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Michael Douglas & Catherine Zeta-Jones v. Hello!: The Use of the Law of Confidence in the Protection of Privacy in the UK

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The recent landmark decided in the United Kingdom involving movie stars Catherine Zeta-Jones and Michael Douglas has catapulted celebrity privacy rights to international prominence. While there exists no specific cause of action for “invasion of privacy” in the U.K., there have been recent notable developments in the area of privacy law in that country.

To begin with, in a decision handed down in 2004 in the von Hannover case, the European Court of Human Rights (“ECHR”) recognized an obligation on the part of member states’ governments to protect one individual from an unjustified invasion of private life by another individual, and the obligation of the courts of a member state to interpret legislation in a way which will achieve that result. The British Parliament had previously communicated that it did not intend to introduce protection of privacy legislation, but instead has left it up to the judiciary to develop this area of law appropriately in compliance with the requirements of the ECHR ruling. On the other hand, the British courts have rejected the creation of a separate “invasion of privacy” cause of action, stating that creating new laws falls within the province of the legislature. Instead, the British courts apply the breach of confidence cause of action to cases typically covered by the “invasion of privacy” tort in the United States.

Breach of confidence is a longstanding cause of action available under English law. The law imposes a “duty of confidence” whenever a person receives information they know or ought to know is fairly and reasonably to be regarded as confidential. That confidentiality may be either implicit or explicit. Where the nature of the information and circumstances imply that a person should keep the information confidential, there is an implied duty of confidence. Explicit confidentiality exists where a person expressly agrees to keep information confidential.

To be considered legally confidential, the information must be conveyed under circumstances importing an obligation of confidence and such information must have the necessary quality of confidence. Information possessing the “necessary quality” of confidence includes—

- The information is confidential in fact, i.e., not in the public domain, not common knowledge, or not easily available by other means
- The information must be worthy of protection (i.e. neither useless nor trivia)
- The public interest that a confidence should be preserved outweighs some other public interest, which favors disclosure.

Thus, a breach of confidence can be found to have occurred when there is an unauthorized disclosure of confidential information and there is not a public interest in disclosure of the information.
Recently, there have been several notable cases where individuals (including several celebrities) petitioned the British courts to redress invasion of their privacy rights by other individuals through assertion of the breach of confidence cause of action. One particularly well known case is Douglas and others v. Hello! Ltd and others where the Court of Appeal issued a landmark ruling after a lengthy legal battle between Michael Douglas, Catherine Zeta-Jones, and two British tabloid publications, OK! magazine and Hello! magazine.

Michael Douglas and Catherine Zeta-Jones entered into an agreement with OK! magazine whereby OK! was given exclusive rights to publish photographs of the Douglases’ wedding. Douglas and Zeta-Jones agreed to use their best efforts to ensure that OK!’s right to publish photographs of the wedding remained exclusive. The couple prohibited guests from taking photographs at the wedding and reception and employees also signed agreements not to take photographs. A freelance photographer managed to get through the security charged with guarding the wedding hotel and clandestinely took several photos at the reception. Hello! purchased the rights to these pictures and planned to publish them as “spoilers” to OK!’s exclusive deal. Soon after the wedding the Douglases learned of Hello! magazine’s plans to publish unauthorized photographs of the wedding. In November 2000, the High Court granted the Douglases and OK! a temporary injunction, but the injunction was subsequently lifted by a panel of Court of Appeal judges. The Douglases asserted claims alleging violations of both their privacy rights and their right of commercial confidence in photographic images of their wedding. OK! asserted a right of commercial confidence based on their exclusive publication agreement with the Douglases.

The appeals court made several significant rulings in this case. It concluded that privacy rights in photographic images of a private occasion continue to exist even after commercial sale of controlled and authorized photographs. The court also held that individuals have the right to commercially exploit private or personal information at their disposal and which the individual can properly deny access to third parties. The court also stated that whether commercial confidence rights are transferred to a publication, so as to enable the publisher to sue, depends on the nature and terms of the contract. In this case, the contract between OK! and the Douglases did not convey such a right.

Ultimately, the court allowed the Douglases to retain the £14,600 awarded to them, while OK!’s claim for damages of over £1 million was reversed. In the grander scheme, this is a landmark decision on privacy rights under English law because it acknowledges for the first time that the courts have a duty to recognize and protect privacy rights of individuals against intrusion from others.