Murray v Big Picture UK Ltd: An Image Right for the Children of Celebrities?

Recent decisions in the UK and Europe that deal with the rights of public people to private lives are looking at how it might be different for children. Anne Flahvin reviews the situation.

Introduction

In a decision with potentially enormous consequences for the development of privacy law in the UK, the English Court of Appeal has reinstated a claim for breach of privacy in respect of a photograph taken of author JK Rowling's infant child while out in public with his parents.

While the claim has yet to be heard, the decision of the Court of Appeal in *Murray v Big Picture UK Ltd*[1] to overturn the earlier strike out has raised for consideration the question whether English law recognises a right of privacy in respect of photographs of a child taken in a public place that convey nothing sensitive or 'private' about the child. According to the Court of Appeal, it is at least arguable that children of famous parents have a reasonable expectation not to be photographed in public, however innocuous the photograph.

If the claim is ultimately successful, the English courts will have all but created an image right for the children of celebrities. [2]

The Murrays' breach of privacy claim

Dr David Murray and his wife Joanne Murray (aka Harry Potter author JK Rowling) were walking from their Edinburgh flat to a local café with their infant son David - who was being pushed in his pram - when they were photographed without their knowledge or consent.

Several photos were taken, including a photograph which was later published in the *Sunday Express* newspaper accompanied by the headline: 'My Secret' and the text of a quotation from Mrs Murray in which she set out some of her thoughts on motherhood and family life.

The Murrays commenced proceedings against the newspaper and Big Pictures Ltd (the photographic agency responsible for the photograph) on behalf of David seeking an injunction restraining further publication and damages or an account of profits for breach of confidence, the infringement of his right to privacy and the misuse of private information relating from the taking, recording, holding and publication of the photograph. The newspaper compromised its claim, so that proceedings continued only against Big Pictures Ltd.

Big Pictures Ltd applied to have the claim struck out on the basis that it had no reasonable prospects of success.

First instance strike out decision

Before considering Patten J's first instance decision,[3] it is useful to briefly review two important decisions – one a decision of the House of Lords and the other a decision of the European Court of Human Rights – which were crucial to any consideration of the Murrays' claim.

Following the introduction in 2000 of the *Human Rights Act* 1998, which required English courts to give effect to the rights protected by Articles 8 (privacy) and 10 (freedom of speech) of the European Convention of Human Rights, the courts had developed the cause of action for breach of confidence to include private information which would not previously have been regarded as confidential.

In *Campbell v Mirror Group Newspapers*,[4] the House of Lords held by a three-to-two majority that an action for breach of confidence arose in respect of the publication of photographs taken in a public place. In that case, model Naomi Campbell was awarded damages in respect of a photograph of her leaving a Narcotics Anonymous meeting and an accompanying story containing details of her treatment. For the majority in *Campbell's* case, what made the activity that was photographed 'private', and therefore subject to protection, was that it conveyed information relating to therapeutic treatment. Lord Hope said:

> *If the information is obviously private, the situation will be one where the person to whom it relates can reasonably expect his privacy to be respected.*[5]

The Court was at pains, however, to stress that it was ***not*** recognising a right to control one's own image, absent some private information being conveyed. Baroness Hale put it this way:

> *The activity photographed must be private. 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. There is nothing essentially private about that information nor can it be expected to damage her private life. It may not be a high order of freedom of speech but there is nothing to justify interfering with it.* [6]

Shortly after *Campbell's* case, the European Court of Human Rights took a more expansive approach to the question of whether photographs taken in a public place which convey nothing sensitive or private about an individual are nevertheless capable of being subject to a claim for breach of privacy.

In *Von Hannover v Germany*,[7] Princess Caroline of Monaco appealed against the refusal of German courts to grant her an injunction restraining further publication of photographs of her which had been published in various German magazines. All the photos had been taken in public places. They included photos of the Princess in a restaurant, riding a horse and on a skiing holiday; in other words, going about her daily life. The claim failed before the German courts due to a doctrine of German law that provided that 'figures of contemporary society *par excellence*' could only claim protection for privacy if the intrusion complained of occurred at their home or in a secluded place away from the public gaze.

The European Court held that to the extent that German domestic law deprived Princess Caroline of a remedy in respect of the photographs complained of, the law was in violation of Article 8 of the European Convention of Human Rights. The Court was critical of the German domestic courts for attaching 'decisive weight' to freedom of the press and to the public interest in knowing how Princess Caroline behaved outside of her official functions.[8] While the Court stressed that freedom of expression constitutes one of the essential foundations of a democratic society, it was clearly of the view that 'the entertainment press' was not deserving of the same level of protection as publishers of 'news items of major public concern'.[9]

In characterising the activities which were photographed as 'private', the Court appears to have been drawing a distinction between the 'public' life of a public figure – such as the carrying out of official duties – and the private, day-to-day life of such a person. On the

test set down by the Court in *Von Hannover*, a public figure has a reasonable expectation of privacy with respect to the latter, even if the activities in question are carried out in public. Unless the publication can be justified on the basis that it is capable of contributing to debate in a democratic society, the Article 8 interest will generally prevail over any interest in freedom of speech.

When Big Pictures' strike out claim came before him in June 2007, Patten J was faced with these two decisions: a decision of the House of Lords which appeared to hold that a photograph of a public figure (or any person, for that matter) engaged in day-to-day activities in public was not capable of grounding an application for breach of confidence absent some element which rendered the activity which was photographed 'private', and a decision of the European Court which appeared to hold otherwise.

Patten J noted that one of the difficulties about the European Court's judgment in *Von Hannover* is to 'identify and dissect from the Court's reasoning the precise factors which in its view engage the Princess's rights under Article 8'.[10] As already discussed above, for the most part, the photographs which were the subject of the claim were entirely innocuous.

While a broad reading of the decision in *Von Hannover* would suggest that a public figure had a legitimate expectation of not being photographed without consent on every occasion on which they were not on public business, Patten J took the view that a close reading of the judgments in *Von Hannover* suggested that a distinction could be drawn between a child (or an adult) engaged in family and sporting activities on the one hand, and something as simple as a walk down the street or a visit to the grocers on the other:

> *The first type of activity is clearly part of a person's private recreation time intended to be enjoyed in the company of family and friends. Publicity on the test deployed in Von Hannover is intrusive and can adversely affect the exercise of such activities. But if the law is such as to give every adult or child a legitimate expectation of not being photographed without consent on any occasion on which they are not, so to speak, on public business, then it will have created a right for most people for protection of their image. If a simple walk down the street qualifies for protection, then it is difficult to see what would not. For most people who are not public figures in the sense of being politicians or the like, there will be virtually no aspect of their life which cannot be characterised as private.* [11]

His Honour ultimately concluded that the Murrays' claim stood no reasonable prospects of success. This was because, firstly, there remained even after *Von Hannover* 'an area of innocuous conduct in a public place which does not raise a reasonable expectation of privacy',[12] and secondly, because 'even if the decision in *Von Hannover* has extended the scope of protection into areas that conflict with the principles and the decision in *Campbell*', Patten J was bound to follow *Campbell.*[13]

Finally, Patten J took some comfort from the fact that the case before him was 'indistinguishable' from the facts in *Hosking v Runting.*[14] In this case, the New Zealand Court of Appeal had recognised a tort of privacy but found that it was not available in respect of a photograph of the eighteen month old twins of well known parents being pushed down the street by their mother on the basis that the photographs revealed nothing sensitive or intimate in nature and were taken in a public place.[15]

The Court of Appeal

The Court of Appeal did not take issue with Patten J's statement of the relevant principles, nor his articulation of the appropriate test; namely did David Murray have a reasonable expectation of privacy when being pushed in his buggy and, if so, were the circumstances such that the Article 10 rights of the publisher ought to prevail over any right to privacy.

Patten J fell into error, according to the Court of Appeal, in his application of that test, and in particular in failing to distinguish between the position of a child and that of an adult when determining whether or not there was a reasonable expectation of privacy.

According to the Court of Appeal judges, it is at least arguable that children have a reasonable expectation of privacy in circumstances where an adult may not, and that David Murray – who had been completely unaware of a photograph being taken, let alone published - had a reasonable expectation not to be photographed.[16]

Perhaps surprisingly, given that this appears to have been the first occasion on which an English court has considered a fact scenario of this kind, the Court does not provide any detailed explanation of the basis for determining that children may have a reasonable expectation not to be photographed going about their day to day life in public. On the facts before the court in this case, there was no evidence of harm or inconvenience being caused to David (he was not aware that the photographs were taken or published). Nor was there any suggestion that the photographs had some potential to embarrass him at some later time when he was old enough to become aware of them.[17] Rather, the judges refer in fairly general terms to the 'rights of children' as recognised by the courts and the *United Nations Convention on the Rights of the Child* (to which the UK is a party)[18], and to the *Press Complaints Commission Editors' Code of Practice* (*the* ***Code***), which provides that editors must not use the fame, notoriety or position of the parent or guardian as sole justification for publishing the details of a child's private life.[19] While noting that a publication called *The Editors' Codebook* states that the *Press Complaints Commission* has ruled that the mere publication of a child's image cannot breach the Code when it is taken in a public place and unaccompanied by any private details or materials which might embarrass or inconvenience the child, the Court of Appeal judges state that 'it seems to us that everything must depend on the circumstances.' [20]

But *what* circumstances might be relevant to any consideration of whether a child had a reasonable expectation of privacy not to be photographed notwithstanding that the taking of the photograph causes no harm or inconvenience and the publication is not such as to embarrass the child?

The Court of Appeal refers, with apparent approval, to the following statement by the Press Complaints Commission in connection with a complaint made by former Prime Minister Tony Blair and his wife:

> *…the acid test to be applied by newspapers in writing about the children of public figures who are not famous in their own right (unlike the Royal Princes) is whether a newspaper would write such a story if it was about an ordinary person.* [21]

The Court suggests that such an approach is arguably appropriate to the question of whether the child of famous parents has a reasonable expectation of privacy with respect to innocuous *photographs* taken in public.

Does that mean that the child of a famous parent has a reasonable expectation of privacy *whenever* he or she is out and about in public? While the Court of Appeal suggests not, noting that 'there may well be circumstances in which there will be no reasonable expectation of privacy, even after *Von Hannover*',[22] the judges offer little assistance in determining where the line should be drawn. They reject as unhelpful the distinction suggested by Patten J between a child (or adult) engaged in family and sporting activities versus something as simple as walking down the street:

> *…an expedition to a café of the kind which occurred here seems to us to be at least arguably part of each member of the family's recreation time intended to be enjoyed by them and such that publicity of it is intrusive and such as to adversely affect such activities in the future. We do not share the predisposition identified by [Patten J] that routine acts such as a visit to the shop or a ride on a bus should not attract a reasonable expectation of privacy. All depends on the circumstances. The position of an adult may be very different from that of a child.* [23]

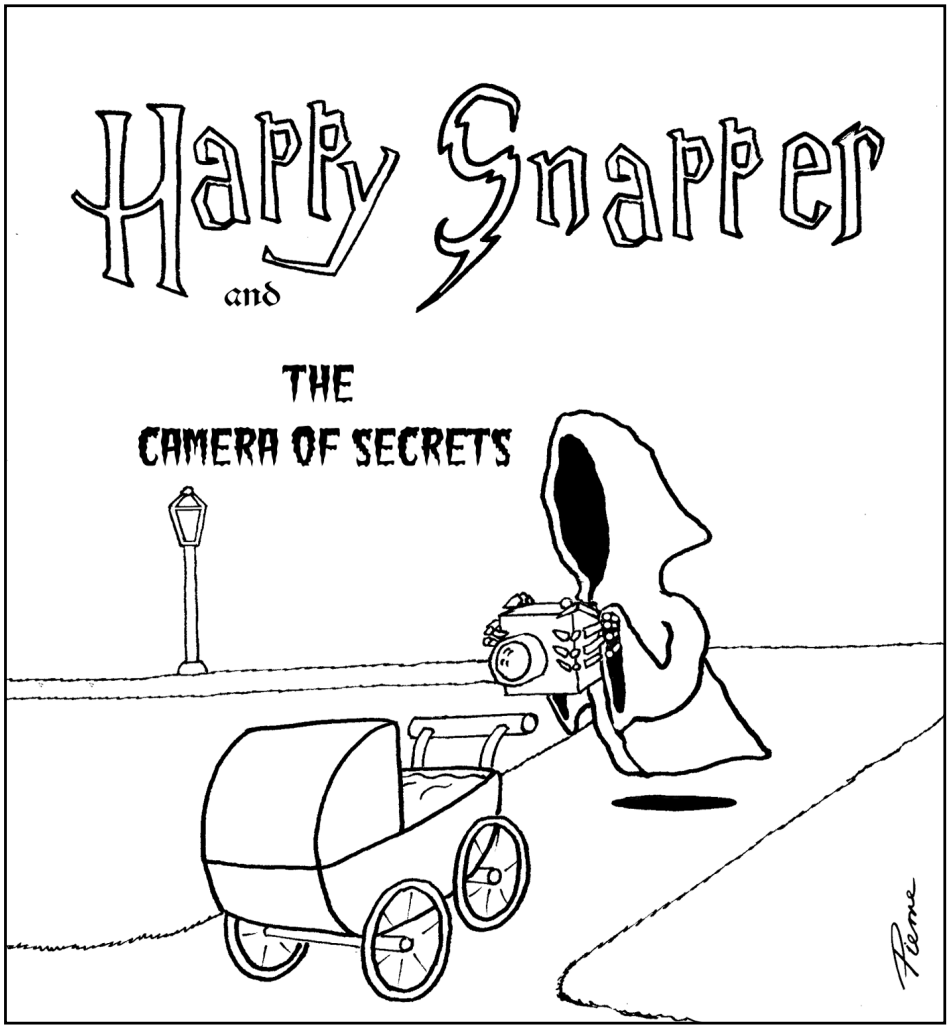
There is a suggestion by the Court of Appeal – not fully developed in their judgment – that the question whether or not the parent or guardian of the child would have objected to the photographs is somehow relevant to determining whether the child had a reasonable expectation of privacy:

> *It seems to us that, subject to the facts of the particular case, the law should indeed protect children from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication which* ***the person who took or procured the taking of the photographs knew would be objected to on behalf of the child****. That is the context in which the photographs of David were taken.*[24]

The Court of Appeal judges seek to distinguish an earlier decision,[25] in which the court expressed doubt as to whether Article 8 was engaged in respect of the publication of a photograph taken in a Malta street of the survivor of conjoined twins, on the basis that the parents in that case would have permitted publication had they been able to agree a price with the newspaper. It is not altogether clear why the question whether a child has a reasonable expectation of privacy should be determined according to whether or not *his or her parents* had intended to commercially exploit media interest in the child, particularly given the Court's emphasis on the 'rights of children' and its insistence that the position of parents on the one hand and children on the other are distinct.

The Court of Appeal's willingness to draw a distinction based on whether or not the parents would have permitted publication (at a price) also appears to be at odds with its decision in *Douglas v Hello*.[26] It will be recalled that in that case, actors Michael Douglas and Catherine Zeta Jones were awarded damages for breach of confidence in respect of unauthorised publication in *Hello!* magazine of photographs of their wedding. Counsel for *Hello!* had submitted that the couple forfeited any entitlement to rely on what was essentially a breach of privacy claim when they agreed to sell photographs of their wedding. The Court of Appeal disagreed. The fact that their interest in seeking to control publication appeared to be largely commercial did not stand in the way of Douglas and Zeta Jones calling into aid their Article 8 rights in respect of a publication which they had not authorised.

It is to be hoped that when the Murrays' breach of privacy claim on behalf of their son is finally determined, the Court will explore in some greater detail than did the Court of Appeal the question of what factors, if any, justify treating children differently to adults when it comes to the question of their entitlement to go about their day to day life in public without being photographed.



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(Endnotes)

1 [2008] EWCA 446

2 The Court of Appeal judges rejected the suggestion by Patten J, the judge who struck out the privacy claim, that to allow the claim would have been to introduce an image right. At paragraph 54, they note that Patten J had focussed his attention on the *taking* of the photograph, rather than on its publication. The Court of Appeal judged suggested that 'in the absence of distress or the like, the mere taking of a photograph in the street may well be entirely unobjectionable. We do not therefore accept, as the judge appears to suggest at paragraph 65, that, if the claimant succeeds in this action, the courts will have created an image right.' With respect, the distinction offered by the Court of Appeal judges between the mere taking of a photograph and its publication does not appear to be an answer to the suggestion that a successful claim on the facts as pleaded in Murrays' case will have effectively introduced an image right into English law, at least with respect to children.

3 [2007] EWHC 1908 (Ch)

4 [2004] 2 AC 457

5 Note 3 above, at para 96

6 Ibid, para 154

7 [2004] EMLR 21

8 Ibid, para 54

9 Ibid, paras 59-60

10 Note 2 above, para 43

11 Ibid, para 65

12 Ibid, para 68

13 Ibid

14 [2005] 1 NZLR 1

15 Note 2 above, paras 33 - 35

16 Ibid

17 It was factors of this kind which appear to have led the New Zealand Court of Appeal to determine in *Hosking v Runting* that 18 month old twins did not have a reasonable expectation not to be photographed while out in the public with their mother.

18 Ibid, para 45

19 Ibid, para 45

20 Ibid

21 Ibid, para 46

22 Ibid, para 55

23 Ibid, paras 55-56

24 Ibid, para 57

25 *MGN Ltd v Attard*, unreported decision of Connell J, 9 October 2001

26 [2005] EWCA Civ 595