



2009-07-02

Confidential Sources and Contempt of Court: An argument for change

Angel Fahy

Dublin Institute of Technology

Follow this and additional works at: <http://arrow.dit.ie/aaschssldis>

 Part of the [Social and Behavioral Sciences Commons](#)

Recommended Citation

Fahy, Angel: Confidential Sources and Contempt of Court: An argument for change. Dublin, DIT, July 2009.

This Dissertation is brought to you for free and open access by the Social Sciences at ARROW@DIT. It has been accepted for inclusion in Dissertations by an authorized administrator of ARROW@DIT. For more information, please contact yvonne.desmond@dit.ie, arrow.admin@dit.ie, brian.widdis@dit.ie.



This work is licensed under a [Creative Commons Attribution-Noncommercial-Share Alike 3.0 License](#)



Confidential Sources and Contempt of Court: An argument for change

Submitted by: Angel Strickland Fahy, BA.

For the award of: Master of Arts at Dublin Institute of Technology, Aungier St,
School of Law.

Supervisor: Eavan Murphy

Submitted: June 2nd 2009.

I certify that this thesis which I now submit for examination for the award of Master of Arts, is entirely my own work and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my work.

This thesis was prepared according to the regulations for postgraduate study by research of the Dublin Institute of Technology and has not been submitted in whole or in part for an award in any other Institute or University.

The work reported on this thesis conforms to the principles and requirements of the Institute's guidelines for ethics in research.

The Institute has permission to keep, to lend or to copy this thesis in whole or in part, on condition that any such use of the material of the thesis be duly acknowledged.

Angel Strickland Fahy

This thesis sought to examine the law on contempt of court as it pertained to journalists' refusal to give evidence that would reveal the identity of their confidential sources of information. It argued that current law in this jurisdiction does not go far enough to protect journalists' sources and, consequently, press freedom. It contended that despite the introduction of a statutory provision in the UK to provide qualified immunity from contempt charges for journalists who refused to reveal their sources, the law is not sufficiently clear to allow journalists to grant confidentiality without fear of prosecution. This thesis found that the law governing contempt of court and revelation of sources in the UK is stacked in favour of quantifiable interests such as the threat to businesses posed by leaked information rather than safeguarding press freedom.

This thesis examined the law on journalists' sources in the US and Sweden, highlighting the greater weight given to protecting anonymous sources in these jurisdictions. It then argued for the introduction of restrictions on the use of anonymous sources and unattributed information based on recent libel actions taken following inaccurate and baseless newspaper allegations. It found a correlation between the use of unattributed information and libellous material, citing the recent McCann abduction case as an example. It also found a link between commercial pressure and the trend towards using anonymous sources.

Chapter One:

Ireland, contempt

of court and

journalists' sources

Introduction:

Morland J: It is vitally important if the press is to perform its public function in our democracy, that a person possessed of information on matters of public interest should not be deterred from coming forward by fear of exposure. To encourage such disclosure, it is necessary to offer a thorough protection to confidential sources generally.¹

A free press is an essential component of any democratic society. The free flow of information, which contributes to informed debate about the use and abuse of power is, therefore, a condition of democracy.² As such, the press requires significant protection in order to function as a fourth estate, informing the public on matters of interest and acting as a check on those in power. In order to fulfill this function, the press often relies on sources of information who wish for their identity to remain undisclosed. One vital element of press freedom is that journalists can promise and maintain the confidentiality of their sources. As Quinn asserts, many of the most important stories the media carries involve publishing information that someone else does not want to be known.³ Such requests for anonymity are made for a number of reasons, usually because the source fears some kind of retribution, from losing his/her job, threats to safety or even prosecution. It is a basic rule of journalistic ethics that if a journalist promises to keep his/her source anonymous, he/she must honour the assurance.⁴

The right to freedom of expression and the press is afforded by Article 40, section six of the Irish Constitution of 1937, which guarantees the right of citizens to ‘express

¹ *John v Express* [2000] 1 All ER 280.

² Cositgan, R, *Protection of Journalists Sources*, Public Law, 2007, at page 464.

³ Quinn, F., *Law for Journalists* (Pearson Education, 2007) at page 258.

⁴ NUJ Code of Conduct: ‘Members of the National Union of Journalists are expected to abide by the following professional principles: 7. Protects the identity of sources who supply information in confidence and material gathered in the course of her/his work.’

freely their convictions and opinions'. This right is qualified with the inclusion of subsection (1), which adds:

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

The right to freedom of expression is guaranteed by Article 10, section one of the European Human Rights Convention, which guarantees to the right of freedom of expression including the '*freedom to hold opinions and to receive and impart information and ideas without interference.*' It does not, as does the First Amendment to the United States Constitution, specifically guarantee freedom of the press. Press freedom is included, within the broader freedom of expression, in the Human Rights Act of 1998 at section 12. However, in a series of cases, the European Court articulated the close connection between freedom of expression and the essential role played by the press when reporting on matters of public interest, and in doing so has accorded the press a special level of protection under article 10.

The Constitutional right to a free press is not absolute and the law governing contempt of court serves as a significant check on press freedom. The court has a '*right to everyman's evidence, except for those persons protected by constitutional or other established and recognised privilege.*'⁵ In Ireland there is no protection in law for journalists' sources and they may be held in contempt of court for failing to reveal the identity of their informants when required to do so by a court of law. In the

⁵ *Re O'Kelly* (108) ILTR 97.

leading case, *Re Kevin O'Kelly*,⁶ Walsh J in the Court of Criminal Appeal underlined that journalists were no more legally or constitutionally immune than any other citizen from disclosing information received in confidence., and thus, from answering a question put to them in court.

Contempt of court is wholly a common law offence in this country unlike in England where 1981 the Contempt of Court Act was introduced to provide immunity from disclosure for journalists unless such disclosure was deemed necessary for one of three prescribed exceptions. This will be discussed in detail in the next chapter.

Contempt of court – defined:

Journalists can be found guilty of contempt in a number of ways, both civil and criminal, ranging from prejudging court proceedings through their coverage to scandalising the court. For the purposes of this thesis, only contempt in the face of the court will be discussed and the discussion will be limited to journalists' sources and disclosure orders. In facie contempt is a criminal contempt punishable by imprisonment for a fixed period. This aspect of contempt relates to unlawful acts committed physically in a courtroom.⁷ Refusing to answer a question posed by a judge falls under this category. In *Keegan v de Burca*,⁸ contempt consisting of refusal to answer a question in court was described, in a dissenting judgement in the Supreme Court, as:

...an offence which continues as long as the refusal continues and cannot adequately be measured while the offence continues; if dealt with by a fixed sentence, the sentence might be oppressive on the offender whereas a sentence

⁶ Ibid.

⁷ Murphy, Y., *Journalists and the law*, (2nd ed, Roundhall, 2000) at page 122.

⁸ [1973] IR 223.

which ends when the offence ceases and the contempt is purged cannot be oppressive. It is not the declaration of refusal to answer the question, but the refusal to comply with the requirement which is the gist of the offence. Furthermore, in a case such as this the purpose of the sentence is not primarily punitive but coercive.

Contempt in *facie curiae* (in the face of the court) encompasses any conduct before the court that interferes with or disrupts proceedings and is used to aid and maintain the effective administration of justice. Consequently, as McGonagle asserts, *‘the judge has unfettered power to deal with the interruption there and then, effectively acting as judge, jury and prosecutor.’*⁹

The Irish Experience:

This thesis seeks to make a case for an amendment to the law of contempt to include a protection for journalists’ confidential sources of information. This topic of contempt of court was given a thorough analysis by the Law Reform Commission in its Consultation Paper of 1991 and its Final Recommendation of 1994. In addition, the prominent media law academic Marie McGonagle, along with Kevin O’Boyle, made a case for an amendment to the law as it pertains to the media in her textbook on media law¹⁰. It is contended that while this prestigious legal research provided an excellent discussion and valid argument of the topic, it is now outdated. Since McGonagle’s 1995 essay, a wealth of significant UK case law, and a key decision of the European Court of Human Rights¹¹ have altered the legal landscape in relation to confidential sources: These cases have highlighted the increasing recognition courts

⁹ McGonagle, M., ed, *Law and the Media: The Views of Journalists and Lawyers* (Round Hall, 1997) at page 134.

¹⁰ *Ibid* at pages 127 – 179.

¹¹ *Goodwin v UK* (1996) 22 EHRR 123.

are willing to give such sources; and have drawn attention to the pressing need to introduce clear legislation to standardise decisions in the area. These cases will be discussed in detail in the next chapter but first the law as it stands in this country must be mapped out.

The previously mentioned the *Re O’Kelly* case must form the starting point for any discussion on how courts deal with the issue of journalists’ sources, underlining the lack of privilege for journalists acting in their professional capacity. In this case, Kevin O’Kelly, a well-known journalist at RTÉ, was charged with contempt of court and sentenced to three months imprisonment for refusing to reveal a source - a sentence that was reduced to a fine on appeal. The contempt arose during the trial of Mr. Sean MacStiofain who stood accused of membership of an illegal organisation. Mr. Kelly was called as a witness on behalf of the prosecution but refused to confirm that the man speaking on a tape recording he made during interview was the accused, Mr. MacStiofain.

As he was appearing as a journalist he did not feel free to disclose this information, believing naming his source would have knock on consequences for other newsmen.

He said:

My position is to disclose the circumstances under which the statements on the tape were made available to me would be a breach of confidence between me and a client which, I feel, were I to breach that confidence, I would be not only putting my own exercise as a journalist into jeopardy, I would make it very difficult for any journalist all over Ireland to promote the public good by fostering the free exchange of public opinion.¹²

However, the fact that Mr. O’Kelly conducted this interview for the purpose of public broadcasting, which would invariably reveal the identity of the source, resulted in him

¹² Note 5 at page 97.

being ordered to confirm Mr. MacStiofain's identity in court and his subsequent charge of contempt for non-compliance with this order.

In his judgment, Walsh J. stated:

The obligation of all citizens, including journalists, to give relevant testimony with respect to criminal conduct does not constitute a harassment of journalists or other newsmen. If a journalist were to be invited to witness the commission of a crime in his capacity as a journalist and received the invitation only as a result of that capacity, the courts could not for a moment entertain a claim that he should be privileged from giving evidence of what he had witnessed simply because of the fact that he was there as a journalist.

He added:

In the present state of criminal law, in such a case a journalist concealing such knowledge, like any other person in a similar position, might well find himself guilty of misprision of a felony where a felony was concerned.

Walsh J. did not say in express terms that the court is obliged to require disclosure in a case where the evidence, although relevant, is not necessary in the interests of justice. Thus, although declining to recognise the existence of a 'journalistic privilege', as such, the courts may at their discretion decline to require such disclosure where it cannot be justified¹³. Indeed, it must be noted that the O'Kelly case was not, in fact, a strong one for the exercise of a claim to journalistic privilege as the journalist had not promised confidentiality to his source at the time of the interview.

However, it is interesting to note that Walsh J. did not expressly inquire into the relevance of the question posed to the journalist nor was the necessity for answering it examined. In fact, O'Kelly's sentence was quashed on the grounds that his refusal to answer the question '*while perhaps adding some little extra difficulty to the case, did*

¹³ Law Reform Commission Final Report on Contempt of Court (1994).

not effectively impede the presentation of the prosecution's case.'¹⁴ In other words, as McGonagle asserts, a fine was imposed even though O'Kelly's testimony was not necessary,¹⁵ highlighting a lack of clarity in the current law.

The Law Reform Commission findings

In 1994 the LRC introduced a consultation paper on contempt of court. The law as it pertains to evidence and journalistic privilege was examined. The LRC recommended that the law relating to the obligation of journalists to give evidence, and, when doing so, to answer questions, should not be altered. That is, journalists are not entitled to refuse to answer questions as to the source of information given to them in confidence on the ground that such communications are privileged. Thus, they did not find that journalistic privilege to refuse to disclose sources of information should be part of the law. It was the Commission's view that while such privilege would be constitutionally permissible, there were no policy grounds for altering O'Kelly. The 1991 paper argued that while O'Kelly's case is authority for the proposition that journalists enjoy no privilege to withhold their sources, the courts would have regard to the confidentiality.

It is interesting to note that the Commission made reference to sacerdotal privilege, which is recognised by the Irish courts but not by their English counterparts. It exists in addition to legal privilege and would suggest that not only is the effective administration of justice given greater weight than freedom of expression but the right to religion is also considered more worthy of protection.

¹⁴ Note 5.

¹⁵ McGonagle, M., *Media Law* (2nd ed, Round Hall, 2003) at page 190.

Sacerdotal privilege was recognised in *Cook v Carroll*¹⁶. In this case, a parish priest interviewed together a girl parishioner who alleged that she had been seduced and the parishioner whom she held responsible for such seduction. Subsequently, the girl's mother brought an action for damages for seduction against this parishioner, and the priest was called to give evidence of what passed at this interview. He refused to give evidence, claiming privilege.

The court held that his refusal to give evidence was justified and was not a contempt of court, expressing the view that communications made in confidence to a parish priest, in a private consultation between him and his parishioners, are privileged.

The LRC pointed to the four-fold test favoured by Gavan Duffy J in *Cook v Carroll* to determine if disclosure should be ordered which is all follows:

- (1) The information must originate in a confidence that the identity of the informant will not be disclosed;
- (2) The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
- (3) The relationship must be one, which in the opinion of the Court should be fostered; and
- (4) The injury that would result for the relationship by reason of the disclosure of the identity of the informant must be greater than the benefit thus gained for the correct disposal of the proceedings.

While acknowledging that the Constitution would permit a legislative exclusion for journalists, it argues that in light of the *Cook v Carroll* test '*it is not clear to what extent, if any, the present law is inhibiting the publication of material which should, in the public interest, be published.*'¹⁷ It is contended that such an assertion does not address the heart of the issue in question – the impact on the free flow of information in the public interest. It cannot be known what vital information may go unpublished

¹⁶ [1945] I.R. 515.

¹⁷ Law Reform Consultation Paper on Contempt of Court, 1991 at page 245.

or what corruption may go unpunished if sources refrain from coming forward with information because journalists cannot guarantee their anonymity. The damage to the media's ability to perform its vital public watchdog role cannot not be quantified, nor can the potential increase in whistle-blowers, should statutory protection be introduced, be predicted with accuracy. This is an area that will be discussed furthered in chapter two in the discussion on the English Experience.

In discussing the drawbacks of granting journalistic privilege the LRC points out the risk that *'unscrupulous journalist might be tempted to publish exaggerated or even imagined information or allegations, since he or she would be able to attribute their provenance to an unidentifiable source.'* It also highlights the potential threat of *'an unscrupulous informant [who] could equally whisper exaggerated or false information in the ear of a journalist without fear of discovery.'*¹⁸

It is contended that these are valid concerns and, thus, any law that exempts journalists from revealing their sources of information to the courts must be countered by placing restrictions on the circumstances when such sources can be used. This argument forms the basis for chapter four where it is discussed at length.

The 1991 consultation paper ends with the rather weak assertion that an argument in favour of a journalistic privilege based on the public's right to know is self-defeating since, *'if an allegation of serious misconduct is made in a newspaper, but the allegation cannot be adequately investigated because the source of the information is*

¹⁸Ibid.

withheld, the publisher is in effect asserting the public's 'right to know' on the one hand and denying it on the other'.¹⁹

It is contended that this argument is invalid as the identity of the informant is seldom necessary in order to investigate wrongdoing. Take for example the case of Granada Television journalist Susan O’Keeffe who was prosecuted for refusing to disclose her sources for the programme ‘Where’s the Beef’ to the Beef Tribunal²⁰. The programme exposed irregularities in the Irish beef industry and led to the establishment of the Beef Tribunal to investigate the abuses. The journalist’s refusal to name her source informant only impeded the Tribunal’s investigation into the source of the leaked information. The public had a right to know of the corrupt practices and who was responsible and not who brought the issue to light. Ms O’Keeffe’s revelations led to the subsequent investigation and she was only able to inform the public in this way by promising anonymity to her source.

The LRC revisited the topic once more in its 1994 Final Report on Contempt of Court. In its final recommendation the Commission remained of the view that it would be unacceptable for a court ‘*to be deprived of evidence which might be necessary to do justice between the parties in a particular case.*’²¹

¹⁹ Note 17 at page 246.

²⁰ *Goodman International v. Hamilton* [1992 No. 375 JR]: Although her evidence was to a tribunal and not a court of law, under the Tribunal of Inquiry Acts 1921-79 contempt of a tribunal could be treated as if it were contempt of the High Court. The Acts also made it an offence to refuse to answer any question ‘to which the tribunal may legally require an answer’ or to refuse to supply any documents ‘in his power or control’ legally required by the tribunal’. These Acts do not provide any exemption or defense for journalists or any other person in such a case.

²¹ Note 13 at page 20.

The Commission found that that the paramount interest of the public in the administration of justice must take precedence over the public interest in freedom of information.

The minority favoured legislation similar to the English section 10, but with a stricter test of 'necessity'. They recommended that the court should not be permitted to order disclosure unless it is established that disclosure is clearly necessary to prevent injustice, or in the interests of national security or to prevent disorder to crime. Their reason for supporting this approach was that it gave appropriate, though admittedly not absolute, recognition to the public interest in the protection of journalistic sources. They drew attention, in particular, to the following passage from the Report of the European Court of Human Rights in the Goodwin case:

The Commission considers that protection of the sources from which journalists derive information is an essential means of enabling the press to perform its important function of 'public watchdog' in a democratic society. If journalists could be compelled to reveal their sources, this would make it much more difficult for them to obtain information and as a consequence, to inform the public about matters of public interest. The right to freedom of expression, ..., therefore requires that any such compulsion must be limited to exceptional circumstances where vital public or individual interests are at stake.²²

Contempt under the spotlight

The previously mentioned O'Keefe case brought the issue of journalists' sources came to the fore in Ireland in 1994. Ms O'Keefe garnered much public support when

²² Ibid.

prosecuted for refusing to reveal her source. As a result, media attention focused on the lack of protection in Irish law for journalists and their sources. Subsequently, two Private Members' Bills were introduced. Section 43 (2) of the Defamation Bill 1995 provided that the onus of proving that disclosure was necessary in the interests of justice or national security or for the prevention of crime 'shall rest with the prosecution'. In addition, the Contempt Bill of the same year, which was introduced solely to deal with the problem of sources, provided in section 2:

No court or tribunal of inquiry established by law may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be estimated to the satisfaction of the court or tribunal that such disclosure is necessary to protect or vindicate the constitutional right of the individual or to protect the security of the State²³.

However, the Contempt Bill was never introduced into law and contempt of court remains wholly a common law offence in this country.

Ireland after Goodwin:

In 1996, the English law on protection of sources was examined by the European Court of Human Rights in the case of *Goodwin v United Kingdom*²⁴, a case that is further discussed in the next chapter. The court criticised the approach of the English courts and stressed that failing to give adequate protection to journalists' sources could breach the right to freedom of expression guaranteed by Article 10 of the Convention.

²³ Contempt of Court Bill, (1995).

²⁴ [1996] 22 EHRR 123.

The ruling in *Goodwin* had repercussions on English law but its influence was also felt in Ireland, where it was used as persuasive authority in the case of Barry O’Kelly, a journalist with the *Star* newspaper, who refused to reveal his sources when called as a witness in a civil action in the Dublin Circuit Court. As a result of the European Court’s decision, the judge held that it was not necessary for the journalist to reveal his source and he was, thus, not in contempt of court.²⁵

The *Goodwin* ruling may also have influenced the decision in *Gray v the Minister for Justice*²⁶ where Quirke J used an approach that avoided ordering the journalist to disclose his source. The case involved a newspaper article based on information alleged to have been leaked by An Garda Síochána. Mr Keane, the journalist, wrote a story about the Grays, who had been providing temporary accommodation for a relative who had been released from prison after serving a sentence for sexual offences. The article accused the couple of ‘harbouring a sex offender.’ The journalist testified that he had received an anonymous phone call from a woman, who told him that a serious sex offender was living in the town.

When asked in court if he had spoken to a member or members of An Garda Síochána he refused to answer. He stated that he could not do so because his answer might identify the source or sources of his information. He claimed that he had a duty to protect his sources at all times. When asked if he could exclude members of the Gardaí as a source or sources of his verification he refused to do so, again claiming that he had an obligation not to disclose the source of his information.

²⁵ McGonagle, M., note 9 at page 193.

²⁶ [2007] IEHC 52.

When asked if the words which he had published stating that ‘Gardaí are not commenting in any way about this case’ were true, he answered ‘Yes’.

When asked ‘did they ever comment to you?’ He replied ‘I can’t answer that question’.

The judge took an approach which avoided disclosure, finding on the balance of probabilities in light of the evidence and Mr Keane’s refusal to exclude members of the gardai as the source of information, ‘*that the information and verification which gave rise to the publication of Mr. Keane’s article came from a member or members of An Garda Síochána.*’

However, he also but also expressed skepticism about the existence of the privilege, stating Mr Keane sought to ‘invoke a questionable privilege in support of his refusal’.

The most recent case concerning journalists’ sources and non-disclosure is that of two Irish Times journalists, Geraldine Kennedy and Colm Keena²⁷. Here the Court focused entirely on the Convention aspects and found that there was a principle of non-disclosure, although in the context that the parties did not dispute this. The facts of the case are as follows: In September 2007, Keena, the Public Affairs Correspondent, and Kennedy, the newspaper’s editor, were summoned to appear before the Mahon tribunal, a tribunal of inquiry set up to examine payments made to Taoiseach Bertie Ahern while he was Minister for Finance.

²⁷ *Judge Mahon and Others v Keena and Kennedy* [2007] IEHC 348.

The High Court ordered the two journalists to appear before the Mahon tribunal to disclose the source of an article about financial payments to Mr. Ahern. The proceedings arose from publication in The Irish Times in September 2006, of an article written by Mr Keena and entitled: 'Tribunal examines payments to Taoiseach'. The article was based on information contained in a letter from the tribunal to businessman David McKenna, one of a group of 12 businessmen who made payments totaling £38,500 to Mr Ahern in 1993 and 1994. The letter was sent to Mr Keena.

Both journalists were summoned before the tribunal but refused to provide documents or answer questions that might identify the source. Ms Kennedy told the tribunal the documents had been destroyed. She also defended publication of the article, arguing that it concerned a matter of '*legitimate and significant public interest*'. The High Court found in favour of the tribunal and ordered Ms Kennedy and Mr Keena to comply with an order to appear in Dublin Castle to answer questions about the source of the information. It also warned that failure to comply with a High Court order '*can amount to a contempt of court*'.

The ruling was delivered by President of the High Court, Mr Justice Richard Johnson, It said the court was satisfied that there is '*no doubt*' that the material sent to The Irish Times was 'leaked' and that the tribunal 'did not in any way' authorise the release.

It noted that the tribunal, which relied on confidentiality to conduct its work, contended that the restriction of freedom of expression was:

...necessary in a democratic society...for preventing the disclosure of information received in confidence. We are satisfied...that the documents had

about them the attributes of confidentiality and the tribunal was entitled to impose an obligation of confidentiality in respect of them on the designated recipient of the document and all others who came into possession of it or them,' the ruling said.²⁸

While accepting that a 'free press' was an essential organ in a democratic society, the tribunal said '*journalists are not above the law. Neither are they entitled to usurp the function of the court as happened here.*'²⁹

The ruling noted that Ms Kennedy and Mr Keena had argued that any risk of disclosure of the identity of sources gave rise to a 'chilling' effect as far as the flow of information to newspapers was concerned. They also argued that if they were seen to be willing to disclose their sources, their reputations would be destroyed and their capacity to work as journalists would be '*grossly impaired or utterly destroyed*'.

However, the court found that the source in this case could not be identified by examining the original documents, as they had been destroyed. It said:

The only additional information that can be revealed by the defendants is whether or not the version or copy of the letter seen by them had the tribunal's letter heading on it or whether it was signed. In all probability, having regard to the fact that the documents are now destroyed, the most that can be achieved by way of answers to questions proposed to be asked by the tribunal of the defendants is to indicate that as a matter of probability the tribunal was not the source of the leak.³⁰

The court therefore found that the journalists' privilege against disclosure of sources is:

²⁸ Note 27.

²⁹ Ibid.

³⁰ Ibid.

...overwhelmingly outweighed by the pressing social need to preserve public confidence in the tribunal and as there is no other means by which this can be done other than the enquiry undertaken by the tribunal, we are of opinion that the test 'necessary in a democratic society' is satisfied.

The decision by the tribunal to compel the two journalists to answer questions, which could potentially identify their source, is problematic given that it was information obtained from confidential sources in the course of investigatory journalism that saw the tribunal of inquiry established in the first place. Moreover, despite being ordered to respond to the Tribunal's questions, both journalists have asserted that they will not jeopardise their journalistic integrity by disclosing such information, regardless of the threat of contempt charges.

While it can be argued that the courts will not require journalists to reveal their sources in all circumstances, it is contended that the current law on contempt is so unclear as to make it impossible for journalists to know when they can guarantee anonymity without fear of prosecution. Despite the LRC's contrary findings, it is asserted that it is necessary to introduce statutory protection for journalists to provide immunity from disclosure. While legislation on journalistic privilege is desirable, this thesis contends that following Britain's lead, the court will not leave Irish journalists in a position that is substantially clearer than that which exists presently. This assertion is made in light of the flaws with the English legislation which are discussed in the next chapter.

Chapter 2: The English Experience

The English Experience

*Lord Hoffman: 'There is no question of balancing freedom of speech against other interests. It is a trump card which always wins.'*³¹

Contempt was placed on a statutory footing in England in 1981 to give effect to the ECHR ruling in *Sunday Times v UK*³² in which it was held that the granting of an injunction preventing the newspaper from publishing an article the drug thalidomide and its effect on unborn children infringed on its right to freedom of expression guaranteed by Article 10 of the Convention.

The Contempt of Court Act provides qualified protection against disclosure for journalists. Section 10 states:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

Section 10 appears to offer a strong prima facie protection for the media. Indeed, in early cases the results for journalists seemed promising. For example, in *AG v Lundin*³³ a journalist was held not to be in contempt for refusing to reveal his source, because the 'revelation of [the] source would not have assisted the prosecution's case and was therefore relevant but unnecessary in the interests of justice. However, the 'interests of justice' exception was given a wider interpretation in later cases³⁴ and is

³¹ *R v Central Independent Television Plc* [1994] 3 All ER 641, 652.

³² (1979-80) 2 EHRR 245, 26.

³³ (1982) 75 Cr App R 90, 101 (DC).

³⁴ *British Steel Corporation v Granada Television Ltd*, [1981] 1 All ER 435.

singularly the greatest flaw in the legislation.³⁵ Thus, this chapter will examine the case law only as it pertains to this exception.

In 1996, the English law on protection of sources was examined by the European Court of Human Rights in the case of *Goodwin v United Kingdom*³⁶, a case which will be further discussed later. The court criticised the approach of the English courts and stressed that failing to give adequate protection to journalists' sources could breach the right to freedom of expression guaranteed by Article 10 of the Convention.

The court further stressed that disclosure orders could only be justified if there was an overriding public interest in the source being revealed. At the time, Goodwin was heralded as a landmark decision in the protection of journalists' sources. However, subsequent cases have proven otherwise.

That said, the ECHR ruling did pave the way for further development at a European level where in 2000 the Committee of Ministers Recommendation on the rights of journalists not to disclose their sources of information stipulated that '*domestic law and practice in member states should provide for explicit and clear protection of the rights of journalists not to disclose information identifying a source.*'³⁷

Domestically, English courts tended to give the term 'interest of justice' a wide definition. In fact, the phrase did not appear in the original Bill, which only removed immunity from disclosure where it was necessary in the interest of national security or

³⁵In *Re An Inquiry* [1996] 22 EHRR 123, Lord Griffiths observed that the word necessary has a meaning lying somewhere between 'indispensable' on the one hand and 'useful' or 'expedient' on the other.

³⁶Note 24.

³⁷March 8, 2000, DH-MM (2000) 2, 125-128, available at www.humanrights.coe.it/media.

the prevention of disorder or crime. As Sallie Spilsbury³⁸ points out, the interests of justice exception can be traced back to the committee stage of the Bill. Lord Hailsham, the then Lord Chancellor, recommended that an exception be introduced where disclosure was vital '*for the administration of justice*'. His exception was intended to apply to legal proceedings where it was necessary for the complainant to know the source in order to make their case. However, instead of limiting the exception to immunity where it was necessary for the administration of justice, the drafter used the words 'interests of justice'.³⁹ The vague and undefined nature of the term led Lord Hailsham to remark: '*What are the interests of justice? I suggest they are as long as the judge's foot.*'⁴⁰

The Lord Chancellor's words proved prophetic with decisions on disclosure in England tending to be decided against journalists due to the wide scope of the exception. In *Secretary of State for Defence v Guardian Newspapers*⁴¹ Lord Diplock, in an obiter statement, sought to limit the term, expressing the view that '*the expression 'justice' in section 10 of the Act of 1981 is not used in a general sense but in the technical sense of the administration of justice in the course of legal proceedings in a court of law.*'⁴² He went on to say that, where the only or predominant purpose of a legal action was to obtain possession of a document in order to identify the source of a leak, he found it impossible to envisage any case where it was necessary in the interests of justice to order disclosure. His comments mirror Lord Hailsham's original intention when drafting the Bill.

³⁸ Spilsbury, S., *Media Law* (Cavendish, 2000) at page 386.

³⁹ *Ibid.*

⁴⁰ Hansard, HL, 10.2.1982, Vol 416, col 2.

⁴¹ [1985] A.C. 339.

⁴² *Ibid.*

The Guardian case involved the publishing of a leaked confidential memo from the Secretary of State for Defence regarding the arrival of Cruise missiles in Britain. Disclosure in this case was deemed necessary in the interests of national security and, as such, Lord Diplock's comments were obiter dictum.

Lord Diplock's comments were ignored in *X Ltd v Morgan Grampian*,⁴³ a key case in highlighting how broad a reading could be applied to the interests of justice exception. The case arose when Bill Goodwin, a trainee journalist received unsolicited information that a company, Tetra Ltd, was experiencing financial difficulties. When he contacted the company to confirm the information, they immediately sought an order seeking the disclosure of the identity of the source of this information. The order was granted primarily on the ground of the threat of severe financial damage to the computer software company, and consequently to the livelihood of its employees. Goodwin refused to disclose his notes, which would have revealed his source, and appealed the case all the way to the House of Lords where he was fined £5000 for contempt. The court said disclosure could be considered necessary in the interest of justice where it was necessary to enable someone to '*exercise important legal rights and to protect themselves from serious legal wrongs.*'⁴⁴

In deciding whether this was the case, the court said the relevant issues were '*the nature of the information obtained from the source.*'⁴⁵ The court said the greater the

⁴³ [1991] 1 AC 1.

⁴⁴ Ibid per Lord Oliver of Aylmerton who said, at pages 708-709: It is, in my opinion, 'in the interests of justice,' in the sense in which this phrase is used in section 10, that persons should be enabled to exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be necessary to attain these objectives.

⁴⁵ Note 43 at page 44.

legitimate public interest in the information, the greater the importance of protecting the source. In addition, the manner in which the source obtained the information was deemed to be *‘another and perhaps more significant factor which will very much affect the importance of protecting the source.’*⁴⁶ Information that appeared to the court to have been obtained legitimately would enhance the importance of protecting the source, the court said. Conversely, if the information appeared to have been obtained illegally, the importance of protecting the source would be diminished, it was held, *‘unless, of course, this factor is counterbalanced by a clear public interest in publication of the information.’*⁴⁷ The court gave the example of a source acting to expose wrongdoing. The House of Lords, in rejecting the journalist’s claim had engaged in a balancing exercise to determine whether the disclosure was ‘in the interests of justice.’

Mr Goodwin brought his case to the European Court of Human Rights, which ruled that forcing him to disclose his source was in breach of the Article 10 right to freedom of expression. The company’s interest in eliminating the threat of financial damage was held to be insufficient to outweigh the vital public interest in the protection of the journalist’s source. The court also ruled that failing to give adequate protection to sources undermined the role of the press as a public watchdog.

Protection of journalistic sources is one of the basic conditions of press freedom...Without such protection sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.⁴⁸

⁴⁶ Ibid.

⁴⁷ Ibid at page 31.

⁴⁸ Note 24 at page 149.

The court ruled the public interest in protecting Mr Goodwin's source outweighed Tetra's interest in identifying the person who leaked the financial information.

The Goodwin ruling was paid lip service in *Camelot Group Plc v Centaur Communications Ltd*⁴⁹ three years later though the outcome deviated from the European Court's finding. The case involved the organisation authorised to run the national lottery, Camelot. A set of their draft year-end accounts was leaked, five days in advance of publication, to a journalist employed by Centaur. On the basis of the information contained in the leaked material, the journalist wrote an article focusing on large payouts which the directors of Camelot were said to have awarded themselves, whilst the funds allocated to good causes decreased. Camelot sought the return of the documents in order to assist in identifying the source of the leak, citing possible damage to their business activities and the potential danger of other confidential information being disclosed.

Centaur confirmed they had no intention of using, publishing or otherwise disseminating any of the material contained in the draft accounts and were content for the documentation to be destroyed. Their concern was the protection of their source.

However, Mr Justice Kay took the view that the public interest in enabling Camelot to discover a disloyal employee who leaked confidential information was greater than the public interest in protecting in protecting sources because the disloyal employee posed an '*ongoing threat*' to the company. The court said this was not a whistle-blowing case and the information leaked by the source and published by the

⁴⁹ [1998] IRLR 80.

defendants would have become legitimately available to the public some five days later. Justice Kay asserted:

Rather than serving a public interest, it would appear that the prior and premature disclosure and publication of the information served a private of the source or the defendants.⁵⁰

Justice Thorpe dismissed the subsequent appeal and refused stay.

The Camelot ruling was made shortly before the introduction of the Human Rights Act of 1998 which, at section 12,⁵¹ affirmed the weight courts ought to give freedom of expression, which was first laid down at European level in section 10 of the 1950 Convention on Human Rights. Sub-section four of the 1998 Act requires courts to have '*particular regard to the importance of the Convention right to freedom of expression*' and to the 'relevant privacy code' if the proceedings relate to 'journalistic material'. In theory it should have had profoundly changed the application of S10/

*John v Express Newspapers*⁵², a case involving famous singer Elton John, followed the introduction of the Act, which may have been responsible for the 'media-friendly' outcome at the appeal stage. In the case the importance of upholding guarantees of anonymity to the profession of journalism and subsequently the free flow of information was acknowledged. The facts were as follows: a draft document regarding litigation the singer was involved in was removed from counsel's chambers

⁵⁰ Ibid

⁵¹ Human Rights Act 1998: 12 Freedom of expression (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression. (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to— (a) the extent to which—(i) the material has, or is about to, become available to the public; or (ii) it is, or would be, in the public interest for the material to be published; (b) any relevant privacy code. (5) In this section 'court' includes a tribunal; and 'relief' includes any remedy or order (other than in criminal proceedings)

⁵² (2000) 1 WLR 1931.

and made its way into the hands of a journalist. The claimants sought an order under section 10 of the Contempt Act requiring the journalist, her editor and the newspaper company, to disclose the identity of the person who had provided the draft advice. The judge found that the source could not be identified by way of an internal enquiry easily and concluded that disclosure was necessary in the interests of justice because of the need to protect legal professional privilege.

The decision was overturned on appeal. The court held that clients needed to be able to consult their lawyers with assurance that their confidence was not at risk of being betrayed and that, if that important principle was in danger of being damaged, disclosure of a journalist's source might be necessary to protect the interests of justice pursuant to section 10 of the Contempt of Court Act.

However, the court ruled that, before the courts required journalists to 'break what they regarded as a most important professional obligation to protect a source,' sufficient effort must be made by the plaintiff to find out the source of the leak before going to court. It was further held that the judge had attached insufficient importance to the failure of counsel's chambers to discover the source of the leak and too much significance to the threat that that single incident posed to legal confidentiality. Thus, it was held the claimants had not established that disclosure of the journalist's source was necessary in the interests of justice and, even if they had, the judge should have exercised his discretion to refuse disclosure. In reaching the decision the judge said:

Section 10 imposes on the judge a two-stage process of reasoning. First, he has to decide whether disclosure is necessary in the interests of justice etc. If he is not so satisfied then he cannot order disclosure. If he is so satisfied, he

still is left with the task of deciding whether as a matter of discretion he should order disclosure. The second stage involves weighing the conflicting interests involved; the need for disclosure on the one hand and the need for protection on the other.

In *Ashworth Security Hospital v MGN Ltd*⁵³ the issue of disclosure of journalists' sources was revisited. The case centered on the medical records of 'Moors Murder' Ian Brady who had killed several children during the 1960s. The Mirror newspaper got hold of details of Brady's treatment while held in Ashworth Security Hospital. The newspaper published a story, containing verbatim extracts from the patient's medical records, which revealed Brady was on hunger strike in protest at his treatment and disclosed the details of how the hospital was dealing with it, including force-feeding Brady. The paper had got the information from a journalist who had been paid for it but did not know where this journalist had gotten the information from. The hospital went to court to compel the Mirror to reveal its source. Just as Bill Goodwin's case had, the case was appealed all the way to the House of Lords and it was, once again, ruled that the source should be disclosed because it was in 'the interest of justice' that someone leaking confidential information from hospital records should be identified and punished by the hospital in order to prevent further leaks from that person and deter others from doing the same:

The care of patients at Ashworth is fraught with difficulty and danger. The disclosure of the patient's records increases that difficulty and danger and to deter the same or similar wrongdoing in the future it was essential that the source should be identified and punished.⁵⁴

⁵³ [2002] 1 WLR. 2033.

⁵⁴ *Ibid* at page 2054.

Following the ruling, the journalist, Robin Ackroyd came forward and identified himself voluntarily. However, he refused to divulge his sources and the hospital took him to court to compel disclosure. In *Mersey NHS Trust v Ackroyd (No 2)*⁵⁵ the Court of Appeal upheld the decision of the lower court, which refused to order him to reveal his sources. It was held that Tugendhat J had not erred in ruling that although the hospital had a legitimate interest in discovering the source, this was outweighed by the public interest in journalists protecting their sources. On the evidence the judge said Mr Ackroyd was a responsible journalist whose purpose was to act in the public interest. It was also noted that it had become clear that the original source had not been acting for financial gain and there had been no subsequent leaks.

The appellate court held:

Weighing all of the factors, the judge held that it had not been convincingly established that there was still a pressing social need that the sources be identified and refused the order sought.

As can be seen in the above case law, in deciding cases under section 10 of the 1981 Act the courts have engaged in a balancing exercise that weighs *the* need for disclosure on the one hand and the need for protection on the other. The introduction of the Human Rights Act 1998 should have had a profound effect on the way s10 is applied, shifting the method of determining applications for disclosure orders from a two-stage process to determining if the order can be made as a matter of fact and then exercising discretion as to whether or not to make it to one of judgment, or as Costigan⁵⁶ asserts in her paper on protection of journalists' sources, whether disclosure should be ordered is [now] a matter of law, albeit influenced by the facts.

⁵⁵ [2007] EWCA Civ 101.

⁵⁶ Costigan R., Note 2 at page 479.

The HRA gives the journalist a right to protect his/her source, which the court is under a duty to observe, by making Article 10 the trump right which prevails over attempts to discover the identity of a source under Section 10. Much progress has been made, as seen by the Akroyd and Express rulings, but it is contended that the courts have not fully acknowledged this primacy.

We must now examine some of the factors taken into consideration by the court when deciding to if orders for disclosure should be made.

It is evident from the above case law that the courts in Britain tended to place greater importance on the potential damage that may be caused to companies or the government if the informant's identity is not revealed than on the '*potential and abstract*' damage caused to the free flow of information.⁵⁷ This may well be due to the vague concept of press freedom and the difficulty in quantifying the harm done by compelling journalist to reveal his/her sources of information. As Palmer asserts, the harm to the public interest caused by the loss of free flow of information cannot by definition be quantified. '*The loss is hypothetical: there is no way of assessing what sources would have come forward if preservation of anonymity was more certain.*'⁵⁸

Conversely, the potential financial loss to a company caused by a whistleblower or disloyal employee may be portrayed with relative ease and it is a factor that the courts seem willing to give considerable weight to.

A further flaw in the British legislation is the weight courts tend to give to the behaviour of the source, focusing on whether the individual is worthy of the Section

⁵⁷ Palmer, S, Protecting journalists' Sources: Section 10, Contempt of Court Act , Legal Journals Index, 1981.

⁵⁸ Ibid at page 89.

10 protection rather than freedom of expression as a concept. In *Morgan Grampian*, Lord Bridge identified the manner in which the source obtained the information as a significant factor in the decision whether to order disclosure.

It appears to the court that the information was obtained legitimately this will enhance the importance of protecting the source. Conversely, if it appears that the information was obtained illegally, this will diminish the importance of protecting the source, unless, of course, this factor is counterbalanced by a clear public interest in the publication of the information, as in the classic case where the source has acted for the purpose of exposing iniquity.⁵⁹

Informants, particularly those working for large businesses or the government, tend to be categorised as disgruntled, disloyal employees, acting out of malice rather than concerned individuals who wish to expose corrupt practices. As seen by Mr Justice Kay's comments in the *Camelot* case⁶⁰, exposing those who leak damaging information to the media tends to be treated as serving the public interest more than protecting press freedom. This is against the spirit of the legislation, which was initially touted as a 'profound' change to the protection afforded to journalists' sources and contrary to the ECtHR ruling. The interests protected by Section 10 are not those of the source, but those relating to press freedom. The vital question for the court is not whether the source merits protection, but whether the journalist should lose the immunity granted by Section 10. This was identified by Justice Laws, the then Lord Justice, in the *Ashworth Hospital* case, who said the curb placed on press by ordering journalists to reveal their sources is not: '*to the least degree lessened or abrogated by the fact...that the source is a disloyal and greedy individual, prepared for money to betray his employer's confidences.*'⁶¹

⁵⁹ Note 43 at pages 51-5

⁶⁰ Note 24.

⁶¹ *Ashworth Hospital Authority v MGN Ltd* [2001] 1 WLR. at page 99.

In addition the courts in Britain have placed emphasis on the conduct of the journalist when deciding whether or not to grant immunity. Of examples beginning with Lord Diplock, who, in *Secretary of State for Defence v Guardian Newspapers Ltd*,⁶² referred to the newspaper's editor as having behaved responsibly throughout the series of events that led to the disclosure order application. Slade L.J. in the *Insider Dealing* case observed; '*responsible journalists should be entitled to protect their sources of information*'.⁶³ In the *Special Hospitals Service Authority v Hyde*, Sir Peter Pain referred to the responsible way in which the journalist dealt with the information, making no important or serious disclosure.⁶⁴ Most recently in the Ashworth hospital cases the conduct and standing of the journalist received significant attention in determining whether a he should be ordered to disclose the identity of an intermediary who provided leaked information about a patient. At the full hearing on Ashworth Hospital's application for disclosure order, Tugendhat J noted: '*the circumstance and conduct of the journalist are potentially relevant to the judgment that has to be made before an order of sources can be made*'.⁶⁵ The judgment ends with the observation that the journalist involved was '*a responsible journalist whose purpose was to act in the public interest*'.⁶⁶

Costigan asserts that the reason for such emphasis on the conduct of the journalist stems from the common law position whereby the presumption against disclosure of media sources related only to interim proceedings in defamation actions. In such cases the diligence of the journalist was a valid consideration.⁶⁷ However, unlike in

⁶² [1985] AC 339 at page 335.

⁶³ *Re Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660 at page 679.

⁶⁴ (1994) BMLR 77 at page 85.

⁶⁵ [2006] EWHC 107 at page 77.

⁶⁶ Costigan, R., note 2 at page 53.

⁶⁷ Note 31 at page 197.

defamation actions the journalist is not the wrongdoer and, in the majority of Section 10 cases, the veracity of the published material is not at issue.

Thus, although the law of contempt has been placed on a statutory footing in Britain, providing qualified immunity from disclosure orders, the wide interpretation given to the exceptions in Section 10, particularly the ‘in the interests of justice’ element have rendered its protection weak and unclear. Any such legislation in Ireland must avoid these pitfalls by steering clear of nebulous phrases that encompass all manner of circumstances and, when given a wide interpretation, serve to abrogate the protection intended by the legislation.

Chapter three: The US and Sweden – a model for change?

Kirsten Mitchell: The Scandinavian countries have particularly strong source protection laws. In Sweden, for example, the protection of sources is so absolute that a journalist is bound legally from revealing sources who request anonymity. Those who don't may be prosecuted at the behest of the source...⁶⁸

The previous two chapters made a case for the implementation of journalistic privilege to protect sources and examined the law as it exists in Ireland and the UK, arguing that despite introducing statutory protection for journalists, the law in England has failed to offer comprehensive protection for confidential informants. This chapter seeks to examine alternative statutory models and the protection they offer journalists.

Federal Law

The law in the United States will be first examined. As previously stated, the First Amendment of the US Constitution provides for freedom of speech and of the press. The leading case on protection of journalists' sources is *Branzburg v Hayes*⁶⁹, in which it was held that the First Amendment of the US Constitution's protection of free speech does not grant journalists the privilege to refuse to divulge names of confidential sources. However, laws providing protection for journalist confidentiality have been adopted by a large number of states, a sample of which will be discussed later. *Branzburg* is a confusing and ambiguous decision. In it, the court was divided, with four of the nine judges dissenting. Justice Powell wrote a concurring opinion that created a majority but it is this opinion that many judges appear to have relied upon in

⁶⁸ Mitchell, K., *Shielding Sources Around the World*, *The News Media & The Law*, Winter 2005 issue, at page 9.

⁶⁹ 408 US 665 (1972).

holding that *Branzburg*, in fact, created a qualified privilege for journalists to protect their sources. He said:

‘[reporters are not without] constitutional rights with respect to the gathering of news or in safeguarding their sources ... no harassment of newsmen will be tolerated. If a newsman believes that a grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if a newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicated confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered.’

In other words, although Justice Powell ultimately voted with the majority, a large proportion of his opinion appears to agree with the dissenting opinion.

In the case’s immediate aftermath, courts held that the First Amendment afforded no protection for journalist’s sources, however, gradually they began drawing on the minority opinion in concluding that a qualified privilege was permitted in some cases. The balancing test favoured by Justice Stewart in his *Branzburg* dissent tends to be favoured by the courts when balancing the freedom of expression against the interests of those seeking disclosure.⁷⁰ As a result of the *Branzburg* decision, there is considerable doubt as to whether journalists may be compelled to disclose confidential sources under the First Amendment.

Thus, while journalists have no absolute constitutional privilege to refuse to disclose information they consider confidential, federal and state judges have frequently

⁷⁰ This test requires the party seeking disclosure to show that there is probable cause to believe that the journalist has information that is clearly relevant; that the information cannot be obtained by alternative means less destructive of first amendment rights and; that there is a compelling and overriding interest in the information.

recognised the public interest in a free flow of news, established in the First Amendment, and the contribution that confidential sources can make to that flow.

State Shield Laws

Partly as a result of *Branzburg*, most states have passed shield laws to create a privilege against disclosure for journalists. To examine each state law is beyond the scope of this thesis so a sample of three will be discussed; California, Illinois and New York, as each of the three provide varying degrees of protection ranging from absolute to qualified, for a narrow category of persons.

The discussion commences with the California shield law⁷¹ which appears to offer absolute privilege to journalists, that is, a privilege that cannot be taken away irrespective of any competing interests. However, in *SCI-Sacramento Inc v Superior Court (People)*⁷² it was held that the provision only provides immunity from contempt charges and is not a general privilege regarding disclosures. The shield law states:

⁷¹ The California Shield Law is contained in the California Constitution and in California's Evidence Code at section 1070.

⁷² App 3 Dist. 1997 62 Cal. Rptr. 2d.

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.⁷³

The law protects a person ‘connected with or employed upon a newspaper, magazine or other periodical publication. In *O’Grady v Superior Courts*⁷⁴, a case involving an online news magazine about Apple Computers, it was held that the shield law applies to persons gathering news for dissemination to the public regardless of whether the medium is print or online. However, the law only protects newsgatherers who engage in ‘*open and deliberate publication on a news-oriented website of news gathered by that site’s operators*’.

California’s shield law also protects several types of information, including unpublished material obtained or prepared in the process of gathering information for communication to the public. This information may be protected from disclosure regardless of whether or not it was obtained in confidence. Regarding informants, the law protects the identity of sources, even if they are not confidential, and information that might lead to their identity. The strength of the shield law’s protection depends upon the sort of legal case and whether the person from whom the information is

⁷³ California Evidence Code, Section 1070.

⁷⁴ 139 Cal. App. 4th 1423 (Cal. Ct. App. 2006).

sought is a party to the proceedings. The protection ranges from absolute in civil cases to nil when the newsgatherer is a party to the proceedings. In criminal cases the strength of the protection depends on whether the a prosecutor or criminal defendant is seeking the information, with prosecutors rarely able to overcome the shield. Thus, it is arguable that the all purportedly absolute shield laws may be defeated by the defendant's right to a fair trial.

Illinois

The shield law of Illinois⁷⁵ provides for qualified privilege, protecting non-disclosure of sources unless ‘ *all other available sources of information have been exhausted and disclosure of the information sought is essential to the protection of the public interest involved*’.⁷⁶

The law states: *No court may compel any person to disclose the source of any information obtained by a reporter except as provided in the other provisions of the shield law.*⁷⁷ The protection afforded to journalists under the shield law of the state of Illinois is less comprehensive than that in California. The protection the privilege provides only extends to those who fall within the law's definition of a ‘reporter’ and is dependent on the type of medium for which they work.

⁷⁵ Illinois's shield law is located at 75 Ill. Comp. Stat. 5/8-901 to 8-909.

⁷⁶ ILL ANN STAT Ch 110 para 8-907 (2) (1983).

⁷⁷ Ibid at Sec. 8 901.

They are defined as follows:

- (a) 'Reporter' means any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a fulltime or parttime basis
- (b) 'News medium' means any newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation; a news service whether in print or electronic format; a radio station; a television station; a television network; a community antenna television service; and any person or corporation engaged in the making of news reels or other motion picture news for public showing.
- (c) 'Source' means the person or means from or through which the news or information was obtained.

Illinois's shield law protects the sources of information, which the law defines as '*the person or means from or through which the news or information was obtained.*' The law applies to both human sources and documentary sources, including information obtained in the newsgathering process, including information not obtained in return for a promise of confidentiality. For example, in *People v. Slover*⁷⁸, an Illinois court held that a reporter's unpublished photograph depicting police performing a search was a protected 'source' within the meaning of the statute. Moreover, a journalist does not need to promise a human source confidentiality in order to avail of the shield's protection.

Until recently, it appeared that federal courts in the Seventh Circuit, which encompasses Illinois, recognised a qualified privilege based on the First Amendment. The courts recognised this privilege applied to both the identity of confidential sources and unpublished information - whether confidential or nonconfidential - collected during newsgathering. Before ordering disclosure of covered information,

⁷⁸ 753 N.E.2d 554, 558 (Ill. App. Ct. 2001).

the courts applied a balancing test considering the media's interests in protecting the information, the relevance of the material sought, and whether the source was confidential.

However, a relatively recent case, involving an Irish defendant, *McKevitt v Pallasch*⁷⁹, has cast serious doubt on the continued validity of the reporter's privilege in the Seventh Circuit. Michael McKevitt was an alleged Irish Republican Army activist being tried in Ireland on charges of directing terrorism and belonging to a banned organisation. One of the witnesses against him, David Rupert, was a purported FBI informant with ties to the IRA. A group of Illinois journalists writing a biography conducted and taped several interviews with the Mr Rupert during their research. Invoking federal law, Mr McKevitt asked an Illinois court to compel the journalists to turn over the tapes as he believed they would be useful to him in the cross-examination of Mr Rupert.. The authors refused, claiming the *Branzburg* ruling protected their unpublished material from disclosure. After the trial court rejected the journalists' claim, the writers appealed to the 7th Circuit.

The 7th Circuit unanimously affirmed the trial court's decision. Writing the opinion in the case, Judge Richard Posner recognised the decision in *Branzburg* was somewhat difficult to interpret because, as previously mentioned, Justice Powell voted with the majority but wrote a concurring opinion that seemingly sided with the dissent. While other courts found a newsgatherers' privilege in this ambiguity, Posner J refused to do so, concluding instead that Powell J's concurrence should be construed narrowly.

⁷⁹ 339 F.3d 530 (7th Cir. 2003).

New York

According to a 1984 case⁸⁰, New York has :

long provided one of the most hospitable climates for the free exchange of ideas.... It is consistent with that tradition for New York to provide broad protections, often broader than those provided elsewhere, to those engaged in publishing and particularly to those performing the sensitive role of gathering and disseminating news of public events.

New York's Shield Law provides an absolute privilege with respect to confidential information, and a qualified privilege for nonconfidential information.

No fine or imprisonment may be imposed against a person for any refusal to disclose information privileged by the provisions of this section.⁸¹

However, the state's shield law covers only a narrow category of people. In general, it only offers protection to 'professional journalists' who earn money from newsgathering for a traditional media source. Journalists who qualify for its protection cannot disclose information obtained to people who do not work for the same organisation as them, or they risk losing the shield's protection.

New York state courts recognise a qualified 'reporter's privilege' based on the US Constitution and the New York Constitution but New York state courts do not recognise any common law privilege for newsgatherers.

⁸⁰ *Re Beach v. Shanley*, 62 N.Y.2d 241 at 255, 476 N.Y.S.2d 765, 773 (1984) (Wachtler, J., concurring).

⁸¹ New York Civil Rights Law section 79-h.

According to the statute:

(6) "Professional journalist" shall mean one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.

(7) "Newscaster" shall mean a person who, for gain or livelihood, is engaged in analyzing, commenting on or broadcasting, news by radio or television transmission.

(8) "News" shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.⁸²

Federal courts in the 2nd Circuit Court, which encompasses New York, recognise a qualified reporter's privilege based on the First Amendment to the US Constitution and the common law. The level of protection depends on whether the journalist obtained the information in question in exchange for a promise of confidentiality.

The New York shield law protects the identity of sources and information collected in the course of newsgathering. The journalist does not need to have spoken with the source or obtained the information in confidence to obtain protection, but the level of

⁸² Ibid.

protection is higher in case where they have. Disclosure of information has significant negative consequences for protection under the shield law.⁸³

New York's shield law has two tiers of protection. The first tier covers journalists who promised his/her source confidentiality or obtained information in return for a promise of confidentiality. In this circumstance, the shield is absolute and courts may not order a journalist to reveal it under any circumstances. The absolute protection applies equally whether the information is sought in a civil or criminal case. It applies even if the journalist is a party to the case in which information is sought. The second level applies if the information is not confidential. In this case, the shield is qualified, meaning that in some circumstances a court may order the journalists. to reveal the information.⁸⁴

State courts in New York also recognise a qualified journalist's privilege based on the US Constitution and the New York Constitution. It covers both confidential and non-confidential information.

The First Amendment

All three states recognise a qualified privilege for journalists' sources under the First Amendment, although there is some doubt over Illinois following the *McKevitt* case.

⁸³ The impact depends on who discloses the information: If the source discloses his or her identity after the journalist has spoken to him or her, the source is considered 'non-confidential.' The journalist is still protected by the the shield, but the level of protection is lower than if the source's identity were confidential. If, after obtaining information, the journalist discloses confidential information or the identity of the source to anyone other than another reporter or editor at their news organisation, they waive protection for that information. In addition, once information is published, it is not protected.

⁸⁴ Freedom of Litigation Project, *Briefing Paper on Protection of Journalists' Sources*, May 1998, Article 19.

In an interesting development in the law, the First Amendment of the US constitution was actually used against a journalist in the landmark ruling of *Cohen v Cowles Media Company*.⁸⁵ In the case a source gave information to a journalist on the condition that his name be kept secret. The journalist promised confidentiality but his editors overruled his decision and the source's identity was revealed. Consequently the source sued the media company on the basis of promissory estoppel. The journalist sought to rely on the First Amendment protection afforded to reporters, arguing it prohibited a plaintiff from recovering damages for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information. The court disagreed and the plaintiff was awarded \$200,000 in compensation.

The US Supreme Court's ruling is significant for the limitations it placed on news media conduct. The court held that media organisations whose agents promise anonymity to a source must keep their word. While the ruling was interpreted by many as a set-back for press freedom, it is contended in this thesis that the ruling may have actually enhanced the free flow of information. It is suggested that by requiring the media to keep their word, potential sources who seek anonymity may be more willing to come forward because any promise of confidentiality is legally binding. It is further contended that using such legislation against the media, rather than restricting the free flow of information, actually aids it by ensuring that the commercial interests of media corporations do not circumvent the public's right to factual, verified news. This argument will be further advanced in the next chapter when a case for restricting the circumstances in which confidential sources can be used will be made.

⁸⁵ 501 US 663 (1991).

Sweden

In light of the decision in *Cohen v Cowles* it is interesting to examine the protection afforded to journalists' sources in Sweden. There a journalist who reveals his or her source without consent may be prosecuted at the behest of the source.⁸⁶ The Freedom of the Press Act (FPA), which has constitutional status, provides for protection of journalists sources.⁸⁷ The FPA also closely regulates executive action regarding the media. Government officials may only make enquiries regarding media sources where this is explicitly allowed by the FPA.⁸⁸ Generally this is only where the authorities have reasonable grounds to believe that the source has committed treason, espionage or a similar crime.⁸⁹ Since the editor is responsible for all crimes committed in publishing the newspaper, the police have little justification for searches to identify sources.

The protection afforded to journalists in Sweden by the FPA is subject to exceptions. Courts may order source disclosure in criminal cases where the information is needed to protect state security or where freedom of the press is not the central issue and disclosure is justified by an overriding public or private interest. The interest of an accused person in obtaining information relevant to establishing his or her innocence and the interest of the police in obtaining evidence about crime are examples of such overriding interests.

⁸⁶ FPA, Chapter 3, Article 5.

⁸⁷ Article 1: An author of printed matter shall not be obliged to have his name, pseudonym or pen-name set out therein. This applies in a like manner to a person who has communicated information under Chapter 1, Article 1, paragraph three, and to an editor of printed matter other than a periodical.

⁸⁸ FPA, Chapter 3, Articles 4 and 5.

⁸⁹ Chapter 7, Article 3 of the FPA.

As asserted in a 1998 briefing paper on the protection of journalists' sources, protection of news sources is considered to be part of 'messenger freedom' and is, thus, a deeply rooted and highly valued legal tradition in Sweden, which even public officials and persons representing powerful institutions rarely try to challenge. For example, in 1988 a court ordered a reporter working for *Dagens Nyheter*, the largest morning paper, to reveal *when* certain conversations with a *known* source had taken place. Outraged journalists argued that this was unconstitutional and the Chancellor of Justice, who was responsible for prosecuting the case, eventually withdrew the question.⁹⁰

Sweden also has a Press Ombudsman's office which is run and funded independently by the media itself. The Press Officer is appointed by a special committee, with representatives from the Swedish Bar Association, the press and the government. All the members of the Newspaper Publishers Association, including all the daily newspapers in Sweden, have agreed to abide by a Code of Ethics, which sets stringent standards concerning accuracy, privacy and rights of reply.⁹¹ For example, provisions one and two of the code state the following:

The role played by the mass media in society and the confidence of the general public in these media call for accurate and objective news reports. Be critical of news sources. Check facts as carefully as possible in the light of the circumstances even if they have been published earlier. Allow the reader/ listener/ viewer the possibility of distinguishing between

⁹⁰ Note 84 at page 12.

⁹¹ Price, S., *Ombudsman to the Swedes*, American Journalism Review, April 1998.

statements of fact and comments.⁹²

These provisions are particularly important to ensuring accurate information is disseminated, given that disclosing a source is an offence in Sweden. People who claim they have been harmed by a violation of the Code can complain to the Press Ombudsman, who may investigate, mediate and recommend that the Swedish Press Council punish the offending publications.⁹³

The above US and Swedish examples serve to illustrate the importance placed on the protection of the free press in these jurisdictions, in marked contrast, it is contended, to the state of play in Ireland and the UK, where the administration of justice and the protection of private interests tend to be given greater weight.

⁹² Code of Ethics for the Press, Radio and Television in Sweden, available at http://ethicnet.uta.fi/sweden/code_of_ethics_for_the_press_radio_and_television, accessed on 28/05/09.

⁹³ Note 91.

Chapter Four:

Balancing

protection with

restriction

When discussing the use of unnamed sources, Michael Gartner, the former NBC News president, remarked: ‘Sometimes it’s a function of laziness. Sometimes it’s competitiveness. There’s always an excuse...Both sources and reporters know they can get by with it so they play these little games.’⁹⁴

Attitudes towards the use of anonymous sources differ greatly between the US and Ireland/Britain, with the American press tending to use such informants more sparingly. In discussing anonymous sources in a US context, Shepard⁹⁵ explains that there is a general feeling amongst editors that a heavy reliance on such sources damages the press’ credibility. Competition was cited as the main reason for using such informants and, for that reason, this chapter seeks to argue that legislation restricting the circumstances in which anonymous sources can be used is not an attack on the free press. Instead such restrictions would serve as a safeguard against unjust attacks on reputation, unwarranted interference with the administration of justice, and the erosion of the integrity of the profession by media organisation concerned more with commercial gains than with informing public.

US experience

The US experience with anonymous sources provides an interesting starting point for a discussion on the introduction of restrictions. The reluctance of the US press to use such sources is founded in a number of high profile and embarrassing incidents, in

⁹⁴ Quoted in Shepard, A., *Anonymous Sources*, American Journalism Review, 1994, December Issue, available at <http://www.ajr.org/Article.asp?id=1596>.

⁹⁵ Ibid.

which stories were fabricated by journalists seeking a better story under commercial pressure.

The most famous example of an anonymous source is Deep Throat, an informant who leaked secrets that helped Washington Post reporters Bob Woodward and Carl Bernstein uncover the Watergate affair. The scandal forced the resignation of Republican President Richard Nixon in 1974 and concerned a break-in at the offices of the rival Democratic Party in the Watergate Building in 1972. The attempted bugging of the building was linked to the offices of the Nixon White House and the cover-up went all the way to the top. In 2005 the Washington Post revealed that Mark Felt, a former top FBI official, was Deep Throat. Initially the Washington Post reporters refused to confirm Mr Felt's identity, sticking with their 31-year promise only to break the silence after their source's death. However, Mr Felt's family said he deserved recognition for the risks he took and requested his identity be revealed. The Watergate affair serves as a clear example of the value of using confidential sources on matters of great public interest when no alternative is available.

In her article for the *American Journalism Review*⁹⁶, Shepard cites a survey by Ohio University Journalism Professor Hugh Culbertson, who surveyed more than 200 US editors in 1979. He found that most said competition forced them to use unnamed sources, even though 81 percent considered them inherently less believable. One-third were '*unhappy to a substantial degree*' with how anonymous sources were handled at their own newspapers, and editors estimated that more than half would go on the record if reporters pushed harder. '*They seemed to regard unnamed attribution as a*

⁹⁶ Ibid at page 1.

crutch for lazy reporters,' Culbertson said. Shepard argues that although the research was conducted in the 70s, 'it's likely the findings would be similar today'.

The issue of anonymous sources came to the fore once more in the US during the murder trial of O.J. Simpson who stood accused of killing his ex-wife. A California television reporter told viewers that DNA tests showed a match between blood on a sock found in Simpson's bedroom and his former wife's blood. The link was attributed to a source who refused to be named. A Los Angeles court judge threatened to close Simpson's murder trial to television cameras in the wake of the controversial report. The television station initially responded by saying that it had '*reported accurately the information our sources have told us.*' Several days later, the station said part of its report was '*in some respect, factually incorrect,*' although it did not specify what was inaccurate.⁹⁷

As with the Madeleine McCann abduction case in the UK, which is discussed later, pressure to be first on the Simpson case was immense. With few knowledgeable sources speaking on the record, journalists turned on those willing to talk on a not-for-attribution basis. Unfortunately, but not surprisingly it is contended, much of the information was inaccurate and had the potential to damage the defendant's right to a fair trial.

⁹⁷ Sharkey, J. E., *Offside on O.J.*, *American Journalism Review*, December 1994, available at <http://www.ajr.org/article.asp?id=1583>.

A further example of the dangers of using unattributed material the case of Janet Cooke, a former American journalist who became infamous when it was discovered that a Pulitzer Prize winning story that she had written for The Washington Post had been fabricated. In an article titled Jimmy's World, which appeared in the Post on September 29, 1980, Cooke wrote a gripping profile of the life of an eight-year-old heroin addict, who did not, in fact, exist. Ironically, The Assistant Managing Editor of the paper who submitted the article for a Pulitzer Prize was none other than Bob Woodward.

Many US editors argue that having a story on the record lends credibility but, as Shepard asserts 'some say it's crucial for another reason: to protect against libel charges.' She writes: '*Many feel that massive libel awards in the early 1980s had more to do with changing attitudes about them.*' Citing a New York Times attorney, the paper goes on to say unnamed sources represent one of the most serious libel threats for news organisations. '*When a paper is sued over a story based on confidential sources, [he says,] "the plaintiff's lawyer will doubtless complain that either the sources didn't exist or they shouldn't have been relied on. Juries will generally believe that when those people never come into the room."*'⁹⁸

The dangers of using anonymous sources with regard to libel awards can be seen in this jurisdiction also. In 2006, businessman Denis O'Brien was awarded a record €750,000 against the Mirror Newspaper Group by 11 jurors in the High Court. The paper had published an article which alleged a former Government minister was going to be investigated over a payment of Ir£30,000. The newspaper based the article

⁹⁸ New York Times Assistant General Counsel George Freeman

on, what it referred to as, an anonymous letter which alleged the donation came from Mr O'Brien. The paper subsequently admitted that the article published was untrue and defamatory of Mr O'Brien. It is contended that had steps been taken to verify the allegation aside from relying on unattributed material, the need for litigation would never have arisen, nor would the damage to the media's reputation.

As mentioned in the discussion of the US' experience, anonymous sources can be a vital tool in bringing important stories to light but they can also be used as a 'crutch for lazy reporters.'⁹⁹ In order to illustrate this argument, this chapter will examine two vastly differing cases in which confidential informants were used by news publications.

Jameel

The discussion commences with the case of *Jameel v Wallstreet Journal Europe*¹⁰⁰, the facts of which are as follows:

On 6 February 2002 the quality, broadsheet newspaper published the article headed "Saudi Officials Monitor Certain Bank Accounts" with a smaller sub-heading "Focus Is on Those With Potential Terrorist Ties". It was written by an Arabic-speaking reporter with specialist knowledge of Saudi Arabia, and acknowledged the

⁹⁹ Ibid.

¹⁰⁰ [2006] UKHL 44.

contribution of a staff writer in Washington. The gist of the article was that the Saudi Arabian Monetary Authority, the Kingdom's central bank, was, at the request of US law enforcement agencies, monitoring bank accounts associated with some of the country's most prominent businessmen in a bid to prevent them from being used, wittingly or unwittingly, for the funnelling of funds to terrorist organisations. This information was attributed to '*U.S. officials and Saudis familiar with the issue*'. In the second paragraph a number of companies and individuals were named, among them '*the Abdullatif Jamil Group of companies*' who, it was stated later in the article, '*couldn't be reached for comment*'.

The article was published five months after the 9/11 terrorist attacks on the US, and consequently the newspaper sought to rely on the qualified privilege laid down in *Reynolds v Times Newspapers*¹⁰¹ in which the common law defence of qualified privilege in libel cases was developed to establish a public interest defence for newspaper articles that were the product of responsible journalism. In the decision, Lord Nicholls set out ten factors that a judge might take into consideration in deciding whether the test of responsible journalism was met, including, for example, the tone of the article and whether the story contained the gist of the claimant's side of the story. The aim was to strike a better balance between the protection of reputation and freedom of expression, affording greater protection to free speech in cases where a newspaper was unable or unwilling to prove the truth of a defamatory allegation.¹⁰² In the Jameel case, the WSJ could not prove the allegations made in the article because they had relied on an anonymous source. However, because the journalist had gone to considerable lengths to verify the information, the Law Lords, on appeal, ruled that

¹⁰¹ [2001] 2 AC 127.

¹⁰² Hooper, D., *The Importance of the Jameel Case*, Entertainment Law Review, 2007, 18(2), 62-64.

Reynold's privilege should apply because the article was on a matter of public interest and was a product of responsible journalism.

The Jameel ruling is an example of an anonymous source being used to bring to light a story of enormous public interest. The Wall Street Journal is a reputable newspaper, known for unsensational journalism. Due to the nature of the story, it is contended that without confidential informants, the information could not be published as very few political officials are willing to speak on record about sensitive matters, such as those relating to national security. The court took the reputation of the newspaper and the attempts made by the WSJ to verify the information into account when overturning the libel award.

McCann

In citing *McCann v Express Newspapers*¹⁰³, this chapter examines the other end of the spectrum with regard to the use of anonymous sources. The case centres on Kate and Gerry McCann, the parents of three young children, the eldest of whom, Madeleine, was abducted from the family's holiday apartment in Portugal in May 2007. The toddler's abduction gave rise to unprecedented media coverage worldwide, with many of the British tabloid media publishing sensational stories speculating on the child's fate. The case serves as a vivid illustration of the dangers of using unnamed sources, both for individuals and for the press, in terms of libel awards and damage to reputation. From the late summer of 2007 until February 2008, Express Newspaper, which is the publisher of the Daily Express, the Sunday Express, the Daily Star and

¹⁰³ *McCann & McCann v Express Newspapers* [1998] QB SIOC/08/0278.

the Daily Star Sunday, published over 100 articles which were seriously defamatory of the McCanns. The general theme of the articles was to suggest that Mr and Mrs McCann were responsible for the death of their daughter and/or that there were strong and reasonable grounds for such suspicions, There were also allegations that the McCann's had disposed of Madeleine's body and that they had then conspired to cover up their actions, including by creating 'diversions' to divert police attention away from evidence which would expose their guilt. Many of these articles were published on the front pages and almost all the allegations were attributed to anonymous sources. In addition, the Daily Star published further articles which alleged that Mr and Mrs McCann had sold their daughter to alleviate their financial burdens. Another article claimed the McCann's were involved in wife-swapping orgies. A sample of such headlines and stories are included in the appendix.

In court, the defendant acknowledged that all the allegations were entirely false and that there was no evidence whatsoever to suggest that Mr and Mrs McCann were responsible for the death of their daughter or involved in a cover-up. The Daily Express editor, Peter Hill, admitted that claims the McCann's sold Madeleine and that they were involved in 'swinging' were entirely baseless. Indeed, in court, counsel for the defendant said: *Express Newspapers regrets publishing these extremely serious, yet baseless, allegations against the McCanns.*¹⁰⁴ In recognition of the falsity of the allegations, Express Newspapers agreed to publish full apologies on the front pages and web sites of all its titles. In addition, Mr and Mrs McCann were awarded more than £550,000 in damages.

¹⁰⁴ *McCann & McCann v Express Newspapers*, Statement in Open Court on 19 March 2008 in the High Court of Justice, Queen's Bench Division, before Mr Justice Eady.

The issue in the McCann case, it is contended, is that the newspaper published false stories over a sustained period of time, completely unchecked until the matter was brought before the courts in a libel claim. It is asserted that if restrictions on the use of anonymous sources were in place, such stories would not be published – or at least less of such stories would go to print - because journalists would have to prove in court that they took steps to substantiate the information before publishing claims made by a confidential informant. Such steps would have to be proven regardless of whether the article in question was the subject of a libel action. Under the proposed restrictions, as laid out below, the mere publishing of material based on nameless sources would be an offence unless the journalist had taken steps to prove the veracity of the claims and could prove that there was no way of publishing the story without the anonymous source, as was the case in Jameel. It is contended that such restrictions would not stifle responsible investigatory journalism, as seen in Reynolds and Jameel but would protect against the further erosion of the reputation of the press by curbing the amount of baseless, sensationalised stories in the media. Using the McCann case as an example, it is clear that in the pursuit of newspaper sales, editors are willing to use anonymous sources to publish false information. It is contended that such actions damage the free press by fostering a culture of media mistrust through the rise in the number of libel actions. In addition, large payouts in damages in defamation cases hurt the press financially with less funds available for investigatory journalism on matters in the public interest, as was seen in the O'Brien case. It is contended, that if the media is not capable of self-regulation, the legislature must step in to protect reputation.

PCC argument

The argument on the failings of media self-regulation warrants further discussion. Remaining with the British example – simply because the problem is more acute across the Channel- this chapter seeks to examine the role of the Press Complaints Commission in regulating media output. The PCC was established as an alternative to statutory interference after a committee was set up to: ‘...consider what measures (whether legislative or otherwise) are needed to give further protection to individual privacy from activities of the press and improve recourse for the individual citizen.’¹⁰⁵

The Calcutt Recommendations recommended that the former Press Council should be disbanded and the Press Complaints Committee be set up to provide effective means of redress for complaints against the press; adopt specific duties to consider unjust and unfair treatment by the press, most notably on privacy issues and publish; and monitor a comprehensive Code of Conduct for both the press and the public. It must be noted that the committee was set up against a background of increasing parliamentary and public concern about unwarranted intrusion by the press into the private lives of individuals¹⁰⁶ Perhaps it is for this reason that the PCC has proven more effective in dealing with privacy issues, as will be highlighted below.

It was finally recommended that: *‘If the industry wishes to maintain a system of non-statutory self-regulation, it must demonstrate its commitment, in particular by providing the necessary money for setting up and maintaining the Press Complaints Commission.’*

¹⁰⁵ Inquiry into Privacy and Related Matters, April 1989 at page one.

¹⁰⁶ Kieran, M., *Media Ethics* (London Routledge 1998) at page 98.

In order to examine the PCC's effectiveness it is necessary to reproduce much of the PCC's mission statement here:

The Press Complaints Commission is an independent body which deals with complaints from members of the public about the editorial content of newspapers and magazines. Our service to the public is free, quick and easy. We aim to deal with most complaints in just 35 working days - and there is absolutely no cost to the people complaining.

The PCC received 4,698 complaints in 2008. Of the complaints that were specified under the terms of the Code of Practice approximately two in three were about accuracy in reporting and approximately one in five related to intrusion into privacy of some sort. All complaints are investigated under the editors' Code of Practice, which binds all national and regional newspapers and magazines. The Code - drawn up by editors themselves - covers the way in which news is gathered and reported. It also provides special protection to particularly vulnerable groups of people such as children, hospital patients and those at risk of discrimination.

Our main aim with any complaint which raises a possible breach of the Code of Practice is always to resolve it as quickly as possible. Because of our success in this, the Commission had to adjudicate on only 45 complaints in 2008. That is a sign not of the weakness of self regulation - but its strength. All those which were critical of a newspaper were published in full and with due prominence by the publication concerned.

Each paragraph will be dealt with in turn, beginning with the first which states that the PCC is an independent body. This claim is refuted by Max Mosely¹⁰⁷ who was, along with Gerry McCann, asked to give evidence to a Commons select committee on press self-regulation. The PCC may be independent from the government but it is not impartial when it comes to regulating the press, according to Mr Mosely, who likened the PCC to '*putting the mafia in charge of the local police station.*'¹⁰⁸ He felt the commission gave '*preferential treatment to its own industry and lacked sufficient*

¹⁰⁷ Mr. Mosley was covertly filmed by the News of the World engaging in sexual acts with prostitutes. The newspaper then published the story, pictures and video.

¹⁰⁸ Evidence to the Commons select committee on March 10, 2009, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcomeds/uc275-iii/uc27502.htm>

powers to deal appropriately with many complaints'.¹⁰⁹ In fact, Mr Mosley told MPs that he had wanted to take the breach of his privacy up with the PCC but it had rules banning complaints while legal proceedings were in action.¹¹⁰ His assertions are back up by Barendt and Hitchens,¹¹¹ who contend that the most frequent criticism of voluntary regulation is that the PCC lacks effective sanction.

Moving to the second and third paragraphs, which explains the volume of complaints and the code of practice, it is interesting to note the evidence Gerry McCann gave to the Commons committee on his dealings with the PCC. Asked by MPs if he and his wife, Kate, considered a complaint to the PCC, McCann said the outgoing Press Complaints Commission chairman, Sir Christopher Meyer, advised him that his best course of action was a legal claim.

This advice, it is contended, is startling, because it suggests that Sir Meyer did not think that the PCC had a role to play in curbing the excesses of papers engaged in the Madeleine McCann feeding frenzy, even though the PCC code clearly states: *'[n]ewspapers should take care not to publish inaccurate, misleading or distorted material.'* In passing the buck to the courts, he is essentially highlighting the weakness of the PCC in press-regulation – stark contrast to the commission's boasts of the strength in paragraph four - and, it is asserted, the need to legislate this area. The PCC does not have the power to intervene in defamation cases but it can, and indeed should, contact a news medium against which a complaint has been lodged. Had its code been heeded by Express Newspapers or had the PCC had the power to

¹⁰⁹ Mr. Mosley sued The News of the World for invasion of privacy and was awarded £60,000 in damages. He is currently appealing the amount of the award.

¹¹⁰ *Mosley v News Group Newspapers Ltd.*, [2008] EWHC 1777 (QB).

¹¹¹ Barendt, E.M., & Hitchens, L., *Media Law* (Pearson Education, 2000) at page 64.

dole out punishment, it is likely the McCann case would never have gone to court, nor, indeed, such defamatory, baseless stories have been run.

Interestingly, Mr McCann, did say that the PCC had been helpful in protecting the privacy of his other children. However, he went on to say that more stringent regulation and a greater level of redress against press stories was required. There were gaps in regulation, he said.

"There has to be some degree of control, I believe, or deterrent to publishing untrue and particularly damaging stories where they have the potential to ruin people's lives."¹¹²

It is contended that the gaps Mr McCann spoke of could be filled by placing restrictions on the use of anonymous sources to curb sensationalist, unsubstantiated journalism.

To return to the Irish experience, it was highlighted in chapter one that journalists tend to cling tightly to the tenets of the NUJ code of conduct, particularly its prohibition on revealing sources. The code in the UK is a mirror image of that in Ireland. It is interesting to note that when compelled by the courts to reveal their informants, most journalists will refuse to do so, pointing to the NUJ code as binding them more than the law of contempt. However, when it comes to the code of the PCC and indeed the Press Council of Ireland - which demands 'in reporting news and

¹¹² Ibid.

information, newspapers and periodicals shall strive at all times for truth and accuracy – the media , particularly the tabloid press, have few qualms about ignoring it.

Both organisations are silent on the use of confidential sources, aside for calling for protection of such informants, It is contended that this fact highlights the need to introduced regulation in this area to prevent situations like that in *McCann v Express Newspapers* where false information was churned out with check.

The Legislation

Drafting the proposed legislation is beyond the scope of this thesis, however, a suggested format will be outlined. Regarding contempt of court and confidential sources, the legislation would mirror that presently in the UK, with the ‘in the interests of justice exception removed:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of national security or for the prevention of disorder or crime.

The legislation would then include a caveat restricting the circumstances in which such sources could be used:

The protection of reputation being of such grave import to the common good, news agencies may only publish unattributed information after reasonable steps have been taken to ensure the veracity of the material obtained.

Reasonable steps, shall include, but are not limited to:

- Verification from at least one other source, documentary or human, that the information in question is correct.
- The inclusion of a response from the subject against whom any allegations may be made.
- An attempt to locate a source willing to be named.
- The inclusion of research and evidence of the practice of due care in establishing the credibility of the claims made by the source.

It is contended that by introducing such a statutory measure, the law in this jurisdiction would be brought closer in line to that in Sweden where absolute protection for journalists' sources is balanced by strict adherence to the code of ethics and the office of the Press Ombudsman.

Conclusion

It is widely accepted that a free press is fundamental to any democratic society, so too is the effective administration of justice. In an ideal world journalists could be given a carte blanche to disseminate news, entirely unchecked by the judiciary. However, as this thesis has found, the world is not ideal and commercial pressure have the potential to corrupt the most ethical of journalists. This thesis has discovered that neither self-regulation nor absolute government control are palatable remedies to the increasing trend toward sensational news stories.

It is contended that in order to strike the right balance between press freedom, the administration of justice and the right to one's good name, a happy-medium must be found. Present law does not go far enough to protect journalists and their confidential sources of information. In the absence of clear legislation, the courts tend to attach greater weight to safe-guarding the administration of justice, thus, leaving journalists vulnerable to contempt of court charges for refusing to reveal their sources. The reticence of the courts to rule in favour of the press is rooted, it is contended, in the increasing attacks on reputation by the press who mask baseless claims with anonymous sources. Such reckless reporting has fostered a culture of media distrust amongst the public and judiciary alike.

This thesis concludes that it is time for the legislature to step in and fill the lacuna in the current law that leaves journalists in legal limbo when guaranteeing anonymity to their sources and fails to protect individual from unjust attacks on their reputation until after the offending material has been published.

Statutory intervention offering absolute protection from disclosure to journalists who use unattributed information within set parameters, it is contended, is the most effective way of safeguarding the freedom of the press, while simultaneously curbing the amount of libel actions that arise from the publication of material that have neither credibility nor foundation.

The current trend toward sensationalism in the press cannot be permitted to continue unchecked, it is contended. So too must the threat of contempt charges that hangs over journalists, who have used anonymous sources to publish responsible journalism in the public interest, be removed.