A new right of privacy following the House of Lords decision in Naomi Campbell –v- MGN Limited?

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The law of privacy remains a fast moving and developing area of law and this year, it has not disappointed. The pace remains hectic and the newspapers and the Courts have had something to say on the law of privacy almost on a weekly basis. So where are we?

Historical Position

Even before the House of Lords Judgment in Naomi Campbell –v- MGN Limited\(^1\), legal protection for privacy against intrusion by the press was established. This remedied the problems faced by Gordon Kaye of ‘Allo ‘Allo fame in the case of Kaye –v- Robertson\(^2\). Over the last few years we have seen an increasing use of actions for breach of confidence as a basis for regular orders by the Courts, in respect of the unauthorised publication of personal information by the media.

The Beckhams have obtained an injunction preventing the unauthorised publication of photographs of their home, the Blairs an injunction against a nanny from publishing details of the family’s domestic arrangements. Amanda Holden was successful against Express Newspapers Limited to prevent the publication of long lens photographs of her topless on holiday. Sara Cox was equally successful in preventing photographs of her sunbathing in the nude on honeymoon. Lady Archer recently obtained damages against an ex-employee for breach of confidence and an injunction prohibiting her from publishing further information. In Douglas and Zeta Jones & Ors –v- Hello\(^3\), the Claimants were of course successful in the Court of Appeal which found that the proposed publication of surreptitiously obtained photographs of the couple’s wedding arguably amounted to a breach of confidence. We will also look later at some of the “lifetime” protection injunctions, which have recently been granted most recently in respect of Maxine Carr.

But not everyone has been so successful either pre or post Campbell.

Anna Ford failed to stop photographs being taken of her on a beach as it was held that it was a public beach and she had no reasonable expectation of privacy. Jamie Theakston was unsuccessful in his attempts to prevent a publication of an account of his visit to a brothel, although he was successful in preventing publications of photographs taken during his visit, Theakston –v- MGN Limited\(^4\). Gary Flitcroft, a footballer that not many of us had heard of until he unsuccessfully tried to prevent two of his mistresses from selling their story (A –v- B Plc\(^5\) and A –v- B, C & D\(^6\)). We

\(^1\) Naomi Campbell (Appellant) –v- MGN Limited (Respondents) : [2004] UKHL 22
\(^3\) Douglas and Zeta Jones & Ors –v- Hello : [2001] QB 967, 997 CA Sedley LJ
\(^4\) Theakston –v- MGN Limited : [2002] EMLR 22
\(^6\) A –v- B,C,&D : [2002] 2 ALL ER 545

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have recently seen the unsuccessful attempts by Lord Coe to prevent revelations of his affair appearing in a newspaper, a case that we will return to later.

All of these cases, save for the Coe one, are pre the House of Lords decision in Campbell. So the law of confidence as a way of protecting privacy was alive and kicking before the Campbell Judgment.

To understand where we are now with the law of privacy it is necessary to trace the development of the law of confidence.

Traditionally we have not been bereft of ways of protecting privacy:

**Protection of privacy by the PCC**

The press largely adhere to the Press Complaints Commission’s Code of Conduct, Clause 3 of which states:

*Everyone is entitled to respect his or her private life in home, health and correspondence; the publication will be expected to justify an intrusion into any individuals private life without consent;*

*The use of long lens photography to take pictures of people in private places without their consent is unacceptable. Private places are private or public property where there is a reasonable expectation of privacy.*

The application of various torts can assist.

Surveillance may involve entry into somebody’s premises, which might amount to trespass of persistent or obvious surveillance of the property or persistent telephone calls amount to nuisance.

But most important is the law of confidentiality. There is nothing new about this cause of action. **Prince Albert –v- Strange**\(^7\) stated that the law of confidence is “based not so much on property or on contract as on a duty to be of good faith”. The famous case of the **Duchess of Argyle –v- the Duke of Argyle**\(^8\) which protected the secrets of the marital bed chamber

Lord Griffiths in **Attorney General –v- Guardian Newspapers**\(^9\) (no 2) better known as the “Spycatcher” case stated:

“I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidante), in circumstances where he has notice, or is held to have agreed that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word “notice” advisedly in order to avoid the (unnecessary) question of the extent to which knowledge is necessary, though I, of

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\(^7\) Prince Albert –v- Strange : [1849] 1 H&T 1

\(^8\) Duchess of Argyle –v- The Duke of Argyle [1967] CH 302


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course, understand knowledge to include circumstances where the confidante has deliberately closed his eyes to the obvious”.

Lord Griffiths went on to say in respect of third parties:

“If this was not the law the right would be of little practical value: there would be no point in imposing a duty of confidence in respect of the secrets of the marital bed if newspapers were free to publish these secrets when betrayed to them by the unfaithful partner in the marriage. When trade secrets are betrayed by a confidante to a third party, it is usually the third party who is to exploit the information and it is in the activity of the third party that must be stopped in order to protect the owner of the betrayed secret”.

Previously for the necessary components in a successful claim in confidence, we would look to the case of Coco – v- A N Clark (Engineers) Ltd10. The House of Lords has reassessed these tests in the Campbell case. But before we come to the up to date position in Campbell we need to look at the Human Rights Act.

Protection of privacy by the Human Rights Act 1998

The single biggest factor that has been responsible for developing the legal concept of privacy beyond just the law of confidentiality is the Human Rights Act 1998 (“the Act”) and its incorporation into our domestic law in October 2002. The Act gave effect to the Convention on Human Rights through domestic law.

Section 2 states that UK Courts and Tribunals must take account of the Judgements, decisions, declarations and opinions of the institutions established by the Convention when determining a question which has arisen in connection with a Convention right. We are not bound by Strasbourg provided that the interpretation “is not outside the range of responses of a contracting state acting in good faith to implement is obligations under the Convention” (Lord Woolf).

Section 7 deals with how a person may pursue a claim before a domestic court or tribunal:

Only a victim of an unlawful act by a public authority can bring proceedings;

Victims do not need to show their rights have been violated but rather that they run the risk of being directly affected;

Nothing in the Human Rights Act creates a criminal offence;

Limitation is one year beginning on the date on which the act took place or a longer period if equitable

Section 12 ensures that the Court gives particular regard to freedom of expression Article 10. Section 12 applies if the Court is considering granting relief which may affect the exercise of the right of freedom:

Where freedom of expression might be effective, the Act makes special provision for cases where the person against whom the application for relief is made is neither

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10 Coco – v- A N Clark (Engineers) Limited : 1969 [RPC 41,47].
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present nor represented no relief can be granted unless the Court is satisfied that the applicant has taken all practical steps to notify the respondent or there are compelling reasons why the applicant should not be notified no relief as to restrain publication before trial unless trial is likely to establish that the publication is not to be allowed when dealing with journalistic (literary or artistic material) the Court should have regard to relevant privacy codes and extent of public interest.

Initially the wording of the Act raised questions as to whether the Act could be used in disputes between private individuals (horizontal effect) or whether it was limited to actions brought against the state by citizens. The House of Lords decision in Campbell confirmed that the Human Rights Act does have a direct horizontal effect between private persons.

In the Judgment of Lord Nichols he stated -

“The time has come to recognise that the values enshrined in Articles 8 and 10 are now part of the cause of action for a breach of confidence as Wolfe CJ has said, Courts have been able to achieve this result by absorbing the rights protected by Article 8 and Article 10”. Further it should now be recognised that for this purpose these values are of general application, the values embodied in Articles 10 and 8 are as much applicable to disputes between individuals or between an individual and non-Governmental body such as a newspaper as they are in disputes between individuals and public authorities”.

Although this was a dissenting Judgment, it appears to have been accepted on this point.

In reaching this conclusion it is not necessary to pursue the convention question whether the European Convention itself has the wider effect. Nor is it necessary to decide whether any duty imposed on Courts by S.6 of the HRA 1998 extends to questions of substantive law, A –v- B Plc as distinct from questions of practice and procedure. It is sufficient to recognise that the values underlying Articles 8 and 10 are not confined to disputes between individuals and public authorities.

It is perhaps worth reminding ourselves of exactly what Article 8 and 10 say:

**Article 8**

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

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Article 10

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.

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 rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

But absent the Human Rights Act, do we have a separate tort of privacy?

To answer this question we need to look at the recent House of Lords decision in Wainwright –v- The Home Office. The case was concerned with a visit by Mrs Wainwright and her son, Alan, to Armley Prison to see her other son. They were both subjected to a strip search. The search of Alan Wainwright involved an intimate physical search and was held by the Court to amount to an assault.

It was accepted by the Court that the search had not been conducted in accordance with prison rules. Alan Wainwright was successful in connection with a claim for battery, Mrs Wainwright in connection with a claim to trespass to the person.

This was partly overturned by the Court of Appeal and the Wainwrights appealed to the House of Lords on the basis that to enable the United Kingdom to conform to its international obligations under the Convention, the Court should declare that there is and in theory always has been, a tort of invasion of privacy under which the searches of both the Wainwrights were actionable. They were not maintaining to give retrospective effect to the Human Rights Act but for recognition that there was a tort of privacy.

Lord Hoffman decided that there was no general tort of invasion of privacy and that the Human Rights Act weakened any arguments that there might have been a general tort, as if any gap existed, it had now been filled.

So we’ve seen the historic position of the law of confidence and the effect of the Human Rights Act on the law of privacy, so where does that leave us now with the House of Lords decision in Campbell?

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11 Wainwright & Anor (Appellants –v- The Home Office (Respondents) : [2003] UKHL 53
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Campbell Decision – Where now?

In *Campbell –v- MGN Ltd*, the case was brought on the basis of breach of confidence. The basic principles in relation to confidence are set out particularly well in the Judgment of Lord Nichols and Baroness Hale.

Lord Nichols said:

“The breach of confidence label harks back to a time when the cause of action was based on an improper use of information disclosed by one person to another in confidence. To attract protection the information had to be of a confidential nature. Historically it is necessary that the information has been disclosed by one person to another in circumstances ‘importing an obligation of confidence’.”

Nichols agrees that this limiting constraint has now been shaken off. He states:

“The continuing use of the phrase duty of confidence and the description of the information as confidential is not altogether comfortable. Information about an individual’s private life would not in ordinary usage be called confidential. The more natural description today is that such information is private, the essence of the tort is better encapsulated now as a misuse of private information. In the case of individuals this tort however labelled affords respect for one aspect of individual’s privacy. That is the value underlying this cause of action. An individual’s privacy can be invaded in ways not involving public information.

Baroness Hale reminded us of the decision is *Hosking –v- Runting*:

“The [English Courts] have chosen to develop a claim for breach of confidence on a case by case basis. In doing so, it has been recognised that no pre-existing relationship is required in order to establish a cause of action and thus an obligation of confidence may arise from the nature of the material or may be inferred from the circumstances in which it has been obtained”.

So again it appears that the HRA has merely breathed new life into the law of confidence and not launched a new law of privacy.

Baroness Hale confirmed in Campbell:

“The common law in this country is powerless to protect them [the Wainwrights] as they suffered at the hands of a public authority. The Human Rights Act would have given them a remedy if it had been in force at the time but it was not. That case indicates that our law cannot, even if it wanted to, develop a general tort of invasion of privacy but where existing remedies are available the Court not only can but must balance the competing convention rights of the parties.”

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12 *Hosking –v- Runting* : [2003] 3 NZ LR 385403 para 83 at 403
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So whilst Wainwright has established that there is no separate tort of breach of privacy, Campbell has equally established that the values enshrined in Articles 8 and 10 are now part of a cause of action for breach of confidence.

**Right of Expression –v- Right of Privacy, part of a cause of action for breach of confidence post Campbell**

Article 8(1) recognises the need to respect private and family life and Article 8(2) recognises that there are occasions when intrusion into family life may be justified. One of those is of course when the intrusion is necessary for the protection of rights and freedoms of others and Article 10 recognises the importance of the freedom of expression. But Article 10(2) like Article 8(2) recognises that there are occasions when protection of the rights of others may make it necessary for freedom of expression to give way.

Baroness Hale perhaps dealt with this best in her Judgment when she emphasised that the “Reasonable expectation of privacy was a threshold test which brings a balancing exercise into play. Once the information is identified as “private” the court must balance the Claimant’s interests for keeping the information private against the countervailing interests of the recipient in publishing it”.

The Council of Europe recently affirmed this when they said “The Assembly reaffirms the importance of everyone’s right to privacy and of the right to freedom of expression as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order since they are of equal value”.

In the case of Re S protection was sought for a little boy whose older brother had been allegedly murdered by his mother. He had to live and go to school with daily publicity about the intimate details over the several months, whilst his mother faced trial for murder. There was psychiatric evidence of the harm that he was likely to suffer and the harm this would do to the relationship with his mother. On the other hand there was public interest in the free reporting of the murder trial. This freedom to report is a manifestation of both the freedom of expression and the freedom to this information and also an essential component of a fair trial. In that case the Court had no difficulty in ordering that the identity of the child should be protected. Also the Court considered how the interference with each right might be minimised by tailoring the restrictions to meet the case. It was not “an all or nothing question”.

As Baroness Hale colourfully put in Campbell, -

“no one in that case was considering that its implications were as serious as the interests in Re S and some may regard them as trivial and put crudely it is a prima donna celebrity against a celebrity exploiting tabloid newspaper each in their time has profited from the other, both are assumed to be grown ups who know the score. This sort of story, especially if it has photos attached is just the sort of thing that fills, sells and enhances the reputation of the newspaper which gets it first. One reason why press freedom is so important is that we need newspapers to sell in order to

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13 Re S : [2003] 3 WLR 1425 1451-1452
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ensure that we still have newspapers at all. It may also be said that newspaper editors often have to make their decisions at great speed and in difficult circumstances so that to expect too minute an analysis of the position is in itself a restriction on its freedom of expression.”

She went on to say, -

“Examined more closely the case was far from trivial. Drug abuse was obviously seriously damaging to her physical and mental health and that treatment needed to tackle the underlying dependence and was aimed at maintaining and reinforcing the resolve to keep off the drugs”.

The Judgment reinforced the acceptance that information about a person’s health and treatment for ill health was both private and confidential. This did not stem just from the confidentiality of the doctor/patient relationship but from the nature of the information itself.

It was therefore accepted that the starting ground by both parties would be that the information for the Daily Mirror article had also been received from an insider, in breach of confidence. It is therefore necessary to look at that information against the background of concession made by Naomi Campbell that the newspapers countervailing freedom of expression did serve to justify the publication of some of the information because of the lies that Naomi Campbell had told about her alleged drug addiction.

Baroness Hale put freedom of speech in different categories. At the top of the list she put political speech. The free exchange of information, ideas and matters relevant to the organisation of the economic, social and political life of the country was crucial in any democracy. In this regard she considered that revealing information about public figures, especially those in elective office which would otherwise be private but is relevant to their participation in public life would be permissible.

Next, she put intellectual and educational speech and again the expression of which she thought was important for democracy, not least because it enabled the development of individual’s potential to play a full part in society.

Artistic speech and expression came next because of its importance in fostering both individual originality and creativity and the free thinking and dynamic society that we value. But the newspaper could not make such claims in respect of the publication of Ms Campbell’s treatment. No personal development is assisted by pawing over the intimate details of Naomi’s battle with drugs, although those considerations did justify the publication of the fact that contrary to her previous statements, Ms Campbell had been involved in illegal drugs. The further information that she was attending Narcotics Anonymous and for sometime and with regularity together with photographs of her arriving enabled the newspaper to print the headline “Naomi I’m a drug addict” not because she had said so, but because it assumed that this is something that she would be saying at the meeting.

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The Court accepted all of this contributed to a sense of betrayal by someone close to whom she spoke and which destroyed the boundary of Narcotics Anonymous as a safe haven for her. Publishing the photographs also contributed to the revelation and to the harm.

Baroness Hale confirmed that unlike other countries, in particular France, we do not recognise a right in one’s own image. The Courts have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must also be confidential and there must be, as in the case of Holden, an expectation of privacy. But here the covering text made plain that these photographs were different. They made it plain that she was coming from or either going to a Narcotics Anonymous meeting and as I said they contributed to the sense by her that she was being followed and betrayed and to deter her from going to the same place again.

The assenting Judges held that the fact that this was a sympathetic story was neither here nor there.

So when balancing Article 8 and Article 10 Baroness Hale decided:

“The weight to be attached to the various considerations was a matter of fact and degree not every statement about a person’s health will carry the badge of confidentiality or risk doing harm to the person’s physical or moral integrity.”

She held that the trial Judge had been well placed to assess all of these matters. He could tell the impact of the story on Naomi Campbell and whether it was serious or trivial. He could also tell how serious an interference with press freedom it would have been to publish the essential parts of the story without the additional material and how difficult a decision this might have been for an editor.

Baroness Hale felt that the Judge in this case had got it right. The balance fell in favour of Naomi Campbell and in protecting her residual area of privacy and therefore she did have a right of privacy in respect of the fact that she was receiving treatment from Narcotics Anonymous, the details of the treatment and the visual portrayal of her leaving a specific meeting with other addicts.

Of course Nichols and Hoffman disagreed. Nichols held that:

“The additional information was of such an unremarkable and inconsequential nature and to divide the one from the other would be to apply all too a fine a tooth comb. Human Rights are concerned with substance, not with such fine distinction. The balance ought not to be held at a point which would preclude in this case a degree of journalistic latitude in respect of the information published for the purpose”.

Hoffman warned that:

“Judges are not newspaper editors. It may have been possible for the Mirror to satisfy the public interest in publication with a story which contained less detail and
omitted photographs and that it was ‘harsh’ to criticise the editor for ‘painting a somewhat fuller picture in order to show her [Campbell] in a sympathetic light’”

So where does this 3:2 decision of the House of Lords leave us on privacy?

In the light of the above, lawyers and newspaper editors will agree that these cases are fact sensitive and there is no actual law of privacy backdoor or front door but it must be applied through the routes of confidentiality and through the Human Rights Act.

The law, as to the test for what amounts to confidential information has been clarified. Even in respect of celebrities and those in the media eye irrespective of public interest, there is certain information which is deemed private.

But then of course the recent decision of Mr Justice Fulford in the Lord Coe –v- Mirror Group Newspapers needs to be considered.

Lord Coe sought an injunction against the Daily Mirror to prevent a ‘kiss and tell’ by his ex-mistress detailing his affair with her whilst married to his wife Nicola McIrvine (from whom he is now separated). His ex mistress stated that she aborted Lord Coe’s child whilst his wife was pregnant. The Judge held that a balancing act was required to weigh up Lord Coe’s private interests against the freedom of the press and the public interest. It was held that Lord Coe in all circumstances, could not expect his privacy to be protected.

As in the case of Flitcroft the court had to take into account the competing interests between the persons providing the story and Lord Coe’s interest in suppressing the story. Further the story had been published in part in 1995 and so there had been a partial waiver of confidentiality.

One can suspect that Lord Coe lost because of Baroness Hale’s approach to freedom of speech in connection with public figures. Interestingly we do not know whether in respect of the Coe case they tried any form of “salami” slicing of the formation in the story, trying to keep out any of the more salacious details but if they did they clearly were not successful as far as Lord Coe was concerned there was no line in the sand for privacy, over which the newspapers could not cross.

Conclusion

The law at present leaves us having to look at these matters on a case by case basis with details of medical treatment, of all forms being more likely to attract protection and details of sexual affairs unlikely to.

As Mr Justice Lindsay said in the Zeta Jones case, -

“The Parliament has failed so far to grasp the nettle and does not prove that it will not have to be grasped in the future. A glance at a crystal ball so to speak, only a low wattage, suggests that if Parliament doesn’t act soon the less satisfactory course of
the Courts creating a law bit by bit at the expense of litigants and the inevitable delays and uncertainty will be thrust upon the judiciary”.

At the moment that is exactly what is happening but there does not seem much chance of Parliament doing anything about it. Michael Howard has gone on record stating that any future Conservative Government would protect the freedom of press and promise to challenge any attempt by the Courts to introduce a privacy law. He stated “I am opposed to the Courts fashioning legislation that should be for Parliament to decide – and I doubt that Parliament could ever form a workable privacy law”.

The Culture Media and Sports Committee investigation into privacy and media intrusion is still grinding on and has published its report and appendices to its original report published in July last year. It is clear from this that they are going to do nothing to restrict freedom of speech and will not seek to intervene in any way in what newspapers and magazines choose to publish. They are in support of self-regulation and invite the PCC to examine further its position.

On the specific question of a new privacy law, the Committee stated

“On balance we firmly recommend that the Government reconsiders its position and brings forward legislative proposals to clarify the protection that individuals can expect from unwarranted intrusion by anyone – not the press alone – into their private lives. This is necessary to fully satisfy the obligations upon the UK under the European Convention of Human Rights. There should be full and wide consultation but in the end Parliament should be allowed to undertake its proper legislative role. Whilst they accept that the debate about privacy legislation is a necessary and proper one they do not believe that there is any need for any further legislation which they consider to be unnecessary and undesirable. They still consider that when competing rights in individual cases it’s the quintessential task of the Courts not of the Government or Parliament. Parliament should only intervene if there are signs that the Courts are systematically striking the wrong balance and they believe that there are no such signs.

So whilst the right of privacy is now unequivocally acknowledged as comprising part of our legal landscape, it is as a result of a natural and logical development of confidence against the backdrop of the Human Rights Act. But it does not constitute a separate tort. Clearly how privacy continues to develop will be for the Courts to decide and not Parliament. This will be a fertile area for lawyers and a minefield for editors and in-house lawyers.