

UK AND EU MEDIA LAW UPDATE

RECENT DEVELOPMENTS

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[141] There have been a number of significant developments in media law in the United Kingdom and Europe since the beginning of 2002. In the first part of this review, an overview of some of the most significant court decisions in this area is provided. The latter part of the review focuses more closely on the development which is perhaps the most interesting of all — the creation of a ‘right to privacy’ in this jurisdiction from the pre-existing equitable action for breach of confidence.

Breach of confidence

It is apparent from the discussion above that, in the wake of the *Human Rights Act 1998* (UK), courts have begun to exercise particular care to ensure that private law operates consistently with the media’s right to free speech. The same concern has been apparent in cases concerning the equitable action for breach of confidence. This can be seen in those cases concerning the developing right of privacy considered in greater detail below. It is also evident in two further cases decided in the period of review.

In *H (A Healthcare Worker) v Associated Newspapers Ltd*,² the Court of Appeal heard a newspaper’s application for the variation of an order made in earlier proceedings for breach of confidence. The order prevented the identification of a healthcare worker who had been diagnosed as HIV positive and who could possibly have created a risk of infection to his patients. The Court of Appeal found that the story which the newspaper wished to publish contributed to legitimate public debate on the role of health authorities in such situations. As a result, it lifted the prohibition on the naming of the Health Authority concerned and of the professional specialty of the worker concerned, even though the publication of these details was likely to result in the disclosure of H’s identity.

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² [2002] EMLR 23.

In *Jockey Club v Buffon*,³ Gray J considered the effect of a consent order made in [142] proceedings for breach of confidence upon a broadcasting company which was not party to those proceedings. The claimant was responsible for supervising the conduct of horse-racing in Great Britain. The defendant to the breach of confidence proceedings was an ex-employee of the claimant. The ex-employee was subject to continuing confidentiality covenants. In breach of these covenants, he had communicated with the media about the activities of the claimant. Proceedings for breach of the contractual confidentiality agreement were settled and a consent order was made restraining the defendant from further revealing any confidential information. The consent order was served on the BBC, which was investigating corruption in horse-racing. In order to make a programme on this subject, it wished to use confidential information obtained by the defendant during his employment with the claimant. The BBC applied to vary the consent order in order to allow it to use the documents. Gray J confirmed that, in certain circumstances, a third party could be liable for contempt of court for disclosing information subject to proceedings for breach of confidence.⁴ However, he found that such liability could arise only where an interim, rather than a final, injunction had been made. Accordingly, the BBC was not bound by the terms of the consent order. In any event, he went on to decide whether disclosure of the information in question would constitute a breach of a free-standing confidential obligation owed by the BBC to the claimant. He found that any such claim would be met by a 'public interest' defence. The claimant was a public authority and allegations of corruption in its affairs were a matter of legitimate and continuing public concern.

The maintenance of the confidentiality of journalists' sources has also been found to be important in securing the right protected under art 10 of the *European Convention on Human Rights*.⁵ However, courts in this jurisdiction have traditionally found themselves unable to resist the temptation to order disclosure of a source's identity when a significant conflicting interest is at stake. In this respect, the decision of the House of Lords in *Ashworth Hospital v MGN Ltd*⁶ was entirely typical. The defendant published an article about B, a notorious murderer who was detained in a secure

³ [2003] EMLR 5.

⁴ See *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191.

⁵ *Goodwin v United Kingdom* (1996) 22 EHRR 123.

hospital. The article contained information deriving from a confidential patient database maintained at the hospital. The hospital, wishing to discover the identity of the person who had 'leaked' the information in question, sought an order requiring the newspaper to hand over any documents received from its source. The newspaper relied on the protection for journalistic sources available under s 10 of the *Contempt of Court Act 1981* (UK).⁷ In exercise of its jurisdiction to make orders against those involved in the wrongdoing of others (deriving from the *Norwich Pharmacal* case⁸), the House of Lords approved the decision of the lower courts to require disclosure of the documents. It found that such disclosure could be justified under s 10 in this 'exceptional' case because the care of patients in secure hospitals was 'fraught with difficulty and danger'. Such difficulty and danger would be significantly increased if the hospital were not able to identify and dismiss the disloyal employee responsible for leaking information from the database.⁹

[143] **Copyright law**

The United Kingdom was required to implement the Directive on Copyright and Related Rights in the Information Society before 22 December 2002.¹⁰ This deadline was missed and, recently, a further promised deadline for implementation has passed.¹¹ When implemented, the Directive, designed to adapt European copyright law to the 'Information Society', will significantly increase the powers available to right-owners. It will also reduce the scope of certain defences to infringement which have traditionally been available in this jurisdiction. The Copyright Directorate of the Patent Office has claimed that the delay in implementing the Directive has arisen as a result of the difficulties of tailoring complex new requirements with the existing body

⁶ [2002] EMLR 36.

⁷ 'No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.'

⁸ *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

⁹ The case is also interesting because Lord Woolf, with whom the other Law Lords agreed, held that the *Norwich Pharmacal* jurisdiction extends to permit the making of an order to identify a wrongdoer who has committed a criminal offence. In this respect, the judgment of Sedley LJ in *Interbrew SA v Financial Times Ltd* [2002] EMLR 24, in which he had found that the jurisdiction was limited to the making of an order to identify a wrongdoer who has committed a civil wrong, was over-ruled.

¹⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

¹¹ That is, the deadline of 31 March 2002; see: <http://europa.eu.int/comm/internal_market/en/intprop/news/1100.html>.

of copyright law. However, while we await this legislation, the courts have handed down a number of interesting, if not earth-shattering, decisions.

In *Beckingham v Hodgens*, the Court of Appeal has confirmed that, under the *Copyright Designs and Patents Act 1988* (CDPA), it is not necessary for all contributors to have a common intention of joint authorship in order for a work of joint authorship to arise.¹² In *Sony Music Entertainment (UK) Ltd v EasyInternetCafe Ltd*,¹³ a company responsible for a chain of Internet cafes was found liable for 'burning' CDs on behalf of its customers. In its defence, it argued, first, that it was not liable because the defendant's employees simply acted on the customers' instructions and therefore that any copying was involuntary. Secondly, it claimed to be entitled to rely on the statutory defence available for 'time-shifting' under s 70 CDPA. Both of these arguments were dismissed by Peter Smith J. Liability for infringement under s 17 and s 18 of the CDPA is strict. It is no defence for a person copying a work to claim that that he did not know he was committing an infringement of copyright. Section 70 only permitted the making of copies for 'private and domestic' time-shifting use. Interestingly, however, Peter Smith J confirmed obiter that a website could fall within the definition of a 'cable programme' under the CDPA. The possibility that a website could be protected in that way has been widely suggested. However, until now, the only authority to support that proposition has been a rather dated preliminary decision from Scotland.¹⁴ Ironically, the point is likely to become redundant when, as a result of the implementation of the Information Society Directive, the specific protection for 'cable programmes' is removed from the CDPA.

By contrast, in *Sony Computer Entertainment Inc v Owen*,¹⁵ Jacob J had to consider a claim of a kind that is likely to become more prevalent after enhanced legal protection for copyright protection systems is introduced under the Directive. In this case, Sony sued those involved in the manufacture and distribution of 'mod-chips', enabling users to circumvent the copy protection devices on Playstation 2 games consoles. Sony brought proceedings under the existing copy protection provisions contained in

¹² [2003] EWCA Civ 143; cf the Canadian position in *Darryl Neudorf v Nettwerk Productions Ltd* [2000] RPC 935.

¹³ [2003] EWHC 62 (Ch).

¹⁴ *Shetland Times v Dr Jonathan Wills* [1997] FSR 604.

¹⁵ [2002] EMLR 34.

s 296 of the *CDPA*. The defendant argued that it was not liable because there were a number of non-infringing, and therefore, legitimate [144] uses for the mod-chip. Jacob J held that such arguments were irrelevant because, under s 296, it was necessary only to prove that the device in question was specifically designed to circumvent Sony's copy protection measures. When the Directive is implemented, it is likely that copyright owners will increasingly tend to rely upon such forms of 'paracopyright', rather than upon copyright law itself.

Image merchandising

Finally, it is worth noting a clutch of interesting decisions concerning the protection available to 'image merchandisers', and particularly to those involved in sport. Traditionally, the United Kingdom has offered patchy legal protection to character, personality and other image merchandisers. A series of well known cases have revealed the limitations of the most obvious sources of protection in this jurisdiction — passing off,¹⁶ infringement of registered trade marks¹⁷ and infringement of copyright.¹⁸ Indeed, the protection available in this jurisdiction has often been criticised for being out of touch with modern commercial conditions, particularly by comparison with that available elsewhere. Cases decided within the period under review suggest that image merchandisers will, in future, be able to prohibit the marketing of unlicensed merchandise in a somewhat wider range of circumstances. However, judicial hostility to merchandisers' attempts to monopolise symbols commonly associated with well known teams and players, has not entirely disappeared.

In trade mark law, it remains difficult to convince courts that famous sporting symbols, such as team names and team badges, are distinctive of the club or association responsible for the team associated with that symbol. This is apparent from the decision of Lloyd J in *Rugby Football Union v Cotton Traders Ltd*, in which he found that the traditional rose symbol worn on the shirts of the English rugby team had been invalidly registered as a Community trade mark.¹⁹ The rose was associated

¹⁶ See, eg, *Lyngstrad v Anabas Products* [1977] FSR 62; *BBC Worldwide v Pally Screen Printing* [1988] FSR 665.

¹⁷ See, eg, *Elvis Presley Trade Marks* [1999] RPC 567 (CA).

¹⁸ See, eg, *BBC Worldwide v Pally Screen Printing* [1988] FSR 665.

¹⁹ [2002] ETMR 76.

by the public with England in general, or with English rugby, rather than with the products of the Rugby Football Union (RFU). Therefore the RFU, and its current authorised licensee, could not prevent rivals from selling traditional all-white rugby shirts bearing the rose symbol. Similarly, Laddie J found that Arsenal FC was not entitled to rely upon its trade marks or the tort of passing off to prevent unlicensed traders from selling merchandise bearing the club's logo and name.²⁰ He found that customers perceived the club's name and crest on the unlicensed merchandise as symbols of allegiance rather than as indicators of the trade origin of the merchandise.

However, a celebrity's right to use passing off to prevent unauthorised use of his image to suggest endorsement of products has recently received a considerable boost in *Irvine v Talksport Ltd*.²¹ In that case, a broadcasting company manipulated an image of the Formula One driver Eddie Irvine to make it appear as though he were listening to its programmes on a portable radio. Copies of the manipulated image were used in publicity materials sent to prospective advertisers. The judge found the radio station had committed passing off by creating the false impression that Irvine had authorised the use of his image in the publicity material. The Court of Appeal upheld this decision and substituted a figure of £25 000 for the £2 000 awarded in damages by the judge. Image merchandisers will also welcome the decision of Peter Smith J in *Football Association Premier League Ltd v Panini UK Ltd*,²² which concerned the defendant's distribution of football stickers containing photographs of football players wearing shirts displaying the claimant's logo and the badges of other football clubs. The claimants sued the defendant [145] for infringement of copyright in the logo and badges. The defendant argued that it was protected by the defence contained in s 31 of the *CDPA*. This provision permits 'incidental' reproduction of copyright works. However, Peter Smith J refused to accept that the defendant's reproduction of the logos and badges was 'incidental'. The meaning of 'incidental' was 'casual, inessential, subordinate or merely background.' In this instance, the inclusion of the logo and the badges was an integral part of the defendant's photographs of football players in the most recent version of their club kits. The advantage of reliance on copyright in such circumstances is clear. Unlike the laws of trade marks and passing

²⁰ *Arsenal v Reed (No2)* [2003] CMLR 13.

²¹ [2003] EWCA Civ 423.

²² Unreported, 12 December 2002.

off, the unpredictable views of the public on the use of contested signals are entirely irrelevant in copyright law. For this reason, merchandisers are increasingly seeking to rely on copyright protection where possible.²³

Having provided this overview of significant developments in United Kingdom media law, I now wish to consider one such development in greater detail. The last year has seen a number of interesting cases, in which, prompted by the introduction of the *Human Rights Act*, courts have continued to develop a right to object to the disclosure of private information. In so doing, they have grappled with the need to balance the conflicting demands of arts 8 (the right to a private life) and 10 (the right to freedom of expression) of the *European Convention on Human Rights*. These cases are considered below.

Creating a Right of Privacy out of the Equitable Action for Breach of Confidence

The excesses of the British press are notorious and, throughout the final decades of the last century, there were frequent calls for the creation of a legal right to privacy. The introduction of a statutory privacy right would be fraught with enormous political difficulties. However, over the last couple of decades, it has often been suggested that the equitable action for breach of confidence is capable of evolving into an action for breach of privacy without statutory intervention. In a series of influential dicta, it was suggested, for example, that an action for breach of confidence would be capable of preventing publication of a page of a personal diary found lying in the street²⁴ or of preventing the publication of the fruits of intrusive long-lens photography.²⁵ However, prior to the coming into force of the *Human Rights Act 1998*, there was little authority to support an argument that the action of breach of confidence applied in the absence of a pre-existing relationship between confider and confidant. The Act, however, appears to have provided the impetus to this much-heralded development. The decisions in *Douglas v. Hello! Ltd*,²⁶ *Venables v News Group Newspapers Ltd*²⁷ and *Mills v News Group Newspapers Ltd*,²⁸ have confirmed that, under s 6 of the Act, courts are obliged to act compatibly with art 8 of the ECHR and that the appropriate

²³ *Rugby Football Union v Cotton Traders Ltd* [2002] ETMR 76.

²⁴ *A-G v Guardian Newspapers No 2* [1990] 1 AC 109 (Lord Goff).

²⁵ *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 (Laws J).

²⁶ [2001] EMLR 199.

²⁷ [2001] 1 All ER 908.

way of ensuring compatibility in the case of unwanted disclosure of private information is by developing the existing action for breach of confidence. Since the beginning of 2002, a number of interesting cases have taken this process further.

[146] *A v B plc & C*

A was a well known professional footballer. He was married with a family. He had affairs with two women, C and D. B plc, a newspaper company, was contacted by C and, as result, prepared a lurid story about A's affairs. A wished to prevent the information contained in the story from reaching his wife and family. Accordingly, he brought proceedings for breach of confidence against B plc and C. Jack J granted an interim injunction, finding that the C's disclosure was in breach of confidence and that there was no public interest in disclosing the details of A's private life.²⁹ B plc appealed.³⁰ In the Court of Appeal, Lord Woolf CJ was clearly perturbed by the sharp increase in the number of cases brought to prevent the publication of private information since the coming into force of the *Human Rights Act*. In order to impose some order on the burgeoning jurisprudence he set out in guidelines to assist courts in dealing with such claims.

Certain of these guidelines enshrine principles emerging from previous case law. Thus, for example, he stated that, in seeking to protect privacy, courts were to develop the action for breach of confidence rather than to create a free-standing privacy right under the *Human Rights Act*. He also stated that s 12 of the Act required any interference with freedom of expression to be justified, but did not mean that the right to freedom of expression 'trumped' other rights, such as the right to privacy. However, some of the other guidelines laid down by Lord Woolf appear to promote an approach to decision-making in privacy cases which favours the application of judicial instinct to the particular facts of the case. Thus for example, in considering how a protectable privacy interest is to be identified, he held that:

In the majority of cases, the question of whether there is an interest capable of being the subject of a claim for privacy should not be allowed to be the subject of detailed argument. There must be some interest of a private nature which the claimant wishes to

²⁸ [2001] EMLR 41.

²⁹ [2002] EMLR 7.

protect, but usually the answer to the question whether there exists a private interest worthy of protection will be obvious. In those cases in which the answer is not obvious, an answer will often be unnecessary. This is because the weaker the claim for privacy the more likely that the claim for privacy will be outweighed by the claim based on freedom of expression.³¹

To some degree, the concern with judicial balance in this and other passages from the judgment reflects the movement away from the relative formalism of the traditional action for breach of confidence towards a more complex accommodation of arts 8 and 10 required under the 1998 Act. However, in reality, 'guidelines' such as that provided above offer little in the way of guidance to prospective litigants.

Nevertheless, elsewhere within the guidelines, Lord Woolf did begin to acknowledge the particular problems of creating a remedy for breach of privacy out of a pre-existing cause of action designed for a related, but distinct, purpose. He recognised that one such problem arises in cases (such as that in *A v B plc & C*), in which one of the parties to a private relationship wishes to disclose information about that relationship. He noted that there were particular difficulties:

... where the alleged intrusion into privacy is as a result of the reporting of the information to a third party by a party to the relationship which creates the privacy. This is a material factor in situations where two people have shared a sexual relationship outside marriage. If one wishes to exercise his or her art 10 rights that must impact on the other's right to maintain confidentiality...In situations where the parties are not married (when they are, special considerations may arise) the fact that the confidence was a shared confidence which only one of the [147] parties wishes to preserve does not extinguish the other party's right to have the confidence respected, but it does undermine that right.³²

In most traditional confidence cases, one party has clearly been the confider and another has been the confidant. However, where an action for breach of confidence/privacy can arise in the absence of any pre-existing relationship of

³⁰ [2002] EMLR 21.

³¹ *Ibid* para 11(vii) (Lord Woolf). A similar approach is adopted to the question of when the 'public interest' will permit disclosure of private information, despite the existence of an obligation.

³² *Ibid* para 11(xi). On this issue, see also *Theakston v MGN Ltd* [2002] EMLR 22.

confidence, difficulties such as those described above are likely to be relatively common. Lord Woolf's tentative resort to a distinction between marriage and other forms of relationship is unlikely to provide a complete solution. Nevertheless, the expression rights of the parties to a relationship clearly need to be accommodated. Much should depend on the expectations of privacy that the parties bring to a relationship. In this respect, the injunction awarded by Jack J at first instance in *A v B plc & C* is interesting. He granted an injunction under which C was prohibited from disclosing information with a view to publication in the media, but was not prohibited from discussing the relationship with other individuals.

Overall, Lord Woolf's guidelines offer considerable encouragement to media organisations defending privacy actions. He emphasised the need for any interference with the media's expression rights to be clearly justified. At the same time, any requirement for the media to demonstrate a 'public interest' in disclosed information seems to have been significantly relaxed. Traditionally, a defendant seeking to rely upon the 'public interest' defence to breach of confidence has had to demonstrate a clear public 'need to know'.³³ However, according to Lord Woolf, the *Human Rights Act* demands a different approach:

Where an individual is a public figure, he is entitled to have his privacy respected in the appropriate circumstances. A public figure is entitled to have a private life. The individual, however, should recognise that because of his public position, he must expect and accept that his or her actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure. The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public attention then you have less ground to object to the intrusion which follows. In many of these situations, it would be overstating the position to say that there is a public interest in the information being published. It

would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information.

In this passage, Lord Woolf describes a concept of 'private interest' that is far removed from the traditional approach to public interest disclosure in breach of confidence. Under the traditional approach, courts have been instructed to distinguish clearly between what is 'in the public interest' and what is simply 'interesting to the public'.³⁴ Now, however:

... courts must not ignore the fact that if newspapers do not publish information which [148] the public are interested in, there will be fewer newspapers published, which will not be in the public interest.³⁵

The contrast with the traditional approach, under which courts were particularly suspicious of the commercial motivations of the press, could not be more marked.

The media-friendliness of Lord Woolf's guidelines is also apparent in his emphasis that, in principle, it is for journalists and editors (rather than courts) to decide how to present a story:

In drawing up a balance-sheet between the respective interests of the parties, courts should not act as censors or arbiters of taste. This is the task of others. If there is not a sufficient case for restraining publication the fact that a more lurid approach will be adopted by the publication than the court would regard as acceptable is not relevant. Whether the publication will be attractive or unattractive should not affect the result of the application if the information is not otherwise the proper subject of restraint.³⁶

In recent judgments, the European Court of Human Rights has indicated that this principle forms a valuable part of the right to freedom of expression protected under

³³ See *Lion Laboratories v Evans* [1985] QB 526.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid* para 11(xiii).

art 10 of the European Convention.³⁷ However, it has not necessarily been reflected in recent developments in other areas of law in this jurisdiction.³⁸

In considering the facts of *A v B plc & C*, Lord Woolf concluded that Jack J had erred in failing to pay insufficient attention to the right of freedom of expression. In particular, he considered that greater weight should have been given to the fact that the relationships between A and C and D were relatively transient and that C and D wished to disclose information about their relationships. Furthermore, unlike Jack J, Lord Woolf found that there was some public interest in the newspaper's proposed stories:

It is not self-evident that how a well known premiership football player, who has a position of responsibility within his club, chooses to spend his time off the football field does not have a modicum of public interest. Footballers are role models for young people and undesirable behaviour on their part can set an unfortunate example. While Jack J was right to say on the evidence which was before him that A had not courted publicity, the fact is that someone holding his position was inevitably a figure in whom a section of the public and the media would be interested.³⁹

Campbell v MGN

Shortly after *A v B & C*, a differently constituted Court of Appeal considered another case raising related issues. Naomi Campbell is an internationally known fashion model with a wide range of commercial interest. In the past, she had gone out of her way to deny that she has drug problems. In February 2001, the *Daily Mirror* published two articles, each accompanied by a photograph, revealing that Campbell was a drug addict and that she was attending Narcotics Anonymous. The information for the articles had derived either from a member of Campbell's entourage or from somebody who had also attended Narcotics Anonymous with Campbell.

³⁷ See, eg, *Fressoz and Roire v France* [2001] EHRR 1.

³⁸ In defamation law, see *Grobbelaar v News Group Newspapers Ltd* [2001] 2 All ER 437 (CA). In copyright, see *Ashdown v Telegraph Group plc* [2001] EMLR 44 (CA).

³⁹ *Ibid* para 43.

Campbell sued,⁴⁰ claiming damages for breach of confidence.⁴¹ She conceded that, as a result of her previous public denials, she could not succeed in respect of the newspaper's disclosure that she was a [149] drug addict. Accordingly, the case was concerned with establishing whether disclosure of the fact that Campbell was receiving treatment for her addiction at Narcotics Anonymous was in itself sufficient to breach her rights to privacy/confidentiality. At first instance, Morland J found that the information concerning her treatment was private, had been disclosed in breach of confidence and that celebrities, even celebrity self-publicists, were entitled to some degree of privacy. He found that Campbell was entitled to damages for the disclosure of the sensitive personal information concerning her attendance at Narcotics Anonymous.⁴²

On appeal, Lord Phillips of Worth Matravers MR, giving the judgment of the Court of Appeal, reconsidered one aspect of Lord Woolf's guidelines noted above. It will be remembered that, in *A v B plc & C*, Lord Woolf had stated that, to a considerable extent, public interest in the lives of celebrities was legitimate. However, there is a danger that such guidance could be regarded as promoting an approach under which public figures have little protection for their private life. Therefore, it is not surprising that, in *Campbell v MGN Ltd*, the Master of the Rolls took the opportunity to offer important clarification of Lord Woolf's judgment on this point.

When Lord Woolf spoke of the public having 'an understandable and so a legitimate interest in being told' information, even including trivial facts, about a public figure, he was not speaking about private facts which a fair-minded person would consider it offensive to disclose...For our part we would observe that the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media. We do not see why it should necessarily be in the public interest that an individual who has been adopted as a role model, without seeking this distinction, should be demonstrated to have feet of clay ...⁴³

⁴⁰ [2003] EMLR 2.

⁴¹ It was conceded that she had no free-standing 'right to privacy' under the *Human Rights Act 1998* (UK).

⁴² He also found that the article breached the *Data Protection Act 1998* (UK).

⁴³ [2003] EMLR 2 para 40.

This passage is significant because it emphasises that public figures retain a right to privacy. It is also significant because, in referring to 'private facts which a fair-minded person would consider it offensive to disclose', Lord Phillips lends support to a workable definition of the type of information capable of being restrained under the action for breach of confidence/privacy.⁴⁴

On the facts, the application of this definition favoured the defendant:

Given that it was legitimate for the appellants to publish the fact that Miss Campbell was a drug addict and that she was receiving treatment, it does not seem to us that it was particularly significant to add the fact that the treatment consisted of attendance at meetings of Narcotics Anonymous ... We do not consider that a reasonable person of ordinary sensibilities, on reading that Miss Campbell was a drug addict, would find it highly offensive, or even offensive, that *The Mirror* also disclosed that she was attending meetings of Narcotics Anonymous ...⁴⁵

Thus, there was no breach of confidence. In any event, the Court of Appeal found that, in reporting the news of Campbell's drug addiction, *The Mirror* was entitled in the public interest to reveal additional and peripheral details concerning her attendance at Narcotics Anonymous. In coming to this conclusion, the Court [150] reiterated that the way in which a story was to be presented was, to a very great degree, a matter for the newspaper itself:

In our judgment, the information published by the appellants was justified in order to provide a factual account of Miss Campbell's drug addiction that had the detail necessary to carry credibility. Provided that publication of particular confidential information is justifiable in the public interest, the journalist must be given reasonable latitude as to the manner in which that information is conveyed to the public or his art 10 right to freedom of expression will be unnecessarily inhibited.⁴⁶

⁴⁴ This approach was derived from *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63.

⁴⁵ [2003] EMLR 2 para 53.

⁴⁶ *Ibid* para 64. It was also found that the newspaper was entitled to benefit from the defence under s 32 of the *Data Protection Act 1998* (UK).

Campbell v Frisbee

On the same day as *Campbell v MGN*, the Court of Appeal handed down judgment in another confidentiality/privacy claim brought by the same claimant. Frisbee was an ex-employee of Campbell. Her contract of employment had contained an express confidentiality clause. However, despite this clause, she approached *The News of the World* and gave an interview to the paper. The information provided in this interview formed the basis of an article about an alleged sexual relationship between Campbell and a famous actor and about the efforts to conceal this relationship from Campbell's fiancé. Campbell sued Frisbee for breach of the contractual confidentiality clause. Frisbee raised two arguments in her defence. First, she argued that Campbell had violently assaulted her and had thereby committed a repudiatory breach of the employment agreement. Having accepted this breach, it was argued, Frisbee was no longer bound by the confidentiality clause. Second, she argued that it was in the public interest for the revelations about Campbell's personal life to be published because she had painted a false picture of herself to the public as a reformed and stable individual who was engaged to be married. Lightman J refused to accept these defences and granted Campbell summary judgment on the claims.

The Court of Appeal, however, reversed this decision, finding both defences to be arguable. The state of authority on the effects of repudiation on an obligation of confidentiality was found to be unclear. As a result, although Frisbee was unlikely to succeed on this point, it was held to be unsuitable for resolution on an application for summary judgment. In relation to the public interest defence, the defendant relied on *Woodward v Hutchins*,⁴⁷ in which a number of celebrities had failed in a breach of confidence action against a former agent. In that case, Lord Denning MR held that:

If a group of this kind seek publicity which is to their advantage, it seems to me that they cannot complain if a servant or employee of theirs afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected.

The judgment in *Woodward v Hutchins* has been criticised on the ground that the concept of the 'public interest' upon which it was based allows excessive scope for

⁴⁷ [1977] 1 WLR 760.

judicial subjectivity and prejudice. Indeed, Lightman J questioned its continued applicability, finding that it did not accord with modern developments in practice in relation to breach of confidence claims. Lord Phillips, however, breathed renewed life into the principle of 'truth in publicity' upon which *Woodward v Hutchins* was based:

Some guidance can be derived from the judgments of this court in *Douglas v Hello! Ltd* and *A v B plc and C*. The latter was delivered after argument before Lightman J and written submissions were submitted in respect of it. Lightman J recorded that he had attempted to reflect that decision in his judgment. We do not find that case provides a clear answer to the present dispute. Lightman J may well be right to suggest that *Woodward v Hutchins* should no longer be applied, but on the facts it lends support to Miss Frisbee's proposed defence.

[151] **Conclusion**

The cases discussed above show that we are at an early stage in the development of a right of privacy in this jurisdiction. It is possible to discern certain principles that have already taken root. We have, for example, a working definition of protectable 'private' information. We also know that it is likely to be in the public interest to dispel false publicity. However, numerous questions remain unanswered. What, for example, is the relationship between the 'classic' action for breach of confidence (applying in commercial cases) and the right to privacy/confidentiality described above? When will information fall into the public domain? As sexual liaisons and attendance at Narcotics Anonymous are not necessarily 'private', when will a celebrity's private life be protected? Lord Woolf's guidelines seek to deter complex litigation on the right to privacy. However, such questions will be difficult for courts to resolve and the guidance offered in *A v B plc & C* will be of only limited use.

Finally, however, the cases discussed above leave a rather unpleasant taste in the mouth. They represent an extremely interesting development of legal doctrine. Nevertheless, when a new era of human rights litigation began in the United Kingdom, many of us hoped that it would provide rather more than an opportunity for violent, drug-taking, adulterous celebrities to prevent the gutter press from writing tawdry articles about matters of little true public significance.