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'Private Facts': Is Naomi Campbell a Good Model?

Raymond Wacks[*]

Abstract

This article analyses the implications of the Naomi Campbell case for the protection of privacy and the long gestation process of a common law privacy tort.

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[*] Professor of Law and Legal Theory, University of Hong Kong.

A common law privacy tort has been long in gestation. For almost four decades, the courts have danced around the problem. A number of cases involving pop stars , film stars, and other celebrities, have been pleaded, mostly unsuccessfully, in equity as breaches of confidence, and, while the relationship between this remedy and a tort of privacy, has been widely acknowledged, the highest court has only this year been presented with an opportunity to declare what the law is. In the interim, the enactment of the Data Protection Act, and especially the Human Rights Act, has served as an significant catalyst for a final reckoning.[1]

The result is, however, disappointing. The House of Lords in *Naomi Campbell v MGN Limited*[2] has offered a less than clear guide on the central question of what constitutes 'private facts' in a case where they have been gratuitously publicised. The purpose of this brief paper is to suggest that, until this vital matter is elucidated, the future of a privacy tort of public disclosure of private facts is likely to be unsatisfactory.

The extent to which the Human Rights Act 1998 (which came into effect on 2 October 2000) has exercised an influence on the judicial deliberation of privacy issues. The Act incorporates into English law Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms which provides for the protection of the right to respect for family life, home and correspondence. This measure, at least in the mind of one senior judge, gives 'the final impetus to the recognition of a right of privacy in English law.'[3] Though his sanguine view may not be shared by all members of the judiciary, the analysis of privacy exhibited in recent cases suggests that the effect of Article 8 is to supply, at least, the potential for the horizontal application of the rights contained in Article 8.[4]

1. The Pre-Naomi Position

Before examining the decision I need briefly to sketch the context in which the prevailing legal climate might be understood. It is, incredibly, almost ten years since I wrote:[5]

> *A statutory cause of action for the public disclosure of private facts (subject, of course, to the accepted defences) is the best way forward. But if Parliament is unwilling to grasp the nettle, the courts must. The combined force of three recent developments*

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[1] For a discussion of these early decisions, see Raymond Wacks, *Personal Information: Privacy and the Law* (Oxford: Clarendon Press, 1993) pp. 82- 100, and Raymond Wacks, *Privacy and Press Freedom* (London: Blackstone Press, 1995) Chapter 3.

[2] [2004] UKHL 22

[3] *Douglas v Hello! Ltd* [2000] 1 QB 967 at para 111, *per* Sedley LJ. Cf Lord Hoffmann in W*ainwright* [2003] UKHL 53: '(T)he coming into force of the Human Rights Act 1998 weakens the argument for saying that a general tort of invasion of privacy is needed to fill gaps in the existing remedies.'

[4] Whether such horizontality is a consequence of the Act is left uncertain by the House of Lords in *Campbell.* This is the subject for another article.

[5] Raymond Wacks, *Privacy and Press Freedom* (London: Blackstone Press, 1995) p. 173.

> *provide ample support for initiative in an appropriate case: the expanding equitable remedy for breach of confidence, the revived tort of inflicting emotional distress, and the growing influence of the international recognition of 'privacy', especially the jurisprudence of the European Convention on Human Rights. With these weapons to hand, the campaign demands only modest judicial heroism.*

The first and last of these developments have, in the last few years, actually engendered what may seem at first to be the mild judicial activism for which I had the temerity to call. The enlargement of the equitable remedy of breach of confidence - spearheaded by bolder judges Down Under - and the adoption in Britain (through the passage of the Human Rights Act 1998) of the European Convention on Human Rights have recently generated a flurry of decisions by the English Court of Appeal and the House of Lords that, though they have won plaudits from privacy advocates, ought perhaps to give us pause to consider whether they reflect judicial courage or confusion.

In *Douglas v Hello! Ltd*,[6] photographs of the wedding of Michael Douglas and Catherine Zeta-Jones were surreptitiously taken, notwithstanding explicit notice having been given to all guests forbidding 'photography or video devices at the ceremony or reception'. The couple had entered into an exclusive publication contract with *OK! Magazine*, but its rival, *Hello!* sought to publish these pictures. The Court of Appeal permitted it to do so, largely on the ground the wedding reception was not an essentially 'private' matter. Indeed, the court was of the view that it had become a commercial transaction. From the point of view of the action for breach of confidence, there was little to support the proposition that the information was indeed 'confidential'. The case, therefore, resembles in some respects what the American courts have called the 'appropriation of name and likeness' - though, oddly, none of the judges in the Court of Appeal mentions this tort.[6] It should also be noted that the court attached considerable importance to the right of freedom of expression, as protected by section 12 of the Human Rights Act 1998.

In the course of his judgment, Sedley LJ announced that the right of privacy had, at last, arrived in England:

> *[W]e have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy.*[7]

This is the case, he continues, for two reasons: first, because of the growing recognition of a need for 'private space'. Secondly, in order to give effect to the right to 'respect for family life' provided for by Article 8 of the Human Rights Act of the European Convention on Human Rights. Neither of these grounds, it must be said, affords a precise or persuasive argument for 'the confidence' expressed by the learned judge in the recognition of this right. But this is not the place to consider the judgment in detail. Suffice it to say that his analysis of what he rather precipitately calls the 'tort' of breach of confidence leaves several questions unanswered. Moreover, the

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[6] [2001] 2 WLR 992, CA.

[7] *Douglas v Hello! Ltd* [2000] 1 QB 967 Para 110.

nebulous equation of 'privacy' and 'the fundamental value of autonomy' merely compounds the woolly contours of a decision which, though it may be supportable in its outcome, provides an unsatisfactorily vague evaluation (by all three members of the Court of Appeal) of the action for breach of confidence and, in particular, its application to the protection of personal information.[9]

The court appears sensibly to have drawn a distinction between what American law calls a 'right to publicity', on the one hand, and a right to privacy, on the other. The former has provided celebrities with the means to assert that by publishing private information about them, the defendant has deprived them of their 'right' to exploit their celebrity status for profit. Restraints on the exercise of freedom of expression would, the court held, be ordered only where 'privacy' properly so-called has been invaded by unwanted publicity.

In view of the alacrity with which Sedley LJ heralded a new dawn of privacy, it is worth quoting the learned judge at some length. Addressing the role of the law of confidence, Sedley LJ states:

> *The courts have done what they can, using such legal tools as were to hand, to stop the more outrageous invasions of individuals' privacy; but they have felt unable to articulate their measures as a discrete principle of law. Nevertheless, we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy …The reasons are twofold. First, equity and the common law are today in a position to respond to an increasingly invasive social environment by affirming that everybody has a right to some private space. Secondly, and in any event, the Human Rights Act 1998 requires the courts of this country to give appropriate effect to the right to respect for private and family life set out in Article 8 of the European Convention on Human Rights and Fundamental Freedoms. The difficulty with the first proposition resides in the common law's perennial need (for the best of reasons, that of legal certainty) to appear not to be doing anything for the first time. The difficulty with the second lies in the word 'appropriate'. But the two sources of law now run in a single channel because, by virtue of section 2 and section 6 of the Act, the courts of this country must not only take into account jurisprudence of both the Commission and the European Court of Human Rights which points to a positive institutional obligation to respect privacy; they must themselves act compatibly with that and the other Convention rights. This, for reasons I now turn to, arguably gives the final impetus to the recognition of a right of privacy in English law.*[8]

The learned judge concludes that 'at lowest':

> *Mr Tugendhat has a powerfully arguable case to advance at trial that his two first-named clients have a right of privacy which English law will today recognise and, where appropriate, protect.*

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[8] Para 110-111

> *To say this is in my belief to say little, save by way of a label, that our courts have not said already over the years. It is to say, among other things, that the right, grounded as it is in the equitable doctrine of breach of confidence, is not unqualified … What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.*[9]

Sedley LJ then turns to section 6 of the Human Rights Act that provides that the court as a public authority cannot act in a manner incompatible with a Convention right:

> *If it is not – for example if the step from confidentiality to privacy is not simply a modern restatement of the scope of a known protection but a legal innovation – then I would accept his submission … that this is precisely the kind of incremental change for which the Act is designed: one which without undermining the measure of certainty which is necessary to all law gives substance and effect to section 6.*[10]

He adds that, 'Such a process would be consonant with the jurisprudence of the European Court of Human Rights, which section 2 of the Act requires us to take into account and which has pinpointed Article 8 as a locus of the doctrine of positive obligation.'[13]

In the course of his judgment, Keene LJ notes that although the particulars of claim were put in terms of breach of confidence, that it was said in argument for the claimants that the case has more to do with privacy that with confidentiality:

> *[I]t is clear that there is no watertight division between the two concepts. Argyll v Argyll*[14] *was a classic case where the concept of confidentiality was applied so as, in effect, to protect the privacy of communications between a husband and wife. Moreover, breach of confidence is a developing area of the law, the boundaries of which are not immutable, but may change to reflect changes in society, technology and business practice.*

Regarding the application of Section 6(1), it:

> *… arguably includes their activity in interpreting and developing the common law, even where no public authority is a party to the litigation. Whether this extends to creating a new cause of action between private persons and bodies is more controversial, since to*

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[9] Para 125-126.

[10] Para 129.

> *do so would appear to circumvent the restrictions on proceedings contained in section 7(1) of the Act and on remedies in section 8(1). But it is unnecessary to determine that issue in these proceedings, where reliance is placed on breach of confidence, an established cause of action, the scope of which may now need to be approached in the light of the obligation on this court arising under section 6(1) of the Act.*[11]

Citing *Guardian Newspapers (No 2)* as authority that a pre-existing confidential relationship between the parties is not required for a breach of confidence suit, Keene LJ elaborates:

> *The nature of the subject matter or the circumstances of the defendant's activities may suffice in some instances to give rise to liability for breach of confidence. That approach must now be informed by the jurisprudence of the Convention in respect of Article 8. Whether the resulting liability is described as being for breach of confidence or for breach of a right to privacy may be little more than deciding what label is to be attached to the cause of action, but there would seem to be merit in recognising that the original concept of breach of confidence has in this particular category of cases now developed into something different from the commercial and employment relationships with which confidentiality is mainly concerned.* [16]

There is much to digest in the rich diet of these sweeping dicta, but I shall resist the feast.[17] In any event, in the recent decision of the House of Lords in *Wainwright v Home Office*, Lord Hoffmann firmly rejected resisted Sedley LJ's invitation to the privacy party:

> *[T]he coming into force of the Human Rights Act 1998 weakens the argument for saying that a general tort of invasion of privacy is needed to fill gaps in the existing remedies. Sections 6 and 7 of the Act are in themselves substantial gap fillers; if it is indeed the case that a person's rights under article 8 have been infringed by a public authority, he will have a statutory remedy. The creation of a general tort will, as Buxton LJ pointed out in the Court of Appeal, at [2002] QB 1334, 1360, para 92, pre-empt the controversial question of the extent, if any, to which the Convention requires the state to provide remedies for invasions of privacy by persons who are not public authorities.*[12]

The tenor of his judgment, however, is such that the existence of the Human Rights Act may have been only a secondary consideration in the Lords' coolness towards the sentiments expressed in the High Court of Australia's judgment in *ABC v Lenah Game Meats*.[19]

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[11] Para 166.

[12] [2003] UKHL 53.

2. Breach of Confidence

The equitable remedy for breach of confidence has long been recognised as a means by which personal privacy may be - and has been – protected.[20] Lately, however, the courts have all but treated confidence as synonymous with, or, at least, a surrogate of privacy. Nor is this development confined to English decisions. Notwithstanding the existence of a privacy tort in New Zealand, its High Court recently found that the equitable remedy for breach of confidence (as developed by the English judges) afforded an adequate cause of action for the plaintiff, a celebrity who had been subjected to intrusive photography by the media.[13]

Before analysing briefly this remarkable evolution, it is perhaps useful to summarise the principal elements of the current legal position. A duty may arise if a person accepts the information on the basis that confidentiality will be maintained, or where a third party receives information from a person who is under a duty of confidence in respect of it and the third party knows, or ought to know, that it has been disclosed to him in breach of confidence. Though the majority most cases concern commercial, industrial, or trade secrets, the disclosure of marital confidences or sexual conduct of an individual may be restrained or compensated. The English law has developed in the context of obligations arising under the Human Rights Act 1998. The following principles may be culled from recent cases, including *Naomi Campbell*:[14]

- Where there is an intrusion in a situation in which a person can reasonably expect his privacy to be respected then that intrusion will be capable of giving rise to liability in an action for breach of confidence unless the intrusion can be justified. The bugging of one's home or the use of other surveillance techniques, such as a long lens, are examples of such an intrusion.
- It is unnecessary to show a pre-existing relationship of confidence where private information is involved. A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected. The existence of a relationship such as may create a duty of confidence may, and in personal confidence cases commonly will, have to be inferred from the facts.
- An injunction may be granted to restrain the publication of photographs taken surreptitiously in circumstances such that the photographer is to be taken to

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[13] *Hosking v Runting* (30 May 2003) High Court Auckland Registry, CP 527/02 *per* Randerson J at para 178, quoted in K Evans, 'Reverse Gear for NZ's Privacy Tort: The *Hosking* Decision' (2003) 10 PLPR 61, 62.

[14] See *A v B plc* [2002] EWCA Civ 337, [2002] 2 All ER 545 (CA), para 11(x); *Venables v Newsgroup Newspapers Ltd* [2001] 1038, para 81; *Theakston v MGN Ltd* [2002] EWHC 137 (QB), paras 77-80; *A v B plc* [2002] EWCA Civ 337, [2002] 2 All ER 545 (CA), para 11(ix); *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281; *Douglas v Hello! Ltd* [2001] 2 WLR 992 (CA), paras 68-69; citing *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444 and *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134; *Douglas v Hello! Ltd* [2001] 2 WLR 992 (CA), para 71.

have known that the occasion was a private one and that the taking of photographs by outsiders was not permitted.

- Equity may intervene to prevent the publication of photographic images taken in breach of confidence. If, on some private occasion, the prospective claimant makes it clear, expressly or impliedly, that no photographic images are to be taken of him, then all those who are present will be bound by the obligation of confidence created by their knowledge (or imputed knowledge) of that restriction.
- The action for breach of confidence generally seeks to preserve confidentiality and the trust that the plaintiff has reposed in the confidant; it does not endeavour to protect individuals from emotional distress and embarrassment caused by an infringement of his privacy. A number of difficulties therefore arise when a plaintiff relies on this action to afford a remedy for unwarranted infringement of privacy. The following ten problems offer some indication of the limits of the action in a privacy setting:

  1. The courts have not adequately clarified the criteria by which to determine what kinds of personal information would have the necessary quality of confidence about them, other than the negative requirement that the information must not be in the public domain. I return to this central problem below.
  2. The law does not impose an obligation of confidence merely because the information relates to an individual's private or sexual life.
  3. The concept of a relationship of confidentiality may well be inapplicable to transitory or commercial sexual relationships even though information relating to sexuality engages an intimate aspect of private life requiring special protection. Thus, where the parties are not married and one of them informs the media about their sexual relationship without the consent of the other party, the fact that the confidence was a shared confidence which only one of the parties wishes to preserve would undermine the other party's right to have the confidence respected. Extra-marital sexual relations would therefore lie 'at the outer limits of relationships that require the protection of the law.'[15] *A fortiori*, when the relationship is one between a prostitute in a brothel and her client. The fact that they participate in sexual activity does not of itself constitute a sufficient basis for the attribution to the relationship of confidentiality. Such a relationship has therefore been held to be not confidential, even though the latter was keen to keep them secret. Thus, although the courts appear to have eliminated the requirement of a pre-existing relationship, the fact that only one party wishes to keep the information private and confidential deprived the plaintiffs in *A v B plc* and *Theakston v MGN Ltd* of the protection under the law of confidence. The requirement of an agreement to keep the information confidential therefore renders actions for breach of confidence

[15] *A v B plc* [2002] EWCA Civ 337, [2002] 2 All ER 545, paras 11(xi), 43(iii) and 47.

inadequate for the purposes of protecting an individual against invasion of privacy by unwanted publicity.[16]

4. Certain private information that is in the public domain may nevertheless warrant protection from further disclosure. Images of a private individual in a public place taken without his knowledge and consent may relate to and affect his private life, particularly when accompanied by a story revealing details of his private life.

5. In *Peck v UK* [17] the applicant was filmed by a local authority CCTV in a public street, brandishing a knife with which he had attempted to commit suicide. The authority later disclosed to the media the footage as well as still pictures, resulting in the applicant's images being published and broadcast. The British Government suggested that the applicant would have been entitled to bring an action for breach of confidence if he had been filmed 'in circumstances giving rise to an expectation of privacy on his part'. But the European Court of Human Rights held that the applicant did not have an actionable remedy in breach of confidence and had no effective remedy before a United Kingdom court in relation to the disclosures by the local authority. The Court was not persuaded by the Government's argument that a finding that the applicant had an 'expectation of privacy' would mean that the elements of the breach of confidence action were established. It was unlikely that the UK courts would have accepted that the images had the 'necessary quality of confidence' about them, or that the information was 'imparted in circumstances importing an obligation of confidence.'[18]

6. It does not follow from the fact that the information is obtained as a result of unlawful activities that its publication should necessarily be restrained by injunction on the ground of breach of confidence, though this could well be a persuasive consideration when it comes to exercising discretion. See below.

7. A person who acquires personal information in relation to another without notice of its confidential character (as when the information is not confidential by its nature) may disclose the information even though there is an agreement to keep it secret between the confider and the confidant.

8. The requirement that the information must have been imparted in circumstances importing an obligation of confidence is problematic where the information was disclosed by a newspaper. The defendant would have to show that the newspaper had been put on notice prior to publication that the disclosure amounted to a breach of confidence owed by the source to the subject of the information. Accordingly, the defendant would have to

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[16] *Theakston v MGN Ltd* [2002] EWHC 137 (QB), paras 57-64 and 72-76, endorsed by the Court of Appeal in *A v B plc*, above.

[17] See G Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 MLR 726, 744-748 and 757-758.

[18] No 44647/98, date of judgment: 28.4.2003 (ECtHR).

show that the newspaper had the requisite notice both of the source's duty of confidence and of the source's breach of that duty. Such a duty will not exist in the majority of cases of media intrusion. Even if a duty of confidence exists in the particular case, it is difficult to prove because of the protection afforded to the media regarding their sources and the fact that information will frequently be provided to the media anonymously.

9. There is no jurisdiction to grant an injunction in respect of personal information already published. Once the information in question is in the public domain, its re-publication is not actionable as a breach of confidence. The obligation of confidence is discharged once the subject matter of the obligation has been destroyed, even though the destruction was the result of a wrongful act committed by the person under the obligation.[19] But private facts or photographs of an individual which have already been published in breach of his privacy may, on re-publication, cause him further distress, embarrassment and frustration.
10. The law of breach of confidence is solely concerned with unauthorised disclosures. It offers no relief when the infringement does not involve, or result in, a disclosure. An intrusion into private premises or surveillance using an aural or visual device is probably not actionable as a breach of confidence.

3. Naomi Campbell

In *Naomi Campbell v MGN Ltd,* the House of Lords, by 3-2, found in favour of the supermodel who sought damages for the publication by the *Daily Mirror* of articles and photographs concerning the fact that she was receiving treatment by Narcotics Anonymous for her drug addiction. The model had publicly denied that she was addicted to drugs, and the Court of Appeal had held that by mendaciously asserting to the media that she did not take drugs, she had rendered it legitimate for the media to put the record straight. The House of Lords nevertheless held that she was entitled to compensation.

The judgments reveal several perspectives of the emerging tort, particularly in the developing environment of Article 8 the Human Rights Act. The majority regarded the disclosure of Campbell's attendance at an NA meeting, along with the publication of the images of her leaving the meeting, as intimate medical information that warranted protection, notwithstanding Article 10's protection of speech provision. The view of the minority, on the other hand, was that this information did not amount to sensitive health data, and, in any event, as Lord Hoffmann puts it,

> *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.*[20]

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[19] *A v B plc* [2002] EWCA Civ 337, [2002] 2 All ER 545, para 11(x); citing *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63.
[20] Para 62.

The court recognizes that the claim is based solely on the *publication* of the images, not the intrusive photography by which they were obtained. Thus,

Lord Nicholls declares:

> *In the case of individuals this tort, however labelled, affords respect for one aspect of an individual's privacy. That is the value underlying this cause of action. An individual's privacy can be invaded in ways not involving publication of information. Strip-searches are an example. The extent to which the common law as developed thus far in this country protects other forms of invasion of privacy is not a matter arising in the present case. It does not arise because, although pleaded more widely, Miss Campbell's common law claim was throughout presented in court exclusively on the basis of breach of confidence, that is, the wrongful publication by the 'Mirror' of private information.*[21]

4. 'Private facts'

There is no clear consensus among the judges in *Campbell* in respect of the crucial question of what constitutes 'private information.' Lord Nicholls expresses a strong preference for a test based on whether in regard to the disclosed facts 'the person in question had a reasonable expectation of privacy.'[22] The learned judge explicitly rejects Gleeson CJ's formulation in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* that asks whether the disclosure 'would be highly offensive to a reasonable person.'[23] This test, according to Lord Nicholls, is stricter than his proposed 'reasonable expectation' test. Moreover, the 'highly offensive' test goes 'more properly to issues of proportionality; for instance, the degree of intrusion into private life, and the extent to which publication was a matter of proper public concern. This could be a recipe for confusion.'[24]

Lord Hope, in formulating his test of what constitutes 'private information' expresses support for the so-called Gleeson test, and held that Court of Appeal was in error

> *… when they were asking themselves whether the disclosure would have offended the reasonable man of ordinary susceptibilities. The mind that they examined was the mind of the reader: para 54. This is wrong. It greatly reduces the level of protection that is afforded to the right of privacy. 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. 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.*[25]

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[21] Para 15.

[22] Para 21.

[23] (2001) 185 ALR 1, 13, para 42.

[24] Para 22.

[25] Para 99. Stress supplied.

Baroness Hale also gives short shrift to the Gleeson test, declaring:

> *An objective reasonable expectation test is much simpler and clearer than the test sometimes quoted from the judgment of Gleeson CJ in the High Court of Australia in Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd.*[26]

Like Lord Hope, she acknowledges the importance of juding the privateness of the disclosed information from the point of view of 'the sensibilities of a reasonable person placed in the situation of the subject of the disclosure rather than to its recipient.'[27] The learned judge adds:

> *It should be emphasised that the 'reasonable expectation of privacy' is a threshold test which brings the balancing exercise into play. It is not the end of the story. Once the information is identified as 'private' in this way, the court must balance the claimant's interest in keeping the information private against the countervailing interest of the recipient in publishing it. Very often, it can be expected that the countervailing rights of the recipient will prevail.*[28]

I like to think that these are echoes of my own views expressed first more than 20 years ago. I urged the courts to define what I preferred to call 'personal information'. My own formulation was as follows:

> *'Personal information' includes those facts, communications or opinions which relate to the individual and which it would be reasonable to expect him to regard as intimate or sensitive and therefore to want to withhold, or at least to restrict their collection, use or circulation.*

Any definition of 'personal information' must therefore include both the *quality* of the information and to the *reasonable expectations of the individual concerning its use*. The one is, in large part, a function of the other. In other words, the concept of 'personal information' postulated here functions both descriptively as well as normatively. Since 'personal' relates to social norms, to so describe something implies that it satisfies certain of the conditions specified in the norms, without which the normative implications would have no validity. Thus if a letter is marked 'personal' or if its contents clearly indicate that it is personal, the implication is that it satisfies one or more of the conditions necessary for its being conceived as 'personal'; this is a descriptive account.

To the extent that it is necessary to define the information by reference to some objective criterion (since a subjective test would clearly be unacceptable), it is inevitable that the classification depends on what may legitimately be claimed to be 'personal'. Only information which it is reasonable to wish to withhold is likely, under any test, to be the focus of our concern. An individual who regards information concerning say, his car, as personal and therefore seeks to withhold details of the size

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[26] Para 135.

[27] Para 136.

[28] Para 137.

of its engine will find it difficult to convince anyone that his vehicle's registration document constitutes a disclosure of 'personal information'. An objective test of what is 'personal' will operate to exclude such species of information.

The question of the offensiveness of the publication relates to the *publicity* given to the personal information.[29] But there are other considerations. See 5 below.

4. Putting the Record Straight

Superstars and supermodels attract little sympathy when they complain of media intrusion. They cannot, it is generally maintained, have it both ways. They bask in the glory of favourable publicity; they cannot therefore legitimately whinge when a disclosure reveals them in a less than satisfactory light. But this simple judgment neglects the principal purpose of the legal protection of personal information against its gratuitous disclosure. A law that purports to defend the individual against unwanted publicity fails in that objective when it is founded on this popular, but misconceived, notion.

There is, *a fortiori,* even less sympathy for public figures who lie. Indeed, Miss Campbell conceded at trial that because she had lied about her drug addiction, the media had a right to put the record straight. there is a public interest in the press revealing the truth. This proposition was vigorously maintained by all five judges in the House of Lords. But why? Suppose that a celebrity were HIV-positive or suffering from cancer. Can it really be the law that a legitimate desire on his part to deny that he is a sufferer of one of these diseases may be annihilated by the media's right to 'put the record straight'? If so, the law's purported protection of privacy or confidence is a rather fragile thing. It is submitted that truth or falsity cannot be allowed to block the reasonable expectations of those who dwell in the glare of public attention.

It is not entirely surprising that, since the adoption of the Human Rights Act in 1998, the courts should now be content to oversee the withering away of the distinction between 'privacy' and 'confidence'. As Phillips LJ put it in *Naomi Campbell*:

> *The development of the law of confidentiality since the Human Rights Act came into force has seen information described as 'confidential' not where it has been confided by one person to another, but where it relates to an aspect of an individual's private life which he does not choose to make public. We consider that the unjustifiable publication of such information would better be described as breach of privacy rather than breach of confidence.*[43]

5. Free speech

This is not the place to challenge (again) the failure of courts to distinguish the various categories of speech, let alone the circumstances under, and manner in, which the right is exercised. The consequences of their treatment of speech in a monolithic, undifferentiated manner inevitably generates an unacceptable conflation between

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[29] The New Zealand Court of Appeal in *Hosking v Runting* [2004] NZCA 34 appears to have adopted this approach.

gossip and politically relevant publications. I have long argued that in attempting to 'balance' the plaintiff's claim to freedom from public disclosure, on the one hand, against the defendant's claim to exercise freedom of expression, on the other, a number of factors ought to be taken into account, including, (a) the defendant's motives and beliefs, (b) the timing of the disclosure, (c) the recipient of the disclosure, (d) the burden and standard of proof. Moreover, the volatile concept of 'public interest' should itself be subjected to a careful scrutiny. I have suggested the following tests:

a) To whom was the information given?

b) Is the plaintiff a 'public figure'?

c) Was the plaintiff in a public place?

d) Is the information in the public domain?

e) Did the plaintiff consent to the publication?

f) How was the information acquired?

g) Was it essential for the plaintiff's identity to be revealed?

h) How serious was the invasion of the plaintiff's privacy?[57]

Yet the importance of these considerations often appears to be lost on the judges. Without a more detailed, coherent analysis of the concept of 'private facts', and the circumstances under which such information warrants protection against disclosure, it will be many years before the common law can be said to have resolved the pressing problem of media invasions of privacy.