Text of a speech given by Christina Michalos, barrister, at a dinner meeting hosted by The Intellectual Property Lawyers' Organisation (TIPLO) at Gray's Inn on 15 June 2005 and chaired by Lord Justice Mummery.

Image Rights and Privacy: After *Douglas v Hello!*

In *Bleak House*, Charles Dickens wrote of the fictional case *Jarndyce v Jarndyce* that children had been born into and old people had died during it. "Every master in Chancery has had a reference out of it. Every [judge] was in it, for somebody or other, when he was counsel at the Bar."

It maybe that this sounds familiar to you. Back in the dim and distant past, in November 2000, lawyers acting for OK! magazine, Catherine Zeta Jones and her husband obtained an injunction on the telephone from Mr Justice Buckley preventing Hello from publishing some illicitly obtained photographs of their wedding. *Douglas v Hello* was off and running. Since then, 5 High Court judges have had their hands on it, it has been to the Court of Appeal 4 times.[1] Two of the Claimants had a child and one won an Oscar. The Pope died. Like *Jarndyce v Jarndyce,* even the Claimants' original barrister is now a High Court judge. And it's probably not over yet as it trundles down the tracks towards to the House of Lords.

So over four and a half years later, we have a Court of Appeal decision in respect of the final trial judgment. It re-iterates the test House of Lords approved in *Campbell*, that when it comes to privacy the question is whether a person in the position of the Claimant would have "a reasonable expectation of privacy."[2] As lawyers, we might have had a 'reasonable expectation" that by now the law regarding a right to a private life would be sufficiently certain to enable us to give if not unequivocal advice, some sensible indication of a court's likely decision. It is a long standing principle of both domestic and European law that national law must be formulated with sufficient certainty and that exceptions must not be arbitrary. The question is four years later, are we any further forward? Do we even know where are we going? Is there any legal certainty in this area?

Let's start with the basics. A simple question: what is the cause of action? Well, :

- We know it's not a tort of privacy, there's no such common law right: see *Wainwright v Home Office*.[3]

- It then appeared that the cause of action is breach of confidence but might better be described as 'the tort of misuse of private information': see Lord Nicholls, *Campbell v MGN*.[4]

- Or 'protection of the individual's informational autonomy' as Baroness Hale preferred it.[5]

So at this point, it's looking more hopeful. It's a tort, it has its roots in breach of confidence and we have a catchy label - the tort of misuse of private information. So far so good. But that didn't last long.

Now, according to the Court of Appeal in *Douglas v Hello*, if you have privacy you want to sell, your cause of action isn't a tort at all. After much judicial wailing about having to shoe-horn this type of claim into breach of confidence, the Court of Appeal have concluded that it definitely isn't a tort and falls to be categorised as a restitutionary claim for unjust enrichment - probably.[6] I would pause here to add that what the Court of Appeal dealt with in one paragraph, namely the jurisdictional basis for breach of confidence, occupies the entirety of Chapter 2 of Francis Gurry's book on Breach of Confidence - noting that at times contract, equity and property have been used by the courts. He suggests that it is sui generis and that attempts to confine it should be resisted in order to allow the cause of action flexibility.

There are also veiled hints that the real complaint is in some cases harassment. In the *Naomi Campbell* case, Lord Hope observed that the message from the photographs was that someone was following her[7] and Lady Hale considered that the harm was aggravated by making the claimant think she was being followed or betrayed.[8] In *Von Hannover,* it was noted that the continual harassment of paparazzi-type photography induces a strong sense of intrusion.[9] The nature of the cause of action is vital as it affects the question of which wrong is actionable and the remedy. The taking of the photograph, private possession of the photograph and the publication of the photograph are entirely separate. So far it is publication that has been enjoined but we may be moving into a world where delivery up of the original images is on

the cards if the complaint is the actual act of photography. The snatched images of the Douglas wedding are the subject of a permanent injunction granted at the end of the trial and affirmed by the Court of Appeal - which you may find surprising given that they have already been published in a national magazine.

At least there seems to be some broad agreement that this cause of action has its roots in breach of confidence. The judges don't want us to call it that any more. But we're not allowed to call it what it actually is - a privacy claim - because there is no such tort. In *Douglas v Hello*, the Court of Appeal actually referred to 'the cause of action formerly described as breach of confidence'.[10] This has unfortunate echoes of "the artist formerly known as Prince" who attempted to re-brand himself as a Symbol, but everyone still called him Prince. Just as we still refer to privacy.

But if we stop for a moment, put down the law books and take a step back, and ask what is *Douglas v Hello* really about?, common sense tells us that it is actually about commercial exploitation of image. It has about as much to do with privacy as a programme like Celebrity Love Island has to do with celebrity or love or indeed reality. It is regrettable that in this case the Court of Appeal didn't embrace the right of publicity and start calling the garden equipment by its proper name. The fact that this is almost an image right is reflected in the following statement from the judgment:

> "Recognition of the right of a celebrity to make money out of publicising private information about himself, including his photographs on a private occasion, breaks new ground. It has echoes of the *droit à l'image* reflected in . . .the French *Civil Code* and the German . . . 'tort of publicity claim'. We can see no reason in principle why equity should not protect the opportunity to profit from confidential information about oneself in the same circumstances that it protects the opportunity to profit from confidential information in the nature of a trade secret." [11]

The Court of Appeal approved Mr Justice Lindsay's description of 'a hybrid kind of commercial confidence'.[12] So it might be thought that we now have 3 separate identifiable causes of action:

1. classic commercial breach of confidence for trade secrets - *Coco v Clark*.[13]
2. tort of misuse of private information for truly private information of the sort that no one would want published - *Campbell*.
3. hybrid commercial confidence in private information - *Douglas v Hello*.

But that would be too straightforward and is negated by the Court of Appeal in *Douglas v Hello* purporting to role up classic breach of confidence with the commercial right in private information:

> "Where an individual ('the owner') has at his disposal information which he has created or which is private or personal and to which he can properly deny access to third parties, and he reasonably intends to profit commercially by publishing . . that information, then a third party who is, or ought to be, aware of these matters and who has knowingly obtained the information without authority, will be in breach of duty if he uses or publishes the information to the detriment of the owner. We have used the term 'the owner' loosely." [14]

So what it is that transforms private information into a protectable interest is 'reasonably intending to profit commercially by publishing the information.' Almost anything to do with a celebrity can be profitable - take a celebrity who is HIV positive. In the sad world in which we live, the reality is that there are publications who would be interested in that information and would buy it. The moment the celebrity decides to sell it, and that intention to sell is known or ought to be known, his medical records - his private information - become a protectable commercial interest.

But according to the Court of Appeal, whilst you can sell it, you can't buy it and this was the reason that OK! failed on their part of the claim. The right doesn't arise because of a proprietary interest.[15] It depends upon a third party's conscience. OK! only had a licence and a licence passes no property - it only makes something lawful which otherwise would have been unlawful.[16]

By this point we have the beginnings of a riddle the Sphinx would be proud of:

"I exist, but no one knows my name. You can sell me, but you can't buy me. What am I?"

There is a glimpse of hope in our search for certainty as *Douglas v Hello* has stated some specific principles that apply to photographs:

1. Firstly, special considerations attach to photographs because a photograph is particularly intrusive.[17] This is not new and was applied in *Theakston v MGN*[18] in which it was held that the fact of Jamie Theakston's extra curricular activities in a brothel could be published, but that the photographs of those activities could not be.

2. Secondly - and this is new - the principle that once the information is in the public domain then it is no longer entitled to protection under the law of confidence does not apply to photographs.[19] Each fresh viewing by an additional viewer amounts to a new intrusion. Even a repeat viewing by someone who has already seen it is an invasion of privacy. This is a major in road in the classic *Coco v Clark* approach to confidence and it is this that entitles the Douglases to a permanent injunction against Hello!. It may also be time for Gordon Kaye to consider instructing some lawyers again and revisiting what is a serious blot on our legal landscape.[20]

3. Thirdly - and this is astounding -

> "The objection to the publication of unauthorised photographs taken on a private occasion is not simply that the images they disclose convey secret information or [unflattering] impressions . . . It is that they disclose information that is private. The offence is caused because what the claimant could reasonably expect would remain private has been made public."[21]

This clearly illustrates how trying to stuff this cause of action into breach of confidence is like trying to stuff an outsized octopus into carry-on luggage: impossible, pointless and just as it looks neatly packed in, another tentacle escapes. A long standing principle of the law of breach of confidence is that the substance of the information must be capable of being confidential. Mere trivial tittle tattle is not protected.[22] In *McNicol v Sportsman Book Stores*[23] the supposed confidential information was a betting system which "depended upon the age of the moon and the date of a particular race." The court refused to grant an injunction holding the system was "perfectly useless" - in other words only of use only to lunatics.

Perhaps one of the most startling aspects of *Douglas v Hello* is the complete failure by the Court to address the question of what the information in issue was. At first instance, Mr Justice Lindsay, had a go suggesting it was 'the photographic representation . . . of what [the couple] looked like on the exceptional occasion of their wedding.'[24] But now this principle - that there must be identifiable information and it must be *capable* of being confidential - seems to have been abandoned. As long as you are in private that is enough. The offence is caused because what the claimant could reasonably expect to remain private has become public. The information in the Douglas case was really nothing more than what they looked like and this is trivial information. Yes, a fuss was made because there was a photograph of Ms Zeta Jones eating, but it is trivial information. Commercially valuable - yes - but still trivial.

This would mater not if the courts had grasped the nettle of the right of publicity as in other jurisdictions and required the commercial hitchhiker seeking to travel on the fame of another to pay the fare or stand on his own two feet. *Douglas v Hello* is really about property rights despite the reluctance of the Court to say so. So we can conclude that there is a cause of action and whatever dress its wearing, underneath are the petticoats of breach of confidence. But we can't say with certainty what we should call it or whether it's a tort or an equitable remedy.

That brings us to the next question. The test is 'reasonable expectation of privacy'. What does that mean in the context of photographs?

In *A v B*, as we all know, Lord Woolf said that 'usually the answer to the question whether there exists a private interest worthy of protection will be obvious'.[25] *Campbell* neatly illustrates the fact that this is a dubious proposition. Overall, in that case, five appellate judges considered that the information was not obviously private and did not warrant protection, - the entire Court of Appeal (Phillips MR, Chadwick and Keene LJJ) and Lord Hoffman and Lord Nicholls in the House of Lords. Only four judges, one of whom was the trial judge, considered that the information was obviously private. If the senior judges can not agree, legal advisers are bound to find it difficult to predict whether the proposed disclosure of any particular piece of information will fall foul of Article 8 or is justified under Article 10. Lord Hoffman's observation that it seems 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 justifiable[26] has to be right if the margin of journalistic licence carries any meaning.

Back in the world of *Jarndyce v Jarndyce,* the Court of Appeal concluded that the Douglases had an "virtually unanswerable"[27] privacy claim and in the light of *Campbell* and *Von Hannover* might well have been clear enough to justify summary judgment in their favour.[28] This, when the first Court of Appeal had discharged the injunction in part on the balance of convenience because it would have resulted in Hello! losing an entire issue which could not be compensated in damages. Some how in four years, the balance has tipped and it has now magically become 'summary-judgment obvious' that an injunction should have been granted. These cases show that trying to define what 'is obviously private' is like trying to define pornography - - you know it when you see it, but everyone has a different opinion about what falls into the class.

The problem is nowhere more apparent when it comes to photographs in a public street. As Lady Hale said in *Campbell*, there could have been no complaint if it was simply a picture of Naomi Campbell going about her business in a public street and there was nothing essentially private in showing how someone looks when they pop down to the shops for a bottle of milk.[29] Lord Hoffman agreed: 'The famous and even the not so famous who go out in public must accept that they may be photographed without their consent, just as they may be observed without their consent.'[30] Even before this, there was a long history of case law in many common law jurisdictions to the effect that if you are in public place, you can't complain if someone takes your photograph - sometimes to really shocking extremes. In an American case[31], a man was convicted of an offence of videotaping up a woman's skirt using a camera concealed in a bag. In reversing his conviction, the Court saw fit to add even though the camera was aimed up her dress 'the victim had no reasonable expectation of privacy while standing on a public fairground.' So we did have some certainty, generally, unless there are exceptional circumstances, the woman in the public street cannot complain.

Then the ECHR gave judgment in *Von Hannover v Germany* - which concerned photographs of Princess Caroline of Monaco in public places. If we consider the content of some of these photographs - for example showing the applicant out shopping, riding a bicycle and in a restaurant - it is clear that they do not show anything 'private' in a 'disclosure is offensive sense'. But the ECHR held that these photographs infringed the applicants right to a private life because the photographs did not contribute to a debate of general interest to society. Instead, they related exclusively to details of her private life. The public did not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life.

The situation is further complicated by *Peck v UK*[32], in which the applicant was captured on CCTV walking in the town centre in obvious distress and then attempting suicide by cutting his wrists. Part of this footage was supplied to a programme called Crime Beat which had 9.2 million viewers. The ECHR found that Mr Peck's right to respect for private life had been infringed but part of the reason was the fact that the distribution far exceeded the degree of exposure that would be foreseeable to a person walking in the area. In the world of the internet, where a digital record can be on the web in an instant and perpetuated forever, the foreseeability aspect is particularly important. Is publishing a photograph that does not disclose anything private but rather only extends knowledge of the particular incident to a somewhat larger public in itself an infringement?

If, God forbid, two members of the Bar decided to desecrate a hallowed place by electing to have sex in the middle of Gray's Inn Gardens and some enterprising clerk takes a picture of them and sells it to the press, does the mere fact that it is sexual activity and the distribution is wider than foreseen infringe their privacy? Even if they are in public? Elizabeth Jagger obtained an injunction against further publication of CCTV footage of her having sex in a nightclub.[33] The Court accepted that the not entirely private place where the incident took place did not destroy the likelihood of success in a privacy claim. However, the Defendants did not attend the hearing and weren't represented. It wasn't fully argued and the value of this case as a precedent should be regarded as minimal.

But *Campbell* and *Von Hannover* on the face of it conflict as regards public street photographs. They can be distinguished in several ways but finally we come to a point where we have a definitive answer. And unsurprisingly, it comes from an entirely different area of law. In *Price v Leeds City Council* [34] (a local authority possession claim against gypsies) it was held that where a decision of Strasbourg conflicts with a previous decision of the House of Lords, the Court of Appeal is bound to follow the decision of the House of Lords. So for popping down to the shops, we follow Naomi Campbell so to speak - at least for the time being.

So there we are. In four and half years, there have been numerous opportunities for the courts to move towards a more certain state of the law. No one denies that this is a difficult area but there has been a disappointing failure to attain any sensible level of certainty. The Courts need to deal with the fact that trade secrets, commercial property in image and genuinely private personal information are different animals and need different causes of action. It may be that, whilst decreed undesirable, legislation is the only way out of the mire.

I wanted to leave you with some thoughts as to where this is headed. Photography is a relatively modern phenomenon. The Kodak Brownie - the first commercially available camera - didn't go on sale until 1900. If I asked you all to name iconic photographs, there would probably be a relatively small pool to chose from. I ask you to consider two.

Firstly, *Toffs and Toughs* a photograph taken by Jimmy Sime in 1937. This is a famous image showing Eton school boys in their top hats outside Lords Cricket Ground with three local boys looking on. It is an interesting social comment. Imagine running that past the legal department of a newspaper today. "OK, it's a public street but they are minors. The boys are at school, publicising that photograph will interfere with their private life, they may be ridiculed by their classmates. And its Eton, so they may have famous parents and then we're in breach of the PCC Code. And even if they don't have famous parents, they'd certainly be able to afford legal fees. Plus if we put that on the front page of the newspaper, it amounts to exposure far beyond that which would be foreseeable. I wouldn't like to try and persuade a judge. Maybe we should pixellate their faces. Actually- let's forget it. Have we got any rights cleared images with model releases?"

The second picture I'd like you to consider is Nick Ut's image of a Vietnamese girl screaming in pain fleeing from a napalm attack on her home. This won a Pulitzer prize. It is an enduring and powerful image that symbolises the horror of war, but perhaps there are some things society shouldn't be protected from. Take that picture today and it would be a brave editor that would want it on their front page. You can't really get more private, naked and overwhelmed with grief at the massacre of your family and running for your life. It's war, you say, there's a public interest. Imagine that picture had been taken in America and there was a risk the subject would instruct lawyers. How confident would you be of persuading a judge in this country that the interest in publishing outweighed her right to privacy if her lawyers were there asking for an injunction?

It isn't yet a slippery slope but it is certainly a sharp incline being progressively greased by the judiciary. We are heading into a world where the only published photographs will be artificial staged images with signed model release forms. The spectre of a lack of genuine, spontaneous documentary photography is raised. I'm not suggesting that there should be a free for all. Where the image is actually private, privacy should be respected. But there is a slow creep into the right to take photographs of people in public places that is not to be welcomed.

In conclusion, it is worth stopping to reflect that the origins of the European Convention on Human Rights lie in the atrocities of the Nazi Holocaust and the need to guard against dictatorships. These rights are primarily directed at the most serious of human rights abuses including torture, slavery and forced labour. Of course, serious intrusions into an individual's private life - which may include, for example, physically endangering paparazzi harassment - properly fall within Article 8. But the fathers of the Convention well stop to wonder how it is that it is now being used to stop publication of innocuous photographs taken in public places and to give 'a prima donna celebrity'[35] the grand sum of £3,500 in respect of a photograph of her on a public street. Piers Morgan, then editor of the *Mirror* at the time of the *Campbell* case, who following the judgment of the House of Lords, produced the obligatory sound bite saying:

> " 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."[36]

In spite of all this, the litigation continues. Other than in the most (and I hesitate to use the word) 'obvious' cases, the media continue to publish the kind of ground breaking images that make these cases - a former drug addict in the street, some wedding photographs, a couple of D-listers having sex in a nightclub. It's hardly the stuff of Woodward and Bernstein. But one thing is certain that the Courts will have more opportunities to clarify the law as the publications continue - either because of a lack of certainty or more likely motivated by profit - because as the market shows, we may not all read the gutter press, but we all want to look at the stars.

Notes:

1. 1. Appeal against the interlocutory injunction, 21st December 2000, (Brooke LJ, Sedley LJ, Keene LJ) [2001] QB 967; 2. Appeal against the setting aside of proceedings against the 6th Defendant (who was domiciled in New York) as a joint tortfeasor, 12th February 2003, (Scott Baker LJ, Rix LJ, Lord Phillips of Worth Matravers MR) [2003] EMLR 28; 3. Appeal against an order granting permission to the Claimants to call and cross-examine a particular witness, 3rd March 2003, (Lord Woolf of Barnes LCJ, Kennedy LJ, Scott Baker LJ); 4. Appeal against final judgment after trial, (Lord Phillips of Worth Matravers MR, Clarke LJ, Neuberger LJ) [2005] EWCA Civ 595.
2. *Campbell v MGN* [2004] UKHL 22, [2004] 2 AC 457 at paras 21 and 135-7.
3. [2003] 3 WLR 1137 at para 27, 31 and 35.
4. *Campbell v MGN* (HL) [2004] UKHL 22, para 14
5. *Campbell v MGN* (HL) [2004] UKHL 22, para 134
6. *Douglas v Hello* (CA) [2005] EWCA Civ 595 para 96 -97.
7. *Campbell v MGN*(HL) para 98
8. *Campbell v MGN*(HL) para 115
9. *Von Hannover* (ECHR) para 59.
10. *Douglas v Hello* (CA) [2005] EWCA Civ 595 para 53.
11. *Douglas v Hello* (CA) [2005] EWCA Civ 595 para 113.
12. *Douglas v Hello* (CA) [2005] EWCA Civ 595 para 34.
13. *Coco v A.N. Clark* (Engineers) Ltd [1969] RPC 41.
14. *Douglas v Hello* (CA) [2005 EWCA Civ 595 para 118.
15. *Douglas v Hello* (CA) [2005] EWCA Civ 595 para 126.
16. *Douglas v Hello* (CA) [2005] EWCA Civ 595 para 134.
17. *Douglas v Hello* (CA) [2005] EWCA Civ 595 para 84
18. [2002] EMLR 22 at para 58
19. *Douglas v Hello* (CA) [2005] EWCA Civ 595 para 105.
20. *Kaye v Robertson* [1991] FSR 62.
21. *Douglas v Hello* (CA) [2005] EWCA Civ 595 para 107.
22. *Coco v Clark* [1969] RPC 41, 48.
23. [1930] MacG CC 116 (1928 -35)
24. *Douglas v Hello* [2003] EWHC 786 (Ch) para 119
25. *A v B plc* [2002] 3 WLR 542, 550 para 11 (viii).

26. *Campbell* (HL) para 62 (Lord Hoffman).

27. *Douglas v Hello* (CA) [2005] EWCA Civ 595 para 253.

28. *Douglas v Hello* (CA) [2005] EWCA Civ 595 paras 259.

29. *Campbell* (HL), Baroness Hale [154]

30. *Campbell* (HL), Lord Hoffman [73]

31. *C'Debaca v Virginia* [1999] Va. App. Lexis 72

32. [2003] EMLR 15.

33. (9 March 2005) Mr Justice Bell.

34. [2005] EWCA Civ 289

35. *Campbell v MGN* [2004] UKHL 22 at para 143, [2004] 2 AC 457, 498.

36. As quoted in *The Daily Mirror*, 7 May 2004.