

Photos of celebrities' children—does Paul Weller's case muddy the waters of media law?

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IP & IT analysis: What is safe to publish? John Stables, a barrister at 5RB media and entertainment law Chambers, points out that although the law of privacy as it applies to children is somewhat clearer following the Court of Appeal's judgment in *Weller v Associated Newspapers*, plenty of sediment remains in the muddy waters of this area of the law.

Original news

Weller and others v Associated Newspaper Ltd [2015] EWCA Civ 1176, [2015] All ER (D) 194 (Nov)

The Court of Appeal, Civil Division, dismissed the defendant's appeal against, among other things, the finding that it was liable in misuse of private information and/or for breach of the Data Protection Act 1998. The judge had been right to hold that the claimants, three children of a well-known musician, had had a reasonable expectation in the privacy of the photographs and that their rights under art 8 of the European Convention on Human Rights (ECHR) had outweighed the defendant's right under ECHR, art 10.

How does this case further our understanding of the expectation of privacy?

Generally, it is this case's affirmation of certain aspects of children's privacy rights that takes us a little further in this area of law--most notably the impact of the fact the claimant is a child on the analysis adopted for determining whether or not the claimant has a reasonable expectation of privacy. The judgment also sheds light on the consideration that is to be given to the various factors in this analysis, including the expectations and relevant conduct of the parents, and the relevance of the local law. In particular, the judgments in *Murray v Express Newspapers plc and another* [2008] EWCA Civ 446, [2008] All ER (D) 70 (May) and in *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439, [2011] All ER (D) 197 (Apr)--both appeals from interim hearings--were to that extent confirmed.

The law of privacy as it applies to children is therefore somewhat clearer--although plenty of sediment remains in the muddy waters of this area of the law.

To what extent can text accompanying photos affect the court's approach?

As ever with considerations of privacy the facts of a case must be considered in the round.

In this case, and mindful of the surrounding facts, the key point in respect of accompanying text was that of identification of the children. In discussing the reasonable expectation of privacy Lord Dyson MR held as 'the critical factor' that the claimants were children and were identified (in the photographs' caption) by their surname. Therefore, although the text that accompanied the photographs was bland and merely descriptive of the scene, in identifying by name all those pictured, including the child claimants, it contributed decisively in the circumstances to the creation of the children's reasonable expectation of privacy. This must be understood against the background of the wider findings that included that the Wellers were photographed in the course of a private family outing and that the defendant was aware that the parents had not consented to the taking or publishing of the photographs.

More generally, the court held--unsurprisingly--that the purpose in publishing the pictures was essentially frivolous. Lord Dyson held as a good submission that the photographs 'had the sole purpose of satisfying public curiosity'. This can be contrasted with cases like *Spelman v Express Newspapers Ltd* [2012] EWHC 355 (QB), [2012] All ER (D) 51 (Mar), where the accompanying text could be said to contribute to a debate of general interest and therefore a situation in which the defendant could advance a much stronger argument when it comes to the balancing exercise.

Even so, it must be supposed that in many 'celeb' pieces that contain unauthorised images of children, identification of the children will be likely one way or another and will point towards the presence of a reasonable expectation of privacy for the children unless other circumstances (such as the fact that it was a public event) militate against such a conclusion.

Does this decision offer any clarification of the special position of children?

Yes. There were three important features of the case in that respect that:

- o the engagement of children's ECHR, art 8 rights does not trump any opposing art 10 rights and a balancing exercise will therefore always be necessary in child cases as in adult cases
- o where a child's interests would be adversely affected the balancing exercise must accord the art 8 rights considerable weight
- o the court 'does not necessarily require evidence of harm that may be caused to a child'

Each of these points had been foreshadowed in previous cases, but their re-statement and stiffening does further illuminate the special position of child claimants and the consideration of the effect on children in privacy cases otherwise concerning only adults. Although the first point confirms the position previously held in the interlocutory proceedings in *ETK* such that any 'trump card' argument in respect of children's privacy must be dismissed, the second and third points together add up to powerful findings in favour of children's privacy rights in the balancing exercise, both as matters of law and of evidence.

How did the court address the Californian law point?

The court's approach to this question was essentially limited to consideration of the reasoning of the judge at first instance--had he properly considered the point and was his conclusion sustainable? In both respects the Court of Appeal found the answer to be 'yes': although 'it would have been better' if the judgment below had set out in greater detail the weight accorded to the California law point and to the reasoning in that respect, it was held 'clear' that the point had been considered and that 'it may be inferred' that it had been given little weight.

However, even if not dealt with explicitly by the Court of Appeal, the reasoning of the judge below that the fact of the lawful act of photographing the family, and so of course the children, in California gives way to consideration of the act of publication in this jurisdiction, can be considered upheld. In view of the finding of the younger children's few connections with California, and the little evidence offered in that respect about the elder, Dylan, (who was resident there), the Court of Appeal considered that *Dingemans J* was entitled not to afford substantial weight to the Californian law point.

Does this decision offer any best practice advice for those advising individuals or media outlets?

Directly, no. The court expressed sympathy with Associated's submission that the law is too vague and too uncertain for decisions about the publication of famous people's children's images to be taken with any degree of confidence. But, after observing that uncertainty in the two-stage tests is inherent, Lord Dyson MR immediately added that he nevertheless believed 'the body of case law that is now being developed should give editors a reasonably clear view of what it is safe to publish in most cases'. The belief of the Master of the Rolls is unlikely to be found among editors of newspapers and other media.

Perhaps the most definite guidance that one can distil from the judgment is that as far as the publication of images of children is concerned, where there is a likelihood that the children's art 8 rights are engaged there will usually have to be some very strong justification available to tip the balancing exercise towards the publisher's art 10 rights. Children became a little more special after this judgment.

John Stables joined 5RB in October 2015 after completion of pupillage at chambers. Before retraining as a barrister John spent over 25 years working in media regulation across broadcast and non-broadcast media. John advises on all aspects of media content, both in relation to the law and the applicable codes.

Interviewed by Kate Beaumont.

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