ARE THE HUNTERS BECOMING THE HUNTED?

THE ROLE OF THE PAPARAZZI AFTER RECENT RULINGS

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THE HUNTERS

1. **Who are they?** According to Wikipedia: *Paparazzi is a plural term for photographers who take unstaged and/or candid photographs of celebrities caught unaware. Paparazzi take photos of celebrities at moments when the subjects do not expect to be photographed, such as when they shop, walk through a city, eat at a restaurant, or swim or lie on the beach.*

2. **Do we need them?** Like it or not the paparazzi have been around for years and they are not going to disappear. In the UK in particular there seems to be an insatiable desire for celebrity gossip and photographs, often focusing on individuals who years ago would not even have come near to being called a celebrity. If anything the demands on the paparazzi for celebrity images are increasing year on year.

3. **Are you one?** We can all be one of the paparazzi if we want to be and many regular people already are. Almost all mobile phones include reasonable quality integrated cameras which means that most people can snap a celebrity if they see one and possibly make some money out of the exercise. Various websites encourage the general public to join the ranks.

   See for example

   www.mrpaparazzi.com and **www.xposureuncut.com**

4. **What methods do they use?** Yes, some paparazzi appear to behave unlawfully, they drive cars and motorbikes recklessly, and hide in bushes or trees or anything else they can find. But the majority of celebrity photographs are taken from public places and without any question of trespass or harassment. They are, however, often assisted by huge camera lenses.

5. **Are the hunters being hunted?** Without any doubt. The list of privacy cases continues to rise and reads like a who's who of the music, modelling and film world. Perhaps not surprisingly you do not find many ex-Big Brother or X Factor contestants complaining about the publication of their image, seemingly only too glad that the general public is interested in them.

6. **Who is hunting them?** Lots of people, young and old. Some are more prolific than others (notably Sienna Miller and Lily Allen) and celebrity children are starting to stamp their feet louder and louder (J K Rowling's son David Murray and Sacha Baron Cohen's daughter Olive, to name but two).

7. **Who is helping them?** Lawyers, and the law. Standard 'keep away from my client' letters are now commonplace, often sent to the paparazzi before the client has even stepped on a plane, or out of the garden gate. These come with encouragement from the developing Art 8 privacy case law, and in the context of the rapid advancement of technology in digital photography, mobile telephone photography and, of course, the Internet.

SOME CASES

8. In the absence of harassment, assault, criminal damage, embarrassment, humiliation, danger, upset, injury, physical or psychological harm, knowledge or awareness on the part of the subject, a need to protect a child's welfare, copyright infringement, or any obvious public interest, is it unlawful to take a photograph of a fellow citizen of this country just doing their own thing in public? The answer is: "Arguably", see ***Murray v Big Pictures (UK) Ltd*** **[2008] 3 WLR 1360**.

9. Whether it is or not, public interest considerations aside, probably depends little upon what the photograph actually shows, but rather on the manner of its taking, its purpose and intended use, and that its subject might not have consented to being photographed if asked in advance.

10. Given the low order of free speech to which most paparazzi shots typically contribute – candid shots showing what celebrities look like – the current position must be that virtually every shot taking by a paparazzo will therefore give rise to a viable cause of action for misuse of private information that *could* be brought by its subject. That appears all the more so in the case of children.

11. However, as recently as 1991 the actor **Gordon Kaye**, lying severely injured in hospital, was unable to rely on any English law of privacy (or confidence) to impugn the taking of photographs of him by journalists who had obtained unauthorised access to his private hospital room. An injunction was upheld by the Court of Appeal in malicious falsehood, to prevent the *Sunday Sport* publishing to the effect that he had consented to the taking of any photographs or being interviewed by its journalists. But the other causes of action which he invoked – libel, trespass to the person and passing off – were found wanting by the Court of Appeal to protect his rights. The court lamented the absence of an actionable right of privacy in English law, urging Parliament to consider the position.

    Kaye v Robertson **[1991] FSR 62**

12. In 2001, **Anna Ford** failed in her attempt for a judicial review of the Press Complaints Commission's decision that long lens photographs taken of her and a friend on a beach in Majorca and published in the *Daily Mail* and *OK!* did not infringe clause 3 (privacy) of the PCC Code. The Administrative Court, in refusing permission, found that the type of balancing operation conducted by a specialist body such as the PCC was a field of activity to which the courts would defer.

    R v Press Complaints Commission, ex parte Anna Ford **[2002] EMLR 5**

13. In October 2001, Garland J approved a settlement at £5,000 of a claim brought by a 10-year-old girl, **Ms Adenjii**, whose picture had been used without parental consent to illustrate brochures concerned with coping with childhood HIV/AIDS and child crime. The photographs conveyed a false impression, since the claimant herself was not infected and not involved in

youth crime. The judge described the case as ground breaking litigation as a claim for damages for breach of confidence.

***Adenjii v London Borough of Newham*, QBD, unreported, 16/10/2001**

14. Also in October 2001 *Mirror Group Newspapers* applied for permission to publish photographs of **Jodie Attard**, the surviving conjoined twin, that had been taken of her being pushed along a public highway in a pram by her mother in Malta. The court had earlier restricted the publication of photographs of Jodie under its inherent wardship jurisdiction, in circumstances in which it had been called on to adjudicate as to her and her twin sister's medical treatment. In the Family Division, Mr Justice Connell thought that at its highest any infringement of Art 8 would minimal. Rather, he suggested, no argument could be advanced that there had been an infringement of the right to privacy. Accordingly, accompanied by a finding that there was no continuing protective jurisdiction being exercised, the court allowed the publication in the *Mirror* of the new photographs placed before it.

***MGN LTD v Attard*, unreported, 19/10/2001, Connell J, transcript**

15. In 2002 the television presenter **Jamie Theakston** obtained an interim injunction restraining the publication of mobile phone photographs taken of his visit to a brothel, but not a newspaper story recounting what had occurred there. The court thought that whereas he would be unlikely to succeed at a trial in restraining the prostitutes from publicising his visit, including its details, if that is what one or more of them wished to do, he would be likely at a trial to restrain publication of the photographs. Therefore interim restrain in respect of the photographs was appropriate. The judge noted that the courts had consistently recognised that photographs could be particularly intrusive. Further, it was not remotely inherent in a visit to a brothel that what was done inside would be photographed, let alone the photographs published.

***Theakston v MGN Limited* [2002] EMLR 398**

16. In 2004 the New Zealand Court of Appeal dismissed an action brought in privacy by the **Hoskings**, a well-known TV personality and his wife, in respect of photographs taken of their small children being pushed in a pushchair in a public street by Mrs Hosking. The photographs had been taken by an individual commissioned by *Pacific Magazines* to get some up to date shots of the children. NZCA found that absent a risk of physical harm the common law did not recognise a cause of action in tort based upon publication of photographs taken in a public place.

***Hosking v Runting* [2005] 1 NZLR 1**

17. Later in 2004, the House of Lords found by a 3-2 majority that **Naomi Campbell**'s rights to privacy had been infringed by the publication of

photographs and other material that disclosed the detail of her therapy for drug addiction that went beyond the publication of anything that was necessary to illustrate the story that Ms Campbell had deceived the public concerning her drug use. The photographs were of Ms Campbell in a public street, outside premises at which Narcotics Anonymous met.

18. Within the minority, Lord Nicholls doubted whether the photographs were taken in circumstances in which there was a reasonable expectation of privacy, but concluded anyway that the balance between Art 8 and Art 10 came down in any event in favour of permitting publication. Unlike the four other members of the House, Lord Hoffman did not specifically refer to a two stage approach to the problem. It is however tolerably clear that his decision to favour publication was based not upon the conclusion that the information in question was not on the face of things private, but because (like Lord Nicholls) he thought that the second stage balancing process should be resolved in the direction of Art 10. He spoke **[#46]** of the privacy of personal information as something worthy of protection in its own right and **[#50]** of human rights law having identified private information as something worth protecting as an aspect of human autonomy and dignity.

19. Baroness Hale **[#154]** observed that there would be nothing essentially private about Naomi Campbell's appearance if captured in a photograph as she popped out to the shops for a bottle of milk. She cited the outing in ***Hosking v Runting*** as "similarly innocuous". She also contrasted the position in this country with that in France and Quebec: here the law does not recognise a right to one's own image. Further, the English courts had not to that date held that the mere fact of covert photography is sufficient to make the *information* contained in a photograph confidential. The *activity* photographed must be private.

20. Lord Nicholls observed **[#14]** that "the essence of the tort is better encapsulated now as misuse of private information".

Campbell v MGN Ltd **[2004] 2 AC 457**

21. On 24 June 2004 (after the HL decision in ***Campbell***), ECtHR found that there had been a violation of **Princess Caroline of Monaco**'s Art 8 rights, by the publication of photographs of her engaged in various everyday activities such as horse riding, shopping, dining at a restaurant, on a skiing holiday, leaving her Paris home with her husband and tripping over at the Monte Carlo beach club. At **[#50]**, ECtHR said:

> …the concept of private life extends to aspects relating to personal identity, such as a person's name, or a person's picture.
>
> Furthermore, private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Art 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'.

Von Hannover v Germany **(2005) 40 EHRR 1**

22. In May 2005, the Court of Appeal upheld **Michael Douglas'** and **Catherine Zeta-Jones'** personal privacy, confidence and data protection claims against ***Hello!*** arising out of uninvited and unauthorised photographing at their wedding in a New York hotel. The judge had awarded the couple £3,750 each personal damages, £7,000 between them for the cost and inconvenience of having to select their official wedding photographs in a hurry, and nominal damages of £50 each for breach of the Data Protection Act 1998.

23. CA applied ***Campbell*** and ***Von Hannover***, saying that special considerations attach to photographs, which are a particularly intrusive way of invading privacy. The test was whether *Hello!* knew or ought to have known that the claimants had a reasonable expectation that the information in the photographs would remain private. It was observed that a claim for invasion of privacy falls within the cause of action of breach of confidence. Further, only by the grant of an interim injunction (which had been refused early in the litigation) could the claimants' rights have been satisfactorily protected.

Douglas and others v Hello! Ltd and others (No 3) **[2006] QB 125**

24. In 2006 **Sir Elton John** failed in his bid for an interim injunction to restrain the publication of pictures of him taken at the front gate of his London home, wearing a baseball cap and with his feet on the pavement. Eady J refused the injunction in the light of ***Campbell*** in particular, holding that the nature and quality of the information in the photographs did not touch on health, social or personal or sexual relationships, with the result that the case was more akin to popping out for a pint of milk. Accordingly, the information lacked a "quality of confidence", and Sir Elton had no reasonable expectation of privacy in relation to it.

Sir Elton John v Associated Newspapers Limited **[2006] EMLR 772**

25. In 2008, the Court of Appeal reinstated the privacy and data protection claim brought by **David Murray**, the infant son of JK Rowling, over photographs taken of him being pushed in his pushchair by his parents down a public street in Edinburgh. The claim had been struck out at first instance by Patten J, on the basis that after ***Von Hannover*** there still remains an area of innocuous conduct in a public place which does not raise a reasonable expectation of privacy. Further, even if ***Von Hannover*** had extended the scope of privacy protection into areas which conflicted with the principles and decision in ***Campbell***, the judge found himself bound to follow the domestic authority. He regarded the case as materially indistinguishable from the facts in ***Hosking***.

26. CA, however, found that an arguable right to privacy arose:

    - "The question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case",

including "the nature and purposes of the intrusion and … the purposes for which the information came into the hands of the publisher" **[#36]**.

- While the mere taking of a photograph of a child in a public place when out with his parents might not engage Art 8, it is arguable that such rights are engaged by the "clandestine taking and subsequent publication of the photograph in the context of a series of photographs which were taken for the purposes of their sale for publication" in the absence of consent, in the knowledge that the parents would have objected if asked **[#17]**.

- The law should as a rule "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" **[#57]**.

Murray v Big Pictures (UK) Ltd **[2008] 3 WLR 1360**

27. Later in 2008, **Max Mosley** recovered £60,000 damages for the intrusion into his privacy arising from the publication of newspaper articles, videos and photographs of his attendance at a sex party. Eady J **[#104]** concluded that it is fairly obvious that the clandestine recording of sexual activity on private property must be taken to engage Art 8. On the subject of the photographs and videos, he observed that even where a hypothetical good case for revealing the fact of wrongdoing to the public was made out, it would not necessarily follow that photographs of every detail would also need to be published to achieve a public interest objective, nor would it automatically justify clandestine recording whether audio or visual. The very fact of clandestine recording itself might be a violation of Art 8 rights. Once the recording had taken place, there was a separate issue of the appropriateness of onward publication, whether to a limited class or the world at large.

Mosley v News Group Newspapers Limited **[2008] EMLR 679**

28. In May 2009, the Court of Appeal allowed an appeal by **Mr Wood**, a member of Campaign Against Arms Trade, against the decision of the Administrative Court to dismiss his application for a judicial review of a decision taken by the Metropolitan Police to photograph him, and retain the photographs, after he had attended as a shareholder a company AGM in Grosvenor Square at a time when the company in question was the organiser of an annual trade fair in London for the arms industry. Although the court was split on the question of proportionality it agreed that Article 8 had been engaged: while the bare act of taking a photograph in a public place was not of itself capable of engaging Art 8, on the particular facts the police action was a sufficient intrusion by the state into the individual's own space and integrity as to amount to a *prima facie* violation of Art 8(1). It attained a sufficient level of seriousness, and in the circumstances Mr

Wood enjoyed a reasonable expectation that his privacy would not be thus invaded.

Wood v Commissioner of Police for the Metropolis **[2009] EWCA Civ 415**

GUIDANCE

29. That the cases just listed form an eclectic mix reflects that many paparazzi photographs do not end up going anywhere near court. Either this is because many subjects simply do not complain, or when complaint is made the photographer and any related media outlet may seek to settle for relatively high compensation at an early stage, in order to avoid greater risk and legal costs later. For example, in 2003 Sara Cox and her husband settled for £50,000 compensation over photographs taken of them naked on their honeymoon. In 2007, Sienna Miller settled for £37,500 over unauthorised pictures of her skinny-dipping (on a film set).

30. Until the recent Max Mosley case, settlements at these levels were more in line with the photograph subject recovering a notional commercial licence fee retrospectively for the use of the image in question, rather than with the sort of relatively small damages ordinarily to be expected for distress, upset and intrusion if an analogy with personal injury awards is drawn. But since damages are going up, and the risks of attracting liability for taking photographs in public seem to be on the increase, what guidance can be drawn from the cases?

- So far as photographs are concerned at least, the law of privacy has divorced itself from that of confidence: it is now unsafe to think of a photograph case in terms of the three-fold analysis of the law of confidence in ***Coco v A N Clark (Engineers) Ltd*** **[1969] RPC 41**. In particular, the first two ***Coco*** limbs – that the information in question has the necessary quality of confidence about it and that it has been imparted in circumstances importing an obligation of confidence – appear to have little application to the approach in ***Murray*** (or indeed ***Von Hannover***).

- Photographers cannot comfortably reassure themselves that in taking a particular photograph they do not appear to have done any harm to the subject. The damage in issue appears to be the intrusion into the subject's "zone of interaction" by the photographing. This in turn appears to depend upon the objective expectations of the subject, as well as potentially on an actual desire on the part of the subject not to be photographed, as it ought to have been known or appreciated by the photographer.

- The real vice *may* lie in the use of the photograph in publishing, rather than in its taking in the first place. This distinction was recognised in ***Murray*** and has featured in other cases. That said, the case in ***Murray*** was permitted to proceed against the picture agency where the

claimant had already settled his case against *Express Newspapers*, who actually published the photograph, having first edited it.

- Nor is a particularly safe or reliable principle available that private information must attain a certain level of seriousness before being capable of being protected. While that remains the position under the law of confidence, in the context of photographs the court's attention has been drawn increasingly to the intrusive nature of the activity of photographing, but away from considering the *information* which is being sought to be protected. At best, this is giving rise to unpredictability of outcome: contrast, for example, Sir Elton John at his garden gate (no reasonable expectation of privacy) with young Master Murray in his pushchair.

- When ultimately photographs taken overseas have been published in this jurisdiction there is unlikely to be any territorial point behind which the photographer may shelter: Catherine Zeta-Jones got married in New York, but the legality (or not) of the photographing in New York did not affect her civil claim here; Anna Ford was in Majorca, but nobody suggested the PCC or the Administrative Court were disbarred from considering her case; the Attards were in Malta; Sara Cox was naked in the Seychelles. What is likely to be extremely dangerous advising pre-publication is to make any assumption that even though the photographer was overseas and did nothing illegal with reference to local laws, that will somehow necessarily provide a defence in the event of objection being taken to the publication of a photograph here.

- It is difficult to say what difference, if any, the recent cases make to the availability of an interim injunction to restrain the publication of a photograph. On the one hand, it is acknowledged in the cases that photographs can be particularly intrusive. But on the other, Baroness Hale for example pointed out in ***Campbell*** that there would be no freestanding justification for a court to interfere with the publication of a photograph of a celebrity popping out for a bottle of milk. This, though, must be considered in the context of the comment of the Court of Appeal in ***Douglas***, that the only satisfactory way to protect a claimant's privacy rights is to grant an early interim injunction. If a subject's privacy rights are serious enough to give rise to an arguable cause of action, as was found to be the case in ***Murray***, then the indicated course may be for a court to grant an interim injunction, albeit somehow at the same time also having particular regard to the importance of the right to freedom of expression (Human Rights Act 1998 section 12) and the usual threshold ("more likely than not" to succeed at trial) that the applicant has to overcome in a media injunction case: ***Cream Holdings v Bannerjee*** **[2005] 1 AC 253**.

31. Given the relative ease discussed above with which a *prima facie* claim in privacy can be established arising from the taking of a photograph in public, photographers and publishers should expect over the coming years to see the subjects of their photography increasingly asserting practical image rights, either purely for commercial exploitation or otherwise to increase significantly subject control over image.

GUIDELINES

32. What the paparazzi really want to know is what they can and cannot do, lawfully. This is not an easy question to answer and it seems clear that a precise analysis of the facts in each case will be required. But it is possible to offer some practical tips and advice.

33. Low (but certainly not no) risk images would include subjects who are fully clothed, in a public place, doing something unremarkable.

34. High risk images would include nudity, subjects in their home or garden, and extend to the grounds of other private property (including hospitals and schools). Images arising from harassment or events where outside photography has been specifically prohibited (eg a celebrity wedding) would also fall squarely within this category.

35. As for children the best advice is to seek express written parental consent or, better still, to avoid taking photographs of minors, unless they are incidental to the main photograph/subject. Even then publishers are likely to pixelate children's faces beyond recognition.

36. Photographers should almost certainly avoid photographs at or outside a school; children who are the subject of family law proceedings (e.g. a custody battle); and issues of child welfare (e.g. alleged abuse).

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