**Parental rights to publish family photographs versus children’s rights to a private life**

Key words: Sharenting; Private Life; Data Protection; MOPI; Duty of confidence

Introduction

In September 2016 it was reported that an eighteen year old Austrian girl had sued her parents for violating her right to privacy.[[1]](#footnote-1) It was alleged that the girl decided to issue proceedings when her parents refused her request to remove hundreds of childhood images from their Facebook pages, images which were accessible to more than 700 ‘friends’. Whilst subsequent reports suggest that no such proceedings were ever issued ,[[2]](#footnote-2) the story nonetheless raises some interesting questions.

Many individuals use social media to share information, including photographs. Indeed, in 2008, only four years after its launch, Facebook reported that its users had already uploaded more than 10 billion photographs, with 250 million more uploaded daily.[[3]](#footnote-3) Recent research suggests many parents will post hundreds of photographs of their children before they even reach their fifth birthday.[[4]](#footnote-4) So many parents now share information about their children online, that a new term ‘sharenting ’ has emerged, meaning ‘the habitual use of social media to share news, images, etc of one’s children.’[[5]](#footnote-5) Many parents sharent for positive reasons: to stay in touch with wider family; to obtain support; and to share parenting advice. Many parents, however, recognise a negative side to sharenting: the impact on children’s privacy; the potential embarrassment caused to children; and that the location of children’s homes, schools, and play areas can be identified from information posted online.[[6]](#footnote-6) Children are now also beginning to express their own concerns about sharenting, seeking to detag themselves or to have their photos taken down.[[7]](#footnote-7)

This does not, of course, mean that we should expect an influx of ‘sharenting’ claims. Where the parent-child relationship is amicable, one would hope that the parent would agree to the child’s request to remove their photographs. Not all children do have good relationships with both parents, however. Some parents will post information and photographs of their children to further their own ends, in full knowledge that such publications reveal intimate details of their children’s private lives and may cause them embarrassment.[[8]](#footnote-8) We cannot ignore the possibility that a child might see no option but to seek removal of childhood information by formal legal means.[[9]](#footnote-9)

The legal position

Although sharenting is a global phenomenon, very different legal responses to the phenomenon are evident across the world. In one of the first academic articles to consider the impact of sharenting on children’s privacy, Steinberg has highlighted that the many American children subject to sharenting, may be unable to obtain any legal remedy to effect the removal of information shared online by their parents. This is both because the First Amendment affords strong protection to free speech (and to the parents’ exercise of free speech through sharenting) and because the courts’ have traditionally been reluctant to grant children privacy rights in the family context.[[10]](#footnote-10) Steinberg accordingly advocates use of an alternative public health model, educating professionals, parents and the public about the potential dangers posed by sharenting.[[11]](#footnote-11)

In France, by contrast, the concern over parental sharenting is such that the French police have placed public warnings on Facebook advising parents of the dangers inherent in posting photographs of children on Facebook and highlighting the importance of protecting the private life and the image of minors.[[12]](#footnote-12) French law also provides explicit protection both to one’s private life and to one’s image.[[13]](#footnote-13) A French child could seek removal of their information via the Cnil[[14]](#footnote-14) (the French equivalent of the Information Commissioner’s Office). French parents would in any event be wise to restrain from sharenting. Sharing intimate photographs of their child, taken in private, without consent may lead to a fine of up to 45,000 Euros or up to a year’s imprisonment.[[15]](#footnote-15)

In England, in contrast to France, there is no provision which recognises a right to one's own image, nor is there any ‘over-arching, all-embracing cause of action for 'invasion of privacy'.[[16]](#footnote-16) With English criminal law offering no obvious remedy to the child whose information has been ‘sharented,’ [[17]](#footnote-17) it is perhaps understandable that English police have offered no comment on the sharenting phenomenon. This is not to say, however, that English law provides no remedy to an individual who objects to their information being shared online. The Data Protection Act 1998, the duty of confidence and the tort of misuse of private information may all be used to prevent online dissemination of personal information, or to obtain compensation. The question, which this article seeks to answer, is whether, using these remedies a child might succeed in removing their images from Facebook.

The Data Protection Act 1998 (‘the DPA’)

If a parent posts information to Facebook, which can be used to identify their child, they will be processing personal data, [[18]](#footnote-18) and must comply with certain principles. [[19]](#footnote-19) For example, information should only be shared in accordance with the law, any information that shared should be relevant and up to date, no more should be shared than is necessary, and it should E+W+S+N.I.not be kept for longer than is necessary. No information should be shared unless one of the conditions detailed in Schedule 2 is satisfied.

Where hundreds of childhood photographs are shared a child might certainly argue that excessive information has been disclosed. One might also argue that where photographs depict a child in its formative years, and no longer represent who the child now is,[[20]](#footnote-20) those photographs are not up to date and are being made public for longer than is necessary. If a child’s private information is shared without their consent, it may not be possible for the parents to demonstrate compliance with a Schedule 2 condition. If information sharing also breaches the child’s Article 8 right to respect for private life, it would then be unlawful, and that in itself would result in a breach of the DPA.

When information sharing contravenes the data protection principles, the individual whose personal data has been shared may complain to the Information Commissioner (‘the ICO’). If the ICO is satisfied that the data protection principles have been contravened they may serve an enforcement notice[[21]](#footnote-21) mandating that the information shared by erased. On the face of it, therefore, the child who objects to sharenting could obtain removal of their information under the DPA. The problem, however, is that the ICO has made clear that it

‘will not consider complaints made against individuals who have posted personal data whilst acting in a personal capacity, no matter how unfair, derogatory or distressing the posts may be. This is because where an individual is posting for the purposes of their personal, family, household or recreational purposes the section 36 exemption will apply.’[[22]](#footnote-22)

Realistically, therefore, when parents share their children’s information or images on Facebook, and their children object, these children will be unable to obtain redress from the ICO.

There is an alternative remedy available to the child via the courts. If the child considers that the presence of their information on their parent’s Facebook page is causing them unwarranted and substantial damage or substantial distress, they could provide a written notice to their parent requiring them to stop processing their information. If the parent failed to comply with that notice the child could ask the court to order the parent to do so.[[23]](#footnote-23) The process is cumbersome. Again such a claim seems unlikely to succeed; given that the domestic purposes exemption specifically covers s10 and the other provisions in Part II DPA. In any event, would the embarrassment that some children describe feeling when they see photographs of their younger selves online be sufficient to satisfy the requirement of substantial damage or distress? Would a court even be willing to interfere in such a parent-child dispute: the court must be mindful of the Data Protection Directive, which the DPA implements and will undoubtedly need to consider whether the drafters of that directive, expected or wish the Directive to be used by family members against another?

The Duty of Confidence

Three elements must be proved for a breach of confidence claim to succeed. [[24]](#footnote-24) The child must first demonstrate that the information shared was of a confidential nature. They must then establish that they either imparted that information to their parents in circumstances importing an obligation of confidence or that it was otherwise clear to their parents that the information was to be kept confidential. Finally the child must show that the sharing that information without their agreement was to their detriment.[[25]](#footnote-25)

Many children may struggle to establish that the information shared (or at least some of it) was confidential in nature or subject to an obligation of confidence. Whilst photographs of a child, taken behind closed doors, perhaps in a state of undress, might be deemed confidential, the courts are unlikely to consider that descriptions or photographs of the child’s everyday activities in public are ‘confidential’. Furthermore, where information, even intimate private information, has been so widely shared that it has become ‘public property and public knowledge’[[26]](#footnote-26)it will potentially be considered to have lost its confidential nature. Accordingly, if a parent shares their child’s information with several hundred ‘friends,’ there will be a strong argument that the child’s information is no longer confidential and that the confidence claim should fail.

A Claim for Misuse of Private Information (MOPI)

The fact that a child’s photographs have been publicly available on Facebook for many years does not prevent a child from bringing a successful claim under the MOPI tort.[[27]](#footnote-27) Breach of confidence actions and MOPI actions rest on different legal foundations and protect different interests.[[28]](#footnote-28) To succeed in their MOPI claim the child must establish both that they have ‘a reasonable expectation of privacy’ in relation to the offending information or images, and that their right to privacy outweighs the Article 10 rights of the sharenting parent. (Parents might argue that the court should also consider their Article 8 right to respect for family life, which protects their right to take decisions in relation to their child and protects them against interference by the state.)

In deciding whether a child has a reasonable expectation of privacy the court will take account of all the circumstances of the case, including;

‘the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.’[[29]](#footnote-29)

In determining whether the child has a reasonable expectation of privacy, the court may need to scrutinise each piece of information in dispute to determine whether they are private in nature, consider whether the child has previously objected either to sharenting or to their photographs being taken, and consider whether the child itself has chosen to share information through social media.

Since the question of whether there is a reasonable expectation of privacy is an objective one, the court will consider what a reasonable person of ordinary sensibilities would feel if they were placed in the same position as the child and faced with the same publicity.[[30]](#footnote-30) It is here perhaps that the difficulty lies. Any child bringing a claim against their parents’ sharenting will effectively be asking the court to comment on social norms; to articulate when a child can expect not to have their information shared, and to express a view on sharenting. It is not entirely clear how the judiciary might respond to such a challenge. In an age when one increasingly reads comments to the effect that ‘sharing is the norm’ and ‘privacy is dead,’[[31]](#footnote-31) a parent could certainly raise an argument that no child can *now* reasonably expect their parents not to sharent. Consider, however, that Facebook was not launched until 2004: could a court realistically say that someone born in 1998 (now just 18) did not have a reasonable expectation of privacy at least until 2004?

If the child can establish a reasonable expectation of privacy, the court will then conduct the balancing exercise, weighing the child’s rights against their parent’s rights. In relation to the Article 8/Article 10 balancing exercise the courts have made clear that neither Article 8 nor Article 10 is of greater weight than the other.[[32]](#footnote-32) It is important, to recognise, however, that the claimant is a child. Lord Dyson made clear in *Weller* that ‘the primacy of the best interests of a child means that, where a child's interests would be adversely affected, they must be given considerable weight.’[[33]](#footnote-33) He emphasised further that children should be protected ‘from the risk of embarrassment and bullying and potentially more serious threats to their safety.’[[34]](#footnote-34)

*Weller* was, of course, a dispute of a very different nature, a claim brought by children against the media, a case in which the parents made clear that they, on behalf of their children, were objecting to interferences with their children’s privacy. The Court of Appeal in *Weller* considered the measure of protection the children were entitled to by reference to the parents’ reasonable expectations for the child, and the way that the parents conducted their lives. This is common with views expressed in other cases brought by children under the MOPI tort, [[35]](#footnote-35) and suggestions from the courts that a child’s reasonable expectation of privacy may be ‘curtailed by decisions made by his or her parents.’[[36]](#footnote-36) What is different about a sharenting case, of course, is that the courts are being asked to determine a dispute which sets the child’s expectations of privacy against their parents expectations of privacy for that child. The courts are being asked not only to interfere with the parents’ Article 10 rights but also with their parents Article 8 rights. The courts are being asked by the child to condemn proud parents for sharing information about their family. This would be a significant departure from the approach that the courts have taken in previous MOPI cases, where the courts have seemingly accepted that parents are entitled to share information about their family, even at the child’s expense.

Conclusion

Whilst to date, no child has brought legal proceedings against their parents to prevent them sharenting, or to obtain removal of information that has been shared, such an action is not unforeseeable. On the face of it English law provides a number of remedies to any child who feels compelled to take such action. Analysis of the DPA and the ICO guidance relating to social media suggests, however, that the DPA currently provides the child with no effective remedy. When the General Data Protection Regulation becomes law the child will potentially find themselves in an improved position. In the meantime, since the child also seems likely to struggle to establish a claim in confidence, it is only the MOPI claim that offers a potential remedy. Yet, whether the MOPI tort might indeed offer a remedy is not clear. The crux of the problem is that the current MOPI jurisprudence has never fully addressed the issue of whether children can expect their parents to guard their privacy or whether parents shouldbe allowed to share their children’s information. Rather, the courts seem to have been satisfied to assume that such sharing is simply part of the parental remit. This being the case one must question whether the English courts would really order a parent to stop sharenting. If they would not, children can do no more than hope both that their parents think carefully before they sharent and that they will willing remove the child’s information when asked.

1. Justin Huggler, Austrian teenager sues parents for 'violating privacy' with childhood Facebook pictures The Telegraph 14 September 2016 <http://www.telegraph.co.uk/news/2016/09/14/austrian-teenager-sues-parents-for-violating-privacy-with-childh/>; Shehab Kahn ‘Austrian teenager sues parents for posting embarrassing childhood pictures on Facebook’ The Independent 14 September 2016 <http://www.independent.co.uk/news/world/europe/teenager-sues-parents-over-embarrassing-childhood-pictures-on-facebook-austria-a7307561.html>; Ashley May ‘18-year-old sues parents for posting baby pictures on Facebook’ USA Today 16 September 2016; [↑](#footnote-ref-1)
2. Francisco Perez ‘Story of Austrian teen suing parents over Facebook pictures debunked’ Deutsche Welle (DW) 19 September 2016 <http://www.dw.com/en/story-of-austrian-teen-suing-parents-over-facebook-pictures-debunked/a-19562265> [↑](#footnote-ref-2)
3. Facebook Statement to the Security and Exchanges Commission <https://www.sec.gov/Archives/edgar/data/1326801/000119312512034517/d287954ds1.htm> [↑](#footnote-ref-3)
4. Megan Rose ‘The average parent shares almost 1,500 images of their child online before their 5th birthday’ <http://parentzone.org.uk/article/average-parent-shares-almost-1500-images-their-child-online-their-5th-birthday> [↑](#footnote-ref-4)
5. Top 10 Collins Words of the Year 2016 <https://www.collinsdictionary.com/word-lovers-blog/new/top-10-collins-words-of-the-year-2016,323,HCB.html> [↑](#footnote-ref-5)
6. Ibid; CS Mott Children’s Hospital National Poll on Children’s Health (2015) 23 (6): Parents on Social Media: Likes and dislikes of Sharenting <http://mottnpch.org/reports-surveys/parents-social-media-likes-and-dislikes-sharenting> [↑](#footnote-ref-6)
7. Kaye Wiggins ‘Should children ban their parents from social media?’ BBC News 2 November 2016 <http://www.bbc.co.uk/news/business-37834856> [↑](#footnote-ref-7)
8. See *Re J (a child) (contra mundum injunction)* [2013] EWHC 2694 (Fam) and *In the matter of an application by Gloucestershire County Council for the committal to prison of Matthew John Newman* [2014] EWHC 3136 (Fam) [↑](#footnote-ref-8)
9. It is acknowledged that even when an image is removed from one Facebook page it may still be accessible elsewhere on the internet, but this issue is not considered in this article. [↑](#footnote-ref-9)
10. Stacey B Steinberg ‘Sharenting: Children’s Privacy in the Age of Social Media’ University of Florida Levin College of Law Legal Studies Research Paper Series Paper No. 16-41,pages 17 and 25 [↑](#footnote-ref-10)
11. Ibid, pg 25 [↑](#footnote-ref-11)
12. ‘Gendarmerie nationale ‘[PREVENTION: Preserver vos enfants!’ (Prevention: Protect your Children!) 23 February 2015 <https://www.facebook.com/gendarmerienationale/posts/1046288785435316>; Note also the similar message from Polizei Nordrhein-Westfalen (NRW) Hagen 13 October 2015 <https://www.facebook.com/Polizei.NRW.HA/posts/474114729427503:0> ; [↑](#footnote-ref-12)
13. Article 9 of the French Civil Code, Article 226 of the French Penal Code and Law 78-17 of 6th January 1978 **relating to information, files and liberties** [↑](#footnote-ref-13)
14. La Commission Nationale de l’Informatique et des libertés [↑](#footnote-ref-14)
15. See Article 226(1) French Code Pénal in relation to photographs taken in a private place without that individual’s consent which affect intimate private life; See also Hortense Nicolet ‘Poster des photos de ses enfants sur Facebook n'est pas sans danger’ Le Figaro 15 February 2015 [↑](#footnote-ref-15)
16. *Campbell v MGN* [2004] UKHL 22 [11], [154] [↑](#footnote-ref-16)
17. Only if the images were either shared with the intent of causing embarrassment or distress or if they were indecent or sexually explicit might a remedy be available (see Protection of Children Act 1978 s1) [↑](#footnote-ref-17)
18. Section 1 DPA defines processing and personal data. [↑](#footnote-ref-18)
19. Schedule 1 DPA [↑](#footnote-ref-19)
20. This argument has been made by a 16 year old in respect of photographs taken when she was 12, see Kaye Wiggins ‘Should children ban their parents from social media?’ <http://www.bbc.co.uk/news/business-37834856> [↑](#footnote-ref-20)
21. Section 40 DPA [↑](#footnote-ref-21)
22. Information Commissioner’s Office ‘Social networking and online forums – when does the DPA apply?’ version 1.1, 26.2.2014 <https://ico.org.uk/media/for-organisations/documents/1600/social-networking-and-online-forums-dpa-guidance.pdf>, [42] [↑](#footnote-ref-22)
23. Section 10 DPA [↑](#footnote-ref-23)
24. *Coco v A N Clark (Engineers) Limited* [1969] FSR 415, 419 (Megarry J) [↑](#footnote-ref-24)
25. Note Megarry J casts some doubt (page 421) on the need for detriment to be proved in all cases [↑](#footnote-ref-25)
26. *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, 215 [↑](#footnote-ref-26)
27. *PJS v News Group Newspapers Ltd* [2016] UKSC 26 [29-32], Lord Mance [↑](#footnote-ref-27)
28. *Google Inc v Vidal-Hall* [2015] EWCA Civ 311 [25] [↑](#footnote-ref-28)
29. *Weller v Associated Newspapers Limited* [2015] EWCA Civ 1176, Lord Dyson MR [16] [↑](#footnote-ref-29)
30. Lord Hope in *Campbell* [99] and more recently Lord Dyson in Weller [16] [↑](#footnote-ref-30)
31. Alex Preston ‘The Death of Privacy’ The Observer 3 August 2014 <https://www.theguardian.com/world/2014/aug/03/internet-death-privacy-google-facebook-alex-preston>; Jo Glanville ‘Privacy is Dead! Long live privacy’ Sage Publications, 2011; Bobbie Johnson ‘Privacy no longer a social norm, says Facebook founder’ The Guardian, 11 January 2010 <https://www.theguardian.com/technology/2010/jan/11/facebook-privacy> [↑](#footnote-ref-31)
32. *Re S* [[2005] 1 AC 593](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/2004/47.html) [17] [↑](#footnote-ref-32)
33. *Weller*, [40-41] [↑](#footnote-ref-33)
34. *Weller*, [64] [↑](#footnote-ref-34)
35. *Murray v Express Newspapers plc*  [2008] EWCA Civ 440, [2009] Ch 481 at para 37 [↑](#footnote-ref-35)
36. Kirsty Hughes ‘Publishing photographs without consent’ (2014) 6(2) Journal of Media Law 180, 185 [↑](#footnote-ref-36)