HUMAN RIGHTS

Jet-skis, holidays and high-profile businesspersons: photographs and privacy protection in domestic law

Stoute v News Group Newspapers [2023] EWHC 232 (KB); [2023] EWCA Civ. 523

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Introduction

When the media take and publish photographs of individuals, together with related stories, the right to do this through freedom of expression and press freedom needs to be balanced against the individual's right to privacy. This is particularly so when the photographs intrude on the rights of the victim's family members, thus strengthening the privacy claim of the claimant.[1] Both domestic law and Article 8 of the European Convention on Human Rights (given effect to by the Human Rights Act 1998) provide remedies in appropriate cases; whether in the form of injunctions or damages,[2] but such rights are restrained by defences based on the right to free speech (and the public interest), which are accommodated by Article 10 of the Convention and s.12 of the Human Rights Act.[3]

However, not every unauthorised photograph will constitute a breach of the domestic law or of Article 8.[4] First, the claimant will need to show that they had an actionable and reasonable expectation of privacy in that image; and the press will then be allowed to claim that there was a public interest in taking and publishing the photograph (and any accompanying story), which then overrode that privacy right. Domestic law has to get that balance right if it is to be consistent with both Articles 8 (private life) and 10 (freedom of expression) of the ECHR, and the jurisprudence of the European Court of Human Rights in this area.[5] The balancing act is carried out through the principles of proportionality, and no right has 'trump' status as such,[6] although the taking of unwarranted photographs is regarded as a particularly intrusive form of privacy breach, and can often swing the case in favour of the claimant.[7]

Despite the above rules, all cases are fact-sensitive and the outcome of any litigation can be difficult to predict. A recent case from the UK High Court,[8] now upheld by the Court of Appeal,[9] involving an application for an interim injunction against the defendant press pending full trial provides an insight into the jurisprudence in this area, illustrating the complex application of what are, at first sight, straightforward guiding principles. The High Court had to consider, at proceedings pending a full trial, whether the photographing of the claimants (reasonably high profile businesspeople), and his friends and family, constituted the tort of misuse of private information and a breach of Article 8. The case raise various legal and practical difficulties in establishing liability in privacy cases, as well as the

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[1] See, in particular, *Weller v Associated Newspapers* [2014] EWHC 1163 (QB), and, in the European Court of Human Rights*, Von Hannover v Germany* (2004) EMLR 2.

[2] This can be in the form of a direct action under the Act, against a public authority, or under the torts of confidentiality, misuse of private information, or for breach of copyright. In addition, in some cases it is possible to take action against the press for harassment, either, under the Protection from Harassment Act 1997.

[3] Section 12 of the Human Rights 1998 provides that courts should pay particular regard to the right of freedom of expression contained in Article 10 when deciding cases where freedom expression is under threat in any legal proceedings.

[4] *Sir Elton John v Associated Newspapers,* unreported, decision of the High Court 23 June 2006*,* and *Murray v Express Newspapers Ltd; also known as Murray v Big Pictures (UK) Ltd* [2007] EMLR 22 (High Court); *Murray v Express Newspapers Ltd* [2009] Ch 481 (Court of Appeal).

[5] Most notably, *Van Hannover v Germany,* n 1.

[6] *Re S (Publicity)* [2005] 1 AC 593.

[7] See the early cases of *Theakston v MGN Ltd* [2002] EMLR 22, and *Jagger v Darling* [2005] EWHC 683*,* and subsequently *Murray*, n 4.

[8] *Stoute v News Group Newspapers* [2023] EWHC 232 (KB); [2023] EWCA Civ. 523

[9] *Stoute and Stoute v News Group Newspapers* [2023] EWCA Civ. 523

application of any press freedom or public interest defences, which will be examined through the established case law.

The decision in *Stoute v News Group Newspapers*

The claimants are a married couple who ran a company which famously sold personal protective equipment to the National Health Service and private hospitals, and who had secured government contracts worth £2 billion during the COVID-19 pandemic. They bought a holiday home beside a public beach in Barbados and, while there with friends and family, were photographed by paparazzi while travelling by jet-ski from a yacht to a beach club for a meal for their daughter's birthday. The defendant newspaper informed the claimants that it intended to publish shots taken on the public beach outside the restaurant and sent them photographs of the holiday home, the boat, and each claimant; the implication being that those were the photographs that were going to be to be published. The claimants then made an urgent application for an injunction at short notice, which was granted in respect of the photographs of the house and the boat, but refused in respect of the photographs of the claimants.[10] The newspaper then published articles without using the injuncted photographs, but using instead the pictures of the claimants. The claimants now claim that the published photographs were cropped differently to those which had been submitted to the court and brought a claim for damages for misuse of private information, infringement of copyright, and for permanent injunctions.

The claimants accepted that the instant application was being made on the return date for the existing injunction in respect of the photographs of the house and boat, and that they were seeking to re-litigate issues that had already been before the court. However, they submitted that the previous hearing had proceeded on an erroneous basis in respect of what photographs the defendant had threatened to publish, that the photographs had been taken while they were engaged in a private activity, and that they had had a reasonable expectation of privacy even though they were in a public place.

Refusing the application, the High Court held that it covered the subject matter that previously had been before the court, that there was a public interest in finality in litigation, and that it was contrary to that public interest to permit the same issues to be re-litigated. If a claimant failed to secure an injunction, then the remedy was an appeal, there being no general right to make a repeat application for the same relief.[11] There was, however, no absolute rule prohibiting a repeat application and the court had a discretion to entertain or grant it where there was good reason to do so.[12] The previous application had been made at very short notice, and the photographs had been disclosed in a way that had led the claimants to believe that they were what would be published and that had informed their application. Whether the publication of a photograph amounted to misuse of private information was highly fact-sensitive and depended on precisely what was depicted in the photograph, and there were significant differences between the photographs disclosed and the photographs published. There was, therefore, a good reason to permit a repeat application and the court would consider it afresh.[13]

The Court then considered the question of whether the photographs could be considered private information, thus forming the basis of a reasonable expectation of privacy in the misuse of private information and related actions. In that respect, the Court noted that the claimants had been in a public place, had been targeted by photographers, and had not consented to the pictures being taken or published.[14] It then noted that although they were in a public place, they were engaging in a private birthday celebration, and had not sought publicity about it.[15] Further they had not been aware that the

[10] Unreported, injunction granted by Heather Williams J on 31 December 2022.
[11] *Stoute v News Group Newspapers*, at [27-28].
[12] *Stoute v News Group Newspapers*, [28], citing *Laemthong International Lines Co Ltd v Artis* [2004] EWHC 2226 (Comm)
[13] *Stoute v News Group Newspapers*, [30-31].
[14] *Stoute v News Group Newspapers*, [32].
[15] *Stoute v News Group Newspapers*, [32].

photographs were being taken, but had known that they had become the target of photographers, and had made the trip to the restaurant and chosen what to wear in that knowledge.[16]

In the Court's view, the information captured in the photographs was capable of amounting to private information because everyone had a right to exercise personal autonomy over the extent to which they revealed aspects of their physical appearance.[17] On the other hand, photographs of the claimants were already in the public domain, and their company had made a considerable amount of money from public funds.[18] Although being in a public location when the information was obtained did not, of itself, mean there was no reasonable expectation of privacy, there was no general reasonable expectation of privacy in respect of information that was obvious to anyone who happened to be in the same place at the same time.[19] The claimants had arrived on a public beach by Jet Ski, and there was a demonstrative and performative element to their arrival. Thus, the information captured in the photographs corresponded to how they had chosen to appear in public.[20] Further, there was no additional element of inherently private information, and the fact that more parts of their bodies were visible in the published photographs than had been shown in those previously before the court did not make a material difference in that respect.[21] Although the absence of consent, the distance from which the photographs had been taken, and the targeting of the claimants were all relevant to whether there was a reasonable expectation of privacy, those factors were not present to a degree which made success at trial likely, as required by s. 12(3) of the Human Rights Act 1998[22] Thus, the claimants were not 'more likely than not' to establish at trial that the photographs amounted to private information and not sufficiently likely to do so to an extent which would justify injunctive relief.[23]

On the question of balance of convenience, and balancing the defendant's Article 10 rights, the Court noted that public expenditure on personal protective equipment remained a newsworthy issue and there was a real prospect that if not restrained the defendant would publish the material that the claimants sought to restrain. If the court was wrong and the claimants were likely to succeed at trial, the losses they would sustain could not be directly remedied by monetary compensation so that damages were not an adequate remedy.[24] However, the photographs *had* been published and damage had been sustained; whether the publication was unlawful would be determined at trial, and even if the claimants could show that they had a reasonable expectation of privacy, the balance fell against the grant of injunctive relief.[25]

The Court of Appeal decision in *Stoute*

On appeal to the Court of Appeal,[26] the appeal was dismissed and the decision at first instance upheld. The grounds of appeal were as follows: first, that the judge had wrongly presumed that events taking place in public were not private unless some additional element was present; secondly that the judge had wrongly held that because the appellants did not have a reasonable expectation of privacy in relation to others present at the beach, they did not have such an expectation in relation to the publication of the photographs in the respondent's newspaper; third, that the judge had erred in the balancing exercise with respect to how other factors had been considered and balanced.

The Court of Appeal firstly reviewed the current applicable law, including the requirement that the claimant show a reasonable expectation of privacy in the relevant information, and that such an

[16] *Stoute v News Group Newspapers*, [32].
[17] *Stoute v News Group Newspapers*, [32].
[18] *Stoute v News Group Newspapers*, [32].
[19] *Stoute v News Group Newspapers*, [33].
[20] *Stoute v News Group Newspapers*, [34].
[21] *Stoute v News Group Newspapers,* [34].
[22] *Stoute v News Group Newspapers,* [34-35], citing *Von Hannover v Germany,* n. 1, and *John v Associated Newspapers*, n. 4.
[23] *Stoute v News Group Newspapers,* [35].
[24] *Stoute v News Group Newspapers*, [39].
[25] *Stoute v News Group Newspapers,* [40].
[26] *Stoute v News Group Newspapers* [2023] EWCA Civ 523.

expectation overrode any freedom of expression claim of the defendants.[27] Noting that various factors needed to be taken into account, the Court then stressed that a person was less likely to have a reasonable expectation of privacy with respect to a photograph taken in a public place, although that was not an absolute rule.[28] The Court then found that the judge had not applied any presumption that events taking place in public were not private unless some additional element was present. The judge had begun by accepting that the fact that the appellants were in public did not mean they did not have a reasonable expectation of privacy, and his reference to an additional element, in context, showed that he was referring to the fact that information revealed in public was less likely to be recognised as private absent some additional element. The judge had also taken into account additional factors including that the appellants had been hounded by paparazzi. There had, therefore, been no error in this respect.[29]

The Court of Appeal then considered the judge's treatment of the case with respect to the public location of the photographs. In the Court's view, the judge had indeed considered what would have been visible to others present at the beach and restaurant, but the authorities showed that that was a relevant factor, and he had not, thus, erred by doing so. The judge had not failed to differentiate between visibility to those present and publication of photographs in a national newspaper, and was fully aware that the context was one of newspaper publication, and had accordingly plainly considered the impact of that fact. Thus, the judge had correctly reasoned that what was visible to members of the public at the time was a relevant, though not determinative, factor in coming to his decision.[30]

Finally, the Court of Appeal held that the challenge to the weight given to other factors in the balancing exercise would only be a viable ground of appeal if it compelled the conclusion that the judge's decision had not been open to him, and that was not the case here.[31] In any event, the judge had been entitled to take into account and assign weight to the factors including the "performative" element of the appellants' arrival on the beach by jet-ski, their targeting by paparazzi, the presence of children, and the effects of the intrusion on the appellants.[32] Further, he had not made any error in concluding that it was unlikely that the appellants would establish a reasonable expectation of privacy in respect of the publication of the photographs, or that the balance of risk favoured refusing an injunction.[33]

Photographs, privacy and domestic law

Before examining the impact of the decision in *Stoute* on existing principles in this area, it is worth examining the legal framework and previous case law on photograph, privacy and press freedom.

Domestic law does not provide the individual with an absolute right over their photographic image, although the laws of confidentiality and misuse of private information (and copyright), can be employed, in combination with Article 8, to protect individuals from the unlawful and unreasonable taking and publication of their image. In the post-Human Rights Act era, the claimant is able to rely, indirectly in private cases, on Article 8 together with relevant case law from the European Court in this area, and the question is whether the circumstances surrounding the taking and publication of the photograph gives rise to a reasonable expectation of privacy and, if so, whether any breach could be justified on grounds of the public interest in publication.

Although early decisions made under the 1998 Act were favourable to publication of personal details of the individual's private life,[34] the courts were still willing to grant injunction to prohibit the publication of intimate photographs. Thus, in *Theakston* v *MGN Ltd*,[35] the claimant, a well-known television presenter, obtained an injunction to stop the publication of photographs taken of him whilst

[27] *Stoute v News Group Newspapers* [2023] EWCA Civ 523, [31], citing *Bloomberg LP v ZXC* [2022] UKSC 5.
[28] *Stoute v News Group Newspapers* [2023] EWCA Civ 523. [37], citing *Campbell v MGN Ltd* [2004] UKHL 22
[29] *Stoute v News Group Newspapers* [2023] EWCA Civ 523, [57].
[30] *Stoute v News Group Newspapers* [2023] EWCA Civ 523, [58].
[31] *Stoute v News Group Newspapers* [2023] EWCA Civ 523, [59].
[32] *Stoute v News Group Newspapers* [2023] EWCA Civ 523, [60].
[33] *Stoute v News Group Newspapers* [2023] EWCA Civ 523, [64-65].
[34] *A v B plc* [2003] QB 195.
[35] [2002] EMLR 22

visiting a brothel. Although the court found that a brothel was not a private place for the purpose of clause 3 of the Press Commission's Code of Practice; it found that the claimant had a reasonable expectation that photographs taken in a brothel without consent would remain private. Mr. Justice Ousley noted that photographs can be particularly intrusive, and subsequently the courts have shown a willingness to prevent the publication of photographs, taken without consent and another sought to exploit and publish.[36]

For example, in *Douglas v Hello! (No 3)*[37] it was accepted that special considerations apply to photographs in the field of privacy, because as a means of invading privacy a photograph is particularly intrusive.[38] Further, in *Campbell v MGN Ltd*,[39] the House of Lords held that there had been a breach of the claimant's privacy when the *Daily Mirror* had published articles revealing that the claimant was a drug addict and was attending Narcotics Anonymous and providing details of those meetings, along with photographs of her leaving a clinic. Importantly, the majority found that had it not been for the publication of the photographs they would have been inclined to regard the balance between the rights as about even. Specifically, Baroness Hale stated that a picture is "worth a thousand words" because it adds to the impact of what the words convey: it tells the reader what everyone looked like; in this case it also told the reader what the place looked like. In context, it also added to the potential harm, by making her think that she was being followed or betrayed, and deterring her from going back to the same place again.[40]

The taking of photographs in breach of Article might also affect the level of damages awarded in such cases. Thus, in *Mosley v News Group Newspapers Ltd*,[41] where the press published photographs and graphic details of the sexual antics of the claimant, the court found an unjustified breach of his rights in confidentiality and privacy,[42] and, in granting damages, it took into account that photographs were published in deciding that a proper award would be £60,000.[43] This, and the fact that publication of private information and images can be damaging to family members, is illustrated in *Edward Rocknroll v MGN Ltd*.[44] where the claimant, a minor celebrity but well known as the husband of the famous actor Kate Winslet, brought a successful action against the defendant newspaper to stop the publication of partially naked photographs of him that that had been taken at a party. Granting the injunction , the court noted that publication would not only cause embarrassment to him, but that there was also a grave risk that that Winslet's children would be subject to teasing at school about the behaviour of their new stepfather and that such teasing could be seriously damaging to the relationship he sought to establish with them.[45]

On the other hand, it is clear that the taking of an individual's photograph without their consent will not give rise to a breach of Article 8 or other rights in every case. Thus, in *Sir Elton John* v *Associated Newspapers,*[46] the court refused to grant an injunction to restrain the publication of photographs taken by the press of the claimant: the photographs and story would have been unflattering and offensive,

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[36] [2002] EMLR 22, at para 78. See also *Jagger v Darling* [2005] EWHC 683, where an injunction was granted to Elizabeth Jagger (the daughter of Sir Mick Jagger) to stop further publication of CCTV footage taken in the defendant's nightclub, showing the claimant engaged in sexual activities with another celebrity (the late George Best's son). Granting the injunction it was held that repeated publication of the images would only serve to humiliate the claimant.

[37] [2005] 3 WLR 881

[38] [2005] 3 WLR 881, [44].

[39] [2004] 2 AC 457

[40] [2004] 2 AC 457, [155].

[41] [2008] EMLR 20

[42] See Steve Foster, 'Balancing privacy with freedom of speech: press censorship, the European Court of Human Rights and the decision in *Mosley v United Kingdom* (2011) 16 (3) *Communications Law* 100, at 101-2.

[43] [2008] EMLR 20, at paras 235-236. See also, *AAA v Associated Newspapers* [2012] EWHC 2103 (QB), where it was held that although there existed an exceptional public interest in the professional and private life of an elected politician so as to justify the publication of a newspaper article claiming that a child had been born as a result of an extra martial affair that he had had, there was no justification for publishing a photograph of the child, taken covertly when she was less than a year old. The decision was upheld by the Court of Appeal: [2013] EWCA Civ 554

[44] [2013] EWHC 24 (Ch)

[45] [2013] EWHC 24 (Ch), at para 36

[46] Unreported, decision of the High Court 23 June 2006.

because they caught the celebrity rock star in a casual and scruffy state, but that was insufficient to ground an action in confidentiality. Further, the fact that the photographs were taken without his consent did not *per se* give rise to an action, the court stressing that there had to be some form of harassment to engage the protection offered by Article 8. Subsequently, the domestic courts have rejected the requirement of harassment to maintain an action, although the above case has established the principle that the individual is not protected from every unwelcome photograph.

The leading authority in the area of photographs and privacy is now the Court of Appeal decision in *Murray v Express Newspapers*,[47] the Court stressing the need to consider all aspects of the privacy claim and the circumstances pertaining to the taking of the photograph. In *Murray*, the author JK Rowling and her husband and son had sought an injunction and damages against the *Express Newspapers* to stop the further publication of a photograph taken of the boy when he was under two years of age. The photograph had been taken by use of a long-range lens when he was walking in the street with his parents. The parents had not given their consent to the photograph and subsequently it appeared in a newspaper, along with a quotation, attributed to JK Rowling, setting out her thoughts on motherhood and family life. An action was brought in the law of confidentiality and under the Data Protection Act 1998.

Giving judgment at first instance, Patten J held that the starting point was whether the child had a reasonable expectation of privacy according to the test laid down in *Campbell v MGN*.[48] That question had to be determined by taking an objective view of the circumstances, including the reasonable expectations of his parents in those same circumstances as to whether their children's lives in a public place should remain private.[49] Rejecting the idea that the taking of the photograph without consent was unlawful *per se*,[50] and that the law did not allow celebrities to carve out a press-free zone for their children in respect of absolutely everything they choose to do,[51] his Lordship noted that there was no evidence that the boy's parents were either aware of the photograph being taken or were in any way distressed by it being taken. Further, there was no evidence that the boy had been exposed to physical danger or any other harm.[52]

His Lordship then stated that there was a distinction that could be drawn between a person engaged in family and sporting activities and something as simple as a walk down a street or a visit to the grocers to buy milk. The former was part of a person's private recreation time intended to be enjoyed in the company of family and friends and publicity was intrusive and could adversely affect the exercise of such activities. On the other hand, if a simple walk down the street qualified for protection, it was difficult to see what would not; there was an area of routine activity which, when conducted in a public place, carried no guarantee of privacy. The instant case fell into that category, and although anodyne and trivial events might be of considerable importance and sensitivity to a particular person, the facts in the present case were not sufficient to engage article 8.[53]

On appeal it was held that whether there was a reasonable expectation of privacy depended on all the circumstances of the specific case, including the attributes of the claimant and the activity in which they were engaged, the place at which it happened, the nature and purpose of the intrusion, the absence of consent, the effect on the claimant and the circumstances in which, and the purposes for which the information reached the hands of the publisher.[54] The Court of Appeal then held that once the reasonable expectation test was satisfied, the court would then have to consider how the balance should be struck, the question whether the publication of those facts would be highly objectionable to a reasonable person

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[47] *Murray v Express Newspapers Ltd* [2009] Ch 481 (Court of Appeal), overruling *Murray v Express Newspapers Ltd; also known as Murray v Big Pictures (UK) Ltd* [2007] EMLR 22 (High Court).
[48] *Murray v Express Newspapers Ltd* [2007] EMLR 22, [22], applying *Campbell v MGN* [2004] 2 AC 457.
[49] *Murray v Express Newspapers Ltd* [2007] EMLR 22, [23].
[50] *Murray v Express Newspapers Ltd* [2007] EMLR 22, [33], noting the New Zealand case of *Hosking v Runting* (2005] 1 NZLR 1.
[51] *Murray v Express Newspapers Ltd* [2007] EMLR 22, [66].
[52] *Murray v Express Newspapers Ltd* [2007] EMLR 22, [66]
[53] *Murray v Express Newspapers Ltd* [2007] EMLR 22, [65].
[54] *Murray v Express Newspapers Ltd* [2009] Ch 481, [36].

being relevant.[55] Applying those tests, the Court of Appeal stated that it was at least arguable that the appellants had a reasonable expectation of privacy; and in particular the fact that the photographed appellant was a child was relevant and of greater significance than the judge at first instance recognised.[56]

The factors identified in *Murray* were employed in *Weller v Associated Newspapers Ltd,*[57] where Paul Weller, a well-known musician, brought an action on behalf of his children for damages under the law of misuse of private information and the Data Protection Act 1998 with respect to a number of photographs that had been taken of Weller and his children whilst shopping and relaxing in a California restaurant and which had been published on line in the UK by the defendant newspaper. The photographs had been removed one day later.

Giving judgment for the claimants, the High Court held that the question test whether there was a reasonable expectation of privacy was a broad one, taking into account all the circumstances,[58] including whether there was an absence of consent, together with the circumstances in which and the purpose for which the information had come into the hands of the publisher.[59] The court noted that although it was appropriate to take into account the fact that it was lawful under California law to take and publish the photographs, the relevant act complained of was the publication of un-pixelated photographs of the children in England and Wales, and whether that was lawful had to be determined by a fair application of the tests laid down in English law.[60] Applying that test, the court concluded that the photographs had been published in circumstances where the claimants had a reasonable expectation of privacy, as they showed the children's faces – a chief attribute of their respective personalities – they were on a family trip with their father, and were identified by their surname. The photographs were different in nature from crowd shots of the street showing unknown children; rather they showed how the claimant's looked as Paul Weller's children and how they looked on a family day out with him.[61] The court then held that the balance came down in favour of upholding the claimant's article 8 rights over and above the defendant's rights under Article 10. There had been an important engagement of privacy rights because the photographs showed expressions on the faces of children on a family afternoon out with their father, showing a range of emotions and then identifying them by surname. In contrast, there was no relevant debate of public interest to which the publication of the photographs contributed.[62]

The above principles have been informed by the case law of the Strasbourg Court**,** which has accepted the potential for greater intrusion into privacy caused by photographs. Thus, in *Reklos v Greece*,[63] it was noted that a person's image constitutes one of the chief images of a person's personality, as it reveals the person's unique characteristics and distinguishes the person from his or her own peers.[64] Further, the Court has been instrumental in protecting the privacy rights of celebrities, particularly from intrusive photographing. Thus, in *Von Hannover v Germany*,[65] the European Court held that the publication of photographs taken of the former Princess Caroline of Monaco and her family in her daily life clearly fell within Article 8. In stressing the significance of photographs as means of invading privacy, the Court held that the photographs in question – of her shopping and relating with close friends and her children in a public place - contained very personal or very intimate 'information' about an individual, where the protection of the rights and reputation of others took on particular importance.[66] Further, it noted that photographs appearing in the tabloid press were often taken in a climate of

[55] *Murray v Express Newspapers Ltd* [2009] Ch 481, [39].
[56] *Murray v Express Newspapers Ltd* [2009] Ch 481, [52].
[57] [2014] EWHC 1163 (QB)
[58] [2014] EWHC 1163 (QB), [16]. It was accepted that the claim under the Data Protection Act 1998 would stand and fall with the claim for misuse of private information.
[59] [2014] EWHC 1163 (QB), at para 28, citing *Murray v Express Newspapers plc*, [38].
[60] [2014] EWHC 1163 (QB), [44].
[61] [2014] EWHC 1163 (QB), [45].
[62] [2014] EWHC 1163 (QB), [47].
[63] [2009] EMLR 16
[64] *Recklos v Greece,* [40].
[65] *Von Hannover v Germany* (2004) EMLR 2
[66] *Von Hannover v Germany*, [59].

continual harassment, inducing in the person concerned a very strong sense of intrusion into their private life or even of persecution.[67]

Significantly, the Court noted that everyone, including people known to the public, had a legitimate expectation that his or her private life would be protected.[68] The Court noted that the photographs showed the applicant in scenes from her daily life, and thus engaged in activities of a purely private nature, taken secretly and without her consent and making no contribution to a debate of public interest. Relevant to the instant case, it also noted that the general public did not have a legitimate interest in knowing the applicant's whereabouts or how she behaved generally in her private life, even if she appeared in places that could not always be described as secluded and was well known to the public.[69]

On the other hand, there is some case law suggesting that it will take into account the well-known status of that individual in determining whether there has been a violation of Article 8. Thus, in *Van Hannover v Germany (No 2*),[70] it was held by the Grand Chamber of the European Court that there had been no violation when photographs had been taken of Princess Caroline of Monaco and her husband on a skiing holiday. In the Grand Chamber's view, because the photographs accompanied a story which questioned whether the couple should have been holidaying at a time when her father – Prince Rainier - was critically ill, they related to a matter of genuine public interest and were thus justified on grounds of freedom of expression.[71] The Court also stated that irrespective of the question to what extent the she assumed public functions on behalf of the Principality of Monaco, it could not be claimed that the applicants, whom were undeniably well known, were ordinary private individuals; they had to be regarded as public figures.[72] Similarly, in *Von Hannover v Germany (No 3),*[73] it was held that there was no breach when the domestic courts refused to grant an injunction prohibiting the further publication of a photograph of the applicant and her husband taken while they were on holiday; the photograph being accompanied by an article about the trend among the very wealthy towards letting out holiday homes and including information about the home. The European Court accepted that although the photograph of the couple did not concern a matter of public interest, the article did, and that the article did not provide private information relating to the couple and was not simply a pretext for taking a photograph.[74]

These principles have also been applied where the individual is simply well known, rather than a public figure or state representative. Thus, in *Springer v Germany*,[75] it was held by the Grand Chamber that there had been a violation of article 10 when an injunction had been granted to a well-known television actor prohibiting the applicants from publishing photographs of him being arrested for cocaine possession, together with articles about his previous drug use and convictions. In the Court's view, the facts as disclosed were not intimate private details but concerned public judicial facts. Further, the actor was sufficiently well known to qualify as a public figure, which reinforced the public's interest in being informed of his arrest and the proceedings against him.[76] Whether the taking and publication of photographs constitutes a breach of article 8 depends, therefore, on a number of factors relating both to the expectation of the individual's privacy and the public interest in publication; and the public status of the individual is apparently vitally important in respect of both questions. Thus, as with the domestic law of misuse of private information, the previous conduct of the applicant, including whether they

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[67] Ibid
[68] *Von Hannover v Germany*, [69], italics added.
[69] *Von Hannover v Germany*, [74]. See the recent decision of the European Court in *Tuzunatac v Turkey,* Application No 14852/18, decision of the European Court of Human Rights March 7, 2023, where the Strasbourg Court decided that the taking and publishing of a photograph showing two high profile actors in an intimate embrace was in breach of Article 8.
[70] (2012) 55 EHRR 15
[71] *Von Hannover v Germany (No 2),* at [56].
[72] (2012) 55 EHRR 15, [120]
[73] Decision of the European Court of Human Rights, 19 September 2013
[74] *Von Hanover v Germany (No. 3),* at [59].
[75] (2012) 55 EHRR 6
[76] *Springer v Germany*, [99].

have courted and consented to publicity in the past, can be considered alongside other factors such as the level of intrusion, and the age and lack of public status of the victims.

This flexible and fact sensitive approach is also employed in cases where the applicant is not a public figure, but has attracted media attention because of their conduct. For example, in *Egeland and Hanseid v Norway*,[77] it was held that there had been no violation of Article 10 when two journalists had been prosecuted and fined for taking photographs of accused persons outside a court hearing without their consent, contrary to national law. The European Court noted that the photographs had been taken without her consent and directly after she had been informed of her conviction for a triple murder; she was in tears and in great distress and thus at her most vulnerable psychologically. The public interest in the photographs and the trial did not outweigh the woman's right to privacy and the interest in the fair administration of justice and the relatively modest fine was not disproportionate. Similarly, in *Recklos v Greece*,[78] it was held that the taking of a baby's photograph in a hospital without the parent's consent constituted a violation of article 8. In the Court's view there was no public interest in taking the photograph and the retention of the photographs contrary to the parents' wishes was an aggravating factor contributing to the finding of a breach.

The impact of *Stoute* on domestic and European case law

It needs to be remembered that the present case was concerned with an application for an interim injunction, pending a full trial on the merits. Thus the decision has not decided once and for all whether or not the claimants had an expectation of privacy, or that such an expectation was overridden by Article 10 of the Convention and the public interest in publication. Those questions can be tested at full trial, in an action for damages, should the claimants wish to pursue the action.[79]

The question for the courts in this case, therefore, was whether the claimants had satisfied the court that the test in s.12(3) of the Human Rights Act 1998 had been satisfied, and that the balance of convenience in granting the injunction lay in their favour. Section 12(3) provides that where a claimant seeks a temporary order to restrain publication pending a full trial no such order shall be made unless the court is satisfied that the applicant *is likely to establish* that publication should not be allowed. The law on this matter was formerly regulated by the rules in *American Cyanamid* v *Ethicon Ltd*,[80] which require the court to consider the strength of both parties' arguments, and whether the claimant had a real prospect of success at full trial. The question will then be where the balance of convenience lies before granting the order, still the applicable test but augmented by the new likelihood test. In *Cream Holdings* v *Banjaree and Another,*[81] the House of Lords confirmed that s.12 did not require the courts to give freedom of expression a higher order than other convention rights, and that the test under s.12(3) was whether the applicant's prospects of success at trial were sufficiently favourable to justify the making of such an order in the particular circumstances of the case. The purpose of s.12(3) was to emphasise the importance of freedom of expression at the interim stage and that it set a higher threshold for granting interim orders against the press than in *American Cynamid*. However, their Lordships also held that the word 'likely' in the section does not mean 'more likely than not' and that there was no single inflexible test. As a general approach the courts should be very slow to make such orders where the applicant had not demonstrated that he would probably succeed at trial, although in some cases a lesser degree of likelihood would suffice.[82]

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[77] (2010) 50 EHRR 2

[78] [2009] EMLR 16

[79] Often claimants will abandon the action once they fail at the interim stage, feeling that the substantial damage has already been inflicted by the dissemination, or further dissemination, of the information. Equally, the defendant press might abandon any defence at full trial if injuncted at the interim stage; feeling that publication in the future, even if they were successful at the full trial, would be fruitless and the information and photographic images have lost their value.

[80] [1975] AC 396.

[81] [2005] 1 AC 253.

[82] On the facts, the House of Lords held that as the allegations of the claimant's corrupt business practices constituted information of strong public interest, the claimant was likely to fail at full trial. The case will be considered in more detail in the next chapter.

In the present case, in balancing the claimants' arguments with those of free speech, the court considered the merits of the parties' claims – the fact that the claimants' expectation of privacy had been reduced by their entrance on to the beach (a public place); and that there was some public interest in their activities, because of their high public commercial profile. Conversely, it considered that a remedy of damages at full trial would not be an adequate remedy for the claimants; the main interest that the claimants were seeking to protect was the non- or further publication of the photographs with the accompanying distress and humiliation. In this respect, the decision can be contrasted with the decision in *Douglas and others v Hello! and others,*[83] where it was held at the interim stage that the claimant's privacy interests were fairly weak (they had already sold their image to another magazine) and in the court's view they could be adequately compensated by an award of damages if they were to succeed at full trial, which they did.[84] The difference in the decisions could be attributed to a growing protection of privacy rights following the decisions in *Campbell* and *Von Hannover,* but in any case the claimants were denied interim relief despite the inadequacy of compensation at full trial, should they win.

The main reason for denying the interim relief in this case appeared to be that the courts, given the public behaviour of the claimants' and the public location in which the images were taken, had serious reservations of the legitimacy of their expectation of privacy. In addition, s.12(4) of the 1998 Act states that where the proceedings relate to material which appears to the court, to be journalistic, literary or artistic material, it must have particular regard to the extent to which the material has, or is about to, become available to the public; the extent to which it is, or would be, in the public interest for the material to be published; and any relevant privacy code. Thus, in addition to the weakness of the claimant's expectation of privacy, the court was convinced that there was a genuine public interest in the claimant's activities, and noted that in any case the images had already been released to the public.

One or two aspects of the decision are, therefore, worthy of discussion in the wider context of privacy and free speech disputes; matters that may well resurface in this case if it goes to full trial. First, was the court right in coming to the conclusion that the public element surrounding the taking of the photographs, substantially reduced to strength of the privacy expectation, despite the appellants' assertion that it was the publication of the images in national newspapers that caused the real damage to their privacy, not the taking of the images in a public place? The Court of Appeal was satisfied that the trial judge had appreciated the significance of public dissemination, but nevertheless upheld the judge's decision on the images and whether, given the public location, the claimants could be said to enjoy an expectation of privacy in such circumstances. The courts must consider the effect of public dissemination in judging an expectation of privacy, and the added humiliation and distress it will cause.[85] The question in this case is whether both courts gave sufficient weight to the fact that the images were exposed, and subject to further exposure, in national newspapers, in addition to interfering with the claimants' privacy rights at that specific time and location. This question requires further investigation by the domestic courts as in raises fundamental questions regarding the reach of privacy rights (not just, but specifically in the context of photographs), and the position of the press in their reporting techniques.

Second, although this may have had little impact on the ultimate decision in this case, the courts' acceptance that there may have been a public interest in reporting the claimants' activities, and taking photographs of them, is debatable. There is no doubt that the claimants' commercial success, built principally on the profits they earned from the pandemic by providing of protective equipment, would engage public discussion, and that there was a public interest in knowing their whereabouts and activities, including, to a degree how they spent their money. The claimants has gained a high public and commercial profile as a result of the award of public contracts, and they would have to expect some interest in their business and general activities, including where they chose to holiday and the way that they chose to spend their wealth. However, whether that transfers to a public interest in seeing

[83] [2001] 2 WLR 992.
[84] [2005] 3 WLR 881: the claimants were awarded £14,600, including £3,750 each for distress.
[85] *PJS v News Group Newspapers Ltd* [2016] UKSC 26. Injunction granted despite the fact that the private information had leaked quite significantly on social media

photographs of them taken whilst on holiday is another matter. The existence of such a public interest is, of course, not necessary if there was no legitimate expectation of privacy in the first place; as in such a case there is nothing to balance, and free speech cannot be interfered with without the claimant enjoying a prima facie legal right. The courts' ruling on public interest in this case might, therefore have been purely in passing, and the appellants did not raise it specifically on appeal. Nevertheless, the courts may have to prove a more measured ruling on this point in the future; either at full trial in the present case, or in similar cases where the press allege that the public interest in the claimants justify an intrusion into their private activates, including the taking of photograph of the nature taken and disseminated in this case.

Conclusions

It has already been confirmed that the taking, and subsequent publication, of an individual's photograph without their consent will not automatically constitute a breach of Article 8 or the civil law. On the other hand, it is now clear that an action may succeed in domestic law despite the absence of clear harassment, and that whether there is a breach of the law will depend on all the circumstances of the case; proportionality and reasonableness being at the heart of any decision.

The law in this area must take into account both the nature of photographic images and reality that photographs of famous individuals will, inevitably, be taken and published, and that a certain level of press intrusion has to be accepted; as part of that reality and to accommodate the fact that the 'victims' will be public figures. First, photographs are a more intrusive form of privacy violation; causing more harm and distress to the claimant and their family, irrespective of the questions of whether the victim is a public figure or whether the photograph is accompanied by a public interest story. Thus, in cases such as *Theakston, Murray* and *Weller*, the newspapers may be entitled to publish the story, but might be stopped from publishing private or intimate images of the victim. The law should also to some extent accept the reality of certain individuals having their photographs taken and published in the media. Taking these factors into account allows the courts to protect the claimant's privacy even where that individual has courted publicity and the publication of the story is otherwise justified, because of its nature or because of the claimant's status and behaviour. It also can work against the claimant in that it accepts that the taking of photographs do not constitute an a violation of article 8 or the civil law, because of the inevitability of such images being taken and the fact that well known individuals should accept a certain, reasonable level of intrusion in this area, and that the law must draw practical boundaries.

The law has a responsibility to safeguard individual privacy from unreasonable intrusions by the press, but at the same time it must establish a realistic and workable threshold to establish an action in such cases. The decision in *Stoute* was, of course, made an the interim stage, but still raises some interesting issues regarding the scope of the claimant's expectation of privacy, especially when it is captured in a public place, and whether the press can justify any intrusion – particularly in the form of public dissemination of photographs – on the basis of public interest.