

## New Model Privacy

The rights of privacy and freedom of expression are both fundamental. In media cases they are often in direct conflict. The theoretical problem of the "balancing of rights" is a pressing practical issue for editors as well as media lawyers. Although the courts have given some guidance over recent years, many of the central points have been obscure or unresolved. The decision of the House of Lords in *Campbell v Mirror Group Newspapers* ([2004] UKHL 22) was the first opportunity for the Lords to decide on the issue in a post Human Rights Act 1998 case. The unanimous decision on the law shows that the basic principles are now clear. However, the split decision on the facts (3:2) shows that their application will not be straightforward.

### Private material

The facts of *Campbell* were unusual. Naomi Campbell is and was an internationally known "supermodel". The defendant newspaper discovered that, despite her public denial of drug use, Ms Campbell was secretly attending meetings of Narcotics Anonymous. The article, published in the *Daily Mirror*, was analysed as disclosing five elements of private material:

- i the fact of Ms Campbell's drug addiction;
- ii the fact that she was receiving treatment for that addiction;
- iii the fact that she was receiving treatment at Narcotics Anonymous;
- iv details of that treatment and her reaction to it; and
- v surreptitiously obtained photographs of her emerging from a treatment session.

Because Ms Campbell had previously publicly denied using drugs, she conceded that although (i) and (ii) were private, their disclosure was justified in the public interest. However, she complained that the disclosure of (iii) to (v) was unjustified.

In March 2002, the trial judge (Morland J) found that there was a breach of confidence and had awarded compensatory and aggravated damages of £3,500 ([2002] EMLR 30). In October 2002, the Court of Appeal allowed the newspaper's appeal on the ground that the publication of elements (iii) to (v) was "within the margin of editorial judgment" of the newspaper ([2003] QB 633). On 6 May 2004, by a majority of 3 to 2, the House of Lords allowed Naomi Campbell's appeal and restored the trial judge's award.

Two fundamental, closely related, issues arose. First, to what extent did the English law recognise a

tort of unjustified publication of private information? Second, how was such a tort to be reconciled with the importance of the right to freedom of expression?

### Private Information

In relation to the first issue, the House of Lords was unanimous in accepting that the time had come to recognise that the cause of action in breach of confidence should be expanded so as to provide a remedy for the unjustified publication of personal information. It was held that, following the introduction of the Human Rights Act 1998, the law of confidence has absorbed the values protected by Article 8 (privacy) and Article 10 (expression) of the European Convention on Human Rights.

In any claim based on the publication of private information, the initial question is whether the information is sufficiently private in nature to engage Article 8. This is determined by applying an objective test of "reasonable expectation of privacy". The "offensiveness" test, which originated in the US and in a number of Commonwealth cases has now been sidelined (see Lady Hale, at para 135).

The objective test must, however, be applied to a person in the position of the claimant. Thus, where a person is suffering from a condition that needs treatment, it is necessary, in order to assess whether or not the disclosure is objectionable, to consider the matter from the position of a reasonable person who is in need of treatment (Lord Hope, at para 98).

All members of the House agreed that in certain circumstances there may be a reasonable expectation of privacy when a person was a public street. The precise limits of this doctrine are unclear. Lord Hoffmann was of the view that the widespread publication of a photograph of a person in a situation of humiliation or severe embarrassment may be an infringement of their privacy (para 75). In contrast, the majority appear to have based their conclusions on the fact that the activity photographed was private in nature.

The reasoning in the various speeches on this issue means that, although the House did not depart from its previous decision that there is no "general tort of invasion of privacy" (see *Wainwright v Home Office* [2003] 3 WLR 1137 HL), any publication of private information will be potentially actionable. The values of "human autonomy and dignity" are now directly protected by what amounts, in effect, to a new cause of action in private law.

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### Balancing

In relation to the second issue (that is, the reconciliation of this new claim with freedom of expression), the House of Lords held that once Article 8 is engaged the court must carry out a "carefully focused and penetrating" balancing exercise to reconcile the restrictions which the Article 8 and 10 rights impose upon each other, applying the principle of proportionality. It was confirmed that, in accordance with the approach in *Re S* ([2003] 3 WLR 1425), neither right takes precedence over the other. In media cases where both articles are engaged, it is necessary to conduct a "parallel analysis". "This involves looking first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights and applying the proportionality test to each" (Lady Hale, para 141).

It was recognised both that some types of speech are of greater value than others and that there are different degrees of privacy.

### The decision

The majority and minority agreed about the test to be applied but differed in its application to the facts. The minority, Lords Nicholls and Hoffmann, were of the view that items (iii) to (v) were minor intrusions into privacy and that the court should recognise a degree of "journalistic latitude". In substance, they found that, on the facts, the Article 10 rights of the defendant prevailed.

The majority, Lady Hale and Lords Hope and Carswell, were more concerned with the Article 8 rights of the claimant. They held that the defendant had gone too far in publishing items (iii) to (v) and that the material published was too intrusive to be justified in the context of the type of speech involved in the article. Importantly, the majority held that the disclosure of details of therapeutic treatment for addiction was private and akin to medical information, and that disclosure could interfere with or disrupt Ms Campbell's treatment. Although the case was close to line, the publication of this intrusive material could not be justified.

### The significance of Campbell

The decision in *Campbell* is an important restatement of the law and is a significant step towards providing

much needed clarity. It does not mean that the media will now be prevented from publishing stories about the private lives of politicians or celebrities. It does, however, require them to adopt a more rigorous approach when considering the publication of articles which may contain private information.

We suggest that the following is the correct approach:

- In relation to a proposed publication, it is necessary to consider whether it contains information in relation to which any person has a reasonable expectation of privacy.
- If it does, it is then necessary to consider whether a "public interest" defence is available in relation to each element of private information.
- If such a defence does not apply to each element, it is necessary to consider how private the information is and what type of speech is involved. If information is 'intimate', it is likely that the publication must have some political and democratic value to justify its publication.
- Photographs should be considered separately. If they depict humiliating or embarrassing events or have been obtained surreptitiously, their publication is likely to be difficult to justify.

The conclusion of the majority has been criticised on the basis that it fails to recognise that a significant degree of "journalistic latitude" should be given to newspaper editors. The authors suggest that these criticisms are wrong. Editors and journalists must exercise care and responsibility when publishing defamatory material. The restrictions placed upon freedom of expression by the law of defamation are consistent with Article 10, even though the right to reputation is not expressly recognised by the Convention. The requirement that journalists must give careful consideration before publishing material that infringes the right to respect for private life, which is protected by Article 8 of the Convention, is no greater an interference with freedom of expression and is amply justified under Article 10(2).

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