The Princess, the Paparazzi and the Press

Privacy Law Marches Forward Through Europe

By Matthew Nicklin

Princess Caroline of Monaco's recent victory over the paparazzi in the European Court of Human Rights has serious implications for the media in the UK. See *von Hannover v Germany*, ECHR June 24, 2004. The full Judgment (and a case summary) is available at www.5rb.com/casereports/detail.asp?case=267.

Background

For some 10 years the Princess has been taking legal action in an effort to stop a number of magazines in Germany from printing paparazzi photographs of her going about her daily life: collecting her children from school, shopping or exercising. Save for winning some limited protection from intrusion into the life of her children, her actions have failed.

Across Europe, the ECHR's decision is indicative of a significant shift towards the French model of protecting privacy.

While German law does provide protection from intrusion into a "secluded place," the German courts were not satisfied that the places where the Princess had been photographed qualified. Princess Caroline was a "figure of contemporary society *par excellence*"; she had to accept publication of photographs of her taken in public.

In contrast, the European Court of Human Rights ("ECHR") in Strasbourg upheld her complaint that this did not adequately protect her privacy rights under Article 8 of the European Convention on Human Rights. Germany has three months to appeal the decision to the full court.

Impact on UK Law

As it stands, the decision is significant not just because the ECHR has recognised that her privacy rights were infringed by photographs taken in public and semi-public places, but also because the domestic law of Germany (which had at least attempted to strike a balance between privacy and freedom of expression) was found wanting in its protection for privacy.

Across Europe, the ECHR's decision is indicative of a significant shift towards the French model of protecting privacy. As the Association of German Magazine Editors had submitted to the ECHR, the German domestic law had tried to set careful boundaries around the private life of public figures and that the resulting law was somewhere between the very restrictive French privacy laws and the comparatively permissive position in the UK.

Nevertheless, the ECHR felt that this compromise position provided insufficient protection for Article 8 rights.

Unlike Germany, the UK Parliament has not even attempted to provide legislation to strike a balance between privacy and freedom of expression. The Human Rights Act 1998 was proffered by Parliament as a protection for the media against the Courts, but has proved to be a modern day Trojan Horse. It was used by the Court of Appeal in *Douglas v Hello! Ltd* [2001] QB 967 to recognize and give effect to "privacy rights" by importing Article 8 rights via the qualifications on freedom of expression set out in Article 10(2) (see §§134-136).

Courts Interpreting Scope of Privacy Rights

Instead of grappling with this undoubtedly difficult issue and attempting to set a balance between these competing rights, UK Parliament has abdicated responsibility and simply left it up to the Courts. Indeed, in June 2003, the Government firmly rejected calls by the House of Commons Select Committee for Culture, Media & Sport that privacy legislation should be introduced.

The failure to legislate (and the consequent privacy void) has ushered in a period of judicial activism. Yet, the Courts are not acting unconstitutionally. Under the Human Rights Act 1998, Parliament has required the courts to take into account the jurisprudence of the ECHR and act consistently with it.

Practically, this means they must give effect to ECHR decisions when interpreting English law. Consistent with the

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UK's Convention obligations, the English courts must respect and give effect to privacy rights and, in default of Parliament providing such protection by legislation, they will fashion the common law in order to fill the void.

This state of affairs presents the judiciary with an almost completely blank canvass. According to their temperament, some judges are enthusiastic about this, others are more cautious. Granted, they have the law of breach of confidence to work with as a guide, but confidence and privacy are not the same, and the effort to "*shoe-horn*" the latter into the former is neither satisfactory nor, in the long run, likely to be successful. *See* Lord Phillips MR at §69 *in Campbell v MGN Ltd* [2003] QB 658.

In particular, as the Princess Caroline decision, and the *Peck* decision before that shows, the ECHR does not accept that the fact that some event may have taken place in public necessarily places it outside the sphere of an individual's private life. In *Peck v United Kingdom* (2003) 36 EHRR 41, the ECHR held that a right of privacy could apply in favor of a man whose failed suicide attempt on a public street was captured by a municipal video surveillance camera.

The ECHR prefers to look at whether the person was carrying out an official or public duty or whether they were simply going about their daily life. The latter instance would give rise to a legitimate expectation of privacy; the former would not.

It is interesting to note that, a few weeks before the ECHR judgment in the Princess Caroline case, the House of Lords in *Campbell* decided that under the common law:

> "the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy."

See Naomi Campbell v MGN Ltd [2004] 2 WLR 1232 *per* Lord Nicholls at §21, cf §§84 and §111 *per* Lord Hope; §§134-137 *per* Baroness Hale. The "*reasonable expectation of privacy*" test is also used in the Code of Conduct of the Press Complaints Commission - http://www.pcc.org.uk/cop/cop.asp.

Their lordships expressly rejected any higher test of whether publication of the information would be "*highly offensive*." See §22 *per* Lord Nicholls and §135 *per* Baroness Hale. (The test was originally introduced by the High Court of Australia in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 §42 and then picked up by the English Court by Lord Woolf CJ in §11(vii) *A v B (Flitcroft v MGN Ltd)* [2003] QB 195. The "*highly offensive*" test will be familiar to US lawyers as an essential ingredient in the tort of intrusion. See *Restatement (Second) of Torts* 2d (1977) vol 3, §652B at 378.)

Indeed, and as the *Campbell* decision re-emphasized, under the Convention freedom of expression (Article 10) has no presumptive priority over privacy (Article 8). Where they come into conflict, the Court has to balance between the competing (yet equal) rights.

This process involves assessing the extent and justification of the interference with the subject's privacy interests as compared with the extent and justification of the interference with the media's freedom of expression.

In Princess Caroline's case this balancing process came down firmly on the side of privacy. The ECHR was fairly dismissive of the suggestion that the media's Article 10 rights should outweigh her privacy rights:

> "… the publication of the photos and articles in question, of which the sole purpose was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public...."

von Hannover v Germany at §§65-67.

The equal ranking of privacy and freedom of expression under the European Convention requires the Court to assess the value of the speech against the invasion of privacy. In Princess Caroline's case, freedom of expression came a very poor second.

Of course, in the US the position would be very different. Such privacy rights that the law recognises are subordinate to the constitutional protection for free speech.

While the ECHR and the US Supreme Court would agree on the self-evident value and importance of freedom of expression, the Convention of Human Rights ranks this alongside the right to respect for private life.

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Impact on UK Media

What does this mean for the UK media? First, it would appear that the English courts are likely to (indeed they must) give effect to the *Caroline* judgment.

While this is likely first to bite those sectors of the media that are dependent upon snatched celebrity photographs as their staple output, the decision is by no means limited to photographs.

Next in the firing line will be the familiar "*kiss and tell*" stories. *See e.g.* the discussion in Lord Hoffman's speech in *Campbell* (§56). It is difficult to imagine that revelations about the sexual conquests and prowess of celebrities and similar trivialities, which have so entertained newspaper readers in the UK for many years, will be found to be anything other than unjustifiable invasions of privacy from now on.

Put simply, this speech is of such low value that it will usually be outweighed by the subject's privacy rights.

Second, the interpretation of privacy given by the press regulatory body, the Press Complaints Commission ("PCC") will have to be adjusted. Hitherto, the PCC has taken the orthodox approach that a person cannot have a reasonable expectation of privacy in matters that take place in public.

For example, Elton John's former wife, Renate, complained that publication of photographs of her going about her daily life in a car park and petrol station forecourt were invasions of her privacy. Her complaint was rejected by the PCC:

> "The Commission could not consider that a public car park or a petrol station were places where anyone could have a reasonable expectation of privacy. The complainant was outdoors in places where any number of people were entitled to be without restriction… The Commission understood that the attention that the complainant had received was clearly unwanted but recognised that the photographs had been taken in a public place while she was not engaged in any private activity. Furthermore, they could not be held to illuminate any aspect of her private life."

Complaint of 6 April 2000. Adjudication http://www.pcc.org.uk/reports/details.asp?id=280.

Following the Princess Caroline decision, the PCC would have to accept that privacy rights do extend to the mundane activities of one's daily life, even in public places, so that intrusion by the media requires proper justification. Without proper justification there is a breach of privacy.

The UK media ought now to give thought to asking the UK government for a statutory privacy law … it is the only practical way in which the media could swing the pendulum back towards freedom of expression.

Equally, it is likely that the PCC's victory in Judicial Review proceedings brought by the newsreader Anna Ford, [2002] EMLR 95, would be decided differently in the light of the Princess Caroline decision. Like Princess Caroline, Ms Ford complained about the publication by *The Daily Mail* newspaper and *OK!* magazine of photographs showing her on a beach.

The PCC rejected her complaint on the grounds that the beach in question was publicly accessible and that Ms Ford could not therefore have any "*reasonable expectation of privacy*." Decisions of the PCC that are not consistent with the ECHR's interpretation of privacy are likely to be susceptible to Judicial Review.

Decision May Spur Parliament to Act

Finally, the effect of the *Caroline* decision is to suggest that the UK media ought to now give thought to asking the UK government for a statutory privacy law. Although this might seem the equivalent of suggesting that turkeys should vote for Christmas (or Thanksgiving), it is the only practical way in which the media could swing the pendulum back towards freedom of expression.

Without legislation, the reality is that, in the shaping of privacy law, the UK courts have little to work with other than the jurisprudence of the ECHR.

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Unless there is some framework of domestic law (beyond the self-created common law protection for privacy), there is little room for the application of the important concept of the margin of appreciation.

This doctrine – which allows individual countries a limited amount of discretion as to how convention rights will be protected in their domestic law - is discussed in *Caroline.* See *von Hannover v Germany* at §57.

Although the German law was eventually found wanting, the UK has no legislation to offer at all. (The ECHR accepted the UK Government's submission in *Spencer v United Kingdom* (admissibility decision, 16 January 1998: Application No. 28851/95) (1998) 25 EHRR CD 105 that there were various remedies provided under the common law which might provide adequate protection for privacy rights.) Eventually, though, the common law will develop a set of parameters, but are the media content to allow the Judges to fix them?

If, as it appears, the Princess Caroline decision represents a significant tilt towards restriction of press freedom in pursuit of privacy rights, then the only really effective remedy is for the UK Parliament to legislate where it wants the balance to be struck.

At least in that political process the views and concerns of the media can be expressed and, if accepted, accommodated in the resulting legislation. Such a step would put the media in a much stronger position to utilize arguments based on the margin of appreciation. Without legislation, the media enjoy no real protection from what may prove to be an inexorable march towards ever more stringent privacy laws.

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