**SHARENTING: BALANCING THE CONFLICTING RIGHTS OF PARENTS AND CHILDREN**

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**INTRODUCTION**

Many parents share information about their children online. It is reported that in the United States 92% of children have an online presence due to their parents’ disclosures by the age of two years old.[[1]](#footnote-1) Although in the United Kingdom far fewer parents admit to sharing their children’s information online,[[2]](#footnote-2) many parents will post hundreds of photographs of their children before they reach their fifth birthday.[[3]](#footnote-3) So many parents now share information about their children online that a new term, ‘sharenting,’ has emerged to describe the phenomenon. ‘Sharenting’ here means the ‘habitual use of social media to share news, images, etc of one’s children’.[[4]](#footnote-4)

Parents are often considered the ‘guardians,’[[5]](#footnote-5) or ‘gatekeepers’[[6]](#footnote-6) of their children’s personal information. Their role in providing consent to use their children’s information is recognised in European Union legislation[[7]](#footnote-7) and the jurisprudence of the European Court of Human Rights (‘the ECtHR).[[8]](#footnote-8) The English judiciary also seemingly acknowledge that parents are the best people to decide whether a child’s information is shared.[[9]](#footnote-9) In the sharenting context, however, a conflict of interests exists between parents and their children. This conflict was clearly highlighted in 2016 when media reports suggested an eighteen-year-old Austrian girl was suing her parents for posting embarrassing childhood photos on Facebook.[[10]](#footnote-10) Whilst that story has since been denounced as untrue,[[11]](#footnote-11) it nonetheless raises an interesting question: Could a child successfully sue their parents for sharenting? In attempting to answer that question this article analyses the remedies in English law that a child might use to prevent sharenting and to secure the removal of sharented information.

**THE SHARENTING PHENOMENON**

Many parents use online platforms, including Facebook, Flickr, Instagram, Snapchat, Pinterest and Twitter, and Mumsnet to share anecdotes, quotes and personal information about their children, including information about behaviour, development, appearance, and health. [[12]](#footnote-12) Photographs are often shared.[[13]](#footnote-13) Indeed, sharenting frequently begins before birth, with the uploading of foetal ultrasound photographs.[[14]](#footnote-14) Significant numbers of parents blog.[[15]](#footnote-15) Whilst some bloggers use pseudonyms or avoid posting their children’s faces, others openly disclose their children’s names, images and locations.[[16]](#footnote-16) Some parents use websites such as YouTube to vlog.[[17]](#footnote-17) Depending upon the privacy settings a parent uses and the extent of their social media following, children’s information may be shared with family, with parents’ friends, acquaintances and professional networks, or the world at large. Even where a parent believes they are sharing to a limited audience, information may be disseminated further if an image is tagged, or reposted.[[18]](#footnote-18)

**Sharenting: The positives**

Parents sharent for many different reasons. Sharenting allows parents to broadcast their children’s achievements.[[19]](#footnote-19) Sharenting also helps parents to avoid isolation, to obtain emotional, practical and social support,[[20]](#footnote-20) and to share parenting advice.[[21]](#footnote-21) Sharenting enables parents to enact and receive validation of their parenting.[[22]](#footnote-22) Through sharenting, parents can share their experiences as parents, whether good, bad or frustrating.[[23]](#footnote-23) Certain parents (including ‘mommy bloggers’ and parents whose children have complex medical needs) report that sharenting affords a sense of solidarity or community, increased feelings of connectedness and a sense of greater wellbeing.[[24]](#footnote-24) Parenting blogs also provide outlets for creativity, enable parents to advocate particular parenting practices or philosophies, and to earn income.[[25]](#footnote-25) Sharenting may provide significant benefits to parents.

There appears to be less evidence that sharenting benefits children. Nonetheless, sharenting can help children develop positive networks of family and friends.[[26]](#footnote-26) Some parents suggest that maintenance of an online record of the child’s life enables the child to learn about themselves.[[27]](#footnote-27) Others submit that sharenting allows parents to build a positive social media image for children, to counteract ‘negative behaviours they might themselves engage in as teenagers.’[[28]](#footnote-28)

**Sharenting: The negatives**

Parents have always shared stories and photos with friends and family. Sharenting, however, takes sharing to a different level. Sharented information has a reach and longevity unimagined twenty years ago.[[29]](#footnote-29) Sharenting may cause children substantial embarrassment and anxiety.[[30]](#footnote-30) Where third parties comment harshly upon sharented information this can impact upon the child’s self-respect.[[31]](#footnote-31)

Many parents express concern about ‘oversharenting’, when parents share too much, or share inappropriate, embarrassing information.[[32]](#footnote-32) A 2017 OFCOM survey suggests most UK parents who sharent consider carefully who can view photos or videos and would not share information their child would be unhappy with.[[33]](#footnote-33) Nonetheless, parents do not always portray their children favourably. The confessional blogs of ‘bad’ or ‘slummy mummies,’ tell stories of frustration, boredom, and parental deficiencies,[[34]](#footnote-34) and disclose feelings parents might never reveal to their children’s faces (seemingly forgetting those posts may be on the internet for years).[[35]](#footnote-35) Some adults with chronic disabilities have expressed concern about parents discussing their children’s disabilities, emphasising the embarrassment they would have suffered had their parents discussed their medical condition online.[[36]](#footnote-36) There are parents who post information knowing it will, or might, embarrass their child.[[37]](#footnote-37) At least one vlogger is believed to have lost custody of his children because of the harm he caused by ‘pranking’ and verbally abusing them on Youtube.[[38]](#footnote-38) Other parents have been condemned for ‘shaming’ their children online, subjecting them to humiliation as a response or remedy for bad behaviour.[[39]](#footnote-39)

Online photo sharing also raises concerns. Photographs and videos accompanied by information about a child’s school, age, or location may expose children to online grooming.[[40]](#footnote-40) Even if a child’s photograph is not accompanied by such information the metadata behind photographs and technologies which facilitate user tagging, automated facial recognition and the compilation of disparate pieces of information, can provide third parties with significant amounts of personal information about children’s identity, location and friends.[[41]](#footnote-41) Photographs may be altered and re-used on illegal websites.[[42]](#footnote-42) Even seemingly innocuous photos can affect a child’s reputation, incite bullying or expose children to ridicule.[[43]](#footnote-43)

Where private information is shared without a child’s consent or knowledge, this may infringe their human rights, including the right to privacy,[[44]](#footnote-44) the right to respect for private life,[[45]](#footnote-45) the right to data protection, [[46]](#footnote-46) and the right to preserve one’s identity.[[47]](#footnote-47) Online information sharing affects adults’ privacy too, but where the victim is a child the need for protection is greater. Paragraph 38 of the preamble to the GDPR spells out clearly, ‘[c]hildren merit specific protection with regard to their personal data.’

**COULD A CHILD SUE THEIR PARENTS – THE POSITION IN ENGLISH LAW**

One hopes that most children who object to sharenting will be able to ask their parent(s) to stop sharenting and to remove any objectionable information.[[48]](#footnote-48) If a parent refuses to do so, however, several civil regimes provide the child with means to seek an injunction to prohibit ongoing dissemination.[[49]](#footnote-49)

The first remedy which will be considered is the law of confidence. The law of confidence has long been used by private individuals to protect personal information, private images,[[50]](#footnote-50) details of home and family life[[51]](#footnote-51) and medical information.[[52]](#footnote-52) In recent years this action has developed, and ‘branched off into two general forms.’[[53]](#footnote-53) Now, where a child objects to parental sharenting, they could potentially seek an injunction using either the classic, ‘old-fashioned’ breach of confidence action, or the newer ‘privacy-related variety,’ the tort of misuse of private information (‘MOPI’).[[54]](#footnote-54) Both regimes are considered.

This article will also consider how a child might use data protection law to enforce their right to determine when and how their information is shared. Data protection, is ‘broadly analogous to the concept “information privacy,”[[55]](#footnote-55) which effectively describes “the claim of individuals, groups or institutions to determine for themselves, when, how and to what extent information about them is communicated to others”.[[56]](#footnote-56)

All these regimes are as relevant to adults as to children. In practice, however, the child is in a weaker position than an adult. Few children will have financial means to bring court proceedings. Additionally, before a child can bring court proceedings on their own behalf they must demonstrate they have the necessary capacity to instruct a solicitor and to bring proceedings.[[57]](#footnote-57) This requirement will prove particularly challenging for younger children, who are generally assumed to lack capacity.[[58]](#footnote-58) We will also see that where the child’s privacy has been violated by their parents, their legal position is potentially inferior to that of a child whose privacy has been violated by a stranger.

**The ‘old-fashioned’ duty of confidence**

More than fifty years ago Megarry J detailed the three requirements which must be satisfied for a claim for breach of confidence to succeed. [[59]](#footnote-59) The information must be of a confidential nature. The information must have been imparted in circumstances importing an obligation of confidence, or it must otherwise have been clear that the information was to be kept confidential. Finally, there must have been an unauthorised disclosure of their information. Whilst in Megarry J’s original formulation disclosure needed to be ‘to the claimant’s detriment’, subsequent case law refinements indicate that this is no longer necessary.[[60]](#footnote-60) Indeed in the 2013 Supreme Court decision in *Vestergaard Frandsen* Lord Neuberger advised that the classic case of breach of confidence now

‘involves the claimant’s confidential information… being used inconsistently with its confidential nature by a defendant, who received it in circumstances where she had agreed, or ought to have appreciated, that it was confidential.’[[61]](#footnote-61)

That detriment is no longer essential is perhaps fortunate. Although a child might argue that sharenting has caused embarrassment, distress, or bullying, or has negatively affected their mental wellbeing, sharenting does not necessarily result in concrete harm.

Confidential information

Where an injunction is sought the child must demonstrate either that their parents intend to publish confidential information or that they have already published confidential information which should be protected by an injunction prohibiting further disclosure.

Much of the information parents share details mundane aspects of everyday life. A child might not consider such information to be confidential, or that disclosure constitutes a significant intrusion into their privacy. In any event, they cannot expect the law of confidence to protect ‘trivial information’ about daily life.[[62]](#footnote-62) Health-related information will, however, ordinarily be considered confidential.[[63]](#footnote-63) Given Lord Buxton’s comments in *McKennitt v Ash* that ‘events in a person’s home' cannot be lightly intruded upon,’ [[64]](#footnote-64) certain elements of a child’s home life, particularly images taken in bathrooms or bedrooms, might also be deemed confidential. What is less clear is whether the courts would consider information about a child’s activities outside the home to be confidential.

To bring a successful claim in confidence, the information disclosed must have ‘the necessary quality of confidence about it; it must not be something which is public property and public knowledge.’[[65]](#footnote-65) Where children’s activities are undertaken outside the family home and viewed by or enjoyed alongside many other people, *Woodward v Hutchins*[[66]](#footnote-66) suggests that such activities might be considered either to be ‘in the public domain’ and/or ‘shared experiences.’ Such activities would not then be ‘confidential’ but might then be considered to be ‘public knowledge’. Whilst *McKennitt v Ash* suggests *Woodward* should be treated with caution,[[67]](#footnote-67) where a child enjoys family, school or sporting activities ‘in public’, with many others, it could certainly be argued that sharing information about such activities does not breach any duty of confidence. However, an alternative argument can also be made.

In *Tchenguiz v Imerman* Lord Neuberger recognises concerns about ‘conflating the developing law of privacy under article 8 and the traditional law of confidence.’[[68]](#footnote-68) He suggests, nonetheless, that

‘the touchstone suggested by Lord Nicholls of Birkenhead and Lord Hope of Craighead in *Campbell*, paragraphs [21], [85], namely whether the claimant had a “reasonable expectation of privacy”[[69]](#footnote-69) in respect of the information in issue, is, … a good test to apply when considering whether a claim for confidence is well founded. (It chimes well with the test suggested in classic commercial confidence cases by Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, page 47, namely whether the information had the “necessary quality of confidence” and had been “imparted in circumstances importing an obligation of confidence.”)’ [[70]](#footnote-70)

If one adopts Neuberger LJ’s approach one could argue that the child will have a reasonable expectation of privacy, and might furthermore found a breach of confidence claim, where ‘family activities’ are conducted publicly. Whilst in *Campbell,* it was suggested that courts will not usually consider ordinary activities in public to be confidential or private,[[71]](#footnote-71) in contrast, in *Weller* and in *Murray* the Court of Appeal were prepared to accept that where children were engaged in family activities,[[72]](#footnote-72) and were subjected to clandestine paparazzi photography, those children had a reasonable expectation of privacy, even in public. The most recent case to consider a child’s expectation of privacy in public is *Re JR 38*,[[73]](#footnote-73) a case which saw the Supreme Court divided 3-2. Whilst in this case the majority were not prepared to accept that JR’s activities (criminal rioting) fell within the ‘protected zone of interaction between a person and others’, or was ‘the type of activity’ which article 8 protects, Lord Toulson’s comments, recognising the importance of the ‘circumstances’ in which a photograph is taken, and the nature of the activity in which a child is involved,[[74]](#footnote-74) leave the door open to the possibility that some family interactions in public might be considered subject to a reasonable expectation of privacy. This does not, of course guarantee that the courts will treat information about such activities as *confidential,* but, if not, as discussed below, the MOPI tort might alternatively be used to prevent publication of information relating to such activities.

When the duty arises

Assuming a child can prove that their information is confidential, they must then demonstrate why their parent was subject to a duty of confidence. There is no case law considering whether the parent-child relationship imports an obligation of confidence. It is clear, however, that a relationship of confidence is no longer essential to the establishment of a duty.[[75]](#footnote-75) To establish whether a duty arises the court is more likely to consider the circumstances in which the parent obtained the objectionable information. Certainly, where a child blurts information out in public or on social media there will be no binding obligation of confidence in that information. [[76]](#footnote-76) It seems equally clear that a parent could be expected to maintain confidence if a child, in private, asks their parent to keep information ‘confidential’ or ‘secret’. Where a child expected confidences to be kept, but did not explicitly say so a duty of confidence might also be found to exist.

‘… [A] duty of confidence will arise whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably expect his privacy to be protected.’[[77]](#footnote-77)

The test is an objective one.

‘For a duty of confidentiality to be owed … the information in question must be of a nature and obtained in circumstances such that any reasonable person in the position of the recipient ought to recognise that it should be treated as confidential. … the law would defeat its own object if it seeks to enforce in this field standards which would be rejected by the ordinary person.’[[78]](#footnote-78)

A key difficulty in the sharenting context is that parents enjoy many of the same experiences as their children. The information they share online will often tell a story not only of the child’s life, but of the parent’s life. This poses problems for the child claimant. How does one determine where a parent’s identity ends and a child’s begins, and whether the child or the parent is the owner of the sharented information?[[79]](#footnote-79) Parents might well argue that when sharenting they are breaching no duty of confidentiality, but are merely exercising their Article 10 right to freedom of expression, disclosing *their experiences*. Whilst Ms Ash unsuccessfully raised similar arguments in *McKennitt v Ash,*[[80]](#footnote-80) the reality was that in *McKennitt* the claimant was very much the focus of the disclosures.[[81]](#footnote-81) Where a parent genuinely wishes to share information about their own experiences the position may be less clear. As Buxton reminds us in *McKennitt* ‘all of these cases are fact sensitive.’[[82]](#footnote-82)

Justifying disclosure

Even if the child establishes that their parent owes a duty of confidence their claim for an injunction may still be unsuccessful if disclosure is justified. Commonly defendants will justify disclosure on the basis that disclosure is in the public interest or that the information is in the public domain.[[83]](#footnote-83)

To justify their sharenting a parent might argue, for example, that; disclosures were made in the exercise of their freedom of expression; that information is shared with wider family for the benefit of the whole family (including the parent and child) or that disclosures are necessary to obtain support from family, friends or community (to benefit the child). They might also argue that talking about their parental experiences benefits the wider community and is thus in the public interest. Where a defendant raises a public interest defence they must, however, not only establish that disclosure is in the public interest, but that there is a greater public interest in disclosing the information than in keeping the information confidential; effectively that it ‘is in the public interest that the duty of confidence should be breached’. [[84]](#footnote-84) Although none of these potential arguments has been put to the courts, it seems unlikely that the parent could justify breach of confidentiality where sharenting is undertaken merely to update family and friends. A parent might, therefore, instead choose to raise the public domain defence.

Even if a child can establish that their parents have shared confidential information, where a parent has shared that information with the world at large or has a substantial social media following, they could argue that the information has become ‘so generally accessible’ that, it is ‘in the public domain’ and ‘cannot be regarded as confidential.’ [[85]](#footnote-85) In such circumstances, the parent might argue that there is no purpose to be gained from an injunction. Certainly, in *Giggs (formerly CTB) v Newsgroup Newspapers Ltd and Thomas*[[86]](#footnote-86) Eady J indicates that ‘the court will not attempt to prevent publication or discussion of material that is genuinely in the public domain since, where that is so, there will no longer be any confidentiality or privacy to protect.’[[87]](#footnote-87)

The problem is that where information has been viewed by a limited audience a court may not consider that confidentiality has gone for all purposes. Ultimately, it ‘is not a black and white distinction between public and private’. The court will need to consider the particular facts and decide whether, ‘notwithstanding some publication, there remains a reasonable expectation of some privacy.’[[88]](#footnote-88) The difficulty is compounded by the fact that ‘[t]he legal principles determining the public domain proviso were formulated in a world predating social media.’ [[89]](#footnote-89) Whilst in *Stephens v Avery,* Sir Nicholas Browne-Wilkinson VC indicated, “information only ceases to be capable of protection as confidential when it is in fact known to a substantial number of people,’[[90]](#footnote-90) there is no clear agreement amongst the judiciary as to what constitutes ‘a substantial number’ or when publication on social media constitutes publication in the public domain.[[91]](#footnote-91) Potentially, when a parent shares information with a small number of Facebook friends that information might be considered to retain its confidential nature. If the information is shared with several hundred ‘friends’ or made publicly available, the child may struggle to establish that such information is not in the public domain. In such a case, whilst a child might succeed in a claim for damages for breach of confidence, they might struggle to obtain an injunction.

Moreham and Warby comment that ‘[t]he limitation of the breach of confidence action is … that it does not cover information which is private but not obviously confidential nor information which is already in the public domain.’[[92]](#footnote-92) This comment is clearly supported by the analysis above. Fortunately, the MOPI action offers the child a possible alternative cause of action.

The MOPI tort emerged out of the breach of confidence action, and indeed the two regimes have become so entwined that it may not always seem clear how they differ one from the other.[[93]](#footnote-93) The two actions nonetheless rest on different legal foundations and protect different interests, ‘secret or confidential information on the one hand and privacy on the other.’[[94]](#footnote-94) Whilst ‘the duty of good faith’ lies at the heart of the classic confidence action, the MOPI tort focuses upon ‘protection of human autonomy and dignity – the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people.’[[95]](#footnote-95) Since the MOPI tort provides protection for information about individuals’ private lives, including information which would not ordinarily be considered ‘confidential’,[[96]](#footnote-96) individuals who have suffered intrusion into their private lives may find it easier to satisfy the requirements of the MOPI tort than breach of confidence. A child may be able to obtain a remedy under MOPI, even if their information has been and continues to be so widely sharented no injunction for breach of confidence would be available.[[97]](#footnote-97) Indeed, *PJS* makes clear that repeated disclosures may constitute further invasions of privacy, even where disclosures are made to individuals to whom disclosure was previously made.[[98]](#footnote-98)

**MOPI**

To succeed in their MOPI claim the child must satisfy both limbs of a two-stage test.[[99]](#footnote-99) They must first establish that they had/have a reasonable expectation of privacy in the information which parents have shared or intend to share. They must then establish that their right to privacy prevails over their parents’ rights. In the sharenting context the application of the MOPI tests is complicated by the fact that the privacy expectations of children and their parents appear often to be treated as one and the same.

A reasonable expectation of privacy

A child does not automatically have a reasonable expectation of privacy.[[100]](#footnote-100) To determine whether any individual has a reasonable expectation of privacy the court will consider ‘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.’*[[101]](#footnote-101)* It will take account of all the circumstances, 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.’[[102]](#footnote-102)

In *Weller[[103]](#footnote-103)* Lord Dyson considered the application of these factors where a newspaper had taken and published photographs of three children. Concluding that the children did have a reasonable expectation of privacy, Lord Dyson emphasised that the claimants were children who, as children, were not in a position to have knowingly or accidentally laid themselves open to being photographed. He noted also that, for children, the publication of even anodyne images, and the resulting potential for their identification might cause harms, including embarrassment, bullying and threats to their safety and security.[[104]](#footnote-104) Whilst *Weller* concerned proceedings brought by celebrity parents who had deliberately kept their children out of the public eye, many of Lord Dyson’s comments might be applicable to a child who objects to parental sharenting. The case of *Weller,* however, is also significant for other reasons. Firstly, it is one of several cases that recognise the special position of children, and the particular harms that publicity may cause them.[[105]](#footnote-105) Most importantly, Lord Dyson confirms in *Weller* that although ‘the broad approach that must be adopted to answering the question whether there is a reasonable expectation of privacy is the same for children and adults, there are several considerations which are relevant to children (but not to adults) which may mean that in a particular case a child has a reasonable expectation of privacy where an adult does not.’[[106]](#footnote-106)

Ultimately, of course, the court will consider each case on its facts, taking account factors such as the child’s age, and whether the child themselves uses social media, or has objected to disclosure by third parties such as schools or sporting organisations. It is suggested, however, that in the sharenting context there is a fundamental question that the courts must also ask when considering whether a child has reasonable expectation of privacy; *is it reasonable for children to expect their parents not to sharent*?

*Reasonable expectations of privacy in the digital age*

Moreham and Warby suggest that

‘The reasonable expectation of privacy test can be seen, at least in part, as shorthand for whether, in a given situation, the protection of privacy is consistent with prevailing social norms. … if applied appropriately, the reasonable expectation of privacy test allows courts to ask… whether the scenario was one in which there was or should be an objectively recognised social norm that privacy should be respected ...’[[107]](#footnote-107)

Steijn explains that information sharing behaviours are regulated externally by four factors; law, the market, architecture and norms (the norms that determine what kind of information is appropriate for sharing in a given context being termed ‘norms of appropriateness.’)[[108]](#footnote-108) He explains further that it takes time for norms to develop to accommodate new technologies.[[109]](#footnote-109) This undoubtedly is the difficulty for the courts in the sharenting context. Whilst headlines suggest ‘privacy is dead’, that sharenting is the norm,[[110]](#footnote-110) the 2017 OFCOM report suggests many parents still consider children can expect their information to remain private, and that parents are divided about the merits of sharenting.[[111]](#footnote-111) A court may struggle, therefore, to determine what ‘the norm’ is, and thus to conclude either that children have a reasonable expectation of privacy in the information their parents hold, or that they must expect their information to be sharented.

Of course, the matter is complicated by the fact that children’s privacy expectations may be very different to adults. Indeed, Steijn identifies striking differences in the normative expectations of adults and children.[[112]](#footnote-112) Even amongst children expectations may vary; the expectations of children born in the past five years may be very different to those of child born prior to the emergence of Facebook (who might validly argue that they did not expect their parents to share their information online).

The fact that a child may have different privacy expectations to their parents is a matter that itself also requires further consideration. In a number of cases, the ECtHR and the English courts have stressed the importance of obtaining parental consent to publication of children’s information, acknowledging the role of parents as consent holders or privacy stewards for their children. The courts appear, in some cases, to also conflate the child’s expectation of privacy with the parent’s expectation of privacy for that child. This poses potential problems in the sharenting context.

*Whose expectations?*

In the cases of *Reklos and Davourlis v Greece*[[113]](#footnote-113)and *Bogomolova v Russia,*[[114]](#footnote-114) the ECtHR considered the failure of the Greek and Russian courts to protect the image rights of a young baby (*Reklos)* and a small boy (*Bogomolova).* In both cases, the ECtHR stresses the importance of the parents not having given consent to photographs being taken or retained (*Reklos)* or published (*Bogomolova).* Crucially, in *Reklos,* the fact that the *parents* had not given consent to the taking of the child’s photographs led to a conclusion that the *child’s* Article 8 right to private life had been breached.[[115]](#footnote-115)

In *Reklos,* wherethe child was a baby, it is unsurprising that the ECtHR concluded both that the parents should oversee the exercise of the right to protection of their son’s image and that their prior consent to photography was indispensable.[[116]](#footnote-116) Concerns, have, however been raised about such an approach. Indeed, Hughes queries:

‘at what point are children able to consent for themselves; and what is the relationship between parental consent and the child’s consent. These questions need exploring as the Court’s blanket assertion that consent lies with the parents has the potential to undercut the very status of the child’s Article 8 ECHR right as a “right” held by the child.’[[117]](#footnote-117)

To date, the English courts have not articulated how *Reklos or Bogomolova* might apply in English law. Lord Dyson’s judgment in *Weller* is, however, a striking example of the judiciary’s acceptance that parents are entitled to decide what happens to their children’s information (especially but not necessarily when they are young);

 ‘it is parents who usually exercise this decision-making for young children. Thus, if parents choose to bring a young child onto the red carpet at a premiere or awards night, it would be difficult to see how the child would have a reasonable expectation of privacy or article 8 would be engaged. In such circumstances, the parents have made a choice about the child's family life and the types of interactions that it will involve. A child's reasonable expectation of privacy must be seen in the light of the way in which his family life is conducted.’[[118]](#footnote-118)

In *AAA,* Lord Dyson suggests further that in evaluating the strength of a child claimant’s reasonable expectation of privacy, a judge would be entitled to take account of any relevant conduct of parents.[[119]](#footnote-119) Similarly in *Murray* Sir Anthony Clarke suggests that ‘if the parents of a child courted publicity by procuring the publication of photographs of the child in order to promote their own interests, the position would or might be quite different from a case like this, where the parents have taken care to keep their children out of the public gaze.’[[120]](#footnote-120)

This line of reasoning is controversial[[121]](#footnote-121). It suggests that a parent’s expectations and decisions on a child’s behalf may trump the child’s own expectations and that effectively, a child’s right to privacy may be waived or curtailed by decisions taken by their parents*.[[122]](#footnote-122)* Whilst in *Murray* and *Weller,* the Court of Appeal seemingly considers a claimant’s status as a “child” to be significant, a point in their favour, the court’s reliance upon parents as privacy stewards at the same time potentially weakens the child’s position as a claimant. The fact that the rights of children are in the hands of their parents may have not been problematic in *Reklos, Murray* or *Weller,* but it undoubtedly poses problems where older children have different privacy expectations to their parents, particularly when the child wishes to preserve their privacy but their parents do not.[[123]](#footnote-123) In *Murray*, Sir Anthony Clarke acknowledges that a ‘child has his own right to respect for his privacy distinct from that of his parents.’[[124]](#footnote-124) Subsequent decisions do not, however, adequately recognise that children have an absolute right to privacy, independent from their parents, and that children should, as they mature, be entitled to enforce that right, irrespective of whether their parents value privacy.[[125]](#footnote-125) A child should not, however, be denied a right to privacy, see their privacy expectation weakened, or their sharenting claim fail, simply because their parents court publicity. [[126]](#footnote-126)

The second stage – the ultimate balancing test

If the first stage of the MOPI test raises numerous issues, the second is no less problematic. The MOPI jurisprudence discusses at length the need to balance the claimant’s Article 8 rights against the defendant’s Article 10 rights. This is logical given that typically MOPI claims are brought by individuals against media defendants or against individuals who wish to exercise their Article 10 rights to freedom of expression. The argument usually raised by such defendants is that dissemination is required in the public interest, or will contribute to a debate of general interest. In a sharenting case, a parent certainly might justify sharenting on the basis that they are exercising their Article 10 rights. They might, however, additionally argue that the court should consider their Article 8 right to respect for family life. Article 8 offers parents protection from state interference in family life, and affords them autonomy rights, rights to determine matters relating to the family’s upbringing. A parent might argue that Article 8 affords them *a right to decide what information about the family they share*.

*Article 8 v Article 10*

The Article 10 point is arguably more straightforward for the courts to determine given their long experience of balancing conflicting article 8 and 10 rights. It is accepted practice that in such situations the court will resort to Lord Steyn’s guidance in *Re S:*

‘First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test...’[[127]](#footnote-127)

Whilst neither right has precedence, it is important that the claimant is a child. In proceedings under the Children Act 1989 the courts must treat the child’s welfare as a paramount consideration.[[128]](#footnote-128) Outside such proceedings no statute requires the courts, parents or the state to treat the child’s welfare as paramount. Nonetheless, the court considering a child’s MOPI claim cannot ignore that child’s interests. As Lord Dyson made clear in *Weller* ‘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.’[[129]](#footnote-129) This is an approach which accords with the requirements of Article 3 UNCRC, which stipulates that ‘[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’

The UNCRC recognises that children have particular vulnerabilities which justify additional protection. The domestic courts too are increasingly acknowledging the importance of children’s rights, and the need to protect children from the harms caused by publicity or revelation of their identity.[[130]](#footnote-130) In *Weller,* Lord Dyson explicitly considers the need for the child claimants to be protected from embarrassment, bullying and ‘potentially more serious threats to their safety’ which might be caused by publication of their images.[[131]](#footnote-131) Even in cases brought by adult claimants, the courts have been willing to provide injunctive relief to prevent publication of information which might cause these claimants’ children embarrassment or distress or result in bullying.[[132]](#footnote-132) Whilst there are clearly differences between the facts in the decided MOPI cases and the sharenting case, the risks that may be posed to children in the sharenting context, risks of bullying, embarrassment and more serious threats (such as approaches from those seeking to groom children), are comparable. They are of significant importance when weighing the child’s rights against the parents’ Article 10 rights.

In relation to the Article 10 right to freedom of expression, the courts will undoubtedly consider the nature of the parent’s disclosures and the contribution that they will make to debates of general interest. In most sharenting cases, parents will be making ‘low value’ communications, matters of personal rather than public importance, which offer no contribution to public debate.[[133]](#footnote-133) It is arguable, again, that given the nature of the information shared by parents the courts might not consider sharenting to be in the public interest, or at least to not outweigh the child’s right to privacy.

The family court’s jurisprudence seems also to lend weight to the child’s privacy claim.[[134]](#footnote-134) *I*n *Re J* a father, who objected to the removal of his fourth child into local authority care, used social media to share information about J’s removal from the family. Issuing an injunction to prohibit further disclosures Munby J makes clear that online discussion cannot

‘be allowed to go so far as to prejudice the rights of the individual children involved. There is a distinction to be drawn between, on the one hand, freedom to discuss the operation of the family justice system and the conduct of individual cases and, on the other hand, the freedom to disseminate identifying particulars of specific children which serves to cause, or risk causing, harm to them. … Article 10 cannot be allowed to justify conduct which interferes with a child’s Article 8 rights to an extent that is harmful to him.’[[135]](#footnote-135)

In *Re J* Munby refers to J discovering as he gets older that ‘graphic and potentially embarrassing material … exists in a form accessible by the public, and which may be re-published at any time and for potentially nefarious purposes.’ He highlights the potential for J to suffer bullying and other harms (including harm to J’s emotions and his ability to develop relationships with others) because of revelations concerning his involvement in care proceedings. Where parents knowingly or unwittingly share intimate information about a child’s family situation, where they disclose sensitive information about disabilities, play online ‘pranks’ on their children, or ‘shame’ then online, sharenting may cause significant harm. *Re J* suggests that such children would have a strong argument to support removal of such information from the online sphere.

*Article 8 v Article 8*

The English courts have not considered in the context of a MOPI claim how the parental right to respect for family life, which protects parents’ rights to determine matters relating to the family’s upbringing, should be balanced against the individual privacy rights of the children. Cases such as *Weller, Murray, AAA*, *Reklos* and *Bogomolova* seem to suggest that parents have rights to determine how information relating to the family is used and given the approach the courts have taken to date one must question whether any court would be willing to condemn a parent who sharents because they want to celebrate their children’s achievements. Many children, however, might argue that theyshould be the ones to decide how their information is used, and not their parents. They might argue, further, of course that parental decisions to share family information are not always in the child’s interests.[[136]](#footnote-136)

The child’s right to a private life and the parents’ right to respect for family life are, of course, both qualified. Ultimately, therefore, even if a court accepts that a parent has a right to determine how their child’s information is used, the court may nonetheless consider it appropriate to intervene where sharenting results in, or poses risks to mental or physical health, or impacts on children’s privacy.

As Sedley LJ explained In Re F (adult: court's jurisdiction):

‘The family life for which Art 8 requires respect is not a proprietary right vested in either parent or child; it is as much an interest of society as of individual family members and its principal purpose, at least where there are children, must be the safety and welfare of the child. … [Its] purpose, in my view, is to assure within proper limits the entitlement of individuals to the benefit of what is benign and positive in family life.’ *[[137]](#footnote-137)*

The jurisprudence of the ECtHR lends additional support to arguments that where the parent’s right to family life conflicts with the child’s best interests, it is the children's best interests that are the primary consideration[[138]](#footnote-138) or paramount.[[139]](#footnote-139) The question that is not clearly answered in any jurisprudence, however, is whether, the court would consider it in the child’s best interests to order their parents to stop sharenting absent actual harm or a risk of harm, and where there is ‘merely’ interference with the child’s ability to determine how their information is used.

*Is harm essential?*

Hughes has suggested;

‘that the only situations in which the courts have given serious consideration to the child’s right to privacy are situations in which either a high degree of protection is afforded to that privacy-related interest in the adult context or where the child is vulnerable to a clearly identifiable harm. This is problematic because the right to privacy is not usually, and should not be, contingent upon the individual suffering harm.’ [[140]](#footnote-140)

Certainly, in *Weller* and in *Re J* it is the harms to which the children are potentially exposed (embarrassment, bullying, and other ‘threats’) which seemingly provide justification for the court’s decision to favour the children’s rights over the media defendant and J’s father. In *Murray,* however, Sir Anthony Clarke suggests that harm is not essential, arguing that:

‘one needs … to differentiate between the case where the child has for medical or some other personal reasons come to the knowledge of the general public and for those very reasons may be particularly vulnerable to harm from intrusive press exposure and the much more ordinary case… Even in cases of this kind the Court is bound to have regard to any particular harm (actual or prospective) which the child may suffer from having his image publicly displayed. But in most such cases … the child will have suffered no upset or harm. The purpose of the claim will be to carve out for the child some private space in relation to his public appearances.’

It certainly seems wrong to expect the child to establish that they have suffered or are vulnerable to a clearly identifiable harm, because of parental sharenting. Not only are such harms not always easy to identify or quantify,[[141]](#footnote-141) a focus on harm may prevent a child from obtaining a remedy under the MOPI tort if their only objection is to the dissemination of their private information.

Children value privacy, and the ability to control access to their information.[[142]](#footnote-142) ‘Privacy serves an important function in the development of individual autonomy, as the mechanism by which boundaries between ourselves and others are established and maintained.’[[143]](#footnote-143) Privacy is important, particularly to older children for whom privacy is more central to their development and integrity, and for whom, therefore, the intrusion is experienced as a greater violation.[[144]](#footnote-144) It is argued, therefore, that when a child brings a sharenting claim, whether the claim is brought because the child has suffered embarrassment, anxiety or hurt, or because the child simply wishes to maintain their privacy, the courts should be more willing to grant an injunction to prevent or limit disclosure than if the claimant were an adult objecting to online dissemination of their private information, and notwithstanding that the person who made those disclosures is that child’s parent.

The difficulty, of course, as noted earlier, is that even if the courts would be minded to grant an injunction to prevent sharenting, few children will have the finances to be able to bring court proceedings. Whilst this is a major issue for children who wish to enforce their rights, this does not mean that such children are without remedy. One further regime exists which also potentially affords children with a remedy against ongoing sharenting.

**Data Protection**

The rules governing processing of personal data within the UK, including the sharing of information relating to a child, are detailed in the Data Protection Act 1998 (‘the DPA’). This gives effect to European Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (‘the Directive’). This details certain conditions under which personal data processing may be lawfully undertaken, the rights of individuals whose personal data is processed and certain standards to which those who process data must adhere. Where a child believes their data protection rights have been infringed, their remedy lies under the DPA, which should be interpreted in accordance with the Directive, to give full effect to the right to data protection detailed in the European Charter.[[145]](#footnote-145)

**Obligations imposed on data controllers by the DPA**

The Directive and the DPA stipulate certain conditions that apply when an individual processes personal data. The leading European case of *Lindqvist[[146]](#footnote-146)* confirms that where one person refers to another individual on an internet page, identifying then by name or some other means, they will be processing that individual’s personal data by automatic means, within the meaning of Article 3(1) of the Directive 95. Accordingly, if a parent shares information online which relates to and identifies their child, they will be considered to fall within the remit of the Directive/the DPA and will be obliged to comply with the data protection principles detailed at Schedule 1 DPA, unless one of the exemptions in Part IV of the DPA applies.

In practice, this means that when a parent shares information about their child online they should act in accordance with the law and act ‘fairly’, letting the child know for what purposes their information is being used and using the information only for those purposes. Sharenting that results in a breach of confidence or the misuse of a child’s private information is itself unlawful and therefore a breach of the DPA. If a parent has not told their child that they intend to share their information or photographs online, arguably, the fair processing requirement has not been satisfied. Parents should use appropriate technological means to avoid unauthorised or unlawful processing of that information. This is important given the evidence that unscrupulous individuals may use images of children to identify and groom children, or may manipulate images and republish them on other websites. Parents should share no more information than is necessary, and ensure that information is relevant, accurate and, if necessary, kept up to date. Where hundreds of childhood photographs have been shared, a child might argue that parents have shared more information than is necessary. A teenager might also argue that photographs of their formative years, which no longer represent who they now are, are not up to date and are being made public for longer than is necessary.[[147]](#footnote-147)Finally, parents must not share information unless E+W+S+N.I.one of the conditions in Schedule 2 DPA is met. If the data is sensitive personal data (information about racial or ethnic origin, political or religious beliefs, health or criminal behaviour) at least one Schedule 3 condition must also be met.[[148]](#footnote-148)

Parents will be able to satisfy a Schedule 2 condition, if their child consents to the sharenting,[[149]](#footnote-149) or where ‘[t]he processing is necessary for the purposes of their own legitimate interests or the legitimate interests of those to whom the data are disclosed. (This last condition is subject to a caveat that processing may be considered unwarranted where it is prejudicial to the rights and freedoms or legitimate interests of the child).[[150]](#footnote-150) A parent might argue that they have a legitimate interest in sharing their children’s information with friends and family, and/or that they are sharing information as permitted by their own right to freedom of expression. The issue then is whether sharenting is nonetheless unwarranted because of the prejudice caused to the child’s privacy or wellbeing.

If a parent wishes to share sensitive personal data, meaning Schedule 3 applies, they must additionally have the child’s explicit consent to sharenting,[[151]](#footnote-151) unless the child has already deliberately made the sharented information public.[[152]](#footnote-152) The child’s consent is thus relevant both under Schedule 2 and under Schedule 3. One must question, however, how many parents seek their children’s consent every time they share information online, particularly if the child is very young and lacks capacity to provide consent. (Whilst parents often consent to information sharing on behalf of young children there are obviously issues with parents providing consent to their own processing). Many parents may be unaware of the need to seek consent, or indeed to comply with any of the obligations imposed by the DPA. This does not, however, exempt a parent from compliance.

Remedies for non-compliance

The child may ask the Information Commissioner’s Office (‘the ICO’) to undertake an assessment to determine whether their personal data is being processed in breach of the DPA. [[153]](#footnote-153) This costs nothing. If the ICO is satisfied that there has been a serious breach of the data protection principles, the ICO may serve a legally binding enforcement notice requiring their parents to erase the objectionable information.[[154]](#footnote-154)

Section 10 DPA additionally provides data subjects with a right to prevent processing likely to cause damage or distress. Under section 10, the child may ask their parents, in writing, to stop posting and/or to remove the information posted online within a specified period. The notice should state why the child believes continued online disclosure is causing or likely to cause them unwarranted and substantial damage or distress.[[155]](#footnote-155) (Whilst sharenting is unlikely to cause a child financial damage, the case of *Google Inc v Vidal-Hall* suggested, albeit in the context of a compensation claim under section 13 rather than under section 10, that the term ‘damage’ should be widely interpreted to incorporate distress, or ‘moral damage.’[[156]](#footnote-156)) Assuming that the child has not consented to the sharenting, the parent must respond within twenty-one days to confirm either that they have complied with, or to what extent they will comply with the request, or stating why they consider the request unjustified.[[157]](#footnote-157) If the parent ignores the notice, the child is entitled to seek court assistance. If the court is satisfied that the notice is justified and that the parent failed to comply with it, the court may then order the parent to comply with the notice, to the extent that the court thinks fit.

On the face of it, the DPA affords a child a real chance to secure removal of sharented information and to prevent ongoing sharenting. Unfortunately, however, success is not guaranteed: where the personal and household exemptionapplies, a parent may be exempted from compliance with the data protection principles and the requirement to satisfy the Schedule 2 and 3 conditions.

Article 3(2) of the Directive states that the Directive does not apply to the processing of personal data ‘by a natural person in the course of a purely personal or household activity.’[[158]](#footnote-158) The position in European Union law is that the personal and household exemption outlined in Article 3(2) should be interpreted narrowly. In *Lindqvist* the ECJ suggested the exemption would not apply where personal information was published online and made available to an indefinite number of people.*[[159]](#footnote-159)* The Article 29 Working Party[[160]](#footnote-160) has, since, suggested that it might be appropriate to distinguish between those who restrict access to a small number of individuals (to whom the exemption applies) and those who have a high number of contacts or allow information to be made publicly available (who are unlikely to be able to rely upon the exemption). [[161]](#footnote-161) Their approach would mean that parents who blog and vlog would be subject to the directive whilst parents who share only with limited, selected ‘friends’ would be covered by the exemption. Many data protection regulators have, however, adopted a stricter approach, akin to that in Lindqvist, considering all online publication to fall within the Directive.[[162]](#footnote-162) In the UK, strikingly, the ICO has taken an entirely different approach.

Section 36 DPA is significantly broader than Article 3(2), stating that ‘[p]ersonal data processed by an individual only for the purposes of that individual's *personal, family or household affairs (including recreational purposes*) are exempt from the data protection principles and the provisions of Parts II and III.’ The ICO’s interpretation broadens the exemption still further. Indeed, the ICO suggests that when an individual shares information online, in a personal capacity, purelyfor their own domestic or recreational purposes the exemption *will apply*, irrespective of the nature of the data being shared, what that data reveals, or the number of people to whom that information is revealed.[[163]](#footnote-163) Most sharenting parents will accordingly be able to rely upon the exemption, although some parents who blog primarily to earn income might still be caught by the DPA. [[164]](#footnote-164)

For a child, based in England, who objects to parental sharenting, the ICO’s stance poses a significant problem. Since the ICO has made clear 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,’[[165]](#footnote-165) the child can obtain no remedy for sharenting through the ICO. One small crumb of comfort for the child can be found in Tugendhat J’s comments in *The Law Society v Kordowski,* which suggest that the courts accept that online dissemination of another person’s information (particularly where dissemination breaches a duty of confidence) may breach the DPA.

Perhaps more importantly for the child a new General Data Protection Regulation (‘the GDPR’) replaces the Directive in May 2018 introducing a new legal regime, which strengthens the right to data protection and provides individuals with greater control over their personal data.[[166]](#footnote-166) Although the GDPR will only be directly enforceable within the UK for a short period prior to the UK’s exit from the European Union, a new Data Protection Act (currently before parliament) will ensure that the UK affords the same protection to personal data as other European Union states post-Brexit.

The GDPR, the Data Protection Bill and the role of social media providers

The GDPR, in contrast to the Directive, acknowledges the importance of considering children’s rights and vulnerabilities. Indeed, the preamble paragraph 38 states that ‘[c]hildren merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data….’ The GDPR also, however, views parents as stewards of their children’s privacy, as the people best placed to consent to use of children’s information, at least until such time as the child has capacity to consent themselves.[[167]](#footnote-167) Concerns have been raised that the GDPR does not appear to provide children (such as those whose information is sharented by their parents) with significantly increased protection.[[168]](#footnote-168) Nonetheless, delving into the detail of the GDPR, it is possible that the GDPR could provide children with an improved means by which to secure removal of sharented information.

It should first be noted that the GDPR lays much greater emphasis on the importance of obtaining explicit consent to the processing of personal data. This is important. It has been suggested that parents should be seeking their children’s consent before they sharent. Indeed Steinberg notes ‘By age four, children have an awareness of their sense of self’ and can build friendships, reason and compare themselves with others. She suggests further that;

‘Parents who post regularly can talk about the Internet with their children and should ask young children if they want friends and family to know about the subject matter being shared. As is the case in many aspects of children’s rights, the weight given to the child’s choice should vary with respect to the age of the child and the information being disclosed. But parents should be mindful that even young children benefit from being heard and understood.’[[169]](#footnote-169)

Of course, unless parents are aware of the new consent provisions they are unlikely to adopt a different approach, seeking consent from their children. To ensure that children’s data protection rights are effectively protected parents and children need to be provided with better information about their rights and responsibilities. If parents do not seek their children’s consent, however, or if children decide later in life that they wish to remove sharented information, the GDPR also affords a potential remedy for the child in the form of the ‘right to erasure’.

A right to be forgotten was included in the Directive and the DPA. The scope of the revised right is, however, much wider.[[170]](#footnote-170) Significantly, the law no longer requires proof that substantial damage or distress is likely to be caused. The right now applies whenever a data subject withdraws consent to processing, where processing is no longer necessary, where processing is unlawful, or where the individual objects to processing and there are no overriding legitimate grounds for processing.

Fully cognisant of its obligations to comply with the GDPR, in the Queen’s speech the Government stated that it would introduce legislation affording individuals new rights ‘to require major social media platforms to delete information held about them at the age of 18.”[[171]](#footnote-171) It was of some concern to read that an individual should have reached 18 years old before they could exercise the right to erasure, given that the DPA currently imposes no age requirements. The Government have subsequently confirmed, however, that there is no requirement to have reached eighteen years old before the right to erasure may be exercised.[[172]](#footnote-172) Whilst the Government has not explicitly considered how a child might use the right to erasure to remove sharented information (in its August 2017 statement of intent its suggestion was that the right would be used by eighteen year olds to remove information they had shared as children) [[173]](#footnote-173) there is clearly scope to use the right for this purpose.

Of course, anyone can ask a social media provider such as Facebook to remove information posted online by a third party. Given that there is no charge or requirement to prove capacity, children could already be using such take down procedures. Unfortunately, however, there is no legal obligation for social media providers to remove the types of information that children might consider objectionable or embarrassing. Although the European Commission has made clear it expects online platforms to play a proactive role in removing online content, the European Commission’s priority is the removal of ‘illegal content’, namely hate speech, speech which incites terrorism, child sexual abuse material and content which infringes intellectual property rights and consumer protection. [[174]](#footnote-174) It does not expect providers to remove information such as a parent might share about their child. Unsurprisingly, therefore, Facebook’s clear position is that it will not automatically remove information because someone finds it disagreeable. It will remove posts, which pose a genuine risk of physical harm, and posts that might result in self-injury, bullying and harassment, criminal activity or sexual violence and exploitation.[[175]](#footnote-175) It will, however, only remove photos and videos that an individual reports as ‘unauthorized’ if removal is required by relevant privacy laws in the complainant’s country.[[176]](#footnote-176) As the above analysis shows, there is no legal provision that would explicitly require Facebook to remove sharented information. This is unfortunate. The ‘transnational and rapidly evolving nature of Internet services and providers’ poses significant challenges for the legal process. Whilst it has been suggested that intermediaries such as Facebook, YouTube, Twitter and Google should be taking greater ‘responsibility for children’s rights in the digital age,’[[177]](#footnote-177) and some have even gone so far as to suggest that these organisations ‘should have a duty of care to consider young children’s privacy and best interests in their operations’, with social media settings ‘privacy respecting as default when images or information about young children are concerned,’[[178]](#footnote-178) the child who objects to parental sharenting is unlikely to be able to secure removal of sharented information by contacting social media providers directly, at least not before the improved right to erasure comes into force.

**Alternatives to the law**

Whilst several legal remedies are available to children who object to sharenting, none are guaranteed success and the financial costs in bringing a court claim are likely to be high. The emotional costs and the potential damage to the family unit cannot be ignored.[[179]](#footnote-179) It is perhaps for this reason that academics have suggested that more should be done to educate parents and children about the impact of ‘sharenting’ and the level of personal information parents are exposing by sharenting.[[180]](#footnote-180)

There are alternatives to mainstream media which could be used by parents who wish to exercise their right to share information, whilst still providing some protection to their children’s privacy. Messaging services such as Snapchat, where photos disappear, and WhatsApp which confines messages to a group, have been suggested as a means to manage ‘different levels of broadcasting’[[181]](#footnote-181) (although of course screenshots of snapchat messages can be shared and photographs shared via WhatsApp are automatically downloaded to a recipient’s phone and thus can potentially be disseminated further). There are a wealth of private online social networks for families (23 Snaps, Efamily, Family Wall, JustFamily, FamilyLeaf, MyFamily.com, Rootsy, Origami). Ammari et al also reported that a number of participants in their research used ‘Dropbox, Google+, LiveJournal, Flickr, Shutterfly, Snapfish, Instagram and iCloud when they wanted to share to smaller or more private audiences than they had on Facebook.’ Others used iOS photo (also perceived as more private).[[182]](#footnote-182)

The use of private social networks for limited sharing may, of course, not offer a viable alternative to blogging, but Steinberg has suggested that it is possible for such parents to exercise their right to freedom of expression whilst protecting their children from harmful information sharing. She suggests, for example, that: parents should familiarize themselves with the privacy policies of the sites with which they share; should set up notifications to alert them when their child’s name appears in a google search result; should consider sometimes sharing anonymously; should be cautious about sharing their child’s actual location; should give their child “veto power” over online disclosures; should consider not sharing pictures revealing their children in any state of undress and more generally consider the effect of sharenting on their child’s current and future sense of self and well-being.[[183]](#footnote-183)

Whilst there are likely to be few people who would disagree that an education campaign could help clarify the rights and responsibilities of parents and children, questions have been raised about who should undertake this crucial educative role.[[184]](#footnote-184) In France and Germany the police have used social media to advise parents of the dangers inherent in sharenting and the need to protect the private life of minors.[[185]](#footnote-185) Since sharenting is unlikely to result in commission of any criminal offence in the UK, education might perhaps better lie elsewhere, with Government, with the ICO, who has a key role in upholding information rights and already provides guidance for the public on related matters, such as photography at school events,[[186]](#footnote-186) or with a body such as the UK Council for Child Internet Safety, which already provides guidance for parents on children’s use of social media. Since the Children’s Commissioner is already working with government to implement a digital citizenship programme in schools, guidance for children sharenting could be included within that programme.[[187]](#footnote-187)

**Conclusion**

Whilst parents have long shared information about their children, with friends, family and colleagues, online disclosures are of much longer lasting impact and significance. How the English courts will respond to the new phenomenon of sharenting, and the challenges it poses to children’s privacy has yet to be seen. On the face of it a range of legal remedies are available to anyone who objects to the online dissemination of their personal, private or confidential information. In practice, however, where a child’s privacy has been violated by their parents their ability to obtain a remedy is, in some regards, potentially more limited than that of an adult whose privacy has been violated by a stranger.

Children are afforded their own rights to privacy by international law. This includes a right to privacy against their parents. Unfortunately, it is clear that the ECtHR and the English judiciary view parents as guardians of their children’s privacy rather than as privacy threats. In the sharenting context it is problematic that children’s privacy expectations are inextricably bound up with their parent’s expectations for the child’s privacy. If children are to be able to effectively use existing remedies, such as the MOPI tort, to remove information which violates their privacy, English law may need to be reinterpreted to recognise that children have a right to privacy, ‘independent from their parents’ privacy expectations’.[[188]](#footnote-188) In a similar vein, the law needs to recognise that children have a right to privacy *against* their parents, although this may perhaps need to be qualified according to the child’s age and capacity.[[189]](#footnote-189)

Undoubtedly, sharenting raises difficult issues for the courts for a host of reasons. The idea that the family should be left to govern itself, free from state interference, save where interference is necessary to protect vulnerable family members, is a principle that has long underpinned English law. It is a principle that is recognised both in the ECHR and the UNCRC. In the sharenting context, however, it is not clear when a parent’s right to determine how their family’s information is used gives way to the child’s right to privacy. This is a particularly difficult issue when the information that a parent wishes to share relates to both their child’s experiences and the parent’s experiences as a parent and arguably belongs to both of them. When the information relates to activities that the child has enjoyed, with others, in public, one can perhaps understand why some parents might consider it legitimate to share that information, which will already be known to many. Parents do, however, seem to be divided about whether and when sharenting is acceptable. For a court applying a ‘reasonable expectation of privacy’ test this is problematic.

Undoubtedly the advent of widespread use of the internet, and social media, poses challenges not just for the courts, but for data protection authorities also. The ICO has made clear that it will not consider complaints about posts made on social media. This is understandable – consider the number of complaints it might otherwise face. It means, however, that currently the DPA is largely ineffective at providing redress when anyone’s information is published online without their consent, and in breach of the data protection principles, unless they have the money to go to court, and can demonstrate that processing has caused them substantial damage or distress.

Whilst the revised right to be forgotten offers some hope for the future, ultimately, the best way to ensure that parents rights and children’s rights are both respected appears to be to promote wider debate about the issue, ensure that parents and children are fully informed of the rights that are afforded to them, and encourage dialogue between parents and children at an early stage.

1. House of Lords Select Committee on Communications 2nd report of 2016-7 ’Growing up with the internet’ HL Paper 31 [206], Written evidence from Horizon Digital Economy Research, University of Nottingham [↑](#footnote-ref-1)
2. 42% of UK parents admit to regularly sharenting, 56% of UK parents never blog or post photos or videos of their children online, and they choose not to sharent because they consider their children’s lives should remain private (OFCOM, The Communications Market Report 2017 <https://www.ofcom.org.uk/research-and-data/multi-sector-research/cmr/cmr-2017>, 35) [↑](#footnote-ref-2)
3. 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-3)
4. 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](https://www.collinsdictionary.com/word-lovers-blog/new/top-10-collins-words-of-the-year-2016%2C323%2CHCB.html) [↑](#footnote-ref-4)
5. Tawfiq Ammari, Priya Kumar, Cliff Lampe and Sarita Schoenebeck, ‘Managing Children’s Online Identities: How Parents Decide What to Disclose About their Children Online’ in *Proceedings of the 33rd Annual ACM Conference on Human Factors in Computing Systems,* April 18-23, 2015, 1895-1904, 1896 [↑](#footnote-ref-5)
6. Stacey Steinberg ‘Sharenting: Children's Privacy in the Age of Social Media’ (2017) 66 Emory LJ 839, 842 [↑](#footnote-ref-6)
7. Article 8 General Data Protection Regulation (‘the GDPR’) authorises parents to provide consent to the use of information society services in cases where the child is deemed too young to do so themselves. [↑](#footnote-ref-7)
8. *Reklos and Davourlis v Greece* [2009] EMLR 16; *Bogomolova v Russia* (App No 13812/09) Judgment 20 June 2017 [↑](#footnote-ref-8)
9. See *Weller v Associated Newspapers* [2015] EWCA Civ 1176; *AAA (by her litigation friend) v Associated Newspapers Limited* [2013] EWCA Civ 554; *Murray v Big Pictures (UK) Limited* [2008] EWCA Civ 446 [↑](#footnote-ref-9)
10. See 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-child/>; 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; Unattributed ‘Austrian teenager sues parents for putting her baby photos on Facebook,’ 16 September 2016 <http://www.itv.com/news/2016-09-15/austrian-teenager-sues-parents-for-putting-her-baby-photos-on-facebook/> [↑](#footnote-ref-10)
11. Unattributed ‘Story of Austrian teen suing parents over Facebook pictures debunked’ 19 September 2016 <http://www.dw.com/en/story-of-austrian-teen-suing-parents-over-facebook-pictures-debunked/a-19562265> [↑](#footnote-ref-11)
12. Ammari et al (fn 5), 1895, 1897; Steinberg, (fn 6), 852 [↑](#footnote-ref-12)
13. Priya Kumar and Sarita Schoenebeck ‘The Modern Day Baby Book: Enacting Good Mothering and Stewarding Privacy on Facebook’ in *Proceedings of the 18th ACM Conference on Computer Supported Cooperative Work & Social Computing* (ACM, 2015), 1302-1312, 1302 [↑](#footnote-ref-13)
14. AVG Technologies (2010) ‘AVG Digital Diaries – Digital Birth’ <http://www.avgdigitaldiaries.com/tagged/stage_one> [↑](#footnote-ref-14)
15. More than 4 million parents in the United States read or write blogs, whilst in the UK Britmums maintains a network of more than 15,000 blogs: Alicia Blum-Ross and Sonia Livingstone, ‘”Sharenting,” parent blogging and the boundaries of the digital self’ (2017) Popular Communication 15(2) 110-125, 112) [↑](#footnote-ref-15)
16. Ibid [↑](#footnote-ref-16)
17. Marion Oswald, Helen Ryan, Emma Nottingham, Rachael Hendry and Sophie Woodman (2017) ‘Have “Generation Tagged” Lost Their Privacy: A report on the consultation workshop to discuss the legislative, regulatory and ethical framework surrounding the depiction of young children on digital, online and broadcast media’, 25 [↑](#footnote-ref-17)
18. Steinberg (fn 6), 850; Nominet, ‘Parents “oversharing” family photos online but lack basic privacy know-how’ <https://www.nominet.uk/parents-oversharing-family-photos-online-lack-basic-privacy-know/> [↑](#footnote-ref-18)
19. Steinberg (fn 6), 846 [↑](#footnote-ref-19)
20. Maeve Duggan , Amanda Lenhart, Cliff Lampe and Nicole Ellison ‘Parents and Social Media’ (Pew Research Center, 2015), 3; Kumar and Schoenebeck (fn 13), 1302 [↑](#footnote-ref-20)
21. Duggan et al, Ibid, 4; CS Mott Children’s Hospital National Poll on Children’s Health ‘Parents on Social Media: Likes and Dislikes of Sharenting (2015) 23 (2); Kumar and Schoenebeck (fn 13), 1302 and 1304 [↑](#footnote-ref-21)
22. Kumar and Schoenebeck (fn 13), 1302 [↑](#footnote-ref-22)
23. Kate Orton-Johnson ‘Mummy blogs and Representations of Motherhood: “Bad mummies” and their Readers (2017) Social Media + Society 3(2) 1-10, 2 [↑](#footnote-ref-23)
24. Steinberg (fn 6), 852; Kumar and Schoenebeck (fn 13), 1304; Orton-Johnson (fn 23), 2 [↑](#footnote-ref-24)
25. Blum-Ross and Livingstone (fn 15), 113 [↑](#footnote-ref-25)
26. Steinberg (fn 6), 855 [↑](#footnote-ref-26)
27. Blum-Ross and Livingstone (fn 15), 116 [↑](#footnote-ref-27)
28. Steinberg (fn 6), 855 (Whilst this may be true, there is a potential problem with this viewpoint; the parent’s portrayal of the child may not represent who the child is, or how they want to portray themselves.) [↑](#footnote-ref-28)
29. Steinberg (fn 6), 844 [↑](#footnote-ref-29)
30. CBBC Newsround ‘Sharenting: Are you ok with what your parents post?’ <http://www.bbc.co.uk/newsround/38841469> [↑](#footnote-ref-30)
31. Muge Marasli, Er Suhendan, Nergis Hazal Yilmazturk and Figen Cok ‘Parents’ shares on Social Networking Sites About the Children: Sharenting’ (2016) Anthropologist 24(2) 399, 400 [↑](#footnote-ref-31)
32. CS Mott Children’s Hospital National Poll on Children’s Health ‘Parents on Social Media: Likes and Dislikes of Sharenting (2015) 23 (2) [↑](#footnote-ref-32)
33. OFCOM, Communications Market Report 2017, 35 [↑](#footnote-ref-33)
34. Orton-Johnson (fn 23) 2 [↑](#footnote-ref-34)
35. Ibid, 5 quoting Jessica Gottlieb ‘You’re kind of a bitch of a mom blogger’ <http://jessicagottlieb.com/2015/03/bitch-mom-blogger/> [↑](#footnote-ref-35)
36. Steinberg (fn 6), 852 [↑](#footnote-ref-36)
37. Family Online Safety Institute (2015) ‘Parents, Privacy & Technology Use,’ 22 [↑](#footnote-ref-37)
38. Clint Davis ‘YouTube star DaddyOFive loses custody of kids after complaints over 'prank' videos’ 2 May 2017 <http://www.newschannel5.com/news/national/youtube-star-daddyofive-loses-custody-of-kids-after-complaints-over-prank-videos> [↑](#footnote-ref-38)
39. Steinberg (fn 6), 853-4; Lisa Belkin ‘Humiliating children in Public: A New Parenting Trend? [https://www.huffingtonpost.com/lisa-belkin/humiliating-children-to-teach-them-\_b\_1435315.html accessed 11.10.17](https://www.huffingtonpost.com/lisa-belkin/humiliating-children-to-teach-them-_b_1435315.html%20accessed%2011.10.17); Valentin and Blackstock Psychology ‘The Dark Side of Public Shaming Parenting’ 16.6.2015 <http://www.vbpsychology.com/the-dark-side-of-public-shaming-parenting/> [↑](#footnote-ref-39)
40. Blum-Ross and Livingstone (fn 15), 110 [↑](#footnote-ref-40)
41. Ammari et al, (fn 5), 1896; Oswald et al (fn 17), 13 [↑](#footnote-ref-41)
42. BlogHer ‘So I Posted Photos of My Kid Online and This is Where They Ended Up’ Feb 14, 2013 (no longer accessible) cited by Steinberg (fn 6), 847 [↑](#footnote-ref-42)
43. Kelli Bender ‘Mother of 2-year-old with rare disorder speaks out after internet memes make fun of her daughter’ <http://people.com/celebrity/mother-fights-cyberbullying-of-toddler-with-rare-disorder/>; Terri Parker (2013) Mean moms bash ‘ugly’ toddlers in secret Facebook group <http://www.wpbf.com/article/mean-moms-bash-ugly-toddlers-in-secret-facebook-group/1319522> [↑](#footnote-ref-43)
44. Article 12 Universal Declaration of Human Rights (‘UDHR’) and Article 16 United Convention on the Rights of the Child (‘the UNCRC’) [↑](#footnote-ref-44)
45. Article 8 European Convention for the Protection of Human and Rights (‘the ECHR’); Article 7 Charter of Fundamental Rights of the European Union (‘the EU Charter’) [↑](#footnote-ref-45)
46. Article 8 EU Charter [↑](#footnote-ref-46)
47. Article 8 UNCRC [↑](#footnote-ref-47)
48. The focus of this article is the removal of images from the primary source, where it has been posted by the parent although it is recognised that third parties may subsequently share images shared by parents on social media and it may not be possible for a child to remove all information/images from the internet. [↑](#footnote-ref-48)
49. In addition to the three main remedies discussed below, where the publication of information has caused or is likely to cause serious harm to their reputation, a child might consider using the Defamation Act 2013. The Protection from Harassment Act 1997 also enables a child to seek an injunction restraining their parent from pursuing any conduct which amounts to harassment. [↑](#footnote-ref-49)
50. *Prince Albert v Strange* (1849) 1 Mac. & G. 25. [↑](#footnote-ref-50)
51. #  *McKennitt v Ash and others* [2006] EWCA Civ 171

 [↑](#footnote-ref-51)
52. *W v Egdell* (1990) 2 WLR 491 [↑](#footnote-ref-52)
53. Rebecca Moosavian ‘Charting the Journey from Confidence to the New Methodology’(2012) 34(5) EIPR 324-335, 326; *OBG v Allan; Douglas v Hello!; Mainstream Properties v Young* [2007] UKHL 21; [2007] 4 All E.R. 545 [255] (Lord Nicholls of Birkenhead) [↑](#footnote-ref-53)
54. Moosavian, Ibid; *Campbell v MGN* [2004] UKHL 22 [14]; *OBG v Allan; Douglas v Hello!; Mainstream Properties v Young* (fn 69) [251] [↑](#footnote-ref-54)
55. Colin Bennett, *Regulating privacy: Data protection and public policy in Europe and the United States* (Cornell University Press, 1992), 14 [↑](#footnote-ref-55)
56. Alan Westin, *Privacy and Freedom* (Atheneum, 1967) 7 [↑](#footnote-ref-56)
57. Civil Procedure Rules 1998, r21.2 [↑](#footnote-ref-57)
58. In the medical context s8(1) Family Law Reform Act 1969 confirms the right of a sixteen-year-old to consent to medical treatment. Under-16s must prove they have ‘sufficient understanding’ (*Gillick v West Norfolk and Wisbech AHA* [1985] 3 WLR 830). In the data protection context, a child must demonstrate they are ‘mature enough to understand their rights,’ are able to broadly understand the process involved, and are able to interpret the information they receive. See ICO, ‘Find out how to request your personal information’ <https://ico.org.uk/for-the-public/personal-information/> Note however that in Scotland a child of twelve years of age or more is *presumed* to be of sufficient age and maturity to have a general understanding of what it means to exercise the rights afforded by the DPA (Section 66 DPA) [↑](#footnote-ref-58)
59. *Coco v A N Clark (Engineers) Limited* [1969] FSR 415, 419 [↑](#footnote-ref-59)
60. #   *Attorney General v Observer Ltd and others; Attorney General v Times Newspapers Ltd and another (Spycatcher)* (1990) 1 AC 109, [281H-282A]); *Terry (previously referred to as LNS) v Persons Unknown* [2010] EWHC 119 (QB) [49] (Mr Justice Tugendhat)

 [↑](#footnote-ref-60)
61. *Vestergaard Frandsen A/A (now MVF 3 ApS) v Bestnet Europe Ltd and others* [2013] UKSC 31 [23] (Lord Neuberger) [↑](#footnote-ref-61)
62. *Spycatcher* (fn 60) 282C-F (Lord Justice Goff of Chieveley) [↑](#footnote-ref-62)
63. *W v Egdell* [1990] Ch 359 [↑](#footnote-ref-63)
64. *McKennitt v Ash and others* [2006] EWCA Civ 1714 [22] (Buxton LJ) [↑](#footnote-ref-64)
65. *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, 215 [↑](#footnote-ref-65)
66. [1977] WLR 760, 763 [↑](#footnote-ref-66)
67. #  *McKennitt v Ash (fn 64)* [33] and [36]

 [↑](#footnote-ref-67)
68. [2010] EWCA Civ 908, [66] Note in *Google v Vidal-Hall* [2015] EWCA Civ 311 [25] (referring to the comments of Lord Nicholls in *Campbell* (fn 54)) it is similarly suggested that ‘there are problems with an analysis which fails to distinguish between a breach of confidentiality and an infringement of privacy rights protected by article 8, not least because the concepts of confidence and privacy are not the same and protect different interests.’ [↑](#footnote-ref-68)
69. This is the first test to be satisfied where a claim is brought under the MOPI tort, discussed further below [↑](#footnote-ref-69)
70. [2010] EWCA Civ 908, [66] [↑](#footnote-ref-70)
71. *Campbell (fn54), [154] (Lady Justice Hale)* [↑](#footnote-ref-71)
72. In *Weller (*fn 12) Lord Dyson emphasised that the children were enjoying a ‘private family outing,’ an activity distinctively different in nature to a mere trip to the shops or walk along the street. [↑](#footnote-ref-72)
73. [2015] UKSC 42 [↑](#footnote-ref-73)
74. In Re JR 38 [2015] UKSC 42 [100] [↑](#footnote-ref-74)
75. #  *Spycatcher* (fn 60)), 281D-F

 [↑](#footnote-ref-75)
76. *Coco v A N Clark* (fn 59), 420 [↑](#footnote-ref-76)
77. *Campbell (fn 54)* [85] (Lord Hope), supported also by Lady Hale and Lord Carswell in *Campbell* at [134] and [165] respectively [↑](#footnote-ref-77)
78. *Napier and Irwin Mitchell v Pressdram Ltd* [2009] EWCA Civ 443 (CA) [42] (Toulson LJ) [↑](#footnote-ref-78)
79. Blum-Ross and Livingstone (fn 15), 111; Alicia Blum-Ross ‘Sharenting: Parental Bloggers and managing children’s digital footprints’ <http://blogs.lse.ac.uk/parenting4digitalfuture/2015/06/17/managing-your-childs-digital-footprint-and-or-parent-bloggers-ahead-of-brit-mums-on-the-20th-of-june/> [↑](#footnote-ref-79)
80. #  *McKennitt v Ash* (fn 64)

 [↑](#footnote-ref-80)
81. #  *McKennitt v Ash,* Ibid [32, 36]

 [↑](#footnote-ref-81)
82. *McKennitt v Ash*, Ibid [36] [↑](#footnote-ref-82)
83. *Terry (previously referred to as LNS)* (fn 60), 50 (Mr Justice Tugendhat) [↑](#footnote-ref-83)
84. *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776 [68] (Lord Phillips) [↑](#footnote-ref-84)
85. *Spycatcher (fn 60)* 282C-F [↑](#footnote-ref-85)
86. [2011] EWHC 1232 [↑](#footnote-ref-86)
87. *Ibid* [27] [↑](#footnote-ref-87)
88. *Giggs, Ibid* [28] See also *Douglas v Hello (No 6)* [2005] EWCA Civ 595; [2006] QB 125 [55]; *HRH Prince of Wales v Associated Newspapers Ltd*  [2006] EWCA Civ 1776; *Browne v Associated Newspapers Ltd*  [2008] QB 103 [61] [↑](#footnote-ref-88)
89. Max Mills ‘Sharing Privately: the effect publication on social media has on expectations of privacy’ (2017) JML 9(1) 45-71, 52 citing Stephens v Avery [1998] 1 Ch 454 [↑](#footnote-ref-89)
90. Stephens v Avery [1998] 1 Ch 454 [↑](#footnote-ref-90)
91. Mills (fn 85), 53 [↑](#footnote-ref-91)
92. Nicole Moreham and Sir Mark Warby (eds) *Tugendhat and Christie: The Law of Privacy and the Media (* 3rd Edition, 2016), 10 [↑](#footnote-ref-92)
93. See for example comments of Lord Neuberger in *Tchenguiz v Immerman* [2010] EWCA Civ 908, [66] [↑](#footnote-ref-93)
94. #  *Google Inc v Vidal Hall and others* [2015] EWCA Civ 311 [25] referring to the comments of Lord Nicholls in *Campbell* (fn 54)

 [↑](#footnote-ref-94)
95. *Google Inc v Vidal-Hall,* Ibid [25] citing Lord Hoffman in *Campbell v MGN* [51] [↑](#footnote-ref-95)
96. #  *Campbell* (fn 54) [14]

 [↑](#footnote-ref-96)
97. PJS v NJN [2016] UKSC 26 [32],[36[; see also *Contostavlos v (1) Michael Mendahun (2) any person in possession or control of material referred to in sch 2 of the order of Mr Justice Tugendhat dated 20 March 2012 (3) Justin Edwards* [2012] EWHC 850 (QB) [105] [↑](#footnote-ref-97)
98. *PJS* (fn 114) [32] [↑](#footnote-ref-98)
99. *Campbell (fn 54)* [↑](#footnote-ref-99)
100. *Weller* (fn 12) [↑](#footnote-ref-100)
101. *Campbell*, (fn 54) [99] Lord Hope [↑](#footnote-ref-101)
102. *Murray (fn 12)* [36] per Sir Anthony Clarke MR [↑](#footnote-ref-102)
103. *Weller (*fn 12) [↑](#footnote-ref-103)
104. *Weller* (fn 12) [56-64] [↑](#footnote-ref-104)
105. Murray (fn 12) [45] and [56], *Re JR 38* [2015] UKSC 42; and the cases of *K v News Group Newspapers Ltd [2011] EWCA Civ 439 and PJS v NJN [2016] UKSC 26* [↑](#footnote-ref-105)
106. *Weller* (fn 12) [29]; See also Murray (fn 12) [57] [↑](#footnote-ref-106)
107. Moreham and Warby (fn 109), 49 [↑](#footnote-ref-107)
108. Wouter Martinus Petrus Steijn ‘The role of Informational Norms on Social Network Sites’ 117-137 in Walrave M., Ponnet K., Vanderhoven E., Haers J., Segaert B. (eds) Youth 2.0: Social Media and Adolescence. (Springer, 2016), 118-9. [↑](#footnote-ref-108)
109. Steijn, Ibid, 119 [↑](#footnote-ref-109)
110. 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> ; Business Wire ‘Digital Birth: Welcome to the Online World’ <http://www.businesswire.com/news/home/20101006006722/en/Digital-Birth-Online-World> [↑](#footnote-ref-110)
111. Leo Kelion ‘Posting children’s photos on social media divides nation’ BBC, 3 August 2017 <http://www.bbc.co.uk/news/technology-40804041> [↑](#footnote-ref-111)
112. Steijn (fn 99), 130 [↑](#footnote-ref-112)
113. (App No 1234/05) [2009] EMLR 16 [40] [↑](#footnote-ref-113)
114. #  (App No 13812/09) Judgment 20 June 2017 [52]

 [↑](#footnote-ref-114)
115. Reklos (fn 104) [43] [↑](#footnote-ref-115)
116. Reklos (fn 104) [41] [↑](#footnote-ref-116)
117. Kirsty Hughes ‘The Child’s Right to Privacy and Article 8 European Convention on Human Rights’ in Michael Freeman (ed) (2012) 14 *Law and Childhood Studies* (Oxford University Press, 2012) 456-486, 479 [↑](#footnote-ref-117)
118. *Weller* (fn 12) [33] [↑](#footnote-ref-118)
119. #  *AAA* (fn 12)*,* [21]

 [↑](#footnote-ref-119)
120. *Murray* (fn 12*),* [37-38] [↑](#footnote-ref-120)
121. Oswald et al (fn 17), 10 [↑](#footnote-ref-121)
122. See Hughes (fn 108), 480; also Kirsty Hughes ‘Publishing photographs without consent’ (2014) 6(2) JML 180, 185 [↑](#footnote-ref-122)
123. Kirsty Hughes (fn 108), 480 [↑](#footnote-ref-123)
124. Murray (fn 12) [16] [↑](#footnote-ref-124)
125. For further discussion see Oswald et al (fn 17), 10 [↑](#footnote-ref-125)
126. Hughes (fn 108), 480 [↑](#footnote-ref-126)
127. #  *In re S (A child)* [2004] UKHL 47; [2005] 1 AC 593 [17] per Lord Steyn

 [↑](#footnote-ref-127)
128. Section 1(1) Children Act 1989 [↑](#footnote-ref-128)
129. *Weller* (fn 12) [40-41] [↑](#footnote-ref-129)
130. Marion Oswald, Helen James & Emma Nottingham ‘The not-so secret life of five-year-olds: legal and ethical issues relating to disclosure of information and the depiction of children on broadcast and social media’,(2016) JML 8(2) 198-228, 216 referring to *In Re S (a child) (Identification: Restrictions on Publication)* (fn 118); *In Re W (Identification: Restrictions on Publication)* [2006] EWHC 2733 (Fam); *In Re M and N (Minors) (Wardship: Publication of Information)* [1990] Fam 211; *Re Steadman* [2009] EWHC 935 (Fam) [↑](#footnote-ref-130)
131. *Weller* (fn 12) [64] [↑](#footnote-ref-131)
132. *ETK v Newsgroup Newspapers* [2011] EWCA Civ 439 [17]; PJS v Newsgroup Newspapers Ltd (fn 92) [44] (Lord Mance); Rocknroll v News Group Newspapers [2013] EWHC 24 (Ch) [36-37], [39]. In PJS [72] LJ Hale makes clear that such an approach is justified as much by concern for the privacy interests of the children as for the family privacy and the privacy of the parents. [↑](#footnote-ref-132)
133. See Jacob Rowbottom ‘‘To rant, vent and converse: Protecting low level digital speech’ (2012) Cambridge Law Journal 355, 356 for definitions of low and high value and low and high level speech [↑](#footnote-ref-133)
134. See *Re J (a child) (contra mundum injunction)* [2013] EWHC 2694 (Fam); *In the matter of an application by Gloucestershire County Council for the committal to prison of Matthew John Newman* [2014] EWHC 3136 (Fam); also *Clayton v Clayton* [2006] EWCA Civ 878 [↑](#footnote-ref-134)
135. *Re J ,* ibid,[76(v)] [↑](#footnote-ref-135)
136. In this regard consider the facts of *Re J,* ibid [↑](#footnote-ref-136)
137. [2000] 2 FLR 512, 531 [↑](#footnote-ref-137)
138. Maumousseau and Washington v France (App No 39388/05) (unreported) 6 December 2007, ECtHR [68]; Neulinger and Shuruk v Switzerland (App No 41615/07) [2011] 1 FLR 122 [134] [↑](#footnote-ref-138)
139. Re R and H v United Kingdom (Application No 35348/06) [2011] 2 FLR 1236 [73]. [↑](#footnote-ref-139)
140. Hughes (fn 108), 456 [↑](#footnote-ref-140)
141. Oswald, James & Nottingham (fn 124), 211 [↑](#footnote-ref-141)
142. Maxine Wolfe and Robert S Laufer ‘The Concept of Privacy in Childhood and Adolescence’ in D H Carson (Ed) *Man-Environment Interactions: Evaluations and Applications* (Dowden, Hutchinson & Ross, 1975) [↑](#footnote-ref-142)
143. Karyn D McKinney ‘Space Body and Mind: Parental Perceptions of Children’s Privacy Needs’ (1998) Journal Fam Iss 19(1) 75, 76 [↑](#footnote-ref-143)
144. Hughes (fn 108), 458-9 [↑](#footnote-ref-144)
145. *Google v Vidal-Hall and others* [2014] EWHC 13 [78] [↑](#footnote-ref-145)
146. ECJ C101/01 [27] [↑](#footnote-ref-146)
147. This argument was made by a 16 year old in respect of photographs taken when she was 12 (Kaye Wiggins ‘Should children ban their parents from social media?’ <http://www.bbc.co.uk/news/business-37834856>) [↑](#footnote-ref-147)
148. Section 2 DPA [↑](#footnote-ref-148)
149. Schedule 2 DPA paragraph 1 [↑](#footnote-ref-149)
150. Schedule 2 DPA paragraph 6(1) [↑](#footnote-ref-150)
151. Schedule 3 DPA paragraph 1 [↑](#footnote-ref-151)
152. Schedule 3 DPA paragraph 5 [↑](#footnote-ref-152)
153. Section 42 DPA [↑](#footnote-ref-153)
154. Section 40 DPA [↑](#footnote-ref-154)
155. Section 10(1) DPA [↑](#footnote-ref-155)
156. [2015] EWCA Civ 311 [77-79] [↑](#footnote-ref-156)
157. Section 10(3) DPA [↑](#footnote-ref-157)
158. Directive Article 3(2) [↑](#footnote-ref-158)
159. ECJ C101/01 [27] [↑](#footnote-ref-159)
160. Composed of representatives from each of the data protection authorities across the European Union [↑](#footnote-ref-160)
161. Article 29 Data Protection Working Party (2009), ‘Opinion 5/2009 on online social networking’ 00189/09/EN WP 163, adopted 12 June 2009 [↑](#footnote-ref-161)
162. David Erdos ‘Beyond ʽHaving a Domesticʼ? Regulatory Interpretation of European Data Protection Law and Individual Publication’ [University of Cambridge Faculty of Law Research Paper No. 54/2016](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2847628##) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2847628> 3; Douwe Korff, (2010) ‘Comparative Study on Different Approaches to new privacy challenges, in particular in the light of technological developments. Working paper no 2: Data protection laws in the EU: The difficulties in meeting the challenges posed by global social and technical developments’, 9 [↑](#footnote-ref-162)
163. ICO (2014) ‘Social networking and online forums – when does the DPA apply?’ V1.1, 4 [↑](#footnote-ref-163)
164. Ibid, 9 [↑](#footnote-ref-164)
165. Ibid, 15 [↑](#footnote-ref-165)
166. European Commission ‘Press Release: Agreement on Commission’s EU Data Protection Reform will boost Single Digital Market, Brussels, December 2015 <http://europa.eu/rapid/press-release_IP-15-6321_en.htm> [↑](#footnote-ref-166)
167. Article 8 GDPR specifies that consent to processing of children’s data on ‘information society services’, will be lawful only if the child’s parents consent or the child is of sufficient age to do so themselves. The GDPR sets a maximum age of 16 but permits states to authorise a child to consent at a lower age of 13, and the data protection bill currently before parliament confirms that in the UK a child may consent if aged 13 or over. [↑](#footnote-ref-167)
168. Oswald, James and Nottingham (fn 124), 209 [↑](#footnote-ref-168)
169. Steinberg (fn 6), 881 [↑](#footnote-ref-169)
170. Article 17 GDPR [↑](#footnote-ref-170)
171. The Queen’s Speech and Associated Background Briefing, on the Occasion of the Opening of Parliament on Wednesday 21 June 2017<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/620838/Queens_speech_2017_background_notes.pdf>, 79 [↑](#footnote-ref-171)
172. Letter dated 19/10/2017 from Lord Ashton of Hyde and Baroness Williams of Trafford to Peers regarding issues raised during the Second Reading of the Data Protection Bill <http://data.parliament.uk/DepositedPapers/Files/DEP2017-0603/Letter_on_Data_Protection_Bill_from_Lord_Ashton_and_Baroness_Williams.pdf> [↑](#footnote-ref-172)
173. Department for Digital, Culture, Media and Sport A New Data Protection Bill: Our Planned Reforms 7 August 2017 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/635900/2017-08-07_DP_Bill_-_Statement_of_Intent.pdf> , 8 [↑](#footnote-ref-173)
174. ##  Communication Tackling illegal content online https://ec.europa.eu/digital-single-market/en/illegal-content-online-platforms#Communication on tackling illegal content online

 [↑](#footnote-ref-174)
175. <https://www.facebook.com/communitystandards/> NB however that the article by Nick Hopkins ‘Revealed: Facebook's internal rulebook on sex, terrorism and violence’ The Guardian 21 May 2017 <https://www.theguardian.com/news/2017/may/21/revealed-facebook-internal-rulebook-sex-terrorism-violence> suggests removal of such hateful, hurtful or violent content is by no means guaranteed [↑](#footnote-ref-175)
176. <https://www.facebook.com/help/428478523862899> accessed 9.10.17 [↑](#footnote-ref-176)
177. Sonia Livingston, John Carr and Jasmina Byrne ‘One in Three: Internet Governance and Children’s Rights’ Global Commission on Internet Governance (2015), 13-14 [↑](#footnote-ref-177)
178. Oswald et al (fn 17), 6-7 [↑](#footnote-ref-178)
179. Benjamin Shmueli and Ayelet Blecher-Prigat, ‘Privacy for Children’(2011) 42 Colum Hum Rts L Rev 759, 793-5 [↑](#footnote-ref-179)
180. Oswald et al (fn 17), 30 [↑](#footnote-ref-180)
181. Geraldine Bedell ‘The Digital Family’, Parentzone (2015) 16 <https://parentzone.org.uk/system/files/attachments/DF%20Report_FINAL2016_0.pdf> [↑](#footnote-ref-181)
182. Ammari et al (fn 5), 1900 [↑](#footnote-ref-182)
183. Steinberg (fn 6), 877-882 [↑](#footnote-ref-183)
184. Oswald et al (fn 17), 30 [↑](#footnote-ref-184)
185. ‘Gendarmerie nationale ‘[PREVENTION: Preserver vos enfants!’ (Prevention: Protect your Children!) 23 February 2015 <https://www.facebook.com/gendarmerienationale/posts/1046288785435316>; Polizei Nordrhein-Westfalen (NRW) Hagen 13 October 2015 [https://www.facebook.com/Polizei.NRW.HA/posts/474114729427503:0](https://www.facebook.com/Polizei.NRW.HA/posts/474114729427503%3A0) ; [↑](#footnote-ref-185)
186. Information Commissioner’s Office ‘Taking photographs in schools’ (2014) [↑](#footnote-ref-186)
187. Children’s Commissioner ‘Our Work: Digital’ <https://www.childrenscommissioner.gov.uk/our-work/digital/> [↑](#footnote-ref-187)
188. Oswald et al (fn 17), 5 [↑](#footnote-ref-188)
189. Shmueli and Blecher-Prigat (fn 169),763 [↑](#footnote-ref-189)