the order. It was also countermanded by the serving of the injunction upon a photographer who clearly identified himself as a member of the Press.

The named defendants, supported by the civil liberties organisation Liberty and the National Union of Journalists, challenged the breadth of the order. In advance of the hearing, the company indicated that it would agree to the revision

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<sup>85</sup> *Ewing v News International Ltd and Others* [2008] EWHC 1390. In a related Scottish case involving the same factual background (*Terence Patrick Ewing v Times Newspapers Limited* [2008] CSOH 169), the Outer House of the Court of Session dismissed an action alleging harassment by means of publication citing Mr Justice Coulson's related judgment with approval. Lord Brodie derided 'the failure by the pursuer to set out in any comprehensible way... the basis upon which he avers that delictual liability has been incurred... [noting further that] whatever may be the practice in other jurisdictions, in Scotland the court expects to be able to understand what a party's case is about and... to be able to make some sort of assessment of its strength' (at [28]).

<sup>86</sup> [2007] EWHC 947 (QB).

<sup>87</sup> A copy of the order is reproduced at: [WWW] <http://www.epuk.org/News/475/the-npower-injunction-in-full> (accessed April 2009).

<sup>88</sup> Some weeks after having made the order, Mr Justice Calvert-Smith indicated that it had not been his intention to restrict media reporting of events – (2007) *Npower injunction judge: it was never meant to be used against professional photographers*. *EPUK News*, 8 March.

of the terms that restricted the activities of photo-journalists. Mr Justice Teare continued the injunction but allowed some further, minor revisions at the behest of the named defendants, and asked the parties to confirm a mutually acceptable rewording. This process culminated in the excision of the third limb of the definition of protestors so as to release journalists from the strictures of the order.<sup>89</sup>

A parallel case was that of *University of Oxford v Webb*, albeit that there the challenge was brought by one of the named defendants, and unsuccessfully so.<sup>90</sup> The background to the case was the campaign of violence and harassment conducted against Oxford University staff generally, and also against contractors engaged to construct a bio-medical research laboratory. A section 3 injunction was imposed under the 1997 Act in November 2004.<sup>91</sup> It was subsequently varied on a number of occasions. In the original order, the tenth defendant was listed as the Animal Liberation Front (ALF). The order was varied in March 2006, with the tenth defendant then being listed as ‘Robin Webb sued on his own behalf and as representing all persons acting as members, participants or supporters or in the name of the unincorporated association known as the Animal Liberation Front’. Webb acted as a spokesperson for the ALF.<sup>92</sup> He applied to have the revised order set aside to the extent that it applied to him personally, *inter alia*, on the basis that – in line with Strasbourg jurisprudence interpreting Article 10 ECHR – he should be free to report views sympathetic to violent terrorist action.<sup>93</sup> The injunction constrained his ability to do so.

Mr Justice Irwin acknowledged the freedom of expression issue in play, but concluded that ‘there is a world of difference between a reputable journalist reporting extremist views on the one hand, and on the other hand a concerted and considered attempt to build up a threat so as to apply pressure to people, as part of a strategy linked directly to those committing crimes’. He added that Webb was ‘not a journalist keeping the public informed... [but rather] a propagandist... [who’s] activity goes far beyond legitimate self expression’.<sup>94</sup> Implicitly, had Webb in fact been acting as a “mere journalist”, the constraint on his reporting may well have been deemed illegitimate. Together, these cases emphasise that only unreasonable journalistic behaviours will be constrained by the court.

There is a further number of cases that have seen the courts actively consider whether to apply the Act to newsgathering behaviour. While none of these has seen the application of the Act, judges have taken the opportunities presented to affirm the availability of the statutory cause of action in appropriate circumstances.

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<sup>89</sup> ‘Court challenge to npower injunctions lifts restrictions on photography’, *EPUK News*, 15 May 2007; ‘NUJ wins fight to lift “Orwellian” injunction’, *Press Gazette*, 29 May 2007.

<sup>90</sup> [2006] EWHC 2490 (QB).

<sup>91</sup> *University of Oxford v Broughton* [2004] EWHC 2543 (QB).

<sup>92</sup> This role was explained in ALF literature averred to by Mr Justice Irwin, n 90 above, at [28].

<sup>93</sup> *Surek and Ozdemir v Turkey* [1999] ECHR 24762/94. That case concerned the reporting of violent activities that were intended to promote Kurdish nationalism in the south eastern region of Turkey.

<sup>94</sup> n 90 above, para 72. Mr Justice Irwin also concluded that Webb was ‘a central and pivotal figure in this organisation, who is fully adherent to its aims, strategy and tactics’ (at [67]).

In *John v Associated Newspapers Ltd*, which involved an application for an interim injunction to prevent the publication of an innocuous photograph of Sir Elton John arriving at his London home, the potential relevance of the Protection from Harassment Act was mooted briefly.<sup>95</sup> On the facts, the possibility of proceeding under the statute was rejected. Nevertheless, the option of using the Act in not entirely dissimilar circumstances was implicitly left open. In *David Murray (by his litigation friends Neil Murray and Joanne Murray) v Express Newspapers plc and Big Pictures (UK) Limited*, Mr Justice Patten explicitly endorsed the option of using the 1997 Act in media cases where harassment becomes an issue.<sup>96</sup> Again, this was found not to have been the scenario in the instant case.

One other case is sometimes cited in this regard. In *CC v AB*, Mr Justice Eady imposed interlocutory injunctions on the basis of both privacy law and the Protection from Harassment Act.<sup>97</sup> The former restricted the defendant from communicating, directly or indirectly, with the media, or on the internet, on the subject of the claimant's past adulterous relationship with the defendant's wife.<sup>98</sup> In previous email and telephone messages, the defendant had threatened to expose the fact of the adulterous relationship to the world at large. This was not, however, a clear illustration of the application of the Act to newsgathering. The section 3 order – in contrast with that imposed under the law of privacy – was not contested by counsel, and it seemingly focused on restraining only further communications between the parties.

### **THIS YEAR'S 'MUST-HAVE': RECENT COURT ORDERS AGAINST PHOTOGRAPHERS**

After years of a somewhat unexpected drought in terms of actions brought by public figures against photographers under the 1997 Act, recent months have witnessed a veritable flash-flood. At least, there has been a discernible trend for harassed female celebrities to seek injunctions against paparazzi photographers citing continual pestering. The first such case, albeit one that culminated in a consent order only, occurred in November 2008. Big Pictures (UK) Limited and its founder Darryn Lyons agreed to settle a case brought by actress Sienna Miller on grounds of harassment.<sup>99</sup> Miller had complained of a 'campaign of harassment' on various dates, including being confronted outside her home, chased by car in a dangerous manner, and pursued while walking her dogs.<sup>100</sup> The terms of the settlement were approved by the High Court and included a substantial sum of

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<sup>95</sup> [2006] EWHC 1611 at [16].

<sup>96</sup> [2007] EWHC 1908 (Ch) at [46] and [66].

<sup>97</sup> [2006] EWHC 3083 (QB).

<sup>98</sup> *ibid* at [53-56].

<sup>99</sup> D. Ponsford, 'Big Pictures agency pays damages to Sienna Miller', *Press Gazette*, 21 November 2008.

<sup>100</sup> D. Ponsford, 'Court: "Paparazzi made Sienna Miller's life intolerable"', *Press Gazette*, 31 October 2008.

damages and an undertaking to the court not to pursue a course of conduct amounting to breach of the section 1(1) prohibition.<sup>101</sup> It was notable, however, that the terms of the order specifically acknowledged that there would be occasions upon which the actress must accept that photography would take place without her explicit consent.<sup>102</sup> Thereby, in broad outline it reflected the balancing exercise between Articles 8 and 10 ECHR as struck under privacy law more broadly.

Similarly, in March 2009, lawyers acting on behalf of singer and media personality Lily Allen sought an injunction at the High Court under the Act to restrict the activities of two photographic agencies, a named individual photographer, and other unnamed photographers.<sup>103</sup> Allen had been beset by photographers at her home for some weeks, culminating the previous week in her being followed from her home by paparazzi in several cars, one of which collided with her vehicle. The photographers had then continued to pursue her on foot after she left her vehicle.<sup>104</sup> In the event, some of the parties agreed a settlement on the afternoon of the hearing after the court had heard the application and considered the witness statements. The court proceeded to make an order. This placed significant restrictions upon the named and unnamed parties. This was not an injunction *contra mundum*, however, as the unnamed parties were designated as those ‘individuals responsible for taking photographs of the claimant outside her home and in other public places during February and March 2009’. Thus, the injunction could reasonably apply to those persons in order to prevent a further or an apprehended breach of the section 1 prohibition. Any subsequent hearing on an alleged breach of the injunction by persons other than named parties would necessarily then involve evidence to the effect that the impugned party was a member of the constrained group, or whether those persons should henceforth be added as co-defendants.<sup>105</sup>

The most recent of the trio of harassment orders was awarded to Amy Winehouse in late March 2009.<sup>106</sup> The singer had been for many years a focal point for paparazzi attention on account of her talent and her lifestyle. She

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<sup>101</sup> The order is reproduced at: [WWW] [http://www.carter-ruck.com/recentwork/Sienna\\_Miller\\_Court\\_Order21\\_11\\_08.pdf](http://www.carter-ruck.com/recentwork/Sienna_Miller_Court_Order21_11_08.pdf) (accessed April 2009). It includes commitments not to pursue or follow the claimant by any means whatsoever, to place her under surveillance, to take pictures of her in specified locations, while being pursued by photographers, or otherwise where she enjoys a reasonable expectation of privacy, or otherwise to harass or intimidate her.

<sup>102</sup> This list of occasions included her entry or exit from a bar, restaurant, nightclub or similar establishment; in public places generally when not visibly upset or otherwise distressed, and at ‘red carpet events’.

<sup>103</sup> D. Ponsford, ‘Lily Allen uses harassment law to curb paparazzi’, *Press Gazette*, 16 March 2009; B. Dowell, ‘Lily Allen given legal protection from paparazzi harassment’, *Guardian*, 16 March 2009.

<sup>104</sup> D. Orr, ‘Fame, fashion and victory over the paparazzi’, *The Independent*, 28 March 2009.

<sup>105</sup> Rule 19.6(4)(b) of the Civil Procedure Rules provides that ‘any judgment or order given in a claim in which a party is acting as a representative... may only be enforced... against a person who is not a party to the claim with the permission of the court’ – see further, *Huntingdon Life Sciences Group PLC v Stop Huntingdon Animal Cruelty* [2007] EWHC 522 QB.

<sup>106</sup> B. Dowell and J. Robinson, ‘Amy Winehouse wins court ban on paparazzi at her home’, *Guardian*, 1 May 2009.

brought proceedings after concluding that her interaction with photographers had become unsafe: ‘every time she got in her car she was chased or was jostled, and it has become unsafe not just for her, but the people around her... it has been mayhem a couple of times’.<sup>107</sup> The court order named a specific photographic agency, but also referred to ‘persons unknown’. It restrained addressees from seeking to photograph Winehouse either in her home, in the homes of any members of her family or friends, outside her home, or in other public places after pursuing her. They were also constrained from following her, and from approaching within one hundred metres of her home.

It is surprising that these first instances of civil claims brought under the Act to constrain newsgathering excess have occurred so long after the introduction of the Protection from Harassment Act. Of course, it may be the case that the Act has in fact been used often by prospective claimants’ legal advisers in their day-to-day interactions with their defendant counterparts, without there ever arising a need to revert to court.<sup>108</sup> Use of the Act in practice may have been significant, but - on account of its lying “below the judicial horizon” - its extent and degree of effectiveness may have remained invisible and under-appreciated. A strategy of settlement may be being deployed by defendants in order to avoid the setting of unwanted judicial precedent in this area. An alternative, perhaps more obvious explanation is that the Act has simply not been much used, and that the recent orders mark a novel, if belated development. The promise of the Act in respect of constraining egregious newsgathering behaviour may finally be coming good.

While the dam may have broken with respect to civil law uses of the Act, there has as yet been no instance of criminal prosecution under the Act involving journalists or paparazzi. It is open to those harassed by journalists and paparazzi to request that the police intercede to disperse those besetting them. As noted above, the 1997 Act contains two primary arrestable offences, now augmented by the powers under sections 42 and 42A of the Criminal Justice and Police Act 2001. No doubt such enforcement does occur, and indeed at least one interest group that sometimes advises those experiencing the media scrum specifically recommends that course.<sup>109</sup> The evidence to be drawn from some of the more notorious recent illustrations of the problem - for example, the experiences of Kate Middleton, the girlfriend of Prince William, surrounding her twenty-fifth birthday - does not suggest that it is a frequently adopted approach. It may be that any advantage in shifting the burden of costs is outweighed by the loss of control over proceedings, particularly when for some there may be advantages to be wrought by accommodation given the symbiosis of celebrity figures and the media. There may also be a reticence to introduce the taint of criminality in a

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<sup>107</sup> *ibid.*

<sup>108</sup> The authors of one textbook suggest that ‘lawyers representing celebrity clients are increasingly resorting to the [Act] as a means of putting pressure on the media to stop photographers from following their clients’ - see D. Bloy and S. Hadwin, *Law and the Media* (London: Sweet & Maxwell, 2007) 137.

<sup>109</sup> MediaWise Trust (2007) Memorandum. Reprinted in Select Committee on Culture, Media and Sport (2006-07) *Seventh Report: Self-Regulation of the Press*. HC 375, Ev1-9, para 2.01. Moreover, the author is conscious of at least one instance of police action taken against a photographer under the 2001 Act.

context where the justification for action might be based upon freedom of expression, the public interest, and the right of journalists and/or photographers to earn a living.

### **THE BELATED EMERGENCE OF NEWSGATHERING HARASSMENT ORDERS: EFFECTIVE REGULATORY ALTERNATIVES?**

A number of explanations can be proffered as to why the 1997 Act was not employed by celebrities to limit paparazzi harassment in the first decade of its operation. It has been suggested that use of the Act would be ‘a high-profile and high-risk route’ down which ‘for all those who bring such actions there is a financial risk’,<sup>110</sup> and also that ‘a heavy-handed approach to the media might alienate... fans’.<sup>111</sup> The first element of these suppositions would not seem to accord with the actuality as seen in each of the recent celebrity harassment orders. Those cases were marked by their limited publicity, which was no doubt due in large part to the confidentiality accorded to the measures in question. The other elements cited might seem to weigh lightly in the balance against the harm caused through persistent harassment.

A second possibility is that other legal avenues have been preferred by claimants. Certainly, in a number of cases where publication was anticipated that might conceivably have been pursued under the 1997 Act, the developing tort of misuse of private information may have been used in preference. Beyond this, at one stage it did seem possible that developments in either or both of the law of nuisance and the rule in *Wilkinson v Downton* might serve to stem newsgathering excess.<sup>112</sup> In recent years, however, both possibilities have been downgraded as a consequence of decisions of higher courts.<sup>113</sup> In consequence, they have not been used to any significant degree in the media harassment context. A final explanation

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<sup>110</sup> *ibid* para 47.

<sup>111</sup> J. Rozenberg, ‘When it comes to intrusion, can Gwyneth act?’, *Daily Telegraph*, 23 September 2004.

<sup>112</sup> In *Khorasandjian v Bush* [1993] QB 276 – a case involving harassment of a young woman by a former friend - the Court of Appeal considered both causes. In the former respect, the court felt able to provide some measure of protection against harassment, and this cause - private nuisance - was then subsequently relied on successfully by Princess Diana in the obtaining of an interim injunction in the paparazzi context – see D. Pannick, ‘Resist pressure for a rushed law’, *The Times*, 9 September 1997. The rule in *Wilkinson v Downton* [1897] 2 QB 57 establishes that false words or verbal threats calculated to cause, uttered with the knowledge that they are likely to cause, and actually causing physical injury to the person to whom they are uttered are actionable. More broadly, it is understood to encompass the intentional or reckless infliction of harm, possibly including serious distress. In *Khorasandjian*, this rule was considered to be of subsidiary importance, but was nonetheless applicable. It was applied on a *quia timet* basis to restrain such of the defendant’s actions that did not amount to threats but which might be expected to cause psychiatric illness over time.

<sup>113</sup> See *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426; *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721; *Wainwright v Home Office* [2003] UKHL 53, and Tugendhat and Christie, n 1 above, paras 4.70-4.89.

is that photographers and journalists may simply have been “better behaved” in recent years. This is palpably, almost laughably, untrue. In short, none of these propositions provides an explanation for the absence of any newsgathering harassment actions.

A more persuasive explanation for the relatively light use of the Protection from Harassment Act to control newsgathering intrusions on privacy is that regulatory bodies offer effective alternatives. In the UK, this function is split between the Press Complaints Commission (PCC) and Ofcom. The former, self-regulatory body oversees the newspaper and periodicals sector, assessing performance against the *Editor’s Code of Practice*. This was written and is periodically revised by an industry body. The PCC has also developed a pre-publication intervention regime by which it seeks to end any continuing harassment. Ofcom is a statutory regulator empowered by the Communications Act 2003 to review all UK broadcasters’ performance against a *Broadcast Code*.<sup>114</sup> In addition, all media organisations operate internal compliance regimes that are intended to ensure that legal liability and regulatory censure do not arise.<sup>115</sup> In the context of newsgathering harassment, it is most often the PCC that is called into action by complainants.

#### THE PCC AND MEDIA HARASSMENT

Since its inception, the PCC has recognised the deleterious repercussions of media intrusion. It has often reiterated its view that harassment is ‘one of the issues on which the *Code* is most rigorous in its requirements’.<sup>116</sup> In November 1997, following the death of Princess Diana and the suggestion that members of the paparazzi might be implicated, the *Code* was significantly revised. The amended *Code* included a new iteration of the clause on privacy that drew inspiration from the European Convention on Human Rights, and significantly revised the pre-existing definition of a “private place”. The clause on harassment was also revised so as to preclude publication of photographs acquired by means of persistent pursuit, as well as through intimidation or harassment. In addition, the formal regulatory ambit was extended through the device of requiring editors not to publish non-compliant material from freelance sources. The revised *Code* came into effect in January 1998.

In its current incarnation, a number of clauses in the *Editors’ Code of Practice* may have a bearing on a complaint brought on grounds of media intrusion or

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<sup>114</sup> The various codes against which these regulators benchmark media practice were given statutory recognition in section 12 of the Human Rights Act 1998 and section 32(3) of the Data Protection Act 1998. As such they are important not just in themselves, but also in their influence on the courts when considering whether to grant relief which might affect the exercise of media freedom.

<sup>115</sup> Of these, perhaps the most notable is that installed by the BBC. It has published *Editorial Guidelines* to which all programme makers are required by contract to adhere and against which those affected by the organisation’s output can seek redress – see BBC, *Editorial Guidelines: The BBC’s Values and Standards* (London: BBC, 2005).

<sup>116</sup> PCC, *Annual Report 2001* (London: PCC, 2002). See further Select Committee on Culture, Media and Sport (2006-07), n 109 above, para 40.



harassment.<sup>117</sup> The most important provision, however, is clause 4 on harassment. This provides in paragraph (i) that ‘journalists must not engage in intimidation, harassment or persistent pursuit’, and in paragraph (ii) that ‘they must not persist in questioning, telephoning, pursuing or photographing individuals once asked to desist; nor remain on their property when asked to leave and must not follow them’. The clause is subject to exceptions relating to the public interest, which is defined in a stand-alone clause in the *Code*.

The impact of the *Code* manifests in three ways. First, many of those working for newspapers are contractually bound to abide by its prescriptions. The range of those covered has extended over time, first including editors, then directly employed journalists and latterly persons providing freelance services. Contractual obligation is not universal, but where adopted this approach ensures that compliant behaviour is in principle secured. Secondly, the PCC has instituted a pre-emptive system of “desist notices”, which it issues to editors at the request of press-embattled individuals.<sup>118</sup> In doing so, the Commission relies indirectly upon the credibility and threat of *ex post* enforcement. Finally, the PCC is regularly called upon to apply the *Editors’ Code* either in resolving or in adjudicating on actual complaints.

## DESIST NOTICES

While largely invisible, the private advisory note regime operated by the PCC has become an important element in efforts to counteract media harassment. The hope is that such contemporaneous intervention by desist notice can dissipate the media scrum; that editors might “call off their dogs”, and also reject material provided by others. The system has been in place, formally, since 2003. Indeed, since that time the PCC has acted as an informal clearing house for the circulation of messages across the range of media platforms. In 2007, over 50 desist notices were circulated by the PCC.<sup>119</sup> There is no formal mandate for the PCC to act in this fashion, and its notes are advisory only. Nevertheless, the PCC is rightly proud of this aspect of its performance and can cite a number of commendable successes in protecting personalities such as Natasha Kaplinsky.<sup>120</sup>

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<sup>117</sup> These include elements of clause 3 on privacy generally, clause 5 on intrusion into grief or shock, clause 6 on children, clause 8 on hospitals, clause 9 on the reporting of crime, and clause 10 on clandestine devices and subterfuge.

<sup>118</sup> In its (2006-07) report the Select Committee on Culture, Media and Sport queried whether the PCC should sometimes take action of their own volition, suggesting that in the case of Kate Middleton ‘it could and should have intervened sooner’ and more generally that ‘the Commission should be readier to depart from its usual practice of issuing a desist notice only in response to a request’ – see n 109 above, para 46.

<sup>119</sup> PCC, *Annual Report 2007* (London: PCC, 2008) 15. Seventeen notices were issued the previous year.

<sup>120</sup> PCC, *Annual Report 2008* (London: PCC, 2009) 8-9; Toulmin, Tim (2009) Speech. London, 28 April.

## RULINGS ON HARASSMENT

Since July 1996, around a year before the 1997 Act came into force, some 50 complaints based exclusively or in part upon clause 4 have been adjudicated by the PCC.<sup>121</sup> A further 70 to 80 such complaints have been resolved through its offices.<sup>122</sup> Compared with the number of complaints brought under some clauses of the *Code*, this figure is low. The former Chairman of the PCC speculated that this is testament to the success of pre-publication interventions.<sup>123</sup> The percentage of complaints under clause 4 that proceed to adjudication, however, is relatively very high. This suggests that complainants are peculiarly unwilling to accept resolution short of public admonition in this context, and/or that newspapers are often loathe to cede that they have acted inappropriately in their newsgathering practice.

In its adjudicatory practice under Clause 4, the Commission often places significant emphasis on whether the complainant has issued a request to be left alone that is subsequently ignored. Such requests can be made directly to particular journalists or to the media in general; personally or through some third party. An illustrative case is that of *Glenn Swire v Mail on Sunday*.<sup>124</sup> A young woman had been the unfortunate author of a lewd email that had been forwarded by its recipient and soon became a global viral event.<sup>125</sup> Subsequently, she and members of her family had been approached by numerous publications for comment which prompted her at one point to “go into hiding”. A journalist from the *Mail on Sunday* was specifically told to desist from contacting the family, after advice had been taken by the complainant from the PCC. Nevertheless, this journalist did not pass on this message to his editor, and instead approached the woman with an offer of a job on the newspaper. Soon afterwards she was accosted outside her home by another journalist and photographer from the same paper. The PCC upheld the complaint against the *Mail on Sunday*, although it accepted that the newspaper had not acted in bad faith. The other complaints made by members of the family were resolved.<sup>126</sup> Subsequently, the Commission took the opportunity

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<sup>121</sup> Adjudication reports are available on the PCC website from that date. The majority of complaints (60 per cent) were made against national newspapers (including Scottish editions); around 30 per cent were made against local or regional newspapers. The remainder were brought either against magazines or against multiple publications drawn from each category. Of the adjudicated complaints made against national newspapers, 13 per cent were made against ‘broadsheets’, 58 per cent against ‘middle-brow’ papers, and 29 per cent against ‘tabloids’.

<sup>122</sup> Around 57 per cent of resolved complaints were made against national newspapers, and 39 per cent against local or regional newspapers. Of the resolved complaints made against national newspapers, 5 per cent were made against ‘broadsheets’, 64 per cent against ‘middle-brow’ papers, and 31 per cent against ‘tabloids’.

<sup>123</sup> C. Meyer, ‘Building Confidence’, speech delivered in London. 25 June 2006.

<sup>124</sup> *Glenn Swire v Mail on Sunday* (PCC Report 54). See also, *Syrita Collins-Plante v People* (PCC Report 55); *Jean Hunter v Daily Mail* (PCC Report, 39); *John Gorman v The Sunday Times* (PCC Report 36).

<sup>125</sup> S. Lister, ‘Lover in trouble over his email ego’, *The Times*, 15 December 2000; R. Uhlig, ‘Lewd e-mail from a lawyer’s lover crosses the world’, *Daily Telegraph*, 15 December 2000.

<sup>126</sup> These were made against *The Sunday Times*, the *News of the World*, and the *Mirror*. In those instances, the editors involved withdrew their reporters, and wrote letters of explanation to the family – see PCC Report 54.

afforded by the adjudication to publish advice to the public on dealing with persistent unwanted approaches from journalists.<sup>127</sup>

Other factors that have been important in the Commission's decision-making have been discrepancies of evidence that may frustrate the adjudication process,<sup>128</sup> the occurrence of developments in the story,<sup>129</sup> whether the events involved pursuit of the complainant,<sup>130</sup> whether the complaint related to journalists' behaviour at a time of shock or bereavement for the complainant,<sup>131</sup> whether journalists had intruded upon medical treatment,<sup>132</sup> and whether the complaint involved journalists' approaches to children.<sup>133</sup> The PCC has been active in encouraging the press to avoid harassment of royal princes,<sup>134</sup> and has emphasised that approaches to judges with regard to their decision-making will likely always be deemed to fall foul of Clause 4.<sup>135</sup> It is noteworthy, however, that only a small percentage of harassment cases – around eighteen per cent - involve complainants who might be considered to be public figures or celebrities.<sup>136</sup> Celebrities may benefit relatively more frequently from the pre-publication advisory regime

#### LIMITATIONS OF THE PCC IN RESOLVING HARASSMENT

Nevertheless, there has been criticism of the Commission's performance in deterring media harassment. One frequent complaint is that the PCC cannot secure damages (although its Director maintains that *ex gratia* payments are often made in resolution of complaints). Another, more chastening critique is that desist

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<sup>127</sup> PCC, *Harassment: what to do if you are being harassed by a journalist* (London: PCC, 2001). This recommends 'a number of practical steps' that can be taken by persons who feel harassed by the media. The majority of these might be described as 'self-help': presenting oneself as cognisant of the regulatory position while politely and firmly rejecting invitations to engage, or appending written notices to doors, relying on a trusted intermediary, and altering voicemail messages to rebuff entreaties. The final piece of advice is to contact the PCC, which operates a twenty-four hour advice service.

<sup>128</sup> *Messrs R & CB Masefield on behalf of their client v Daily Mail* (PCC Report 37); *Rula Lenska v Daily Mail* (PCC Report 39); *Sean Connery v Daily Record* (PCC Report 47); *Barbara Crompton v Evening Standard* (PCC Report 58); *Syrita Collins-Plante v People* (PCC Report 55).

<sup>129</sup> *Entwistle v Worksop Guardian* (PCC Report 77; issued 29/09/08); *Greater Manchester Police v Daily Telegraph* (PCC Report 77; issued 12/6/08); *Kimberly Fortier v Sunday Mirror*

<sup>130</sup> *A woman v Daily Mirror* (PCC Report 37). Other resolved 'pursuit' cases include *Kate Middleton v Daily Mirror* (PCC Report 75); *Duchess of York v Mail on Sunday*; *v News of the World* (PCC Report 77).

<sup>131</sup> *Kimble v Bucks Herald* (PCC Report 53).

<sup>132</sup> *Emily Jennings v Eastbourne Gazette* (PCC Report 60). Such cases are redolent of *Kaye v Robertson* [1991] F.S.R. 62, in which Lord Justice Bingham asserted that 'if ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff's complaint' (70).

<sup>133</sup> *Keith Cousins v The Sunday Times* (PCC Report 73; issued 27/07/06).

<sup>134</sup> See A. Marr, 'Privacy, the press and happy hypocrites', *Independent*, 24 August 1995; A. Culf, 'Wakeham warns the tabloids off William', *Guardian*, 24 August 1995; PCC, *Annual Report 1999* (London: PCC, 2000); Wakeham, Lord of Maldon, 'Prince William and privacy', speech delivered in London, 28 June 2000.

<sup>135</sup> PCC Report 77 (HH Judge John Bevan); PCC, *The Judiciary and Harassment* (London: PCC, 2003).

<sup>136</sup> Twenty two complaints of all those resolved or adjudicated by the PCC since 1996. In producing the statistic, the categories were interpreted 'generously', but public figure / celebrity complainants included Sean Connery, Prince William, Kate Middleton, Rula Lenska, the Duchess of York, Heather Mills, Fern Britton, and a number of MPs.

notices are not always effective. In its 2003 report on *Privacy and Media Intrusion*, the House of Commons Select Committee on Culture, Media and Sport highlighted such concerns. It professed itself still concerned by the harassment attendant on the practice of door-stepping, and by the apparent failure to address the phenomenon of collective harassment. It called upon the media regulatory bodies together to consider the matter,<sup>137</sup> and returned to the general issue in 2007.<sup>138</sup> Sienna Miller's experiences in 2008 are also instructive. After a warning was circulated to editors by the PCC, the actress was still moved to sue when the *Daily Star* published photographs depicting her in a distressed state: the result of a paparazzi hounding.<sup>139</sup> Moreover, the harassment that she faced persisted with the result that she was forced back to court to deploy the 1997 Act against Big Pictures (UK) Limited and Darryn Lyons in the hope of curtailing the pursuit. Both cases were settled. The PCC's warning neither stopped publication, nor ended the harassment faced by the actress. The irony here is that notwithstanding its very notable achievements in recent years, a specific demonstrated failure in this very particular case may have highlighted the attractions of the alternative path open to celebrities (and their lawyers).

To its credit, the PCC has recognised and sought to explain its inability to restrain all instances of the media scrum. It agrees that its capacity is limited, but explains this by reference to the fact that much of the content acquired by photographers is sold to overseas publishers over which the Commission has no influence.<sup>140</sup> In this regard, it is notable that each of the recent claims made by celebrities involved photographers and agencies and not publishing media organisations. Only the latter category of potential defendant is subject directly to the regulatory ambit of the PCC. Nonetheless, the explanation offered by the PCC may be a deliberately partial representation, although it would probably not accept that sometimes British newspapers and magazines may simply choose to ignore its requests.

## **CONCLUSION: FUTURE INTERPLAY BETWEEN LEGAL AND REGULATORY OPTIONS**

There is no single explanation as to why the 1997 Act has been relatively lightly used by celebrities and other public figures to constrain over-vigorous

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<sup>137</sup> Select Committee on Culture, Media and Sport (2002-03) *Fifth Report: Privacy and Media Intrusion*. HC 458, paras 34-39.

<sup>138</sup> Select Committee on Culture, Media and Sport (2006-07), n 109 above.

<sup>139</sup> D. Ponsford, 'Daily Star defied PCC Sienna Miller harassment ban', *Press Gazette*, 30 September 2008.

<sup>140</sup> Meyer, n 123 above. This view has also been taken by the National Union of Journalists – see Select Committee on Culture, Media and Sport (2006-07), n 109 above, Ev 9-13, para 26, and Robin Esser (Executive Managing Editor, the *Daily Mail*). (Q104, Ev 41). For good reason, this position is also well-appreciated by photographers: 'the PCC? It doesn't have any effect on me. My market is the world' – see Travis, n 70 above.

newsgathering and paparazzi excess. A combination of factors would appear to have been important. Relatively few individuals are subjected to continuing paparazzi harassment that might justify and prompt such action to be taken. Other causes of actions, in particular the tort of misuse of private information, may often also have been available and on the basis of greater familiarity could be expected to be used in preference to the statutory cause. Perhaps, such use of the Act as there has been may be invisible and unquantifiable on the basis that complaints never reached the stage of court proceedings. Most importantly, the Press Complaints Commission offers - for all but the most particular cases - an effective alternative means of resolving immediate problems, and this has been used to a significant degree.

Two certain repercussions of the actions taken by Winehouse, Allen and Miller will be a reduction in both the degree of media intrusion that they each face and the amount of coverage accorded to them in the newspapers and magazines. The latter result has already been noted in respect of Winehouse.<sup>141</sup> Darryn Lyons, the self-styled “Mr Paparazzi” and addressee of some of the orders made, has explained, ‘as for Sienna Miller I don’t go near her now and we throw away any pictures that come in that are taken of her’.<sup>142</sup> It will be interesting to observe whether photographers will remain willing to provide such celebrities with the “oxygen of publicity” on occasions when they have some reason to be more accommodating. One would expect that the laws of supply and demand will force photographers’ hands, even should they be minded to be obstinate or vindictive. It will also be intriguing to assess in future whether the professional careers of those concerned are in any way affected by their withdrawal. In the instant cases, this would seem unlikely: each has talent. The answer may be different, and hence the propensity to seek the protection of the court lower, for those celebrities who have less substance underpinning their claims to fame.

Perhaps of more moment will be the ramifications for the future interaction between the legal and regulatory avenues that serve to combat the problem of media harassment. Now that it has been proved a reality, the risk of actions based upon the 1997 Act will exercise a constraining influence on photographers and newspaper editors. Its use may prove in fact, however, to be limited to occasions on which either no publication has yet occurred and the prospective publishers are unknown, or where the publishers are based overseas. The PCC may continue to be asked to police the actions of identifiable publishing organisations. There is no reason in law, however, why a harassment action should not - assuming the requirements of the Act are satisfied - also be brought in other circumstances. Indeed, should those suffering from harassment have limited faith in the ability of the PCC to curtail harassment or to deliver an adequate remedy, then the statute-based legal route could become the preferred one. In the main, though, we might

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<sup>141</sup> E. Saner, ‘Have celebrities finally snapped?’, *Guardian*, 4 May 2009.

<sup>142</sup> Dowell and Robinson, n 106 above.

expect that privacy laws and regulators, like houses, will continue to lean on one another.