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I – A Move in the Law

"As a campaigner, Naomi’s about as effective as a chocolate soldier."¹ This statement by ‘The Mirror,’ can now be regarded with irony. The House of Lords’ decision in Campbell has become a landmark ruling for the recognition of privacy, arguably ‘spurred’ by the integration of the Human Rights Act 1998.² It is considered to incorporate the invasion of privacy into the common law action of ‘breach of confidence.’

Naomi Campbell brought an action on ‘breach of confidence.’ The traditional requirements for this action are outlined in Coca.³ However, the House of Lords followed Lord Goff in Spycatcher (No2) and classified a confidential relationship as one where the ‘defendant knew or ought to know the information would be considered [by the claimant] as private.’⁴ This removed the limitation of pre-existence from the relationship, confirming a widely anticipated development⁵.

The Lordships then appeared to extend the test by distinguishing between information which is ‘confidential’ and that which is ‘private’. It was this distinction which led to the phrase ‘misuse of private information.’⁶

II – Misuse of Private Information: The Tests

To apply what may be seen as a broadened tort one must decide what constitutes ‘private information.’ Three tests arose. The first: based on the facts did the claimant have a ‘reasonable expectation of privacy?’⁷ The second: would the information be “highly offensive to a reasonable person of ordinary sensibilities”, based on the position of the claimant?⁸ The third: was the information ‘obviously private?’⁹

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¹ The Mirror, 7th Feb as cited in Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22 [9] (Lord Nicholls)
² Campbell v Mirror Group Newspapers Ltd [2004] per Lord Nicholls
⁴ Attorney-General Appellants v Observer Ltd. and Others Respondents
⁷ Campbell (n 2) [14] per Lord Nicholls
⁸ ibid [11] per Lord Nicholls
⁹ ibid
Does the proposal of alternate tests simply add confusion to the scope of privacy? The incorporation of a subjective element into the first two tests is welcomed. The first test of ‘reasonable expectation’ is applied by Lord Phillips in *Douglas v Hello* and is regarded clearer and simpler than the ‘highly offensive’ criteria. It is argued by Lord Nicholls that the criteria of the second test is a more challenging bar for the claimant to prove. The concern is that, in order to evidence this, one may consider the weight of the intrusion of privacy and thus merge the question of privacy and proportionality.

The ‘highly offensive’ test was intended by Lord Hope for application if the ‘obviously private’ test did not suffice; thus when there is ‘room for doubt.’ Although depicted as a two part test, it could be argued that the latter is unnecessary, as ultimately the ‘highly offensive’ criteria is the only hurdle the information must pass. So what is it that the ‘obviously private’ test intends to achieve? In consideration Lord Hope cites Lord Woolf; ‘the subject of a claim for privacy should not be allowed to be the subject of detailed argument.’ This reasoning suggests an intention of saving time and cost. It also presents a possibility for the correction of what is perhaps a flaw in UK law; that often in order to protect privacy the claimant’s most intimate details are examined.

### III – Judging What is Private

Is it fathomable that a claimant could circumvent private information being discussed? If so how is the information to be decided on? Baroness Hale asserts three categories as ‘obviously private’: ‘health, personal relationships and finances.’ However, it is not held that information which fits these classifications, no matter how marginally, shall be deemed private with no further enquiry. Consideration must be given to the individual details, for example although clearly medical information, ‘a cold or broken leg’ are not regarded as private information. So, when applying the facts, how is the scope of these categories to be defined? By simply contrasting judgments considered in the later hearings of *Campbell*, as to whether therapy should be regarded medical treatment, one can see there is already disparity in opinion towards what falls within the categories. It was, however, decided by the majority in the House of Lords that the scope of the definition of ‘medical treatment’ is now extended to included ‘therapy’.

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11 *Douglas, Zeta-Jones and Northern &Shell plc v Hello! Ltd (No5 and 6)* [2005] EWCA Civ 595 per Lord Phillips

12 *Campbell (n 2)* [99] per Baroness Hale

13 *ibid.* [22] per Lord Nicholls, paraphrased

14 *ibid.* [94] per Lord Hope


16 *Campbell (n 2)* [135] per Baroness Hale

17 *ibid.* [157] per Baroness Hale

18 *ibid*
Contrasting judicial opinions highlight that the application of the ‘obviously private’ test can create uncertainty, which is undesirable in courts. Some argue against established categories, as surely what one regards to be private information is dependent on the individual.\textsuperscript{19} Thus, the approach should not assume protected categories, but leave these areas open to a subjective view, albeit with the need of some objective restrictions. Although relative to both parties this argument is more effectively raised in order to protect free speech, as the presumption which arises based on these categories only adds to the protection of the claimant, the categories provide useful guidelines. If written in legislature they could be deemed restrictive, but the flexibility of common law can aid their evolution, even with the creation of exceptions.

\textbf{IV – A Shift Towards a Higher Recognition of Privacy}

Regardless of which test is applied there is undeniably a shift towards a higher recognition of privacy by the common law. Following \textit{Campbell}, \textit{Jagger} and \textit{Mckennit} have received injunctions over personal relationship stories.\textsuperscript{20} This shows that the special consideration, which Lord Woolf argued should only be afforded to marriage, is now extended to transitional relationships.\textsuperscript{21} As the courts encompass a broader interpretation of privacy, it is now considered that in practice it is ‘very easy to get through the Article 8 doorway.’\textsuperscript{22} If this is true, one must consider why some ‘misuse of information’ claims fail.\textsuperscript{23} This may be because ‘private information’ is also subject to the second test in \textit{Campbell}: ‘Is the publication of the information proportionate when balancing Article 8; the right to privacy against Article 10; freedom of expression?’ This development of the common law can be seen as a reaction to the enactment of Human Right Act 1998. Section 6(1) imposes an obligation on the UK court in its function as a ‘public body’ to act in a way which is compatible with the European Convention of Human Rights.\textsuperscript{24}

At this point the law becomes relatively complex. How does one decide the weighting of each article? Lord Hoffmann states there is ‘not a presumption in favour of one or another,’ a view harmonious with Resolution 1165.\textsuperscript{25} However the appeal in \textit{Peck v UK} contradicts the stance of neutrality over each right.\textsuperscript{26} The domestic court appears

\footnotesize{\textsuperscript{19}N.A Moreham, ‘Privacy in the common law: a doctrine and theoretical analysis’. \textit{Law Quarterly Review} 2005, 628, 656

\textsuperscript{20} \textit{Campbell} (n 2); \textit{Ms Elizabeth Jagger v John Darling & Others} [2005] EWHC 683 (Ch), \textit{Ash v Mckennit} [2008] Q.B.73

\textsuperscript{21} \textit{Av B} (n 15)[11] and [43] per Lord Woolf CJ

\textsuperscript{22} Marcus Partington of the Media Lawyers Association as cited in The Select Committee Report on press standards, privacy and libel. Published 24th Feb 2010 [26] www.publications.parliament.uk

\textsuperscript{23} The claim failed in the following cases: \textit{LNS (Terry) v Persons Unknown} [2010] EWHC 119 (QB), \textit{Lord Browne of Madingley v Associated Newspapers Ltd} [2007] EWCA. Civ 295

\textsuperscript{24} European Convention of Human Rights 1950

\textsuperscript{25} \textit{Campbell} (n 2) per Lord Hoffman, Resolution 1165 of the Parliamentary Assembly of the Council of Europe (1998)

\textsuperscript{26} \textit{Peck v United Kingdom} (44647/98) [2003] E.M.L.R. 15}
to favour freedom of expression, conversely the European Court of Human Rights applies more weighting to privacy; as evidenced by the judgments in these cases.

The Human Rights Act also encompasses section12 ‘freedom of expression’, a provision which the UK parliament regarded as a ‘safeguard to the press’.\(^{27}\) The function of section12 is to acknowledge the importance of Article 10,\(^{28}\) ‘where the proceedings relate to...journalistic, literary or artistic’ material.\(^{29}\) This shows that it is not just the court as interpreter who recognises that a ‘freedom to publish of unjustifiable restraint [is]...the sort of society which the convention seeks to promote,’\(^{30}\) it is also the central aim of the legislature.

V – The Public Interest

The Human Rights Act section 12(4)(b) also gives effect to the PCC Code of Practice. Section 3; Privacy, reiterates the importance of ‘public interest’ as a defence to ‘justify intrusion into one’s private life without consent.’\(^{31}\) Section 3(1)(iii) provides the justification as to why certain private details denoting Miss Campbell’s drug addiction were able to be published. Campbell had supplanted her right by lying to the public about the problem, and thus ‘The Mirror’ acted in the interest of the public to prevent them from being misled.

If Miss Campbell had not misled the public, none of the story would have been deemed ‘justly’ published. This is because it does not follow that, as a ‘public figure has had a long and symbiotic relationship with the media,’\(^{32}\) publication is justified. Details of one’s life, that are not wished to be promoted, engage a residual right which the court must protect.\(^{33}\) This right appears analogous to that obtained by the ordinary person. Thus, even though there may be a public interest in the life of a celebrity or sportsman, this is to be distinguished from the definition of ‘public interest’ implemented by the courts. Article 10 provides publication must be ‘...necessary in a democratic society.’ Considered crucial to democracy are matters relevant to the ‘political, economic and social life of the community.’\(^{34}\) The order forms that of priority, with political speech notably above the rest.

So, can it be implied that as the courts must apply Article 8; a right which can only be superseded on grounds of ‘genuine public interest’, that rulings post implementation of the Human Rights Act, such as Mckennit\(^{35}\) and Mosley,\(^{36}\) signal the end for ‘kiss

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\(^{28}\) European Convention of Human Rights 1950, Article 10.

\(^{29}\) Human Rights Act 1998 Section 12(4)

\(^{30}\) Jameel v Wall Street Journal Europe SPRL (No.3) [2006] UKHL 44 [17] (Lord Bingham of Cornhill)


\(^{32}\) Campbell (n 2)[57] per Lord Hoffman

\(^{33}\) ibid [68] per Lord Hoffman

\(^{34}\) ibid[148] per Baroness Hale

\(^{35}\) Niema Ash & Others v Loreena Mckennit & others [2008] Q.B.73
and tell’ stories? This is the view of a report from the ‘Reuters for the study of Journalism’ which concluded that the only chilling effect imposed on the media, as a result of the Human Rights Act, was the end of these exposés. 37 On the surface this can be regarded as a positive development, which encourages media responsibility. However could this aim become distorted in practice? Max Mosley is a figurehead of Formula One and an economic and social representative of the UK. The fact that he managed to protect his privacy, against the right to free speech, by analogy, presents the fear that other members of strategic institutions, including politicians or school teachers, may use this judgment to conceal actions that may once have led to resignation. 38 Thus blurring transparency in democracy. Recently, the Italian Prime Minister used the recourse of privacy to prevent the publication of photographs of a party, which was ‘allegedly attended by escorts’. 39 Moreover according to staff at the newspaper ‘La Vangurdia,’ in Spain a story about a politician having an affair would not be released. 40 It is to be remembered that each member state has its own media culture, in which the question of ‘whether a journalist exceeds the latitude afforded to them’ is construed differently. 41 In the UK political speech is regarded as crucial and therefore it remains unlikely that stories which seek to protect this interest will be prevented.

VI – The Whole Story

In Campbell a main factor perceived to exceed the journalistic latitude was the publication of the photographs. 42 Lord Hope states ‘looking to the text only, I would have been inclined to regard the balance between these rights as about even.’ 43 The tone of the story, ‘sympathetic [or not] was neither here nor there.’ 44 This suggests that a vindictive story with no picture could, depending on the facts, be considered acceptable. So, what is it about an image which is deemed so intrusive? In Campbell the focus is not on the image itself, but the circumstances in which it was taken; on a public street, surreptitiously, without Miss Campbell’s consent. It was noted that by giving effect to decisions of the European Court of Human Rights such as Peck v UK,
that privacy can be extended to included activities conducted in public.\(^{45}\) Moreover, lack of consent is currently not enough to establish privacy in the UK. However, this could be subject to change following Von Hannover,\(^ {46}\) which gave Princess Caroline a right over her own image, and the domestic ruling in Murray.\(^ {47}\) Yet, the latter can be distinguished as applicable only to children and the former was not adopted in John v Associated Newspapers.\(^ {48}\)

**VII – Conclusion**

The focus of Campbell seemed to be the concept of looking at everything as a whole. Although the picture or article alone were not regarded private, together they were. The right to privacy was not obtained on the basis of one specific fact, but a culmination of many. Following the Human Rights Act the common law has taken a much broader approach to privacy, with the duty to act compatibly playing a large role. Striking the balance is a more onerous task; I recommend Lord Hoffmann’s approach. He takes one fact and balances what the editor considers it adds to the story against how the claimant feels it adds to the intrusion. Despite the theory of balancing rights, there is an obvious trend towards the infringement of freedom of speech. Although John v Associated Newspapers presented resistance,\(^ {49}\) it is inevitable that what is actually shown is reluctance. The recent recognition in Mckennit,\(^ {50}\) that the principles in Von Hannover should receive a more general application highlights this.\(^ {51}\)

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\(^{45}\) Peck (n 26)

\(^{46}\) Von Hannover v Germany (59320/00) (2006) 43.E.H.R.R.7,

\(^{47}\) Murray v Express Newspapers plc and another [2008] EWCA Civ 446.

\(^{48}\) John v Associated Newspapers Ltd. [2006] EWHC 1611 (QB)

\(^{49}\) ibid

\(^{50}\) Ash v Mckennit (n 35)

\(^{51}\) Von Hannover (n 46)