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WELLER V ASSOCIATED NEWSPAPERS: PHOTOGRAPHS OF CHILDREN IN PUBLIC

Key words

Privacy; Article 8; Right to respect for private life

Introduction

The question of when someone may take and publish photographs of another person has been considered in a string of domestic and European cases.¹ It has most recently been considered by the Court of Appeal in *Weller v Associated Newspapers*.² This case is significant in confirming that publication of innocuous photographs of the children of public figures may justify a claim under the law of misuse of information, even when those photographs were taken in public place. What is unclear, however, is whether the judgement in *Weller* is of wider relevance, for example when the claimants are not the children of famous parents and where the defendants are not the media. This article considers why it might be appropriate to extend the reach of the decision to all children, and how the approach adopted in *Weller* might be applied to such 'ordinary' individuals.

Weller: The facts

In October 2012 Paul Weller, a well-known musician, was enjoying a family shopping trip in California with his 10-month-old twin boys and his 16-year-old daughter. A photographer, without the consent of the children or Mr Weller, took photographs of the family on the street and at a café. Seven photographs were published by the Mail Online. The children instituted a claim alleging misuse of their private information and breach of the Data Protection Act 1998.

At first instance Dingemans J concluded the children's claim for misuse of private information was well-founded and awarded £5,000 damages to the daughter and £2,500 to each boy. The defendant newspaper appealed, questioning whether publication of an "innocuous" photograph of a child taken in a public street without consent can give rise to a reasonable expectation of privacy merely because the person is identifiable but where nothing inherently private is shown.³

The appeal was unsuccessful. A misuse of the children's private information had occurred.

The law

In *Weller*, the Master of the Rolls, Lord Dyson reiterated that where a publication is claimed to be a misuse of private information the 'starting point'⁴ is the two stage test established in *Campbell v MGN Ltd*.⁵ First one must consider 'whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.' If the answer is no, the claim fails. If the answer is yes, the court must conduct the 'ultimate balancing test,'⁶ weighing the claimant's Article 8⁷ rights against the publisher's Article 10 rights.

The question of whether a person has a reasonable expectation of privacy is an objective one. '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.'⁸ All the circumstances of the case must be taken into account,⁹ but particularly;

'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.'¹⁰

In concluding that the children had a reasonable expectation of privacy¹¹ Lord Dyson stressed that the claimants were children and, critically, that they were identified by publication of their surname alongside the image. As children they were not in a position to have knowingly or accidentally laid themselves open to being photographed,¹² and as children the publication and their identification might cause harms, including embarrassment, bullying and threats to their safety and security. Lord Dyson emphasised also that the children were enjoying a 'private family outing,' an activity distinctively different in nature to a mere

¹ Notably *Campbell v MGN Ltd* [2004] UKHL 22 ('*Campbell*'); *Murray v Big Pictures Ltd* [2008] EWCA Civ 446; *Von Hannover v Germany* (2005) 40 EHRR 1 and *Von Hannover v Germany (No 2)* (2012) 55 EHRR 15; *Reklos and Davourlis v Greece* App no 1234/05 judgment 15.4.09;

² [2015] EWCA Civ 1176 ('*Weller*')

³ *Weller*, [5]

⁴ *Weller*, [15]

⁵ [2004] UKHL 22

⁶ *Re S (FC) (A Child)* [2004] UKHL 47, [17] per Lord Steyn

⁷ Article 8 European Convention for the Protection of Human Rights and Fundamental Freedoms

⁸ *Campbell*, [99] per Lord Hope

⁹ *Weller*, [30]

¹⁰ *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, [36]. Use of these factors has been endorsed by the Supreme Court (*In re JR 38* [2015] UKSC 42 per Lord Toulson)

¹¹ *Weller*, [56-64]

¹² An issue specifically considered in *Reklos and Davourlis v Greece* App no 1234/05 judgment 15.4.2009

trip to the shops or walk along the street. Relevant also, however, was the fact that the parents had not courted publicity, and that their consent to photography was not given.

In considering the balance between the parties' rights, Lord Dyson expands upon the guidance previously given in *Campbell v MGN Ltd* and *Re S*, highlighting¹³ that in cases involving children, even if a child's article 8 rights are engaged they do not automatically trump any article 10 rights. Nonetheless, 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. Powerful article 10 rights (for example, exceptional reasons in the public interest) may be needed to outweigh a child's article 8 rights where publication would harm a child. Where likely harm is alleged, the court does not require evidence of the harm that may be caused. Applying the balancing criteria detailed by the European Court of Human Rights in *Von Hannover (no 2)*¹⁴ to the facts Lord Dyson thus found that;

- The publication of the photographs made no contribution to any current debate of general interest
- The children had no 'public profile' such as would justify disclosure of information about their private lives
- The family had been careful to ensure maintain their children's privacy, avoiding online publication of their faces
- The publication had embarrassed and upset the family and had provoked safety concerns
- The photograph had been taken not only without the family's consent, but contrary to their specific wishes and in circumstances amounting to harassment
- Taking the weak arguments for publication and weighing them against the children's Article 8 rights, the claimant's article 8 rights outweighed the defendant's article 10 rights.

Why the non-famous need privacy protection

Some have criticised the outcome, suggesting *Weller* goes too far, effectively creating image rights.¹⁵ Nonetheless this decision cannot be ignored. Associated Newspapers have now been refused permission to appeal by the Court of Appeal and the Supreme Court. The Court of Appeal's analysis currently provides the 'definitive statement' of how the tort of misuse of private information applies to paparazzi photographs of children.¹⁶ The question yet to be answered, however, is whether *Weller* applies to cases which do not involve the famous or the paparazzi.

It is rare for 'ordinary people' to claim that the media has breached their privacy.¹⁷ Similarly few misuse of private information claims have been brought by ordinary people against other individuals.¹⁸ However, the rise of smart phones and social media now makes it simple for individuals to disseminate others' private information, including photographs, online. That individuals are increasingly using social media to share private information, causing harm to others in the process, has not gone unnoticed in the criminal courts,¹⁹ and it is arguable that we should now consider how the tort of misuse of private information, used primarily by the rich and famous, can be used to protect ordinary individuals. This is not to suggest that the tort should be considered relevant whenever an individual is photographed in public. No domestic case has yet suggested that publication of innocuous photographs of adults in public engages Article 8.²⁰ It is relevant that the claimants in *Weller* were *children* for whom the publication of a photograph might have greater repercussions than for adults.

Children may be photographed when out shopping, at cafés and restaurants, in the park, at school sports days and school plays, at public events and fetes, and at sporting events. Whilst little academic attention has been paid to any potential need to protect ordinary children's privacy in public there is evidence that some organisations involved with children have considered this issue. The NSPCC's Child Protection in Sport Unit suggests, when children take part in sporting activities they and their parents should have a right to decide if their images are taken and how they may be used.²¹ Research undertaken in 2013²² identifies that many education authorities consider parental photography at school events raises significant legal issues. Forty-one education authorities recognise that when parents take photographs at school events capturing images of children other than their own this raises potential safeguarding issues, particularly where children's whereabouts are not to be disclosed

¹³ *Weller*, [39-41]

¹⁴ *Von Hannover v Germany (No 2)* (2012) 55 EHRR 15 [108-113]

¹⁵ See Brian Pillans 'Protecting the Privacy of Children: *Weller v Associated Newspapers Ltd* [2015 EWCA Civ 1176] (2016) 1 CL 16; Jennifer Agate 'Court of Appeal Dismisses Appeal in *Weller v Associated Newspapers Ltd*' [2016] Ent LR 69

¹⁶ Inform's Blog 'News: Supreme Court refuses permission to appeal in *Weller* children paparazzi photographs case' 26 March 2016

<https://inform.wordpress.com/2016/03/26/news-supreme-court-refuses-permission-to-appeal-in-weller-children-paparazzi-photographs-case/> accessed 28.4.16

¹⁷ Lord Justice Leveson does however identify several 'ordinary' individuals whose phones were hacked by the press ('An Inquiry Into the Culture, Practices and Ethics of the press (The Leveson Inquiry Report') 2012)

¹⁸ Although see *Applause Store Productions and another v Raphael* [2008] EWHC 1781 (QB)

¹⁹ Crown Prosecution Service 'Guidelines on prosecuting cases involving communications sent via social media' (2012) outlines and provides guidance on offences likely to be commonly committed by the sending of communications via social media.

²⁰ See discussion in *Johns v Associated Newspapers Ltd* [2006] EWHC 1611 (QB). NB however that it is implied in *Von Hannover v Germany* (2005) 40 EHRR 1 and *Von Hannover v Germany (No 2)* (2012) 55 EHRR 15, [110] that a private individual unknown to the public would be able to claim the protection of article 8

²¹ NSPCC Child Protection in Sport Unit 'CPSU Briefings: Photographing and Filming Children in Sport' (2012)

²² Claire Bessant 'Data Protection, Safeguarding and the Protection of Children's Privacy: Exploring local authority guidance on parental photography at school events, (2014) ICTL 23(3) 256

because they have been adopted, are in local authority care, or are fleeing from domestic abuse. The concern in such situations is the harm posed to the vulnerable child if they and their location are identified by the online publication of a photograph.

At a school or a sporting event it may be possible to minimise identification risks by asking parents to accept restrictions on online posting or photography; or by seeking explicit consent to photography from all parents, taking steps to prevent photographs where consent is not provided. When a child is playing in the park or attending a publically organised event, it may, however, be impossible to prevent photography. Questions are raised as to how many parents, in such circumstances, would consider their child had a reasonable expectation of privacy justifying restrictions on photography. As yet no research answers this question. When, however, one considers the factors which led to the Court of Appeal finding the Weller children had a reasonable expectation of privacy, it is possible that some ordinary children might be considered to have a reasonable expectation of privacy in such circumstances.

Determining if a child has a reasonable expectation of privacy in public

In *Weller* it was important that the claimants were children and had no influence over their exposure to being photographed. Simply being a child, therefore seems to be a factor which strengthens a claim not to be photographed in public. It was also significant that the Wellers were enjoying a 'private family outing,' albeit one conducted in public.²³ One might accordingly argue that when any child enjoys a family excursion their article 8 rights are potentially engaged. The fact Paul and Hannah Weller had attempted to maintain their children's privacy was also, however, clearly relevant to the court finding their children had a reasonable expectation of privacy. It is well-established that a parent's actions may impact upon their child's article 8 rights.²⁴ If a parent has taken positive steps to minimise publication of their child's photographs this would seemingly support an argument that their child has a reasonable expectation of privacy. In the same vein, presumably the child of a parent who regularly posts family photographs to a public blog might be considered to have a lower expectation of privacy.

Another factor emphasised by the court in *Weller* was the identification of the children by name. There will be instances when a child is photographed in public and their image subsequently published with an accompanying commentary or their name (usually when a friend or family member posts the image online). In many situations, however, photographs are published without any accompanying name. What is not entirely clear from *Weller* is whether the naming of the children was essential to the finding they had a reasonable expectation of privacy. It has been suggested the naming of the children was a 'critical factor.'²⁵ It is possible, however, that the naming of these children was of importance in this case only because their parents were famous. The claimant's parents in this case were said to have 'security concerns' as a result of the photographs' publication.²⁶ Whether the parents of 'ordinary' children would experience similar security concerns following the publication of their children's images is debatable. One should recognise, however, that for some vulnerable children, it is not simply identification by name which may cause risks of embarrassment, bullying or threats to safety.²⁷ For children whose whereabouts must be kept secret from abusive family members the publication of a photograph, even without an accompanying name, may pose significant risks, particularly if the photograph's location is revealed. One could argue that when a child is not the focus of the image but simply part of a crowd no reasonable expectation of privacy should arise. However, a vulnerable child, identifiable in a crowd scene even without their name, might still have good grounds for objecting to publication and, arguably, a reasonable expectation that their photograph should not be published without consent.

An absence of parental consent to the taking and publishing of the photographs was, for Lord Dyson another key factor, relevant to finding that the Weller children's article 8 rights were engaged.²⁸ This reflects the opinions of the European Court of Human Rights in *Reklos* that the obtaining of parental consent before a child's photograph is taken is 'indispensable,' even if the child's photograph is not published.²⁹ However, whilst it may be feasible to expect journalists to ask before taking photographs of celebrities' children, can one expect a journalist taking photographs at a public event or an individual taking photographs in the park to obtain permission from every child whose image may be captured? In *Weller* the Court of Appeal was perhaps mindful of the harassment many celebrities are subjected to by the media. It was also arguably relevant that not only had Mr Weller not provided consent, he had in fact *objected* to the photography. Questions therefore remain as to whether consent is always required, even when the claimant is an 'ordinary' child.

Weller, also however raises other questions. It seems that an ordinary child might be able to establish a reasonable expectation of privacy; when enjoying a family activity; if consent to photography has not been provided or has been refused; if parents have previously attempted to maintain their child's privacy; and if a photograph is subsequently published along with identifying details. What is not clear is whether children can establish a reasonable expectation of privacy if they satisfy some but not all of the *Weller* factors (for example if they are not named). Questions are also raised as to whether family activities are the only

²³ See *Weller*, [61]

²⁴ See *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446; *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554

²⁵ Jennifer Agate 'Court of Appeal Dismisses Appeal in *Weller v Associated Newspapers*' [2016] Ent LR 69, 70

²⁶ *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB), [168]

²⁷ These are the specific risks identified by Lord Dyson at [64]. See also *Jaqueline A v London Borough of Newham* (QBD) 16.10.2001 unreported

²⁸ *Weller* [62]

²⁹ *Reklos* [41]

activities in respect of which an ordinary child might have a reasonable expectation of privacy. Lord Dyson's comments that '[t]he taking of photographs in a public street must be taken to be one of the ordinary incidents of living in a free community'³⁰ suggest the court did not consider a reasonable expectation of privacy should apply whenever a child is in public. One might indeed argue that an anodyne activity which reveals no information of an essentially private nature, and which would not be expected to damage the child's private life should not attract the protection of Article 8.³¹ One might, however, argue that there are other situations, not considered in *Weller*, when a child in public should have a reasonable expectation of privacy, for example: when 'in a situation of humiliation or severe distress';³² when the revelation of their whereabouts would place them at risk of harm; or when engaged in certain sporting activities and thus physically exposed.³³

Balancing children's rights against others' rights

Weller of course reiterates that where a child objects to the publication of their image, and can establish a reasonable expectation of privacy, one must then balance the child's rights against the publisher's rights. Where the publisher is a newspaper, the publisher must demonstrate the publication contributes to a debate of general interest.³⁴ It is arguable that following *Weller*, and given uncertainty as to how *Weller* applies to ordinary children, the media should ensure that even when ordinary children's images are published the photographs contribute demonstrably to a debate of general interest or alternatively that, unless parental consent has been provided, such images should be pixellated.³⁵ Where a child's photograph is captured by an ordinary individual the legal principles that apply are less clear.

The tort of misuse of information was designed to respond to the vicissitudes of the press and unsurprisingly therefore the balancing exercise designed for the media seems ill-suited to the non-media publisher.³⁶ Could and indeed should individuals be expected to demonstrate their publication of a child's photograph contributes to a debate of general interest? Probably not. Might they instead suggest such a publication provides social benefits³⁷ or alternatively argue it is simply in the public interest for individuals to be able to take and share photographs, as an exercise of their right to freedom of expression? Whichever argument is used, could an individual ever justify publishing a child's image given the considerable weight Lord Dyson suggests children's interests be afforded? To complicate matters further, there will, undoubtedly, be situations when an individual takes but does not publish a child's photographs. This is, of course, not something the Court of Appeal considered. One might ask what harm is caused when a photograph is taken but not published; how any claim for misuse of private information can thus be founded. On the other hand, one might argue that absent publication, and thus absent exercise of Article 10 rights, the only rights engaged are the child's Article 8 rights which should accordingly assume pre-eminence.³⁸ If this is correct, however, significant restrictions would be imposed on photography in public. One can only assume that this was not the intention of the Court of Appeal when giving judgment in *Weller*, and that if a claim were brought by an individual against another individual the courts might need to reconsider the very tests that lie at the heart of the *Weller* decision.

Conclusion

Numerous commentators have commented on the significance of the *Weller* case, yet it remains unclear whether *Weller* is in fact relevant only in narrow circumstances, where the claimant is the identified child of famous parents who strongly object to their children's images being made public, where the claimant is engaged in a family activity and the claim is against a media defendant. Analysis of the key factors which led to the Court of Appeal finding the *Weller* children had a reasonable expectation of privacy, and application of those factors to ordinary individuals, suggests that following *Weller* the tort of misuse of private information could perhaps be used to protect ordinary children's privacy, with a similar balancing test applying in media intrusion cases to that applied in *Weller* and other celebrity cases. The primary difficulty arises where the defendant publisher is an individual. The tort having been designed to tackle media intrusion, and with Lord Dyson in *Weller* emphasising the weight to be given to children's interests, it is hard to see how, if the court applies the same balancing test to individuals as to the media it could ever find in favour of a non-media publisher. In such cases a new balancing test may need to be devised to ensure the appropriate balance between individual rights can be achieved.

³⁰ *Weller* [18] citing *Hoskins v Runtig* [2003] 3 NZLR 385 [138]

³¹ *Campbell*, [154] per Baroness Hale

³² *Campbell*, [75] per Lord Hoffman

³³ Play By the Rules 'Images of Children' <http://www.playbytherules.net.au/legal-stuff/child-protection/images-of-children> accessed 29.4.16; Nicole Moreham 'Privacy in Public Places' (2006) 65 CLJ 606

³⁴ *Weller* [74]

³⁵ Infirm's Blog (n18)

³⁶ Jacob Rowbottom 'A landmark at a turning point: Campbell and the use of privacy law to constrain media power' (2015) 7(2) JML 170; Jacob Rowbottom 'To rant, vent and converse: Protecting low level digital speech' (2012) 71 (2) CLJ 355

³⁷ Rob Mindell 'Rewriting privacy: the impact of online social networks' (2012) Ent LR 52

³⁸ This appears to be the basis of the court's decision in *Reklos and Davourlis v Greece* App no 1234/05 judgment 15.4.2009; see also John Hartshorne 'The Protection of Prosser's Privacy Categories within English tort law' (2014) 22 TLJ 37, 50-51