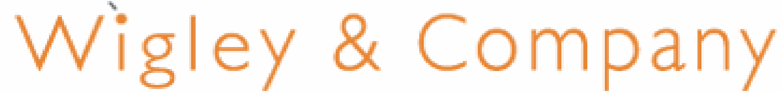

BARRISTERS *and* SOLICITORS

MIKE HOSKING AND NAOMI CAMPBELL DEVELOP PRIVACY & CONFIDENTIALITY LAW

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In important decisions, the House of Lords and our Court of Appeal have clarified the law relating to privacy and confidentiality in the context of photographs in a public context of Mike Hosking's kids and Naomi Campbell coming out of a drug rehabilitation centre. We summarise those cases and their impact.

Our Courts will supplement existing law such as our Privacy Act, where appropriate, to protect privacy and confidentiality. The *Naomi Campbell* case indicates that these remedies will probably continue to evolve in New Zealand. The *Hosking* case is an important milestone in relation to the use of international instruments and statutory interpretation.

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1 Introduction

1.1 *"Kiwi TV host and Supermodel, caught snogging, sue the Press"?* No, Mike Hosking and Naomi Campbell have not been caught out. Each has battled the media, one in New Zealand and one in England. Privacy and confidentiality law has developed apace as a result. The May 2004 House of Lords case, won by Naomi Campbell, indicates that NZ law may further evolve, past the March 2004 *Hosking* Court of Appeal case.

1.2 The *Hosking* case could end up being remembered as much for its approach to statutory interpretation, including use of international instruments, when the legal position is being assessed in many areas outside the privacy/confidentiality arena.

1.3 We'll deal with New Zealand first, then the English case.

2 The *Hosking* case

2.1 Mike Hosking and his estranged wife, Marie, wanted to stop *New Idea!* publishing photographs of their 18 month old twins. The photos were taken in a public street.

2.2 The High Court wouldn't grant them an injunction and they appealed.

2.3 In reality, the case was always largely doomed for two reasons. The facts were against the Hoskings (this was a public place and there was no particularly private or intimate situation). Additionally, as with defamation, the Courts are hesitant before granting injunctions prohibiting publication by the media.

2.4 However, in other cases (not this one) the courts might grant an injunction to protect the safety of children. Scottish actor, Ewan MacGregor, won an injunction last year in England, restraining publication of photos of him and his kids on a hotel's private beach. And on 10 May 2004, it was reported that Supermodel Kate Moss may take the *OK!* magazine to court in relation to photos taken of her sunbathing with her baby daughter.

2.5 Until *Hosking,* in New Zealand, a contentious issue was whether there is a tort of privacy. In the United Kingdom, the House of Lords has recently said there is no such separate tort. They subsumed the privacy remedy within the equitable remedy for breach of confidentiality.

2.6 3 of the 5 New Zealand Court of Appeal judges in *Hosking* said that, really, the confidentiality duty is of a different nature, that it smudged things too much to roll the two into one, and it is better to recognise a separate tort in relation to privacy. They did so having extensively reviewed the existing legislative framework (such as the Privacy Act, the New Zealand Bill of Rights Act, etc), and international regimes, including international obligations and treaties such as the International Covenant on Civil and Political Rights.

2.7 So the majority concluded that there is a tort by which someone can sue where:

2.7.1 there are facts about which a person has a *reasonable expectation of privacy;*

2.7.2 a third party *publicises* those private facts;

2.7.3 the facts would be considered to be *highly offensive* from an objective perspective.

2.8 One of the 3 judges, Tipping J, would use the words "*substantial level of offence*" rather than "*highly offensive*".

2.9 It's likely that, just as in the United States, this tort will develop over time.

2.10 The case highlights that privacy and confidentiality are not just about the Privacy Act. There is a great deal of other law including judge-made law. A good illustration is that the Privacy Act affects only individuals. But of course there are other entities such as companies which are also

affected (and they can rely upon obligations such as duties of confidentiality).

2.11 We get the impression sometimes that privacy compliance focuses exclusively on the Privacy Act without regard to these wider issues. A Privacy Impact Assessment can be inadequate and misleading for this reason. A further reason is that a silo approach can often be taken to PIAs, without regard to the surrounding matrix such as other legal issues.

3 Hosking: Implications for statutory drafting, policy and use of international instruments

3.1 The *Hosking* case is likely to be important for other reasons too. It sends strong messages about the degree to which the Courts will develop the law in a legislative and international framework. They will take into account international obligations and international instruments, just as they do international court decisions.

3.2 Additionally, the Courts will enter areas which are already extensively covered by statute. As one of the judges said (Tipping J):

> *"If Parliament wishes a particular field to be covered entirely by an enactment, and to be otherwise a no-go area for the Courts, it would need to make the restriction clear".*

3.3 For those doing policy and legislative drafting work, the decision would be well worth reading.

3.4 The case is readily available from the Brookers website at no cost: *Hosking v. Runting & Others* CA 1001/03, 25/3/2004.

4 Naomi Campbell

4.1 Just like Mrs Hosking and her kids, who were photographed in public, so was Naomi Campbell. If that was as far as the story goes, she would have had no claim against the *Daily Mirror*, which published her picture. Generally pictures taken in public are fair game, both here and in England. As one Law Lord said:

> "*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.*" [1]

[1] *Campbell v. MGM Ltd* [2004] UKHL 22, 154 per Baroness Hale.

4.2 That was the position in the *Hosking* case (Mrs Hosking was only out shopping with her children). But there was a difference here. The Daily Mirror had twigged to the fact that Naomi Campbell was attending Narcotics Anonymous, despite her denying publicly that she was addicted. The paper ran a story about her addiction, which she later admitted. The photograph showed her coming out of the Narcotics Anonymous meeting place.

4.3 Three of the five Law Lords decided that the paper had gone too far and the photograph should not have been published, even though the text confirming she was an addict was acceptable.

4.4 In England, and contrary to the decision of the three majority Judges in *Hosking*, the House of Lords had already decided that there would be no general tort of privacy (rather this would be handled within the general heading of confidentiality).[2]

4.5 While the five members of the House of Lords differed on the outcome, they were largely agreed on the principles to be applied. Like the New Zealand Judges, but under a differing although similar regime in some respects, the English Judges took into account human rights legislation and international obligations (in the case of England, EU commitments in particular). These obligations include (a) the right to privacy and (b) the right to freedom of expression. Privacy and freedom of expression have to be balanced in many cases.

4.6 Just like our Court of Appeal, the starting point is whether there is a *"reasonable expectation of privacy"*. However they emphasised that this was just a threshold test which then 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 countervailing rights of the recipient will prevail.*"[3]

4.7 As we note above, the third element of privacy claims, for 2 of our Court of Appeal judges, is that the disclosure "*would be considered to be highly offensive from an objective perspective*". The other majority Judge substituted instead "*substantial level of offence*".

4.8 The "*highly offensive*" test follows from Australian cases.[4] Although the point is not conclusively decided, there are strong signs in the House of Lords judgment that this sets the bar too high. In any event, says the House of Lords, that type of issue only comes into play during the

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[2] *Wainwright v. Home Office* [2003] 3 WLR 1137.
[3] Per Baroness Hale at para 137.
[4] *ABC v. Lenah Game Meats Pty Ltd* (2001) 185 ALR 1.

weighing up exercise, after the threshold question (is there *a reasonable expectation of privacy*?) is answered.

4.9 While the English Courts are going down the path of creating a right in relation to privacy under the confidentiality umbrella, it's apparent that the outcome is following a similar path to that taken within New Zealand, where it is accepted that there is a separate tort. But while there is overlap, there are differences. It may well be that the New Zealand Courts will evolve further the way in which the tort of privacy is framed (or alter the remedy to the English approach), either at Court of Appeal or Supreme Court level. A sea-change toward the English use of the confidentiality mechanism looks unlikely in the short term, given the overlap between the judges in the Court of Appeal who decided *Hosking* and the new Supreme Court appointees.

4.10 Finally, the House of Lords makes it clear that the media is to be given a fair measure of leeway and so won't be held to requirements that are unduly stringent.

5 Conclusion

5.1 Our Courts will supplement existing law such as our Privacy Act, where appropriate, to protect privacy and confidentiality. The *Naomi Campbell* case indicates that these remedies will probably continue to evolve in New Zealand. The *Hosking* case is an important milestone in relation to the use of international instruments and statutory interpretation.

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