PRIVACY LAW IN TRANSITION

A review of recent developments in the law of privacy and the media

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Introduction

1. In 2003 Gavin Phillipson of the University of Durham published an article in the Modern Law Review surveying the state of privacy law in the wake of the Human Rights Act. His main title was *"Transforming Breach of Confidence?"*. Since he wrote we have seen a domestic decision of the highest authority - *Campbell v MGN* [1] - which surely makes clear that we can now remove the question mark: the branch of the law of confidence which has previously been used to develop remedies for breaches of privacy is transformed. What is more, it is a new albeit fledgling tort, separate and distinct from its parent cause of action, and it gives effect to the values "enshrined" or "embodied" in Article 8 ECHR. Gavin Phillipson's article suggested that the cases he reviewed had already transformed the law of confidence into a privacy remedy "in all but name". Now, it can be said the name too has been authoritatively changed - even though the precise name remains uncertain. We ought now to speak of "misuse of private information" or "infringement of privacy".

2. The broad shape of this new tort has also come into clearer focus, but serious questions remain about the all-important details of its precise scope and application, especially in the light of the ECHR's decision in *Princess Caroline*[2], which came just a month after *Campbell*. Areas where questions remain include:-
   - How exactly are we to determine whether information is private? And how exactly will the courts decide if the information deserves protection?
   - Is there now any difference between the approach to alleged breaches of privacy by private persons and those perpetrated by public bodies?
   - How, nowadays, will the court approach claims that iniquity or some other public interest justifies disclosure?

   The tort is still immature.

3. Other decisions in 2004 have thrown up other important points about privacy rights, and the role they will play in litigation about media publications - whilst leaving other questions open for future argument. For instance**:-**

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1 Full references to this and other cases mentioned are given at the end of this paper. Phillipson's "valuable" article was referred to: [18] *per* Lord Nicholls.

2 *Von Hannover v Germany*

- we now know that among the rights protected by Article 8 are the right to *disclose* private and personal information[3], and the right to reputation[4]; how will this impact on the analysis in privacy cases?
- we have two recent decisions, in the HL and in the CA, on the right approach to media injunctions[5]; but do these give us clear enough guidance, and have we heard the final word - for the time being at least - on the right approach to privacy injunctions?

The new privacy tort: Naomi Campbell gives birth

4. The facts, and ultimate outcome of *Campbell v MGN* are too well-known to this audience to need recitation. Whether Naomi Campbell is satisfied with the end result of her claim against the *Mirror* (£3,500 in damages after outings before the High Court, CA and HL and volumes of unfavourable publicity) is a matter for speculation. For media lawyers, it will no doubt remain debatable whether the HL's 3:2 decision on the facts was correct; many doubt it[6]. However, it can at least be said that the decision offers us an authoritative account of the broad parameters of a civil wrong involving unwarranted disclosure of private information. Analysis of the 5 speeches is admittedly not easy, because of the varying language, but Lord Hoffmann professed to see no difference of substance between them. A reasonable synthesis, I would suggest, is that the wrong will be made out where these 2 conditions are satisfied:-
   - The information disclosed is private rather than public in character; and this will be so where the claimant has a reasonable expectation that his or her privacy will be protected and the defendant knows this, or ought to know it;
   - The balance to be struck, after conducting a parallel analysis of the rights under Articles 8 and 10, comes down in favour of protecting the claimant's reasonable expectation.

5. What these very broad principles mean in practice, and some difficulties with them, will be examined later in this paper, but it is clear on their face that they are not the parameters of the established cause of action for breach of confidence, as developed in the commercial cases. The majority in *Campbell* noted that Ms Campbell's claim was framed as a traditional confidence claim and expressed the view that there was no need for the courts to create a new cause of action. Indeed, the view was expressed that doing

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3 *Re Angela Roddy*

4 *Radio France v France*, *Chauvy v France, Cumpana & Mazare v Romania* (all ECtHR)

5 *Cream Holdings* (HL) and *Greene v Associated.*

6 See, for instance, Rosalind McInnes' pungent critique: "Celebrities Anonymous: Whatever Next?", in *Human Rights & UK Practice* 5.3, p6

so was not authorised by law[7]. The majority used the language of confidentiality. However, as Lord Nicholls pointed out at [13] and [14], the language of "confidence" and "confidentiality" is misleading and inapt in the context of informational privacy. All members of the House agreed that there is no longer any need for a confidential relationship; what matters is the nature and quality of the information at issue, and the reasonable expectations of the person to whom it relates. As Lord Nicholls observed, this and other developments have "changed the nature" of the cause of action[8].

6. None of the Lords suggested that the features of the wrong under discussion in *Campbell* had been or would be imported into the established equitable cause of action for breach of commercial confidences. They are ill-suited for such translation, and different considerations are applicable in commercial contexts[9]. As Lord Diplock famously said, "[I]t is essential to realise that when ... the name of a form of action is used to identify a cause of action, it is used as *a convenient and succinct description* of a particular category of factual situation which entitles one person to obtain from the court a remedy against another person"[10]. It therefore seems futile if not positively unhelpful to cling to the terminology of breach of confidence, and to deny that what has finally emerged from the *Campbell* litigation is a new cause of action, the contours of which are quite different from those of the cause of action for breach of confidence. Lords Hope and Carswell both began their opinions by using "confidence" language but ended by concluding at [125] and [171] that the *Mirror* publication constituted "an infringement of [Miss Campbell's] right to privacy". This, surely, was appropriate language and Lord Nicholls was surely right to conclude at [14] that confidence terminology should now be abandoned in this field and "The essence of the tort is better encapsulated now as misuse of private information".

7. I have referred to the new cause of action as a *tort* because of Lord Nicholls' use of the word in the passage just cited. This is interesting, and of some potential importance. The established cause of action for breach of confidence has not generally been considered a tort; it grew up as an equitable doctrine, based on conscience, and breaches gave rise to equitable remedies. It cannot be said that the point has been decided, but there has been a growing judicial tendency to characterise the misuse of private information as a tort. Lord Nicholls is not the first to do so[11]. If it comes to be recognised as such, this

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7 See Baroness Hale at [132]

8 See also, to similar effect, Lord Hoffmann at [51], speaking of a "shift in the centre of gravity" and the "new approach" where personal information is concerned.

9 As the CA held in *Campbell* when rejecting the notion that liability to pay damages should depend - as it does in commercial confidence - on proof that the defendant knew or was reckless as to the wrongful nature of his act.

10 *Letang v Cooper* [1965] 1 QB 232, 242-3, emphasis added.

will influence the available remedies and the applicable law of limitation; it may also affect the applicable law in cases with an international element.[11]

The role and scope of Article 8

Private vs public law: the death of the horizontal effect debate?

8. There has of course been extensive debate in the academic literature about whether, and if so to what extent, Article 8 and/or the HRA require the court to develop a remedy for invasion of privacy by private persons as opposed to public bodies. The express terms of Article 8 protect people against interference with private life by a public authority ("vertical effect"). The debate has been whether Art 8, via the HRA, has any and if so what "horizontal" effect in private law. The question was relatively little canvassed in the English authorities prior to 2004. But the courts have repeatedly said that the protection of privacy via the law of confidence will, since the HRA, take account of, or accommodate, or is absorbing the values of Article 8[12]. The awkward question for practitioners has been: what does that actually *mean* in practice? To what extent, for example, does it impose on media organisations the full weight of the obligations which Article 8 imposes on public authorities?

9. Some of the decisions of 2003-2004 have addressed this question, but in different ways.
   - In *Re S (A Child)* in July 2003 the CA had to decide whether an injunction should be granted to prohibit the identification of the defendant to a criminal prosecution, in the interests of the defendant's child. It was argued that in considering whether to grant such an injunction against the media, Article 8 added nothing, as the media are not public authorities. Hale LJ, as she then was, dismissed the argument (at [47]-[51]), holding that the child's Article 8 rights were engaged and the court had a duty to protect them, since the threat to the child 'stemmed' from the actions of public authorities in prosecuting the child's mother. The majority, and the HL after them, preferred to approach the case on the basis that the horizontal effect issue did not arise because the child was invoking the inherent jurisdiction of the court - a public authority - to protect minors.
   - However, when the HL gave judgment in *Campbell* on 6 May 2004 the majority thought both Articles 8 and 10 applied in a private law dispute. Lord Hoffmann recognised that the Convention might oblige the state to take steps to protect privacy against invasion by private persons, but he did not think it followed that

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11 See *The Law of Privacy & The Media* and its Supplement at 6.10.

12 See, for instance, *A v B Plc (Flitcroft)* and *Campbell* (CA) at [43], [69]-[70].

this obligation would have any counterpart in domestic law: [49]. Lord Nicholls held, however, that the values embodied in the two Articles are as much applicable in a private law case as they are in disputes between individuals and a public authority; and it was not necessary to pursue the horizontal effect question: [17-18]. Lady Hale and the rest of the majority proceeded, it appears, on the assumption that Articles 8 and 10 had to be 'balanced' in any private law case. They did not examine the horizontal effect issue.

- On 28 May 2004 the CA dealt with an employment case called *X v Y*. The issue was whether, when a private employer dismissed a member of staff on account of his being cautioned for having sex in a public lavatory, this engaged Article 8. The court held that Article 8 imposes a positive obligation on the state to secure the observance of the right to privacy between private individuals. Applying s3 of the HRA, the court proceeded to interpret the relevant provisions of the Employment Rights Act in such a way that private and public employees would be treated in the same way, as regards their privacy rights.
- On 24 June 2004 the ECHR gave judgment in *Princess Caroline* reiterating - but this time in a media case - that Article 8 imposes positive obligations on states which may involve the adoption of measures to ensure respect for private life between private individuals; it held that German law had failed in this respect.

10. Where does this leave us? I would suggest that three reasonably confident conclusions can be drawn.
    - The notion that Article 8 has no application to the media will not now be entertained by the courts.
    - In private law cases, as in public law, the starting assumption should be that the courts are likely to recognise as private information anything which the Strasbourg jurisprudence would recognise as falling within the ambit of Article 8. (This encompasses a great deal: see below).
    - The real difference between public and private law cases will lie in the court's approach to the question of whether disclosure is legitimate. Lord Hoffmann encapsulated the core of it neatly in *Campbell* at [50] : "There may of course be justifications for the publication of private information by private persons which would not be available to the state - I have particularly in mind the position of the media ... but I can see no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification."

Private vs public facts: a reasonable expectation of privacy?

11. The starting point of any privacy case must be to decide whether the information at issue

is private in nature. So one looks for a definition or set of tests of some kind. Before *Campbell* (HL) the English authorities were distinctly unhelpful. I have argued before that despite the bold pronouncements in *Flitcroft* and *Campbell* (CA) that the answer will usually be obvious, or unnecessary, one of the most conspicuous features of the English cases to date has been *disagreement* between judges over whether particular items of information are private information worthy of protection. The Strasbourg cases have not been of much help, either. There have been few dealing with issues of the kind familiar to English lawyers, arising from media exposes of the private lives of celebrities - cases such as *Flitcroft, Theakston,* and *Campbell*.

Campbell

12. The HL made an attempt to grapple with the problem of tests or criteria for what is private. Different members of the House used differing language, and two of them claimed to see agreement between themselves and the others which outside observers might otherwise have found hard to detect (see Lord Hoffmann, and Lady Hale at [134]). For the future, though, it does seem fair to say this.

- The HL's view is best encapsulated in Lord Nicholls' observation that "Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy": [21]. Dyson LJ cited this dictum as representing the law in *X v Y* (at [67]) and in June 2004 Gray J considered the passage, and the corresponding paragraph of Lady Hale's speech ([137]), and accepted Counsel's submission that the 'reasonable expectation' criterion "comes into play when considering the anterior question whether the [documents at issue] qualify as private information."*: Maccaba v Lichtenstein* (the 'Indecent Proposal' case) at [3]-[4].
- According to the majority, the potential for disclosure to cause harm to the individual is an important factor in determining what is private ([119], [157]. However, we are likely to see little more of the criterion which the CA approved in *Campbell* (drawing indirectly on US jurisprudence), namely whether the information is such that its disclosure would be offensive to a person of ordinary sensibilities. A majority of the House was uneasy about the utility of this test, Lord Nicholls taking the view that it had the potential for sowing confusion, by leading one into the separate and subsequent question of whether disclosure in the particular case was legitimate.

Guidance from English decisions on the facts

13. When, therefore, is there a reasonable expectation of privacy for particular facts? In other words, when does information pass the threshold test?

- <u>*Reasonable expectation:*</u> *Campbell* provides some illustrations. The information at issue - information about drug abuse, and private therapy for it at NA - was

unanimously held to satisfy the requirement. So, according to the majority, were photographs taken surreptitiously of Ms Campbell emerging from a therapy session.

- *No reasonable expectation.*
  - In *X v Y (CA)* the court upheld the decisions of the tribunals below, that consensual sex in a public lavatory is not an activity within the scope of Article 8 (so that disciplinary sanctions by an employer need not pass the Article 8(2) threshold). Two relevant factors were identified: the activity was in a public place; and it was criminal.(Some other recent cases relevant to that topic are considered below, in the context of prior restraint).
  - In *Maccaba* Gray J, unsurprisingly, accepted that as a starting point "correspondence between A and B on private matters such as their feelings for each other would be a prime candidate for protection". But he held the position was different where A is a married man expressing in unsolicited letters his love for B, who is married to someone else; his sexual ambitions for her; and "making what I would for present purposes treat as a semi-serious proposal to pay her husband a large sum for her release". Such conduct was shocking and immoral, and there was no reasonable expectation that such facts would be kept private.
  - As for *Campbell*, photographs Ms Campbell "going about her business in a public street" or of "innocuous outings" such as popping down to the shops to get some milk would not have qualified as private (see [154], Lady Hale). Nor would information that she had a cold or a broken leg [157]. The law does not concern itself with trivia (cf. *Flitcroft* on trivia which are interesting to the public).

Princess Caroline

14. This aspect of the law now has to be considered in the light of the ECHR's subsequent *Princess Caroline* decision. Strasbourg held that in refusing to grant Princess Caroline injunctions against those taking and publishing photographs of her the German courts had infringed her Article 8 rights. This decision was hailed by some at the time as a considerable extension in the reach of Article 8, and a potential springboard for domestic privacy claims.

15. The Princess had complained over three sets of photographs, published in German magazines in 1993, 1997 and 1997 respectively. Each set of publications was followed by a set of proceedings, pursued to the highest available appeal court. With limited exceptions, the claims failed. The photographs the subject of the ECHR's decision showed the Princess in various places: on horseback; on a ski-ing holiday; out shopping; alone on a bicycle; at a horse show; leaving her house; playing tennis; on a beach

(tripping over an obstacle)[13]. The photos illustrated magazine stories described by the ECHR as 'anodyne'. On this factual basis the ECHR held there was "no doubt" the photos and their publication fell within the scope of the Princess's private life. It went on to hold that on the facts the German courts should have recognised a legitimate expectation of privacy in respect of the photos.

16. The ultimate decision on the merits, and its implications, will be examined below. First, though, two important features can be noted.

- With the ink barely dry on the *Campbell* decision, the ECHR has taken a far more generous view of what can qualify as private information. The contrast is stark. Few of the *Caroline* photos would have passed muster under the HL's approach; yet they all seem to have done so in the ECHR. It is very hard to reconcile the decision that Princess Caroline's shopping trips are private with the HL's view that Naomi Campbell's are not. It is obviously possible to argue from *Caroline* that the HL took an unduly narrow view of what is private.
- There is rich potential for confusion over the role of the question: 'Is there a reasonable expectation of privacy'? The ECHR's reasoning is itself difficult to analyse, but whereas the HL uses this question as a way of dealing with the threshold question, the Strasbourg court seems to use it as shorthand for the second stage, of balancing Articles 8 and 10.

17. In this somewhat confusing state of affairs, media lawyers acting for defendants will be bound to adopt the HL's approach, and argue that harmless but mildly interesting trivia about private lives fall outside the scope of our privacy law, as do criminal or other shocking conduct, because there can be no reasonable expectation that these things will be kept private (*Xv Y; Maccaba*). In the longer term, though, it is hard to resist the conclusion that the more inclusive approach of Strasbourg is likely to prevail, and claimant lawyers will get over the threshold with relative ease. In due course, I would suggest, the 'reasonable expectation' test may be dropped as a threshold criterion; it will come to be recognised - like the 'offensiveness' test - as potentially confusing.

18. It is surely unreal to ask *in the abstract* whether a particular item of information is one which a person can reasonably expect to keep private. As the ECHR made clear in *Peck*, all depends on context. To be observed by passers-by in a street is one thing; one may have no reasonable expectation that people will turn the other way, or keep to themselves some embarrassing thing one does in a public place. To be made the subject of a permanent photographic record of such an event is, however, another thing; and to have

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[13] The German courts had, in the decision known as *Caroline III*, granted injunctions over some of the photographs (those in the restaurant).

that record disseminated to the general public is something else again. The ECHR in *Peck* emphasised the unforeseeability of such an event, in ordinary circumstances. As the English courts recognised long ago in a different context: "There is a great difference between a man's telling a ludicrous story of himself to a circle of his own acquaintance, and a publication of it to all the world through the medium of a newspaper."[14]

Photographs: a special category?

19. On any view, *Caroline* clearly stands as a decision emphasising the importance of photographs (see [57]), and it seems to have been the photographs which tipped the balance in *Campbell.* Why? One reason is simple and obvious: photographs are simply different from and have more impact than verbal information, as everyone knows. So the quality of what is "taken" from an individual and displayed to the public is different, and more intrusive, when the information is photographic. It seems, however, to have been a different reason which played a powerful role in these two decisions: the *surreptitious* taking of the photographs.

- In *Campbell*, the majority found this significant. Although the photographs were by themselves not objectionable, and covert photography by itself does not make information confidential, the publication here of the covert photographs "added to the potential harm, by making her think that she was being followed or betrayed, and deterring her from going back to the same place again." (Lady Hale, [155]; see also Lord Hope at [123], who viewed these factors as decisive). It is strongly arguable that this was false reasoning given the scope of the claim made. As Lord Nicholls pointed out: "The complaint regarding the photographs is of precisely the same character as [those] ... regarding the articles: the information conveyed ... was private information. Thus the fact that the photographs were taken surreptitiously adds nothing to the only complaint being made."
- In *Caroline*, the court held that the protection of the rights and freedoms of others "takes on a special importance" when it comes to the publication of photographs. The important distinction between intrusion by surreptitious photography and breach of privacy by publication of private information was recognised, but then glossed over. "... even though, *strictly speaking*, the present application concerns only the publication of the photos and articles ... the context in which these photos were taken - without the applicant's knowledge or consent - .... cannot be fully disregarded." (See [68] and [69].) The court did not explain on what basis this context could be relevant. Surely, Lord Nicholls' reasoning applies equally here; if the information in the photos had not been private, but public knowledge, the means would have been irrelevant?

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[14] *Cook v Ward* (1830); see *The Law of Privacy and the Media* 9.10-9.11.

- The blending of different strands of reasoning seems to be persistent feature of privacy decisions. See also *Flitcroft*. That said, the reasoning of these two high authorities cannot simply be ignored. It appears that what we are seeing here is the further transformation of the privacy tort into one where the intrusional quality of the acts performed to obtain the published information is a factor to take into account in deciding whether the information is private.

Resolving conflicts between privacy and freedom of expression: parallel analysis

20. The English courts and Strasbourg are agreed that if information is private in nature one next has to ask whether its disclosure is legitimate in all the particular circumstances. The HL made clear that the existence of a reasonable expectation of privacy is not the end of the matter. Articles 8 and 10 have to be balanced. As a result of *In re S* (CA and HL) and *Campbell* it is now accepted doctrine that the way this should be done is by a process known as "parallel analysis", or the application of the "ultimate balancing test"[15]. This involves addressing, separately and in turn, the questions
    - whether publication would pursue a legitimate aim and be a proportionate interference with the privacy interest; and
    - whether prohibition of, or any other sanction in respect of publication would serve a legitimate aim and be a proportionate interference with freedom of expression.

    For examples of this exercise being carried out, see *Campbell* at [112]-[125] per Lord Hope, and *In re S* (HL) at [24]-[36].

21. One effect of this approach is that it focuses attention on the *weight* to be attributed to the conflicting rights. It has been argued, particularly in some academic circles, that the courts have hitherto taken too uncritical an approach to claims for freedom of expression and have failed to focus on the purposes to which it is being put in particular cases. A hierarchy can be seen in the Strasbourg jurisprudence, in which political speech is deemed to have the greatest weight or value, commercial speech far less, and "hate speech" the least of all (if any). In *Campbell*, Lady Hale made the point on behalf of the majority that the privacy interests at stake were important, involving as they did information about Ms Campbell's physical and mental health [144]. On the other hand, the free speech interest at issue stood low in the hierarchy; the political and social life of the community were not obviously assisted by "poring over the intimate details of a fashion model's private life" ([148]-[149]).

Caroline

[15] per Lord Steyn in *Re S* (HL) at [17].

22. The ECHR's decision takes Lady Hale's line of reasoning to a further extreme. The essential basis for the court's conclusion that Germany had failed to respect the Princess's private life was as follows.

- There is a fundamental distinction between facts the reporting of which can contribute to a debate in a democratic society on matters of public concern, and details of the private life of an individual with no official functions, which cannot make such a contribution. The 'watchdog' function of the media is not in play in the latter case.
- Caroline was not a public figure. The fact that the photos made no contribution to any public debate of general interest was decisive. The public has no legitimate interest in knowing where the Princess is or what she is doing, or any such interest must yield to her privacy rights.
- The sole purpose of the photos was to satisfy public curiosity.
- Further the German courts had failed to provide any clear enough criteria by which a public figure could determine whether his or her activities might legitimately be observed by the media and relayed to the public; the Princess should have had a 'legitimate expectation' of the protection of her private life under German law.

23. This is a striking decision. A simple and straightforward interpretation would be that it goes well beyond the reasoning of the majority in *Campbell*, holding not only that harmless photographs of a person popping down to the shops, and the like, *are* within the scope of private life but also that their publication will involve an unacceptable intrusion into privacy, unless the person is a public figure (in the sense that they are involved in politics, hold public office or such like). The publication of photographs and information about private life will only be justifiable if it could somehow contribute to serious debate on matters of political or social significance. This approach would of course bring about something of a revolution, if applied to the daily fare of British tabloid journalism - indeed, a fair number of television formats might feel a chill wind. *Caroline*, some say, will usher in a much more restrictive culture in English law, hitting first of all those (many) publications which trade in celebrity snapshots, and then the 'kiss and tell' story[16].

24. Is it possible to quarrel with this interpretation, or the view that this somewhat high-minded approach is one that the English courts must and will now adopt? I think it is, though the case clearly does present real difficulties for the English media.

- First, Strasbourg decisions are not strictly binding authorities, either in European or English law. A single Strasbourg decision does not have the same weight as an HL decision. The English courts must follow domestic authority, guided

[16] See for instance 'The Princess, the Paparazzi and the Press', by Matthew Nicklin, http://www.5rb.co.uk/articles/detail.asp?ArticleID=51.

where necessary by Strasbourg cases. And the English authorities take a somewhat different line.

- Secondly, and maybe more persuasively, it can be argued that the *Caroline* decision is best understood as a decision on the particular facts, distinct from most of those which are likely to face the English courts. The key points were
  - The Princess was held to be a person with no real public role; someone who was simply born into a given position; far from seeking publicity she consistently shunned or objected to it. In these respects she is quite unlike entertainers or others who gain celebrity by "selling" themselves - including their private lives - to the general public.
  - The 3 series of publications were regarded as amounting to real press harassment of the Princess (a factor clearly given considerable weight by the court). Unless the case is understood in this way, it is open to the criticism that the parallel analysis was not properly conducted: the court evaluated the Article 10 right, but failed to weigh the importance of the Article 8 right. On what *other* grounds could it be said that the Princess's shopping trips involved a privacy right weighty enough to make it *necessary* to interfere with freedom of expression?
- Finally, it is to be noted that the approach outlined at 22 above was not adopted by the minority of 2, who agreed in the result (presumably on the basis of the inadequacies of German law) but strongly disagreed with the majority's reasoning. They took the view that Caroline was a public figure; that the proper criterion was whether she had a "reasonable expectation of privacy"; and that she had no such expectation if she went out in public places where she could be observed and photographed.

Multiple interests at stake

25. "Parallel analysis" or "ultimate balancing" becomes all the more complex when several people are involved, and/or when a given individual's interests may be categorised as aspects of more than one Convention Right. This was seen to some extent in *A v B (Flitcroft)*, where the Article 10 rights of the women to disclose their experiences with the claimant footballer were brought into account in favour of permitting publication. Recent cases show, however, that a still more complex analysis will be necessary in some cases.

Emerging Article 8 rights

The right to publicise

26. *Re Angela Roddy* was a family case where a 13-year-old girl had become pregnant; the court had imposed injunctions against the world to protect her, the teenage father, and

their child, from harmful publicity. Already, in managing this situation the court had been required to take account of the Article 8 rights of these 3 minors, and the grandparents of the infant. On top of that, there were the rights of the couple who had adopted the infant, which had been taken away from its mother. Angela, now nearly 17, decided to sell her story to a newspaper and she and the paper asked for the injunctions to be varied to allow this, without naming anyone else involved. Munby J upheld the application, acknowledging that it rightly invoked not only the Article 10 rights of the newspaper and Angela, but also Angela's right under Article 8 to tell her story to the general public: see [38]. One of the fundamental principles underlying Article 8 is the value of personal autonomy; and one of the rights protected by Article 8 is the right to share, if one chooses, one's story with others.

27. This newly recognised Article 8 right will add a layer to parallel analysis in some cases. In *Flitcroft,* for example, it could have added weight to the women's acknowledged Article 10 rights. I would also suggest that this point could come to have considerable importance in the continuing debate - highlighted by the *Douglas* case - about the right of celebrities to seek, and at the same time shun publicity. So long as the public is not misled or harmed, it may be asked why the famous should not be entitled to exercise their human right to self-determination by picking and choosing which aspects of their lives they show to the public?

The right to reputation

28. A series of EctHR judgments in 2004 has firmly embedded in Convention jurisprudence another novel right: the Article 8 right to reputation. In this country it had been thought that libel cases involved only one Convention right: the right to freedom of expression. It has also been said on several occasions that false information cannot be the subject of a claim in confidence. However, in *Radio France v France*, *Chauvy v France* and *Cumpana & Mazare* the Strasbourg court (in the last case, the Grand Chamber) have put us right. The first two cases involved allegations of involvement in WWII war crimes; the third, accusations of bribery and corruption in government. In each case the court declared that the right to reputation was among the rights guaranteed by Article 8. Put another way, the right to 'respect' for private life embraces a right not to have others purvey false information about one's private life. It follows, surely, that a claim in privacy can be made in respect of a publication of that kind.

29. This could resolve one awkward practical point: what claims to advance when a newspaper publishes a story (based, for example, on revelations by a secretary, PA or the like) which mixes fact and fiction about the claimant's private life? It seems one may now be able to choose how to label the claim, and select the route which seems to have the greatest procedural advantages. The emergence of this new aspect of Article 8 could

also have an impact, in the future, on the court's approach to injunctions in libel cases involving private life, as discussed later.

The public interest

30. In the traditional law of confidence, the public interest was a potential defence to, or justification for, a breach of confidence. In the new law, the degree to which information is of public concern is a factor to be taken into account in conducting the parallel analysis of Articles 8 and 10. Three particular issues emerge from the cases in 2004.

Criminal offences and court reporting

31. At this conference last year I highlighted the remarkable case of *Ellis*, in which the Divisional Court had to deal with an Offender Naming Scheme run by a police force, publicising the crimes of local people. The court held that the job of punishing offenders was for the courts and doubted whether it could ever be lawful for police to include the father of young children in such a scheme. The question I asked was whether this same approach might be applied to a newspaper "name and shame" campaign, of which there have been some notable examples. The continuing erosion of the public/private law distinction since then could be thought to lend weight to the view that it might. What would be the differences, justifying a distinction? One reason might be that the possible justifications are different, and more extensive, in the case of the media, with their role as watchdog on behalf of the public (see Lord Hoffmann in *Campbell*). And cases this year have tended to support that view, and mitigate concern that the misdeeds of those prosecuted at public expense might somehow become (at least partially) private information.

- In April, in *Re X, Y (Children)* Munby J refused to enjoin newspaper publication of photographs of U, a convicted paedophile with a long criminal history. The injunction was sought on behalf of U's brother F (also a convicted paedophile) and F's twin 8-year old daughters X and Y, who had suffered when previous trials involving U, and linking him to F, had been reported. Munby J observed that there was a clear public interest in the publication of a criminal's photograph so that the public could "put a face to a name" and avoid contact with the criminal.
- In May, in the similarly named *X v Y* already mentioned (the public lavatory sex case) the CA court held that criminal offences are not purely private matters but are "normally a matter of legitimate concern to the public": [52]. This, coupled with the public nature of the offence, took the events outside the scope of Article 8.
- In October, in *R(Stanley) v Metropolitan Police Commissioner* the Administrative Court rejected a challenge to a local authority's naming and

shaming scheme, relating to youths the subject of Anti-Social Behaviour Orders (ASBOs). The scheme involved leaflets posted on the council's website and a tenants' newsletter. Both featured photographs, personal details and graphic accounts of the youths' behaviour. In this case, unlike the other two, *Ellis* was cited. It was nonetheless held that publicity intended to inform, reassure, assist in enforcement of existing orders, inhibit the youths or deter others was unlikely to be effective without publicity. The scheme was reasonable and proportionate.

- A few weeks later the HL affirmed in *re S*, [18], that "the ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in a criminal court... a strong rule [which] can only be displaced in unusual or exceptional circumstances". By analogy, it would seem, the basic rule must be that - subject to any arguments based on statutory rehabilitation - convictions can be freely reported.

Interesting trivia

32. Where does this kind of information stand now? *Flitcroft* was widely seen as a firmly pro-media decision, with its emphasis on the importance of selling newspapers, and the fact that even trivia about public figures could be of legitimate interest to the public. These factors were acknowledged by the majority in *Campbell* (HL) (see [143]) and to that extent the HL decision endorses this strand of judicial reasoning. Equally, the majority's view that the shopping trips and colds or broken legs of celebrities are usually outside the scope of privacy law will tend to reassure editors. Their worries for the future will stem from *Caroline*, and to some extent from the way the HL in *Campbell* dealt with editorial discretion.

Deference to editorial judgment

33. The central issue in *Campbell* was, in the end, whether the editor's decision to include in his articles some details of Ms Campbell's therapy at NA and photographs of her emerging from a session was within the scope of his editorial discretion. The key feature of the case was the acceptance of Ms Campbell that the paper was entitled to reveal her drug addiction, in order to correct her public lies about it. It was also entitled to say that she was taking therapy for it. The question was how far the paper could go in adding detail to these bare facts. The HL, like the CA, was unanimous in recognising that it is not the function of the courts to step into an editor's shoes; the media must have some latitude for judgment when deciding, in the heat of the moment, how much information it is legitimate to provide to readers, in fulfilling a recognised public interest. This, as a principle, is satisfactory for the media. The application of the law in the particular case does however give grounds for some concern that the majority were really paying only lip-service to the principle they acknowledged. As Lord Hoffmann observed: "This is a matter on which different people may have different views ... If any margin is

to be allowed, it seems to me strange to hold the *Mirror* liable in damages for a decision which three experienced judges in the Court of Appeal have held to be perfectly justified". It is understood that the case may be on its way to Strasbourg on this point, if not others.

Prior restraint

34. One of the shorter appellate decisions of 2004 concerned one of the most vexed issues in media law: what does s12(3) HRA mean when it says that a court may not restrain publication before trial unless it is satisfied that the applicant is "likely" to establish that publication should not be allowed. The issue arose in *Cream Holdings v Banerjee* The CA had delivered lengthy judgments, effectively holding that likely does not mean probable; s12(3) imposes an enhanced *American Cyanamid* test. In October the HL pronounced, in just 30 paragraphs. Its answer was that "likely" sets a flexible standard. It cannot in all circumstances mean "more probable than not"; in some cases that would produce injustice. So,

- in general, an applicant should be required to cross the threshold of satisfying the court he is more likely than not to win at trial, and the court should be "exceedingly slow" to grant an injunction if this is not shown; but
- there will be cases where it is necessary for the court to depart from this general approach, and a lesser degree of likelihood will suffice; eg, where disclosure could lead to particularly grave consequences.

35. *Cream* was a commercial confidence case, but clearly this approach must be followed in media privacy cases. The rule in libel cases is different, though; there a claimant will only obtain an injunction by showing that he is bound to win at trial - a stiff hurdle. This rule, which goes back to the 19th Century, was reaffirmed at first instance in March 2004 (*Autocherish v Coys)* and in the CA in November (*Greene v Associated Newspapers.)* What, though, of the Article 8 right to reputation (above)? Suppose the defamatory and allegedly false material complained of clearly relates to an intimate aspect of private life. Suppose it is such that the court would, if it were true, prohibit its disclosure on privacy grounds? It can be said that the law is illogical if it is readier to stop the disclosure of admittedly true information about an aspect of private life than to block the peddling of alleged lies about the same topic[17]. Why should a media defendant be *better* off if the accuracy of its information is disputed? Elements of such an argument were raised in the *Greene* case (see [68]), but in some haste on unpromising facts, and the judgment does not dispose of the point. It is surely going to arise soon.

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[17] See *The Law of Privacy & The Media* §§7.46-7.52, 10.24

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* Official judgment available only in French at present, but a case summary and unofficial English translation are available at http://www.5rb.com/casereports/detail.asp?case=292