J. K. Rowling photo case - the boundaries of privacy continue to grow

The Court of Appeal have reinstated the privacy case (Murray v Big Pictures (UK) Ltd) brought on behalf of J.K. Rowling's young son concerning a photograph of him taken covertly in a public place which was later published by a newspaper.

Summary

- Photographs of J.K. Rowling's son with his parents in a public street were taken covertly for a picture agency, offered for sale and one was published by the Express Newspaper.

- In the High Court, the privacy case brought for the child by J.K. Rowling and her husband was struck out. They appealed.

- The Court of Appeal granted the appeal and found that the child arguably had a reasonable expectation of privacy in relation to the publication of the photograph, notwithstanding his mother's fame and the fact that the picture merely shows him and his parents in a public street.

Business impact

- The scope of "private" information is potentially very broad and broader than previously thought.

- This development may be of concern to journalists and broadcasters but it does not follow that it will prejudice freedom of expression: Article 10 of the European Convention on Human Rights has not been diminished simply because Article 8 is wider than previously thought.

- This case goes to highlight the importance in specific cases of the balancing act between Article 8 and Article 10.

- Compensation under the Data Protection Act 1998 could be wider than compensating an individual for direct financial loss suffered; for example, it might extend to seeking an account of a data controller's profits.

Background

This case centres on the publication of a photograph of J.K. Rowling's son, David Murray, in the Sunday Express Magazine in April 2005 alongside an article discussing the author's attitude to motherhood. The photograph was of the child...
(then aged 19 months) and his parents in a public street in Edinburgh; he was in his buggy and his face was shown in profile; it showed his size, the style and colour of his hair and his skin colour. The picture was taken covertly in November 2004 with a long range lens by Big Pictures (UK) Ltd ("BPL"), a celebrity picture agency which licences its catalogue of photographs for use in the UK and internationally. David's parents were unaware any pictures had been taken until one was published.

Proceedings were brought in June 2005 for an injunction to prevent further publication of the photograph or any similar ones and for damages. The cause of action was breach of confidence, infringement of privacy and the misuse of private information. A claim was also made under the Data Protection Act 1998 ("DPA").

BPL successfully applied to strike out the claimant's case on the grounds that it did not disclose any legally recognised claim and therefore had no real prospect of success. (The case against Express Newspapers had settled by this time).

Summary of the Court of Appeal's decision

The Court of Appeal held that the Judge was wrong to strike out David's claim: there was an arguable case that he had a reasonable expectation of privacy in respect of the published picture; in other words, Article 8 (the right to respect for private and family life) of the European Convention for the Protection of Human Rights was arguably engaged. Although not necessary for them to decide, they also commented that David appeared to have an arguable case that the balance between Articles 8 and 10 (the right to freedom of expression) should be struck in his favour and against publication. The judgment focused on whether Article 8 was engaged rather than on where the balance should be struck between Articles 8 and 10.

The Court of Appeal also reinstated the claim under the DPA. They held that, if publication was unlawful as a breach of confidence, it followed that it would contravene the First Data Protection Principle requirement for lawful processing. The appellate court also disagreed with the Judge's finding that compensation for damages under the DPA was limited to pecuniary loss suffered by the claimant and considered this was arguably too narrow. If these questions are heard at full trial, we could see awards under the DPA on a broader basis in future, for example, an account of profits.

The law

The test for whether there has been a breach of confidence (or misuse of private information) has two stages:

1. is there a reasonable expectation of privacy (is Article 8 engaged)?

2. if there is, does the balance between privacy and freedom of expression come down in favour of the individual's privacy, or in favour of publication?

This appeal was concerned with whether an expectation of privacy arose. The Court of Appeal applied the test from Campbell v MGN (2004): "the question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity".

In Murray the Court of Appeal provided a checklist of factors to be considered when determining whether an expectation of privacy arises; these include (with examples added by the authors from case law):

1. the attributes of the claimant (e.g. child, adult, drug addict);

2. the nature of the activity in which the claimant was engaged (e.g. embarrassing tumble or just walking down the street);

3. the place at which it was happening (e.g. private property or on a public street);

4. the nature and purpose of the intrusion (e.g. incidental street scene "snapped" by a passer by or targeted by paparazzi);
(5) the absence of consent and whether it was known or could be inferred (e.g. use of long range lens);

(6) the effect on the claimant (e.g. distress caused by the publication, increased risk of media intrusion in a person's life, likely to deter from continuing with drug therapy sessions); and

(7) the circumstances in which and the purposes for which the information came into the hands of the publisher (e.g. pictures taken to order).

The Court of Appeal considered the approaches in Campbell and Von Hannover (2005) (the latter decision is not binding on English courts). In Campbell, Baroness Hale said that if Ms Campbell had been photographed popping out for a bottle of milk, this would not be private. In Von Hannover the European Court of Human Rights described two categories of activities conducted in public: (a) recreation activities to be enjoyed in the company of family and friends (private) and (b) routine activities (not private).

The Judge in Murray, while recognising the dangers of trying to categorise various types of information as private (or not), said he was pre-disposed to consider that routine activities such as a ride on the bus or a shopping trip should not give rise to an expectation of privacy. The Court of Appeal said "we do not agree that it is possible to draw a clear distinction in principle between the two kinds of activity" and took the view that it depended on all of the circumstances.

The fact that this case concerns a child's privacy, not that of an adult, clearly has a bearing on both whether the information is private and on whether or not it would infringe his privacy to publish it. Information is more likely to engage Article 8 if it is about a child. Even for children, however, it appears that the test established in Campbell should be applied; it merely has to be set in the context of what the reasonable child, or rather the reasonable parents on behalf of the child, would expect. This appears consistent with the Press Complaints Commission Code.

Comment - will broader privacy mean compromised freedom of expression?

These days anyone with internet access can be a publisher, e.g. on YouTube or MySpace. The person included on a photo taken by a long forgotten acquaintance may not expect it to be posted on the internet for all to see. Whether that publication, on balance, infringes his privacy will depend on all of the circumstances but, if Article 8 is not engaged in the first place, the individual has no possibility of objecting on privacy grounds. A wider scope of privacy may therefore be appropriate in light of this.

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