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### Protecting Privacy

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Commission<sup>9</sup> are not principles at all, but model rules in the form of a code. The von Bar group is called the Study Group on a European Civil Code. It will produce documents which may be called Principles but which will really be draft codes. The “optional instrument” envisaged by the European Commission would probably be in the form of a draft code. Even if the word “code” is often carefully avoided, the idea of codification is alive and well at European level. And that idea in its modern form comes straight from the French civil code. The drafters of all these European instruments are trying, consciously or subconsciously, to follow the style and general approach pioneered by the drafters of the French civil code and, if they are not, they should be!

So I end as I began. Let us pay homage to the *Code civil* on its bicentenary. It brought harmony where there was diversity. It gave the community it served good laws in a good form. It established a new legal base in tune with the needs and values of the times but manifestly did not prevent further development of the law in response to changing needs and changing values. May its influence live on forever.

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## Protecting Privacy

In *Campbell v MGN Newspapers Ltd*<sup>1</sup> the House of Lords held, by a majority of 3-2, that the action for breach of confidence could be used to give a remedy to the “supermodel” Naomi Campbell<sup>2</sup> in respect of an article and photograph published in the *Daily Mirror* newspaper on 1 February 2001 (i.e. some four months after the Human Rights Act 1998 had come into force on 2 October 2000). The *Mirror* story had exposed the falsity of Campbell’s earlier public denials of her drug addiction, by telling of her course of treatment with Narcotics Anonymous. The case has been heralded as an important step towards the common law protection of individual privacy. It thus appears to contrast with the earlier decision of the House in the strip-searching case of *Wainwright v Home Office*,<sup>3</sup> noted in the last issue of the *Edinburgh Law Review*,<sup>4</sup> that English common law before 2 October 2000 did not recognise a general right of privacy. *Wainwright* did however accept that the law of confidential information was developing to protect privacy, and *Campbell* therefore merely confirms and reinforces that acceptance, leaving *Wainwright*’s denial of a general right of privacy unaffected.<sup>5</sup> Indeed the House is effectively unanimous on the law; the difference of view between the majority and the minority is essentially on how to apply it to the facts of the case before it.

The essential principle is that personal as well as commercial information should be treated as confidential by a person who knows or ought to know that the other person has a reasonable

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9 See note 5 above.

1 [2004] UKHL 22; 2 WLR 1232; 2 All ER 995 (HL).

2 “Even the judges know who Naomi Campbell is” (Baroness Hale of Richmond at para 127).

3 [2003] UKHL 53; 3 WLR 1137; 4 All ER 969 (HL).

4 H L MacQueen, “Protecting privacy” (2004) 8 EdinLR 249.

5 For the lack of effect on the *Wainwright* conclusion see Lord Hoffmann at para 43 and Baroness Hale at para 133.

expectation that it will be respected as private.<sup>6</sup> There is no need for a pre-existing relationship of confidence between the parties or for the party to whom the duty is owed to have imparted the information to the other subject under an express or implied obligation of confidence. The law might well be better described as being about the misuse of private information.<sup>7</sup> Articles 8 and 10 of the European Convention on Human Rights, on respect for privacy and freedom of expression respectively, had already (in the “Spycatcher” case in 1989<sup>8</sup>) been brought into the law as pre-eminent factors for consideration in weighing the competing interests in such cases. But, consistently with Resolution 1165 of the Parliamentary Assembly of the Council of Europe in 1998, neither right is absolute or outweighs the other.<sup>9</sup> Although section 12(4) of the Human Rights Act enjoins the courts to have “particular regard” for freedom of expression, the right itself is not unqualified, and requires regard at least for the right of privacy as well.<sup>10</sup>

The case proceeded on the common ground that the *Mirror*’s revelations could be placed in five categories: (1) Campbell’s drug addiction; (2) her treatment for it; (3) the provision of the treatment by Narcotics Anonymous; (4) details of the treatment, such as its length, frequency and form; (5) the photograph showing Campbell on the street as she left a specific meeting with other addicts (whose faces were pixillated in the published version). All the judges accepted that items (1) and (2) could be published by the *Mirror*, given Campbell’s previous untruths on the subject. The differences between them emerged with regard to (3), (4) and (5).

For the majority, the publication of this information went beyond what was needed to rebut Campbell’s claims and impermissibly entered her private sphere. Information about a person’s health and treatment therefor is both private and confidential.<sup>11</sup> Indeed, at the heart of the Narcotics Anonymous treatment was client anonymity; such therapy was “obviously private”.<sup>12</sup> The possible adverse effects of unauthorised publication could not be foreseen. The *Mirror* could only have acquired its information from someone else taking the course of treatment with Campbell, or from a member of her entourage, adding to the victim’s sense of betrayal.<sup>13</sup> With obviously private information there was no need to ask whether its publication would be “highly offensive”.<sup>14</sup> While “the law of privacy is not intended for the protection of the unduly sensitive”,<sup>15</sup> the correct perspective was that of the reasonable person of ordinary sensibilities in the same position as the victim of the disclosure, i.e. a mixture of the objective with the subjective.<sup>16</sup> In favour of the *Mirror*’s freedom of expression was the journalist’s duty to impart to the public

6 The principle is taken to have been established in the speech of Lord Goff of Chieveley in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 281.

7 See in particular Lord Nicholls at para 14. Cf the approach of the New Zealand Court of Appeal in *Hosking v Runting* [2004] NZCA 34 (to which there is reference in *Campbell*, but in which the majority of the court recognises a right of action for breach of privacy by giving publicity to private and personal information, separate from breach of confidence). The courts in both *Campbell* and *Hosking* refer approvingly to the important article by Gavin Phillipson, “Transforming breach of confidence? Towards a common law of privacy under the Human Rights Act” (2003) 66 MLR 726.

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

9 Lord Nicholls at para 12; Lord Hoffmann at para 55; Lord Hope of Craighead at para 113; Baroness Hale at para 138; Lord Carswell at para 167.

10 Lord Hope at para 111.

11 Baroness Hale at paras 144, 145, 147.

12 Lord Hope of Craighead at para 95, 96; Lord Carswell at para 165.

13 Lord Hope at para 98; Baroness Hale at para 153.

14 The test formulated by Gleeson CJ in the Australian case of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 (HCA): on this see Lord Hope at para 96, Baroness Hale at para 136, and Lord Carswell at para 166. See further Lord Nicholls at para 22.

15 Lord Hope at para 94.

16 Lord Hope at paras 99-100; Baroness Hale at paras 157-158; Lord Carswell at para 166.

ideas and information of public interest,<sup>17</sup> and the significant degree of choice on how to present the material.<sup>18</sup> But there would be greater privileging of political than artistic or commercial expression: “there were no political or democratic values at stake here, nor has any pressing social need been identified.”<sup>19</sup> For the majority the photograph in particular tilted the balance in favour of privacy:

Miss Campbell could not have complained if the photographs had been taken to show the scene in the street by a passer-by and later published simply as street scenes. But these were not just pictures of a street scene where she happened to be when the photographs were taken. They were taken deliberately, in secret and with a view to their publication in conjunction with the article.<sup>20</sup>

To the minority, on the other hand, since the main substance of the *Mirror*'s story was justified, the additional “colour” of information items (3)-(5) had to be accepted as part of the latitude which should be given to the press as part of its right of freedom of expression. The initial story had been presented sympathetically.<sup>21</sup> Nothing was disclosed about Narcotics Anonymous therapy which was not already well-known in general to the public,<sup>22</sup> while the photograph of “Miss Campbell in the street exchanging warm greetings with others on the doorstep of a building [with] nothing undignified or distraught about her appearance”<sup>23</sup> involved “nothing embarrassing”<sup>24</sup> or of a private nature.

There are some contrasting dicta on the horizontal effect of the Human Rights Act.<sup>25</sup> For the dissenting Lords Nicholls and Hoffmann, Convention rights are “values” which can inform the development of the law in disputes between parties who are not public authorities.<sup>26</sup> Lord Hope and Baroness Hale clearly see a stronger effect. For Lord Hope, Articles 8 and 10 are already embedded in the English law of confidence, although balancing the two “is plainly now carefully focussed and more penetrating ... new breadth and strength is given to the action for breach of confidence by these articles.”<sup>27</sup> Later, he highlighted the court's duty under section 6(1) of the Human Rights Act not to act in a way incompatible with Convention rights,<sup>28</sup> while Baroness Hale observed that “if there is a relevant cause of action available, the court as a public authority must act compatibly with both parties' Convention rights.”<sup>29</sup>

Speaking after the decision of the House of Lords was issued, Piers Morgan, the editor of the *Mirror*, remarked: “This is a very good day for lying drug-abusing prima donnas who want to have their cake with the media, and the right to then shamelessly guzzle it with their Cristal champagne. ... If ever there was a less deserving case for creating what is effectively a back door

17 *Jersild v Denmark* (1994) 19 EHRR 1.

18 *Fressoz v France* (2001) 31 EHRR 28.

19 Lord Hope at para 117; Baroness Hale at paras 148-149. For criticism of such categorisations of speech as applied to commercial expression, see C R Munro, “The value of commercial speech” (2003) 62 CLJ 134.

20 Lord Hope at para 123; see also Baroness Hale at paras 154-156; Lord Carswell at para 165.

21 The tone of the *Mirror* coverage changed unpleasantly once Campbell launched her action.

22 Lord Nicholls at para 26; Lord Hoffmann at para 60.

23 Lord Nicholls at paras 30-31.

24 Lord Hoffmann at paras 72-77.

25 Note also the brief discussion of this topic in *X v Y* [2004] EWCA Civ 662, 28 May 2004, paras 43-49 (Mummery LJ). I am grateful to Chris Himsforth for drawing this case to my attention.

26 Lord Nicholls at paras 17-18; Lord Hoffmann at paras 49-50.

27 Para 86.

28 Para 114.

29 Para 132.

privacy law it would be Ms Campbell, but that's showbiz."<sup>30</sup> Nevertheless, the approach of the House in starting with what fell within Campbell's private sphere, then asking whether there was an intrusion and if so to what extent it was justified or outweighed by freedom of expression considerations, is very much that advocated in the previous commentary on the *Wainwright* case, and is welcome. So is the recognition that there is no automatic priority for either freedom of expression or privacy in the cases where the two rights clash. On the other hand, the extension of breach of confidence so that private personal information is protected leads one to wonder wherein lies the great difficulty in going on, in the best incremental traditions of the Common Law, to protect physical privacy of the kind that was violated in the *Wainwright* case.

That *Campbell* does not entail the death of journalism about celebrities, since every case will involve a balancing exercise in which privacy has no priority over expression, was confirmed a few days after the decision by the refusal of Fulford J to grant an injunction to Lord Coe to prevent *The Mail on Sunday* and the *Sunday Mirror* publishing details of a ten-year extra-marital affair.<sup>31</sup> But that case does not seem to have involved photographs or images of the parties. It is here that the media will have to tread with greater care in future.<sup>32</sup> Not only is the photograph the decisive factor in *Campbell*, but the European Court of Human Rights has since held in *Von Hannover v Germany*<sup>33</sup> that the Article 8 rights of Princess Caroline of Monaco were infringed by the publication of unauthorised photographs of her engaged in private activities, even when the accompanying coverage was favourable or anodyne. Nor did she have to retire to a secluded place out of the public eye in order to enjoy this right of privacy. The Princess was not a public figure involved in any political or public debate of general interest to society, and "in these conditions freedom of expression calls for a narrower interpretation".<sup>34</sup> The judgment seems very much in line with the approach of the majority in *Campbell*, and may force at least reconsideration of the meaning of the Press Complaints Commission's privacy code in so far as it bans long lens photography of people in private places. This can include "public property where there is a reasonable expectation of privacy"; but in the Commission's view in 2001 the rule was not broken when the TV newsreader Anna Ford was photographed in a bikini and in close company with a male friend on a quiet beach in Majorca and the pictures were subsequently published. One doubts whether the Strasbourg court would agree with that conclusion now.

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30 BBC News Online, 6 May 2004 (<http://news.bbc.co.uk/1/hi/uk/3689049.stm>). Morgan was dismissed as editor on 14 May, after publishing in the *Mirror* photographs, subsequently shown to be fakes, purporting to show British soldiers abusing prisoners in Iraq (BBC News Online, [http://news.bbc.co.uk/1/hi/uk\\_politics/3716151.stm](http://news.bbc.co.uk/1/hi/uk_politics/3716151.stm)).

31 BBC News Online, 30 May 2004 (<http://news.bbc.co.uk/1/hi/uk/3761131.stm>). I have been unable to access a copy of the full judgment in this case, if any was given.

32 See also C R Munro, "Photographs and illegality" (1997) 8 *Entertainment LR* 197, and note the New Zealand case of *Hosking v Runting* [2003] 3 NZLR 385, aff'd [2004] NZCA 34.

33 Application no 59320/00, 24 June 2004, accessible on the Court's website, <http://hudoc.echr.coe.int/>.

34 Para 66.