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PRIVACY, PRINCESSES, AND PAPARAZZI

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I. INTRODUCTION

This article is a study of two European cases in which two high-profile identities pursued the media to the highest courts of Europe with almost as much dogged determination as the media packs that had followed them for years. The first is a princess by birth: Princess Caroline of Monaco, who brought proceedings against three popular German magazines to restrain them from publishing photos of her in what she called her “daily life.” The second is a princess by choice: Naomi Campbell, a member of the new aristocracy of supermodels whose faces are known and sought around the world, who brought proceedings against a tabloid newspaper that had published a photo of her leaving a Narcotics Anonymous meeting.

Both Princess Caroline and Campbell have succeeded in challenging and extending the legal boundaries of privacy rights of public figures. English law has tended to be piecemeal and incomplete compared to the United States, which has greater protections based both on the law of trespass, and through an umbrella law of privacy encompassing four distinct tort actions.¹ English plaintiffs seeking equivalent protection would previously have had to rely on the torts of trespass, defamation, and passing off,² or on the equitable principles protecting confidential information in limited cir-

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1. See generally BASIL MARKESINIS & SIMON DEAKIN, TORT LAW ch. 7.4 (4th ed. 1999). In Chapter 7, entitled Protection of Reputation and Privacy: An American Perspective, Professor David A. Anderson, after a summary of the United States' position, notes that “. . . despite the existence of four rather elaborate privacy torts, American law rarely provides a remedy for persons who believe their privacy has been invaded by the media or others. Many of the criticisms . . . of England's failure to protect privacy could be made of American law as well.” *Id.*

2. The tort of passing off involves the defendant deceptively claiming that his or her products are made by, connected with, or sponsored by the plaintiffs. See J. G. FLEMING, THE LAW OF TORTS 782 (9th ed. 1998).

cumstances. Furthermore, English law has developed neither a “public figure” defense to defamation nor the equivalent of the United States’ First Amendment guarantee of freedom of speech.³ Like England, Germany has also provided piecemeal protection for privacy under a variety of instruments dating back to the late 19th century. In Germany, the delay in developing constitutional and judicial development of free speech principles until the latter half of the century may be explained by the country’s turbulent history in the 20th century.

This paper will analyze and compare the decision of the European Court of Human Rights in *Von Hannover v. Germany*⁴ with that of the English House of Lords in *Campbell v. MGN Ltd.*⁵ These decisions provide insight into the historical and constitutional background of the legal framework in Germany⁶ and the United Kingdom which is developing into a new European context. Despite national and European boundaries and constitutional differences, the law in relation to privacy is getting closer around the world as courts are increasingly relying on precedents and principles from other legal systems in relation to such fundamental values.⁷

Part II of this article provides a general introduction to the issues raised by the cases and their legal background. Parts III and IV considers the *Von Hannover* and *Campbell* cases, respectively, noting points of interest and significance in each case, and drawing a comparison of the points of convergence in the decisions. The article concludes by looking at the impact these cases will have on the future development of the law of privacy in Europe and elsewhere.

3. See MARKESINIS & DEAKIN, *supra* note 1, at ch. 7.4.

4. App. No. 59320/00 (Eur. Ct. H.R. June 24, 2004), available at <http://echr.coe.int/echr>.

5. [2004] UKHL 22, [2004] 2 A.C. 457 (H.L.) (Eng.).

6. See Basil Markesinis, *Privacy, Freedom of Expression and the Human Rights Bill: Lessons from Germany*, 115 L.Q. REV. 47 (1999); KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW ch. 43 (Tony Weir trans., 3d ed. 1998).

7. However, the New Zealand Court of Appeal recently preferred to develop a free standing tort of invasion of privacy rather than following the English lead of extending the equitable action for breach of confidence to situations where there was no prior relationship of confidence between the parties. *Hosking v. Runting*, [2004] NZCA 34. See Rosemary Tobin, *Yes, Virginia, there is a Santa Clause: the Tort of Invasion of Privacy in New Zealand*, 12 TORTS L.J. 95 (2004).

II. BACKGROUND OF ENGLISH AND GERMAN DEFAMATION

A picture may tell a thousand words, a face may launch a thousand ships, but a picture of a face will sell millions of magazines. As visual images have overtaken the written word as the preferred medium for the generations brought up with extensive access to telecommunications, photography of the rich and famous has become a booming and highly competitive industry with high financial stakes for those who are ahead of the pack. The sale of one photograph can make the career and fortune of a member of the paparazzi. For publishers of newspapers and magazines, and producers of television and web-based news, the publication of such photographs has a critical impact on circulation and advertising revenue. But, as the *Von Hannover* and *Campbell* decisions illustrate, the powerful impact of photographs can create special risks which may require restrictions on publication apart from those imposed by the law of defamation.⁸ The implementation of further restrictions is a result which the media are, understandably but paradoxically, reluctant to accept.

In any case involving the paparazzi, there is always in the background, at least in the case of Princess Caroline, the haunting image of the death of another modern princess as she tried to evade the cameras of the paparazzi. The death of the Princess of Wales in a Paris road-tunnel in 1997 triggered a debate in the Parliamentary Assembly of the Council of Europe in 1997 that led to a Resolution on the right to privacy.⁹ The Resolution called on the governments of Europe to legally enshrine Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the Convention),¹⁰ which all member states, including the United Kingdom and Germany, have ratified. Article 8 of the Convention provides, in relevant part:

1. Everyone has the right to respect for his or her private and family life, his home and his correspondence.

8. *Campbell*, [2004] UKHL 22, [2004] 2 A.C. 457, para. 72 (H.L.) (Eng.) (In dissent, Lord Hoffmann argued that: "In my opinion a photograph is in principle information no different from any other information.")

9. See Resolution 1165 on the Right to Privacy, Eur. Parl. Ass., 29th Sess. (1998).

10. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.¹¹

The Convention, however, also includes Article 10, which guarantees freedom of expression and freedom of the press. How legislators and courts balance these ideals, and whether or not the domestic law of Germany and the United Kingdom gives them sufficient and appropriate weight, is the subject of these cases.

The decision of the European Court of Human Rights in the case of *Von Hannover v. Germany*¹² in June 2004 was the end of a saga of litigation that began on August 13, 1993 when Princess Caroline¹³ first sought an injunction in the German courts to prevent German publishing companies Hubert Burda Media and Heinrich Bauer from republishing photos taken of her alone and in the company of a male companion and her children, in three popular magazines.¹⁴ In the German courts, Princess Caroline relied on sections of German copyright legislation of 1907¹⁵ and on articles in the new German Constitution, also known as the Basic Law, which was introduced after World War II.¹⁶ In three sets of pro-

11. *Id.* at art. 8.

12. App. No. 59320/00 (Eur. Ct. H.R. June 24, 2004), available at <http://echr.coe.int/echr>.

13. The Princess was originally known as "Princess Caroline of Monaco" although she was later known as Caroline von Hannover after her marriage to Prince Ernst August von Hannover.

14. *Von Hannover*, App. No. 59320/00 (Eur. Ct. H.R. June 24, 2004), available at <http://echr.coe.int/echr>.

15. *Kunsturhebergesetz* [Law Regulating Copyright to Works of Portraiture and Photography], Jan. 9, 1907, RGBl. at 7 (F.R.G.) [hereinafter Copyright (Arts Domain) Act].

16. GRUNDGESETZ [GG] [Constitution] art. 1[1] & 2[1] (F.R.G.). As Zweigert and Kötz note, the issue of whether a court judgment has properly balanced the interests of protection of personality rights and freedom of expression is now dominated by constitutional considerations and by decisions of the Federal Constitutional Court. KONRAD ZWIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 690-91, (Tony Weir trans., Oxford Univ. Press 1998) (1977). The interplay between the "private law" principles in the BGB and the public law articles in the German Constitution, particularly with respect to privacy law and as a predictor of the impact of the then proposed Human

ceedings, Princess Caroline had only mixed success in the German courts and failed to stop the republication of most of the photographs.¹⁷ She then appealed the case to the European Court, which held that the German decisions violated Article 8 of the Convention but stopped short of granting the monetary remedy sought by Princess Caroline.¹⁸ The court invited the parties to make further submissions within six months with a clear hint that by then the parties might have reached a settlement.¹⁹

Naomi Campbell's action concerned an article and photograph published in the *Daily Mirror* tabloid newspaper showing her and others leaving a Narcotics Anonymous meeting.²⁰ In the article, the newspaper rebutted her previous public denial that she was addicted to drugs and praised her for seeking treatment with Narcotics Anonymous.²¹ Campbell sought damages based on breach of confidence.²² Her action concluded successfully in the House of Lords, in which the court restored the trial judge's "modest" award.²³ Because Campbell presented her case only on the basis of a breach of the common law equitable duty of confidence, the House of Lords was not required to consider broader issues which arise from other forms of invasion of privacy. The House of Lords, however, acknowledged that while the United Kingdom still does not have an "over-arching, all-embracing" cause of action for "invasion of privacy,"²⁴ in contrast to the United States,²⁵ the European

Rights legislation in the United Kingdom. See Basil Markesinis, *Privacy, Freedom of Expression and the Human Rights Bill: lessons from Germany*, 115 L.Q. REV. 47 (1999).

17. *Von Hannover*, App. No. 59320/00 (Eur. Ct. H.R. June 24, 2004), <http://echr.coe.int/echr>.

18. *Id.*

19. *Id.*

20. Polly Graham, *Naomi: I am a Drug Addict*, THE DAILY MIRROR, Feb. 1, 2001, available at 2001 WLNR 9439074.

21. *Id.*

22. *Campbell*, [2004] UKHL 22, [2004] 2 A.C. 457, para. 10 (H.L.) (Eng.). Campbell also sought damages for breach of the Data Protection Act of 1998, but it was accepted that this legislation provided parallel protection with the equitable action and the case proceeded on the basis of the equitable action. *Id.*

23. *Id.* at para. 10.

24. *Wainwright v. Home Office*, [2003] UKHL 53, [2004] 2 A.C. 406, para. 35 (H.L.) (Q.B.).

25. For a succinct comparative view of the relevant law of the United States in relation to invasion of privacy, see David A. Anderson, *Protection of Reputation and Privacy: an American Perspective*, in MARKESINIS & DEAKIN, TORT LAW (5th ed. 2003).

Convention for the Protection of Human Rights and the Human Rights Act 1998 has had a significant influence on the development of the English common law and may signal a move toward a cause of action for the invasion of privacy.²⁶ This must now be tested explicitly to ensure that it is in harmony with the values encapsulated in Articles 8 and 10 of the Convention.²⁷

The principles developed by the courts of equity to enforce duties of confidence had long been used in English law as a means of protecting persons from the public disclosure of private facts, as well as commercial confidences such as trade secrets. One requirement for the cause of action was that the information had been communicated to the recipient in circumstances which gave rise to a duty of confidence, and, therefore, much depended on the particular relationship of the confidor and the recipient.²⁸ In *Attorney-General v. Guardian Newspapers Ltd. (No 2)* in 1990, Lord Goff of the House of Lords stated that a duty of confidence could arise independently of a transaction or relationship between the parties.²⁹ A number of cases since then, at first instance and at the lower appellate level, have relied on this statement as the basis for extending the protection provided by the equitable principles to protect private information in the absence of any pre-existing relationship between the parties.³⁰ However, it was *Campbell* which provided the

26. Lord Hoffman points out that although the equivalent of Article 8 has been enacted as part of English law by virtue of section 6 of the Human Rights Act 1998, it is a guarantee of privacy only against public authorities, not explicitly others such as publishers. *Campbell*, [2004] UKHL 22, [2004] 2 A.C. 457, para. 49 (H.L.) (Eng.) (Lord Hoffman).

27. See *Campbell*, [2004] UKHL 22, [2004] 2 A.C. 457, paras. 16–19.

28. The three requirements for the action at that time were analyzed in *Coco v. AN Clark (Engineers) Ltd.*, [1969] RPC 41. The other two requirements were that the information had to be of a confidential nature and that there had to be an unauthorized use of the information to the detriment of the confidor. It has since been accepted that proof of detriment is not essential. See RP MEAGHER, JD HEYDON & M LEEMING, *MEAGHER GUMMOW AND LEHANE'S EQUITY: PRINCIPLES AND REMEDIES* ¶¶ 41–45 (2002).

29. See [1990] 1 A.C. 109 at 281.

30. See *Hellewell v. Chief Constable*, [1995] 1 WLR 804; *Venables v. New Group Newspapers Ltd.*, [2001] Fam. 430. These cases and the development of the law up to and including *Campbell* are discussed by the English Court of Appeal in the most recent judgment in the action brought by actors Michael Douglas and Catherine Zeta-Jones and the publishers of *OK!* magazine against the publishers of *Hello!* magazine for publishing unauthorized photographs of the couple's wedding. *Douglas and Ors v. Hello Ltd. and Ors*, [2005] EWCA (Civ) 595 (2005).

House of Lords with a further opportunity to address this development.

III. VON HANNOVER V. GERMANY

From 1993 until 1997, Princess Caroline launched three sets of proceedings in the Hamburg Regional Court to prevent the republication of three series of photographs which had been published in various magazines published by two German media companies.³¹ The photographs depicted Princess Caroline in various public places alone, with a male companion, with her children, and with her husband, engaged in ordinary activities such as dining in a restaurant, shopping, on holiday, and playing sport.³² All were accompanied by what were described as “anodyne” headlines or descriptions such as “Caroline and the blues,”³³ “The tenderest romance,”³⁴ and “A woman returns to life.”³⁵

Princess Caroline based her action on both the breach of § 22 of the Copyright (Arts Domain) Act,³⁶ and on a breach of her right to protection of her personality rights under § 1(1) and § 2(1) of the *Grundgesetz* (Basic Law) of Germany.³⁷ Section 1(1) of the Basic

31. For a complete description of the photographs and the magazines in which they were published, see *Von Hannover*, App. No. 59320/00, at paras. 11–16 (Eur. Ct. H.R. June 24, 2004), available at <http://echr.coe.int/echr>.

32. *Id.* at paras. 11–16. The first series, the subject of first proceedings comprised 5 photos of Princess Caroline with actor Vincent Lindon at the far end of a restaurant garden in Provence, 1 photo of Princess Caroline on horseback and 1 of her on a bicycle, 3 photos of Princess Caroline with her two children and one of her son, 2 photos of her shopping, 1 photo of her with Vincent Lindon in a restaurant. The second series, the subject of second proceedings comprised 10 of Princess Caroline on a skiing holiday, 7 of Princess Caroline and her husband at a horse show in Provence, 4 of Princess Caroline leaving her house in Paris, 7 of her with her husband playing tennis or with bicycles. The third series, the subject of the third set of proceedings comprised a sequence of photos shot long range of Princess Caroline in swimsuit and towel tripping over something and falling at the Monte Carlo Beach Club.

33. BUNTE MAG., Aug. 5, 1993, at edition No. 32.

34. FREIZEIT REVUE MAG., July 22, 1993, at edition No. 30.

35. BUNTE MAG., Aug. 5, 1993, at edition No. 32.

36. See Copyright (Arts Domain) Act, *supra* note 15, §§ 22–23. Section 22(1) provides that images can only be disseminated with the express approval of the person concerned. Section 23(1) provides four exceptions, the first of which is for images which portray an aspect of contemporary society. This exception only applies if the publication does not interfere with a legitimate interest of the person concerned. Copyright (Arts Domain) Act, *supra* note 15, §§ 22–23 (translation provided by author).

37. GRUNDGESETZ [GG] [Constitution] art. 1[1] & 2[1] (F.R.G.).

Law states, in relevant part, that “[t]he dignity of human beings is inviolable. All public authorities have a duty to respect and protect it.”³⁸ Section 2(1) continues that “[e]veryone shall have the right to the free development of their personality provided that they do not interfere with the rights of others or violate the constitutional order or moral code.”³⁹

In the first set of proceedings, Princess Caroline appealed to the Hamburg Court of Appeal, the Federal Court of Justice, and lastly, the Federal Constitutional Court.⁴⁰ In the second and third sets of proceedings, she appealed from the Hamburg Court of Appeal directly to the Federal Constitutional Court.⁴¹ In both cases, the Federal Constitutional Court refused to entertain the appeals, referring to the Federal Court of Justice judgment of December 19, 1995, and its own judgment of December 15, 1999, in the first set of proceedings.⁴² These two judgments, summarized below, are the most significant in terms of laying down the relevant principles as applied under German law. At the conclusion of the three sets of proceedings, Princess Caroline had succeeded in preventing the republication of only nine of approximately forty-seven photographs. She then took her case to the European Court of Human Rights, arguing that the criteria set down by the German courts for determining the boundaries of her private sphere were so narrow that they failed to provide adequate protection of her privacy as required by Article 8.⁴³

A. *The Regional Proceedings*

In the first set of proceedings, the Hamburg Regional Court granted Princess Caroline’s application for an injunction in relation to the republication of photographs in France under French law (Article 9 of the French Civil Code), but held that with respect to the republication of the photos in Germany, German law pro-

38. *Id.* at art. 1[1].

39. *Id.* at art. 2[1].

40. *See Von Hannover*, App. No. 59320/00, at para. 18 (Eur. Ct. H.R. June 24, 2004), <http://echr.coe.int/echr>.

41. *Id.* at paras. 27, 33.

42. *Id.* at para. 18.

43. *Id.*

vided her with no protection.⁴⁴ The court held that she was “a figure of contemporary society ‘par excellence’” and, thus, under § 23(1) of the Copyright (Arts Domain) Act, the press was free to publish photos of her without obtaining her permission, as they would otherwise have to do under § 22.⁴⁵ As such a figure, Princess Caroline’s “right to protection of her private life stopped at her front door.”⁴⁶ Therefore, no protection was afforded to her in respect to photos taken of her in public places. The Hamburg Court of Appeal dismissed her appeal, noting that “even if the constant hounding by the press made her daily life difficult, it arose from a legitimate desire of the press to inform the public.”⁴⁷

B. The Federal Court of Justice

Princess Caroline had limited success on appeal to the Federal Court of Justice. The Court allowed her appeal and granted an injunction, but only with respect to the republication of photos of her with actor Vincent Lindon in the far end of a courtyard garden in a private restaurant. The Federal Court of Justice, in its judgment of December 19, 1995, extended the protection for “figures of contemporary society ‘par excellence’” to occasions outside their homes only when the following three criteria were met: (1) when “they had retired to a secluded place away from the public eye . . . where it was objectively clear that they wanted to be alone”; (2) where, confident of being in private, they behaved in a manner in which they would not behave in a public place; and (3) where the photographs had been “taken secretly and/or by catching them unawares.”⁴⁸

In this first series of proceedings, the court determined that only the photos at the restaurant satisfied these criteria. As for the rest, the court found that Princess Caroline had to tolerate the photos of “scenes from her daily life” because “the public had a legitimate interest in knowing where she was staying and how she behaved in public.”⁴⁹

44. *Id.* at para. 23.

45. *Id.*

46. *Id.* at para. 19.

47. *Id.* at para. 21.

48. *Id.* at para. 23.

49. *Id.*

C. *The Federal Constitutional Court*

Princess Caroline's appeal to the Federal Constitutional Court, relying on her right to protection of her personality rights under the Basic Law, resulted in a further extension of the boundaries of her private sphere. Princess Caroline argued that the photos were not intended to inform the public, but to entertain and, therefore, the freedom of the press, a right also guaranteed by the Basic Law, did not prevail over her right to protection.⁵⁰ In what the European Court described as "a landmark judgment," the Federal Constitutional Court held on December 15, 1999, that the decisions of the Hamburg Court and Court of Appeal violated the Basic Law and that the criteria laid down by the Federal Court of Justice was too narrow.⁵¹ The constitutional rules set out by the Federal Constitutional Court required that the Federal Court of Justice re-examine the publication of the photos of Princess Caroline with her children. These photos might infringe on her right to protection of personality, reinforced by her right to family protection under section 6 of the Basic Law.⁵²

In summary, the points made by the Federal Constitutional Court by the European Court were as follows. With regard to the history of the relevant law, the court stated that provisions in the Copyright (Arts Domain) Act are part of the constitutional framework which underlies the Basic Law.⁵³ They derive from an incident involving photos of Bismarck on his deathbed in 1889, taken by photographers stealing by night into his room, and from the scandal and politico-legal debate that followed.⁵⁴ Further, "they aim to strike a fair balance between respect for personality rights and the community's interest in being informed."⁵⁵

50. *Id.* at para. 25.

51. *Id.*

52. *Id.*

53. *Id.*

54. See ZWEIGERT & KÖTZ, *supra* note 6, at 688, for a discussion of the Bismarck incident and the case that followed. The Reichsgericht upheld a claim by Bismarck's heirs to insist on destruction of the photographs as the defendants had obtained the pictures by trespassing on the property of others. The rules of the *condictio obiniustam causam* applied (RGZ 45,170). *Id.*

55. *Von Hannover*, App. No. 59320/00, at para. 25 (Eur. Ct. H.R. June 24, 2004), <http://echr.coe.int/echr> (internal citation omitted).

The court stated that while it is true that there is a limited exemption under § 23(1) of the Copyright (Arts Domain) Act from seeking permission for publication of photos “relating to contemporary society,” that exemption does not apply where the publication interferes with a legitimate interest of the person who is the subject of the photos.⁵⁶ These rules reflect the need to balance the rights of that person and the freedom of the press under § 5(1) of the Basic Law.⁵⁷ The legitimate interests of the person include the right to protection of personality rights, which includes a right to privacy within a private sphere outside the home.⁵⁸

In reference to entertainment, the court noted that “[t]he fact that the press fulfills the function of forming public opinion does not exclude entertainment from the functional guarantee under the Basic Law. The formation of opinion and entertainment are not opposites. Entertainment . . . [may] even stimulate or influence opinion more than our factual information.”⁵⁹ These days there is a mixed format and many readers obtain their information from entertaining coverage. Entertainment is not just about “amusement, relaxation, escapism or diversion.”⁶⁰ It can convey reality and propose subjects for debate, leading to discussion of philosophies of life. “[E]ntertainment in the press is neither negligible nor entirely worthless and therefore falls within the scope of application of fundamental rights.”⁶¹

The court also noted that journalists attract the attention of readers by personalizing the stories.⁶² Using personalized accounts of stories arouses a reader’s interest and increases their desire for information.⁶³ Because celebrities embody certain moral values and lifestyles, personalized stories about their lives are of particular interest.⁶⁴ Emulation of celebrity lifestyle is very pervasive in many

56. *Id.* at para. 25 (internal citation omitted).

57. *Id.*

58. *Id.*

59. *Id.* (internal citation omitted).

60. *Id.* (internal citation omitted).

61. *Id.* (internal citation omitted).

62. *Id.*

63. *Id.*

64. *Id.*

cultures: “[Celebrities] become points of crystallisation for adoption or rejection and act as examples or counter-examples.”⁶⁵

The court went on to note that public interest in politicians is accepted as legitimate in the interests of transparency and democratic control. It extends to other public figures in situations beyond specific functions and events, but not as to private matters, disseminated only to satisfy curiosity. When defining who and what comes within “the domain of contemporary society” in § 22(1) of the Copyright (Arts Domain) Act⁶⁶ for the purposes of the exemption, the words should be taken not only to cover events of historical and political interest but also the public interest in being informed.⁶⁷ “The kernel of press freedom and free formation of opinions requires the press to have sufficient margin of maneuver to allow it to decide . . . what amounts to a matter of public interest.”⁶⁸ Further, when interpreting the Act, account should be taken of the increased importance of illustrations. The exemption from the need for prior consent is not limited to pictures of official functions. “The public has a legitimate interest in being allowed to judge whether [their] personal behaviour . . . convincingly tallies with their behaviour on their official engagements.”⁶⁹

Although the German Federal Constitutional Court described the criteria established by the Federal Court of Justice as “in theory . . . irreproachable from the point of view of constitutional law,”⁷⁰ it had doubts as to the necessity or usefulness for the second and third criteria set down as to the private sphere outside the home. That the subject behaves in a manner in which he would not normally behave in public may be persuasive as to the private sphere but is not *necessary*. And the fact that a photo was taken secretly could not be enough on its own to render it an infringement of privacy. Thus, it appears that the Federal Constitutional Court es-

65. *Id.* (internal citation omitted).

66. *See* Copyright (Arts Domain) Act, *supra*, note 15, § 22(1).

67. *Von Hannover*, App. No. 59320/00, at para. 25 (Eur. Ct. H.R. June 24, 2004), <http://echr.coe.int/echr>.

68. *Id.* at para. 25 (internal citation omitted).

69. *Id.* (internal citation omitted).

70. *Id.* (internal citation omitted).

sentially upheld the first criterion as the critical one in public places: that of an objectively secluded place.⁷¹

Applying these principles, there could be no complaint of the rejection of Princess Caroline's claim in respect of the photos of her shopping or dining with a companion openly in a popular restaurant (in contrast to the obvious seclusion in the restaurant in Provence) or on horseback or a bicycle.⁷² Her mere desire to be alone while in a public place "is not relevant in any way."⁷³ The photos of Princess Caroline with her children did, however, need to be reviewed in the light of the additional protection of section 6 of the Basic Law regarding a person's intimate relations with their children.⁷⁴

Following this decision, the publisher undertook not to republish the photos of Princess Caroline with her children.⁷⁵ However, Princess Caroline failed in the two sets of subsequent proceedings to prevent the republication of the second and third series of photographs.⁷⁶ As to the third set of photographs, all three tiers of the German courts held that the Monte Carlo Beach Club was not a secluded place, even if entry was controlled.⁷⁷

D. The Appeal to the European Court of Human Rights

In the European Court of Human Rights, Princess Caroline claimed that the German law, as set out by the Federal Court of Justice and Federal Constitutional Court, infringed on her right to respect for her private and family life guaranteed by Article 8 of the European Convention.⁷⁸

Specifically, Princess Caroline argued that the definition of a "secluded place" was too narrowly defined to provide adequate protection, that the burden was unfairly placed on her to establish every time that she was in a "secluded place," often months after the relevant date, that she was a constant target of the paparazzi,

71. *Id.*

72. *Id.* (internal citations omitted).

73. *Id.*

74. *Id.* (internal citations omitted).

75. *Id.* at para. 26.

76. *Id.* at paras. 27-32, 33-38.

77. *Id.* at para. 38.

78. *Id.* at para. 45.

that the weaker German protection undermined the safeguards provided to her by French law, which protected her whenever she was not at an official event, and that interest in her was purely for entertainment and profit.⁷⁹

The German government, in defense of the courts and its legislation, argued that they had properly balanced the two competing interests of the subject and the press.⁸⁰ The government contended that the public has a legitimate interest in knowing how a figure of contemporary society 'par excellence' behaves in public.⁸¹ The secluded place concept was not the only factor taken into account in regard to photos taken in public places as the nature of the photographs was also considered.⁸²

The two magazine publishers and an industry association also intervened to support the German law. Interestingly, they described it as "halfway between French law and United Kingdom law,"⁸³ stressing the wide definition of "public figure," the blurring of the line between political commentary and entertainment, that Princess Caroline was the official "First Lady" of the Grimaldi family (which had always sought media attention), and that the publications did not harm her reputation.⁸⁴

In its decision, the court's majority applied the German domestic law, the 1998 Resolution of the Parliamentary Assembly of the Council of Europe,⁸⁵ and Articles 8 and 10 of the European Convention of Human Rights.⁸⁶ Two other judges agreed, at least in part, with the conclusions and orders, but delivered separate judgments.

The Assembly's Resolution defined "public figures" as "persons holding public office and/or using public resources and more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any

79. *Id.* at para. 44.

80. *Id.* at para. 45.

81. *Id.*

82. *Id.*

83. *Id.* at para. 46.

84. *Id.* at para. 47.

85. Parliamentary Assembly of the Council of Europe, Resolution 1165, Right to Privacy (1998), <http://assembly.coe.int/>.

86. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, 10, Nov. 4, 1950, 213 U.N.T.S. 221.

other domain.”⁸⁷ The Assembly went on to state that public figures “must recognize that the special position they occupy in society, in many cases by choice, automatically entails increased pressure on their privacy.”⁸⁸ However, it went on to emphasize that “the importance of every person’s right to privacy and of the right to freedom of expression as fundamental to a democratic society. These rights are neither absolute not in any hierarchical order, since they are of equal value.”⁸⁹

The Resolution concluded with guidelines to member states as to the protection which domestic law should provide in order to guarantee protection of rights to privacy and comply with Article 8.⁹⁰ The guidelines stated that the law should establish the right of an individual to bring a civil action for damages; personal liability for editors and journalists for invasion of privacy; a mandate for the publication of corrections; economic penalties for publishers who “systematically invade people’s privacy”; prohibitions on following or chasing people in certain circumstances, and procedures for seeking interim orders to prevent publication.⁹¹

Previous decisions of the court concerning Article 8 established that the concept of private life extends to matters of identity such as name and picture, physical and psychological integrity, and the development of personality by relations with others, even in public. The court stated that persons have a legitimate expectation of protection and respect for their private life.⁹² It further held that, without a doubt, the various photos of Princess Caroline fell within the scope of her private life so as to make Article 8 applicable.⁹³

The court then considered the positive obligations which Article 8 effectively requires a member state to undertake to secure respect for private life “even in the sphere of the relations of

87. Parliamentary Assembly of the Council of Europe, Resolution 1165, Right to Privacy (1998), para 7, <http://assembly.coe.int/>.

88. *Id.* at para. 6.

89. *Id.* at para. 11.

90. *Id.*

91. *Id.* at para. 14.

92. *Von Hannover*, App. No. 59300/00, para. 51 (Eur. Ct. H.R. June 24, 2004), available at <http://echr.coe.int/echr>.

93. *Id.* at para 53.

individuals between themselves.”⁹⁴ Regard to the fair balance between competing interests of the individual and the community is required, and the court stated that “the State enjoys a certain margin of appreciation.”⁹⁵ Freedom of expression guaranteed by Article 10 applies even to information and ideas that may “offend, shock, or disturb.”⁹⁶ The court found that “such are the demands of the pluralism, tolerance and broadmindedness of a democratic society”⁹⁷ and that the press has a duty to impart information and ideas on all matters of public interest. Further, it stated that “journalistic freedom covers possible recourse to a degree of exaggeration or even provocation.”⁹⁸

But in relation to photographs, the right of freedom of expression must not infringe on the protection of the rights and reputations of others: “Photos appearing in the tabloid press are often taken in a climate of continual harassment that induces the persons concerned a very strong sense of intrusion into their private life or even of persecution.”⁹⁹ In three recent cases,¹⁰⁰ the court balanced the demands of Article 8 and 10 in respect to photographs and articles in the press, and in doing so, the court drew a distinction between matters of public concern and the disclosure of individuals’ private lives.¹⁰¹ Most recently, in May 2004, the court held that the more time passed, the more the public interest in President Mitterand’s 14 years as President prevailed over the protection of his medical details to be revealed in a book by his former private doctor, and that an order to restrain the revelation was in breach of Article 10.¹⁰²

In relation to the facts of the present case, the court made a number of points. First, it noted that the case not concern the dissemination of ideas, but images containing very personal or even intimate information about an individual.¹⁰³ The photos showed

94. *Id.* at para. 57.

95. *Id.*

96. *Id.* at para. 58.

97. *Id.*

98. *Id.*

99. *Id.* at para. 59.

100. *Id.*

101. *Id.* at para. 60.

102. *Id.*

103. *Id.* at para. 61.

Princess Caroline in scenes from her “daily life,” engaged in purely private activities such as sport, walking, sitting in a restaurant, and while on holiday.¹⁰⁴ Princess Caroline does not exercise any function for the State of Monaco, although she does represent the ruling family of Monaco at cultural and charitable events.¹⁰⁵ She was thus to be distinguished from politicians for whom the public’s democratic right to be informed might in special circumstances extend to aspects of their private life, stating, “the situation does not come within the sphere of any political or public debate.”¹⁰⁶ The court disagreed with the German courts’ categorization of Princess Caroline as a “figure of contemporary society ‘par excellence’” within the meaning of the Copyright (Arts Domain) Act, describing her rather as a “private individual.”¹⁰⁷ The court determined that, in any event, the Act must be interpreted narrowly to ensure that the state complies with its positive obligations to protect privacy.¹⁰⁸

The court’s conclusion was that the sole purpose of the publications was to satisfy the curiosity of a particular readership regarding details of Princess Caroline’s private life and could not be deemed to contribute to any debate of public interest to society. The court stated that “freedom of expression calls for a narrower interpretation It does not mean that readers are entitled to know everything about public figures.”¹⁰⁹ It went on to state that the fact that the photos were taken without Princess Caroline’s knowledge and consent, and that many public figures must endure harassment in their everyday lives, should not be overlooked.¹¹⁰ Further, increased vigilance in protecting individuals’ private lives, even beyond the private family circle and into the social dimension, is necessary to contend with new communication technologies for taking, storing, transmitting, and disseminating photos.¹¹¹ The Convention is intended to guarantee “practical and effective” rights and not just “theoretical or illusory” liberties.¹¹² The court deter-

104. *Id.*

105. *Id.* at para. 62.

106. *Id.* at para. 64.

107. *Id.* at para. 65.

108. *Id.* at para. 72.

109. *Id.* at paras. 66, 67.

110. *Id.* at para. 68.

111. *Id.* at para. 70.

112. *Id.* at para. 71.

mined that individuals must be given precise indications by the law as to when and where they are or are not in a protected sphere.¹¹³

The European Court of Human Rights considered the spatial and functional criteria set down by the German courts too vague and difficult to determine in advance and to protect an individual's private life effectively: unless an individual can prove that she is in a secluded place, as a "figure of contemporary society 'par excellence,'" she is forced to "accept that she might be photographed at almost any time, systemically, and that the photos are then very widely disseminated even if they relate exclusively to details of her private life."¹¹⁴ The court further stated that

*[T]he 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. It is clear in the instant case that they make no such contribution since [Princess Caroline] exercises no official function and the photos and articles relate exclusively to details of her private life.*¹¹⁵

The court determined that there was no legitimate public interest in knowing those details that could override Princess Caroline's right to effective protection of her private life.¹¹⁶ Rather, she had a "legitimate expectation" that it would be protected.¹¹⁷ The court found that the German courts did not strike a fair balance between the competing interests and that there had been a breach of Article 8. The issue of damages was reserved for the parties to make submissions.¹¹⁸

113. *Id.* at para. 73.

114. *Id.* at para. 74.

115. *Id.* at para. 76 (emphasis added).

116. *Id.* at para. 77.

117. *Id.* at para. 72.

118. Judge Cabral Barreto, President of the Court, viewed Princess Caroline as a public figure and would have limited her legitimate expectation of privacy to the photo of her riding and playing tennis. Judge Zupancic also based his decision on reasonable expectations of privacy rather than on whether the material contributed to a matter of public debate. He appeared to have little sympathy for those on the public stage, including royalty, stating, "The absolute *incognito* existence is the privilege of Robinson" *Id.* at 32.

E. Comment on Von Hannover

The ruling of the European Court of Justice is a significant victory for persons such as Princess Caroline. The decision may prove to herald greater curbs on the freedom of the popular press in Germany and other European countries to publish photographs of both public and “semi-public” figures going about their “daily lives.” This case tests the definition of “public figures” in that Princess Caroline’s position appears to be borderline because she was born into the role and did not choose it. She does not appear to rely on or benefit financially from publicity as a career. Like many members of families with inherited titles, she plays no governmental role but merely represents the family on public and charitable occasions. This is not necessarily the case with all members of a royal family. Two factors which do not appear to have been explored are whether Princess Caroline’s financial status is entirely independent of any public funds, and secondly, whether a person should be able to retain a title, which is in itself publicly endowed, albeit a remnant of a past age, as an acknowledgement or declaration of some special status in the social hierarchy while at the same time professing to be a private person.

Further, even in the case of public figures, the court’s decision indicates a greater respect for the notion that some aspects of their lives should remain private and free of intrusion even when they are in public. The applicable tests — whether the information came within their “legitimate expectation” of privacy so as to invoke a need to be balanced with the right to freedom of expression, and if so, whether it contributes to a debate of general interest — is a fairly high bar for the media to overcome. A “debate” implies the existence of a serious ongoing issue of public importance.

Thirdly, it is clear that politicians may have the least expectation of privacy as there appears to be a growing body of opinion that some of their conduct in their private lives is indicative of their suitability for office.¹¹⁹ But even then, there will be limits.

Finally, it is worth noting that the presence of Princess Caroline’s children was not the subject of the appeal, as the Federal

119. See JOSHUA ROZENBERG, *PRIVACY AND THE PRESS* (2004) (questioning, “Surely we are entitled to know a little more about those who hold positions of authority in society — if only to decide whether they are fit to remain in office?”).

Constitutional Court had already indicated its reservations as to the publication of such photographs. Accordingly, the media companies agreed not to republish photographs of Princess Caroline with her children, no doubt wishing to avoid a court decision preventing them from publishing such photos. It remains to be seen whether the media will now apply the same caution to photographs of children of other public figures in public places, particularly when the parents have asked for photographs not to be taken or published.¹²⁰

IV. *CAMPBELL v. MGN LTD.*

Naomi Campbell commenced proceedings against the publisher of *The Daily Mirror* newspaper in February 2001 on the day it featured an article about her drug addiction along with photographs of her leaving a Narcotics Anonymous (NA) meeting.¹²¹ The article was headed “Naomi: I am a drug addict” and was accompanied by several photographs, including one of her dressed in baseball cap and jeans with the captions “Therapy: Naomi outside meeting”¹²² and “HUGS: Naomi, dressed in jeans and baseball hat, arrives for a lunchtime group meeting this week.”¹²³ The article described her attendance at counseling and group therapy sessions and stated, “This is one of the world’s most beautiful women facing up to her drink and drugs addiction — and clearly winning.”¹²⁴ It also recounted an incident in which Miss Campbell was hospitalized and had her stomach pumped, stating that although she had claimed it was for an allergic reaction, “those closest to her knew

120. See *Hosking v. Runtig*, [2005] 1 N.Z.L.R. 1 (C.A.), in which the New Zealand Court of Appeal concluded that a celebrity couple did not have a cause of action in privacy for the publication of photographs of their children taken on a public street. But see *McGregor v. Fraser*, [2003] EWHC 2972 (QB), in which the High Court of England and Wales determined that there was a cause of action, in breach of confidence but that could fairly be considered breach of privacy, for the publication of photographs of children taken on a private beach.

121. *Campbell*, [2002] EWHC (QB) 499.

122. Polly Graham, *Naomi: I am a Drug Addict*, THE DAILY MIRROR, Feb. 1, 2001, available at 2001 WLNR 9439074.

123. Polly Graham, *Naomi's Finally Trying to Beat the Demons That Have Been Haunting Her*, THE DAILY MIRROR, Feb. 1, 2001, available at 2001 WLNR 9378163.

124. *Id.*

the truth.”¹²⁵ It was common knowledge that the defendant newspaper had received its information about Naomi Campbell’s attendance at NA from either one of her entourage or from another person attending the meetings.

Days after she commenced proceedings, *The Daily Mirror* published two further articles disparaging her for bringing proceedings, republishing one photograph with text such as “Naomi Campbell whinges about privacy”¹²⁶ and an editorial headed “No hiding, Naomi.”¹²⁷ Campbell claimed damages for her distress, embarrassment, anxiety, and aggravated damages due to the defendant’s later publications and conduct at trial.¹²⁸

A. *The Earlier Proceedings*

At trial, Miss Campbell acknowledged that because she had previously publicly denied her drug addiction, the press was entitled to publish that she was indeed addicted and was seeking treatment.¹²⁹ She claimed, however, that the fact that she was receiving treatment at NA, the details of the treatment, and her appearance leaving an NA meeting were private and confidential matters (described as “the associated facts”).¹³⁰ The trial judge gave judgment for £2500 in compensatory damages¹³¹ and £1000 in aggravated damages.¹³² The Court of Appeal granted an appeal by the defendant, holding that attendance at NA meetings was distinguishable from usual medical treatment as it was publicly known that drug addicts could benefit from NA meetings, and that the relevant test was whether the disclosure would have offended a reasonable reader of ordinary sensibilities.¹³³

125. *Id.*

126. Alun Palmer, *Pathetic*, THE DAILY MIRROR, Feb. 5, 2001, available at 2001 WLNR 9397950.

127. Editorial, *Voice of the Mirror: No Hiding, Naomi*, THE DAILY MIRROR, Feb. 5, 2001, available at 2001 WLNR 9394914.

128. *Campbell*, [2002] EWHC (QB) 499, para. 2.

129. *Campbell*, [2002] EWHC (QB) 499, para. 4; *Campbell*, [2002] EWCA (Civ) 1373, [2003] 1 All E.R. 224, paras. 9, 36 (Eng.); *Campbell*, [2004] UKHL 22, [2004] 2 A.C. 457, para. 24 (H.L.) (Eng.).

130. *Campbell*, [2002] EWHC (QB) 499, para. 4; *Campbell*, [2004] UKHL 22, [2004] 2 A.C. 457, para. 42 (H.L.) (Eng.)

131. *Campbell*, [2002] EWHC (QB) 499, para. 136.

132. *Id.* at para. 164.

133. *Campbell*, [2002] EWCA (Civ) 1373, [2003] 1 All E.R. 224, para. 48 (Eng.).

B. *The House of Lords*

The House of Lords, by a majority of three to two, allowed Miss Campbell's appeal and restored the trial judge's order.¹³⁴ The court held that publication of the associated facts and the photographs of her leaving and attending the NA meetings were an unjustifiable infringement of Miss Campbell's right to privacy.¹³⁵ Lord Hoffman noted that, despite the dissent by himself and Lord Nicholls as to whether the newspaper went too far in publishing the associated facts, the House was unanimous on the general principles as to the way in which the law should strike a balance between the right to privacy and the right to freedom of expression.¹³⁶

The House held that the duty of confidence would arise whenever the person who came under the duty was in a situation in which he knew or ought to have known that the other person could reasonably expect his or her privacy to be protected.¹³⁷ Further, the reasonable expectation of the subject was to be assessed by asking whether the publication of the information would be highly offensive to a reasonable person of ordinary sensibilities *if they were in the same position as the subject*.¹³⁸ The court determined that Miss Campbell's attendance at NA was private information which imported a duty of confidence and that her therapy was put at risk by disclosure.¹³⁹ The assurance of privacy was an essential part of the exercise of attending the meetings and the attendees owed a duty of confidence to each other.¹⁴⁰ The right to privacy and respect for private life had to be balanced against the right of the media to

134. *Campbell*, [2004] UKHL 22, [2004] 2 A.C. 457 (H.L.) (Eng.).

135. *Id.*

136. *Id.* at para. 36.

137. *Id.* at para. 85.

138. *Id.* at paras. 99, 100. Lord Nicholls noted that the test is similar to that set out in the Restatement (Second) of Torts §652D (1977), and the Australian case of *Australian Broadcasting Corp. v. Lenah Game Meats Pty. Ltd.*, (2001) 185 A.L.R. 1, para. 42: whether the conduct is "highly offensive to a reasonable person." *Id.* at para. 22. Lord Nicholls cautioned against using the "highly offensive test" at the initial stage of deciding whether the information was private. In his view, the offensiveness of the publication was relevant at the later stage of balancing freedom of expression, stating, "Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy." *Id.* at para. 21.

139. *Id.* at para. 95.

140. *Id.*

impart information to the public.¹⁴¹ The court found that neither Article 8 nor Article 10 had pre-eminence over the other¹⁴² and that the values enshrined in Articles 8 and 10 are now (and perhaps have always been) part of the common law cause of action for breach of confidence.¹⁴³ Any limitation on one right at the expense of another had to be rational, fair, and proportionate to the need.¹⁴⁴

It seems to be at this point that the majority and minority opinions diverged. The majority continued by stating that relevant to the balancing exercise was the fact that, in contrast to the undisputed right of the public to know that she had previously deceived them, there were no political or democratic matters at risk and no vital social need for the public to know about her treatment.¹⁴⁵ The court determined that the photographs added greatly to the intrusion which the article as a whole had made into her private life and that the publication had the potential to cause her harm, a fact that carried a great deal of weight.¹⁴⁶ The taking of photographs in public had to be considered one of the events of living in a free community, but the publication was subject to what was offensive — that they were taken deliberately, surreptitiously, and with the intent of being published, was highly relevant to the offensiveness of the publication.¹⁴⁷ The court noted that Miss Campbell could not have complained if she had happened to be in photographs which had been taken by a passerby simply to show a street scene.¹⁴⁸

141. *Id.* at para. 105.

142. *Id.* at para. 4. *See also* Douglas v. Hello! Ltd., [2001] Q.B. 967, [2001] 2 All E.R. 289; Douglas v. Hello! Ltd., [2003] EWHC (Ch) 332, [2003] 3 All E.R. 996, 1043.

143. *Campbell*, [2004] UKHL 22, [2004] 2 A.C. 457, para. 17 (H.L.) (Eng.). *See also* A v. B Plc., [2003] QB 195, para. 4. Lord Hoffmann describes the influence of human rights law as more subtle and indirect and appears to question whether Articles 8 and 10 are incorporated in domestic law, but nevertheless describes freedom of the press and the right to protection of personal information as “important civilised values” as though they were always there. *Campbell*, [2004] UKHL 22, [2004] 2 A.C. 457, para. 55 (H.L.) (Eng.).

144. *Id.* at para. 115.

145. *Id.* at para. 117.

146. *Id.* at para. 121.

147. *Id.* at paras. 122, 130.

148. *Id.* at paras. 122, 123. Presumably though, in such a case, the plaintiff would consider an action in defamation where one issue would be whether any defense of qualified privilege based on the privilege of reply would excuse the publication of “associated facts.” But that raises the question which remains: whether the claimant would

In contrast, the minority relied on a variety of factors in deciding that the publication of the associated facts and photographs did *not* unjustifiably infringe her privacy. First, Miss Campbell had publicly lied by saying that unlike many other supermodels, she did not use drugs and had, thus, put her addiction and treatment into the public domain.¹⁴⁹ It was not enough that she was a famous person with a “long and symbiotic relationship with the media” and that sufficient public interest was created by her public statements.¹⁵⁰ The minority determined that obtaining treatment by attending NA meetings is a common form of therapy that is widely used and very respected; to divide this information of such a consequential nature from the central facts was “to apply altogether too fine a toothcomb. Human rights are concerned with substance, not with such fine distinctions.”¹⁵¹

Secondly, the minority noted that even if the associated facts were private, “non-publication . . . would have robbed a legitimate and sympathetic newspaper story of . . . detail which added colour and conviction. This information was published [in fairness to her] to demonstrate [her] commitment to tackling her drug problem.”¹⁵² Further, the minority determined that in striking a fair balance, a fair degree of journalistic latitude must be granted for the publication of information for such purposes.¹⁵³ They found that at this point, the rights of the press should be granted greater weight and that the test of proportionality is a matter on which people may differ.¹⁵⁴ The minority stated that “it is harsh to criticise the [newspaper] editor for ‘painting a somewhat fuller picture in order to show her in a sympathetic light.’”¹⁵⁵ The minority posed what it considered to be the principle question of the case:

Where the main substance of the story is conceded to have been justified, should the newspaper be held liable

have any basis for a defamation action where the central facts are defamatory but justifiable and the associated facts are private but not defamatory.

149. *Id.* at para. 25.

150. *Id.* at para. 57.

151. *Id.* at para. 26.

152. *Id.* at para. 28.

153. *Id.*

154. *Id.* at para. 59.

155. *Id.* at para. 59 (quoting *Campbell*, [2002] EWCA (Civ) 1377, para. 52).

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?¹⁵⁶

The judges in the minority concluded that it would be unfair to hold newspaper publishers to a strict liability standard and that to expect them to get it right every time would be unreasonable.¹⁵⁷ Further, as photographs are frequently an essential part of conveying a story, the decision to publish them in this case was “within the margin of editorial judgment.”¹⁵⁸

Finally, in the minority’s opinion, that the photographs were taken secretly was immaterial; even though the plaintiff may have understandably felt “hounded” by the press, her complaint did not concern the actual taking of the photographs, but rather that the publication of the photos conveyed private information.¹⁵⁹ The minority found that, in general, the mere taking of photographs without consent is not enough to amount to a wrongful invasion of privacy.¹⁶⁰ In the minority’s view, celebrities must accept that they may be photographed in public without their consent.¹⁶¹ Further, the minority found that there was no intrusion into a private place, nothing humiliating or embarrassing about the pictures, and that they showed nothing untoward.¹⁶² The minority concluded that *The Daily Mirror’s* “shabby” and “mean-spirited” attack was not relevant unless Miss Campbell had a cause of action to begin with.¹⁶³

C. *Comment on Campbell v. MGN Ltd.*

The main significance of the decision of the House of Lords in *Campbell v. MGN Ltd.* lies not so much in its affirmation of the place or incorporation of the values of the European Convention of Human Rights into the law of the United Kingdom (as there was already a significant level of acceptance of this position in the case

156. *Id.* at para. 61.

157. *Id.* at para. 63.

158. *Id.* at para. 77.

159. *Id.* at para. 30.

160. *Id.* at para. 73.

161. *Id.*

162. *Id.* at para. 31.

163. *Id.* at para. 35.

law¹⁶⁴ and any other view would be self-limiting for the highest court of a member state), nor in its confirmation that there is no general cause of action for invasion of privacy in the law of the United Kingdom (as this had already been decided by the House in *Wainwright v. Home Office*¹⁶⁵). Rather, it is significant for its affirmation that the action for breach of confidence has been freed from its earlier constraints of requiring an initial confidential relationship.

This point was formulated by Lord Goff of Chieveley in what has proved to be a most important and influential judgment, *Attorney-General v. Guardian Newspapers Ltd.*,¹⁶⁶ and accepted by the European Court of Human Rights as representing current English law in *Earl Spencer v. United Kingdom*.¹⁶⁷ However, as it was acknowledged that the information about Miss Campbell's attendance at NA was leaked either by one of her entourage or by a fellow member of NA, she did not need to rely on this extension of the duty of confidence. While some might argue that this renders the judgment *obiter dicta* on this point, the affirmation in this case is nevertheless important for the future development of the cause of action.

Lord Nicholls explains that, in abandoning the limitation, "the cause of action changed its nature" and became of much wider operation:

Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.¹⁶⁸

164. See Gavin Phillipson, *Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act*, 66 MOD. L. REV. 726 (2003).

165. [2003] UKHL 53, [2004] 2 A.C. 406 (H.L.) (Eng.).

166. [1990] 1 A.C. 109 (H.L.).

167. App. No. 28852 (Eur. Ct. H.R. Jan. 16, 1998), <http://echr.coe.int/echr>.

168. *Campbell*, [2004] UKHL 22, [2004] 2 A.C. 457, para. 14 (H.L.) (Eng.). Jonathan Morgan comments that this statement "reveals a real change of substance, and no mere re-branding." Jonathan Morgan, *Privacy in the House of Lords, Again*, 120 LAW Q. REV. 563, 566 (2004). The other judges do not discuss the nature of the cause of action — whether it is a tort or an equitable remedy. Arguably, the award of com-

Lord Hoffman points out that the law has thus changed its emphasis from the fixing, as equity usually did, upon the conscience of the holder of the information arising out of some relationship, to the fixing upon the information itself.¹⁶⁹ Further, in doing so, the new approach¹⁷⁰ reflects a shift in the underlying values which the law protects: “Instead of the cause of action being based on the duty of good faith . . . 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.”¹⁷¹

Lord Hope disagreed with this view¹⁷² but, if Lord Hoffmann’s view is more generally accepted, one could comment that the law of confidential or private information would increasingly fill a gap that the law of defamation has only partially and imperfectly protected.¹⁷³ This is reflected in Lord Hoffman’s judgment in which he juxtaposes the privacy of personal information with the law of defamation as two different limitations on the freedom of the press.¹⁷⁴

The law of privacy is in a much earlier stage of development as the defenses available to the two actions show: defenses to defamation may incorporate or reflect the public interest either directly or indirectly. For example, in the defenses of qualified privilege, justification, or in a “public figure” defense, “public interest” in itself is not a “nominate” defense to defamation. In contrast, public interest as a factor to support the freedom of the press in relation to non-defamatory but private matters is of a much broader and general nature even though it may reflect similar aspects of that interest. Baroness Hale has attempted some hierarchy of matters of public interest and this is reflected in the majority’s view that the

pensatory damages for distress, embarrassment, and anxiety and aggravated damages indicate that it is a tort as such damages are not in equity’s repertoire. A new tort?

169. *Campbell*, [2004] UKHL 22, [2004] 2 A.C. 457, para. 44 (H.L.) (Eng.).

170. See *Douglas v. Hello! Ltd.*, [2001] 2 All E.R. 289; *Douglas v. Hello! Ltd.*, [2003] 3 All E.R. 996,1043.

171. *Campbell*, [2004] UKHL 22, [2004] 2 A.C. 457, para. 51 (H.L.) (Eng.).

172. See *id.* at para. 86.

173. See Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986) (the seminal article on reputation as property, dignity, and honor).

174. *Campbell*, [2004] UKHL 22, [2004] 2 A.C. 457, para. 56 (H.L.) (Eng.).

information about Miss Campbell's treatment was much lower on the scale of public interest than the information of her drug addiction,¹⁷⁵ stating:

Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organization of the economic, social and political life of the country is crucial to any democracy Intellectual and educational speech and expression is also important in a democracy Artistic speech and expression is important . . . in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made.¹⁷⁶

The other significant consequence of the transformation of the cause of action for breach of confidence into a cause of action for misuse or wrongful dissemination of private information, widely defined to include one's picture in certain situations, is its capacity to fill a gap in the common law of the United Kingdom and other common law countries without constitutional guarantees of privacy. Of course, if this transformation is regarded as solely due to the direct or indirect incorporation of the European Convention of Human Rights into the law of the United Kingdom, non-European countries such as Australia will have to find another justification for a similar development. The International Covenant on Civil and Political Rights,¹⁷⁷ if ratified by a country, may be sufficient justification for a common law development on what is now regarded as a fundamental right in a civilized society. Certainly, the decision of the Australian High Court in *Australian Broadcasting Corp. v. Lenah Game Meats Pty. Ltd.*,¹⁷⁸ in which the court adopted the tests for "private information" as set out in the Restatement (Second) of

175. No one seemed to argue that because she held herself out as a role model for young women, information of her commitment to treatment and the value and availability of such treatment, once addicted, would be information with a strong public benefit in itself.

176. *Campbell*, [2004] UKHL 22, [2004] 2 A.C. 457, para. 148 (H.L.) (Eng.).

177. International Covenant on Civil & Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

178. (2001) 185 A.L.R. 1.

Torts and in the seminal article *Privacy* by W.L. Prosser in 1960,¹⁷⁹ indicates the readiness of courts outside of the United States to adopt principles of law which are not exclusively referable to particular provisions or amendments of the U.S. Constitution, but are of more general application.¹⁸⁰ In *Campbell*, the trial judge and the House of Lords applied the Australian High Court's test, showing the increasing international convergence of law in this field.¹⁸¹

The question of the appropriate remedy was not discussed at any length in the House of Lords, but there are some interesting issues which arise out of the categorization of the claim for breach of a "duty not to reveal private information" as stemming from an equitable duty rather than one rooted in tort. The primary remedy for breach of confidence is an account of profits if the breach has already occurred or if an injunction was issued beforehand.¹⁸² The former reflects the early history of the remedy as one to protect trade or business secrets, but recent cases show that celebrities are also often concerned with protecting the market value of their own image.¹⁸³ Would an account of profits have been available in *Campbell*? Mere difficulty of calculation does not usually deter a court. If this is an equitable action, why are the tort remedies of aggravated compensatory damages or damages for distress appropriate?¹⁸⁴

179. Prosser, *Privacy*, 48 CAL. L. REV. 383, 396-97 (1960).

180. Nevertheless, Australian courts have been slow to develop a freestanding action for breach or invasion of privacy, whether by way of tort or by expanding the equitable action for breach of confidence, although the High Court of Australia in *Australian Broadcasting Corp. v. Lenah Game Meats Pty. Ltd.*, (2001) 185 A.L.R. 1, implicitly encouraged the development of more protection of privacy and private information, except for corporations, by the equitable action. It has been said that the weight of authority at the moment is that a new tort of invasion of privacy does not yet exist in Australia. See *Kalaba v. Commonwealth*, [2004] F.C.A. 763. See also *Giller v. Procopets*, [2004] V.S.C. 113. Public figures such as actress Nicole Kidman have found minimal legal protection against photographers following them in their "everyday life" in public places, although there is statutory protection from listening devices.

181. But see *Hosking v. Runting* [2005] 1 N.Z.L.R. 1 (C.A.)

182. See R.P. MEAGHER, J.D. HEYDON & M. LEEMING, MEAGHER GUMMOW AND LEHANE'S EQUITY: PRINCIPLES AND REMEDIES ¶¶ 41-135 (2002). In the seminal "privacy" case of *Prince Albert v. Strange*, (1849) 2 De G & Sm 652, the Prince Consort was granted an injunction to restrain the publication of a catalogue describing etchings made by the Prince of the royal family at home.

183. *Douglas v Hello! Ltd.*, [2005] EWCA (Civ) 595, para. 53.

184. See *Giller v. Procopets*, [2004] V.S.C. 113, in which the Victoria Supreme Court rejected a claim for damages for mental distress in a breach of confidence action.

Does this case indicate a greater willingness by courts to “mix and match” actions and remedies?

V. CONCLUSION

There are a number of points of common ground in the judgments of the European Court of Human Rights in *Von Hannover v. Germany* and of the House of Lords in *Campbell v. MGN Ltd.*

First, Article 8 does not just concern interference or disclosure by government and public authorities. The accepted view is that it applies to provide protection of privacy rights generally, whether directly by implication or indirectly by means of the courts. The Court of Appeal recently commented on the *Von Hannover* decision in *Douglas v. Hello! Ltd.*, stating, “It follows that the ECtHR has recognised an obligation on member states to protect one individual from an unjustified invasion of private life by another individual and an obligation on the courts of a member state to interpret legislation in a way that will achieve that result.”¹⁸⁵ Further, Article 8 imposes a positive obligation on member states to take steps to protect rights of privacy.¹⁸⁶ As set out in the Resolution of the General Assembly in 1998, this includes the provision of an action for damages for infringement.¹⁸⁷ In addition, Article 41 allows the European Court to award reparation.¹⁸⁸

The cases also established that the test of “the legitimate expectation of the subject” is the appropriate threshold test as to whether or not the information is obviously private. However, the English courts go further if the information does not pass this test and asks whether the publication would be highly offensive to a reasonable person in the situation of the subject.¹⁸⁹

In addition, there is a need for the press to have some latitude or journalistic discretion as to what information it does or does not include, although the majority of the House of Lords was not convinced that the matters complained of in *Campbell* were merely an-

185. *Douglas*, [2005] EWCA (Civ) 595, para. 49.

186. See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

187. See Resolution 1165 on the Right to Privacy, Eur. Parl. Ass., 29th Sess. (1998).

188. *Id.*

189. *Campbell*, [2004] UKHL 22, [2004] A.C. 457 para. 93 (H.L.) (Eng.).

cillary or supportive data so as to come within that latitude.¹⁹⁰ Similarly, the European Court seemed to accept the right of journalists to exaggerate or provoke within the sphere protected by freedom of speech, but not to extend the boundaries of that sphere. Finally, the publication of photographs, often taken in secret and while following a person continuously, either visibly or surreptitiously, add greatly to the subject's feelings of intrusion.

Given the relatively modest remedy awarded by the court, media companies may not be very worried about the impact of the *Campbell* decision on their budgets. Of greater importance will be the readiness or reluctance of the courts to grant prior injunctive relief to prevent publication. In other respects, by affirming that the equitable action for breach of confidence is freed from the requirement that the claimant show some initial relationship of confidence, the House of Lords has made the action a more general application so that anyone who comes across private information will come under a duty not to misuse or reveal it. This aspect will prove significant in contexts other than that of media companies and public figures such as Naomi Campbell. Some members of the English Court of Appeal may have preferred to develop the law of privacy as a series of separate tort actions, as in the United States and recently in New Zealand,¹⁹¹ noting: "We cannot pretend that we find it satisfactory to be required to shoe-horn within the cause of action of breach of confidence claims for publication of unauthorized photographs of a private occasion."¹⁹² The ongoing significance of the *Von Hannover* case remains to be seen. The German Constitutional Court recently seemed to emphasize the indirect impact of the decisions of the European Court of Human Rights on German law, pointing out in *2B v. R* that only the state involved is bound by the final judgment with regard to the specific matter in dispute.¹⁹³ As to other European states, the decisions merely give them occasion to examine their domestic legal systems and to orient themselves to the case law of the European Court. After referring to the *Von Hannover* case, the German court stated:

190. *Id.* at para. 144.

191. *See supra* text accompanying note 7.

192. *Douglas*, [2005] EWCA (Civ) 595, para. 53.

193. *See* Order of the Second Senate of October 14, 2004, *2B v. R* 1481/04 (F.R.G.).

It is the task of the domestic courts to integrate a decision of the ECHR into the relevant partial legal area of the national legal system, because it cannot be the desired result of the international law basis nor express the will of the ECHR for the ECHR through its decisions itself to undertake directly any necessary adjustments within a domestic partial legal system. . . . In this respect, it is necessary for the national courts to evaluate the decision when taking it into account; in this process, account may also be taken of the fact that the individual application proceedings before the ECHR, in particular where [they] were in civil law, possibly does not give a complete picture of the legal positions and interests involved.¹⁹⁴

Despite this hint that there is much more to be said about the protection of privacy under German domestic law, the European Court's decision in *Von Hannover* is nevertheless of relevance throughout Europe when national courts examine how their domestic law shapes up in the balancing of protection of privacy and protection of freedom of the press. The English Court of Appeal has accepted that this is required by the decision in *Von Hannover*.¹⁹⁵

The *Von Hannover* and *Campbell* decisions are relevant to any international publisher. For countries outside of Europe, the increasing universality of fundamental human rights can only encourage courts to look to other systems of law facing the same issues and to seek consistency in formulating universal principles.

194. *Id.* at para. 3(c).

195. *Douglas*, [2005] EWCA (Civ) 595, paras. 47–49.