

Guidance on answering the discussion questions in the book

18.11

Lord Hoffman in *Campbell* considered there to have been a ‘shift in the centre of gravity’ of breach of confidence regarding personal information, based not on extended duties of confidence and good faith but on autonomy and dignity [*Campbell v MGN Ltd* [2004] 2 AC 457, para 51]. Do you agree? Review your answer after you have considered the cases discussed in the following section.

It is likely that there has been a shift in the centre of gravity. The focus is no longer on whether there is a real obligation of confidence, or whether one can be implied or identified – although these obligations are still important where they exist. However, other judges in *Campbell and other cases* have focussed on a balance of specific human rights (articles 8 and 10 ECHR) and their limits. This provides a more transparent and structured basis for decision-making in respect of personal information rather than the rather vague concept of “autonomy and dignity.” Regarding the balance, note also the decision of the ECtHR. (See paras 18.11-18.13, 18.19-18.25.)

18.25

A style magazine publishes pictures of a supermodel leaving what is tipped to be the new fashionable beauty store. She is not happy as she has just signed a contract with a competitor. Discuss.

A problem arises for the supermodel if the photographs are to be published. This scenario is similar to *Campbell v MGN Ltd* [2004] 2 AC 457 and *Douglas v Hello!* [2007] UKHL 21 where special treatment has been afforded to photographs (see para 18.17). However, those cases involved photographs taken in public revealing details of a health problem, and photographs taken in private of a wedding.

It is less likely that a visit to a new store is information in respect of which the supermodel has a reasonable expectation of privacy (compare photographs of a child: para 18.14). The fact that the visit was unwise does not change this. The question would be more complex if, say, the supermodel was photographed leaving by the back door or in the middle of the night. This would be more likely to satisfy the test proposed by the Court of Appeal in *Hello!* (see para 18.12, 18.56 and also look back to paras 17.23-17.24).

If there is information in respect of which there is a reasonable expectation of privacy, article 8 ECHR is engaged and must then be balanced with article 10. Details of choice of beauty store to visit are not the highest form of expression. However, given the new contract there is a celebrity story worth telling; and it is one of the business, as opposed to personal, life of the individual. Accordingly, preventing disclosure of this information would be unlikely to be a proportionate restriction on article 10 freedom of expression. (See paras 18.19- 18.25 for discussion of balancing act cases.)

The competing store is also unlikely to be pleased if the photographs are published.

However, its remedy would only be in contract against the supermodel. It is unlikely that

developing doctrines of personality and information as property would cover this situation.

See also later in this chapter, paras 19.56ff.

18.52

Do you agree that the endorsement of a well-known personality can be a source of goodwill? Does Article 8 ECHR require the protection of such goodwill? Whose goodwill? – the trader whose products are endorsed or the personality doing the endorsing? And consider how your conclusions here relate to your views formed earlier regarding privacy.

The endorsement of a well-known personality can clearly attract more business for the product so endorsed, otherwise it would not be such a common commercial phenomenon. So false endorsement would seem to be a way of attracting custom by deception (see *Irvine v Talksport Lts* [2003] EWCA Civ 423). But the goodwill involved, at least initially, seems to be that felt towards the personality rather than to the business or product being endorsed; the one begets or increases the other. And what if the personality then behaves in a way which some argue have a negative impact on the product? An answer might lie in contract – but what is the impact on personality and passing off arguments?

Article 8 ECHR deals with the right to privacy; but endorsement is not so much about privacy as publicity (unless perhaps the well-known person is well-known for avoiding rather than seeking publicity). From the more commercial side, the finding by the House of Lords that OK! could sue in respect of the wedding pictures in *Douglas v Hello!* [2007] UKHL 21 did not create a right in publicity.

Para 18.61

Should there be an image right in the UK? If so, what would it look like? You might find the Guernsey legislation, an interesting mix of copyright and trade mark law, a useful starting point. Guernsey Image Rights (Bailiwick of Guernsey) Ordinance, 2012 and see also <http://ipo.guernseyregistry.com/article/103037/What-are-Image-Rights>.

Think about registration, distinguishing features, what one might be able to prevent, the conferring of greater powers on those who are well known, need for intention, special treatment for images, expiry of rights, transfer of rights, the relevance of a commercial or moral focus. Consider your response also in light of existing UK law – would your proposed image right be an improvement? Why/why not?