PRIVACY AND THE PRESS

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Preface

When this book first appeared, two of the world's most photographed women were anxiously waiting for the results of their long-running privacy claims against the press. In the summer of 2004, both of them won. As a result, the balance struck by English law between freedom of expression and respect for private life has tilted further towards privacy. That movement accelerated a year later when another much-photographed woman had her privacy claim—and one by her husband—upheld by the Court of Appeal. In this preface to the paperback edition of *Privacy and the Press*, I shall try to assess how far these three women have moved the law.

Campbell falls on her feet

The first case to be decided was Naomi Campbell's appeal to the House of Lords. It turned out to be something of a cliff-hanger. In March 2002, as you will see from page 60 of this book, a High Court judge ordered the *Daily Mirror* to pay £3,500 in damages to the fashion model after she had accused the newspaper of invading her privacy. Seven months later, the *Mirror*'s appeal was allowed by a unanimous Court of Appeal; its judgment is discussed on page 64. But then the law lords agreed to hear an appeal by Campbell, delivering their ruling one morning early in May 2004.

Their lordships always give judgment in order of seniority. It soon became clear that they were divided—but which way? A reporter reading methodically through their freshly printed rulings—or watching them making their formal speeches in the Lords chamber that May morning—would have not have discovered the outcome until the very end.

First to rule was Lord Nicholls, the longest-serving law lord and the judge who had previously decided that newspapers could avoid the risk of libel if they acted responsibly: see page 188. In keeping with his natural

sympathy for freedom of expression, he voted to dismiss Campbell's appeal. Next was Lord Hoffmann, who had recently come down against a general rule of privacy in the *Wainwright* case (see page 47). Even so, he too would have dismissed Campbell's appeal. For a win, the *Mirror* needed to persuade just one more of the remaining three judges.

But Lord Hope, the senior Scottish law lord and the next to rule, delivered a lengthy judgment in favour of Campbell. Next came Lady Hale, deciding her first high-profile case since joining the Lords at the beginning of the year. She too voted to allow Campbell's appeal. That meant the outcome would depend on Lord Carswell, who had joined at the same time as Lady Hale and taken up the seat traditionally reserved for the most recent Lord Chief Justice of Northern Ireland. Lord Carswell remained inscrutable during the hearing, commenting only briefly, and delivered a ruling of just 11 paragraphs (the other judges had averaged 40). 'In my opinion it is a delicately balanced decision,' he said, raising the *Mirror*'s hopes. But then he sided with Lord Hope and Lady Hale. Campbell had won.

So let us turn first to the quietly spoken Lord Hope, the most senior of those in the majority. He began by pointing out that the information carried by the *Mirror* consisted of five elements:

(1) the fact that Campbell was a drug addict;
(2) the fact that she was receiving treatment for her addiction;
(3) the fact that her treatment was provided by Narcotics Anonymous;
(4) the details of her treatment; and
(5) photographs of her leaving the Narcotics Anonymous meeting.

Normally, all five categories would be eligible for protection. Because Campbell had denied being addicted to drugs, it was accepted by all concerned that the newspaper was entitled to put the record straight on the first two of these elements—reporting that she was a drug addict receiving treatment. Even so, Lord Hope concluded that the remaining details were still covered by the law of confidence. Where the Court of Appeal had gone wrong, he thought, was in concluding that therapy at Narcotics Anonymous was not the same sort of thing as treatment at a clinic or hospital. But you had to look at it through the eyes of a drug addict receiving treatment. You had to appreciate the sense of unease that would result from discovering that somebody, somewhere, was following you. 'I would expect a drug addict who was trying to benefit from meetings to discuss her problem

anonymously with other addicts to find this distressing and highly offensive,' Lord Hope said.

So the test was not, as the Court of Appeal had thought, whether the disclosure would have affected the reasonable person of ordinary susceptibilities. 'The mind that has to be examined is that, not of the reader in general, but of the person who is affected by the publicity,' Lord Hope explained. 'The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity.' Because the Court of Appeal had wrongly held that the last three elements in the list did not qualify for protection under the law of confidence, it had failed to carry out the balancing exercise between Article 8 and Article 10 of the Human Rights Convention—the balance between respect for private life and freedom of expression that forms a major theme of this book. 'Had it not been for the publication of the photographs, and looking to the text only, I would have been inclined to regard the balance between these rights as about even,' said Lord Hope. But they added greatly to the intrusion into Campbell's private life. Their publication was a 'gross interference with her right to respect for her private life'. It was more than enough to outweigh the newspaper's right to freedom of expression.

'Even the judges know who Naomi Campbell is,' added Lady Hale. The first woman to become a law lord also stressed that the case was about medical treatment. 'It has always been accepted that information about a person's health and treatment for ill-health is both private and confidential,' she noted. There was a risk that publication would damage Campbell's recovery. 'People trying to recover from drug addiction need considerable dedication and commitment, along with constant reinforcement from those around them. That is why organisations like Narcotics Anonymous were set up and why they can do so much good. Blundering in when matters are acknowledged to be at a "fragile" stage may do great harm.'

Lady Hale said that there was nothing to stop anyone photographing Campbell as she walked down the street: 'readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk.' Explaining that the right to one's own image was not then protected in England, she contrasted the position in France and Quebec—as shown by the case of *Aubry v Les Éditions Vice-Versa Inc* (discussed on page 241). She agreed that the press must be free to put the record straight about Campbell's drug addiction. This justified publication of the first two

elements in Lord Hope's list. But it was not necessary for the press to publish any further information, she concluded, especially if this might jeopardise the continued success of her treatment.

Lord Carswell agreed that the information in categories 3 and 4, allied to the photographs in category 5, 'constituted such an intrusion into the appellant's private affairs that the factors relied upon by respondents do not suffice to justify publication'.

What significance should we attach to this ruling? The *Mirror* was left facing a costs bill of more than £1m, prompting its soon-to-be-sacked editor, Piers Morgan, to remark that it was 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'. But how much of an inroad will it make into freedom of expression? In the immediate aftermath, commentators were divided. Some thought it heralded the end of press freedom, with editors having to think twice before publishing private information about celebrities. Others thought that the case was decided on its own special facts and would therefore have only limited impact on free speech.

Certainly the facts of the *Campbell* case were unusual: not many future claimants will willingly accept that it is legitimate for newspapers to invade their privacy so long as they do not go into too much detail. And not many claimants are trying to protect medical information, which appeared to be the key factor in this case. One of the earliest people to take a view was Sir Charles Gray, who sits in the High Court as Mr Justice Gray. Delivering the Margaret Howard Memorial Lecture in May 2004, he regarded the alarm felt by some sections of the media as understandable. 'Editors will have to think long and hard about kiss-and-tell stories,' he said. 'Photographs will be a particular problem.' In Sir Charles's view, newspapers had to be allowed the journalistic latitude or 'margin of editorial judgment' that the Court of Appeal supported. And, since he agreed that the *Campbell case* turned on such a narrow point, he thought it unfortunate that this was the one 'privacy' case that had gone to the House of Lords.

What was interesting about the *Campbell* case is the widely-held belief among lawyers and judges that the House of Lords simply 'got it wrong'. In one sense, of course, the country's highest court can never reach the 'wrong' answer, since whatever it declares the law to be is, by definition, the law. But there was a widespread feeling that the two most senior judges

who heard Campbell's appeal, Lord Nicholls and Lord Hoffmann, had a much better feeling for what the law should be on this subject.

That view was certainly shared by the *Mirror*: it understandably, sought to take the case to the European Court of Human Rights. But the English courts had all taken account of the Human Rights Convention in reaching their decision; it is unlikely that the Strasbourg judges would think they were in a better position than their English counterparts to find the balance between respect for private life and freedom of expression. Even if they did take a different view, the law lords' ruling would still stand. And, as we shall see, a ruling from Strasbourg the following month must have extinguished what little hope the *Mirror* still had.

The three law lords in the majority did not disagree with Lord Nicholls and Lord Hoffmann on the law. So it is to their views that we should now turn.

Lord Nicholls explained that the case concerned just one aspect of the fast-growing law of privacy—wrongful disclosure of private information. That, in turn, is derived from the law of confidence, which had its origins in the improper use of information disclosed by one person to another in confidence. But 'this cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship', Lord Nicholls explained. Now the law imposed a 'duty of confidence' whenever a person received information he knew, or ought to know, was fairly and reasonably to be regarded as confidential. But even that formulation was awkward. One would not normally describe information about someone's private life as 'confidential'. A much better description would therefore be 'misuse of private information'. As he explained, a person's privacy can be invaded in ways not involving publication of information—a strip-search, for example. 'Essentially, the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy,' Lord Nicholls said.

Disclosing that a drug addict was receiving treatment at Narcotics Anonymous was, in his view, of no more significance than revealing that a cancer sufferer was receiving radiotherapy. To allow publication of the fact that Campbell was being treated but not to permit reports of the location and details 'would be to apply altogether too fine a toothcomb'. Human rights were concerned with substance, said the law lord, not with such fine distinctions. But that was not the only issue. Although disclosing information about drug addiction should not give journalists as much leeway as

they would get if they were disclosing political information, they still deserved some latitude. 'On the one hand', said Lord Nicholls, 'publication of this information in the unusual circumstances of this case represents, at most, an intrusion into Miss Campbell's private life to a comparatively minor degree. On the other hand, non-publication of this information would have robbed a legitimate and sympathetic newspaper story of attendant detail which added colour and conviction.' Recalling that the information had been published to show Campbell's commitment to tackling her drug problem, Lord Nicholls concluded that the 'balance ought not to be held at a point which would preclude, in this case, a degree of journalistic latitude in respect of information published for this purpose'.

And what of the photographs? Lord Nicholls pointed out that Campbell was not complaining about whoever had taken the pictures of her outside the Narcotics Anonymous building. Her complaint was simply that publication of the photographs conveyed 'private information'. But he rejected this argument too. The pictures added nothing that was essentially private. 'They showed nothing untoward. They conveyed no private information beyond that discussed in the article. The group photograph showed Miss Campbell in the street exchanging warm greetings with others on the doorstep of a building. There was nothing undignified or distrait about her appearance.' For these reasons, Lord Nicholls would have dismissed Campbell's appeal.

So, too, would have Lord Hoffmann. But he believed the importance of the case lay in the statements of general principle it provided on the way in which the law should strike a balance between the right to privacy and the right to freedom of expression. On these, he pointed out, the law lords were unanimous. After tracing the law of confidence back to *Prince Albert v Strange* (see page 2), Lord Hoffmann noted some important developments. There was no longer a need for a prior confidential relationship between the parties. 'Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity—the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.'

Turning to the case itself, he considered whether the *Mirror* should have confined itself to the bare facts that Campbell had conceded. To anyone who had started with just that information, he thought, the additional

details would add nothing. That brought Lord Hoffmann to what he regarded as the only point of principle in the case:

> Where the main substance of the story is conceded to have been justified, should the newspaper be held liable whenever the judge considers that it was not necessary to have published some of the personal information? Or should the newspaper be allowed some margin of choice in the way it chooses to present the story? In my opinion, it would be inconsistent with the approach which has been taken by the courts in a number of recent landmark cases for a newspaper to be held strictly liable for exceeding what a judge considers to have been necessary. The practical exigencies of journalism demand that some latitude must be given. Editorial decisions have to be made quickly and with less information than is available to a court which afterwards reviews the matter at leisure. And 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.

All that remained were the photographs. Like Lord Nicholls, Lord Hoffmann regarded a photograph as a form of information—albeit a more vivid one. So the same principles applied. The mere fact that the pictures were taken without Campbell's consent was not enough to amount to a wrongful invasion of privacy.

'But the fact that we cannot avoid being photographed does not mean that anyone who takes or obtains such photographs can publish them to the world at large,' he added. That was clear from Geoffrey Peck's victory in Strasbourg (discussed on pages 115–17). In Lord Hoffmann's opinion, 'the widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information. Likewise, the publication of a photograph taken by intrusion into a private place (for example, by a long-distance lens) may in itself by such an infringement, even if there is nothing embarrassing about the picture itself'. However, the picture of Campbell leaving Narcotics Anonymous was not embarrassing—it showed her 'neatly dressed and smiling among a number of people'—and it did not involve an intrusion into private space. So that was not an invasion of her privacy.

> No doubt it would have been possible for the Mirror to have published the article without pictures. But that would in my opinion again be to ignore the realities of this kind of journalism as much as to expect precision of judgment about the amount of circumstantial detail to be included in the text. We value the free-

dom of the press but the press is a commercial enterprise and can flourish only by selling newspapers. From a journalistic point of view, photographs are an essential part of the story. The picture carried the message, more strongly than anything in the text alone, that the Mirror's story was true. So the decision to publish the pictures was in my opinion within the margin of editorial judgment and something for which appropriate latitude should be allowed.

Readers will not be surprised to learn from page 63 that I side with Lord Nicholls and Lord Hoffmann on the merits of this case. But while I have little enthusiasm for tougher privacy laws, I find it hard to disagree with the principle that a person's private life should be protected if he or she 'had a reasonable expectation of privacy'.

Small win, huge fee?

In an unusual move, the case of *Campbell v MGN Ltd* came back to the House of Lords in May 2005 for a ruling on costs. Campbell's solicitors, Schillings, had represented her on a Conditional Fee Agreement, or CFA, in her appeal to the law lords a year earlier. Under the rules governing no-win, no-fee arrangements, solicitors are allowed to charge a 'success fee' or 'uplift' of as much as 100 per cent to compensate for the cases they lose. In litigation, the winner usually gets about three-quarters of his legal costs paid by the losing side — so uplifts are inevitably an additional burden for the unsuccessful party. Lawyers for the *Mirror* said Schillings had charged a success fee of £280,000 in addition to their normal fee of £314,000 for the two-day hearing, making a total of nearly £600,000. This arrangement, the newspaper claimed, amounted to a violation of its rights to freedom of expression under Article 10 of the Human Rights Convention: an award of costs against the losing party had to be reasonable and proportionate. In any event, said the *Mirror*, the uplift claimed by Schillings should be disallowed.

The appeal was opposed by James Price, QC, for Campbell, who was briefed, perfectly properly, to say the opposite of what he had previously argued before the High Court in *King v Telegraph Group Ltd* (see page 218). Mr Price told the law lords that, in the absence of any alternative system of funding, CFAs were necessary to ensure that litigants had effective access to justice under Article 6 of the convention. Uplifts, he added, were an integral part of the system, designed to even out over time.

The reserved judgment will be reported on my website—www.rozenberg.net—as soon as it is available.

The private Princess

A ruling from the European Court of Human Rights in June 2004 can now be seen as a turning point in the English law of privacy. It was a victory for Princess Caroline of Monaco, who complained about paparazzo photographs showing her shopping or on holiday with her family. She persuaded the court that the pictures, in German magazines such as *Bunte*, had been published in breach of her right to respect for her private life under Article 8 of the Human Rights Convention. It was the German government that found itself in the dock for not banning pictures of this kind, but courts in Britain must take all Strasbourg rulings 'into account' when deciding future cases. So we need to know what the case means.

The familiar tension between personal dignity and free speech is at the heart of the German constitution, summarized on page 231. And where do the German courts strike the balance? Half-way between French law and English law, according to a helpful submission to the Human Rights Court from the Association of German Magazine Editors. German law 'struck a fair balance between the right to protection of private life and the freedom of the press,' they added. And the German government argued that people had a 'legitimate interest' in knowing how a public figure behaved in public.

As we saw from Lady Hale's comments in the *Campbell* case, the French take a rather different approach to privacy. Following her ruling, we are certainly moving towards a law that—in certain, clearly defined, circumstances—will ban publication of photographs of individuals taken in public places. But France is there already. As you will see on page 229, a French newspaper that printed a picture of Princess Caroline together with a well-known actor was found to have breached the actor's privacy. And reporters who photographed the scene of the car crash in which Diana, Princess of Wales, died were found guilty by a French court of invading the late Princess's privacy, even though their pictures were never published (see page 230).

But Germany's constitutional court had ruled in 1999 that Princess Caroline was a contemporary public figure who had to tolerate photos of

herself in public places, even if they showed her in scenes from her daily life rather than engaged in her official duties. That was not allowed in France, but the ban could be circumvented easily enough by paparazzo photographers who simply took photographs of the Princess there and sold them to magazines in Germany.

In *von Hannover v Germany*—as Princess Caroline's case is called—the Strasbourg judges drew a distinction between reporting facts about politicians and reporting on the private life of an individual who had no official functions. It was only in the former case that the press exercised its vital role of 'watchdog' by imparting information and ideas on matters of public interest. Although there were special circumstances in which the public had a right to be told about the private lives of public figures, particularly where politicians were concerned, this was not such a case. If, as here, the sole purpose of publishing articles and photographs was to satisfy the public's curiosity about a person's private life, publication could not contribute to 'any debate of general interest to society'. In these circumstances, the judges said, 'freedom of expression calls for a narrower interpretation'.

While acknowledging that they were dealing only with what had been published by German magazines, the judges said they could not ignore the 'context in which these photos were taken—without the applicant's knowledge or consent—and the harassment endured by many public figures in their daily lives'. As an example, they said that photographs showing Princess Caroline tripping over at a private beach in Monte Carlo had been taken secretly from a house several hundred yards away. The 'decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest,' the court said. These pictures 'made no such contribution' since Princess Caroline exercised 'no official functions' and the photographs and articles related exclusively to her private life.

'The court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life—even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public. Even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the court's view, yield to the applicant's right to the effective protection of her private life.'

I say on page 232 that it would be a worrying precedent if Princess

Caroline were to win. That remains my view now that she has done so. Heather Rogers and Hugh Tomlinson, both leading barristers in this field, described the Princess's victory as a 'highly significant extension of the right to privacy—moving closer to the restrictive French law under which photographs of her, other than at official functions, can be published only with her consent'. They regarded it as much more restrictive than the approach adopted in the *Campbell* case, that publication of pictures taken in public places is normally permitted—at least for now. As Lady Hale said (emphasis added), 'We have not *so far* held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private.'

But now the courts of England and Wales must take into account the contribution that publication of private information, including photographs, makes to a debate of general public interest. Writing in *The Times*, Rogers and Tomlinson said:

> Princess Caroline's case warns the media that the publication of snatched celebrity pictures will be exceptionally difficult to justify. The case makes clear that famous people have the right to be left alone, even when they are in public places. Before publishing photographs of celebrities doing their shopping, the press must ask: what legitimate purpose does publication serve? A convincing answer may be hard to find. It is difficult to imagine a case where such pictures could be said to contribute to a debate on matters of public concern.

So the summer of 2004 will be remembered for marking a distinct shift towards respect for people's private lives. Delivering a concurring opinion in the *von Hannover* case, Judge Zupančič said the courts had previously made something of a fetish of the freedom of the press. He thought this was the result of American influence, but it could just as easily have been the English approach. In any event, things had gone too far. 'It is time that the pendulum swung back to a different kind of balance between what is private and secluded and what is public and unshielded,' he said.

On the whole, I regard this development as rather sad. There is a much stronger argument for protecting the privacy of children than of adults, as both the courts in Germany and the press in Britain have recognized. But if people really want to see pictures of a 47-year-old princess riding a horse or doing the shopping, is that really such a bad thing? Sure, it doesn't teach us anything about politics or the price of bread, but what harm does it do? It's just what happens to you when you're a princess.

Writing about this case in July 2004 for the first hardback reprint of *Privacy and the Press*, I suggested that the media should exercise some caution at this point. Editors needed to realise that celebrities would soon be seeking damages for the sort of picture that would hardly have justified a solicitor's letter in the past. And once trial judges started to apply the *Campbell* and *von Hannover* rulings, I predicted at the time, we might start down a slippery slope that would end when anyone photographed at a public event had the right to veto an unflattering shot.

Hello? OK!

The first step down that road came in May 2005, when the Court of Appeal gave judgment in *Douglas v Hello! Ltd*. Lord Phillips, Master of the Rolls, sitting with Lord Justices Clarke and Neuberger, had before them a complex series of appeals.

First, the publishers of *Hello!* were appealing against the order that they should pay damages to the magazine's arch-rival *OK!* for printing 'spoiler' pictures taken surreptitiously at the wedding in 2000 of Michael Douglas and Catherine Zeta-Jones. In April 2003, the High Court had found *Hello!* liable to compensate *OK!* for the loss of potential sales after approved photographs of the couple's wedding, purchased by *OK!*, lost their exclusivity in circumstances described on page 39; the ruling is reported on page 70. It was not until November 2003 that the High Court set the damages payable by *Hello!* to *OK!* at £1,033,156. In May 2005, however, *Hello!* won its appeal on that point: the Court of Appeal said that buying authorized pictures did not give *OK!* the right to prevent other publications from carrying snatched shots. So no damages were payable to *OK!* after all.

Secondly, *Hello!* was appealing against an order requiring it to pay Douglas and Zeta-Jones a total of £14,500 for invasion of their privacy (plus a further £100 under the Data Protection Act 1998: see page 82). On that point, *Hello!* lost its appeal: the couple did have enforceable privacy rights against the magazine, as we shall see. It did not matter that they had shared their wedding with an audience of millions: an arrangement made by the Douglases to sell authorized pictures to one publication did not entitle a different magazine to publish paparazzo pictures.

So the Douglases kept their damages. But were they entitled to any more money? That was the subject of a cross-appeal by the couple. It was unsuc-

cessful: the court noted that they had already been paid £1 million for the authorized pictures. A further cross-appeal by *OK!*, based on unlawful interference with trade, was also dismissed.

The ruling repays closer study. After sketching in the facts, the Court of Appeal turned immediately to Princess Caroline's Strasbourg success, mentioned earlier in this Preface. As the judges explained, states that had adopted the European Convention on Human Rights were bound, as a result of the court's ruling in the *von Hannover* case, to protect individuals from unjustified invasion of their private lives by other individuals. To enforce this right, the English courts were therefore required to adapt 'the cause of action formerly described as breach of confidence'—unsatisfactory though it might be to 'shoe-horn' claims over unauthorized photographs of a private occasion within that long-established remedy.

As noted already in this Preface, Lord Nicholls had said in the *Campbell* case that breach of confidence claims were now being used to deal with what could be encapsulated as 'misuse of private information'. Lord Nicholls continued: 'Essentially, the touchstone of private life is whether … the person in question had a reasonable expectation of privacy.' Applying that test, said the Court of Appeal in 2005, 'photographs of the wedding plainly portrayed aspects of the Douglases' private life and fell within the protection of the law of confidentiality, as extended to cover private or personal information.'

Photographs, indeed, require special consideration, the court stressed. 'They are not merely a method of conveying information that is an alternative to verbal description. They enable the person viewing the photograph to act as a spectator, in some circumstances *voyeur* would be the more appropriate noun, of whatever it is that the photograph depicts.' Photography was particularly intrusive, quite apart from the fact that a telephoto lens could allow viewers to see scenes that those who were photographed could reasonably have expected to have remained private.

So there was little chance that *Hello!* would get away with its claim that once the Douglases had sold authorized photographs to *OK!* they could no longer claim that events at their wedding were private or confidential. It was true that mere information would not normally remain protected by the law of confidence once it had come into in the public domain. But photographs were different. The court said:

> There will be a fresh intrusion of privacy when each additional viewer sees the photograph, and even when one who has seen a previous publication of the

> photograph is confronted by a fresh publication. To take an example, if a film star were photographed, with the aid of a telephoto lens, lying naked by her private swimming pool, we question whether widespread publication of the photograph by a popular newspaper would provide a defence to a legal challenge to repeated publication on the ground that the information was in the public domain.

True, the level of distress caused by an unauthorized picture might be reduced if the person concerned had authorized other pictures to be published, and this would affect the level of damages. 'The agreement that authorised photographs can be published will not, however, provide a defence to a claim, brought under the law of confidence, for the publication of unauthorised photographs.'

The next question to be decided was whether the law of confidence would protect the Douglases' commercial interest in information about their wedding. Nearly half the £14,600 damages they received had been for the work and expense of selecting the approved photographs for *OK!* earlier than had been intended. 'This head of damage could only be justified in so far as it represented compensation for interference with the Douglases' commercial exploitation of their wedding,' the judges noted. So Lord Phillips and his fellow judges had to decide whether information about a celebrity's private life should be protected in the same way as a manufacturing process or any other trade secret. As they explained, this was not something the courts had needed to decide before.

> 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 Article 9 of the French Code Civil and the German cause of action that Professor Markesinis describes as the 'tort of publicity claim'... Despite the comment of Rozenberg in Privacy and the Press (2004) at p 228, we do not see this as any reason to draw back. 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...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 using or 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.

So a new tort was born: the Douglases had the right to protect and exploit private information about themselves. But what they had not done, under the terms of their contract, was to sell that right to *OK!*. On the contrary, the rights to unposed pictures were part of the area of privacy that the Douglases had chosen to retain. Nor could they sell their right to privacy, the court ruled: 'confidential or private information, which is capable of commercial exploitation but which is only protected by the law of confidence, does not fall to be treated as property that can be owned and transferred'. For these reasons, Mr Justice Lindsay had been 'wrong to hold that *OK!* was in a position to invoke against *Hello!* any right to commercial confidence in relation to the details of the wedding or the photographic images portraying these'. So *Hello!* won its appeal against the order requiring it to pay *OK!* more than £1m in damages.

Since the Court of Appeal had concluded that *OK!* was not entitled to damages for breach of confidence, the judges had to consider whether there was any other basis on which *Hello!* might be ordered to compensate *OK!* for the loss of its exclusive. After a discussion lasting some 80 paragraphs, they concluded that *OK!* had 'failed to establish that *Hello!* had the requisite intention to establish the tort of unlawful interference with business, or conspiracy to injury by unlawful means, with the result that *OK!*'s cross-appeal fails'. If *Hello!* had intended to cause *OK!* to lose sales, it would have been liable to pay compensation. But the evidence was that it had set out only to boost its own circulation, not to damage that of *OK!*.

The final issue of substance was the size of the compensation awarded to the Douglases. They claimed that *Hello!* should have paid them as much in damages as it would have had to pay them for authorized pictures—a 'notional licence fee' of, presumably, around £1m. But the court found difficulties with this argument.

> First, the whole basis of their … complaint about Hello!'s publication of the unauthorised photographs is upset and affront at invasion of privacy, not loss of the opportunity to make money… Secondly, the Douglases would never have agreed to any of the unauthorised photographs being published… Thirdly, and most importantly, having sold the exclusive right to publish photographs of the reception to OK!, the Douglases would not have been in a position to grant a licence to Hello!.

They had already been paid £1m by *OK!* for the exclusive rights, the court explained, and an award of a notional licence fee on top would have amounted to unjust enrichment.

Another factor was that, strangely enough, *Hello!* did not earn any money out of the whole exercise: taking into account the £125,000 they paid for the snatched photographs, they actually made a loss. If the magazine had profited from the deal, the Douglases would have been entitled to a share in those profits. 'Such an approach may also serve to discourage any wrongful publication,' the court said, 'at least where it is motivated by money.'

Finally, and unusually, the judges turned to an issue on which they had not been addressed by counsel. This was the decision of the Court of Appeal in November 2000 to lift the temporary injunction restraining *Hello!* from publishing the unauthorized photographs. 'In the light of the law as it can now be seen to be', said Lord Phillips, Lord Justice Clarke, and Lord Justice Neuberger, the decision taken by Lords Justices Brooke, Sedley, and Keene (and reported on page 39) had been wrong: 'the interlocutory injunction should in fact have been upheld'. Caselaw had moved on since 2000: the earlier ruling had been made before the law lords' ruling in the *Campbell* case and the Strasbourg decision in the *von Hannover* case. 'Had the court had the opportunity to consider those two decisions', the appeal judges said in 2005, 'we believe that it would have reached the conclusion that the Douglases appeared to have a virtually unanswerable case for contending that publication of the unauthorised photographs would infringe their privacy.'

These remarks are obiter dicta—comments that are not binding because they do not form part of the court's reasoning. But they are unlikely to be ignored by judges who find themselves asked, often at short notice, to issue an injunction against a newspaper. While acknowledging that there was a public interest in a free press, Lord Phillips's court did not see how *Hello!* could have claimed in 2000 that publication of the unauthorized photographs would have been in the public interest, particularly as the Douglases and *OK!* were planning to publish much clearer photographs of the same event. And, without suggesting that the damages for invasion of privacy should have been any higher than £14,600, the court pointed out that a 'relatively small sum' like this 'could not represent any real deterrent to a newspaper or magazine, with a large circulation, contemplating the publication of photographs which infringed an individual's privacy'. For that reason, the judges added, 'the refusal of an interlocutory injunction in a case such as this represents a strong potential disincentive to respect for aspects of private life, which the convention intends should be respected.'

This was a resounding win for *Hello!*, according to its solicitor, Chris Hutchings. 'The focus of this case was not about privacy: it was about commerce and, in particular, the common practice of editorial "spoilers",' he said. 'As a result of our win, *Hello!* will recover all amounts paid to *OK!* in respect of damages and costs, plus a great proportion of their own costs.'

And what of the happy couple themselves? Mr Hutchings was blunt. 'The Douglases have won a hollow victory,' he said. 'They did retain a "residual right to privacy" but they failed in their appeal to increase their damages.' But Martin Kramer, solicitor for *OK!*, said the Court of Appeal had 'fully vindicated' the action taken by Michael Douglas and Catherine Zeta-Jones. The publishers of *OK!* would seek to appeal to the House of Lords, he added. Otherwise, he explained, papers that had bought exclusive rights would have no protection against spoilers.

The Court of Appeal ruling certainly recognizes image rights, acknowledging that an individual has the right to protect private information even though he or she intends to exploit it commercially. The individual can stop disclosure by unauthorized people who know, or should know, that the information is private. But only the owner has the right to do this: the right to prevent disclosure cannot be transferred.

Above all, though, the judgment stands as a landmark decision on privacy rights under English law. The Douglases set the boundaries of their own privacy. Once they gave the word, images of their wedding could be shared with millions. But when they pulled down the shutters, just 360 guests might enjoy no more than a transitory glimpse of the couple. Pictures taken during what they regarded as private moments are still protected by a court order.

For Lord Phillips, at last, there was the opportunity to construct a law of privacy along the lines he had sketched out two years earlier (see page 5). As he and his fellow judges said: 'the court should, in so far as it can, develop the action for breach of confidence in such a manner as will give effect to both Article 8 and Article 10 rights.' And in case there was any doubt about how he would balance the competing rights to respect for private life and freedom of expression in a case involving celebrities, he stressed that there were special considerations affecting photography. 'As a means of invading privacy, a photograph is particularly intrusive.' The message was clear: snappers beware.

Reynolds privilege

What about words, rather than pictures: should public figures have the right to veto what is written about them? That must surely depend on whether publication is in the public interest—as opposed to being merely of interest to the public. An example of how this works is to be found in the *Campbell* case, mentioned earlier in this Preface: given her denials, it was in the public interest for the *Mirror* to report that she was a drug addict and receiving treatment.

The courts have also recognized the importance of the public interest in developing the notion of 'responsible journalism'. No doubt some of my readers will consider this concept to be as much of an oxymoron as 'government organization', 'healthy tan', or 'airline food'. But it lies at the heart of one of the most important developments in libel law for many years: a new defence for news organisations, generally known as *Reynolds* privilege. It enables them to publish documents, in the public interest, even if the newspaper cannot produce the evidence to show that the allegations are true.

In Chapter 6, I trace the development of this defence. It is derived from the law lords' ruling of October 1999 in *Reynolds v Times Newspapers Ltd* and in particular the famous 'ten points' listed by Lord Nicholls (see page 188). Provided newspapers stick to these principles when publishing information that the public has a right to know, they should be able to see off a libel claim even if they cannot prove that the information they published is true.

That was the defence put forward by the publishers of *The Daily Telegraph* in response to a libel claim by the anti-war MP George Galloway, who won £150,000 in damages for a series of articles published in April 2003, shortly after Saddam Hussein was deposed as dictator of Iraq by the US-led invasion. Searching through the abandoned Foreign Ministry in Baghdad, David Blair, the newspaper's correspondent, found documents relating to Galloway's campaign to bring a young Iraqi girl called Mariam to London for life-saving treatment. His aim was to highlight the hardship caused to Iraqis by international sanctions.

As the Court of Appeal explained in April 2005, the published documents, 'which were deemed to be authentic, stated that the Iraqis had funded the Mariam campaign by providing Mr Galloway with the means to make profits on oil supplied by Iraq under the oil-for-food programme

and on food contracts with the Iraqi Ministry of Trade. It was said that at the end of 1999 he had met with an Iraqi intelligence officer to explain that the campaign needed greater financial support and so had asked for an increased share of the oil and exceptional commercial and contractual facilities. These arrangements were to be carried out by his nominated Iraqi representative and partner so that Mr Galloway could not be directly connected with them.'

The newspaper's report included Galloway's response to these allegations. He denied ever having asked for or received any money from Iraq to support the Mariam campaign, ever having bought or sold any oil or, so far as he was aware, ever meeting an Iraqi intelligence officer. The campaign, he said, had been funded by private donations and friendly governments.

In the High Court, Mr Justice Eady had found that the newspaper's publishers had not merely adopted the allegations made in the documents. 'They embraced them with relish and fervour. They then went on to embellish them.' As the Court of Appeal explained, 'the allegations had been embellished because the reporting alleged that Mr Galloway had taken the money for himself, whereas the Baghdad documents alleged that it had only been for the Mariam campaign. Furthermore, the allegation of personal gain had not been put to Mr Galloway.'

Why should it matter whether the *Telegraph* had embraced the allegations? The answer is to be found in a case from 2001 called *Al-Fagih*, which makes it clear that that *Reynolds* privilege extends to 'reportage'—but no further. Reportage, as I explain on page 191, means neutral reporting of attributed allegations without adopting them as true. Because newspapers can go that far, Galloway's lawyers accepted that he could not have sued the *Telegraph* if it had done no more than report the discovery and content of the Baghdad documents in a fair and disinterested way. The problem was that the newspaper had added its own interpretation in its leader columns and alleged that he was an 'MP in Saddam's pay', without putting the specific allegation to him.

But what difference should it make if the newspaper had adopted the allegations rather than merely reported them? Seeking permission to appeal in April 2005, James Price, QC, for the *Daily Telegraph*, cited two cases from the European Court of Human Rights. *Thoma v Luxembourg*, decided in 2001, involved a reporter who was ordered to pay libel damages for reporting that a fellow journalist had accused forestry wardens in Luxembourg of being corruptible. Even though he had partly adopted the allegation, the

Strasbourg court found in his favour. In the court's words, 'a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas.' And in *Selisto v Finland*, decided in 2004, the Strasbourg judges remarked that 'journalists cannot be expected to act with total objectivity and must be allowed some degree of exaggeration or even provocation'. They found in favour of a regional newspaper that published allegations, in the context of a wider debate about drunkenness, that a particular surgeon had been drunk. The allegations had been made a by the relative of a patient who had died during surgery performed by that doctor.

According to Mr Price, these cases showed it was not fatal to a defence of qualified privilege that the press had adopted allegations made by a third party. They were entitled to explain, interpret and adopt the allegations made—as the *Daily Telegraph* had done with the documents found in Iraq.

Giving the newspaper permission to appeal against Galloway's success in the High Court, Lord Justice Tuckey said in April 2005 that it was arguable that a defence based on reportage went further than the court had previously found in the *Al-Fagih* case. But that did not mean the *Daily Telegraph* could be confident of success at the substantive hearing: the judge made it clear he was not saying whether, 'on the facts of this case, resolution of the issue that I have identified will make any difference to the result, given the extent to which the reporting in this case went beyond the type of reporting considered in *Al-Fagih*'.

A hearing date was set for October 2005; and shortly after the *Telegraph* was given permission to ask the Court of Appeal for a ruling on the scope of *Reynolds* privilege, another newspaper was told it could take a similar point to the House of Lords. The *Wall Street Journal Europe* was granted leave to challenge the rejection by the Court of Appeal of its defence of qualified privilege in a case brought against it by a Saudi Arabian businessman, Mohammed Jameel.

Giving judgment in February 2005, the Court of Appeal had said that 'responsible journalism' was not, by itself, enough to satisfy the test of *Reynolds* privilege. 'The subject matter of the publication must be of such a nature that it is in the public interest that it should be published,' the court said. 'This is a more stringent test than that the public should be interested in receiving the information.'

Jameel and his company had sued the *Wall Street Journal Europe* over an article headlined 'Saudi officials monitor certain bank accounts: focus is on those with potential terrorist ties'. In the event, the newspaper was found not to have satisfied the test of responsible journalism. The jury did not accept the reporter's evidence that his story had been confirmed by four separate sources (though they accepted that the he had been given a 'lead' by a fifth source). The newspaper had not given Jameel enough time to comment on the allegations against it, despite being asked to wait a day. Also, the public interest had not required Jameel's company to be identified.

Some time in 2006, therefore, we can expect a ruling from the law lords on the scope of *Reynolds* privilege. The lords will also be asked to decide whether the presumption in libel cases that a claimant has suffered damage is compatible with freedom of expression under Article 10.

Again, I hope to add this ruling to my website—www.rozenberg.net—along with other changes that have taken place since the main text of this book was completed in November 2003. And no doubt there will be more to come. Privacy continues to move on apace—despite the famously apocryphal requests from students that the judges 'should at least wait until after the exams before making any more law'.

Joshua Rozenberg

June 2005

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