

## Appeals test scope of privacy

The media's fears over the impact of human rights legislation could be borne out by the result of three recent court hearings

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When the human rights bill was going through parliament the media were worried that it would create a privacy law in the UK for the first time. This was because the new legislation was about to make European Convention rights directly enforceable in UK courts, including article 8, the right to respect for private life. Nearly ten years on, the concerns have turned out to be well founded. Now, in three appeals which have just been heard (but not yet decided), the media will learn how far privacy rights have evolved. The cases focus on different aspects of privacy but reveal an emerging trend.

Potentially the most interesting of the three is a claim brought by the Canadian folk singer Loreena McKennitt against her former friend Niema Ash over a book called *Travels with Loreena McKennitt: My Life as a Friend*. In 2005 Mr Justice Eady granted an injunction to prevent publication of parts of the book containing private information. The novelty of the decision was in its adoption of the generous approach of the European Court of Human Rights to which situations are deemed private, and the raising of the bar for those seeking to justify publishing private information.

The judge was influenced by the groundbreaking 2004 House of Lords decision in Naomi Campbell's privacy case against the Daily Mirror and by a European Court decision a month later involving Princess Caroline of Monaco. The European Court had found that repeated publication by the media of seemingly anodyne photographs of Caroline in public amounted to an infringement of her article 8 right which was not justified by the magazines' article 10 rights to freedom of expression. The most significant finding was that a public figure may be treated as having a reasonable expectation of privacy even in a public space, and that unless a report relating to the detail of a public figure's private life contributes to a public or political debate its publication is unlikely to be justified. Coming so soon after Campbell, the decision set alarm bells ringing, especially among tabloid newspapers. In McKennitt, Eady held that the singer had a right to keep certain aspects of her life private when historically the courts would not have given this protection. For example, a description of her home, the decor, the layout or the state of cleanliness, were deemed private, even though known to her immediate social circle and ostensibly anodyne. The judge stressed that even public figures are entitled to a private life and, in the light of the Caroline case, there would have to be a strong public interest justification for publishing such private information.

Following an appeal by Ash last month the Court of Appeal will have to decide if the balance reached between articles 8 and 10 in McKennitt's case was correct or has swung too far towards privacy. In another case last month, the Mail on Sunday asked the Court of Appeal to overturn a decision which prevented it from defending its publication of Prince Charles' private journal about an official trip to Hong Kong. The court must consider whether Mr Justice Blackburne was correct in ruling that the paper had no real prospect of showing that Prince Charles did not have a reasonable expectation of privacy in writing the journals, and that there was no public interest justification in publishing them. Applying Campbell and the Caroline case, the judge held that the prince had "the right to be able to commit his private thoughts to writing and keep them private, the more so as he is inescapably a public figure who is subject to constant and intense media interest".

Meanwhile, also last month, the House of Lords was asked to overturn a Court of Appeal decision in favour of Hello! magazine in the long-running privacy case centred on the wedding of Michael Douglas and Catherine Zeta-Jones. The appeal was brought by rival magazine OK!. The case turns on whether the Douglasses could transfer their right to commercial confidentiality in photographs of their wedding to OK!, so giving it an enforceable commercial confidence claim against Hello! who "spoiled" OK!'s exclusive to publish the photographs. If the Law Lords find for OK! this could be used to argue for the creation of an image right, of value not just to the celebrity but also to a third party. Recently Lord Hoffmann said the Campbell case had been intended to redress the balance in favour of a right of privacy. The three appeals will show if the balance has shifted too far.

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