Judgments - Campbell (Appellant) v. MGN Limited (Respondents)

HOUSE OF LORDS

SESSION 2003-04

[2004] UKHL 22

on appeal from: [2002] EWCA Civ 1373

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Campbell (Appellant)

v.

MGN Limited (Respondents)

ON

THURSDAY 6 MAY 2004

The Appellate Committee comprised:

Lord Nicholls of Birkenhead

Lord Hoffmann

Lord Hope of Craighead

Baroness Hale of Richmond

Lord Carswell

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THE LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. Naomi Campbell is a celebrated fashion model. Hers is a household name, nationally and internationally. Her face is instantly recognisable. Whatever she does and wherever she goes is news.

2. On 1 February 2001 the 'Mirror' newspaper carried as its first story on its front page a prominent article headed 'Naomi: I am a drug addict'. The article was supported on one side by a picture of Miss Campbell as a glamorous model, on the other side by a slightly indistinct picture of a smiling, relaxed Miss Campbell, dressed in baseball cap and jeans, over the caption 'Therapy: Naomi outside meeting'. The article read:

> 'Supermodel Naomi Campbell is attending Narcotics Anonymous meetings in a courageous bid to beat her addiction to drink and drugs.
> The 30-year old has been a regular at counselling sessions for three months, often attending twice a day.
> Dressed in jeans and baseball cap, she arrived at one of NA's lunchtime meetings this week. Hours later at a different venue she made a low-key entrance to a women-only gathering of recovered addicts.
> Despite her £14million fortune Naomi is treated as just another addict trying to put her life back together. A source close to her said last night: "She wants to clean up her life for good.
> "She went into modelling when she was very young and it is easy to be led astray. Drink and drugs are unfortunately widely available in the fashion world.
> "But Naomi has realised she has a problem and has bravely vowed to do something about it. Everyone wishes her well."
> Her spokeswoman at Elite Models declined to comment.'

3. The story continued inside, with a longer article spread across two pages. The inside article was headed 'Naomi's finally trying to beat the demons that have been haunting her'. The opening paragraphs read:

> 'She's just another face in the crowd, but the gleaming smile is unmistakeably Naomi Campbell's.

In our picture, the catwalk queen emerges from a gruelling two-hour session at Narcotics Anonymous and gives a friend a loving hug.

This is one of the world's most beautiful women facing up to her drink and drugs addiction - and clearly winning.

The London-born supermodel has been going to NA meetings for the past three months as she tries to change her wild lifestyle.

Such is her commitment to conquering her problem that she regularly goes twice

a day to group counselling …

To the rest of the group she is simply Naomi, the addict. Not the supermodel. Not the style icon.'

4. The article made mention of Miss Campbell's efforts to rehabilitate herself, and that one of her friends said she was still fragile but 'getting healthy'. The article gave a general description of Narcotics Anonymous therapy, and referred to some of Miss Campbell's recent publicised activities. These included an occasion when Miss Campbell was rushed to hospital and had her stomach pumped. She claimed it was an allergic reaction to antibiotics and that she had never had a drug problem: but 'those closest to her knew the truth'.

5. In the middle of the double page spread, between several innocuous pictures of Miss Campbell, was a dominating picture over the caption 'Hugs: Naomi, dressed in jeans and baseball hat, arrives for a lunchtime group meeting this week'. The picture showed her in the street on the doorstep of a building as the central figure in a small group. She was being embraced by two people whose faces had been pixelated. Standing on the pavement was a board advertising a named café. The article did not name the venue of the meeting, but anyone who knew the district well would be able to identify the place shown in the photograph.

6. The general tone of the articles was sympathetic and supportive with, perhaps, the barest undertone of smugness that Miss Campbell had been caught out by the 'Mirror'. The source of the newspaper's information was either an associate of Miss Campbell or a fellow addict attending meetings of Narcotics Anonymous. The photographs of her attending a meeting were taken by a free lance photographer specifically employed by the newspaper to do the job. He took the photographs covertly, while concealed some distance away inside a parked car.

7. In certain respects the articles were inaccurate. Miss Campbell had been attending Narcotics Anonymous meetings, in this country and abroad, for two years, not three months. The frequency of her attendance at meetings was greatly exaggerated. She did not regularly attend meetings twice a day. The street photographs showed her leaving a meeting, not arriving, contrary to the caption in the newspaper article.

The proceedings and the further articles

8. On the same day as the articles were published Miss Campbell commenced proceedings against MGN Ltd, the publisher of the 'Mirror'. The newspaper's response was to publish further articles, this time highly critical of Miss Campbell. On 5 February 2001 the newspaper published an article headed, in large letters, 'Pathetic'. Below was a photograph of Miss Campbell over the caption 'Help: Naomi leaves Narcotics Anonymous meeting last week after receiving therapy in her battle against illegal drugs'. This photograph was similar to the street scene picture published on 1 February. The text of the article was headed 'After years of self-publicity and illegal drug abuse, Naomi Campbell whinges about privacy.' The article mentioned that 'the Mirror revealed last week how she is attending daily

meetings of Narcotics Anonymous'. Elsewhere in the same edition an editorial article, with the heading 'No hiding Naomi', concluded with the words: 'If Naomi Campbell wants to live like a nun, let her join a nunnery. If she wants the excitement of a show business life, she must accept what comes with it.'

9. Two days later, on 7 February, the 'Mirror' returned to the attack with an offensive and disparaging article. Under the heading 'Fame on you, Ms Campbell', an article referred to her plans 'to launch a campaign for better rights for celebrities or "artists" as she calls them'. The article included the sentence: 'As a campaigner, Naomi's about as effective as a chocolate soldier.'

10. In the proceedings Miss Campbell claimed damages for breach of confidence and compensation under the Data Protection Act 1998. The article of 7 February formed the main basis of a claim for aggravated damages. Morland J [2002] EWHC 499 (QB) upheld Miss Campbell's claim. He made her a modest award of £2,500 plus £1,000 aggravated damages in respect of both claims. The newspaper appealed. The Court of Appeal, comprising Lord Phillips of Worth Matravers MR, Chadwick and Keene LJJ, allowed the appeal and discharged the judge's order: [2002] EWCA Civ 1373, [2003] QB 633. Miss Campbell has now appealed to your Lordships' House.

Breach of confidence: misuse of private information

11. In this country, unlike the United States of America, there is no over-arching, all-embracing cause of action for 'invasion of privacy': see *Wainwright v Home Office* [2003] 3 WLR 1137. But protection of various aspects of privacy is a fast developing area of the law, here and in some other common law jurisdictions. The recent decision of the Court of Appeal of New Zealand in *Hosking v Runting* (25 March 2004) is an example of this. In this country development of the law has been spurred by enactment of the Human Rights Act 1998.

12. The present case concerns one aspect of invasion of privacy: wrongful disclosure of private information. The case involves the familiar competition between freedom of expression and respect for an individual's privacy. Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual. And restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state: see La Forest J in *R v Dymont* [1988] 2 SCR 417, 426.

13. The common law or, more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence. A breach of confidence was restrained as a form of unconscionable conduct, akin to a breach of trust. Today this nomenclature is misleading. The breach of confidence label harks back to the time when the cause of action was based on improper use of information disclosed by one person to another in confidence. To attract protection the information had to be of a confidential nature. But the gist of the cause of action was that information of this

character had been disclosed by one person to another in circumstances 'importing an obligation of confidence' even though no contract of non-disclosure existed: see the classic exposition by Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47-48. The confidence referred to in the phrase 'breach of confidence' was the confidence arising out of a confidential relationship.

14. This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. In this country this development was recognised clearly in the judgment of Lord Goff of Chieveley in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281. 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 continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. 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.

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

16. The European Convention on Human Rights, and the Strasbourg jurisprudence, have undoubtedly had a significant influence in this area of the common law for some years. The provisions of article 8, concerning respect for private and family life, and article 10, concerning freedom of expression, and the interaction of these two articles, have prompted the courts of this country to identify more clearly the different factors involved in cases where one or other of these two interests is present. Where both are present the courts are increasingly explicit in evaluating the competing considerations involved. When identifying and evaluating these factors the courts, including your Lordships' House, have tested the common law against the values encapsulated in these two articles. The development of the common law has been in harmony with these articles of the Convention: see, for instance, *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 203-204.

17. The time has come to recognise that the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence. As Lord Woolf CJ has said, the courts have been able to achieve this result by absorbing the rights protected by articles 8 and 10 into this cause of action: *A v B plc* [2003] QB 195, 202, para 4. Further, it should now be recognised that for this purpose these values are of general application. The values embodied in articles 8 and 10 are as much applicable in disputes between individuals or between an individual and a non-

governmental body such as a newspaper as they are in disputes between individuals and a public authority.

18. In reaching this conclusion it is not necessary to pursue the controversial question whether the European Convention itself has this wider effect. Nor is it necessary to decide whether the duty imposed on courts by section 6 of the Human Rights Act 1998 extends to questions of substantive law as distinct from questions of practice and procedure. It is sufficient to recognise that the values underlying articles 8 and 10 are not confined to disputes between individuals and public authorities. This approach has been adopted by the courts in several recent decisions, reported and unreported, where individuals have complained of press intrusion. A convenient summary of these cases is to be found in Gavin Phillipson's valuable article 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 MLR 726, 726-728.

19. In applying this approach, and giving effect to the values protected by article 8, courts will often be aided by adopting the structure of article 8 in the same way as they now habitually apply the Strasbourg court's approach to article 10 when resolving questions concerning freedom of expression. Articles 8 and 10 call for a more explicit analysis of competing considerations than the three traditional requirements of the cause of action for breach of confidence identified in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

20. I should take this a little further on one point. Article 8(1) recognises the need to respect private and family life. Article 8(2) recognises there are occasions when intrusion into private and family life may be justified. One of these is where the intrusion is necessary for the protection of the rights and freedoms of others. Article 10(1) recognises the importance of freedom of expression. But article 10(2), like article 8(2), recognises there are occasions when protection of the rights of others may make it necessary for freedom of expression to give way. When both these articles are engaged a difficult question of proportionality may arise. This question is distinct from the initial question of whether the published information engaged article 8 at all by being within the sphere of the complainant's private or family life

21. Accordingly, in deciding what was the ambit of an individual's 'private life' in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.

22. Different forms of words, usually to much the same effect, have been suggested from time to time. The second Restatement of Torts in the United States (1977), article 652D, p 394, uses the formulation of disclosure of matter which 'would be highly offensive to a reasonable person'. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, 13, para 42, Gleeson CJ used words, widely quoted, having a similar meaning. This particular formulation should be used with care, for two reasons. First, the 'highly offensive' phrase is suggestive of a stricter test of private information than a reasonable expectation of

privacy. Second, the 'highly offensive' formulation can all too easily bring into account, when deciding whether the disclosed information was private, considerations which go more properly to issues of proportionality; for instance, the degree of intrusion into private life, and the extent to which publication was a matter of proper public concern. This could be a recipe for confusion.

The present case

23. I turn to the present case and consider first whether the information whose disclosure is in dispute was private. Mr Caldecott QC placed the information published by the newspaper into five categories: (1) the fact of Miss Campbell's drug addiction; (2) the fact that she was receiving treatment; (3) the fact that she was receiving treatment at Narcotics Anonymous; (4) the details of the treatment - how long she had been attending meetings, how often she went, how she was treated within the sessions themselves, the extent of her commitment, and the nature of her entrance on the specific occasion; and (5) the visual portrayal of her leaving a specific meeting with other addicts.

24. It was common ground between the parties that in the ordinary course the information in all five categories would attract the protection of article 8. But Mr Caldecott recognised that, as he put it, Miss Campbell's 'public lies' precluded her from claiming protection for categories (1) and (2). When talking to the media Miss Campbell went out of her way to say that, unlike many fashion models, she did not take drugs. By repeatedly making these assertions in public Miss Campbell could no longer have a reasonable expectation that this aspect of her life should be private. Public disclosure that, contrary to her assertions, she did in fact take drugs and had a serious drug problem for which she was being treated was not disclosure of private information. As the Court of Appeal noted, where a public figure chooses to present a false image and make untrue pronouncements about his or her life, the press will normally be entitled to put the record straight: [2003] QB 633, 658. Thus the area of dispute at the trial concerned the other three categories of information.

25. Of these three categories I shall consider first the information in categories (3) and (4), concerning Miss Campbell's attendance at Narcotics Anonymous meetings. In this regard it is important to note this is a highly unusual case. On any view of the matter, this information related closely to the fact, which admittedly could be published, that Miss Campbell was receiving treatment for drug addiction. Thus when considering whether Miss Campbell had a reasonable expectation of privacy in respect of information relating to her attendance at Narcotics Anonymous meetings the relevant question can be framed along the following lines: Miss Campbell having put her addiction and treatment into the public domain, did the further information relating to her attendance at Narcotics Anonymous meetings retain its character of private information sufficiently to engage the protection afforded by article 8?

26. I doubt whether it did. Treatment by attendance at Narcotics Anonymous meetings is a form of therapy for drug addiction which is well known, widely used and much respected. Disclosure that Miss Campbell had opted for this form of treatment was not a disclosure of any more significance than saying that a person

who has fractured a limb has his limb in plaster or that a person suffering from cancer is undergoing a course of chemotherapy. Given the extent of the information, otherwise of a highly private character, which admittedly could properly be disclosed, the additional information was of such an unremarkable and consequential nature that to divide the one from the other would be to apply altogether too fine a toothcomb. Human rights are concerned with substance, not with such fine distinctions.

27. For the same reason I doubt whether the brief details of how long Miss Campbell had been undergoing treatment, and how often she attended meetings, stand differently. The brief reference to the way she was treated at the meetings did no more than spell out and apply to Miss Campbell common knowledge of how Narcotics Anonymous meetings are conducted.

28. But I would not wish to found my conclusion solely on this point. I prefer to proceed to the next stage and consider how the tension between privacy and freedom of expression should be resolved in this case, on the assumption that the information regarding Miss Campbell's attendance at Narcotics Anonymous meetings retained its private character. At this stage I consider Miss Campbell's claim must fail. I can state my reason very shortly. On the one hand, publication of this information in the unusual circumstances of this case represents, at most, an intrusion into Miss Campbell's private life to a comparatively minor degree. On the other hand, non-publication of this information would have robbed a legitimate and sympathetic newspaper story of attendant detail which added colour and conviction. This information was published in order to demonstrate Miss Campbell's commitment to tackling her drug problem. The balance ought not to be held at a point which would preclude, in this case, a degree of journalistic latitude in respect of information published for this purpose.

29. It is at this point I respectfully consider Morland J. fell into error. Having held that the details of Miss Campbell's attendance at Narcotics Anonymous had the necessary quality of confidentiality, the judge seems to have put nothing into the scales under article 10 when striking the balance between articles 8 and 10. This was a misdirection. The need to be free to disseminate information regarding Miss Campbell's drug addiction is of a lower order than the need for freedom to disseminate information on some other subjects such as political information. The degree of latitude reasonably to be accorded to journalists is correspondingly reduced, but it is not excluded altogether.

30. There remains category (5): the photographs taken covertly of Miss Campbell in the road outside the building she was attending for a meeting of Narcotics Anonymous. I say at once that I wholly understand why Miss Campbell felt she was being hounded by the 'Mirror'. I understand also that this could be deeply distressing, even damaging, to a person whose health was still fragile. But this is not the subject of complaint. Miss Campbell, expressly, makes no complaint about the taking of the photographs. She does not assert that the taking of the photographs was itself an invasion of privacy which attracts a legal remedy. The complaint regarding the photographs is of precisely the same character as the nature of the complaints regarding the text of the articles: the information conveyed by the photographs was

private information. Thus the fact that the photographs were taken surreptitiously adds nothing to the only complaint being made.

31. In general photographs of people contain more information than textual description. That is why they are more vivid. That is why they are worth a thousand words. But the pictorial information in the photographs illustrating the offending article of 1 February 2001 added nothing of an essentially private nature. They showed nothing untoward. They conveyed no private information beyond that discussed in the article. The group photograph showed Miss Campbell in the street exchanging warm greetings with others on the doorstep of a building. There was nothing undignified or distrait about her appearance. The same is true of the smaller picture on the front page. Until spotted by counsel in the course of preparing the case for oral argument in your Lordships' House no one seems to have noticed that a sharp eye could just about make out the name of the café on the advertising board on the pavement.

32. For these reasons and those given by my noble and learned friend Lord Hoffmann, I agree with the Court of Appeal that Miss Campbell's claim fails. It is not necessary for me to pursue the claim based on the Data Protection Act 1998. The parties were agreed that this claim stands or falls with the outcome of the main claim.

33. In reaching this overall conclusion I have well in mind the distress that publication of the article on 1 February 2001 must have caused Miss Campbell. Public exposure of this sort, especially for someone striving to cope with a serious medical condition, would almost inevitably be extremely painful. But it is right to recognise the source of this pain and distress. First, Miss Campbell realised she had been betrayed by an associate or fellow sufferer. Someone whom she trusted had told the newspaper she was attending Narcotics Anonymous meetings. This sense of betrayal, and consequential anxiety about continuing to attend Narcotics Anonymous meetings, flowed from her becoming aware she had been betrayed. The newspaper articles were only the *means* by which she became aware of her betrayal. Secondly, Miss Campbell realised her addiction was now public knowledge, as was the fact she was undergoing treatment. She realised also that it was now public knowledge that she had repeatedly lied. Thirdly, as already mentioned, Miss Campbell would readily feel she was being harassed by the 'Mirror' employing a photographer to 'spy' on her.

34. That Miss Campbell should suffer real distress under all these heads is wholly understandable. But in respect of none of these causes of distress does she have reason for complaint against the newspaper for misuse of private information. Against this background I find it difficult to envisage Miss Campbell suffered any significant additional distress based on public disclosure that her chosen form of treatment was attendance at Narcotics Anonymous meetings.

35. Nor have I overlooked the further distress caused by the subsequent mean-spirited attack, with its shabby reference to a chocolate soldier, made by the 'Mirror' on a person known to be peculiarly vulnerable. If Miss Campbell had a well-founded cause of action against the

newspaper the trial judge rightly recognised that an award of aggravated damages was called for. But for reasons already given I would dismiss this appeal.

LORD HOFFMANN

My Lords,

36. The House is divided as to the outcome of this appeal, but the difference of opinion relates to a very narrow point which arises on the unusual facts of this case. The facts are unusual because the plaintiff is a public figure who had made very public false statements about a matter in respect of which even a public figure would ordinarily be entitled to privacy, namely her use of drugs. It was these falsehoods which, as was conceded, made it justifiable, for a newspaper to report the fact that she was addicted. The division of opinion is whether in doing so the newspaper went too far in publishing associated facts about her private life. But the importance of this case lies in the statements of general principle on the way in which the law should strike a balance between the right to privacy and the right to freedom of expression, on which the House is unanimous. The principles are expressed in varying language but speaking for myself I can see no significant differences.

37. Naomi Campbell is a famous fashion model who lives by publicity. What she has to sell is herself: her personal appearance and her personality. She employs public relations agents to present her personal life to the media in the best possible light just as she employs professionals to advise her on dress and make-up. That is no criticism of her. It is a trade like any other. But it does mean that her relationship with the media is different from that of people who expose less of their private life to the public.

38. The image which she has sought to project of herself to the international media is that of a black woman who started with few advantages in life and has by her own efforts attained international success in a glamorous profession. There is much truth in this claim. Unfortunately she has also given wide publicity, in interviews with journalists and on television, to a claim which was false, namely that (unlike many of her colleagues in the fashion business) she had not succumbed to the temptation to take drugs.

39. In January 2001 the *Mirror* obtained information that Ms Campbell had acknowledged her drug dependency by going regularly to meetings of Narcotics Anonymous ("NA") for help in ridding herself of the addiction. It was told that she would be going to a meeting at an address in the King's Road. The informant was either a member of Ms Campbell's numerous entourage or another participant in the meetings. The *Mirror* sent a photographer to sit unobtrusively in a car. As she left the meeting, he took a couple of pictures of her on the pavement.

40. On 1 February 2001 the *Mirror* published an article on the front page under the headline: "Naomi: I am a drug addict". It was accompanied by one of the pictures. The text said that she was attending NA meetings in a "courageous bid" to beat her addiction. She had been "a regular at counselling sessions for three months, often attending twice a day." It described her dress (jeans and a baseball cap) and said that later the same day she made a "low-key entrance" to a women-only gathering. A source was quoted as saying that it was easy in the fashion world to be led astray but that "Naomi has realised she has a problem and has bravely vowed to do something about it."

41. There was more on pages 12 and 13, with another picture of her in the doorway of the house where the meeting took place. The address was not identified but someone very familiar with that part of the King's Road could no doubt have recognised it. The article said that her commitment to conquering her problem was such that "she regularly goes twice a day to group counselling". The article described the way group counselling at NA worked: the anonymity which meant that to the group she was "simply Naomi, the addict. Not the supermodel." A friend was quoted as saying "She is still fragile, but she is getting healthy". Later it said that her "long rumoured problems with drugs" had emerged in public in 1997 when she was rushed to hospital, reportedly after taking an overdose, but that she had then insisted that it was an allergic reaction: "It's ridiculous. I've never had a drug problem." But, said the article "those closest to her knew the truth". There was also a good deal more about men with whom she had been associated and other past incidents, taken no doubt from a bulging cuttings file.

42. On the same day as the article appeared, Ms Campbell issued proceedings for damages for "breach of confidence and/or unlawful invasion of privacy". The narrowness of the dispute between the parties emerged at the trial when Mr Caldecott QC conceded that because of the publicity which Ms Campbell had given to her claim that she had "never had a drug problem" the *Mirror* was entitled to publish that she was an addict and also, in fairness to her, that she was now attempting to deal with it. The matters which were alleged to be in breach of confidence or an unlawful invasion of privacy were, first, the fact that she was attending meetings at NA, secondly, the published details of her attendance and what happened at the meetings and thirdly, the photographs taken in the street without her knowledge or consent.

43. In order to set both the concession and the residual claim in their context and to identify the point of law at issue, I must say something about the cause of action on which Ms Campbell relies. This House decided in *Wainwright v Home Office* [2003] 3 WLR 1137 that there is no general tort of invasion of privacy. But the right to privacy is in a general sense one of the values, and sometimes the most important value, which underlies a number of more specific causes of action, both at common law and under various statutes. One of these is the equitable action for breach of confidence, which has long been recognised as capable of being used to protect privacy. Thus in the seminal case of *Prince Albert v Strange* (1849) 2 De G & Sm 293; 1 Mac & G 25 the defendant was a publisher who had obtained copies of private etchings made by the Prince Consort of members of the royal family at home. The publisher had got them from an employee of a printer to whom the Prince had entrusted the plates. Vice-Chancellor Knight-Bruce, in granting an injunction restraining the publication of a catalogue containing descriptions of etchings, said (2 De G & SM 293, 313) that it was -

> "an intrusion - an unbecoming and unseemly intrusion…offensive to that inbred sense of propriety natural to every man - if, intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life - into the home (a word hitherto sacred among us)…"

44. But although the action for breach of confidence could be used to protect privacy in the sense of preserving the confidentiality of personal information, it was not founded on the notion that such information was in itself entitled to protection. Breach of confidence was an equitable remedy and equity traditionally fastens on the conscience of one party to enforce equitable duties which arise out of his relationship with the other. So the action did not depend upon the personal nature of the information or extent of publication but upon whether a confidential relationship existed between the person who imparted the information and the person who received it. Equity imposed an obligation of confidentiality upon the latter and

(by a familiar process of extension) upon anyone who received the information with actual or constructive knowledge of the duty of confidence.

45. Thus the cause of action in *Prince Albert v Strange* was based upon the defendant's actual or constructive knowledge of the confidential relationship between the Prince Consort and the printer to whom he had entrusted the plates of his etchings. It was not essential that the information should concern the Prince's family life or be in any other way personal. Any confidential information would have done. Nor was it essential that the defendant should have intended widespread publication. Communication to a single unauthorised person would have been enough. Many of the cases on breach of confidence are concerned with the communication of commercially valuable information to trade rivals and not with anything that could be described as a violation of privacy.

46. In recent years, however, there have been two developments of the law of confidence, typical of the capacity of the common law to adapt itself to the needs of contemporary life. One has been an acknowledgement of the artificiality of distinguishing between confidential information obtained through the violation of a confidential relationship and similar information obtained in some other way. The second has been the acceptance, under the influence of human rights instruments such as article 8 of the European Convention, of the privacy of personal information as something worthy of protection in its own right.

47. The first development is generally associated with the speech of Lord Goff of Chieveley in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281, where he gave, as illustrations of cases in which it would be illogical to insist upon violation of a confidential relationship, the "obviously confidential document…wafted by an electric fan out of a window into a crowded street" and the "private diary…dropped in a public place." He therefore formulated the principle as being that?

> "a duty of confidence arises when confidential information comes to the knowledge of a person…in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others."

48. This statement of principle, which omits the requirement of a prior confidential relationship, was accepted as representing current English law by the European Court of Human Rights in *Earl Spencer v United Kingdom* (1998) 25 EHRR CD 105 and was applied by the Court of Appeal in *A v B plc* [2003] QB 195, 207. It is now firmly established.

49. The second development has been rather more subtle. Until the Human Rights Act 1998 came into force, there was no equivalent in English domestic law of article 8 the European Convention or the equivalent articles in other international human rights instruments which guarantee rights of privacy. So the courts of the United Kingdom did not have to decide what such guarantees meant. Even now that the equivalent of article 8 has been enacted as part of English law, it is not directly concerned with the protection of privacy against private persons or corporations. It is, by virtue of section 6 of the 1998 Act, a guarantee of privacy only against public authorities. Although the Convention, as an international instrument, may impose upon the United Kingdom an obligation to take some steps (whether by statute or otherwise) to protect rights of privacy against invasion by private individuals, it does not follow that such an obligation would have any counterpart in domestic law.

50. What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity. And this recognition has raised inescapably the question of why it should be worth protecting against the state but not against a private person. There may of course be justifications for the publication of private information by private persons which would not be available to the state - I have particularly in mind the position of the media, to which I shall return in a moment - but I can see no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification. Nor, it appears, have any of the other judges who have considered the matter.

51. The result of these developments has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information. It recognises that the incremental changes to which I have referred do not merely extend the duties arising traditionally from a relationship of trust and confidence to a wider range of people. As Sedley LJ observed in a perceptive passage in his judgment in *Douglas v Hello! Ltd* [2001] QB 967, 1001, the new approach takes a different view of the underlying value which the law protects. Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity - the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.

52. These changes have implications for the future development of the law. They must influence the approach of the courts to the kind of information which is regarded as entitled to protection, the extent and form of publication which attracts a remedy and the circumstances in which publication can be justified.

53. In this case, however, it is unnecessary to consider these implications because the cause of action fits squarely within both the old and the new law. The judge found that the information about Ms Campbell's attendance at NA had been communicated to the *Mirror* in breach of confidence and that the *Mirror* must have known that the information was confidential. As for human autonomy and dignity, I should have thought that the extent to which information about one's state of health, including drug dependency, should be communicated to other people was plainly something which an individual was entitled to decide for herself: compare *Z v Finland* (1997) 25 EHRR 371, 405, at para 95. The whole point of NA is that participants in its meetings are anonymous. It offers them support and the possibility of recovery without requiring them to allow information about their drug dependency to become more widely known. If Ms Campbell had been an ordinary citizen, I think that the publication of information about her attendance at NA would have been actionable and I do not understand the *Mirror* to argue otherwise.

54. What is said to make this case different is, first, that Ms Campbell is a public figure who has sought publicity about various aspects of her private life and secondly, that the aspects of her private life which she has publicised include her use of drugs, in respect of which she has made a false claim. The *Mirror* claims that on these grounds it was entitled in the public interest to publish the information and photographs and that its right to do so is protected by article 10 of the European Convention.

55. I shall first consider the relationship between the freedom of the press and the common law right of the individual to protect personal information. Both reflect important civilised values, but, as often happens, neither can be given effect in full measure without restricting the other. How are they to be reconciled in a particular case? There is in my view no question of automatic priority. Nor is there a presumption in favour of one rather than the other. The question is rather the extent to which it is *necessary* to qualify the one right in order to protect the underlying value which is protected by the other. And the extent of the qualification must be proportionate to the need: see Sedley LJ in *Douglas v Hello! Ltd* [2001] QB 967, 1005, para 137.

56. If one takes this approach, there is often no real conflict. Take the example I have just given of the ordinary citizen whose attendance at NA is publicised in his local newspaper. The violation of the citizen's autonomy, dignity and self-esteem is plain and obvious. Do the civil and political values which underlie press freedom make it necessary to deny the citizen the right to protect such personal information? Not at all. While there is no contrary public interest recognised and protected by the law, the press is free to publish anything it likes. Subject to the law of defamation, it does not matter how trivial, spiteful or offensive the publication may be. But when press freedom comes into conflict with another interest protected by the law, the question is whether there is a sufficient public interest in that particular publication to justify curtailment of the conflicting right. In the example I have given, there is no public interest whatever in publishing to the world the fact that the citizen has a drug dependency. The freedom to make such a statement weighs little in the balance against the privacy of personal information.

57. One must therefore proceed to consider the grounds why the *Mirror* say there was a public interest in its publication of information about Ms Campbell which it would not have been justified in publishing about someone else. First, there is the fact that she is a public figure who has had a long and symbiotic relationship with the media. In my opinion, that would not in itself justify publication. A person may attract or even seek publicity about some aspects of his or her life without creating any public interest in the publication of personal information about other matters. I think that the history of Ms Campbell's relationship with the media does have some relevance to this case, to which I shall return in due course, but that would not without more justify publication of confidential personal information.

58. The reason why Mr Caldecott concedes that the *Mirror* was entitled to publish the fact of her drug dependency and the fact that she was seeking treatment is that she had specifically given publicity to the very question of whether she took drugs and had falsely said that she did not. I accept that this creates a sufficient public interest in the correction of the impression she had previously given.

59. The question is then whether the *Mirror* should have confined itself to these bare facts or whether it was entitled to reveal more of the circumstantial detail and print the photographs. If one applies the test of necessity or proportionality which I have suggested, this is a matter on which different people may have different views. That appears clearly enough from the judgments which have been delivered in this case. But judges are not newspaper editors. It may have been possible for the *Mirror* to satisfy the public interest in publication with a story which contained less detail and omitted the photographs. But the *Mirror* said that they wanted to show themselves sympathetic to Ms Campbell's efforts to overcome her dependency. For this purpose, some details about her frequency of attendance at NA meetings were needed. I agree with the observation of the Court of Appeal, at p 660, para

52, that it is harsh to criticise the editor for "painting a somewhat fuller picture in order to show her in a sympathetic light."

60. To someone who started with the (legitimately communicated) knowledge that she was seeking treatment, there was nothing special about the additional details. The fact that she was going to NA would come as no surprise; there are, according to its web-site, 31,000 NA meetings a week in 100 different countries. The anonymity of participants and the general nature of the therapy is common knowledge. The details of her frequency of attendance (which were in fact inaccurate) could not be said to be discreditable or embarrassing. The relatively anodyne nature of the additional details is in my opinion important and distinguishes this case from cases in which (for example) there is a public interest in the disclosure of the existence of a sexual relationship (say, between a politician and someone whom she has appointed to public office) but the addition of salacious details or intimate photographs is disproportionate and unacceptable. The latter, even if accompanying a legitimate disclosure of the sexual relationship, would be too intrusive and demeaning.

61. That brings me to what seems to be the only point of principle which arises in this case. Where the main substance of the story is conceded to have been justified, should the newspaper be held liable whenever the judge considers that it was not necessary to have published some of the personal information? Or should the newspaper be allowed some margin of choice in the way it chooses to present the story?

62. In my opinion, it would be inconsistent with the approach which has been taken by the courts in a number of recent landmark cases for a newspaper to be held strictly liable for exceeding what a judge considers to have been necessary. The practical exigencies of journalism demand that some latitude must be given. Editorial decisions have to be made quickly and with less information than is available to a court which afterwards reviews the matter at leisure. And if any margin is to be allowed, it seems to me strange to hold the *Mirror* liable in damages for a decision which three experienced judges in the Court of Appeal have held to be perfectly justified.

63. Ms Campbell now concedes the truth of the essentials of the *Mirror's* story but the editor said in evidence that he thought at the time, in view of her previous falsehoods, that it was necessary to include some detail and photographs by way of verification. It is unreasonable to expect that in matters of judgment any more than accuracy of reporting, newspapers will always get it absolutely right. To require them to do so would tend to inhibit the publication of facts which should in the public interest be made known. That was the basis of the decision of this House in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 and I think that it is equally applicable to the publication of private personal information in the cases in which the essential part of that information can legitimately be published.

64. A similar point, in relation to the protection of private information, was made by the European Court of Human Rights in *Fressoz and Roire v France* (2001) 31 EHRR 28. *Le Canard enchaîné* published the salary of M. Calvet, the chairman of Peugeot, (which was publicly available information) and also, by way of confirmation, photographs of the relevant part of his tax assessment, which was confidential and could not lawfully be published. The Strasbourg court said that the conviction of the journalists for publishing the assessment infringed their right of free speech under article 10:

> "If, as the Government accepted, the information about M. Calvet's annual income was lawful and its disclosure permitted, the applicants' conviction merely for having published the documents in which the information was contained, namely the tax assessments, cannot be justified under article 10. In essence, that article leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility."

65. In my opinion the Court of Appeal was right in the present case to say [2003] QB 633, 662, para 64:

> "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 article 10 right to freedom of expression will be unnecessarily inhibited."

66. It is only in connection with the degree of latitude which must be allowed to the press in the way it chooses to present its story that I think it is relevant to consider Ms Campbell's relationship with the media. She and they have for many years both fed upon each other. She has given them stories to sell their papers and they have given her publicity to promote her career. This does not deprive Ms Campbell of the right to privacy in respect of areas of her life which she has not chosen to make public. But I think it means that when a newspaper publishes what is in substance a legitimate story, she cannot insist upon too great a nicety of judgment in the circumstantial detail with which the story is presented.

67. The trial judge described (at paragraph 35) the "essential question" as being—

> "whether even if a public figure which includes an international celebrity, such as Miss Naomi Campbell, courts and expects media exposure, she is left with a residual area of privacy which the court should protect if its revelation would amount to a breach of confidentiality."

68. To that question I would certainly answer yes, but it was not the question which arose in this case. Accepting that Ms Campbell has a "residual area of privacy", the question is whether it was infringed by the publication in this case. To answer that question one must assess the disclosures said to be objectionable in the light of the disclosures conceded to be legitimate. One must then ask whether the journalists exceeded the latitude which should be allowed to them in presenting their story.

69. The judge made no attempt to answer either of these questions. He said:

> "In my judgment clearly the publication of information about details of her therapy in regularly attending meetings of [NA] was to Miss Naomi Campbell's detriment. It was, viewed objectively, likely to affect adversely her attendance and participation in therapy meetings."

70. The judge did not analyse the details which were said to be likely to have this effect or explain why they should have this effect when the bare revelation that she was a drug addict seeking therapy would not. The question of the effect of the publication upon Ms Campbell's therapy was not pleaded. She is resident in the United States but travels widely and often visits London. In her witness statement she said that since the article she had not been back to

that particular meeting place but had attended a few meetings in England and continued to attend NA meetings in other countries. The question was not further explored. Nor did the judge consider whether, even assuming that the article had included unnecessary details, it was within the margin of judgment which the newspaper should be allowed. In my opinion it was and the judge's failure to take this into account was an error of principle which the Court of Appeal was right to correct.

71. As for the Court of Appeal's own approach, I do not understand the submission that it erred in saying, at p 659, para 48, that it did not equate "the information that Miss Campbell was receiving therapy from [NA] … with disclosure of clinical details of medical treatment". I do not imagine that the Court of Appeal was unaware of the nature of the therapy provided by NA or was attempting some obscure metaphysical distinction. It was saying only that the support provided by NA for large numbers of drug addicts is so well known that it cannot be compared with the details of individual clinical treatment. This seems to me no more than common sense.

72. That leaves the question of the photographs. In my opinion a photograph is in principle information no different from any other information. It may be a more vivid form of information than the written word ("a picture is worth a thousand words"). That has to be taken into account in deciding whether its publication infringes the right to privacy of personal information. The publication of a photograph cannot necessarily be justified by saying that one would be entitled to publish a verbal description of the scene: see *Douglas v Hello! Ltd* [2001] QB 967. But the principles by which one decides whether or not the publication of a photograph is an unjustified invasion of the privacy of personal information are in my opinion the same as those which I have already discussed.

73. In the present case, the pictures were taken without Ms Campbell's consent. That in my opinion is not enough to amount to a wrongful invasion of privacy. The famous and even the not so famous who go out in public must accept that they may be photographed without their consent, just as they may be observed by others without their consent. As Gleeson CJ said in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, 13, para 41:

> "Part of the price we pay for living in an organised society is that we are exposed to observation in a variety of ways by other people."

74. But the fact that we cannot avoid being photographed does not mean that anyone who takes or obtains such photographs can publish them to the world at large. In the recent case of *Peck v United Kingdom* (2003) 36 EHRR 41 Mr Peck was filmed on a public street in an embarrassing moment by a CCTV camera. Subsequently, the film was broadcast several times on the television. The Strasbourg court said (at p. 739) that this was an invasion of his privacy contrary to article 8:

> "the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on August 20, 1995."

75. In my opinion, therefore, the widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in

a public place, may be an infringement of the privacy of his personal information. Likewise, the publication of a photograph taken by intrusion into a private place (for example, by a long distance lens) may in itself by such an infringement, even if there is nothing embarrassing about the picture itself: *Hellewell v Chief Constable of Derbyshire* [1985] 1 WLR 804, 807. As Lord Mustill said in *R v Broadcasting Standards Commission, Ex p BBC* [2001] QB 885, 900, "An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate."

76. In the present case, however, there was nothing embarrassing about the picture, which showed Ms Campbell neatly dressed and smiling among a number of other people. Nor did the taking of the picture involve an intrusion into private space. Hundreds of such "candid" pictures of Ms Campbell, taken perhaps on more glamorous occasions, must have been published in the past without objection. The only ground for claiming that the picture was a wrongful disclosure of personal information was by virtue of the caption, which said that she was going to or coming from a meeting of NA. But this in my opinion added nothing to what was said in the text.

77. No doubt it would have been possible for the *Mirror* to have published the article without pictures. But that would in my opinion again be to ignore the realities of this kind of journalism as much as to expect precision of judgment about the amount of circumstantial detail to be included in the text. We value the freedom of the press but the press is a commercial enterprise and can flourish only by selling newspapers. From a journalistic point of view, photographs are an essential part of the story. The picture carried the message, more strongly than anything in the text alone, that the *Mirror's* story was true. So the decision to publish the pictures was in my opinion within the margin of editorial judgment and something for which appropriate latitude should be allowed.

78. I would therefore dismiss the appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

79. The facts of this case have been described by my noble and learned friend Lord Nicholls of Birkenhead, and I gratefully adopt his account of them. But I should like to say a few more words about the general background before I explain why I have reached the conclusion that this appeal must be allowed.

The background

80. The business of fashion modelling, in which the appellant Naomi Campbell has built up such a powerful reputation internationally, is conducted under the constant gaze of the media. It is also highly competitive. It is a context where public reputation as a forceful and colourful personality adds value to the physical appearance of the individual. Much good can come of this, if the process is carefully and correctly handled. But there are aspects of Miss Campbell's exploitation of her status as a celebrity that have attracted criticism. She has been manipulative and selective in what she has revealed about herself. She has engaged in a deliberately false presentation of herself as someone who, in contrast to many models, has managed to keep clear of illegal drugs. The true position, it is now agreed, is that she has made a practice of abusing drugs. This has caused her medical problems, and it has affected

her behaviour to such an extent that she has required and has received therapy for her addiction.

81. Paradoxically, for someone in Miss Campbells' position, there are few areas of the life of an individual that are more in need of protection on the grounds of privacy than the combating of addiction to drugs or to alcohol. It is hard to break the habit which has led to the addiction. It is all too easy to give up the struggle if efforts to do so are exposed to public scrutiny. The struggle, after all, is an intensely personal one. It involves a high degree of commitment and of self-criticism. The sense of shame that comes with it is one of the most powerful of all the tools that are used to break the habit. But shame increases the individual's vulnerability as the barriers that the habit has engendered are broken down. The smallest hint that the process is being watched by the public may be enough to persuade the individual to delay or curtail the treatment. At the least it is likely to cause distress, even to those who in other circumstances like to court publicity and regard publicity as a benefit.

82. The question in this case is whether the publicity which the respondents gave to Miss Campbell's drug addiction and to the therapy which she was receiving for it in an article which was published in "The Mirror" newspaper on 1 February 2001 is actionable on the ground of breach of confidence. Miss Campbell cannot complain about the fact that publicity was given in this article to the fact that she was a drug addict. This was a matter of legitimate public comment, as she had not only lied about her addiction but had sought to benefit from this by comparing herself with others in the fashion business who were addicted. As the Court of Appeal observed [2003] QB 633, 658, para 43, where a public figure chooses to make untrue pronouncements abut his or her private life, the press will normally be entitled to put the record straight.

83. Miss Campbell's case is that information about the details of the treatment which she was receiving for the addiction falls to be treated differently. This is because it was not the subject of any falsehood that was in need of correction and because it was information which any reasonable person who came into possession of it would realise was obtained in confidence. The argument was put succinctly in the particulars of her claim, where it was stated:

> "Information about whether a person is receiving medical or similar treatment for addiction, and in particular details relating to such treatment or the person's reaction to it, is obviously confidential. The confidentiality is the stronger where, as here, disclosure would tend to disrupt the treatment and/or its benefits for the person concerned and others sharing in, or giving, or wishing to take or participate in, the treatment. The very name 'Narcotics Anonymous' underlines the importance of privacy in the context of treatment as do the defendants' own words - 'To the rest of the group she is simply Naomi, the addict.'"

84. The respondents' answer is based on the proposition that the information that was published about her treatment was peripheral and not sufficiently significant to amount to a breach of the duty of confidence that was owed to her. They also maintain that the right balance was struck between Miss Campbell's right to respect for her private life under article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the right to freedom of expression that is enshrined in article 10(1) of the Convention.

85. The questions that I have just described seem to me to be essentially questions of fact and degree and not to raise any new issues of principle. As Lord Woolf CJ said in *A v B plc* [2003] QB 195, 207, paras 11(ix) and (x), the need for the existence of a confidential relationship should not give rise to problems as to the law because a duty of confidence will arise whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably expect his privacy to be protected. The difficulty will be as to the relevant facts, bearing in mind that, if there is an intrusion in a situation where a person can reasonably expect his privacy to be respected, that intrusion will be capable of giving rise to liability unless the intrusion can be justified: see also the exposition in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 282 by Lord Goff of Chieveley, where he set out the three limiting principles to the broad general principle that a duty of confidence arises when confidential information comes to the knowledge of a person where he has notice that the information is confidential. The third limiting principle is particularly relevant in this case. This is the principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.

86. The language has changed following the coming into operation of the Human Rights Act 1998 and the incorporation into domestic law of article 8 and article 10 of the Convention. We now talk about the right to respect for private life and the countervailing right to freedom of expression. The jurisprudence of the European Court offers important guidance as to how these competing rights ought to be approached and analysed. I doubt whether the result is that the centre of gravity, as my noble and learned friend Lord Hoffmann says, has shifted. It seems to me that the balancing exercise to which that guidance is directed is essentially the same exercise, although it is plainly now more carefully focussed and more penetrating. As Lord Woolf CJ said in *A v B plc* [2003] QB 195, 202, para 4, new breadth and strength is given to the action for breach of confidence by these articles.

87. Where a case has gone to trial it would normally be right to attach a great deal of weight to the views which the judge has formed about the facts and where he thought the balance should be struck after reading and hearing the evidence. The fact that the Court of Appeal felt able to differ from the conclusions which Morland J reached on these issues brings me to the first point on which I wish to comment.

Was the information confidential?

88. The information contained in the article consisted of the following five elements: (1) the fact that Miss Campbell was a drug addict; (2) the fact that she was receiving treatment for her addiction; (3) the fact that the treatment which she was receiving was provided by Narcotics Anonymous; (4) details of the treatment - for how long, how frequently and at what times of day she had been receiving it, the nature of it and extent of her commitment to the process; and (5) a visual portrayal by means of photographs of her when she was leaving the place where treatment had been taking place.

89. The trial judge drew the line between the first two and the last three elements. Mr Caldecott QC for Miss Campbell said that he was content with this distinction. So the fact that she was a drug addict was open to public comment in view of her denials, although he maintained that this would normally be treated as a medical condition that was entitled to protection. He accepted that the fact that she was receiving treatment for the condition was not in itself intrusive in this context. Moreover disclosure of this fact in itself could not harm

her therapy. But he said that the line was crossed as soon as details of the nature and frequency of the treatment were given, especially when these details were accompanied by a covertly taken photograph which showed her leaving one of the places where she had been undertaking it. This was an area of privacy where she was entitled to be protected by an obligation of confidence.

90. Court of Appeal recognised at the start of their discussion of this point that some categories of information are well recognised as confidential: [2003] QB 633, 659, para 47. They noted that these include details of a medical condition or its treatment. But they were not prepared to accept that information that Miss Campbell was receiving therapy from Narcotics Anonymous was to be equated with disclosure of clinical details of the treatment of a medical condition: para 48. This was contrary to the view which Morland J appears to have taken when he said at para 40 that it mattered not whether therapy was obtained by means of professional medical input or by alternative means such as group counselling or by organised meetings between sufferers. The Court of Appeal were also of the view that the publication of this information was not, in its context, sufficiently significant to shock the conscience and thus to amount to a breach of the duty of confidence which was owed to her. They accepted the respondents' argument that disclosure of these details was peripheral. They had regard too to the fact that some of the additional information that was given in the article was inaccurate.

91. I do not think that the Court of Appeal were right to reject the analogy which the judge drew between information that Miss Campbell was receiving therapy from Narcotics Anonymous and information about details of a medical condition or its treatment. Mr Brown QC for the respondents said that it was not his case that there was an essential difference or, as he put it, a bright line distinction between therapy and medical treatment. He maintained that the Court of Appeal were simply drawing attention to a difference of degree. But it seems to me that there is more in this passage in the Court of Appeal's judgment and its criticism of the judge's analogy than a difference of degree. The implication of the Court of Appeal's criticism of the judge's reasoning is that the details of non-medical therapy are less deserving of protection than the details of a medical condition or its treatment. That seems to be why, as they put it in para 48, the two "are not to be equated."

92. The underlying question in all cases where it is alleged that there has been a breach of the duty of confidence is whether the information that was disclosed was private and not public. There must be some interest of a private nature that the claimant wishes to protect: *A v B Ltd* [2003] QB 195, 206, para 11 (vii). In some cases, as the Court of Appeal said in that case, the answer to the question whether the information is public or private will be obvious. Where it is not, the broad test is whether disclosure of the information about the individual ("A") would give substantial offence to A, assuming that A was placed in similar circumstances and was a person of ordinary sensibilities.

93. The trial judge applied the test which was suggested by Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1. In that case the respondent sought an interlocutory injunction against the broadcasting of a film about its operations at a bush tail possum processing facility. It showed the stunning and killing of possums. Gleeson CJ said at pp 11-12, paras 34-35, that information about the respondent's slaughtering methods was not confidential in its nature and that, while the activities filmed were carried out on private property, they were not shown, or alleged, to be private in any other sense. At p 13, para 41 he observed that there was a large area in between what was necessarily public and what was necessarily private:

> "An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private, as may certain kinds of activity which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private."

Applying to the facts of the case the test which he had described in the last sentence of this paragraph, he said in para 43 that the problem for the respondent was that the activities secretly observed and filmed were not relevantly private.

94. The test which Gleeson CJ has identified is useful in cases where there is room for doubt, especially where the information relates to an activity or course of conduct such as the slaughtering methods that were in issue in that case. But it is important not to lose sight of the remarks which preceded it. The test is not needed where the information can easily be identified as private. It is also important to bear in mind its source, and the guidance which the source offers as to whether the information is public or private. It is taken from the definition of the privacy tort in the United States, where the right of privacy is invaded if the matter which is publicised is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public: *Restatement (Second) of the Law of* Torts (1977), p 383, para 625D. The reference to a person of ordinary sensibilities is, as Gleeson CJ acknowledged in his footnote on p 13, a quotation from William L Prosser, *Privacy*, (1960) 48 California Law Review 383. As Dean Prosser put it at pp 396-397, the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities, who must expect some reporting of his daily activities. The law of privacy is not intended for the protection of the unduly sensitive.

95. I think that the judge was right to regard the details of Miss Campbell's attendance at Narcotics Anonymous as private information which imported a duty of confidence. He said that information relating to Miss Campbells' therapy for drug addiction giving details that it was by regular attendance at Narcotics Anonymous meetings was easily identifiable as private. With reference to the guidance that the Court of Appeal gave in *A v B plc* [2003] QB 195, 206, para 11 (vii), he said that it was obvious that there existed a private interest in this fact that was worthy of protection. The Court of Appeal, on the other hand, seem to have regarded the receipt of therapy from Narcotics Anonymous as less worthy of protection in comparison with treatment for the condition administered by medical practitioners. I would not make that distinction. Views may differ as to what is the best treatment for an addiction. But it is well known that persons who are addicted to the taking of illegal drugs or to alcohol can benefit from meetings at which they discuss and face up to their addiction. The private nature of these meetings encourages addicts to attend them in the belief that they can do so anonymously. The assurance of privacy is an essential part of the exercise. The therapy is at risk of being damaged if the duty of confidence which the participants owe to each other is breached by making details of the therapy, such as where, when and how often it is being undertaken, public. I would hold that these details are obviously private.

96. If the information is obviously private, the situation will be one where the person to whom it relates can reasonably expect his privacy to be respected. So there is normally no need to go on and ask whether it would be highly offensive for it to be published. The trial judge nevertheless asked himself, as a check, whether the information that was disclosed about Miss Campbell's attendance at these meetings satisfied Gleeson CJ's test of confidentiality. His conclusion, echoing the words of Gleeson CJ, was that disclosure that her therapy for drug addiction was by regular attendance at meetings of Narcotics Anonymous would be highly offensive to a reasonable person of ordinary sensibilities. The Court of Appeal disagreed with this assessment. In para 53 they said that, given that it was legitimate for the respondents to publish the fact that Miss Campbell was a drug addict and that she was receiving treatment, it was not particularly significant to add the fact that the treatment consisted of attendance at meetings of Narcotics Anonymous. In para 54 they said that they did not consider that a reasonable person of ordinary sensibilities, on reading that Miss Campbell was a drug addict, would have found it highly offensive, or even offensive. They acknowledged that the reader might have found it offensive that what were obviously covert photographs had been taken of her, but that this of itself was not relied upon as a ground for legal complaint. Having drawn these conclusions they held in para 58 that the publication of the information of which Miss Campbell complains was not, in its context, sufficiently significant to amount to a breach of duty of confidence owed to her.

97. This part of the Court of Appeal's examination of the issue appears to have been influenced by the fact that they did not regard disclosure of the fact that Miss Campbell was receiving therapy from Narcotics Anonymous capable of being equated with treatment of a clinical nature. If one starts from the position that a course of therapy which takes this form is of a lower order, it is relatively easy to conclude that a reasonable person of ordinary sensibilities would not regard the publication of the further details of her therapy as particularly significant. But I think that it is unrealistic to look through the eyes of a reasonable person of ordinary sensibilities at the degree of confidentiality that is to be attached to a therapy for drug addiction without relating this objective test to the particular circumstances.

98. Where the person is suffering from a condition that is in need of treatment one has to try, in order to assess whether the disclosure would be objectionable, to put oneself into the shoes of a reasonable person who is in need of that treatment. Otherwise the exercise is divorced from its context. The fact that no objection could be taken to disclosure of the first two elements in the article does not mean that they must be left out of account in a consideration as to whether disclosure of the other elements was objectionable. The article must be read as whole along with the photographs to give a proper perspective to each element. The context was that of a drug addict who was receiving treatment. It is her sensibilities that needed to be taken into account. Critical to this exercise was an assessment of whether disclosure of the details would be liable to disrupt her treatment. It does not require much imagination to appreciate the sense of unease that disclosure of these details would be liable to engender, especially when they were accompanied by a covertly taken photograph. The message that it conveyed was that somebody, somewhere, was following her, was well aware of what was going on and was prepared to disclose the facts to the media. I would expect a drug addict who was trying to benefit from meetings to discuss her problem anonymously with other addicts to find this distressing and highly offensive.

99. The approach which the Court of Appeal took to this issue seems to me, with great respect, to be quite unreal. I do not think that they had a sound basis for differing from the

conclusion reached by the trial judge as to whether the information was private. They were also in error, in my opinion, when they were asking themselves whether the disclosure would have offended the reasonable man of ordinary susceptibilities. The mind that they examined was the mind of the reader: para 54. This is wrong. It greatly reduces the level of protection that is afforded to the right of privacy. The mind that has to be examined is that, not of the reader in general, but of the person who is affected by the publicity. The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity.

100. In *P v D* [2000] 2 NZLR 591 the claimant was a public figure who was told that publicity was about to be given to that fact that he had been treated at a psychiatric hospital. In my opinion the objective test was correctly described and applied by Nicholson J at p 601, para 39 when he said:

> "The factor that the matter must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities prescribes an objective test. But this is on the basis of what a reasonable person of ordinary sensibilities would feel if they were in the same position, that is, in the context of the particular circumstances. I accept that P has the stated feelings and consider that a reasonable person of ordinary sensibilities would in the circumstances also find publication of information that they had been a patient in a psychiatric hospital highly offensive and objectionable."

That this is the correct approach is confirmed by the *Restatement*, p 387, which states at the end of its comment on clause (a) of para 652D:

> "It is only when the publicity given *to him* is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises." [emphasis added]

101. These errors have an important bearing on the question whether the Court of Appeal were right to differ from the decision of the trial judge on the question where the balance lay between the private interest of Miss Campbell and the public interest in the publication of these details.

102. In view of the conclusion that I have reached on this issue it is not necessary for me to say anything about the weight that the Court of Appeal attached to the inaccuracies, except to observe that there is a vital difference between inaccuracies that deprive the information of its intrusive quality and inaccuracies that do not. The inaccuracies that were relied on here fall into the later category. The length of time that Miss Campbell had been attending meetings was understated, while the frequency of her attendance at meetings was exaggerated. And the caption to the photograph in the first article stated that she was arriving at the meeting, when the fact was that she was leaving it. These were errors of a minor nature only, which did not affect the overall significance of the details that were published. I would hold that they did not detract from the private nature of what was being published.

The competing rights of free speech and privacy

103. Morland J did not give any detailed reasons in para 70 of his judgment for his conclusion that, striking the balance between articles 8 and 10 and having full regard to section 12(4) of the Human Rights Act 1998, Miss Campbell was entitled to the remedy of damages. But he did recognise in para 98 that neither article 10 nor article 8 had pre-eminence, the one over the other. Court of Appeal's approach to the respondents' entitlement to publish what they described as the peripheral details was based on their view that the provision of these details as background to support the story that Miss Campbell was a drug addict was a legitimate part of the journalistic package which was designed to demonstrate that she had been deceiving the public when she said that she did not take drugs: [2003] QB 633, 662, para 62. In para 64 they said that its publication was justified in order to give a factual account that had the detail necessary to carry credibility. But they do not appear to have attempted to balance the competing Convention rights against each other. No doubt this was because they had already concluded that these details were peripheral and that their publication was not, in its context, sufficiently significant to amount to a breach of duty of confidence: para 58.

104. In my opinion the Court of Appeal's approach is open to the criticism that, because they wrongly held that these details were not entitled to protection under the law of confidence, they failed to carry out the required balancing exercise.

105. The context for this exercise is provided by articles 8 and 10 of the Convention. The rights guaranteed by these articles are qualified rights. Article 8(1) protects the right to respect for private life, but recognition is given in article 8(2) to the protection of the rights and freedoms of others. Article 10(1) protects the right to freedom of expression, but article 10(2) recognises the need to protect the rights and freedoms of others. The effect of these provisions is that the right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public. And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life.

106. There is nothing new about this, as the need for this kind of balancing exercise was already part of English law: *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109, per Lord Goff of Chieveley. But account must now be taken of the guidance which has been given by the European Court on the application of these articles. As Sedley LJ pointed out in *Douglas v Hello! Ltd* [2001] 1 QB 967, 1004, para 135:

> "The European Court of Human Rights has always recognised the high importance of free media of communication in a democracy, but its jurisprudence does not - and could not consistently with the Convention itself - give article 10(1) the presumptive priority which is given, for example, to the First Amendment in the jurisprudence of the United States' courts. Everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court."

107. I accept, of course, that the importance which the Court of Appeal attached to the journalistic package finds support in the authorities. In *Jersild v Denmark* (1994) 19 EHRR 1, para 31 the European Court, repeating what was said in *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153, para 59, declared that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. It then added these comments in para 31:

> "Whilst the press must not overstep the bounds set, *inter alia*, in the interest of 'the protection of the reputation and rights of others', it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'."

108. The freedom of the press to exercise its own judgment in the presentation of journalistic material was emphasised in a further passage in *Jersild's* case where the court said, at p 26, para 31:

> "At the same time, the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the court recalls that article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed."

In *Fressoz v France* (2001) 31 EHRR 28, 60, para 54 the court said that in essence article 10 leaves it for journalists to decide whether or not it is necessary to reproduce material to ensure credibility, adding:

> "It protects journalists' rights to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism."

109. There was no need for the court in *Jersild's* case to examine the question how the article 10 right which was relied on was to be balanced against a competing right under article 8 of the Convention. The applicants maintained that their right to freedom of expression under article 10 was infringed when they were charged and convicted of committing offences which resulted from their choice of the material that had been published. The objectionable remarks which were contained in the television broadcast of a news programme were of a racist nature. The focus of the case was on the right to impart information and ideas of public interest and the right of the public to receive such ideas. The *Fressoz* case on the other hand was about the disclosure of information which was confidential as it was contained in the taxpayer's tax file. It was lawful to disclose information about the taxpayer's income. The question was whether publication of the documents in which that information was contained could be justified under article 10. So the court addressed itself to the question whether the objective of preserving fiscal confidentiality, which in itself was legitimate, constituted a relevant and sufficient justification for the interference with the article 10 right. There was a balance to be struck by weighing the interference with freedom to disclose against the need for confidentiality.

110. The need for a balancing exercise to be carried out is also inherent in the provisions of article 10 itself, as the court explained in *Bladet Troms? and Stensaas v Norway* (2000) 29 EHRR 125. In that case a newspaper and its editor complained that their right to freedom of expression had been breached when they were found liable in defamation proceedings for statements in articles which they had published about the methods used by seal hunters in the hunting of harp seals. At p 167, para 59 the court said:

"Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart - in a manner consistent with its obligations and responsibilities - information and ideas on all matters of public interest."

The court dealt with the question of balance at p169, para 65:

"Article 10 of the Convention does not, however, guarantee a wholly freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it 'duties and responsibilities' which also apply to the press. These 'duties and responsibilities' are liable to assume significance when, as in the present case, there is question of attacking the reputation of private individuals and examining the 'rights of others'. As pointed out by the government, the seal hunters' right to protection of their honour and reputation is itself internationally recognised under Article 17 of the International Covenant on Civil and Political Rights. Also of relevance for the balancing of competing interests which the Court must carry out is the fact that under article 6(2) of the Convention the seal hunters had a right to be presumed innocent of any criminal offence until proved guilty. By reason of the duties and responsibilities' inherent in the exercise of the freedom of expression, the safeguard afforded by article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith to provide accurate and reliable information in accordance with the ethics of journalism."

111. Section 12(4) of the Human Rights Act 1998 provides:

"The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to -
(a) the extent to which -
(i) the material has, or is about to, become available to the public; or
(ii) it is, or would be, in the pubic interest for the material to be published;
(b) any relevant privacy code."

But, as Sedley LJ said in *Douglas v Hello! Ltd* [2001] QB 967, 1003, para 133, you cannot have particular regard to article 10 without having equally particular regard at the very least to article 8: see also *In re S (A Child) (Identifications: Restrictions on Publication)* [2003] 3 WLR 1425, 1450, para 52 where Hale LJ said that section 12(4) does not give either article pre-eminence over the other. These observations seem to me to be entirely consistent with the jurisprudence of the European Court, as is the following passage in Sedley LJ's opinion in *Douglas* at p 1005, para 137:

"The case being one which affects the Convention right of freedom of expression, section 12 of the Human Rights Act 1998 requires the court to have regard to article 10 (as, in its absence, would section 6). This, however, cannot, consistently with section 3 and article 17, give the article 10(1) right of free expression a presumptive priority over other rights. What it does is require the court to consider article 10(2) along with article 10(1), and by doing so to bring into the frame the conflicting right to

> respect for privacy. This right, contained in article 8 and reflected in English law, is in turn qualified in both contexts by the right of others to free expression. The outcome, which self-evidently has to be the same under both articles, is determined principally by considerations of proportionality."

It is to be noted too that clause 3(i) of the Code of Practice of the Press Complaints Committee acknowledges this limitation. It states that a person may have a reasonable expectation of privacy in a public place.

Striking the balance

112. There is no doubt that the presentation of the material that it was legitimate to convey to the public in this case without breaching the duty of confidence was a matter for the journalists. The choice of language used to convey information and ideas, and decisions as to whether or not to accompany the printed word by the use of photographs, are pre-eminently editorial matters with which the court will not interfere. The respondents are also entitled to claim that they should be accorded a reasonable margin of appreciation in taking decisions as to what details needed to be included in the article to give it credibility. This is an essential part of the journalistic exercise.

113. But decisions about the publication of material that is private to the individual raise issues that are not simply about presentation and editing. Any interference with the public interest in disclosure has to be balanced against the interference with the right of the individual to respect for their private life. The decisions that are then taken are open to review by the court. The tests which the court must apply are the familiar ones. They are whether publication of the material pursues a legitimate aim and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy. The jurisprudence of the European Court of Human Rights explains how these principles are to be understood and applied in the context of the facts of each case. Any restriction of the right to freedom of expression must be subjected to very close scrutiny. But so too must any restriction of the right to respect for private life. Neither article 8 nor article 10 has any pre-eminence over the other in the conduct of this exercise. As Resolution 1165 of the Parliamentary Assembly of the Council of Europe (1998), para 11, pointed out, they are neither absolute not in any hierarchical order, since they are of equal value in a democratic society.

The article 10 right

114. In the present case it is convenient to begin by looking at the matter from the standpoint of the respondents' assertion of the article 10 right and the court's duty as a public authority under section 6(1) of the Human Rights Act 1998, which section 12(4) reinforces, not to act in a way which is incompatible with that Convention right.

115. The first question is whether the objective of the restriction on the article 10 right - the protection of Miss Campbell's right under article 8 to respect for her private life - is sufficiently important to justify limiting the fundamental right to freedom of expression which the press assert on behalf of the public. It follows from my conclusion that the details of Miss Campbell's treatment were private that I would answer this question in the affirmative. The second question is whether the means chosen to limit the article 10 right are rational, fair and not arbitrary and impair the right as minimally as is reasonably possible. It is not enough to

assert that it would be reasonable to exclude these details from the article. A close examination of the factual justification for the restriction on the freedom of expression is needed if the fundamental right enshrined in article 10 is to remain practical and effective. The restrictions which the court imposes on the article 10 right must be rational, fair and not arbitrary, and they must impair the right no more than is necessary.

116. In my opinion the factors that need to be weighed are, on the one hand, the duty that was recognised in *Jersild v Denmark* (1994) 19 EHRR 1, para 31 to impart information and ideas of public interest which the public has a right to receive, and the need that was recognised in *Fressoz v France* (2001) 31 EHRR 28, para 54 for the court to leave it to journalists to decide what material needs to be reproduced to ensure credibility; and, on the other hand, the degree of privacy to which Miss Campbell was entitled under the law of confidence as to the details of her therapy. Account should therefore be taken of the respondents' wish to put forward a story that was credible and to present Miss Campbell in a way that commended her for her efforts to overcome her addiction.

117. But it should also be recognised that the right of the public to receive information about the details of her treatment was of a much lower order than the undoubted right to know that she was misleading the public when she said that she did not take drugs. In *Dudgeon v United Kingdom* (1981) 4 EHRR 149, para 52 the European Court said that the more intimate the aspects of private life which are being interfered with, the more serious must be the reasons for doing so before the interference can be legitimate. *Clayton and Tomlinson*, *The Law of Human Rights* (2000), para 15.162, point out that the court has distinguished three kinds of expression: political expression, artistic expression and commercial expression, and that it consistently attaches great importance to political expression and applies rather less rigorous principles to expression which is artistic and commercial. According to the court's well-established case law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and the self-fulfilment of each individual: *Tammer v Estonia* (2001) 37 EHRR 857, para 59. But there were no political or democratic values at stake here, nor has any pressing social need been identified: contrast *Goodwin v United Kingdom* (1996) 22 EHRR 123, para 40.

118. As for the other side of the balance, Keene LJ said in *Douglas v Hello! Ltd* [2001] QB 967, para 168, that any consideration of article 8 rights must reflect the fact that there are different degrees of privacy. In the present context the potential for disclosure of the information to cause harm is an important factor to be taken into account in the assessment of the extent of the restriction that was needed to protect Miss Campbell's right to privacy.

The article 8 right

119. Looking at the matter from Miss Campbell's point of view and the protection of her article 8 Convention right, publication of details of the treatment which she was undertaking to cure her addiction - that she was attending Narcotics Anonymous, for how long, how frequently and at what times of day she had been attending this therapy, the nature of it and extent of her commitment to the process and the publication of the covertly taken photographs (the third, fourth and fifth of the five elements contained in the article) - had the potential to cause harm to her, for the reasons which I have already given. So I would attach a good deal of weight to this factor.

120. As for the other side of the balance, a person's right to privacy may be limited by the public's interest in knowing about certain traits of her personality and certain aspects of her private life, as L'Heureux-Dubé and Bastarache JJ in the Supreme Court of Canada recognised in *Aubry v Les ?ditions Vice-Versa Inc* [1998] 1 SCR 591, paras 57-58. But it is not enough to deprive Miss Campbell of her right to privacy that she is a celebrity and that her private life is newsworthy. A margin of appreciation must, of course, be given to the journalist. Weight must be given to this. But to treat these details merely as background was to undervalue the importance that was to be attached to the need, if Miss Campbell was to be protected, to keep these details private. And it is hard to see that there was any compelling need for the public to know the name of the organisation that she was attending for the therapy, or for the other details of it to be set out. The presentation of the article indicates that this was not fully appreciated when the decision was taken to publish these details. The decision to publish the photographs suggests that greater weight was being given to the wish to publish a story that would attract interest rather than to the wish to maintain its credibility.

121. Had it not been for the publication of the photographs, and looking to the text only, I would have been inclined to regard the balance between these rights as about even. Such is the effect of the margin of appreciation that must, in a doubtful case, be given to the journalist. In that situation the proper conclusion to draw would have been that it had not been shown that the restriction on the article 10 right for which Miss Campbell argues was justified on grounds of proportionality. But the text cannot be separated from the photographs. The words "Therapy: Naomi outside meeting" underneath the photograph on the front page and the words "Hugs: Naomi, dressed in jeans and baseball hat, arrives for a lunchtime group meeting this week" underneath the photograph on page 13 were designed to link that what might otherwise have been anonymous and uninformative pictures with the main text. The reader would undoubtedly make that link, and so too would the reasonable person of ordinary sensibilities. The reasonable person of ordinary sensibilities would also regard publication of the covertly taken photographs, and the fact that they were linked with the text in this way, as adding greatly overall to the intrusion which the article as a whole made into her private life.

122. The photographs were taken of Miss Campbell while she was in a public place, as she was in the street outside the premises where she had been receiving therapy. The taking of photographs in a public street must, as Randerson J said in *Hosking v Runting* [2003] 3 NZLR 385, 415, para 138, be taken to be one of the ordinary incidents of living in a free community. The real issue is whether publicising the content of the photographs would be offensive: Gault and Blanchard JJ in the Court of Appeal (25 March 2004), para 165. A person who just happens to be in the street when the photograph was taken and appears in it only incidentally cannot as a general rule object to the publication of the photograph, for the reasons given by L'Heureux-Dubé and Bastarache JJ in *Aubry v ?ditions Vice-Versa Inc* [1998] 1 SCR 591, para 59. But the situation is different if the public nature of the place where a photograph is taken was simply used as background for one or more persons who constitute the true subject of the photograph. The question then arises, balancing the rights at issue, where the public's right to information can justify dissemination of a photograph taken without authorisation: *Aubry,* para 61. The European Court has recognised that a person who walks down a public street will inevitably be visible to any member of the public who is also present and, in the same way, to a security guard viewing the scene through closed circuit television: *PG v JH v United Kingdom*, App No. 44787/98, para 57. But, as the court pointed out in the same paragraph, private life considerations may arise once any systematic or permanent record comes into existence of such material from the public domain. In *Peck v United Kingdom* [2003] 36 EHRR 719, para 62 the court held that the release and publication of CCTV forage

which showed the applicant in the process of attempting to commit suicide resulted in the moment being viewed to an extent that far exceeded any exposure to a passer-by or to security observation that he could have foreseen when he was in that street.

123. The same process of reasoning that led to the findings in *Peck* that the article 8 right had been violated and by the majority in *Aubry* that there had been an infringement of the claimant's right to respect for her private life can be applied here. Miss Campbell could not have complained if the photographs had been taken to show the scene in the street by a passer-by and later published simply as street scenes. But these were not just pictures of a street scene where she happened to be when the photographs were taken. They were taken deliberately, in secret and with a view to their publication in conjunction with the article. The zoom lens was directed at the doorway of the place where the meeting had been taking place. The faces of others in the doorway were pixilated so as not to reveal their identity. Hers was not, the photographs were published and her privacy was invaded. The argument that the publication of the photograph added credibility to the story has little weight. The photograph was not self-explanatory. Neither the place nor the person were instantly recognisable. The reader only had the editor's word as to the truth of these details.

124. Any person in Miss Campbell's position, assuming her to be of ordinary sensibilities but assuming also that she had been photographed surreptitiously outside the place where she been receiving therapy for drug addiction, would have known what they were and would have been distressed on seeing the photographs. She would have seen their publication, in conjunction with the article which revealed what she had been doing when she was photographed and other details about her engagement in the therapy, as a gross interference with her right to respect for her private life. In my opinion this additional element in the publication is more than enough to outweigh the right to freedom of expression which the defendants are asserting in this case.

Conclusion

125. Despite the weight that must be given to the right to freedom of expression that the press needs if it is to play its role effectively, I would hold that there was here an infringement of Miss Campbell's right to privacy that cannot be justified. In my opinion publication of the third, fourth and fifth elements in the article (see para 88) was an invasion of that right for which she is entitled to damages. I would allow the appeal and restore the orders that were made by the trial judge.

THE BARONESS HALE OF RICHMOND

My Lords,

126. This case raises some big questions. How is the balance to be struck between everyone's right to respect for their private and family life under Article 8 of the European Convention on Human Rights and everyone's right to freedom of expression, including the freedom to receive and impart information and ideas under Article 10? How do those rights come into play in a dispute between two private persons? But the parties are largely agreed about the answers to these. They disagree about where that balance is to be struck in the individual case. In particular, how far is a newspaper able to go in publishing what would otherwise be confidential information about a celebrity in order to set the record straight? And does it matter that the article was illustrated by a covertly taken photograph?

The facts

127. Even the judges know who Naomi Campbell is. On 1 February 2001, the Daily Mirror published a front-page article under the headline 'Naomi: I am a drug addict'. This did not refer to any public confession she had made. The Mirror had discovered that she was attending meetings of Narcotics Anonymous. It knew enough about those meetings to construct an article based on what would have gone on there. It had also discovered that this had been going on for some time and that on the day in question she had been to two meetings at different places in London. The front-page article had a small picture of her emerging from the first meeting. The fuller article spread across pages 12 and 13 had a larger picture of her and others outside a building with a prominent café signboard in the foreground. The others' faces were pixillated. The article gave a full account of her history of difficult behaviour but was sympathetic to her attempts to 'beat the demons that have been haunting her.' It quoted anonymous friends of hers, and acknowledged both the seriousness of her commitment to therapy and the fragility of her state of recovery.

128. The original source of the story was either a fellow sufferer attending NA meetings or a member of Miss Campbell's staff or entourage. The Mirror had sent along a photographer in the hope of catching her outside the meeting. This done, the editor rang her agent the evening before publication. He pretended that the photographer had happened to be in the street when he saw Miss Campbell coming out of a shop and followed her to the meeting. The agent told the editor that she had 'no comment' but that NA was a 'medical thing' and that it would be 'morally wrong' to publish it.

129. At trial and ever since, however, it has been accepted that the Mirror was entitled to publish the fact that Miss Campbell was a drug addict and was having therapy. She had publicly denied any involvement with illegal drugs, in particular in a television interview after an admission to a clinic in America in 1997, and the paper was entitled to put the record straight. It was also entitled, even obliged, to balance that disclosure with the fact that she was addressing the problem by having therapy. But, it was argued, the paper was not entitled to disclose that she was attending meetings of Narcotics Anonymous, or that she had been doing so for some time and with some frequency. Nor was it entitled to illustrate the story with covert photography of Miss Campbell in the company of other participants in the meeting.

130. Proceedings for breach of confidence and infringement of privacy were issued that same day. At trial only the former was pursued (along with a claim under the Data Protection Act 1998 which it is agreed adds nothing to the claim for breach of confidence). The judge held that the information 'giving details that [her treatment] was by regular attendance at NA meetings' clearly bore the badge of confidentiality. The details were obtained surreptitiously, assisted by covert photography when Miss Campbell was engaged, deliberately 'low key and drably dressed', in the private activity of therapy to advance her recovery from drug addiction. Given the source, they must have been imparted in circumstances importing an obligation of confidence. Publication was to her detriment. It was, viewed objectively, likely to affect adversely her attendance and participation in therapy meetings. Although the disclosure of her addiction and previous lying denial caused her 'considerable' distress, publication of the details about her sessions with NA caused her 'significant' distress. Article 8 was thus engaged and striking the balance with Article 10 she was entitled to a remedy.

131. The Court of Appeal reversed this decision. Given what it was accepted could be disclosed, the 'peripheral details' about her attendance at NA were part of the 'journalistic

package' adding colour and credibility to the story without increasing the breach of confidence. As complaint could not be made about the taking of the photographs, their publication added nothing.

The basic principles

132. Neither party to this appeal has challenged the basic principles which have emerged from the Court of Appeal in the wake of the Human Rights Act 1998. The 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights. In a case such as this, the relevant vehicle will usually be the action for breach of confidence, as Lord Woolf CJ held in *A v B plc* [2002] EWCA Civ 337, [2003] QB 195, 202, para 4:

> "[Articles 8 and 10] have provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified. The court's approach to the issues which the applications raise has been modified because, under section 6 of the 1998 Act, the court, as a public authority, is required not to 'act in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of these articles."

133. The action for breach of confidence is not the only relevant cause of action: the inherent jurisdiction of the High Court to protect the children for whom it is responsible is another example: see *In re S (a child) (identification: restrictions on publication)* [2003] EWCA Civ 963[2003] 3 WLR 1425. But the courts will not invent a new cause of action to cover types of activity which were not previously covered: see *Wainwright v Home Office* [2003] 3 WLR 1137. Mrs Wainwright and her disabled son suffered a gross invasion of their privacy when they were strip-searched before visiting another son in prison. The common law in this country is powerless to protect them. As they suffered at the hands of a public authority, the Human Rights Act would have given them a remedy if it had been in force at the time, but it was not. That case indicates that our law cannot, even if it wanted to, develop a general tort of invasion of privacy. But where existing remedies are available, the court not only can but must balance the competing Convention rights of the parties.

134. This begs the question of how far the Convention balancing exercise is premissed on the scope of the existing cause of action. Clearly outside its scope is the sort of intrusion into what ought to be private which took place in *Wainwright*. Inside its scope is what has been termed the protection of the individual's informational autonomy' by prohibiting the publication of confidential information. How does the scope of the action for breach of confidence accommodate the Article 8 rights of individuals? As Randerson J summed it up in *Hosking v Runting* [2003] 3 NZLR 385, 403, para 83 at p 403:

> "[The English Courts] have chosen to develop the claim for breach of confidence on a case by case basis. In doing so, it has been recognised that no pre-existing relationship is required in order to establish a cause of action and that an obligation of confidence

> may arise from the nature of the material or may be inferred from the circumstances in which it has been obtained."

The position we have reached is that the exercise of balancing article 8 and article 10 may begin when the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential. That is the way in which Lord Woolf CJ put it in *A v B plc*, at paras 11(ix) and (x) (in which he also referred to the approach of Dame Elizabeth Butler-Sloss P in *Venables v News Group Newspapers Ltd* [2001] Fam 430). It is, as I understand it, also the way in which it is put by my noble and learned friends, Lord Nicholls of Birkenhead (at paragraph 21) and Lord Hope of Craighead (at paragraph 84) in this case.

135. An objective reasonable expectation test is much simpler and clearer than the test sometimes quoted from the judgment of Gleeson CJ in the High Court of Australia in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, 13, para 42, that 'disclosure or observation would be highly offensive to a reasonable person of ordinary sensibilities'. It is important to set those words in their full context, bearing in mind that there is no constitutional protection of privacy in Australia:

> "There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private."

136. It is apparent, therefore, that the Chief Justice did not intend those last words to be the only test, particularly in respect of information which is obviously private, including information about health, personal relationships or finance. It is also apparent that he was referring to the sensibilities of a reasonable person placed in the situation of the subject of the disclosure rather than to its recipient.

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

138. The parties agree that neither right takes precedence over the other. This is consistent with Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe, para 10:

"The Assembly reaffirms the importance of everyone's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value."

139. Each right has the same structure. Article 8(1) states that "everyone has the right to respect for his private and family life, his home and his correspondence". Article 10(1) states that "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers. . . . " Unlike the article 8 right, however, it is accepted in article 10(2) that the exercise of this right 'carries with it duties and responsibilities.' Both rights are qualified. They may respectively be interfered with or restricted provided that three conditions are fulfilled:

(a) The interference or restriction must be 'in accordance with the law'; it must have a basis in national law which conforms to the Convention standards of legality.
(b) It must pursue one of the legitimate aims set out in each article. Article 8(2) provides for "the protection of the rights and freedoms of others". Article 10(2) provides for "the protection of the reputation or rights of others" and for "preventing the disclosure of information received in confidence". The rights referred to may either be rights protected under the national law or, as in this case, other Convention rights.
(c) Above all, the interference or restriction must be "necessary in a democratic society"; it must meet a "pressing social need" and be no greater than is proportionate to the legitimate aim pursued; the reasons given for it must be both "relevant" and "sufficient" for this purpose.

140. The application of the proportionality test is more straightforward when only one Convention right is in play: the question then is whether the private right claimed offers sufficient justification for the degree of interference with the fundamental right. It is much less straightforward when two Convention rights are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a "pressing social need" to protect it. The Convention jurisprudence offers us little help with this. The European Court of Human Rights has been concerned with whether the state's interference with privacy (as, for example, in *Z v Finland* (1997) 25 EHRR 371) or a restriction on freedom of expression (as, for example, in *Jersild v Denmark* (1994) 19 EHRR 1, *Fressoz and Roire v France* (2001) 31 EHRR 2, and *Tammer v Estonia* (2001) 37 EHRR 857) could be justified in the particular case. In the national court, the problem of balancing two rights of equal importance arises most acutely in the context of disputes between private persons.

141. Both parties accepted the basic approach of the Court of Appeal in *In re S* [2003] 3 WLR 1425, 1451-1452, at paras 54 to 60. This involves looking first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights; and applying the proportionality test to each. The parties in this case differed about whether the trial judge or the Court of Appeal had done this, the appellant arguing that the Court of Appeal had assumed primacy for the Article 10 right while the respondent argued that the trial judge had assumed primacy for the Article 8 right.

Striking the balance

142. The considerations on each side in *In re S* were of an altogether more serious order than those in this case. On the one hand was respect for the private and family life of a little boy who had had his whole world turned upside down by the death of his older brother allegedly at the hands of his mother. He faced having to live and go to school with daily publicity about the most intimate details of his family life over the several months while his mother was being tried for his brother's murder. That publicity would include the names and photographs of both his mother and his brother from which he could readily be identified. There was psychiatric evidence of the harm which he was likely to suffer as a result. This would include not only the further increase in the already much heightened risk of mental illness in adulthood but also the harm to his relationship with his mother, which on any view was important to his continuing health and development. On the other hand was the public interest in the free reporting of murder trials. This is not only important in itself, as a manifestation both of freedom of expression and of freedom to receive information. It is also an essential component in a fair trial (albeit one which this accused was more than willing to relinquish for the sake of her surviving son) and in securing that justice is done in the open and not in secret, so that the public can have confidence in the system both in general and in the particular case. In *In re S* it was also possible to consider how the interference with each right might be minimised by tailoring the restrictions to meet the case: it was not an 'all or nothing' question.

143. No one can pretend that the interests at stake on either side of this case are anywhere near as serious as the interests involved in *Re S*. Some might even regard them as trivial. Put crudely, it is a prima donna celebrity against a celebrity-exploiting tabloid newspaper. Each in their time has profited from the other. Both are assumed to be grown-ups who know the score. On the one hand is the interest of a woman who wants to give up her dependence on illegal and harmful drugs and wants the peace and space in which to pursue the help which she finds useful. On the other hand is a newspaper which wants to keep its readers informed of the activities of celebrity figures, and to expose their weaknesses, lies, evasions and hypocrisies. This sort of story, especially if it has photographs attached, is just the sort of thing that fills, sells and enhances the reputation of the newspaper which gets it first. One reason why press freedom is so important is that we need newspapers to sell in order to ensure that we still have newspapers at all. It may be said that newspapers should be allowed considerable latitude in their intrusions into private grief so that they can maintain circulation and the rest of us can then continue to enjoy the variety of newspapers and other mass media which are available in this country. It may also be said that newspaper editors often have to make their decisions at great speed and in difficult circumstances, so that to expect too minute an analysis of the position is in itself a restriction on their freedom of expression.

144. Examined more closely, however, this case is far from trivial. What is the nature of the private life, respect for which is in issue here? The information revealed by the article was information relating to Miss Campbell's health, both physical and mental. Drug abuse can be seriously damaging to physical health; indeed it is sometimes life-threatening. It can also lead to a wide variety of recognised mental disorders (see The ICD-10 Classification of Mental and Behavioural Disorders, WHO 1992, F10 - F 19). Drug addiction needs treatment if it is to be overcome. Treatment is at several levels. There is the quick 'detox' to rid the body of the harmful substances. This will remove the immediate physical danger but does nothing to tackle the underlying dependence. Then there is therapy aimed at tackling that underlying dependence, which may be combined with a transfer of the dependence from illegal drugs to legally prescribed substitutes. Then there is therapy aimed at maintaining and reinforcing the resolve to keep up the abstinence achieved and prevent relapse. This is vital. Anyone who has

had anything to do with drug addiction knows how easy it is to relapse once returned to the temptations of the life in which it began and how necessary it is to try, try and try again to achieve success.

145. It has always been accepted that information about a person's health and treatment for ill-health is both private and confidential. This stems not only from the confidentiality of the doctor-patient relationship but from the nature of the information itself. As the European Court of Human Rights put it in *Z v Finland* (1997) 25 EHRR 371, 405, para 95:

> "Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community."

146. The Court of Appeal in this case held that the information revealed here was not in the same category as clinical medical records. That may be so, in the sense that it was not the notes made by a doctor when consulted by a patient. But the information was of exactly the same kind as that which would be recorded by a doctor on those notes: the presenting problem was addiction to illegal drugs, the diagnosis was no doubt the same, and the prescription was therapy, including the self-help group therapy offered by regular attendance at Narcotics Anonymous.

147. I start, therefore, from the fact - indeed, it is common ground - that *all* of the information about Miss Campbell's addiction and attendance at NA which was revealed in the Daily Mirror article was both private and confidential, because it related to an important aspect of Miss Campbell's physical and mental health and the treatment she was receiving for it. It had also been received from an insider in breach of confidence. That simple fact has been obscured by the concession properly made on her behalf that the newspaper's countervailing freedom of expression did serve to justify the publication of some of this information. But the starting point must be that it was all private and its publication required specific justification.

148. What was the nature of the freedom of expression which was being asserted on the other side? There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, 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.

149. But it is difficult to make such claims on behalf of the publication with which we are concerned here. The political and social life of the community, and the intellectual, artistic or personal development of individuals, are not obviously assisted by pouring over the intimate details of a fashion model's private life. However, there is one way in which the article could be said to be educational. The editor had considered running a highly critical piece, adding the new information to the not inconsiderable list of Miss Campbell's faults and follies detailed in the article, emphasising the lies and hypocrisy it revealed. Instead he chose to run a sympathetic piece, still listing her faults and follies, but setting them in the context of her now-revealed addiction and her even more important efforts to overcome it. Newspaper and magazines often carry such pieces and they may well have a beneficial educational effect.

150. The crucial difference here is that such pieces are normally run with the co-operation of those involved. Private people are not identified without their consent. It is taken for granted that this is otherwise confidential information. The editor did offer Miss Campbell the opportunity of being involved with the story but this was refused. Her evidence suggests that she was concerned for the other people in the group. What entitled him to reveal this private information about her without her consent?

151. The answer which she herself accepts is that she had presented herself to the public as someone who was not involved in drugs. It would have been a very good thing if she were not. If other young women do see her as someone to be admired and emulated, then it is all to the good if she is not addicted to narcotic substances. It might be questioned why, if a role model has adopted a stance which all would agree is beneficial rather than detrimental to society, it is so important to reveal that she has feet of clay. But the possession and use of illegal drugs is a criminal offence and a matter of serious public concern. The press must be free to expose the truth and put the record straight.

152. That consideration justified the publication of the fact that, contrary to her previous statements, Miss Campbell had been involved with illegal drugs. It also justified publication of the fact that she was trying to do something about it by seeking treatment. It was not necessary for those purposes to publish any further information, especially if this might jeopardise the continued success of that treatment.

153. The further information includes the fact that she was attending Narcotics Anonymous meetings, the fact that she had been doing so for some time, and with some regularity, and the photographs of her either arriving at or leaving the premises where meetings took place. All of these things are inter-related with one another and with the effect which revealing them might have upon her. Revealing that she was attending Narcotics Anonymous enabled the paper to print the headline 'Naomi: I am a drug addict', not because she had said so to the paper but because it could assume that she had said this or something like it in a meeting. It also enabled the paper to talk about the meetings and how she was treated there, in a way which made it look as if the information came from someone who had been there with her, even if it simply came from general knowledge of how these meetings work. This all contributed to the sense of betrayal by someone close to her of which she spoke and which destroyed the value of Narcotics Anonymous as a safe haven for her.

154. Publishing the photographs contributed both to the revelation and to the harm that it might do. By themselves, they are not objectionable. Unlike France and Quebec, in this country we do not recognise a right to one's own image: cf *Aubry v Editions Vice-Versa Inc* [1998] 1 SCR 591. We have not so far held that the mere fact of covert photography is

sufficient to make the information contained in the photograph confidential. The activity photographed must be private. If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint. She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life. It may not be a high order of freedom of speech but there is nothing to justify interfering with it. (This was the view of Randerson J in *Hosking v Runting* [2003] 3 NZLR 385, which concerned a similarly innocuous outing; see now the decision of the Court of Appeal, 25 March 2004.)

155. But here the accompanying text made it plain that these photographs were different. They showed her coming either to or from the NA meeting. They showed her in the company of others, some of whom were undoubtedly part of the group. They showed the place where the meeting was taking place, which will have been entirely recognisable to anyone who knew the locality. A picture is 'worth a thousand words' because it adds to the impact of what the words convey; but it also adds to the information given in those words. If nothing else, it tells the reader what everyone looked like; in this case it also told the reader what the place looked like. In context, it also added to the potential harm, by making her think that she was being followed or betrayed, and deterring her from going back to the same place again.

156. There was no need to do this. The editor accepted that even without the photographs, it would have been a front page story. He had his basic information and he had his quotes. There is no shortage of photographs with which to illustrate and brighten up a story about Naomi Campbell. No doubt some of those available are less flattering than others, so that if he had wanted to run a hostile piece he could have done so. The fact that it was a sympathetic story is neither here nor there. The way in which he chose to present the information he was entitled to reveal was entirely a matter for him. The photographs would have been useful in proving the truth of the story had this been challenged, but there was no need to publish them for this purpose. The credibility of the story with the public would stand or fall with the credibility of Daily Mirror stories generally.

157. The weight to be attached to these various considerations is a matter of fact and degree. Not every statement about a person's health will carry the badge of confidentiality or risk doing harm to that person's physical or moral integrity. The privacy interest in the fact that a public figure has a cold or a broken leg is unlikely to be strong enough to justify restricting the press's freedom to report it. What harm could it possibly do? Sometimes there will be other justifications for publishing, especially where the information is relevant to the capacity of a public figure to do the job. But that is not this case and in this case there was, as the judge found, a risk that publication would do harm. The risk of harm is what matters at this stage, rather than the proof that actual harm has occurred. People trying to recover from drug addiction need considerable dedication and commitment, along with constant reinforcement from those around them. That is why organisations like Narcotics Anonymous were set up and why they can do so much good. Blundering in when matters are acknowledged to be at a 'fragile' stage may do great harm.

158. The trial judge was well placed to assess these matters. He could tell whether the impact of the story on her was serious or trivial. The fact that the story had been published at all was bound to cause distress and possibly interfere with her progress. But he was best placed to judge whether the additional information and the photographs had added

significantly both to the distress and the potential harm. He accepted her evidence that it had done so. He could also tell how serious an interference with press freedom it would have been to publish the essential parts of the story without the additional material and how difficult a decision this would have been for an editor who had been told that it was a medical matter and that it would be morally wrong to publish it.

159. The judge was also obliged by section 12(4)(b) of the 1998 Act, not only to have particular regard to the importance of the Convention right to freedom of expression, but also to any relevant privacy code. The Press Complaints Commission Code of Practice supports rather than undermines the conclusion he reached:

> "3. * Privacy
> i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent.
> ii) The use of long lens photography to take pictures of people in private places without their consent is unacceptable.
> Note - Private places are public or private property where there is a reasonable expectation of privacy
> The public interest
> There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.
> 1. The public interest includes:
> i) Detecting or exposing crime or a serious misdemeanour.
> ii) Protecting public health and safety.
> iii) Preventing the pubic from being misled by some statement or action of an individual or organisation. . . . "

This would appear to expect almost exactly the exercise conducted above and to lead to the same conclusion as the judge.

160. I would therefore allow this appeal and restore the order of the judge.

LORD CARSWELL

My Lords,

161. I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Hope of Craighead and Baroness Hale of Richmond, and I agree with them that the appeal should be allowed.

162. The arguments advanced to your Lordships ranged over a wide spectrum of issues in the law of breach of confidence, but in the end they seemed to me to come down to fairly short points and straightforward questions, which involved the application of reasonably well settled principles.

163. The material in the article the subject of this appeal was divided by counsel into five categories, set out in paragraph 88 of Lord Hope's opinion, to which I would refer. It was not in dispute that the information was imparted in confidence to the respondents, but that they were in the circumstances of the case justified in publishing that contained in the first two

categories, the facts that the appellant was a drug addict and that she was receiving treatment for her addiction. These facts would ordinarily be regarded as matters of confidential information. The justification for their publication in this case, however, consists in the fact that the appellant is a well known figure who courts rather than shuns publicity, described as a role model for other young women, who had consistently lied about her drug addiction and compared herself favourably with others in the fashion business who were regular users of drugs. By these actions she had forfeited the protection to which she would otherwise have been entitled and made the information about her addiction and treatment a matter of legitimate public comment on which the Press were entitled to put the record straight. The contest in this litigation centred round the question whether the respondents were on the same basis entitled to publish the material comprised in the third, fourth and fifth categories, as the Court of Appeal held, or whether it fell outside the class of information the subject of legitimate comment and should be treated as information received in confidence which should not have been published.

164. The Court of Appeal drew a distinction between the information that the appellant was receiving therapy from Narcotics Anonymous and details of the treatment of a medical condition, regarding the latter but not the former as private information. They did not regard it as more than a "peripheral disclosure" and considered that the publication of the details given in the "Mirror" about the appellant's attendance at NA meetings was not in its context sufficiently significant to amount to a breach of duty of confidence owed to her. They held that a reasonable person of ordinary sensibilities, on reading that the appellant was a drug addict, would not find it offensive that the "Mirror" newspaper also disclosed that she was attending meetings of Narcotics Anonymous (paragraph 54 of their judgment). It was therefore not of sufficient significance to shock the conscience and justify the intervention of the court (paragraph 56).

165. I am unable to agree with the distinction drawn by the Court of Appeal and for the reasons given by Lord Hope and Lady Hale I consider that the information was private. It seems to me that the publication of the details of the appellant's course of treatment at NA and of the photographs taken surreptitiously in the street of her emerging from a meeting went significantly beyond the publication of the fact that she was receiving therapy or that she was engaged in a course of therapy with NA. It revealed where the treatment was taking place and the text went into the frequency of her treatment. In this way it intruded into what had some of the characteristics of medical treatment and it tended to deter her from continuing the treatment which was in her interest and also to inhibit other persons attending the course from staying with it, when they might be concerned that their participation might become public knowledge. This in my view went beyond disclosure which was, in the words of the Court of Appeal, "peripheral to" the publication of the information that the appellant was a drug addict who was receiving treatment and was capable of constituting breach of confidence. One cannot disregard the fact that photographs are a powerful prop to a written article and a much valued part of newspaper reporting, especially in the tabloid or popular press (hence the enthusiasm of paparazzi to obtain pictures of celebrities for publication in the newspapers). I think that the Court of Appeal dismissed them too readily as adding little to the reports already published and that they were not justified in rejecting the judge's conclusions on this.

166. It follows that it is not necessary in this case to ask, in the terms formulated in the judgment of Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at para 41, whether disclosure of the information would be highly offensive to a reasonable person of ordinary sensibilities. It is sufficiently established by the

nature of the material that it was private information which attracted the duty of observing the confidence in which it was imparted to the respondents. It also follows in my opinion that the motives of the respondents in publishing the information, which they claim to have done in order to give a sympathetic treatment to the subject, do not constitute a defence, if the publication of the material in the third, fourth and fifth categories revealed confidential material.

167. One must then move to the balancing exercise, which involves consideration of articles 8 and 10 of the European Convention on Human Rights, the process which was described in some detail by Lord Woolf CJ in paragraph 11 of his judgment in *A v B plc* [2003] QB 195, 204-210. The carrying out of the balancing is at the centre of this case and forms the point at which the two currents of opinion divide. I agree with the analysis contained in paragraphs 105 to 113 of Lord Hope's opinion in the present appeal and am gratefully content to adopt it. I also agree with him that in order to justify limiting the article 10 right to freedom of expression the restrictions imposed must be rational, fair and not arbitrary, and they must impair the right no more than necessary.

168. Resolution of this question depends on the weight which one attributes to several factors, the extent of the distress to the appellant and the potential adverse effects on her drug therapy, the extent to which one judges the material in categories 3, 4 and 5 to have gone beyond that contained in categories 1 and 2, and the degree of latitude which should be allowed to the press in the way in which it chooses to present a story. Weighing and balancing these factors is a process which may well lead different people to different conclusions, as one may readily see from consideration of the judgments of the courts below and the opinions given by the several members of the Appellate Committee of your Lordships' House.

169. In my opinion it is a delicately balanced decision, and the answer to the questions which one must ask is by no means self-evident. My own conclusion is the same as that reached by Lord Hope and Lady Hale. My reasons can be expressed in fairly short compass. Publication of the details about the appellant's attendance at therapy carried out by Narcotics Anonymous, highlighted by the photographs printed, constituted in my judgment a considerable intrusion into her private affairs, which was capable of causing substantial distress, and on her evidence did cause it to her. It is difficult to assess how much, if any, actual harm it may have done to her progress in therapy. In her evidence the appellant said that she had not gone back to the World's End centre of NA since the article was published and that she had only attended about four meetings in other centres in England, though she had gone to meetings abroad and met privately at her home with other NA attendees. It seems to me clear, however, that the publication of the article did create a risk of causing a significant setback to her recovery. In favour of the respondents it is urged that the material in categories 3, 4 and 5 differed very little in kind from that in categories 1 and 2, the view which found favour with the Court of Appeal. My noble and learned friends, Lord Nicholls of Birkenhead and Lord Hoffmann, also emphasised the importance of allowing a proper degree of journalistic margin to the press to deal with a legitimate story in its own way, without imposing unnecessary shackles on its freedom to publish detail and photographs which add colour and conviction. I do not minimise these factors, which are part of the legitimate function of a free press and require to be given proper weight.

170. In my opinion the balance comes down in favour of the appellant on the issues in this appeal. I would not myself attempt to isolate which of the contents of categories 3, 4 and 5 is more harmful or tips the balance. I find it sufficient to hold that the information contained in

categories 3 and 4, allied to the photographs in category 5, went significantly beyond the revelation that the appellant was a drug addict and was engaged in drug therapy. I consider that it constituted such an intrusion into the appellant's private affairs that the factors relied upon by respondents do not suffice to justify publication. I am unable to accept that such publication was necessary to maintain the newspaper's credibility.

171. I would accordingly hold that the publication of the third, fourth and fifth elements in the article constituted an infringement of the appellant's right to privacy that cannot be justified and that she is entitled to a remedy. I would allow the appeal and restore the judge's order.