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The Media and the Famous: a cautious relationship?

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The Media and the Famous: a cautious relationship?

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Title: *The Media and the Famous: a cautious relationship?*

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Abstract

The Media and the Famous: a cautious relationship?

In the light of landmark legal cases during 2006/7, which have greatly broadened the original ruling from *Douglas v Hello! Ltd [2001] 1 All ER 289*, and which have gone some way towards reversing the judgement in *Douglas v Hello! Ltd (No.6); sub nom Douglas v Hello! Ltd (trial action: breach of confidence) (No.3) [2003] EWHC 786*, can we now say that everyone has the right to privacy and confidentiality, thereby extending the conflict between Article 8 and Article 10 of the European Convention on Human Rights?

And if so, where does this leave Media Law in relation to the Human Rights Act 1998 and freedom of expression?

Introduction

This dissertation presents an analysis of whether or not English law currently has, or is developing a defined law of privacy, and the effect such a law has, or will have, upon the media and media law in general. The study research is two-fold, and conducted in the light of recent high-profile court cases: 1) to consider and analyse the conflict between Art.8 ECHR1950 – the right to privacy and family life – and Art.10 ECHR1950 – the right to freedom of expression – both of which rights are enshrined in the HRA1998. 2) To consider the possibility that English law now has, or is heading towards a (statutory) law of privacy.

Analysis of these two issues has been conducted through contemplation of the relevant legislation, both new and in the recent past, from English law through the effect of the HRA1998 and from European law through the ECHR1950. Using detailed comparison of legal development through court case decisions (most specifically over a period which is roughly enshrined in the duration of the *Douglas v Hello!* case, some seven and a half years), the analysis shows how judicial thinking has altered, the pendulum swinging continuously back and forth from protection of individual privacy rights on the one extreme, to determination for freedom of expression for the media on the other.

The significance of this study is threefold: First, it supports and expands the earlier principles enshrined within the ECHR1950 which were adopted by English law in the HRA1998, thereby providing a clear focus upon the conflict between Art.8 and Art.10 ECHR1950 and, in so doing, recognises that reconciliation at a judicial level is extremely difficult. Second, it determines how English law has developed a new post-HRA1998 tort protecting privacy. The study shows a significant improvement in the protection of

personal privacy rights through confirmation by the courts, evidenced by almost non-existent case law pre-HRA1998, to the creation of the new tort altogether post-HRA1998 enactment. Third, the study looks at the boundaries that such a law of privacy places upon the media and media law in general, the purpose being to determine where privacy law is likely to lead, and what future statutory instruments are likely to be imposed upon the judiciary, and the possible effect this could have upon them.

In conclusion, this study argues that the relationship between freedom of expression and the right to privacy and private life has been wrongly conceptualised. That in fact, both Art.8 and Art.10 ECHR interests serve the same underlying set of values, but that problems arise when these two conflicting interests are balanced in the abstract, rather than in context. Thus, any future law of privacy designed to restrict the type or amount of information that can be conveyed without detriment, will surely first have to address precisely what it means to have a private life, and just how much of that privacy can be construed to be part of the public interest.

NB: The author has deliberately avoided a personal opinion on whether or not there ought to be legal protection against invasion of privacy by the media in a system of free expression, on the basis that such individual commentary would detract from the research and findings outlined in the conclusion. However, out of necessity a definition of privacy has been outlined[1] which, it is contended, meets the criteria for a reasoned, neutral definition.

[1] Conclusion, p79, para 2

Chapter One

The Nature of the Beast

"The areas where he [the judge] has found against us are, frankly, commercial ones. He has ruled that a contract such as the one which existed between the Douglas's and OK! magazine is similar to a trade secret - this is completely new in English law, and we shall be asking for leave to appeal against it".

Press Release, *Hello!* magazine following the judgements against them in 2003

1.01 A simple wedding and some photographs…

Just imagine the situation: you're a world famous celebrity, a movie star no less, and used to getting your own way all of the time. People fawn all over you and tell you that you are wonderful simply because you have a face everybody wants to look at; the public demands to know every bit of gossip and seemingly banal piece of information that there is about you. Then, one day, you fall in love and decide to get married to an equally famous movie star, somebody who is also used to having their face photographed with 'Hollywood perfection', every time.

Question: how are you going to keep the wedding ceremony under control; carefully vetted photographs so that the bride looks 'oh, so wonderful', and the groom perhaps not as old as he actually is? Answer: You do the sensible thing; you sell the exclusive rights to your wedding photographs to a celebrity magazine for £1m in exchange for their promise they will only print the pictures that you decide should be seen…

Then suddenly, you discover unauthorised wedding photographs are being sold on the streets of London, and there is nothing you can do about it; and worse still, you're not getting any money for them. Now, wouldn't that make you livid?

Figure 1.101 Michael Douglas & Catherine Zeta-Jones on their wedding day[2]

On Saturday, 18 November 2000, movie stars Michael Douglas and Catherine Zeta-Jones were married at a lavish ceremony and reception held in the world-famous Plaza Hotel at Central Park South, Manhattan, New York City. The couple had, for some time prior to the wedding, negotiated with Northern & Shell Ltd, publishers of the British weekly celebrity gossip magazine *OK!* who subsequently secured[3] exclusive photographic rights for a period of nine months, paying[4] £1m for them[5]. The deal was

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[2] Copyright, Northern & Shell Ltd, *OK!* © 2000

[3] Northern & Shell Ltd finally secured the exclusive rights on 10 November 2000, just eight days before the wedding ceremony was to take place

[4] The article in *OK!* states: "*Catherine and Michael accepted no payment for their wedding photographs, but instead requested that money was paid into a charitable trust on behalf of their son, Dylan – he will decide which charities to benefit when he comes of age*", *OK!* Magazine, Issue 241, 1 December 2000, p22

[5] Moscona, R.: 'Having paid for exclusivity one ought to be in a position to protect it – a new direction for the law of confidentiality?', *European Intellectual Property Review*, Vol.29, No.10, October 2007, p428

brokered on the understanding that *OK!* would only reproduce carefully vetted pictures of the wedding that the Douglas's themselves had chosen[6]. In return, the Douglas's would do all in their power to ensure that security was provided to minimise the risk of photographs being made available to third-party media.

Cleverly hedging their bets, the Douglas's had also talked in respect of these rights to celebrity 'fixer' Marquesa de Valera, whose company Naneta Overseas Ltd, working with paparazzi photographer Philip Ramey, acted on behalf of *Hola!* SA, the Spanish-based publishers of *Hello!*, another celebrity magazine, and arch-rival of *OK!*[7]. *Hello!* had actually offered more money[8] for the exclusive photographic rights than *OK!*, but were not prepared to grant the Douglas's *inter alia* the right to approve all material for publication, and so the deal went to *OK!*

Not happy with the result of these negotiations, *Hola!* SA instructed *Hello!* picture editor, Sue Neal, to 'find a way' to obtain photographs of the event regardless of the cost implications. Philip Ramey and his agent Frank Griffin discovered that *Hola!* SA were still interested in acquiring images from the wedding ceremony despite the obvious breach of security that would imply; however, just prior to the event taking place Ramey and Griffin indicated to Sue Neal that they would attempt to 'obtain' some photographs[9].

All the guests and staff at the Plaza hotel were told in no uncertain terms that no photographic equipment of any kind would be tolerated on the great day. Unfortunately, and despite some bizarre and elaborate security measures (which included invitation

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[6] Rozenberg, J.: 'Privacy and the Press', (*Oxford University Press, 2004*), p39
[7] Curry, G.: 'Confidentiality's *OK!*', *Entertainment Law Review*, Vol.14, No.6, June 2003, p148
[8] Negotiating through Marquesa de Valera, *Hola!* SA had offered in the region of £1.5m for the photographic rights
[9] Arnold, R.: 'Confidence in exclusives: Douglas v *Hello!* in the House of Lords', *European Intellectual Property Review*, Vol.29, No.8, August 2007, p340

cards with specially added security codes, a gold identity pin that had to be worn, plus the 110 family, friends and guests all having to wait in line outside the reception hall while they were physically searched – something many objected to, but did produce several cameras all of which were confiscated) an uninvited paparazzi photographer, Rupert Thorpe[10], managed to sneak into the ceremony[11].

Somehow Thorpe managed to take fifteen photographs without his 'peeping tom' surreptitious activities being seen by anybody – particularly the Douglas's – and within hours his 'stolen' images were being electronically transmitted to Philip Ramey. On 19 November 2000, Ramey orally agreed with *Hola!* SA, through Sue Neal, a price of £125,000 for 'exclusive' rights to the unauthorised photographs for the United Kingdom, France and Spain. Six photographs were selected and prepared for publication in the London edition of *Hello!* which was due out on 21 November 2000[12].

On 20 November, the day before *Hello!* was due to hit the streets, Northern & Shell learned of the unauthorised photographs and informed the Douglas's that their security, for all it's elaborate measures (the bill for the security alone is supposed to have exceeded US$66,000[13]), had been compromised. Furthermore, the images were already in the hands of *Hola!* SA who intended to publish them in *Hello!* the next day.

Within hours the well-oiled Hollywood legal machine had sprung into action and an interim injunction obtained from Buckley J. restraining *Hello!* from publishing any

[10] Rupert Thorpe (then 33 years old) is the son of former Liberal Party leader, Jeremy Thorpe. He attended the reception with his then fiancée, Michelle Day, both of whom were already staying at the Plaza Hotel. How he got into the reception area past the security has never been established, and official photographs are inconclusive as to whether he is wearing the gold security pin.

[11] Martino, T.: 'The excremental right to triviacy', *Entertainment Law Review*, Vol.19, No.2, February 2008, p21

[12] Arnold, R.: 'Confidence in exclusives: Douglas v *Hello!* in the House of Lords', *European Intellectual Property Review*, Vol.29, No.8, August 2007, p340

[13] Curry, G.: 'Confidentiality's *OK!*', *Entertainment Law Review*, Vol.14, No.6, June 2003, p148

photographic material of the wedding. This injunction was continued by Hunt J. on 21 November 2000, remaining in place until a trial or further order could be imposed[14]. The Douglas's based their injunction on two main grounds: breach of confidence – that they were owed a duty of confidence which had subsequently been breached by *Hello!* and an infringement of privacy – that the Data Protection Act 1998[15] had been breached, and that the laws of privacy should protect them[16]

Despite being blissfully unaware of the 'stranger' in their midst, Michael Douglas claimed that: "*…we felt as if our home had been ransacked and everything taken out of it and spread in the street*", while his wife exclaimed that she: "*…felt violated and that something precious had been stolen from me*". This visceral language, echoing of rape as it did, was a fact duly noted by the court; and yet, exaggerated as it was, it was not only allowed, but excused by the court[17].

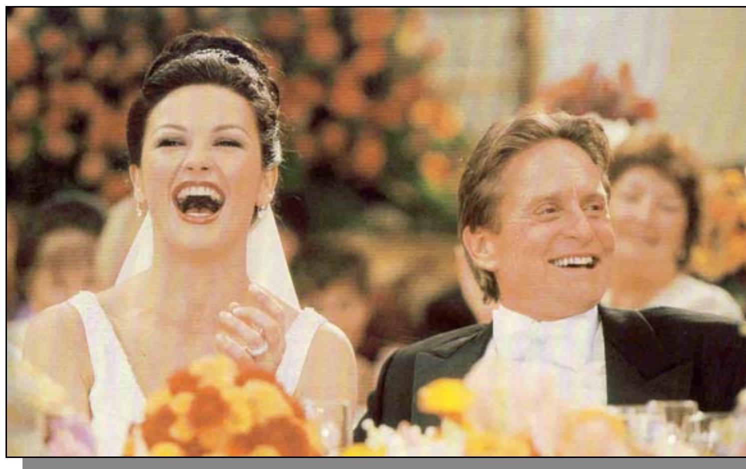

Figure 1.102 Michael Douglas felt: "*…as if our home had been ransacked*", while his wife exclaimed she: "*…felt violated*"[18]

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[14] Arnold, R.: 'Confidence in exclusives: Douglas v *Hello!* in the House of Lords', *European Intellectual Property Review*, Vol.29, No.8, August 2007, p341

[15] Data Protections Act 1998 (*c.29, 1998*)

[16] At trial, the Douglas's and Northern & Shell Ltd contended that the publication of the unauthorised photographs was actionable on no less than six separate grounds: the two original grounds of breach of confidence and invasion of privacy, plus four new grounds of breach of the Data Protection Act 1998, interference with the claimants' rights or businesses by unlawful means, conspiracy to injure the claimants by unlawful means and conspiracy to injure the claimants with the predominant purpose of injuring the claimants

[17] Martino, T.: 'The excremental right to triviacy', *Entertainment Law Review*, Vol.19, No.2, February 2008, p22

[18] Copyright, Northern & Shell Ltd, *OK!* © 2000; *OK!* Magazine, Issue 241, 1 December 2000, p19

Hello! immediately went to the Court of Appeal and persuaded Brooke LJ, Sedley LJ and Keene LJ to unanimously allow their appeal, lifting the injunction on 23 November[19] on the basis that the balance of convenience favoured the defendants [*Hello!*] who would otherwise have lost an entire issue had the injunction remained in place[20].

The fact that the Human Rights Act 1998[21] (HRA1998) had come into force in English law just over one month earlier on 2 October 2000 cannot be underestimated in regards to this matter. Consequently, *Douglas v Hello!* was one of the earliest tests to consider privacy at a time when the statute was not just in its infancy, but positively foetal.[22] Brooke LJ struggled with this when observing: "*So far as privacy is concerned, the case of [The Douglas's and Northern & Shell Ltd] is not a particularly strong one. They did not choose to have a private wedding attended by a few members of their family and a few friends, in the normal sense of the words 'private wedding'*"[23].

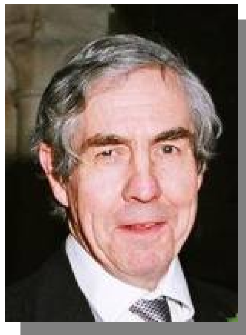

Figure 1.103 Lord Justice Brooke, who struggled with the newly adopted Human Rights Act 1998

There is, of course, no cause of action under HRA1998 as between private individuals[24] since the act only applies to public bodies[25]. However, Lord Justice Brooke commented[26]

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[19] *Douglas v Hello! (No.1) [2001] QB 967*

[20] Michalos, C.: 'Douglas v *Hello!*: the final frontier', *Entertainment Law Review*, Vol.18, No.7, July 2007, p241

[21] Human Rights Act 1998 (*c.42, 1998*)

[22] Michalos, C.: 'Douglas v *Hello!*: the final frontier', *Entertainment Law Review*, Vol.18, No.7, July 2007, p242

[23] Brooke LJ in *Douglas v Hello! (No.1) [2001] QB 967* at 970

[24] "*Under s.6 Human Rights Act 1998 Convention guarantees are binding only against 'public authorities*", Fenwick, H.: 'Defining a public authority under the Human Rights Act', *Student Law Review*, Vol.53, Spring 2008, p2

[25] Curry, G.: 'Confidentiality's *OK!*', *Entertainment Law Review*, Vol.14, No.6, June 2003, p149

that the scope of the law of confidence must be evaluated in the light of obligations falling upon the court under the act which, he said: "*…gives an action for breach of confidence a new strength and breadth*"[27]. He went on to say that: "*…the weaker a claim is for privacy the more likely it will be outweighed by a claim based on freedom of expression – the likely outcome being a balance between the conflicting interests*"[28].

Brooke LJ bolstered his argument by referring to the nineteenth century case of *Prince Albert v Strange*[29], stating that: "*…it was a court accepted precedent that prevention of the publication of photographs {images} could be taken when a breach of confidence has occurred*"[30]; i.e. if people, on a private occasion, make it clear – explicitly or implicitly – that no pictures are to be taken of them, then everybody present is bound by the law of confidence to comply[31].

However, in weighing up all the evidence before them, all three judges came to the determination that the detriment to *Hello!* were the injunction to remain in place – i.e. huge financial loss caused through the cancellation of an entire issue of the magazine [the Douglas's wedding story being only a small, but admittedly important part of the whole] – was totally inequitable, and consequently the injunction was lifted.

The six images obtained by Rupert Thorpe were triumphantly printed in *Hello!* the very next day, Friday, 24 November 2000, with legal commentators quick to proclaim a new

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[26] In December 2000

[27] Brooke LJ in *Douglas v Hello! (No.1) [2001] QB 967* at 969

[28] Brooke LJ in *Douglas v Hello! (No.1) [2001] QB 967* at 971

[29] *Prince Albert v Strange (1849) 1 Mac & G 25*; The Complainant, HRH Prince Albert, husband of Queen Victoria, successfully obtained an injunction against the Defendant, Strange, who had attempted to publish etchings of the Queen, made by the Prince in private. Strange was a publisher, and the etchings had come into his possession through a series of third parties, one of whom worked for a printer who had simply run off some extra copies without the permission of the Royal family. The injunction was granted, and Strange did not attempt to dissolve it. The case is still considered good law to this day.

[30] Brooke LJ in *Douglas v Hello! (No.1) [2001] QB 967* at 969

[31] Rozenberg, J.: 'Privacy and the Press', (*Oxford University Press, 2004*), p40

battleground for the establishment of a right of privacy in English law[32]. The basis of the claims were the comments from the judges during the injunction hearing, and, in light of the implementation of articles of the European Convention on Human Rights 1950 (ECHR1950) through the HRA1998, and fundamental freedoms into domestic law[33].

Meanwhile, *OK!* now desperate to reclaim something from a rapidly diminishing return on their £1m expenditure, published part one of a two-part 'official series'[34], their 'world exclusive' edition (containing the authorised photographs) on the same day as *Hello!*[35] The scene was now set for a legal battle-royal between the Douglas's and *OK!* on the one hand, and *Hello!* on the other. However, nobody could possibly have imagined that it would take another seven years to resolve.

Figure 1.104 The font covers of *OK!* magazine Issue 241, 1 December 2000 (23 November 2000) & Issue 242, 8 December 2000[36]

[32] 'A new right of privacy in English law had been created', *The Times*, 22 December 2000, p1
[33] Mackenzie, A.P.: 'Privacy – a new right in UK law?', *Scots Law Times*, No.12, December 2002, p98
[34] *OK!* magazine, Issue 241, bearing the date 1 December 2000, but actually published on 23 November 2000
[35] *Hello!* magazine, Issue 639, 23 November 2000
[36] Copyright, Northern & Shell Ltd, *OK!* © 2000

1.02 Drugs, brothels and Princesses… but whose business is it?

Historically, there have been three elements essential to a cause of action for breach of confidence: 1) that the information was of a confidential nature; 2) that it was communicated in circumstances importing an obligation of confidence; and 3) that there was an unauthorised use of the information. This was established by Mr Justice Megarry as long ago as 1969 in the seminal case of *Coco v A N Clark (Engineers) Ltd*[37]. However, while later judges often referred to this case when delivering their *obiter*, the fact of the matter is that much of the obligation of confidence as defined in *Coco v Clark* has continually been relaxed ever since[38].

In 1990, one of the most influential cases[39] in the area of breach of confidence came to court when the Attorney General attempted to stop Guardian Newspapers from serialising the book *Spycatcher*[40], the candid autobiography of a senior British intelligence officer seeking to discover a Soviet mole in MI5. The book had been published in Australia in 1987, despite the best efforts of the British Conservative Government; but when British newspapers tried to report on allegations made in the book they were issued with 'gag' orders. It eventually took the European Court of Human Rights (ECtHR) to rule that the British Government was in breach of the ECHR1950 in gagging its own newspapers[41].

Earlier however, during the Court of Appeal case, important comments were made by a number of judges such as Lord Keith who said that: "*…the right to privacy is clearly one*

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[37] *Coco v A N Clark (Engineers) Ltd [1969] RPC 31*

[38] Mackenzie, A.P.: 'Privacy – a new right in UK law?', *Scots Law Times*, No.12, December 2002, p99

[39] *Attorney General v Guardian Newspapers Ltd (No.2) [1990] 1 AC 109*

[40] Wright, P.: 'Spycatcher: The Candid Autobiography of a Senior Intelligence Officer', (*Heinemann, 1987*)

[41] *Observer and Guardian v United Kingdom (1991) 14 EHHR 153*

which the law of confidence should seek to protect"[42], and Lord Goff who considered that confidentiality would be imposed in instances where, for example: "*…an obviously confidential document… [if accidentally dropped in a public place was] picked up by a passer-by*"[43]. However, both judges were quick to distance themselves and their decisions from articles in the ECHR1950, Lord Keith noting that the Court of Appeal had reached agreement after considering Art.10 ECHR1950: "*I have reached my conclusion upon the common law of England without finding any need to rely upon the European Convention*"[44]; while Lord Goff expressed the opinion that: "*…in the field of freedom of speech there is no difference in principle between English law on the subject and Article 10 of the Convention*"[45]. This was a clear crossroads in the law – but which way would future judges choose to rule?

Over the past few years in particular, post-HRA1998, there have been a number of high profile law cases which have unwittingly, through public interest (or is it just media interest?), brought the issue of a law of privacy to the fore. Media intrusion into the private lives of individuals has become an important theme in recent English cases where the courts have tried to strike a balance between Art.8 ECHR1950 – the right to private life – and Art.10 ECHR1950 – the right to freedom of expression[46].

As Howard Johnson, Senior Lecturer in law at Bangor University & Cardiff Law School, points out: "*A Martian landing in Britain today would soon come to the view that we seem obsessed with sport, sex, drink and celebrity. Celebrity, either in the form of a constant stream of stories about them, or attempting to become one ourselves by appearing on*

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[42] Lord Keith in *Attorney General v Guardian Newspapers Ltd (No.2) [1990] 1 AC 109* at 225
[43] Lord Goff in *Attorney General v Guardian Newspapers Ltd (No.2) [1990] 1 AC 109* at 281
[44] Lord Keith in *Attorney General v Guardian Newspapers Ltd (No.2) [1990] 1 AC 109* at 229
[45] Lord Goff in *Attorney General v Guardian Newspapers Ltd (No.2) [1990] 1 AC 109* at 284
[46] See: Appendix III – ECHR 1950 Article 8 & Article 10, full text

increasingly bizarre reality-television shows. The media, of course, are only too interested in pandering to this, as tabloids seek in ever more desperate ways, to continue to feed the rumour mill. Unctuously, the broadsheets follow in the name of 'freedom of the press'. In my view, this squalid scandal-mongering is doing untold damage to the stature of the press and the respect in which it is held – this debasement of our public life and standards will involve a long-term price to pay for the press"[47]. One of the first of these cases involved the 'Supermodel' Naomi Campbell in March 2002.

Fashion Supermodel Naomi Campbell had stated publicly on a number of occasions that she did not use illegal drugs. However, this was untrue. In court, she admitted that as far back as 1997 she had: "*…made a practice of abusing illegal drugs*"[48], and for more than two years had been visiting a therapy group, Narcotics Anonymous. A paparazzi photographer took a picture of Campbell leaving one of her meetings and this was published[49] by *The Mirror*, alongside the caption "*Therapy: Naomi outside meeting*"[50]. The article, initially of a sympathetic nature, revealed her addiction to drugs, that she was in therapy, and also detailed the frequency of her visits to Narcotics Anonymous.

Ms Campbell commenced proceedings[51] against Mirror Group Newspapers Ltd (MGN), the publisher of *The Mirror*, who in turn printed additional stories about her, but now far less sympathetic than the first article had been. In court, both parties agreed that all the

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[47] Johnson, H.: 'Privacy: Donoghue v Stevenson moment passes – Lords and Government say no to privacy statute', *Communications Law*, Vol.8, No.6, June 2003, p387

[48] Naomi Campbell in *Campbell v Mirror Group Newspapers Ltd [2002] EWCA Civ 1373* at 1377

[49] 'Naomi: I am a drug addict', *The Mirror*, Thursday, 1 February 2001

[50] *Ibid.*

[51] *Campbell v Mirror Group Newspapers Ltd [2002] EWCA Civ 1373*

categories of information published would ordinarily be considered private, and therefore attract the attention of Art.8 ECHR1950. However, Ms Campbell conceded that since she had previously falsely denied having a narcotics problem, she couldn't pursue MGN for publishing the fact of her addiction, nor the fact that she was seeking therapy. Her complaint therefore was directed wholly at MGN having published that she had sought that therapy at Narcotics Anonymous, the frequency of her visits, and the published photograph of her leaving one of those visits[52].

Figure 1.201 Supermodel, Naomi Campbell giving evidence before the High Court

The case was presented by the media as 'the privacy case', the first to be heard by a judge, but it was in fact more a case of confidentiality, rather than privacy. At trial[53], Justice Sir Michael Morland, relying on the historic three-step test[54], felt that the existing tort of breach of confidentiality was sufficient to rule that certain aspects of Ms Campbell's life should remain out of the media spotlight. Testing this result against the standards of the ECHR1950, the judge showed the need for a balance between Art.8 and Art.10. Consequently, Morland J found MGN liable of breach of confidence and in violation of the Data Protection Act 1998, and they were ordered to pay Ms Campbell damages of £2,500, plus £1,000 in aggravated damages.

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[52] Schreiber, A.: 'Campbell v MGN Ltd', *European Intellectual Property Review*, Vol.27, No.4, April 2005, p159

[53] *Campbell v Mirror Group Newspapers Ltd [2002] EWCA Civ 1373*

[54] *per* Megarry J in *Coco v A N Clark (Engineers) Ltd [1969] RPC 31*

The Mirror editor, Piers Morgan said at the time that he felt: "*…the whole thing is a complete joke. Naomi Campbell had been misleading the public by her denials of drug addiction, I was under the impression that we had exposed her as a drug addict after she repeatedly lied about it and that she was having treatment. She has achieved, in her words, 'a landmark ruling' that says in future when I am presented with a story about a world-famous star who has been lying about taking drugs, who is a drug addict, we will simply have to expose them and not show any compassion or any sympathy by revealing details of their brave treatment. It is a complete nonsense*"[55].

Figure 1.202 The Mirror editor, Piers Morgan, thought that he was "*…doing her a favour*", when he exposed Miss Campbell's drug addiction problems

MGN immediately appealed, and the matter went before the Court of Appeal in 2003[56] where Morland J's order was reversed. The Court of Appeal accepted the trial judge's approach as to what information is confidential, but they determined that reliance on common sense is not helpful in terms of predictability. Therefore, the Court of Appeal did not accept the analogy between medical treatment and narcotics rehabilitation, and so did not consider Ms Campbell's treatment as obviously private.

The test for whether breach of confidence should protect personal/private information comes from an Australian case: *Australian Broadcasting Corporation v Lenah Game*

55 Mirror Editor, Piers Morgan interview for BBC outside the High Court, 27 March 2002

56 *Campbell v Mirror Group Newspapers Ltd [2003] QB 633 (CA (Civ Div))*

Meats Pty Ltd[57] which determined that where disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities, then it is private[58] [although the test was only meant to be applied where the information is not obviously private]. Applying the 'Lenah test' then, the Court of Appeal found that the reasonable reader would not find the information concerning Ms Campbell's drug therapy highly offensive; rather, it was: "*…peripheral to the facts of her addition and treatment, and consequently the details of her drug therapy were not protected*"[59].

In addition, the Court of Appeal accepted that *The Mirror* was justified in publishing the photographs and further details, referring to the ECtHR decision in *Fressoz & Roire v France*[60] for interpretation of Art.10 ECHR which allowed journalists to publish reference material so long as they acted in good faith, and provided reliable and precise journalism. In conclusion, Court of Appeal had determined that MGN were not liable after all, that the photographs could be published since, apparently, they were 'peripheral' to the published story and served only to show Ms Campbell in a better light. It was, the court had determined, within a journalists' margin of appreciation to decide whether such 'peripheral' information should be included[61].

Jubilant *The Mirror* editor, Piers Morgan said he and his team had been vindicated by the judgement: "*Naomi Campbell kept up an image of herself as a non-drug taking model that would have been commercially beneficial to her. We were perfectly entitled to set that record straight and let the public know that, far from being a drug-free model, she was actually a drug addict. This is a firm message to celebrities who want to use the*

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[57] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63 (HC)*
[58] Schreiber, A.: 'Campbell v MGN Ltd', *European Intellectual Property Review*, Vol.27, No.4, April 2005, p159
[59] *Campbell v Mirror Group Newspapers Ltd [2003] QB 633 (CA (Civ Div))*
[60] *Fressoz and Roire v France (2001) 31 EHHR 2*
[61] Schreiber, A.: 'Campbell v MGN Ltd', *European Intellectual Property Review*, Vol.27, No.4, April 2005, p160

law as an extension of their PR firm that we newspapers will defend ourselves vigorously"[62].

Initially, their Lordships at the Court of Appeal refused Ms Campbell permission to appeal further to the House of Lords, despite saying in their verdict that the HRA1998 must be balanced against freedom of expression in the media. This left her contemplating costs and damages (for both sides) estimated at almost £750,000. Eventually, Naomi Campbell was allowed her appeal on the basis, *inter alia*, that the aforementioned breach of confidence, subject to human rights principles, had indeed occurred. The stage was set for the final showdown in the House of Lords in 2004[63].

With the catwalk and the courtroom normally worlds apart, Naomi Campbell made an unexpected appearance in court just in time to hear all five Law Lords agree that in certain circumstances there may be a reasonable expectation of privacy when a person was on a public street; that in fact our law does protect privacy, and that a major impetus for this has been the HRA1998, which enshrined the ECHR1950 into English law[64]. All the judges agreed that information relating to drug addiction and treatment should be regarded as private information and attracts the protection of Art.8 ECHR1950. The taking of photographs in a public street must be taken as one of the ordinary incidents of living in a free community. The real issue therefore, is whether publicising the content of such photographs would be offensive? Can the public's right to information justify dissemination of a photograph taken without authorisation?

[62] Mirror Editor, Piers Morgan interview for BBC outside the Court of Appeal, Monday, 14 October 2002
[63] *Campbell v MGN Ltd [2004] UKHL 22*
[64] Gill, C.: 'Naomi Campbell privacy victory in House of Lords', *Carter-Ruck Media & Human Rights Lawyers Newsletter*, 26 May 2004

The House of Lords decision in *Campbell v MGN Ltd* is an important and significant step towards providing much needed clarity in this area[65]. We do, it would seem, have a law of privacy in the United Kingdom, and newspapers cannot afford in future to ignore it as they must be careful if they are thinking of illustrating an article with an intrusive photograph taken without the subject's consent or, of publishing significant detail about someone's private life, even if some of that information may be deemed to be in the public interest[66].

Figure 1.203 Supermodel Naomi Campbell attempts to hide behind an umbrella as she exits the Royal Courts of Justice in London

However, the ruling does not mean that the media will be prevented in future from publishing stories about the private lives of politicians or celebrities – as we will see with the next case – but what it does mean is that they will be required to adopt a more rigorous approach when considering publication of articles with private information contained within them[67].

[65] Lord Nicholls of Birkenhead, Lord Hoffman, Lord Hope of Craighead. Baroness Hale of Richmond and Lord Carswell in *Campbell v MGN Ltd [2004] UKHL 22*, decision on Thursday, 6 May 2004
[66] Gill, C.: 'Naomi Campbell privacy victory in House of Lords', *Carter-Ruck Media & HR Lawyers Newsletter*, 26 May 2004
[67] Tomlinson, H., Thomson, M.: 'New Model Privacy', *New Law Journal*, Vol.154, No.7130, 28 May 2004, p795

Jamie Theakston was the 'golden boy' of British Television and Radio. At the age of just nineteen he was already producing his own Sunday lunchtime show on *BBC Radio 1*, hosted *Top of the Pops* from 1999-2002, and was the star presenter of several children's prime-time television shows including *Live and Kicking* with Zoe Ball. His celebrity status grew with every move up the career ladder, and by 2002 he was seriously considering taking up acting. Theakstons' playboy lifestyle, his boyish charm and good looks had also attracted a host of beautiful women to his side, and he notably had relationships with supermodel Erin O'Connor, singers Natalie Appleton and Kylie Minogue, as well as actresses Amanda Holden and Joely Richardson.

Curiously, having approved some 21 articles about his private and sex life in the public domain[68] in previous publicity[69], Theakston must surely have known that any transgression by him would be of immediate interest to the tabloid media. So it was that one night just before Christmas 2001, feeling a bit down after splitting up with his then girlfriend, Joely Richardson, Theakston had been out drinking with friends in London when an unlicensed cab driver asked whether he wanted to go to a late-night drinking venue after the bar they were at had closed.

"*I thought, 'why not? It's Christmas', I must have been totally drunk, so I told him to take me there*"[70], Theakston explained; but the 'late-night drinking venue' turned out to be a brothel, and Theakston soon found himself in a private room [known as 'the dungeon'[71]] with a girl called Madam Bella, a 6ft 4in African-born beauty[72], who began to do a

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[68] Morgan, J.: 'Dossier defeats bid to ban Theakston expose', *Press Gazette*, Thursday, 1 February 2002 [Online]
[69] Coad, J.: 'Sex and Privacy: Theakston v MGN Ltd', *Swan Turton Solicitors e-bulletin*, 19 February 2002 [Online]
[70] Jamie Theakston: 'Theakston 'sorry' over sex stories', *BBC News*, Sunday, 27 January 2002 [Online]
[71] Verkaik, R.: 'Prostitutes have legal right to tell all, court rules', *The Independent*, Friday, 15 February 2002 [Online]
[72] McGibbon, R.: 'The Press in Conference with Jamie Theakston', *Press Gazette*, 3 February 2006, p22

striptease dance for him, before performing a "sex act"[73]. Three more girls then entered the room and at that point, according to Theakston, somebody else burst into the room and took 'photographs' before running out, after which Theakston gave Madam Bella £40 and left the brothel. However, he soon realised that his mobile phone was missing and returned to try and retrieve it, but nobody at the brothel knew anything about it or the photographer who had been there.

Theakston purchased a new mobile phone and shortly after that started to receive texts and voicemail messages from the prostitute demanding money or the photographs would be made available to the tabloid press. Theakston refused, and within days the story and pictures had been given to the *Sunday People*. The newspaper had contacted Theakston for an interview regarding the incident, albeit on the Friday just two days before the Sunday publication date, saying: "*There's this girl, and we're going to run the story. If you do an interview, we won't use her*". Theakston replied: "*I can have sex with whomever I want, it isn't anybody's business. No, I am not going to tell you intimate details about my sex life*"[74].

"*That's when I made the foolish decision. What I thought would be a relatively straightforward legal issue, suddenly exploded into this big privacy matter. I was not really aware what a big issue privacy is for the newspapers; and there is this wonderful grey area for lawyers and bods on newspapers to exploit. I genuinely believed I had a case to prove, but by making it a legal issue, The Sunday People then said: 'If you don't go along with us and lose, we will make it a lot worse'. In a conference call with my*

[73] Jamie Theakston: 'Theakston 'sorry' over sex stories', *BBC News*, Sunday, 27 January 2002 [Online]
[74] McGibbon, R.: 'The Press in Conference with Jamie Theakston', *Press Gazette*, 3 February 2006, p22

lawyers, they made it very clear how bad they would make the story sound and of course that is exactly what they did"[75].

Figure 1.204 Jamie Theakston, the 'golden boy' of television and radio, before being caught leaving a London brothel

Two days, however, was enough time for: "*Theakston to run off to the courts under the HRA1998 and try to injunct {sic} us… but the judge laughed out of court the idea that having sex with a prostitute in a brothel could be considered confidential*"[76], said *Sunday People* editor Neil Wallis. Theakston's lawyers sought the injunction to prevent publication of both the story and the photographs, but at trial[77] Mr Justice Ouseley refused to fully grant it, saying: "*If this sexual activity in the fleeting relationship were invested with confidentiality, the concept of confidentiality would become all-embracing for all physical intimacy. I find it impossible to invest with the protection of confidentiality all acts of physical intimacy regardless of the circumstances*"[78]. To do otherwise would have been to concede the existence of a free-standing privacy law, an issue which the judge was unwilling to be drawn into[79].

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[75] McGibbon, R.: 'The Press in Conference with Jamie Theakston', *Press Gazette*, 3 February 2006, p23
[76] Morgan, J.: 'Dossier defeats bid to ban Theakston expose', *Press Gazette*, Thursday, 1 February 2002 [Online]
[77] *Theakston v MGN Ltd [2002] EMLR 22*
[78] Ouseley J in *Theakston v MGN Ltd [2002] EMLR 22* at 26
[79] Rozenberg, J.: 'Privacy and the Press', (*Oxford University Press, 2004*), p12

Ouseley J referred to the test applied in *Douglas v Hello!* [Injunction[80]], and also applied the balancing test between Art.8 and Art.10 ECHR1950 as prescribed in s.12 HRA1998. His application of the test was influenced by the content of the Press Complaints Commission (PCC) Code of Practice[81], especially s.3(i) & (ii) concerning privacy[82] which was interpreted in such a way as to ask whether, at trial, the injunction was more likely to be granted than not. Stressing the importance of freedom of the press, the onus rested – according to the judge – on the claimant, as it was he who wanted to restrict the defendants' rights to freedom.

Evidently, Ouseley J considered freedom of the press to be more important than freedom of privacy. Furthermore, the judge determined that there was a: "…*real element of public interest*"[83] in the matter, because the claimant, as a presenter with the BBC, had to endure higher standards of morality applied to him than others might. It was not clear whether Ouseley J drew his conclusion from the fact that Theakston was a public figure, or that he was employed within a public sector broadcaster, or that he might be some sort of a role-model for teenagers. The mix of all three elements sufficed to allow the publication of the story.

There was also the added element that the *Sunday People*, lacking an interview with Theakston himself, had interviewed Madam Bella at the brothel for her side of the story. Ouseley J said that there was no law preventing a prostitute from selling her story, and suggested that if the claimant wanted to keep his meeting confidential he should have

[80] *Douglas v Hello! Ltd (No.1) [2001] 1 All ER 289*
[81] See: Appendix I – Press Complaints Commission Code of Practice
[82] Press Complaints Commission Code of Conduct s.3(i)(ii)
[83] Ouseley J in *Theakston v MGN Ltd [2002] EMLR 22* at 28

offered her more money![84] He went on to say: "*If a well known man has sexual relations with a prostitute in brothel, the desire on his part to keep their actions and relationship confidential, and the desire on the part of the other to exploit their actions and relationship commercially, are irreconcilable. The law of confidentiality should therefore be judged from the point of view of the prostitute, as well as her client*"[85].

PEOPLE
KELLY BROOK
TV JAMIE BONDAGE BROTHEL SHAME

Figure 1.205 *The Sunday People*, Sunday, 26 January 2002

The *Sunday People* were therefore granted the right to publish the story, and this they duly did under the banner headline: '*TV Jamie Bondage Brothel Shame*'[86]; but, somewhat illogically (especially in the light of the *Campbell v MGN* decision), the newspaper was prevented from publishing the pictures of Theakston actually in the brothel. Ouseley J held that: "*…publication of such photographs would be particularly intrusive into the claimant's own individual personality. They could still constitute an intrusion into his private and personal life, and would do so in a particularly humiliating and damaging way*"[87]. When it looked as if his injunction idea was not going to work, the two-day time factor also gave Theakston the opportunity to go to the *News of the World* and tell his side of the story to the *Sunday People's* deadliest rival, thereby gazumping their 'exclusive'.

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[84] Verkaik, R.: 'Prostitutes have legal right to tell all, court rules', *The Independent*, Friday, 15 February 2002 [Online]
[85] *Ibid.*
[86] 'TV Jamie Bondage Brothel Shame, *The Sunday People*, Sunday, 26 January 2002, p1
[87] Rozenberg, J.: 'Privacy and the Press', (*Oxford University Press, 2004*), pp12-13

Why then, if the story had a: "*…real element of public interest*", did Ouseley J decide that the photographs did not? Lord Phillips, then the second ranking judge in England, and now Lord Chief Justice of England and Wales[88], used his Bentham Club Presidential Lecture in 2003[89] to explain why he thought Theakston had been granted the injunction preventing publication of the pictures: "*The claimant had not agreed to being photographed. There was no public interest in the publication of the photographs. The courts had consistently recognised that photography could be particularly intrusive. To restrain publication involved no particular extension of the law of confidentiality*"[90].

Certainly it had been decided that blackmail was the only purpose in taking the photographs of Theakston, unlike *Campbell v MGN* where the image was arguably just as intrusive, but only proposed to enhance the background to the story. Because blackmail of Theakston was intended, this was contrary to the PCC Code, whose definition of a 'private place' did not of course include a brothel, and therefore in Ouseley J's view the injunction on the photographs could be granted. Art.10 ECHR1950 however, justified the written account of Theakston's activities mostly because he had willingly placed at least some aspects of his private and sex life in the public domain on previous occasions. The balance, therefore, between privacy and freedom of expression weighed in Theakston's favour in relation to the photographs, whereas it had swung back in favour of the *Sunday People* for the publication of the story.

[88] Nicholas Addison Phillips, Baron Phillips of Worth Matravers PC QC, MR (6 June 2000-3 October 2005), Lord Chief Justice of England and Wales (30 September 2005 - present)
[89] Lord Phillips of Worth Matravers: 'Private life and public interest', *The Bentham Club*, Presidential Address 2003
[90] *Ibid.* at p14

It is by no means just sporting, television and film celebrities however, who complain about their images appearing in magazines and newspapers without their permission or knowledge. During her eighteen-year relationship with the Royal family, Diana, Princess of Wales, was the constant target for numerous paparazzi photographers intent on capturing every moment wherever she went, whomever she saw and whatever she did. While it is true that at times Diana manipulated the press to her own ends, her tragic death in the Pont d'Alma tunnel in Paris in August 1997 denied the editors of numerous global magazines their favourite headline-maker.

It is tempting to imagine just how many legal battles the Princess would have found herself embroiled in had she lived beyond the HRA1998.

However, Diana was not the first or only Princess to have suffered at the hands of the paparazzi. Princess Caroline of Hannover and Monaco has been campaigning since the beginning of the 1990s – often through the courts, and in various European countries – to prevent photographs about her and her private life being published in the sensationalist press. On several occasions she had unsuccessfully applied to German courts for an injunction preventing any further publication of a series of photographs which appeared in the German magazines *Bunte*[91], *Neue Post*[92] and *Freizeit Revue*[93]. The first of these applications was filed in 1993 when all three magazines published pictures which showed the Princess skiing, horse-riding, sitting in a cafe and playing tennis with her husband Ernst August V, Prince of Hannover[94].

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[91] *www.bunte.de*
[92] *www.bauerverlag.de*
[93] *www.freizeitrevue.de*
[94] Sanderson, M.A.: 'Is von Hannover v Germany a step backwards for the substantive analysis of speech and privacy interests?', *European Human Rights Law Review*, 2004, No.6, p631

The Princess lives for most of the year in the town of Saint-Rémy-de-Provence, in the south of France, where the legal regime for the protection of privacy is very different from that of the United Kingdom or Germany[95]. In almost all cases in France, the written permission of a subject is required prior to the publication of photographs taken of them in anything other than an official context. When photographs of the Princess and her family were published in 1993, three separate sets of German proceedings were filed – in 1993, 1997 and again in 1998, all seeking to prevent either the publication, or republication of pictures taken of the Princess at unguarded moments[96].

Figure 1.206 In more formal times, Princess Caroline of Monaco with her husband Ernst August V, Prince of Hannover, before his death in 2005. Over the years less flattering images of the Princess have been published, this example from Hola! magazine in 1996.

In a landmark judgement[97] on 15 December 1999, the Federal Constitutional Court of Germany granted Princess Caroline's injunction regarding photographs in which she appeared with her children, on the grounds that their need for protection was greater than that of adults. However, the court considered that the applicant herself, who was undeniably a contemporary 'public figure', had to tolerate the publication of photographs

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[95] Küchen, M.: 'Privacy Rights vs. Free Speech', *Globaljournalist*, Q4 2004 [Online]

[96] Sanderson, M.A.: 'Is von Hannover v Germany a step backwards for the substantive analysis of speech and privacy interests?', *European Human Rights Law Review*, 2004, No.6, p632

[97] *von Hannover v Germany (59320/00)*

of herself alone in a public place, even if they showed her in scenes from her daily life rather than engaged in her official duties. The Constitutional Court referred in that connection to the freedom of the press, and to the public's legitimate interest in knowing how such a person generally behaved in public.

Princess Caroline's lawyers argued that her children were constantly being followed with photographers frequently staking out their schools, and that it was impossible to separate the privacy of the children from that of their mother. They took the case to the ECtHR where, on 24 June 2004, the judges in Strasbourg overruled the 15 December 1999 decision, criticising the German court and determining that the publications had violated the Princess' right to privacy in breach of ECHR1950: "*…everyone, including people known to the public, had to have a 'legitimate expectation' that his or her private life would be protected*[98]*. The court considered that the general public did not have a legitimate interest in knowing Caroline von Hannover's whereabouts or how she behaved generally in her private life even if she appeared in places that could not always be described as secluded and was well known to the public*"[99]. The ECtHR further ruled that public figures must give their consent before the publication of material about their private lives -- both pictures and written words -- could be permitted.

The Princess' lawyer, Matthias Prinz, welcomed the ruling and urged a change in German law to reflect a person's right to a private life: "*This is very good for my client and for all people in Europe because the court is raising the standard of protection of private life to a level higher than in Germany – to the level of France*". Herr Prinz said his client wanted Europe-wide regulations such as those in France, where prominent people

[98] *von Hannover v Germany (2005) 40 EHHR 1* at 51
[99] *von Hannover v Germany (2005) 40 EHHR 1* at 50

may only be photographed while carrying out public duties unless otherwise agreed on, and that as long as the German press is allowed to publish paparazzi-style photos taken abroad, laws such as those in France are meaningless: "*Paparazzi are manhunters, authorised by the German legal system*", he added[100].

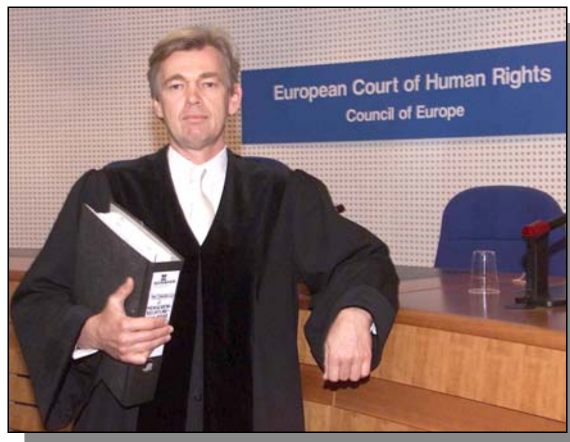

Figure 1.207 The Princess' lawyer, Matthias Prinz, welcomed the verdict of the ECtHR in 2004

In an open letter addressed to the then Chancellor, Gerhard Schröder, published in the *Die Welt*[101], around forty leading German newspapers and broadcasters urged him to contest the ECtHR ruling, which effectively stated that the private sphere of prominent persons in Germany was not adequately protected, and that press freedom had been given priority at the cost of privacy. "*If the German Government doesn't appeal the judgement, then it would mean that all serious journalism will be muzzled… with that, the most important duty of the press – to closely watch the powerful – will be massively hindered*", the letter read[102].

In protesting the ruling, the German editors argued further that as it stood the decision would only permit reporting on public figures in their public role. How these people

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[100] Küchen, M.: 'Privacy Rights vs. Free Speech', *Globaljournalist*, Q4 2004 [Online]
[101] 'Mr Chancellor, stop the censorship', *Die Welt*, Monday, 30 August 2004, p8
[102] *Ibid.* para 4

behaved, who their business contacts were or who pays for their holidays would all go unreported. To back their argument they listed several major domestic German news stories that would not have seen the light of day under the new ruling, including the perks scandal which led to the resignation of the previous head of Germany's central bank, Ernst Welteke, and the investment activities of the former head of Germany's powerful metal workers' union, Franz Steinkühler[103]

The Princess Caroline case has potentially quite wide-ranging consequences for English media law: although not binding on the English courts, the decision in Strasbourg must be 'taken into account', under s.2 HRA1998. The ECtHR used the concept of 'positive obligations' to extend Art.8 ECHR1950 into the private sphere, meaning that the state must entertain such obligations by protecting private individuals against interference in private life by other private individuals. In other words, the ECHR1950 has 'horizontal effect' in this area[104], governing relations between individuals at the same level, rather than the 'vertical' relationship between a state and its citizens that is the main focus of the legislation[105].

Although the court's chosen conception of 'public' was a highly specific one and is, as a result, comparatively easy to apply, the opinion of the ECtHR left the contours of what is 'private' wholly undefined[106]. The judges in Strasbourg failed entirely to make clear whether their opposition of the classification of the Princess as a 'public figure' was

[103] 'Press freedom under siege, Media bosses say', *Deutsche Welle*, 31 August 2004 [Online]
[104] Tomlinson, H., Thomson, M.: 'Bad news for paparazzi – Strasbourg has spoken', *New Law Journal*, Vol.154, No.7136, 9 July 2004, p1041
[105] Rozenberg, J.: 'Privacy and the Press', (*Oxford University Press, 2004*), p101
[106] Moreham, N.: 'Privacy and horizontality: relegating the common law', *Law Quarterly Review*, Vol.123, July 2007, p374

based on the disproportionate effect of this classification, or whether it was purely in response to the non-political role she had adopted[107].

This in itself is a very important issue, well worth detailed consideration, because it leaves the door open to the possibility of an intermediate stage of privacy protection, one which allows for the heightened public scrutiny of figures such as Princess Caroline who, although not formal political figures in their own right, enjoy an unusual degree of social, economic and cultural political influence simply because of their public profile[108].

Strasbourg has therefore, in effect 'spoken'; it now remains to be seen how the English courts will react. Media law is undoubtedly heading for a serious shake up[109], and *von Hannover v Germany* may well mark the point when the 'kid gloves' of the gutter press began to come off for real. For the time being, Naomi Campbell and Princess Caroline may well consider that they have claimed a 'moral' victory, and with it the current high-ground in the battle for personal privacy. It is tempting however, to wander whether the ECtHR judgement in *von Hannover v Germany* will simply encourage those more unscrupulous members of the paparazzi to focus on what are potentially more unsavoury aspects of the private conduct of public figures, in an attempt to ensure that their stories enjoy a defensible claim to public interest. Only time and the moral fortitude – or otherwise – of the editors of celebrity publications will tell.

[107] Jones, V., Wilson, A.: 'Photographs, privacy and public places', *European Intellectual Property Review*, Vol.29, No.9. September 2007, p359

[108] Sanderson, M.A.: 'Is von Hannover v Germany a step backwards for the substantive analysis of speech and privacy interests?', *European Human Rights Law Review*, 2004, No.6, p643

[109] Tomlinson, H., Thomson, M.: 'Bad news for paparazzi – Strasbourg has spoken', *New Law Journal*, Vol.154, No.7136, 9 July 2004, p1041

Chapter Two
The human conflict: Art 8 v Art 10 ECHR

In order to find the rules of the English law of breach of confidence, we have to look at the jurisprudence of ECHR1950 Art.8 & Art.10. Those articles are not merely of persuasive or parallel effect, but, as Lord Woolf says: "...are the very content of the domestic tort that the English court has to enforce". Accordingly, where the complaint is of the wrongful publication of private information, the court has to decide two things: is the information private in the sense that it is in principle protected by Art.8? If so, must the interest of the owner of the private information yield to the freedom of expression under Art.10?

2.01 Are privacy and English law out of touch with one another?

Can photographs taken in public places give rise to issues of privacy? For many years, most English lawyers' response to that question would have been: '*…certainly not! How could anyone claim rights in relation to something they were doing in a public place, even if they were photographed doing it?*'[110].

But things have now changed…

The absence of any constitutional or legislative statement of freedom of speech or the right to privacy used to mean that these liberties were largely residual, i.e. they existed where statute or common law rules did not restrict their exercise. This feature of English

[110] Jones, V., Wilson, A.: 'Photographs, privacy and public places', *European Intellectual Property Review*, Vol.29, No.9, September 2007, p357

law was stressed by Dicey in his classic study of the constitution[111], noting that unlike French and Belgian law, which frequently made special provision for the protection (or regulation) of the press, English law took little or no notice of such concepts as 'freedom of speech' or 'liberty of the press'. Dicey concluded that: "*…freedom of discussion is, in England, little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written*"[112].

The ECHR1950 gives a right to respect for privacy and family life under Art.8 of the Convention, but conversely guarantees freedom of expression under Art.10 (subject to some exceptions). Both of these articles can be enforced in English law under the HRA1998, so the problem today that we are faced with is how effective is this right to privacy likely to prove to be, and when will it outweigh considerations of freedom of speech?[113] Both are very important aspects of constitutional right and, in some cases, one must give way to the other.

Figure 2.101 The Human Rights Act 1998 came into force in the United Kingdom on 2 October 2000

The English common law is much more familiar with the notion of underlying values – 'principles', in their broadest sense – which direct its development: "*…the common law, and equity with it, grows by slow and uneven degrees. It develops reactively, both in the*

111 Dicey, A.V.: 'Introduction to the Study of the Law of the Constitution', 10th Edition (*Macmillan, 1959*)
112 Barendt, E.: 'Freedom of Speech', (*Oxford University Press, 2007*), p40
113 Moore, D.J.: 'Privacy and the Human Rights Act', *Legal Executive*, February 2001, p32

immediate sense that it is only ever expounded in response to events, and in the longer-term sense that it may be consciously shaped by the perceived needs of legal policy"[114]. Nobody suggested prior to the HRA1998 that freedom of speech was in itself a legal principle capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases; and, because that is simply not the way the common law works, any new privacy action would immediately have been rejected with the tort of breach of confidence the preferred form of protection in that area[115].

The development of a right of privacy in common law before the HRA1998 was therefore unsynthesised[116] as a distinct body of law. By contrast, the right of privacy under Art.8 of the ECHR1950[117] developed evenly in Europe over a number of years, with privacy being the titular head and eponymous concern directing the thrust of case law development under its own aegis[118]. In response, the British Government put forward a late amendment to the Bill[119] [that would eventually become the HRA1998] which resulted in the introduction of Section 12 expressly instructing the courts: *"…to have particular regard*"[120] to the rights of freedom of expression.

The media in England immediately cried 'foul', and complained that their rights under Art.10 ECHR1950 would be disproportionately diluted in favour of claims under Art.8 ECHR1950. During Parliamentary debates in February, and again in June 1998, the

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114 Sedley LJ in *Douglas v Hello! (No.1) [2001] QB 967* at 981

115 Johnson, H.: 'Privacy: Donoghue v Stevenson moment passes – Lords and Government say no to privacy statute', *Communications Law*, Vol.8, No.6, June 2003, p388

116 Source: Immanuel Kant – Critique of Judgement: 'unsynthesised: i.e. an aesthetic theory in the original sense, everything that is out there regardless of whether we perceive it or not.

117 See: Appendix III – ECHR 1950 Article 8

118 Kearns, P.: 'Privacy and the Human Rights Act 1998', *New Law Journal*, Vol.151, No.6975, 16 March 2001, p377

119 'Rights Brought Home: The Human Rights Bill', Secretary of State for the Home Department, October 1997, Cm 3782

120 s.12(4) HRA1998

then Home Secretary, Jack Straw[121] made several amendments to the HRA1998 in an attempt to prevent judge-made law on privacy, and in so doing tried to protect the press, provided the latter observed the media industry Code of Practice through self-regulation by the Press Complaints Commission[122].

Figure 2.102 Home Secretary, Jack Straw: "...people deserve protection from unjustified interference in their private life"

As with Art.10(2), Art.8(2) refers to freedoms that are: "*…necessary in a democratic society*"[123]; but s.12(3) HRA1998 states: "*No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed*"[124]. The implication is that an applicant must demonstrate to a court first and foremost that the principles of freedom of expression should not outweigh their right to privacy, thereby limiting the recourse to injunctive relief to protect the principle of freedom of expression even though this may render the protection of privacy more difficult. This is especially so in cases of confidentiality, and even more so when the information is in the public domain.

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[121] John Whitaker Straw MP, Home Secretary: 2 May 1997 – 8 June 2001
[122] See: Appendix I – Press Complaints Commission Code of Practice
[123] Art.8(2), Art.10(2) ECHR 1950
[124] s.12(3) HRA1998

Home Secretary, Jack Straw commented at the time: "*…people deserve protection from unjustified interference in their private life… our amendment does not sanction that kind of behaviour, but it does safeguard legitimate journalistic activity. We have to strike a fine balance here, and I am confident we have got it right*"[125]. The boundaries of the legal concept of privacy in English law were therefore fast being delineated by reference to the competing claims of the right to a private family life, home and correspondence (Art.8 ECHR 1950) and the right to the freedom of expression (Art.10 ECHR 1950)[126].

So-called 'kiss-and-tell' stories had pervaded the pages of the tabloid media in England for many years before the HRA1998 came into effect. However, writing in his 'Paper Round' column in *The Times* in August 2000[127], Brian MacArthur, associate editor of *The Times*, founder of *The Times Higher Education Supplement*, and consultant editor at *The Daily Telegraph*, celebrated the HRA1998: "*We can say farewell to 'kiss-and-tell'. The next few years will show whether English judges follow the examples of France, where privacy is used as a weapon against the press, or seek to balance the conflict between the spirit of Art.8 and Art.10 ECHR1950*"[128].

As we have seen already, in the past, individuals who sought judicial protection from media intrusion were required to rely upon existing statutory protection such as the Data Protection Act 1998, as well as the law of trespass, tort of confidence and of defamation. After the HRA1998 came into force on 2 October 2000 and *Douglas v Hello!*, the law of

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[125] Speech by the Rt. Hon. Jack Straw MP, Home Secretary at the Campaign for Freedom of Information's Annual Awards Ceremony, Monday, 7 June 1999

[126] Rizvi, R.: 'The privacy pendulum', *New Law Journal*, Vol.155, No.7198, 28 March 2005, p1622

[127] MacArthur, B.: 'Farewell kiss-and-tell', *The Times*, Friday, 18 August 2000, p18

[128] Pillans, B.: 'McKennitt v Ash: the book of secrets', *Communications Law*, Vol.12, No.3, March 2007, p78

privacy was placed firmly on the agenda as regards media intrusions into the private lives of individuals. Previously it had to be established that if a photographer did not have a relationship of confidence due to being an intruder, the law of confidence itself would be unavailable. This would then leave the question of whether the breach of Art.8 ECHR1950 could be claimed as a cause of action in its own right?

But this was altered following the comments of Lord Woolf in *A v B & C*[129]: "*The need for the existence of a confidential relationship should not give rise to problems as to the law. The difficulty will be as to the relevant facts. A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows, or ought to know, that the other person can reasonably expect his privacy to be protected*[130]. *The range of situations in which protection can be provided is therefore extensive. Obviously, the necessary relationship can be expressly created. More often, its existence will have to be inferred from the facts. Whether a duty of confidence does exist which courts can protect, if it is right to do so, will depend on all the circumstances of the relationship between the parties at the time of the threatened or actual breach of the alleged duty of confidence*"[131].

However, and irrespective of the comments made by Lord Woolf, this did not alter the fact that a cause of action based on an ECHR1950 right may not exist in English law where neither party concerned was a public body (as in *Douglas v Hello!*); alternatively,

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[129] In *A v B & C* (*Flitcroft v MGN Ltd [2002] EWCA Civ 337*), the claimant, Gary Flitcroft, a married professional footballer with Premier League Blackburn Rovers, sought an injunction to prevent MGN Ltd from disclosing or publishing any information concerning the sexual relationships that he had had with two other women. Initially, an injunction was granted against publication by the *Sunday People* on the basis that the law of confidentiality should afford the same protection to sexual relationships outside of a marriage as those inside a marriage, and that since there was no public interest in the details of those relationships, the injunction was granted. However, at appeal, the court was drawn to consider the interference with the freedom of the press under Art.10 ECHR1950, and whether such interference was justified when Flitcroft, as a public figure, had to appreciate that his actions were legitimately in the public interest. Accordingly, the judge ruled that the degree of confidentiality to which the claimant was entitled within his marriage, was modest by comparison in relation to his acts outside of his marriage, and that the injunction was therefore set aside.

[130] as *per* Lord Goff of Chieveley in *Attorney General v Guardian Newspapers Ltd (No.2) [1990] 1 AC 109* at 281

[131] Lord Woolf in *A v B & C (Flitcroft v MGN Ltd [2002] EWCA Civ 337)* at 11, (point ix)

s.12(4) HRA1998 *could* be interpreted in such a way as to create an exception to the general principle solely for the ECHR1950 right of privacy i.e. this could be taken to signify the importance to which Parliament attached the right when introducing the statute in the first place[132].

In summary then, the question today is whether or not the law of confidence, in the light of these recent cases[133], has developed along with ECHR1950 principles into a new tort of privacy, and whether such a law is now being acknowledged or not? Therefore, it is no longer a case of whether photographs taken in a public place give rise to issues of privacy, but much more of establishing just how far English law is prepared to comply with the requirements imposed upon it by the ECHR1950 and HRA1998?

[132] Carey, P.: 'Media gagging after Zeta-Jones', *Solicitors Journal*, Vol.145, No.2, 19 January 2001, p44
[133] See: Chapter One

2.02 Time for a law of privacy?

In English law, until Parliament passes legislation with regard to a particular topic, the law of the land is what the judges say it is.

While there are several laws already on the statute books with powers intended to protect our privacy such as the Data Protection Act 1998[134], the Protection from Harassment Act 1997[135] and to some extent the Sexual Offences Act 2003[136] (which punishes voyeurism with up to two years' imprisonment), not to mention the HRA1998[137], the Government has no current plans whatsoever to legislate further in this area – something that was made abundantly apparent to the House of Commons Culture, Media and Sport Committee in June 2003[138].

The Committee had been setup in the light of the high profile privacy cases that had been passing through the courts, and was given the remit to look specifically look at whether Parliament should create a universal privacy law. Chaired by former Labour spin-doctor and one-time journalist, Gerald Kaufman MP, the committee members were uncompromising in their conclusion[139]. They recommended that the Government should reconsider its position and bring forward immediate legislative proposals to clarify the protection that individuals could expect from unwanted intrusion into their private lives by anyone – not just the press. They went further in saying that such legislation was

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[134] Data Protections Act 1998 (*c.29, 1998*)
[135] Protection from Harassment Act 1997 (*c.40, 1997*)
[136] Sexual Offences Act 2003 (*c.42, 2003*)
[137] Human Rights Act 1998 (*c.42, 1998*)
[138] This Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Department for Culture, Media and Sport and its associated public bodies
[139] House of Commons Culture, Media and Sport Committee Report 'Privacy and media intrusion', Report HC213 Replies to the Committee's Fifth Report 2002-2003, 9 February 2004, p8

necessary to fully satisfy the obligations imposed upon the United Kingdom under the ECHR1950, adding that there should be a full and wide consultation on the matter, but that in the end Parliament should be allowed to undertake its proper legislative role[140].

Figure 2.201 House of Commons Culture, Media and Sport Committee Report 2002-2003 on 'Privacy and media intrusion'

Introducing the report, the Chairman commented: "*It was clear to me that if there were not a properly enacted privacy law then the HRA1998 would create de facto a privacy law, decided by judges ad hoc, on the basis of individual cases brought to court inevitably by interested parties*". However, he insisted the Committee support the principles of self-regulation, and ruled out any possibility of the new media watchdog, Ofcom, being given any powers over the editorial content of newspapers[141].

The Committee recognised that at the root of the problem was the fact that English law did not yet recognise a general tort of invasion of privacy. This would, they concluded, no doubt come as quite a shock to most individuals who believed, incorrectly as it turns out, that we, all of us in England and Wales, regardless of whether we are high born or

[140] House of Commons Culture, Media and Sport Committee Report HC458 'Privacy and media intrusion', 9 July 2003, p19
[141] Tugendhat, M., Christie, I.: 'The Law of Privacy and the Media', 2nd Cumulative Supplement, (*Oxford University Press, 2006*), p10

low, famous, infamous or just plain ordinary, have some right to privacy granted us through statute. Nothing could be further from the truth.

They recognised that: "*…there is a difficult tension between the need to preserve free speech in an open and democratic society, and the important need to protect individuals from unwarranted intrusion by the media into their privacy. Even when there is sufficient public interest to justify media activity, it can be difficult to ensure that the extent of that activity is proportionate*[142]*. The Government strongly believes that a free press is vital to the health of our democracy. There should be no laws that specifically seek to restrict that freedom, and Government should not seek to intervene in any way in what a newspaper or magazine chooses to publish*"[143].

The HRA1998 and the ECHR1950 clearly demonstrate then, that the United Kingdom is under statutory obligation to provide individuals with a degree of protection – regardless of where their rights are breached i.e. at home, or in a public place – thereby ensuring that the media is kept in constant check. There is no doubt then, that a sound understanding of the court's application of the ECHR1950 right to respect for private life through s.12 HRA1998 is an essential prerequisite for appreciation of the content of the right to privacy in domestic, public and common law.

Unfortunately however, the Convention right to respect for private life is not at all easily understood. The right is ill-defined and amorphous. The courts have acknowledged that it extends beyond the: *"…right to privacy, the right to live, as far as one wishes,*

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[142] Department for Culture, Media and Sport, 'Privacy and media intrusion', The Government's Response to the Fifth Report of the Culture, Media and Sport Select Committee on 'Privacy and media intrusion' (HC 458-1) Session 2002-2003, Cm5985, October 2003, Chapter 1.2, p1

[143] Department for Culture, Media and Sport, 'Privacy and media intrusion', The Government's Response to the Fifth Report of the Culture, Media and Sport Select Committee on 'Privacy and media intrusion' (HC 458-1) Session 2002-2003, Cm5985, October 2003, Chapter 1.3, p1

protected from publicity"[144], but has consistently declined to define it further. Instead, the court insists that it is: "*…a broad term, not susceptible to exhaustive definition*"[145]., and repeats several broad statements about the nature of the interest. 'Private life', it says, includes: "*…activities of a professional or business nature*"[146], the "*right to establish and develop relationships with other human beings and the outside world*"[147], "*a zone of interaction of a person with others, even in a public context*"[148], the "*physical and psychological integrity of a person*"[149], the "*right to… personal development*"[150], and "*the right to establish details of their identity as human beings*"[151]. Interests as diverse as the right to live as a gypsy, to change one's name and to be free of environmental pollution, as well as 'traditional' privacy rights (such as protection against dissemination of personal information and images) all fall within it[152].

Strasbourg's interpretation of Art.8's protection is clearly demonstrated in their very broad decision in *von Hannover v Germany*. Art.8 was extended to include the most anodyne of information (photographs of Princess Caroline playing tennis and going shopping), when just a few weeks earlier the English courts had an entirely different view in *Campbell v MGN Ltd*. Baroness Hale stated that if the published photograph of Naomi Campbell had shown her popping out for milk rather than leaving a Narcotics Anonymous meeting, she would have had no legitimate expectation of privacy[153]. What

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[144] *X v Iceland (1976) 5 D&R 86* at 87
[145] *Peck v United Kingdom (2003) 36 EHRR 41* at 57
[146] *Niemitz v Germany (1992) 16 EHHR 97* at 29
[147] *Peck v United Kingdom (2003) 36 EHRR 41* at 57
[148] *von Hannover v Germany (2005) 40 EHHR 1* at 50
[149] *Pretty v United Kingdom (2002) 35 EHHR 1* at 61
[150] *Peck v United Kingdom (2003) 36 EHRR 41* at 57
[151] *Goodwin v United Kingdom (2002) 35 EHHR 18* at 90
[152] Moreham, N.A.: 'The right to respect for private life in the European Convention on Human Rights: a re-examination', *European Human Rights Law Review*, January 2008, p44
[153] Wilson, K., Elliott, R.: 'The New Black', *New Law Journal*, Vol.157, No.7264, 16 March 2007, p393

is the difference between milk and tennis, shopping and a drug rehabilitation meeting? Evidently, depending on which court, and which country you are in, quite a lot!

If judges at the very highest level are confused which way to interpret Art.8, then it begs the question how on earth are the rest of us supposed to understand what is and what is not a legitimate claim to respect for private and family life? This would be a hard enough question on its own, but now couple it with the problem of weighing up Art.8 against the balance test of Art.10, the right of the press for freedom of expression. Now you can begin to understand why there are now so many calls for a statutory explanation of exactly where the law on privacy stands.

However, while the ink was still wet on the report from the House of Commons Culture, Media and Sport Committee, the decision of the judicial committee of the House of Lords in the case of *Wainwright v The Home Office*[154] echoed the clearest indication yet that the Government in Britain had no intention of introducing a new law of privacy. Their Lordships upheld a ruling from the Court of Appeal[155] that Mary Wainwright should receive no damages for the very intrusive strip-search that she and her son Alan, who suffers from cerebral palsy, had endured while looking for suspected concealed drugs when visiting her elder son Patrick, at Armley Prison, Leeds in January 1997[156].

The Law Lords, in rejecting an attempt as they saw it to establish a right to sue for invasion of privacy, held that Mary Wainwright had no actionable rights under the circumstances[157]. Lord Hoffman pointed out: "*The law no longer needs to construct an*

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[154] *Wainwright v Home Office [2003] UKHL 53*
[155] *Wainwright v Home Office [2003] 3 All ER 943 (CA)*
[156] Rozenberg, J.: 'Privacy and the Press', (*Oxford University Press, 2004*), p44
[157] 'Law Lords 'close door' on privacy law', *The Lawyer*, Vol.17, No.43, 27 October 2003, p12

artificial relationship of confidentiality between intruder and victim; it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy"[158]. Martin Soames, a media partner at DLA lawyers said of the judgement: "*…a very conservative ruling. Given Parliament's refusal to acknowledge its responsibilities in the area of privacy law, it is pitiful that the House of Lords has shied away from the challenge of privacy as well*"[159].

The balancing exercise, weighing Art.8 and Art.10 rights, provides for consideration of factors like the degree of intrusion suffered and the defendant's right to tell their own story. Clearly, in *Wainwright v Home Office* a 'more than intrusive strip-search'[160] performed by male prison officers on an innocent (as it transpired) female visitor, was not intrusive enough. In *Campbell v MGN Ltd*, although the taking of the photographs formed no part of the claim, the fact that they were taken covertly appears, however, to have influenced some of their Lordships analysis of the photographs' intrusiveness[161].

Decisions by judges in later cases[162] have been, as we shall see in the next chapter, influenced by the defendants' motivations for wishing to publish the information in revenge and resentment, and therefore evidence about the peripheral and surrounding circumstances, as opposed to the obvious, may well enhance a claimant's chances for an interim injunction.

[158] Lord Hoffman in *Wainwright v Home Office [2003] UKHL 53* at 58
[159] 'Law Lords 'close door' on privacy law', *The Lawyer*, Vol.17, No.43, 27 October 2003, p12
[160] Rozenberg, J.: 'Privacy and the Press', (*Oxford University Press, 2004*), p44
[161] Wilson, K., Elliott, R.: 'The New Black', *New Law Journal*, Vol.157, No.7264, 16 March 2007, p394
[162] *CC v AB [2006] EWHC 3083*; *McKennitt v Ash [2006] EWCA Civ 1714*

2.03 Douglas v Hello! again – an atmosphere right for an appeal, or two!

Following the lifting of the injunction[163] against *Hello!* on 24 November 2000, the Douglas's and *OK!* magazine prepared themselves for a legal battle-royal in the high courts. More than two years had passed when in late-January 2003, the Hollywood machine that is Michael Douglas and Catherine Zeta-Jones arrived at the High Court in London. All three claimants were now seeking damages in an atmosphere which, in the light of recent privacy cases, they hoped would question further the split in the Court of Appeal in 2000 which had seen Lord Justice Sedley comment whether: "*…the law recognises, and will appropriately protect the right of personal privacy*"[164].

Figure 2.301 The Douglas's in the High Court

The Douglas's sought damages from *Hello!* for breach of privacy, while *OK!* sought compensation for the loss of its exclusive right to publish the wedding photographs. Needless to say there was something of media frenzy during the entire six weeks of the hearing, rising to a crescendo when it was announced on Friday, 11 April 2003 that the

[163] *Douglas v Hello! (No.1) [2001] QB 967*
[164] Sedley LJ in *Douglas v Hello! (No.1) [2001] QB 967* at 971

Douglas's had been successful in the High Court[165] (in respect of liability only), with damages of £14,600 being awarded in their favour on Friday, 7 November 2003[166].

Lindsay J distinguished the commercial and personal claims of the claimants to confidentiality, regarding the Douglas's primary claim as a traditional commercial confidence or trade secret case and not as a privacy case: "*…I find the Hello! defendants to have acted unconscionably and that, by reason of breach of confidence, they are liable to all three claimants to the extent of the detriment which was thereby caused to the claimants respectively*"[167].

Throughout the hearing, great attention was paid by all three judges (Lindsay J, Sedley J, Brooke LJ) to their interpretation of the evidence that the couples names and likenesses were valuable assets, and that they had gone to great lengths to prevent unauthorised use of either. Therefore, despite the fact that the Douglas's were claiming privacy rights in an event to which they had sold publicity rights, it was held that the wedding was private in nature and that the intentions of privacy were made quite clear to all involved, including Rupert Thorpe, the paparazzi photographer, and this, in itself, imported an obligation of confidence[168].

Michael Douglas and Catherine Zeta-Jones were each awarded £3,750 for the distress occasioned by the publication of the unauthorised photographs, and £7,000 between them for the cost and inconvenience of having to deal hurriedly with the selection of the authorised photographs to enable them to be published in *OK!* magazine no later than

[165] *Douglas v Hello! (No.3) [2003] EWHC 786* (the 'liability' case, Monday, 3 February 2003 to Friday, 11 April 2003)
[166] *Douglas v Hello! [2003] EWHC 2629 (Ch)* (the 'quantum' case, Friday, 7 November 2003)
[167] Lindsay J in *Douglas v Hello! (No.3) [2003] EWHC 786* at 227
[168] Curry, G.: 'Confidentiality's *OK!*', *Entertainment Law Review*, Vol.14, No.6, June 2003, pp148-149

the publication of the unauthorised photographs in *Hello!* magazine[169]. Both the Douglas's were also awarded £50 each nominal damages for breach of the Data Protection Act 1998[170].

OK! magazine were also successful in their claim for compensation against *Hello!* for loss of exclusive right to publish, and in November 2003, the High Court[171] awarded damages of £1,033,156 (£1,026,706 representing their assessment of loss of profit from the exploitation of the unauthorised photographs, and a further sum of £6,450 in respect of wasted costs). Lindsay J thought that the award of substantial damages against *Hello!*, given the resources of the magazine, would not materially stifle free expression, and therefore did not go beyond the principle of compensation[172].

Figure 2.302 Catherine Zeta-Jones and Michael Douglas leaving the High Court in London in April 2003

Realistically, that should have been that. The argument was well and truly won by both the Douglas's and *OK!* magazine, or so it seemed. The claimants certainly felt that

[169] *Douglas v Hello! [2003] EWHC 2629 (Ch)*
[170] s.32 Data Protection Act 1998
[171] *Douglas v Hello! [2003] EWHC 786 (Ch D)* on 7 November 2003
[172] Of the thirteen claims brought against *Hello!* by the Douglas's and *OK!*, only nine were granted by Lindsay J in his 90-page judgement, a fact not lost on Sally Cartwright, Publishing Director of *Hello!*, who said in reaction to the judgement: "*We are all very pleased that the vast majority of the claims against us have been thrown out*"

justice had been done and were vindicated in their argument for privacy… but, as so often happens in the law, what may seem black to one party is very often white to the other! *Hello!* went back to court to plead their case further, requesting that the matter go before the Court of Appeal on the basis that there was no relationship between *Hello!* and the Douglas's in the first place, therefore there could be no breach of confidentiality. On 14 January 2004, after lengthy consideration, the *Hello!* appeal request was granted[173].

It took another year and a half before the matter once more came to London, this time to the Court of Appeal. The media were naturally disappointed when the Douglas's did not attend, the action primarily concerning the 2003 damages award in favour of *OK!*; but the biggest shock came when Lord Phillips of Worth Matravers MR, Lord Justice Clarke and Lord Justice Neuberger, handed down their 70-page decision[174] on Wednesday, 18 May 2005: a unanimous judgment in favour of *Hello!* Their Lordships had somewhat surprisingly agreed with the 'no breach' view, and consequently reversed (in part) the damages award from the High Court in 2003[175]. What had happened?

Certainly the Court of Appeal made a number of significant, and, it could (and would) be argued, controversial rulings. (1) It was held that photographs were not merely a method of conveying information as an alternative to a verbal description: "*…they enable the person viewing the photograph to act as a spectator, in some circumstances voyeur*

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[173] '*Hello!* wins leave to appeal Douglas decision', *The Lawyer*, Vol.18, No.3, 19 January 2004, p14
[174] Lindsay J in *Douglas v Hello! (No.6) [2005] EWCA Civ595 (CA)* at 295
[175] *Douglas v Hello! (No.6) [2005] EWCA Civ 595 (CA); which reverses (in part) Douglas v Hello! (no.3) [2003] EWHC 786*

would be the more appropriate noun"[176]. (2) It was held that there was a fresh intrusion of privacy when each additional viewer saw the photographs; therefore, an injunction could be granted restraining further publication in appropriate cases[177]. (3) A photograph can portray the personality and the mood of the subject of the photograph (though not necessarily accurately). (4) The Court of Appeal held that being prepared to sell privacy should not affect privacy protection. (5) And most bizarrely, it was held that you cannot assign or transfer privacy rights: "*We have concluded that confidential or private information, which is capable of commercial exploitation, but which is only protected by the law of confidence, does not fall to be treated as property that can be owned and transferred*"[178].

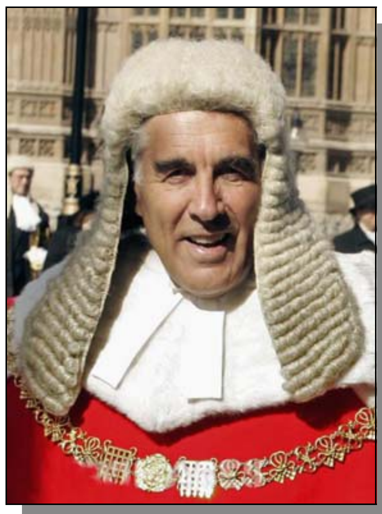

Figure 2.303 Lord Phillips of Worth Matravers MR, whose 70-page ruling in the Court of Appeal caused enormous controversy

Lord Phillips explained further: "*The grant to OK! for the right to use the authorised photographs was no more than a license, albeit an exclusive license, to exploit commercially those photographs for a nine-month period. That license did not carry with it any right to claim, through assignment or otherwise, the benefit of any other*

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[176] *Douglas v Hello! (No.6) [2005] EWCA Civ595 (CA)*

[177] Thomson, M.: '*OK!* What have you bought now?', Carter-Ruck Media & Human Rights Lawyers [Online]

[178] *Douglas v Hello! (No.6) [2005] EWCA Civ595 (CA)*

confidential information vested in the Douglas's. Hello! had not intended injury to OK! in publishing its unauthorised photographs, but merely upheld the practice of 'spoilers' in the media industry"[179].

The Court of Appeal had effectively ruled that 'spoilers' were not unlawful. *Hello!*'s counsel argued that 'spoilers' could in fact give a magazine with an 'exclusive' a commercial benefit, as they received a promotional boost from the inferior pictures of an event in a competing publication; thus, the damages that had been awarded to *OK!* were inappropriate[180]. To the delight of *Hello!* and its legal team, the Court of Appeal agreed, and overturned the High Court ruling in favour of *OK!*; but upheld the Douglas's privacy claim damages. "*To spend over £4m in legal costs to recover a total of £14,600 is grand folly indeed*", explained *Hello!* lawyer, Matthew Higdon, of media boutique M Law. "*If the 'spoiler' has no intent to injure, then there's no problem*"[181].

OK!'s lawyers, Martin Kramer and Katherine Rimell, of Addleshaw Goddard, took a rather different view of the decision: "*At the moment people are asking themselves what exactly is the nature of an exclusive?*"[182]. Lawyer, Maninder Gill, acting on behalf of the Douglas's said: "*…the ruling will have an impact on all publishers with exclusive rights as it means rivals can run spoilers with no redress in law*"[183]. Predictably, *OK!* magazine were given leave to appeal the decision to the House of Lords.

[179] Lord Phillips of Worth Matravers MR in *Douglas v Hello! (No.6) [2005] EWCA Civ 595 (CA)* at 607
[180] '*Hello!* wins £1m damages challenge', *BBC News*, 18 May 2005 [Online]
[181] Harris, J.: 'Appeal denies *OK!* exclusive rights to Douglas's wedding', *The Lawyer*, Vol.19, No.22, 23 May 2005, p27
[182] *Ibid.*
[183] '*Hello!* wins £1m damages challenge', *BBC News*, 18 May 2005 [Online]

Despite the over-optimistic expectations of some, the effect of *Douglas v Hello!*, unsurprisingly, was not the panacea for individuals seeking to protect their privacy that it was hoped it would be… at least, not in 2005. The 2003 judgement had expanded the boundaries of confidence, but the 2005 ruling showed that judges in England would still stop short of recognising a law of privacy. The decision whether or not a privacy law is desirable or necessary, they determined, was perhaps best left to Parliament to address when the time was right.

Two more years would pass, and several high-profile cases traverse the corridors of justice; and yet Parliament, in its infinite wisdom, still did nothing. The scope of the common law and equitable principles with it – as seen in *Douglas v Hello!* – was likely to continue to expand incrementally in yet more diverse and interesting ways, but at a painful, meandering pace. It was time for change. By 2007, in the absence of Parliamentary legislation, judge-made law was back on the agenda.

Chapter Three

The 2006/7 Rulings

"Where an individual is in a position to control personal information, such as images of an event that can be kept secret from the outside world, he will be able to treat that information as a 'conventional' trade secret and protect it using the doctrine of breach of confidence"

Baroness Hale clarifying the wedding photographs in this manner. Douglas v Hello! [2007] UKHL 21

3.01 Write whatever you like…

Loreena McKennitt is a Canadian singer, composer, harpist and pianist most famous for writing, recording and performing world music with New age, Celtic and Middle Eastern themes. Even though it contains aspects and characteristics of music from around the globe, it is sometimes classified as Folk music in record stores. Before she composes anything, McKennitt engages in considerable research on a specific subject which then forms the general concept of an album.

Shy, and very emotional, McKennitt was deeply affected by the drowning of her fiancée, Ronald Rees, along with two other people close to her, in a boating accident in 1998. Her live performances became increasingly rare after this, and she didn't record any new material until 2006, when the album *An Ancient Muse* was released[184].

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[184] *McKennitt, L.: 'An Ancient Muse', © 2006 Quinlan Road Ltd, Cat: QRCD109*

For twenty years, fellow Canadian, Niema Ash, was the best friend of Loreena McKennitt, having befriended her long before she attained celebrity status. "*I was working as a teacher in London and Loreena, whom I had met during a trip home to Canada, would often come and stay at my house*", Ash explains. "*At that time the record companies shunned her; this was even before she had a harp – the instrument which made her a star. There was an instant rapport between us and I was happy to put her up and introduce her to my family and friends*".

Figure 3.101 Singer, Songwriter, Loreena McKennitt and Author, Niema Ash

"*Over time, we became extremely close. We would have long discussions about life and love and went on holidays together. When her music career took off in the late 1980s, I enjoyed her success as if it were my own, and I was filled with admiration for her single-mindedness. Loreena believed in total control, setting up her own record label and offices. She was her own manager, arranged her own tours and made all the decisions both in business and music. Within a short space of time she became extremely wealthy. I was thrilled for her, and my partner, Tim, and I were big fans of her music. We both did a lot of work for her, for free; but, as fame and money took over her life, Loreena changed*".

"*At first it was quite subtle; she would sometimes adopt a haughty tone with me that I had never heard before. Then, later, she started yelling at people. Finally, Loreena and Tim fell out. He had disagreed with her about something and she had told him in no uncertain terms: 'I'm the boss. You do as I say'. Tim wasn't prepared to be spoken to like that, and he walked out. I was devastated and tried to make peace between them, but Loreena wouldn't budge. She became even more aggressive and we ended up in another battle with her, this time financial. Our friendship was at an end and I was left bewildered and hurt. To my mind, fame had stolen my best friend. Over the next five years I tried to make sense of what had happened and, in the end, I decided to write a book about my experience*"[185].

That book, called '*Travels with Loreena McKennitt: My Life as a Friend*'[186], is a biography, as well as a cautious tale of what a wonderful person Ash thought McKennitt was, but, how celebrity and money had ruined their friendship. Niema Ash published it herself and paid a printer to produce 1,000 copies to sell on Amazon and other websites. However, as soon as it was published in June 2005, Ash was contacted by Loreena's solicitors who told her in no uncertain terms that it was a breach of Loreena's privacy and that if publication didn't cease immediately they would take Ms Ash to court.

"*Write whatever you like…*", said Ms McKennitt in a telephone call to Ms Ash. "*I'm not really worried, because I can pull your book in 24 hours! If it comes to a battle over this in the courts, I can stay the course. You can't*"[187]. Loreena McKennitt was good to her word, and sought to prevent widespread publication of the book arguing that it contained

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[185] Ash, N.: 'The bitter court confrontation with international singing star Loreena McKennitt', *The Daily Mail*, Saturday, 19 May 2007, p7

[186] Ash, N.: 'Travels with Loreena McKennitt: My Life as a Friend', (*Purple INC Press, 2005*)

[187] Ash, N.: 'The bitter court confrontation with international singing star Loreena McKennitt', *The Daily Mail*, Saturday, 19 May 2007, p7

identified material which was published in breach of confidence and/or as an invasion of privacy. There were details in the book of Loreena McKennitt's personal and sexual relationships, her feelings in relation to her deceased fiancée and the circumstances of his death, matters relating to her health, diet and emotional vulnerability as well as details of a property dispute that had been settled by Tomlin order[188]. In addition, there were references to confidential commercial contracts for a cottage that Ms McKennitt owned, and details of 'an incident' witnessed by Ms Ash's mother in a hotel room shared by McKennitt and Ash[189]. In all, McKennitt complained of 34 specific episodes[190].

Clearly trust and loyalty are features that one would expect to underpin not only marital, but other relationships such as long term friendships involving a similar degree of commitment by each party to the other. Certainly that was the approach taken by Eady J in court[191] when he upheld Ms McKennitt's complaints in relation to the majority of passages, and awarded her with an injunction and £5,000 in damages. At that point in time only about 300 copies of the book had been released, so relatively little media attention had been paid to it. Needless to say, following the ruling, copies were in high demand and unsurprisingly Niema Ash, and publishers Purple Inc. Press, appealed the decision on the grounds that it struck a blow to freedom of expression.

At the Court of Appeal[192], Buxton LJ acknowledged that the law of privacy and confidence is: "*…still in some respects a matter of controversy. This is an important and developing area of law where an appeal on these facts may help to clarify and define*

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[188] McLean, A., Mackey, C.: 'Is there a law of privacy in the UK? A consideration of recent legal developments', *European Intellectual Property Review*, Vol.29, No.9, September 2007, p389

[189] Pillans, B.: 'McKennitt v Ash: the book of secrets', *Communications Law*, Vol.12, No.3, March 2007, p80

[190] Hewson, B.: 'With friends like that…', *New Law Journal*, Vol.156, No.7210, 3 February 2006, p165

[191] *McKennitt v Ash [2006] EMLR 10*

[192] *McKennitt v Ash [2007] EMLR 4*

some of the relevant principles, even if it does not alter the outcome"[193]. His Lordship summarised the current legal position: that there is no English domestic law tort of invasion of privacy, thereby reaffirming the entrenched position of the English courts who, in developing a right to protect private information, including the implementation of Art.8 & Art.10 ECHR1950, have had to proceed through the tort of breach of confidence, into which the two convention articles have had to be 'shoehorned'[194].

Buxton LJ described Ms McKennitt's complaint as: "*…what might be called an old-fashioned breach of confidence by way of misconduct inconsistent with a pre-existing relationship, rather than simply of the purloining of private information*"[195]. His Lordship referred to leading cases in this area including *Campbell v MGN Ltd*, *von Hannover v Germany*, *Attorney General v Guardian Newspapers (No.2)* and even *Prince Albert v Strange*, as he distinguished between 'traditional breach of confidence' cases, where confidential information is shared within a relationship giving rise to a duty of confidence, and the 'misuse of private information' cases, where information is so private that a duty of confidence arises without the requirement of a pre-existing relationship[196].

This latter determination by Buxton LJ was a critical development, and of the greatest significance as the focus of 'traditional breach of confidence' cases had previously been upon the nature and extent of the relationship between the two parties i.e. the type of information itself was irrelevant, provided that it was confidential. Buxton LJ was distinguishing this, arguing that it is the very nature of the information itself which becomes paramount. However, his Lordship omitted to take the opportunity to define the

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193 Buxton LJ in *Ash v McKennitt [2006] EWCA Civ 778* at [2], *per* Richards LJ

194 McLean, A., Mackey, C.: 'Is there a law of privacy in the UK? A consideration of recent legal developments', *European Intellectual Property Review*, Vol.29, No.9, September 2007, pp389-390

195 Buxton LJ in *McKennitt v Ash [2007] EMLR 4* at 115

196 Pillans, B.: 'McKennitt v Ash: the book of secrets', *Communications Law*, Vol.12, No.3, March 2007, p81

hallmarks of each category and, as *McKennitt v Ash* fell into the ‘traditional breach of confidence’ type, this relieved Buxton LJ of the need to define those characteristics giving rise to a duty of confidence, worthy of protection, but in the absence of a relationship.

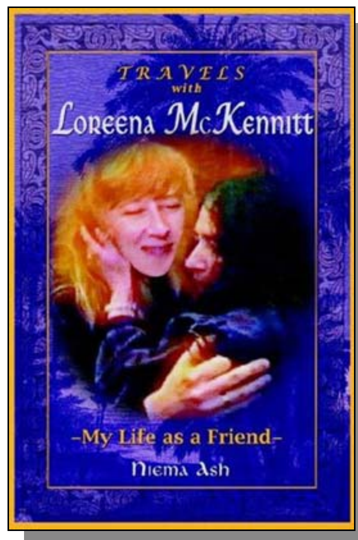

Figure 3.102 '*Travels with Loreena McKennitt: My life as a friend*', the book by Niema Ash which caused so much controversy

Nevertheless, initially with Eady J and subsequently Buxton LJ examining Art.8 rights, then balancing these against Art.10, and both judges determining the former, rather than the latter, must supersede, for the first time a clear path was being beaten towards the idea that a law of privacy genuinely exists in English law. A fact not lost on Ms Ash’s advocate, David Price, who said of Buxton LJ (and his fellow Lordships, Latham LJ and Longmore LJ) and the decision in favour of Ms McKennitt: “*…the importance of the case went far beyond the protagonists today. The judgement is a triple-whammy against freedom of expression – that freedom being not merely the right of an author to impart information, but also the public’s right to receive it, if they so choose*”[197].

[197] David Price in an interview for BBC News outside the Court of Appeal, 14 December 2006 [Online]

Loreena McKennitt had indeed won her Court of Appeal battle against Niema Ash, but the ramifications were felt much further and wider than the simple ruling in her favour. For the first time in a media-driven age, English law was seen to recognise a right to privacy for celebrities facing media exposure. Loreena McKennitt, commenting on the result, said: "*I am very grateful to the court that has recognised every person has an equal right to a private life. If an aspect of career places one directly in the public eye, or if extraordinary events make an ordinary person newsworthy for a time, we still should have the basic human dignity of privacy for our home and family life*"[198].

So, what exactly did *McKennitt v Ash* do for the development of the law of privacy? Well, it certainly moved to clarify the effect of the HRA1998 on English law and, in particular, the incorporation of the right to respect for private life as described in Art.8 ECHR1950. Moreover, it is important to note that various media parties, including the BBC, Times Newspapers Ltd and the Press Association, had all attempted to intervene on behalf of Ms Ash, and that the court had considered their detailed submissions in favour of Art.10 ECHR1950. In the end however, it was the ruling of Eady J in the first instance, and the concurrence of Buxton LJ at the Court of Appeal, which helped explain the breadth of privacy rights in this country. In the absence of parliamentary legislation, the judges were, as they always had done, creating new law with each new ruling – in this instance, privacy law.

[198] Loreena McKennitt in an interview for BBC News outside the Court of Appeal, 14 December 2006 [Online]

3.02 A victory for the Douglas's?

Towards the end of 2006 and early into 2007, a series of high-profile legal battles took place in our high courts, spurring the belief in a genuine law of privacy in English law like nothing that had been seen previously. The Court of Appeal ruling in *McKennitt v Ash* was a transition judgement without being landmark, and yet: "*It is the first time in English law that we've seen such a positive right stated in those terms*", says Iain Christie, media law barrister at 5 Raymond Buildings chambers. "*The law is being developed now on a case-by-case basis, and among those judges, one stands out as the most influential man in this sensitive area: Mr Justice Eady*"[199].

Figure 3.201 The Hon. Mr Justice Eady, the man driving privacy law?

Sir David Eady, 64, is the country's foremost expert on privacy law, but after a 40-year career, nobody is quite sure whether he is in favour of one or not. He has, as both an advocate and a judge, stood up to speak powerfully for freedom of expression at one moment while, at the next, calling equally powerfully for safeguards from the evils of public exposure of private lives. He has therefore become the great enigma among the higher judiciary. The uncertainty may illustrate only one thing: Mr Justice Eady is a very

[199] Moshinsky, B.: 'Privacy on parade', *The Lawyer*, Vol.21, No.28, 16 July 2007, p14

good lawyer. He has sat in judgement on disgraced former BP Chief, Lord Browne[200], spared the blushes of a household name sports figure in the discreetly handled *CC v AB*[201] case, and of course presided over the transitional *McKennitt v Ash* dispute.

Not everything has gone his way of course; he was given a severe drubbing by the House of Lords for his bold decision in *Jameel v Wall Street Journal Europe*[202]. However, most observers seem to agree that Mr Justice Eady applies, more often than not, the correct exposition of the developing law of privacy and confidence, while almost all media practitioners see him as the driving force behind the strengthening of the rule of privacy in the High Court[203].

Just weeks after *von Hannover v Germany* and *McKennitt v Ash*, yet another privacy case made the headlines as the search continued for a balance between protecting confidential information and copyright on the one hand, and the extent of freedom of the press on the other. Once more, Mr Justice Eady was at the forefront of the privacy law decision-making machine. HRH Prince Charles, Prince of Wales, a keen diarist it seems, had set down his private and personal thoughts in a journal, which was leaked by a

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[200] *Lord Browne v Associated Newspapers Ltd [2007] EWCA Civ 295*. Lord Browne was scuppered by a lie that he told the court about where he had met his gay lover, Jeff Chevalier. He had said he had met him while excising in Battersea Park, while in actual fact he met him through a gay escort website. *The Mail on Sunday's* lawyers argued that the lie was enough reason to refuse him a privacy injunction. Mr Justice Eady rejected that argument, but took the decision to allow some material to be published saying that the details of their relationship had become so generally accessible that it could no longer be regarded as confidential.

[201] *CC v AB [2006] EWHC 3083 (QB).* Mr Justice Eady granted CC an injunction against AB from disclosing details of his identity and details of his affair with AB's wife, as CC's wife was receiving medical treatment for stress, and her condition was likely to be made worse by press exposure. This would seem to run contrary to *A v B & C* (*Flitcroft v MGN Ltd [2002] EWCA Civ 337*) where Blackburn Rovers footballer, Gary Flitcroft, failed to maintain an earlier injunction granted against the *Sunday People* preventing the newspaper from publishing the kiss-and-tell story of his two mistresses.

[202] *Jameel v Wall Street Journal Europe [2005] EWCA 74*. Mohammed Jameel brought a libel action over claims the newspaper made that the Saudi Arabian authorities were monitoring the bank accounts of prominent businesses for evidence of links to terrorism. The House of Lords ruled that provided journalists act responsibly when reporting stories that are in the public interest, they should be shielded from libel actions. This ruling overturned that of Mr Justice Eady at the initial hearing.

[203] Moshinsky, B.: 'Privacy on parade', *The Lawyer*, Vol.21, No.28, 16 July 2007, p15

member of his personal staff[204] and subsequently published in *The Mail on Sunday* and *Daily Mail*[205].

Particular reference was made to the period just prior to handing Hong Kong back to the Chinese administration in 1997, when the Prince attended a series of functions in the Far East, making some less than flattering descriptions of the Chinese delegation under the title of 'The Great Chinese Takeaway'. One comment stood out among the entries whereby the Prince lampooned the behaviour of the Chinese delegates (whom he clearly regarded with some distaste) describing them as a set of 'appalling waxworks'.

When the matter came to court[206], Blackburne J followed Eady J's lead, and delivered a lengthy summary judgement in favour of Prince Charles, finding that the claimant had a reasonable expectation of privacy under such circumstances which had been breached by the defendant's actions. Associated Newspapers Ltd argued that the information in the journal was not confidential as it was of a political nature and related to the claimant's public life and office in which there was powerful public interest.

Nor had Associated Newspapers Ltd committed copyright infringement[207] on the grounds that its use was not of a substantial[208] part in any event, and additionally because Prince Charles himself had previously authorised copies of the journal to be made and distributed to a number of selected recipients, including journalists; he could therefore

[204] Ms Sarah Goodall was a trusted lady clerk who worked for the Prince from 1988 to 2000, and who claims that her dismissal was secured by Camilla, Duchess of Cornwall. Her contract had included a confidentiality undertaking not to disclose any information acquired during the course of her employment, and it was Ms Goodall who had been responsible for circulating the authorised copies of the journal. In May 2005, nearly five years after being dismissed from the Prince's service, she made an unauthorised disclosure of their existence to Associated Newspapers via an intermediary, and while attempts were made to rectify the error, including threats of legal proceedings by the Prince's solicitors, extracts from the journal were published in *The Mail on Sunday*, 13 November 2005.

[205] Elliott, S.: 'Freedom of speech: breach of confidence and privacy', *Entertainment Law Review*, Vol.16, No.4, April 2007, pN59

[206] *HRH Prince of Wales v Associated Newspapers Ltd [2006] EWCA Civ 1776*

[207] s.30(1),(2) & s.171(3) Copyright Designs and Patents Act 1988 (*c.48, 1988*)

[208] Although it was noted in court that many of the extracts taken verbatim were those which touched upon the claimant's opinion and which therefore were of the most interest to the newspaper's readers.

have no reasonable expectation that the journal be kept from the public[209]. While there may well be a public interest defence to breach of confidence cases, any such defence under copyright is far narrower, if it exists at all. Moreover, it is doubtful that an intention to eventually publish a work stops it from being confidential before it is published. If this were the case, publishing houses would not be able to control the launch date of their works, which would be disastrous for planning[210].

Both Blackburne J and Eady J determined that Art.10 ECHR1950 affirming freedom of the press, carried with it responsibilities, one of which was to prevent the disclosure of information received in confidence. It was held therefore, that the strong public interest in preserving the confidentiality of journals and communications within private offices, justified the interference with the defendant's right to freedom of expression[211]. Consequently, the application in respect of the claims in confidence concerning the Hong Kong journal were successful, and Associated Newspapers Ltd were ordered to pay Prince Charles damages accordingly. The claims in respect of the other journals however, were sent forward to trial.

Associated Newspapers Ltd petition to appeal the Court of Appeal judgment[212] was refused by the House of Lords in June 2007. Lord Phillips of Worth Matravers CJ, Sir Anthony Clarke MR and May LJ dismissed the petition on the following three points: (1) The unresolved issues of fact relating to the Prince's practice in relation to others seeing his journals, and his general conduct in making public his views and seeking to influence executive action, were not such as to require a trial; (2) The information was obviously

[209] Caddell, R.: 'Privacy and confidential documents – the 'secret' diary of Prince Charles: Associated Newspapers Ltd v His Royal Highness the Prince of Wales', *Communications Law*, Vol.12, No.2, February 2007, p68
[210] Hamilton, A.: 'Prince to sue over leak to paper', *The Times*, Saturday, 19 November 2005 [Online]
[211] Pinto, T.: 'A private and confidential update – not for publication', *Entertainment Law Review*, Vol.18, No.5, May 2007, p175
[212] *HRH The Prince of Wales v Associated Newspapers (No.3) (CA) [2007] 2 All ER 139*

both private and of a confidential nature, because of both the relationship within which it was disclosed and its nature. The manner in which Prince Charles treated the journal did not affect this – nobody receiving it would have felt entitled to publish it without permission. The fact that there was a breach of a contractual duty of confidence was a significant element to be weighed in the balance between Art.8 and Art.10. The test was not simply whether publication was in the public interest, but whether it was in the public interest that the duty of confidentiality should be breached. It was not; and (3) The publication was an infringement of Prince Charles' copyright.

The Mail on Sunday criticised the decision, claiming that: "*…a law of privacy is being developed by judges at a rapid pace without reference to Parliament. It is most regrettable that the House of Lords has, for the second time, failed in its constitutional duty to examine whether this represents a threat to free speech. It is surprising and disappointing that the House of Lords has, without giving any reasons, rejected the opportunity to hear an appeal on a matter so clearly in the public interest. This follows its recent refusal to hear the case of McKennitt v Ash which also involves important issues of freedom of expression. The ultimate loser is the general public, which is facing increasing restrictions on what it has a right to know*"[213].

On Wednesday, 2 May 2007, the House of Lords finally handed down its eagerly awaited judgements from the long-standing dispute between *OK!*, the Douglas's and *Hello!* in relation to three points: (1) whether the photographic imagery of the Douglas's wedding was an appropriate subject matter for a duty of confidence; (2) assuming a duty

[213] Associated Newspapers Ltd/*The Mail on Sunday* statement, Thursday, 14 June 2007

of confidence existed, whether it continued to apply after the publication of the approved photographs by *OK!*; and (3) if there was a breach of confidence, whether *OK!* should be compensated for losses sustained as a result[214]. All three appeals were heard simultaneously[215] and all concerned similar issues around two important areas of law: the tort of unlawfully causing economic loss, and the law of confidence[216].

The litigation had left the Court of Appeal in 2005 on the basis that *OK!* didn't have a proprietory interest in the confidential information within the unauthorised wedding photographs published by *Hello!* This left *OK!* with no damages, and because the loss it suffered as a result of the unauthorised photographs was valued at £1m, it was no surprise that *OK!* appealed to the House of Lords, the most powerful court in English law, in a last-ditch attempt to reclaim what it considered its due[217].

An enormous amount of media and legal interest surrounded the 2007 rulings as it was thought that finally, after a wait of nearly seven years, plus an estimated £8m in legal costs, that the House of Lords would give clarity to the issues of breach of confidence and privacy in English law. Unfortunately, when the decisions came they served only to highlight the problems that judges, in the absence of statutory guidelines, face when making difficult rulings in controversial cases.

In a 3-2 vote the judgement went narrowly in favour of *OK!* The majority, Baroness Hale, Lord Browne and Lord Hoffman (concurring), answered positively to all three questions; Lord Nicholls (dissenting), disagreed on point (2), and did not express an opinion on

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[214] Moscona, R.: 'Having paid for exclusivity one ought to be in a position to protect it – a new direction for the law of confidentiality?', *European Intellectual Property Review*, Vol. 29, No.10 October 2007, p430

[215] Bristow, G.: 'Douglas v *Hello!* and the protection of exclusivity', *The In-House Lawyer*, Vol.154, October 2007, p52

[216] '*OK!* v *Hello!* From bad to awful…', Intellectual Property & Information Law Blog from Freeth Cartwright LLP, 3 May 2007 [Online]

[217] Hall. S.: '*OK!* Triumphs in Zeta-Jones wedding photo war', E-Online News, 2 May 2007 [Online]

points (1) and (3); Lord Walker gave a dissenting opinion on all three points. However, the division between their Lordships on these three matters can only be described as severe and acerbic.

Figure 3.202 After a wait of nearly seven years, the House of Lords reached a result in a combined decision addressing three different appeals

Of the three concurring voices, Lord Hoffman (leading the majority view) warned against theory losing touch with reality – the 'reality' in his Lordships' view was that *OK!* paid £1m for the exclusivity and: "*…provided that one keeps one's eye firmly on the money and why it was paid, the case is, as Lindsay J held, quite straightforward*"[218]. His Lordship argued further that the photographs comprised information of a commercial value over which the couple could impose an obligation of confidence, and that simultaneous publication by *OK!* of those authorised photographs had not put the unauthorised images in the public domain out of the reach of the action[219]: "*Some may view with distaste a world in which information about the events of a wedding should be*

[218] Hoffman LJ in *Douglas v Hello! [2007] UKHL 21* at 117
[219] Black, G.: 'Douglas v *Hello!* – An *OK!* result', *Script-ed*, Vol.4, No.2, June 2007, p162

sold in the market in the same way as information about how to make a better mousetrap; but I see no reason why there should not be an obligation of confidence for the purpose of enabling someone to be the only source of publication if that is something worth paying for"[220].

However, Lord Nicholls (dissenting) could not agree with the assertion from *OK!* that *Hello!*'s surreptitious photography was an unlawful interference with its business, or a breach of its right to confidentiality: "*Let me assume, without deciding, that this generic class of information was confidential at the outset. Even so, this formulation of the commercial 'secret' leads nowhere, for the same reason as applies to the narrower formulation of the secret: the unapproved pictures contained nothing not included in the approved pictures, and the approved photographs were published at much the same time as the unapproved photographs*[221]*. For these reasons I am unable to accept OK!'s claim based on confidentiality*[222]".

At least their Lordships were unanimous on the matter of the tort of unlawfully causing economic loss, granting the appeal to *OK!*[223]. As a consequence, the damages award of £1,033,156 granted by the High Court in 2003[224] was reinstated. This is of critical relevance to commercial lawyers, both contentious and non-contentious as it demonstrates how far a business can go towards spoiling a rival's business interests, before it becomes a tort[225]. Of course, this may well leave their commercial clients

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[220] Hoffman LJ in *Douglas v Hello! [2007] UKHL 21* at 114

[221] Nicholls LJ in *Douglas v Hello! [2007] UKHL 21* at 259

[222] Nicholls LJ in *Douglas v Hello! [2007] UKHL 21* at 260

[223] Ridgway, S.: 'OBG Ltd v Allan, Douglas v *Hello!* Ltd and Mainstream Properties Ltd v Young', *Entertainment Law Review*, Vol.18, No.7, July 2007, pp92-93

[224] Moscona, R.: 'Having paid for exclusivity one ought to be in a position to protect it – a new direction for the law of confidentiality?', *European Intellectual Property Review*, Vol. 29, No.10 October 2007, p431

[225] '*OK!* v *Hello!* From bad to awful…', Intellectual Property & Information Law Blog from Freeth Cartwright LLP, 3 May 2007 [Online]

equally uncertain as to just what the law will protect and what it will not. *Hello!* had argued successfully before the Court of Appeal in 2005 that because no harm was meant at the outset, no economic loss was incurred as a result of the spoiler[226]. Their Lordships in 2007 unanimously disagreed.

In August 2007, another right to privacy case was brought before the High Court when David Murray, the four-year old son of author J. K. Rowling, unsuccessfully brought a claim of breach of confidence against Express Newspapers plc[227]. David Murray had been photographed using a long lens in November 2004, when just 18 months old, being pushed in a buggy by his father down an Edinburgh street with his mother walking alongside. The photograph had been taken without his parents' knowledge or consent, but the child had of course suffered no harm or distress as a result. The photograph was published in the *Sunday Express*, and the litigation friends sought an injunction to restrain further publication, citing *von Hannover v Germany*[228] and the right to privacy and family life for a child accorded in Art.8 ECHR1950 and HRA1998.

Mr Justice Patten, presiding, took into account the test that had been identified in *Campbell v MGN Ltd*[229] in determining whether the invasive conduct led to a reasonable expectation of privacy in respect of the disclosed facts; but concluded that where the individual was engaged in innocuous routine activity in a public place, such as a street, then that activity attracted no right or expectation of privacy and, accordingly, there was

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[226] Arnold, R.: 'Confidence in exclusives: Douglas v *Hello!* in the House of Lords', *European Intellectual Property Review*, Vol.29, No.8, August 2007, p341

[227] *Murray (by his litigation friends, Murray and another) v Express Newspapers plc and another [2007] EWHC 1908 (Ch D)*

[228] *Von Hannover v Germany (2005) 40 EHHR*

[229] *Campbell v MGN Ltd [2004] 2 AC 457*

no prohibition on the taking or publishing of photographs of famous people – or their children – engaged in such activity, unless there were special circumstances such as harassment or distress caused to the individual. The judge said: "*I have considerable sympathy for the claimant's parents and anyone else who wishes to shield their children from intrusive media attention. But the law does not, in my judgement, (as it stands) allow celebrities to carve out a press-free zone for their children in respect of absolutely everything they choose to do. Even after von Hannover, there remains, I believe, an area of routine activity which, when conducted in a public place, carries no guarantee of privacy. In my view this is just such a case*"[230].

Express Newspapers plc settled the claim, and Patten J struck out the remaining proceedings against Big Pictures (the celebrity picture agency who had originated the photograph), awarding them £40,000 interim costs against the Murray's, pending the outcome of an appeal and a final costs assessment. The judge did however impose a temporary ban on the publication of the photograph pending the appeal. In a statement, J. K. Rowling said that she and her husband Neil Murray intended to appeal the ruling: "*This judgement seems to have misunderstood our claim. Our aim has only been to protect our children from press intrusion during their childhood and we see no legitimate reason why, as in this case, David, who was less than two years of age at the time, should have his photograph taken and then published in the press. We take his, and that of his sibling's privacy and safety, very seriously*"[231].

Essentially, Patten J has drawn a clear distinction between *von Hannover v Germany* where a family engaging in sporting activities which were obviously intended to be

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[230] Patten J in *Murray v Express Newspapers plc [2007] EWHC 1908 (Ch D)* at 66

[231] J. K. Rowling, filing on behalf of her son under her married name of Joanne Murray, speaking to BBC News outside the High Court, 7 August 2007

enjoyed in the company of family/friends without intrusion would attract an expectation of privacy, and *Murray v Express Newspapers plc* where simple activities such as walking down a public street or visiting shops presumptively should not attract any reasonable expectation of privacy. No date for the appeal (if allowed) has yet been given.

Unlike many of the cases which have been detailed above, the 2007 *Douglas v Hello!* House of Lords three-point appeal concerned *OK!*'s claim to protect commercially confidential information, and nothing more. It was not concerned with the protection of privacy or the interpretation of Art.8 ECHR1950, and Lord Hoffman, despite his leading judgement, was quick to distance himself from the idea that, by finding favour with *OK!*, it furthered development of a law of privacy. He also said that he was not endorsing a personality right, or the right to sue for control of an image or any other hybrid form of intellectual property right.

Despite the judges themselves being at loggerheads on fundamental and important legal issues, with some confusion over the very nature of what is and what is not confidential information, he fact remains however, that the 2007 House of Lords rulings not only ended the long-running case of *Douglas v Hello!,* but should be welcomed as a timely contribution to the law of economic torts, if not assisting quite so much the development of the issues of breach of confidence.

3.03 The Privacy Act 2011?

The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste, the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilisation, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury"[232].

Written in 2008? Actually, no. It is a passage from one of the most influential legal articles ever written, '*The Right to Privacy*', by Samuel Warren and Louis Brandeis, and was first published in *Harvard Law Review*[233] in December 1890. How is it that something written one hundred and eighteen years ago, despite the slightly archaic sounding language, can appeal to us today as if it were written for our time? Are we to deduce that nothing has progressed in over a century of law? Of course not.

The reason that Warren and Brandeis can cry out to us here in the twenty-first century is because all citizens, now, as then, require a genuine belief that a fundamental degree of

[232] Warren, S.D., Brandeis, L.D.: 'The Right to Privacy', *Harvard Law Review*, Vol.4. No.5, 15 December 1890
[233] *Ibid.*

privacy can be guaranteed through statutory right in order to protect them. On this basis our civilisation is built, our democracy stands and our freedoms are defined. Rightly or wrongly, without this belief anarchy would reign. Therefore, the question must be are we likely to ever get such a positive statutory guarantee in English law as a Privacy Act?

Figure 3.301 The Privacy Act 2011… but will it ever happen in English law?

Parliament has proved reticent beyond belief on this subject thus far, and despite committees and conferences, court cases and conventions, the truth is that in 2008 we are no closer to defining legislation than we were on that day in November 2000 when Rupert Thorpe snapped his illicit wedding photographs… or are we? Ever more sophisticated techniques of surveillance and interception of communications are being developed, and the law can hardly keep up. Every criminal justice bill includes more powers for state agencies to take personal information from the citizen, to share it with other agencies and there is even talk of identity cards yet again[234].

[234] Singh, R.: 'Right Time', *The Guardian*, Saturday, 21 September 2002, p11

Centuries ago, the right to property was established as a fundamental right in English law through Magna Carta to the court battles of John Wilkes[235] in the 18th Century; and everyone knows that an Englishman's home is his castle, but perhaps few know that Chief Justice Coke[236] is believed to have originated this as a legal principle in the early 1600s[237].

Perhaps, just perhaps, with the actions of a few bold judges ringing in our ears, who now make law on their own from the highest courts in our land, the time has come to proclaim a right of privacy from the rooftops.

[235] John Wilkes (17 October 1725 – 26 December 1797) was an English radical, journalist and politician who fought for the rights of voters, rather than the House of Commons, to determine their representatives

[236] Sir Edward Coke (1 February 1552 – 3 September 1634), Chief Justice (1616-1620), the jurist whose writings on the English common law were the definitive legal texts for the next 300 years

[237] Singh, R.: 'Right Time', *The Guardian*, Saturday, 21 September 2002, p11

Conclusion

Lord Hoffman made clear the importance of not being distracted by discussion about the European Convention on Human Rights and the development of privacy law in the United Kingdom. He said that OK! had no claim to privacy under the convention, nor could it make a 'parasitic claim' based upon the Douglas's right to privacy. Its claim was based entirely on protecting commercially confidential information.

Analysis of Lord Hoffman's ruling in Douglas v Hello! [2007] UKHL 21

The purpose of this research was two-fold: first, to conclude whether or not, in the light of the developments cumulating in the 2007 House of Lords decision in *Douglas v Hello!*, everybody now has a right to privacy and confidentiality under the HRA1998 and Art.8 ECHR1950; and secondly, if this were the case, where does this leave media law in relation to HRA1998 and Art.10 ECHR1950?

The first chapter of this study asks the necessary question 'what is privacy?'. We define privacy as the quality of being secluded from the presence or view of others; it is the ability of an individual or group to keep their lives and personal affairs out of public view, or to control the flow of information about themselves. Privacy is sometimes related to anonymity, although ironically it is often most highly valued by people who are publicly known, as demonstrated in *Douglas v Hello!*, *Campbell v MGN*, *Theakston v MGN* and *von Hannover v Germany*.

Like the Douglas's, Ms Campbell is no stranger to publicity, yet when photographs of her were published in a manner which she deemed intrusive, did everything in her power to prevent them from being used in a manner detrimental to her image. The Douglas's, Jamie Theakston and Princess Caroline all sought to prevent publication of images which they felt breached their rights to privacy under Art.8 ECHR1950; though the judges in each case concurred with their arguments in varying degrees.

In the case of the Douglas's it was a straightforward breach of confidentiality; Jamie Theakston was able to prevent images of him in a London brothel only because they were deemed intrusive and, significantly, because they were used in a manner intended to blackmail him. Princess Caroline fought a long and hard battle across the courts of Europe, before the ECtHR determined that she, like anybody else, and in spite of her public profile, should have an expectation of privacy when on those occasions clearly her activities are of no public interest.

The second chapter of this study examines the conflict between the right to privacy – Art.8 ECHR1950 – and the right to freedom of the press – Art.10 ECHR1950, both of which are enshrined in English law in the HRA1998. Over the period of the *Douglas v Hello!* case(s), roughly seven and a half years, there have been numerous calls from various bodies, both inside and outside the legislature, executive and judiciary, to address the problem of the lack of a tort of privacy.

Even the Government-backed report from the House of Commons Culture, Media and Sport Committee in June 2003 recommended that it was time for a law of privacy;

though it stopped short of anything other than self-regulation through bodies such as the Press Complaints Commission. However, the problem with self-regulation is who regulates the regulator? In the past, the Press Complaints Commission Code of Practice has often fallen woefully short of restraining over-exuberant news editors with the scent of a scoop in their nostrils. Why should a future, self-regulated body, be any different operating under statutory regulations? The simple fact is that it probably wouldn't.

Figure 4.101 The Press Complaints Commission Code of Practice, but as a self-regulatory body, can it really be entirely impartial?

The third chapter of the study looks specifically at the landmark rulings in 2006 and 2007 from *McKennitt v Ash*, *Prince of Wales v Associated Newspapers*, *Murray v Express Newspapers* and of course the resolution to *Douglas v Hello!* English law has always protected, albeit partially, confidential personal information; but, in the post-HRA1998 era the courts have stopped short of introducing a tort of privacy, instead choosing to interpret and develop the action for breach of confidence in a way which now provides (or at least seems to provide, dependant upon the circumstances) a much fuller protection of privacy.

If we go back for a moment to the original requirements in *Coco v Clark* and the ruling of Megarry J, two significant changes have occurred as a result of these case law developments: first, instead of asking whether information is 'confidential', courts now ask whether it is 'private' – the favoured test being 'a reasonable expectation of privacy'. Second, where 'private' information does exist, this is sufficient to establish a duty of confidentiality or, at least a duty not to disclose the information. This is so even in the absence of a relationship of confidence (as determined by Lord Woolf in *A v B & C*); in other words, the second requirement of *Coco v Clark*, at least in relation to private or personal information, is now redundant[238].

Certainly the study undertaken by the author has determined, without doubt, that over the seven and a half years since Michael Douglas and Catherine Zeta-Jones were married, the law of privacy – or rather the lack of one – has caused case after case to traverse the corridors of justice, verifying it to be a thorn in the side of English law. The 2007 House of Lords rulings may well have put an end to the long-running case(s) of *Douglas v Hello!*, but the judgements have also proved perplexingly inconclusive with regards to the question of whether or not everybody now has a right to privacy.

Long before the HRA1998 came into force, English law was fully aware of the effect of the ECHR1950, and with it the conflict between Art.8 and Art.10. In spite of this, in October 2003, the House of Lords ruled in *Wainwright v Home Office* that there was no

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[238] Aplin, T.: 'The development of the action for breach of confidence in the post-HRA era', *Intellectual Property Quarterly*, No.1, 2007, p59

tort of invasion of privacy under English law[239]. The ECtHR, when giving judgment in favour of the Wainwright's in September 2006[240] noted this deficiency, which had denied the claimants an effective remedy.

Figure 4.102 The courts have been trying to balance privacy with the right of freedom of expression, which always exists in media cases. The law is being developed however, by the judges on a case-by-case basis

Following the December 2006 ruling in *CC v AB*[241] where an adulterer was able to prevent the husband of a woman with whom he committed adultery from publishing that fact, certain limitations on the freedom of speech which had long been assumed, were judicially imposed. The reasons for this prohibition are either good or erroneous, depending upon your point of view, but at the moment that is the legal position[242]. With Parliament continuously failing to grasp the nettle of legislating on this matter, it has been left to the courts to introduce what amounts to a *de facto* privacy law framed around the tort of confidentiality, the HRA1998 and competing rights in the ECHR1950.

The Lords' ruling in favour of *OK!* in May 2007 has, if anything, merely transformed the law on image rights, rather than shed any specific clarity on privacy rights *per se*. Media

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239 *Wainwright v Home Office [2003] UKHL 53*
240 *Wainwright v United Kingdom (Application No. 12350/04)*
241 *CC v AB [2006] EWHC 3083 (QB)*
242 'Constitutional changes in the UK – Editorial', The Lawyers' Help [Online]

owners therefore, must surely be rubbing their hands in glee at the prospect of the implications, as the value of the rights in which they hold an interest will surely increase enormously. Richard Slowe, litigation partner at SJ Berwin, acting on behalf of *OK!* says: "*It is not just photographs that have confidentiality in an event, it's the way that celebrities can now control the press which has become extraordinarily intrusive. Make no mistake; this will severely limit the press*"[243].

In conclusion therefore, the author would argue that the relationship between freedom of expression and the right to privacy and private life has been wrongly conceptualised. That in fact, both Art.8 and Art.10 ECHR1950 interests serve the same underlying set of values, but that problems arise when these two conflicting interests are balanced in the abstract, rather than in context. Thus, any future law of privacy designed to restrict the type or amount of information that can be conveyed without detriment, will surely first have to address precisely what it means to have a private life, and then, just how much of that privacy can be construed to be part of the public interest.

Kahlil Gibran[244] said: "*If you reveal your secrets to the wind, you should not blame the wind for revealing them to the trees*"[245]. Perhaps today we should take our lesson from: "*Hell hath no fury like a bride crossed on her wedding day!*".

[243] 'Lords' *OK!* ruling creates image rights monopoly', *The Lawyer*, Vol.21, No.18, p13

[244] Kahlil Gibran (Gibran Kahlil Gibran bin Mikhael bin Saâd) (6 January 1883 – 10 April 1931) was a Lebanese/American artist, poet and writer.

[245] Gibran Kahlil Gibran bin Mikhael bin Saâd, '*Sand and Foam*' (1926)

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Appendix I

Press Complaints Commission Code of Practice

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The Press Complaints Commission is charged with enforcing the following Code of Practice which was framed by the newspaper and periodical industry and was ratified by the PCC on 01 August 2007.

THE CODE

All members of the press have a duty to maintain the highest professional standards. The Code, which includes this preamble and the public interest exceptions below, sets the benchmark for those ethical standards, protecting both the rights of the individual and the public's right to know. It is the cornerstone of the system of self-regulation to which the industry has made a binding commitment.

It is essential that an agreed code be honoured not only to the letter but in the full spirit. It should not be interpreted so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it constitutes an unnecessary interference with freedom of expression or prevents publication in the public interest.

It is the responsibility of editors and publishers to apply the Code to editorial material in both printed and online versions of publications. They should take care to ensure it is observed rigorously by all editorial staff and external contributors, including non-journalists, in printed and online versions of publications.

Editors should co-operate swiftly with the PCC in the resolution of complaints. Any publication judged to have breached the Code must print the adjudication in full and with due prominence, including headline reference to the PCC.

1 **Accuracy**

i) The Press must take care not to publish inaccurate, misleading or distorted information, including pictures.

ii) A significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and - where appropriate - an apology published.

iii) The Press, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact.

iv) A publication must report fairly and accurately the outcome of an action for

defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.

2 **Opportunity to reply**

A fair opportunity for reply to inaccuracies must be given when reasonably called for.

3 ***Privacy**

i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications. Editors will be expected to justify intrusions into any individual's private life without consent.

ii) It is unacceptable to photograph individuals in private places without their consent.

Note - Private places are public or private property where there is a reasonable expectation of privacy.

4 ***Harassment**

i) Journalists must not engage in intimidation, harassment or persistent pursuit.

ii) They must not persist in questioning, telephoning, pursuing or photographing individuals once asked to desist; nor remain on their property when asked to leave and must not follow them.

iii) Editors must ensure these principles are observed by those working for them and take care not to use non-compliant material from other sources.

5 **Intrusion into grief or shock**

i) In cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion and publication handled sensitively. This should not restrict the right to report legal proceedings, such as inquests.

*ii) When reporting suicide, care should be taken to avoid excessive detail about the method used.

6 ***Children**

i) Young people should be free to complete their time at school without unnecessary intrusion.

ii) A child under 16 must not be interviewed or photographed on issues involving their own or another child's welfare unless a custodial parent or similarly responsible adult consents.

iii) Pupils must not be approached or photographed at school without the permission of the school authorities.

iv) Minors must not be paid for material involving children's welfare, nor parents or guardians for material about their children or wards, unless it is clearly in the child's interest.

v) Editors must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child's private life.

7 ***Children in sex cases**

1. The press must not, even if legally free to do so, identify children under 16 who are victims or witnesses in cases involving sex offences.

2. In any press report of a case involving a sexual offence against a child -

i) The child must not be identified.

ii) The adult may be identified.

iii) The word "incest" must not be used where a child victim might be identified.

iv) Care must be taken that nothing in the report implies the relationship between the accused and the child.

8 ***Hospitals**

i) Journalists must identify themselves and obtain permission from a responsible executive before entering non-public areas of hospitals or similar institutions to pursue enquiries.

ii) The restrictions on intruding into privacy are particularly relevant to enquiries about individuals in hospitals or similar institutions.

9 ***Reporting of Crime**

(i) Relatives or friends of persons convicted or accused of crime should not generally be identified without their consent, unless they are genuinely relevant to the story.

(ii) Particular regard should be paid to the potentially vulnerable position of children who witness, or are victims of, crime. This should not restrict the right to report legal proceedings.

10 ***Clandestine devices and subterfuge**

i) The press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls, messages or emails; or by the unauthorised removal of documents or photographs; or by accessing digitally-held private information without consent.

ii) Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only in the public interest and then only when the material cannot be obtained by other means.

11 **Victims of sexual assault**

The press must not identify victims of sexual assault or publish material likely to contribute to such identification unless there is adequate justification and they are legally free to do so.

12 **Discrimination**

i) The press must avoid prejudicial or pejorative reference to an individual's race, colour, religion, gender, sexual orientation or to any physical or mental illness or disability.

ii) Details of an individual's race, colour, religion, sexual orientation, physical or mental illness or disability must be avoided unless genuinely relevant to the story.

13 **Financial journalism**

i) Even where the law does not prohibit it, journalists must not use for their own profit financial information they receive in advance of its general publication, nor should they pass such information to others.

ii) They must not write about shares or securities in whose performance they know that they or their close families have a significant financial interest without disclosing the interest to the editor or financial editor.

iii) They must not buy or sell, either directly or through nominees or agents, shares or securities about which they have written recently or about which they intend to write in the near future.

14 **Confidential sources**

Journalists have a moral obligation to protect confidential sources of information.

15 **Witness payments in criminal trials**

i) No payment or offer of payment to a witness - or any person who may reasonably be expected to be called as a witness - should be made in any case once proceedings are active as defined by the Contempt of Court Act 1981.

This prohibition lasts until the suspect has been freed unconditionally by police without charge or bail or the proceedings are otherwise discontinued; or has entered a guilty plea to the court; or, in the event of a not guilty plea, the court has announced its verdict.

*ii) Where proceedings are not yet active but are likely and foreseeable, editors must not make or offer payment to any person who may reasonably be expected to be called as a witness, unless the information concerned ought demonstrably to be published in the public interest and there is an over-riding need to make or promise payment for this to be done; and all reasonable steps have been taken to ensure no financial dealings influence the evidence those witnesses give. In no circumstances should such payment be conditional on the outcome of a trial.

*iii) Any payment or offer of payment made to a person later cited to give evidence in proceedings must be disclosed to the prosecution and defence. The witness must be advised of this requirement.

16 ***Payment to criminals**

i) Payment or offers of payment for stories, pictures or information, which seek to exploit a particular crime or to glorify or glamorise crime in general, must not be made directly or via agents to convicted or confessed criminals or to their associates – who may include family, friends and colleagues.

ii) Editors invoking the public interest to justify payment or offers would need to demonstrate that there was good reason to believe the public interest would be served. If, despite payment, no public interest emerged, then the material should not be published.

THE PUBLIC INTEREST

There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.

1. The public interest includes, but is not confined to:

i) Detecting or exposing crime or serious impropriety.

ii) Protecting public health and safety.

iii) Preventing the public from being misled by an action or statement of an individual or organisation.

2. There is a public interest in freedom of expression itself.

3. Whenever the public interest is invoked, the PCC will require editors to demonstrate fully how the public interest was served.

4. The PCC will consider the extent to which material is already in the public domain, or will become so.

5. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.

Appendix II

Ofcom Broadcasting Code

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(Relevant legislation includes, in particular, sections 3(2)(f) and 326 of the Communications Act 2003, sections 107(1) and 130 of the Broadcasting Act 1996 (as amended), and Articles 8 and 10 of the European Convention on Human Rights.)

Section Eight

Privacy

Foreword

This section and the preceding section on fairness are different from other sections of the Code. They apply to how broadcasters treat the individuals or organisations directly affected by programmes, rather than to what the general public sees and/or hears as viewers and listeners.

As well as containing a principle and a rule this section contains "practices to be followed" by broadcasters when dealing with individuals or organisations participating or otherwise directly affected by programmes, or in the making of programmes. Following these practices will not necessarily avoid a breach of this section. *However, failure to follow these practices will only constitute a breach of this section of the Code (Rule 8.1) where it results in an unwarranted infringement of privacy.* Importantly, the Code does not and cannot seek to set out all the "practices to be followed" in order to avoid an unwarranted infringement of privacy.

The Broadcasting Act 1996 (as amended) requires Ofcom to consider complaints about unwarranted infringements of privacy in a programme or in connection with the obtaining of material included in a programme. This may call for some difficult on-the-spot judgments about whether privacy is unwarrantably infringed by filming or recording, especially when reporting on emergency situations ("practices to be followed" 8.5 to 8.8 and 8.16 to 8.19). We recognise there may be a strong public interest in reporting on an emergency situation as it occurs and we understand there may be pressures on broadcasters at the scene of a disaster or emergency that may make it difficult to judge at the time whether filming or recording is an unwarrantable infringement of privacy. These are factors Ofcom will take into account when adjudicating on complaints.

Where consent is referred to in Section Eight it refers to informed consent. Please see "practice to be followed" 7.3 in Section Seven: Fairness.

Principle

To ensure that broadcasters avoid any unwarranted infringement of privacy in programmes and in connection with obtaining material included in programmes.

Rule

8.1 Any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

Meaning of "warranted":

In this section “warranted” has a particular meaning. It means that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.

Practices to be followed (8.2 to 8.22)

Private lives, public places and legitimate expectation of privacy

Meaning of "legitimate expectation of privacy":

> Legitimate expectations of privacy will vary according to the place and nature of the information, activity or condition in question, the extent to which it is in the public domain (if at all) and whether the individual concerned is already in the public eye. There may be circumstances where people can reasonably expect privacy even in a public place. Some activities and conditions may be of such a private nature that filming or recording, even in a public place, could involve an infringement of privacy. People under investigation or in the public eye, and their immediate family and friends, retain the right to a private life, although private behaviour can raise issues of legitimate public interest.

8.2 Information which discloses the location of a person's home or family should not be revealed without permission, unless it is warranted.

8.3 When people are caught up in events which are covered by the news they still have a right to privacy in both the making and the broadcast of a programme, unless it is warranted to infringe it. This applies both to the time when these events are taking place and to any later programmes that revisit those events.

8.4 Broadcasters should ensure that words, images or actions filmed or recorded in, or broadcast from, a public place, are not so private that prior consent is required before

broadcast from the individual or organisation concerned, unless broadcasting without their consent is warranted.

Consent

8.5 Any infringement of privacy in the making of a programme should be with the person’s and/or organisation’s consent or be otherwise warranted.

8.6 If the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted. (Callers to phone-in shows are deemed to have given consent to the broadcast of their contribution.)

8.7 If an individual or organisation's privacy is being infringed, and they ask that the filming, recording or live broadcast be stopped, the broadcaster should do so, unless it is warranted to continue.

8.8 When filming or recording in institutions, organisations or other agencies, permission should be obtained from the relevant authority or management, unless it is warranted to film or record without permission. Individual consent of employees or others whose appearance is incidental or where they are essentially anonymous members of the general public will not normally be required.

- However, in potentially sensitive places such as ambulances, hospitals, schools, prisons or police stations, separate consent should normally be obtained before filming or recording and for broadcast from those in sensitive situations (unless not obtaining consent is warranted). If the individual will not be identifiable in the programme then separate consent for broadcast will not be required.

Gathering information, sound or images and the re-use of material

8.9 The means of obtaining material must be proportionate in all the circumstances and in particular to the subject matter of the programme.

8.10 Broadcasters should ensure that the re-use of material, i.e. use of material originally filmed or recorded for one purpose and then used in a programme for another purpose or used in a later or different programme, does not create an unwarranted infringement of privacy. This applies both to material obtained from others and the broadcaster's own material.

8.11 Doorstepping for factual programmes should not take place unless a request for an interview has been refused or it has not been possible to request an interview, or there is good reason to believe that an investigation will be frustrated if the subject is approached openly, and it is warranted to doorstep. However, normally broadcasters may, without prior warning interview, film or record people in the news when in public places.

(See “practice to be followed” 8.15.)

Meaning of "doorstepping":

> Doorstepping is the filming or recording of an interview or attempted interview with someone, or announcing that a call is being filmed or recorded for broadcast purposes, without any prior warning. It does not, however, include vox-pops (sampling the views of random members of the public).

8.12 Broadcasters can record telephone calls between the broadcaster and the other party if they have, from the outset of the call, identified themselves, explained the purpose of the call and that the call is being recorded for possible broadcast (if that is the case) unless it is warranted not to do one or more of these practices. If at a later stage it becomes clear that a call that has been recorded will be broadcast (but this was not explained to the other party at the time of the call) then the broadcaster must obtain consent before broadcast from the other party, unless it is warranted not to do so.

(See “practices to be followed” 7.14 and 8.13 to 8.15.)

8.13 Surreptitious filming or recording should only be used where it is warranted. Normally, it will only be warranted if:

- there is prima facie evidence of a story in the public interest; and
- there are reasonable grounds to suspect that further material evidence could be obtained; and
- it is necessary to the credibility and authenticity of the programme.

(See “practices to be followed” 7.14, 8.12, 8.14 and 8.15.)

Meaning of "surreptitious filming or recording":

> Surreptitious filming or recording includes the use of long lenses or recording devices, as well as leaving an unattended camera or recording device on private property without the full and informed consent of the occupiers or their agent. It may also include recording telephone conversations without the knowledge of the other party, or deliberately continuing a recording when the other party thinks that it has come to an end.

8.14 Material gained by surreptitious filming and recording should only be broadcast when it is warranted

(See also “practices to be followed” 7.14 and 8.12 to 8.13 and 8.15.)

8.15 Surreptitious filming or recording, doorstepping or recorded ‘wind-up’ calls to obtain material for entertainment purposes may be warranted if it is intrinsic to the entertainment and does not amount to a significant infringement of privacy such as to cause significant annoyance, distress or embarrassment. The resulting material should not be broadcast without the consent of those involved. However if the individual and/or

organisation is not identifiable in the programme then consent for broadcast will not be required.

(See "practices to be followed" 7.14 and 8.11 to 8.14.)

Suffering and distress

8.16 Broadcasters should not take or broadcast footage or audio of people caught up in emergencies, victims of accidents or those suffering a personal tragedy, even in a public place, where that results in an infringement of privacy, unless it is warranted or the people concerned have given consent.

8.17 People in a state of distress should not be put under pressure to take part in a programme or provide interviews, unless it is warranted.

8.18 Broadcasters should take care not to reveal the identity of a person who has died or of victims of accidents or violent crimes, unless and until it is clear that the next of kin have been informed of the event or unless it is warranted.

8.19 Broadcasters should try to reduce the potential distress to victims and/or relatives when making or broadcasting programmes intended to examine past events that involve trauma to individuals (including crime) unless it is warranted to do otherwise. This applies to dramatic reconstructions and factual dramas, as well as factual programmes.

- In particular, so far as is reasonably practicable, surviving victims, and/or the immediate families of those whose experience is to feature in a programme, should be informed of the plans for the programme and its intended broadcast, even if the events or material to be broadcast have been in the public domain in the past.

People under sixteen and vulnerable people

8.20 Broadcasters should pay particular attention to the privacy of people under sixteen. They do not lose their rights to privacy because, for example, of the fame or notoriety of their parents or because of events in their schools.

8.21 Where a programme features an individual under sixteen or a vulnerable person in a way that infringes privacy, consent must be obtained from:

- a parent, guardian or other person of eighteen or over in loco parentis; and
- wherever possible, the individual concerned;

unless the subject matter is trivial or uncontroversial and the participation minor, or it is warranted to proceed without consent.

8.22 Persons under sixteen and vulnerable people should not be questioned about private matters without the consent of a parent, guardian or other person of eighteen or over in loco parentis (in the case of persons under sixteen), or a person with primary responsibility for their care (in the case of a vulnerable person), unless it is warranted to proceed without consent.

Meaning of "vulnerable people":

> This varies, but may include those with learning difficulties, those with mental health problems, the bereaved, people with brain damage or forms of dementia, people who have been traumatised or who are sick or terminally ill.

Appendix III

The European Convention on Human Rights 1950

ARTICLE 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Appendix IV

The Human Rights Act 1998 (c.42, 1998)

An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes. [9th November 1998]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Introduction

1 The Convention Rights

(1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in—

(a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol, and

(c) Articles 1 and 2 of the Sixth Protocol,

as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

(4) The Secretary of State may by order make such amendments to this Act as he considers appropriate to reflect the effect, in relation to the United Kingdom, of a protocol.

(5) In subsection (4) "protocol" means a protocol to the Convention—

(a) which the United Kingdom has ratified; or

(b) which the United Kingdom has signed with a view to ratification.

(6) No amendment may be made by an order under subsection (4) so as to come into force before the protocol concerned is in force in relation to the United Kingdom.

2 Interpretation of Convention rights

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(3) In this section "rules" means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section—

(a) by the Lord Chancellor or the Secretary of State, in relation to any proceedings outside Scotland;

(b) by the Secretary of State, in relation to proceedings in Scotland; or

(c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland—

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force.

Legislation

3 Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

4 Declaration of incompatibility

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied—

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.

(5) In this section "court" means—

(a) the House of Lords;

(b) the Judicial Committee of the Privy Council;

(c) the Courts-Martial Appeal Court;

(d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;

(e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.

(6) A declaration under this section ("a declaration of incompatibility")—

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

5 Right of Crown to intervene

(1) Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court.

(2) In any case to which subsection (1) applies—

(a) a Minister of the Crown (or a person nominated by him),

(b) a member of the Scottish Executive,

(c) a Northern Ireland Minister,

(d) a Northern Ireland department,

is entitled, on giving notice in accordance with rules of court, to be joined as a party to the proceedings.

(3) Notice under subsection (2) may be given at any time during the proceedings.

(4) A person who has been made a party to criminal proceedings (other than in Scotland) as the result of a notice under subsection (2) may, with leave, appeal to the House of Lords against any declaration of incompatibility made in the proceedings.

(5) In subsection (4)— “criminal proceedings” includes all proceedings before the Courts-Martial Appeal Court; and “leave” means leave granted by the court making the declaration of incompatibility or by the House of Lords.

Public authorities

6 Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section “public authority” includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) “Parliament” does not include the House of Lords in its judicial capacity.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) “An act” includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

7 Proceedings

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

(4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.

(5) Proceedings under subsection (1)(a) must be brought before the end of—

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances, but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) "legal proceedings" includes—

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

(8) Nothing in this Act creates a criminal offence.

(9) In this section "rules" means—

(a) in relation to proceedings before a court or tribunal outside Scotland, rules made by the Lord Chancellor or the Secretary of State for the purposes of this section or rules of court,

(b) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes,

(c) in relation to proceedings before a tribunal in Northern Ireland—

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force,

rules made by a Northern Ireland department for those purposes, and includes provision made by order under section 1 of the [1990 c. 41.] Courts and Legal Services Act 1990.

(10) In making rules, regard must be had to section 9.

(11) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to—

(a) the relief or remedies which the tribunal may grant; or

(b) the grounds on which it may grant any of them.

(12) An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.

(13) "The Minister" includes the Northern Ireland department concerned.

8 Judicial remedies

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

(5) A public authority against which damages are awarded is to be treated—

(a) in Scotland, for the purposes of section 3 of the [1940 c. 42.] Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;

(b) for the purposes of the [1978 c. 47.] Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.

(6) In this section— "court" includes a tribunal; "damages" means damages for an unlawful act of a public authority; and "unlawful" means unlawful under section 6(1).

9 Judicial acts

(1) Proceedings under section 7(1)(a) in respect of a judicial act may be brought only—

(a) by exercising a right of appeal;

(b) on an application (in Scotland a petition) for judicial review; or

(c) in such other forum as may be prescribed by rules.

(2) That does not affect any rule of law which prevents a court from being the subject of judicial review.

(3) In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention.

(4) An award of damages permitted by subsection (3) is to be made against the Crown; but no award may be made unless the appropriate person, if not a party to the proceedings, is joined.

(5) In this section— "appropriate person" means the Minister responsible for the court concerned, or a person or government department nominated by him; "court" includes a tribunal; "judge" includes a member of a tribunal, a justice of the peace and a clerk or other officer entitled to exercise the jurisdiction of a court; "judicial act" means a judicial act of a court and includes an act done on the instructions, or on behalf, of a judge; and "rules" has the same meaning as in section 7(9).

Remedial action

10 Power to take remedial action

(1) This section applies if—

(a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies—

(i) all persons who may appeal have stated in writing that they do not intend to do so;

(ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or

(iii) an appeal brought within that time has been determined or abandoned; or

(b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made

after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.

(3) If, in the case of subordinate legislation, a Minister of the Crown considers—

(a) that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and

(b) that there are compelling reasons for proceeding under this section, he may by order make such amendments to the primary legislation as he considers necessary.

(4) This section also applies where the provision in question is in subordinate legislation and has been quashed, or declared invalid, by reason of incompatibility with a Convention right and the Minister proposes to proceed under paragraph 2(b) of Sch 2.

(5) If the legislation is an Order in Council, the power conferred by subsection (2) or (3) is exercisable by Her Majesty in Council.

(6) In this section "legislation" does not include a Measure of the Church Assembly or of the General Synod of the Church of England.

(7) Schedule 2 makes further provision about remedial orders.

Other rights and proceedings

11 Safeguard for existing human rights

A person's reliance on a Convention right does not restrict—

(a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or

(b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9.

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.

(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(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).

13 Freedom of thought, conscience and religion

(1) If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

(2) In this section "court" includes a tribunal.

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