

Breach of Confidence – Problems and pitfalls for information sharing

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1. One of the most striking consequences of the Human Rights Act 1998 (“HRA 1998”) has been a radical development of the law as to breach of confidence. To quote the co-authors of the leading textbook on confidentiality², in response to the challenge of giving further effect to article 8 of the European Convention on Human Rights the courts have hatched a fledgling law of privacy in the nest of confidentiality. The purpose of this paper is to give a short account of this development, and then to discuss its implications specifically in relation to information sharing.

CONFIDENTIALITY AND PRIVACY: WHAT IS THE DIFFERENCE?

2. In some circumstances these two concepts may overlap; the same information may be both confidential and private. The path that has been taken by English law – using the action for breach of confidence as a technique for the protection of privacy – has tended to blur the distinction. Nevertheless, in principle confidentiality and privacy are different notions.
3. Both confidentiality and privacy can be deployed by a claimant (C) in seeking to prevent a defendant (D) from disclosing information or from using it for D’s own benefit. Where C argues that information should be protected in this way because it is *confidential*, C is focusing on the means by which the information has come to D’s knowledge. What C is saying, essentially, is that the information has come to D’s knowledge because D has been told it *in confidence*; or, perhaps, because D has been told it by third person, who was himself told the information in confidence. C’s claim to a right to control the use or dissemination of the information rests on the principle that confidences ought to be respected. In other words, C is making a claim that the law

¹ Some of the material in this paper will appear in modified form in a forthcoming chapter in a book on Media Law (to be published by OUP later in 2009).

² *Confidentiality*, by R.G. Toulson and C.M. Phipps (London, Sweet & Maxwell 2006): see Preface to the Second Edition.

should protect those who enter into particular kinds of relationships, involving an element of trust, from having their trust abused. Underpinning this claim is the notion that trust between individuals is a social asset (sometimes referred to as “social capital”), and that there is a public interest in preserving the asset from being eroded.

4. By contrast, where C argues that information should be protected because it is *private*, C is focusing on the nature of the information itself rather than on the means by which it has come to D’s knowledge. Information is private in nature because of what it tells you about the person who is the subject of the information. In the words of Lord Mustill in *R v Broadcasting Standards Commission, ex parte BBC*³, in such a case C’s concern is:

the damage done to the sensibilities of a human being by exposing to strangers the workings of his or her inward feelings, emotions, fears and beliefs.

To say that information is private is to say that, given the nature of the information, it should be for the person who is the subject of the information, and not for anyone else, to decide how that information is to be disseminated or in what way it is to be used. While confidentiality focuses on the desirability of protecting and encouraging relationships of trust, privacy focuses on the individual’s right to preserve his seclusion and anonymity if he so chooses. The underlying value is often described as being the protection of individual autonomy.

5. It follows that the type of information that is intrinsically capable of being confidential is much wider than the type of information that is capable of being private. The law as to breach of confidence is often used to protect trade secrets and other commercial information. There is nothing problematic in the idea that a company’s information can be confidential, or that a company can sue for breach of confidence. If information about a production process is imparted to a trusted employee, on the basis that he is to use it for the company’s benefit not for his own, and that he is not to disclose it to competitors or to the public at large, then the company can sue for breach of confidence to restrain the employee from misusing the information. This use of the action for breach of confidence is very common indeed. On the other hand, it is hard to see how a company could be said to have an interest in *privacy* – having, in a famous phrase, neither a soul to be saved nor a body to be kicked, a company cannot suffer the kind of injury to human personality that lies at the heart of the notion of privacy.
6. In this respect, confidentiality is potentially much wider than privacy, as extending to a broader category of information. However, in another sense it is privacy that is the wider concept. Confidentiality is primarily about information; breach of confidence will always

³ [2001] QB 885, paragraphs 48-49.

involve the misuse of information in some way. By contrast there are many different ways in which privacy can be infringed, and by no means all of them are about the use or abuse of information. For example, an intrusion on to a person's physical integrity (for instance, by carrying out a strip search), or an invasion of private physical space (an individual's home, or hospital ward) can constitute an invasion of privacy, irrespective of what sort of information about the individual is obtained as a result of the intrusion.

CONFIDENTIALITY AND PRIVACY IN ENGLISH LAW PRIOR TO HRA 1998

7. Before HRA 1998 came into force, the orthodoxy was that English law did not recognise invasion of privacy as being, in itself, a ground for a legal remedy. This did not mean that privacy interests were wholly unprotected in English law. Such protection as was available was however extremely patchy; an individual complaining of what was in substance an invasion of privacy had to rely on some other established cause of action. Lacking any free-standing cause of action for invasion of privacy, English law did not need to analyse the different ways in which privacy could be invaded. To the extent that privacy interests were recognised and protected, therefore, there was no explicit recognition of the different forms that those interests could take.

8. *Kaye v Robertson*⁴ is a notorious illustration of the limited protection given to privacy by the common law. A TV actor was in hospital recovering from a serious head injury. Journalists from the *Sunday Sport* entered his hospital room without permission, interviewed him, and took photographs. An attempt to obtain an interim injunction to prevent publication of the interview and photographs was rejected by the Court of Appeal. The court granted limited relief, restraining publication of any material suggesting that the actor had consented to be interviewed or photographed. In the words of Glidewell LJ⁵:

It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.

⁴ [1991] FSR 62. See also e.g. *Malone c Metropolitan Police Commissioner* [1979] Ch 344.

⁵ [1991] FSR 62 at 66.

The Court of Appeal considered whether the facts gave rise to a claim for libel, malicious falsehood, trespass to the person or passing off⁶. The limited relief that was given was on the basis of malicious falsehood: given the circumstances of the intrusion, any suggestion that the actor had agreed to be interviewed was false and was known by the newspaper to be false.

9. Analysing the facts of *Kaye v Robertson* in privacy terms, there are two distinct ways in which the newspaper invaded the claimant's privacy. In the first place, it intruded into his physical seclusion. There are places where an individual can reasonably expect to be free from unwanted intrusion – and a hospital ward in which he is recovering from a serious injury is surely one of them. Secondly, the newspaper misused the claimant's private information. Both the photographs and the interview conveyed information; namely, that at a time when he was recovering from serious injury this is what the claimant looked like, and this is what he said. Making this information public without the claimant's consent was an infringement of his dignity and an injury to his personality.
10. *Kaye v Robertson* was not argued on the basis of breach of confidence. As explained above, in its origins the claim for breach of confidence was intended to prevent the misuse of certain kinds of relationship: the cause of action depended on there being a confidential relationship between the person who imparted the information and the person who received it⁷. By extension, a remedy could be granted not simply against the person who originally obtained the information in confidence, but upon anyone else who received it with actual or constructive knowledge of the duty of confidence⁸. Even in that extended situation, the claimant would still need to establish that there was some initial confidential relationship between himself and a third party, and that the defendant had received the information via that third party in circumstances where he knew or should have known of the duty of confidence. At first sight, therefore, it is hard to see how the facts of *Kaye v Robertson* could possibly give rise to a claim for breach of confidence. The newspaper did not have a confidential relationship with the claimant. Nor did it obtain information from others who did (e.g. the medical practitioners involved in his treatment). All that it did was to come into the claimant's hospital room uninvited.
11. However, even before HRA 1998 came into force there were indications that the courts were willing to take a wider view, and that breach of confidence was beginning to break free of the requirement for a pre-existing relationship of confidence. For example, in *Attorney General v Guardian Newspapers Ltd (No 2)*⁹ Lord Goff suggested that it would be illogical to insist on violation of a confidential relationship in circumstances where an obviously confidential

⁶ The limited relief granted by the Court was based on the tort of malicious falsehood.

⁷ See *Campbell v MGN Limited* [2004] UKHL 22, [2004] 2 AC 457, paragraph 13 (Lord Nicholls).

⁸ See *Campbell*, above, paragraph 44 (Lord Hoffman).

⁹ [1990] 1 AC 109 at 281.

document was blown from a window on to a crowded street, or dropped in a public place. In *Hellewell v Chief Constable of Derbyshire*¹⁰ Laws J (as he then was) suggested that if someone with a telephoto lens took a photograph from a distance and with no authority of another person engaged in some private act, then subsequent disclosure of the photograph would be a breach of confidence. In *Earl Spencer v United Kingdom*¹¹ the European Court of Human Rights accepted that a claim for breach of confidence was available in the UK even without a prior confidential relationship.

DEVELOPMENTS FOLLOWING HRA 1998

12. HRA 1998 has accelerated the emancipation of the claim for breach of confidence from the requirement of a prior confidential relationship, in the interest of giving further effect to the right of privacy under article 8 of the European Convention on Human Rights. At the same time the courts have sought to reconcile the conflicting demands of article 8 and article 10, which protects freedom of expression.

13. A detailed account of HRA 1998 would be well outside the scope of this paper¹². In very brief outline the most important provisions are these:

- so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights (section 3(1));
- the UK courts may make a declaration of incompatibility if satisfied that a provision in primary legislation is incompatible with a Convention right (section 4(2));
- the UK courts may also make a declaration of incompatibility in respect of a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, in cases where the primary legislation concerned prevents removal of the incompatibility (section 4(4));
- it is unlawful for a public authority to act in a way which is incompatible with a Convention right (section 6(1));

¹⁰ [1995] 1 WLR 804 at 807H

¹¹ (1998) 25 EHRR CD 105.

¹² The literature on HRA 1998 is very extensive indeed. The leading practitioner text is R Clayton QC and H Tomlinson QC, *The Law of Human Rights* (2nd edition, OUP 2009). Chapters 2-5 deal with general principles under the HRA. Chapters 12 (on privacy) and 15 (on freedom of expression) are especially relevant to the subject-matter of this paper.

- a person who claims that a public authority has acted or proposes to act in a way which is made unlawful by section 6(1) may bring proceedings under HRA 1998 in the appropriate court or tribunal, or may rely on the Convention right(s) concerns in any legal proceedings, but only if he is or would be a victim of the unlawful act (section 7(1)); and
- in relation to any act or proposed act of a public authority which the court finds is (or would be) unlawful, the court may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate (section 8(1)).

14. Article 8.1 provides that everyone has the right to respect for his private and family life, his home and his correspondence. This is qualified by article 8.2, which reads:

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

15. Article 10.1 provides that everyone has the right to freedom of expression, and continues:

That right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers¹³.

Article 10.2 qualifies this right, and is in similar (though not identical) terms to article 8.2:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary.

16. HRA 1998 has affected the development of the law as to breach of confidence in two main ways. First, in cases where the action is used as a remedy for the unjustified

¹³ The final sentence of article 10.1 provides that the article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

publication of personal information, as one judge has put it¹⁴ the “centre of gravity” has shifted, with the focus being on the nature of the information protected rather on the nature of the relationship in which it was disclosed. Secondly, within the framework of the law of breach of confidence there is now an explicit recognition of the need to balance the privacy right recognised by article 8 of the European Convention, and the right to freedom of expression recognised by article 10. In effect, the rights protected by both articles have been absorbed into the framework of this cause of action¹⁵.

17. These developments can be illustrated by a trio of well-known cases involving the unauthorised publication of newspaper photographs about celebrities or their families: *Douglas and others v Hello! Ltd*; *Campbell v MGN Ltd*; and *Murray v Express Newspapers plc and another*.

18. The *Douglas* case became something of a legal saga¹⁶. There were three claimants - a celebrity couple (Michael Douglas and Catherine Zeta-Jones), and *OK!* magazine. The couple had sold exclusive rights to the magazine to publish photographs of their fashionable and expensive wedding. All three claimants sought an interim injunction to restrain a rival magazine, *Hello!* from publishing unauthorised photographs of the same event. There was fierce commercial rivalry between *OK!* and *Hello!*, a rivalry that was fuelled rather than moderated by the similarity of their product. Essentially *OK!* had achieved a commercial coup by obtaining exclusive rights to the wedding, and *Hello!* was trying to spoil its story. There was a certain amount of evidence that this was a case of tit-for-tat, and that *OK!* had adopted similar tactics in the past. An interim injunction restraining publication was granted at first instance, but the decision was overturned in the Court of Appeal¹⁷.

19. The case was put partly on the basis of an orthodox breach of confidence analysis. It had been made clear to those attending the wedding (whether as guests or employees) that photography was prohibited. Hence it was argued that any unauthorised photographs were therefore taken in breach of a duty of confidence, and that *Hello!* was on notice that this was so.

20. The case was also argued, however, on the basis that the proposed publication by *OK!* amounted to a wrongful use of private information. The Court took a range of

¹⁴ See Lord Hoffman in *Campbell*, above, at paragraph 51.

¹⁵ See *A v B plc* [2003] QB 195 at 202, paragraph 4 (Lord Woolf CJ).

¹⁶ Illustrated by the fact that on the Westlaw site there are currently 9 separate judgments under this title.

¹⁷ [2001] QB 967

approaches to the privacy issue, The strongest statement in favour of an explicit recognition of a right of privacy is in the judgment of Sedley LJ¹⁸:

I would conclude, at lowest, that [the Claimants have] a powerfully arguable case to advance at trial that [the couple] have a right of privacy which English law will today recognise and, where appropriate, protect ...

What a concept of privacy does ... is to accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim; it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.

21. The leading case on the interaction between privacy and the claim for breach of confidence is now *Campbell v MGN Ltd*¹⁹ in the House of Lords. The facts are well-known. The claimant was an internationally famous supermodel – so famous that, as one member of the House of Lords put it, even the judges knew who she was. The *Mirror* published a story about her which, as analysed in the House of Lords²⁰, consisted of five elements: (1) the fact that she had a 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, including such matter as the duration and frequency of her attendance at meetings; and (5) a photograph of her leaving a specific meeting. Following the publication she brought a claim for breach of confidence. She succeeded at trial, and was awarded £3,500 damages. The decision was overturned by the Court of Appeal, but Ms Campbell succeeded in the House of Lords (by a 3-2 majority).

22. In the House of Lords it was accepted that the newspaper was entitled to publish elements (1) and (2) above, as Ms Campbell had falsely claimed in public that she did not take drugs and the newspaper was entitled to set the record straight. The question was whether publication of the remaining elements of the story was actionable.

¹⁸ At paragraphs 125-126.

¹⁹ [2004] UKHL 22; [2004] 2 AC 457

²⁰ See e.g. at paragraph 23 (Lord Nicholls)

23. The House of Lords approached the case as being essentially about the misuse of private information²¹, and analysed it within the framework of articles 8 and 10, in two stages. The first stage was to ask whether the right to privacy under article 8(1) was engaged, and that turned on whether the claimant had a reasonable expectation of privacy in relation to the disclosed facts. As Lord Hope put it, the question was what a reasonable person of ordinary sensibilities would feel if placed in the same position as the claimant and faced with the same publicity²². If yes, the second stage was to balance the right to privacy against the right to freedom of expression, asking: (i) how serious was the interference with the right to privacy, by reason of publication of the photographs; and (ii) how serious an interference would it be with freedom of expression if the claim were to succeed²³. This balancing test would determine whether the claim succeeded or failed. Baroness Hale stated that there were different types of private information, some more deserving of protection than others; and likewise there were different types of freedom of expression, with political, educational and artistic speech attracting a higher degree of protection than celebrity gossip²⁴.
24. Their Lordships differed as to how these principles applied to the facts of the case. The majority (Lords Hope and Carswell, and Baroness Hale) upheld Ms Campbell's claim, considering that the information about the nature of the treatment, together with the photograph, added something of real significance to the disclosure that Ms Campbell was a drug addict and receiving treatment. The minority (Lords Nicholls and Hoffman) considered that – given that it was agreed that the newspaper was entitled to publish the fact that Ms Campbell was a drug addict and receiving treatment – the additional information was peripheral. As Lord Hoffman put it²⁵, publication was within the margin of editorial judgment and something for which appropriate latitude should be allowed.
25. The third in the trio of cases is *Murray v Express Newspapers plc and another*²⁶. The facts are a striking illustration of how far breach of confidence in its post-HRA version can now reach. The author JK Rowling and her husband were out walking with their child. A photograph of the family group was taken and subsequently published in the *Sunday Express* magazine. A claim for damages and other relief was brought by the parents, on behalf of the child, against both the newspaper and the photographic agency that took the picture. The claim

²¹ The clearest statement of this is in the speech of Lords Nicholls, at paragraph 14. However, although the language of the speeches varies, the principles set out in the five speeches do not differ significantly: see per Lord Hoffman, paragraph 26.

²² See at paragraph 99. In *Murray*, above, at paragraph 35, the Court of Appeal stated that it could not detect any difference in this regard between Lord Hope's opinion and that of the other Law Lords in *Campbell*.

²³ For a similar two-stage analysis of the reasoning in the case, see *Murray v Express Newspapers* [2008] EWCA Civ 446, [2008] 3 WLR 1360, at paragraphs 24-41.

²⁴ Baroness Hale, at paragraphs 148-149.

²⁵ See paragraph 77.

²⁶ [2008] EWCA Civ 446; [2008] 3 WLR 1360

against the newspaper was settled. The photographic agency applied to strike out the claim; it was successful at first instance, but the decision in its favour was reversed by the Court of Appeal.

26. The Court of Appeal approached the case by reference to the two stage analysis set out in *Campbell*, above. They considered that it was arguable both that the child's right to privacy under article 8 was engaged, and that the balance between privacy and freedom of expression should be struck in his favour. This was so, even though the pictures were innocuous in their content, and showed the family group on a public street. The Court of Appeal took account of the fact that the claimant was a child, that the pictures had been taken and sold to the press without the parents' knowledge or consent, and that the pictures had been targeted at the parents and the child (rather than showing a street scene with the family in the background). In order for article 8 to be engaged it was not necessary to show that the publication of the photograph would be regarded as offensive by reasonable people; though the degree of any incursion into privacy would be relevant at the second stage of the analysis, when balancing privacy against freedom of expression.

27. These UK developments will be further encouraged by *Von Hannover v Germany*²⁷, which is now the leading Strasbourg case. The claimant was a member of the Monaco royal family. She complained about the publication of various photographs (mostly taken while she was in public) showing her carrying out innocuous activities such as shopping or horse-riding. Her claim failed before the German court. The Strasbourg court held that even though she was a public figure she was still entitled to a private life; and there was no value in the publication of this material, which did not in any way contribute to public debate on matters of importance. Her claim under article 8 was upheld, on the basis that the German state had failed to provide her with an adequate remedy to protect her privacy.

THE NEW LAW OF BREACH OF CONFIDENCE: IMPLICATIONS FOR INFORMATION SHARING

28. The consequence of these developments is that breach of confidence now takes two quite different forms. One is the traditional version, based on a pre-existing relationship of confidence. The other is the post-*Naomi Campbell* version, in substance a claim for the wrongful use of private information, but shoehorned into the legal framework of breach of confidence.

²⁷ (2005) 40 EHRR 1

29. What implications, if any, does all of this have for information sharing? The answer will vary depending on whether the body sharing the information is public or private in nature.
30. Where the body is public and therefore subject to the duty under HRA section 6(1) not to act incompatibly with Convention rights, then in most cases there will be no need to rely on a *Naomi Campbell*-style claim for breach of confidence. Instead the claimant can simply argue that sharing information about him would breach his article 8 rights and would therefore involve a breach of HRA section 6(1). The court would need to consider whether article 8(1) was engaged, and if so whether any *prima facie* infringement could be justified under article 8(2). For an example, see *R (Stone) v South East Coast Strategic Health Authority* [2007] UKHRR 137, concerning the publication of an independent inquiry report into the treatment of a convicted murderer. Publication was a serious interference with his article 8 rights, but was nevertheless justified by very strong public interest factors in favour of disclosure.
31. There is an interesting issue as to whether a public authority could resist a claim based on article 8, by relying on the article 10 right. Article 10 extends to a right to receive information: so the public authority could argue that restrictions on its freedom to share information would engage the article 10 rights of potential recipients of the information. However, it is difficult to see how a public authority could rely on its own article 10 rights, as it would not be a “victim” for the purposes of section 7(1)(a) of HRA 1998²⁸.
32. By contrast, information sharing by a private body cannot be challenged by way of section 6(1) of the HRA. In this situation a *Naomi Campbell* claim could be of real value to a potential claimant, if the claimant was unable to establish any pre-existing relationship of confidence. In substance the law now gives a measure of “horizontal” effect to article 8: that is, it enables the article to be relied upon even though none of the parties to the dispute are public authorities.
33. How would the courts approach a case involving a challenge to information sharing by a private body? Following the analysis in the *Naomi Campbell* and *Murray* cases, the first step would be to consider whether the claimant had a reasonable expectation of privacy in relation to the disclosed facts. *Murray* suggests that this will be a relatively low hurdle, with the real issue coming at the second stage of the analysis. This second step involves a consideration

²⁸ See e.g. *R (Westminster City Council) v Mayor of London* [2003] BGLR 611. A hybrid public authority could be a victim when not exercising public functions. Thus a public service broadcaster could have article 10 rights in relation to its journalistic functions: see Clayton and Tomlinson, above, paragraph 22.27.

of whether any infringement of the article 8(1) right is justified under article 8(2), and in this context article 10 has an important role to play. The article 10 rights both of the body wishing to share information, and of the potential recipients of that information, could be in play.

34. As far as traditional breach of confidence is concerned, it is well-established that one potential defence is that disclosure is in the public interest. Does a similar defence apply in relation to the *Naomi Campbell* claim? The answer is probably that any public interest considerations would be accommodated in considering article 8(2), and in considering the balance between article 8 and article 10: separate consideration of whether disclosure is in the public interest would be unlikely to add anything.

35. The key practical consideration as far as information sharing is concerned is *proportionality*: and that is so, whether the body contemplating information sharing is a public or a private body. In considering whether any interference with the article 8(1) right is justified, proportionality will inevitably play a central role. There are a number of issues that will need to be considered.

- What is the aim of the information sharing? The object should be defined as clearly as possible. Any potential benefits should be identified, in relation to: (i) the person who is the subject of the information; (ii) third parties; and (iii) the public in general.
- How will the proposed information sharing contribute to achieving the aim? If the answer is that it will not, information sharing will not be justifiable.
- How much information needs to be shared? Could the aim be achieved by sharing a more restricted set of information? In particular, could the aim be achieved without sharing information that discloses individual identities?
- How widely does the information need to be shared? This requires a careful consideration of the roles and functions of the proposed recipients, and the ways in which they could make use of the information.
- Finally, where does the balance lie between the interests of the individual and the objectives that the information sharing is intended to achieve? How serious are the potential consequences for the individual if the information is disclosed? On the other hand, how serious are the potential consequences if the information is withheld?

36. Information sharing is a notoriously difficult subject. The legal framework is often confusing, and the complexities of breach of confidence can sometimes contribute to the confusion. In practice, however, those bodies that can show that they have recognised the competing interests that are at stake, and can explain clearly in what way they took them into account and what weight they gave them, are likely to be best placed to avoid a successful legal challenge.

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