

COMMENT AND ANALYSIS

*WELLER* CASE HIGHLIGHTS NEED FOR GUIDANCE ON  
PHOTOGRAPHY, PRIVACY AND THE PRESS

Holly Hancock

PhD Candidate and Associate Tutor, University of East Anglia

University of East Anglia Law School

Norwich Research Park

Norwich

NR4 7TJ

Email: [holly.hancock@uea.ac.uk](mailto:holly.hancock@uea.ac.uk)

## COMMENT AND ANALYSIS

*Weller & Ors v Associated Newspapers Ltd* [2015] EWCA Civ 1176

### WELLER CASE HIGHLIGHTS NEED FOR GUIDANCE ON PHOTOGRAPHY, PRIVACY AND THE PRESS

Holly Hancock\*

#### ABSTRACT:

Photographs published in the Mail Online of Musician Paul Weller and his young children taken in the street in California were subject to a misuse of private information and breach of Data Protection Act claim against Associated Newspapers Limited. In the Court of Appeal's judgment a number of matters were given consideration, including the application of Californian law, where it was lawful to both take and publish the photographs, whether the claimants had a reasonable expectation of privacy, the relevance of the status of the child and the extent to which matters such as consent play a role. In outlining these issues the case emphasises a need for more clarity on both the taking and publishing of photographs - in relation to the famous and their children, and to children in general.

#### KEYWORDS:

Photographs, privacy, children, image rights, consent

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\* PhD Candidate and Associate Tutor, University of East Anglia

## FACTS AND KEY POINTS ARISING FROM THE WELLER CASE

The Court of Appeal's recent decision in *Weller v Associated Newspapers Ltd*<sup>2</sup> saw Lord Dyson MR, Tomlinson and Bean LJJ unanimously dismiss the Defendant's (Associated Newspapers Ltd, hereafter ANL) appeal against a ruling made by Dingemans J in April 2014. This ruling found the Defendant liable for misuse of private information and breach of the Data Protection Act 1998, and the Claimants, Dylan Weller, John Paul Weller and Bowie Weller, acting by their father and litigation friend Paul Weller, were awarded damages (Dylan £5000 and John Paul and Bowie £2500 each). The Defendant also appealed against a later ruling in June 2014 which granted an injunction against ANL preventing further publication of the photographs.

In an article published on the Mail Online 21 October 2012 headed "A family day out", the photographs showed Paul and his children Dylan (16) and twins John-Paul and Bowie (10 months) out shopping in the street in California and relaxing in a café. Seven unpixelated photographs were published despite the lack of parental consent, Paul's request to stop, and an assurance by the photographer that the pictures would be pixelated. The article was removed the next day, owing to the misdescription of Dylan as Paul's wife but in this time had received 34,000 hits, about 24,000 of these in England and Wales.

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<sup>2</sup> [2015] EWCA Civ 1176

In reaching their decision, the Court of Appeal effectively extended the misuse of private information doctrine, to provide that there may be a reasonable expectation of privacy in the case of innocuous photographs with nothing inherently private about them, particularly for children, essentially developing the domestic law in accordance with recent European Court of Human Rights decisions, but in doing so placed an emphasis on the relevance of the facts of each case leading to potentially less coherence with the application of the doctrine. The claim for breach of the Data Protection Act was held to add nothing to the argument for misuse of private information. The decision can be seen to have a number of wider implications for both the press and the parents of famous or not-so-famous children, which will be given consideration in due course.

#### ORIGINAL JUDGMENT

In March 2014, Dingemans J heard the case in the Queen's Bench Division of the High Court. The article published on 21 October 2012 was illustrated with seven photographs. The judge found that these seven photographs showed the faces of the children, and additionally their surnames were published. In applying the *Campbell*<sup>3</sup> test, he held that the facts gave rise to (1) a reasonable expectation of privacy, that (2) outweighed ANL's article 10 rights to publication, when balanced against the Weller children's article 8 rights, in applying the ultimate balancing test set out by Lord Steyn in *Re S*.<sup>4</sup> Importance was given to the fact that although it was lawful to take the photographs and publish them in California, this did not

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<sup>3</sup> *Campbell v MGN* [2004] UKHL 22; [2004] 2 AC 457

<sup>4</sup> [2005] 1 AC 593, [17]

prevent the Claimants having a reasonable expectation of privacy in relation to their publication in this jurisdiction,<sup>5</sup> therefore the Defendant was liable for misuse of private information.

KEY ISSUES ARISING FROM THE APPEAL  
& THE COURT OF APPEAL'S REASONING

In appealing against the finding that (a) the Defendant was liable for misuse of private information and breach of the Data Protection Act and (b) the grant of the injunction, the Defendant raised the following key issues before the Court of Appeal:

(1) Whether a reasonable expectation of privacy existed.

Essentially, could the publication, without consent, of an “innocuous” photograph of a child taken in a public street where the person is identifiable and out and about with other family members, but where nothing inherently private is shown, give rise to a reasonable expectation of privacy? A further argument concerned whether Californian law was given sufficient consideration.

(2) Whether the Defendant's article 10 rights should have outweighed the article 8 rights of the Claimant.

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<sup>5</sup> *Weller & Ors v Associated Newspapers Ltd* [2014] EWHC 1163 (QB), [172]

The Court of Appeal held that:

(1) Ultimately, whether there was a reasonable expectation of privacy was a question of fact. Despite the photographs having been taken in a public place, it is well established in both the domestic and Strasbourg case law that 'there are some matters about which a person can have a reasonable expectation of privacy notwithstanding that they occur in public'.<sup>6</sup> Reference was made to *Murray*,<sup>7</sup> where it was emphasised how this will be dependent on the facts. Holding that this was a private family activity, Dingemans J was entitled to conclude that all three claimants had a reasonable expectation that the photographs would not be published, especially as the images were of the children's faces, one of their chief attributes of their respective personalities - in respect of the impact of foreign law, it was found by the Court of Appeal that Dingemans J did take this into account, although he had not said how much weighting was given to it, which would have been helpful. This was not, however, grounds for interfering with his decision.

(2) The Claimants' article 8 rights outweighed the defendant's article 10 rights.<sup>8</sup> The balance came down in favour of the Claimants' rights as the photographs did not contribute to a current debate and photographs of the children's faces had not previously been published to any measurable extent.

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<sup>6</sup> *Weller*, n2 [60]

<sup>7</sup> *Murray v Express Newspapers plc* [2007] EWHC 1908 (Ch), [55]

<sup>8</sup> This second test was set out in *Murray*, n7

An appeal against the injunction was also dismissed.

## CONTROVERSIAL ISSUES RAISED BY THE JUDGMENT

### **Privacy**

The outcome in *Weller* brings the domestic law further in line with the European Court of Human Rights jurisprudence, in particular the decisions in the *Von Hannover* cases.<sup>9</sup> To decide otherwise would perhaps have been seen as a step backwards in respect of protecting privacy, particularly for children.

It can be seen as developing the traditional concept of privacy in two fundamental ways, firstly, the continued emergence of privacy in a public place, and secondly, privacy protection extending to where there is nothing inherently private about the photograph. When considered in respect of establishing whether a reasonable expectation of privacy exists, or article 8 is engaged, the decision effectively creates a fallacy of a reasonable expectation of privacy, as great emphasis is placed on the facts of each case, meaning that there may be an expectation of privacy in circumstances where privacy considerations would not usually be present.

The Defendants relied heavily on the New Zealand Supreme Court's decision in *Hoskings v Runting*<sup>10</sup> which emphasised how the taking of photographs in a public

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<sup>9</sup> *Von Hannover v Germany* [2004] EMLR 379; (2005) 40 EHRR 1; *Von Hannover v Germany (No. 2)* (2012) 55 E.H.R.R. 15; *Von Hannover v Germany (No. 3)* (2013) Application No.8772/10

<sup>10</sup> [2003] 3 NZLR 385, [138]

street must be taken as one of the ordinary incidents of living in a free community. However, subsequent case law has developed indicating that privacy rights could be infringed in a public place. If the law's development is traced from the beginnings of the misuse of private information claim, in the first cases decided, there needed to be an additional element or further information revealed by the photograph, for example the model's addiction to narcotics in *Campbell v MGN*,<sup>11</sup> or an aspect of embarrassment or humiliation revealed by the photograph (*Peck v UK*<sup>12</sup>) to engage article 8. The degree of publicity or public exposure arising from the image was relevant (*Peck v UK*<sup>13</sup>), as was the creation of a systematic or permanent record of something which happens in public (*PG and JH v United Kingdom*<sup>14</sup>). *Murray* also focused on the relevance of publication;

The essence of the complaint in virtually all of these cases centre on the degree of publicity which the occasion photographed ultimately receives. A photograph taken by a member of the public which remains the property of that person and is at most shown to family and friends does not infringe any right of privacy because it does not lead to any real public exposure of the events portrayed. They remain essentially private and unseen.<sup>15</sup>

It is interesting to note how these aspects can today be both challenged by technology, and amplified by the public, something which could not happen in the past (and particularly at the time these decisions were taken). *Von Hannover*

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<sup>11</sup> *Campbell*, n3 [165]

<sup>12</sup> *Peck v United Kingdom* (2003) 36 EHRR 41; [2003] EMLR 287

<sup>13</sup> *Ibid*, [62]

<sup>14</sup> (2001) 46 EHRR 1272, [57]

<sup>15</sup> *Murray*, n7 [37]



signalled a broader view being taken towards private life, with the publication of photographs needing to contribute to a debate of public interest, there being a 'zone of interaction of a person with others, even in a public context, which may fall within the scope of private life',<sup>16</sup> and *McKennit v Ash*<sup>17</sup> acknowledged that the public/private divide was becoming less clear and that information being 'anodyne or trivial' may not necessarily mean that article 8 is not engaged.<sup>18</sup> The ECHR decision in *Reklos v Greece* emphasised the importance of consent at the point the picture was taken, as opposed to when it was published.<sup>19</sup>

One of the key cases relied upon by the Court of Appeal in *Weller* was *Murray v Big Pictures Ltd*,<sup>20</sup> which concerned photographs taken of the author JK Rowling's infant son on a street in Edinburgh. A number of factors to be taken into account when considering whether the claimant had a reasonable expectation of privacy were set out, and endorsed by the Supreme Court decision of *Re JR 38*.<sup>21</sup> These factors indicated that a broad approach should be taken, with a threshold of seriousness needed before article 8 is engaged, taking into account all the circumstances, which may include:

- The attributes of the claimant
- The nature of the activity
- The place at which it was happening
- The nature and purpose of the intrusion

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<sup>16</sup> *Von Hannover v Germany* (2004) 40 EHRR 1, [50]-[53]

<sup>17</sup> [2006] EWCA Civ 1714; [2008] QB 73; [2007] 3 WLR 194; [2007] EMLR 113

<sup>18</sup> *Ibid*, [58] Eady J

<sup>19</sup> *Reklos v Greece* (2009) 27 BHRC 420

<sup>20</sup> *Murray v Big Pictures Ltd* [2008] EWCA Civ 446; [2009] Ch 481, [36]

<sup>21</sup> UKSC 42 [2015] 3 WLR 155

- The absence of consent and whether it was known/inferred
- The effect on the claimant and the circumstances in which and purposes for which the information came into the hands of the publisher<sup>22</sup>

Further factors were added by Lord Toulson in *Re JR 38*, which included the age of the person involved, the absence of consent to publication, the context of the activity and the use to which the relevant material is put.<sup>23</sup> In the present case, it was reiterated how, today, it is now 'well established in both the domestic and Strasbourg case law that there are some matters about which a person can have a reasonable expectation of privacy notwithstanding they occur in public'.<sup>24</sup>

Regarding *Weller*, as the photographs in question were taken in a public café, with nothing inherently private about them, ANL queried whether this was sufficient for a reasonable expectation of privacy, as there was nothing about them that raised concerns in respect of privacy. Baroness Hale made the now famous statement in *Campbell* concerning how there could be no expectation of privacy for Naomi Campbell popping to the shops to buy a pint of milk.<sup>25</sup> Similarly *John v Associated Newspapers*<sup>26</sup> saw no reasonable expectation of privacy for Elton John being photographed outside his house in a tracksuit and baseball cap in respect of the information conveyed. The Court in *Murray* did not find this distinction so absolute, finding that routine acts such as a visit to a shop or a ride on a bus could attract a reasonable expectation of privacy, it all depended upon the

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<sup>22</sup> *Murray*, n20 [36]

<sup>23</sup> *Ibid*, [98]

<sup>24</sup> *Weller*, n2 [60]

<sup>25</sup> *Campbell*, n3 [154]

<sup>26</sup> *John v Associated Newspapers Ltd* [2006] EMLR 722

circumstances.<sup>27</sup> This approach was followed in *Weller* and whether protection will extend to such activities for both adults and children in the future remains to be seen. Part of the concerns raised by the Claimants' parents (Paul and Hannah Weller) revolved around the increased security risk created by publication of the photographs of their children, particularly when out with their nanny, granny or aunty.

This raises the question as to why publication of the photographs was enough, in this instance, to engage the Claimants' article 8 rights. It seems there are a number of reasons. In addition to the *Murray*<sup>28</sup> and *Re JR 38*<sup>29</sup> factors, a number of strands can be drawn together from previous decisions of the domestic and ECHR Courts, which point towards the decision in *Weller* and are considered at various points by the court, in respect of both whether article 8 is engaged and in balancing this with article 10. These include:

### **Lack of consent**

The lack of consent from the Claimant or Claimant's parents is explicitly mentioned in both *Murray*<sup>30</sup> and *Re JR 38*<sup>31</sup>. In *Weller* this was amplified by the family being followed by a paparazzo, and the photographs being taken without consent. Furthermore, the photographer had been asked to stop and had ignored

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<sup>27</sup> *Murray*, n20 [56]

<sup>28</sup> *Murray*, n20

<sup>29</sup> *Re JR 38*, n21

<sup>30</sup> *Murray*, n20 [8]

<sup>31</sup> *Re JR 38*, n21 [55]

this request, and given false assurances about pixilation. The lack of consent contributed to the Court of Appeal's decision to dismiss the Defendant's appeal.

### **Identifiability**

A differentiation was made between crowd shots of the street showing unknown children,<sup>32</sup> and the current images, - as they showed the children's faces and identified them by surname.<sup>33</sup> Had the Claimants' faces not been identifiable, the Court may have reached a different conclusion.

### **Prior publicity**

Somewhat of a recurring theme, the approach taken by parents towards a child's privacy is also relevant, particularly where the child is too young to have an understanding of privacy, Patten J in *Murray* stating that '. . . The court can attribute to the child reasonable expectations about his private life based on matters such as how it has in fact been conducted by those responsible for his welfare and upbringing'.<sup>34</sup> In this instance, there had been no previous publication of the article, and it was considered that Paul Weller's previous associations with the media about his family were not sufficient to amount to seeking publicity as visual images of the twins had not previously been published by the media, and the fact that Dylan had appeared in a photoshoot for the Teen Vogue magazine some years previously did not amount to sufficient prior

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<sup>32</sup> *Weller*, n2 [171]

<sup>33</sup> *Ibid*, [63]

<sup>34</sup> *Murray*, n7 [23]

publicity. The Court of Appeal found it did not follow that children of famous parents also needed to be in the spotlight;

The child's reasonable expectation of privacy cannot be different from that of a child whose parents are not in the public arena, unless the parents have courted publicity for the child. Indeed, the fact that a child's parents are in the public eye means that the child is potentially exposed to a special vulnerability: it could put their safety and security at risk.<sup>35</sup>

It is difficult to see how a future decision would reverse the trend towards privacy advocated in *Weller*, although perhaps if, hypothetically, a celebrity had used their child to further their career, this would be a different situation, which might well reach a different outcome (with the weighting given to the welfare and upbringing of the child).

### **The relevance of the status of the child**

The status of a child in itself was not seen as a sufficient reason to depart from the reasonable expectation of privacy test, although it would be a potentially relevant factor in its consideration.<sup>36</sup> Some considerable attention was given to this matter – and it is important to note the age difference between the claimants in respect of the claim. Although in *Weller* there was no evidence of serious harm and the twins were accepted as being too young to even be aware that they were being photographed, the court did give some weight to the embarrassment suffered by

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<sup>35</sup> *Weller*, n2 [63]

<sup>36</sup> *Re JR 38*, n21 [95]

Dylan (then aged 16 years) as a result of the publication. Where the children were too young to have a sufficient idea of privacy, an objective view was taken towards the matter, including the reasonable expectation of the parents as to whether the child's life in a public place should remain private.<sup>37</sup> *Re JR 38* acknowledged how a child's reasonable expectation of privacy may vary from that of an adult '... A child's need for protection can be beyond what, if he was an adult, he would be reasonably entitled to expect'.<sup>38</sup> The Court of Appeal in *Weller* considered the relevance of the child in some depth, concluding with the following three points: - firstly, a child does not have a separate right to privacy merely by virtue of being a child; secondly, there are several considerations which are relevant to children (and not adults) which may mean that a child has a reasonable expectation of privacy where an adult does not; and, thirdly, all the circumstances should be taken into account in deciding whether there is a reasonable expectation of privacy,<sup>39</sup> including the factors set out in *Murray*.<sup>40</sup>

### **Family element**

Alluded to in *Murray*, which saw a distinction drawn between a child (or adult) engaged in family and sporting activities as compared with something as simple as a walk down the street or a visit to the grocers to buy the milk,<sup>41</sup> the key distinguishing aspect in *Weller* was held to be the family element of the activity, a visit to a café falling within a family's recreation time, and any publicity of that

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<sup>37</sup> *Weller*, n2 [20] referring to *Re JR 38*, n21 [95]

<sup>38</sup> *Re JR 38*, n21 [65]

<sup>39</sup> *Weller*, n2 [29]-[30]

<sup>40</sup> See n22 for the factors.

<sup>41</sup> *Murray*, n7 [65]

being 'intrusive and such as adversely to affect such activities in the future'.<sup>42</sup> It seems that the family element led to a potentially public activity (visiting a café) being classified as private, the distinction between public and private turning on the context of the environment. The family element may be an aspect which could potentially create problems in the future, in respect of its reach. The courts have recognised the danger of inadvertently creating an image right, 'If a simple walk down the street qualifies for protection then it is difficult to see what would not', where do the limits of protection lie? For example, would visiting a café alone be classed as within family recreation time, or only when it is accompanied by members of the family (which may in itself be difficult to determine).

#### FINDING THE BALANCE

The area in which the Court maintains much of the level of discretion is in respect of the ultimate balancing test between privacy and freedom of expression. The court in *Weller* emphasized that a child's article 8 privacy right being engaged through the first stage test would not automatically mean that any article 10 free speech rights would be trumped by the child's best interests (under the UN Convention on the Rights of the Child, Article 3(1)). Where the child's best interests would be adversely affected, they must be given considerable weight, and consequently, it 'might require very powerful article 10 rights (for example, exceptional reasons in the public interest) to outweigh a child's article 8 rights where publication would be harmful to the child'.<sup>43</sup> Section 12(4) of the Human

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<sup>42</sup> *Weller*, n2 [25]

<sup>43</sup> *Weller*, n2 [40]

Rights Act 1998 was considered by Dingemans J at first instance; it directs the Court to have “particular regard” to: the importance of freedom of expression protected by article 10 of the ECHR; the extent to which material has, or is about, to become public; the public interest in publishing the material; and any privacy code.<sup>44</sup> In carrying out the balancing exercise of articles 8 and 10 of the ECHR, the Court applied the five criteria set out in *Von Hannover* (below) and concluded that the balance fell in favour of the Claimants’ article 8 rights:<sup>45</sup>

1. Does the publication make a contribution to a debate of general interest?
2. The notoriety of the person concerned.
3. The prior conduct of the person concerned.
4. The content, form and consequences of the publication.
5. The circumstance in which the photographs were taken.

It is important to note that with regard to freedom of expression, the courts have laid out how there needs to be some quality to the information conveyed, particularly where photographs are the communication medium. As put in *Von Hannover*;

Although freedom of expression also extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the dissemination of ‘ideas’, but of images containing very personal or even intimate ‘information’ about an individual.<sup>46</sup>

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<sup>44</sup> *Weller*, n5 [54]

<sup>45</sup> *Von Hannover v Germany (No.2)* (2012) 55 EHRR 15, [109]-[113]

<sup>46</sup> *Von Hannover (No. 1)*, n16 [59]



## IMPLICATIONS

### **“Chilling effect” on the Press?**

The Press were concerned by the *Weller* decision and, speaking in respect of the proposed so-called “Weller’s Law”, organisations such as the National Union of Journalists spoke of how it would have a “chilling effect on a free press”.<sup>47</sup> Although it must be kept in mind that this is the press talking about the potential consequences on their own work, perhaps their concern can be understood to some extent. When a photograph is worth a ‘thousand words’ – in today’s culture, would there be a story without images? Merely reporting on having seen the Weller family out in California would perhaps not have had the same impact as an article illustrated by pictures. Whilst the Press has an obligation to report on matters of public interest, it is possible that this obligation might be adversely affected by the Court of Appeal’s decision (although it is difficult to see how photographs such as those in *Weller* could be in the public interest).

The press argued that the *Weller* decision significantly increased the rights of children of famous parents in respect of published photographs in the media, one of the concerns raised being that the decision paves the way for unfettered rights of privacy for children of famous parents. This has the potential to give rise to the beginnings of an image right in English law, although ANL had argued that the

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<sup>47</sup> See National Union of Journalists, ‘Photographers call ‘Wellers’ Law’ wrong and unworkable’, (5 January 2015) <<https://www.nuj.org.uk/news/photographers-call-wellers-law-wrong-and-unworkable/>> accessed 26 April 2016

publication of the photographs was not actionable as 'English law does not recognise an image right'.<sup>48</sup> Whilst Paul and Hannah Weller admitted that their motive was to control whether and which images and information about their children should be published, the "critical factor" in favour of an expectation of privacy was that Dylan, John Paul and Bowie were children and identified by surname,<sup>49</sup> suggesting that the law falls short of creating an image right, with more being necessary than simple publication of their image. Whether the courts continue to develop cases along this line in the future remains to be seen. Undoubtedly, the creation of an image right would go some way towards providing protection for the children of famous people in the UK, but this has traditionally been something the law has shied away from.

Conversely, might the decision contribute to a change in the press culture – particularly when it has been highlighted how the tabloid press has a culture of continual harassment of celebrities.<sup>50</sup> Patten J made the observation in *Murray* that 'It is, I think, common knowledge that much of the continental press adopts a far less aggressive and prurient approach to the private lives of celebrities and politicians than do their English tabloid counterparts',<sup>51</sup> a matter given considerable focus both pre and post the Leveson Inquiry and Report of 2011/12.

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<sup>48</sup> *Weller*, n2 [49]

<sup>49</sup> *Weller*, n2 [63]

<sup>50</sup> *Von Hannover (No. 1)*, n16 [59]

<sup>51</sup> *Murray*, n7 [47]

## **Famous parents, famous children?**

*Murray* saw a somewhat measured rejection of the idea that a parent's fame should be a reason for the public to know about the lives of their children. However, there is somewhat of a dichotomy between those children that are famous (or subject to public scrutiny) in their own right, and those potentially subject to the media spotlight purely by virtue of their parent's fame. An example would be contrasting *Weller* against the Royal babies. Prince George is potentially a future King, and there is consequently a great public interest in his growing up, yet the safeguards surrounding his privacy are strict and enforced, with only carefully chosen images released into the public domain. Contrast this against the *Weller* case, where the children were photographed purely because of their parent's fame. The IPSO Editors' Code of Practice provides that the fame or position of a parent must not be used as the sole justification for publishing details of a child's private life (Clause 6),<sup>52</sup> and reference was made to the *Murray* judgment and a statement from the Press Complaints Commission, noting that:

[T]he acid test to be applied by newspapers in writing about the children of public figures who are not famous in their own right (unlike the Royal Princes) is whether a newspaper would write such a story if it was about an ordinary person.<sup>53</sup>

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<sup>52</sup> Independent Press Standards Organisation, Editors' Code of Practice (March 2015)  
<[https://www.ipso.co.uk/assets/82/Editors\\_Code\\_of\\_Practice\\_A4\\_March\\_2015.pdf](https://www.ipso.co.uk/assets/82/Editors_Code_of_Practice_A4_March_2015.pdf)> accessed 26 April 2016

<sup>53</sup> *Murray*, n7 [46]

If a similar approach were to be adopted towards photographs, as suggested in *Murray*,<sup>54</sup> this would help to clearly differentiate between acceptable and non-acceptable behaviour by the media.

### **A requirement for consent or pixilation?**

Is an implication of the *Weller* case a requirement for consent? Clearly, obtaining consent prior to both the taking and publishing of photographs, particularly of children, would solve a number of difficulties presented by the current case, but would it be practical and how far could the law extend? If consent was required prior to the taking of every photograph of identifiable individuals (even if just children), would this result in key moments being forgotten or unable to be recorded? Again, does this allude towards the creation of an image right where individuals have control over images of themselves and their dissemination in the public domain? Although obtaining consent is already good practice, it may be that a photograph is used for a purpose other than that for which consent is obtained, which can cause problems. Currently somewhat of a grey area, clarification of how the matter of consent can impact on photography would be desirable.

It is also in respect of consent (or lack of consent) that pixilation can play a role. It may be that, had the images been pixilated, under the assurance from the photographer, no action would have been taken in respect of the images - Paul and Hannah Weller expressed in a statement shortly after the original judgment their

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<sup>54</sup> *Murray*, n20 [46]

reasons for the action; ‘. . .the court has upheld our complaint that unpixelated photographs taken of our children whilst out enjoying some quality time with their family should not be published without consent. That is why we brought this action on their behalf.’<sup>55</sup> Pixilation would also deal with another potential issue: to a large extent the issues arising in such cases concern the publication of images, rather than the taking of them. Therefore pixilation of children’s faces would allow for protection of children yet not extend to adults.

### WIDENING THE FOCUS

In bringing the action, Paul & Hannah Weller were very clear that their intention behind the claim was to ensure that ‘. . .[J]ust because a father is well known doesn’t mean that the children should be . . . the primary objective in bringing this claim on behalf of the children was to ensure that it never happened again’,<sup>56</sup> but they did not see the limits of this protection as extending only to the children of the famous. As Hannah Weller continues her campaign to change the law to criminalise the publication of unpixelated photographs of children in the media without parental consent, she is aiming to extend the remit to every child.<sup>57</sup> In today’s multimedia, interactive environment, this touches on a wider issue, the privacy of all children, and it seems that the public are concerned about this too. In research carried out by ComRes as part of Hannah’s campaign in January 2015,

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<sup>55</sup> For the Weller’s Statement see Press Association, ‘Paul Weller children win privacy damages over photos on Mail Online (*The Guardian*, 16 April 2014) <<http://www.theguardian.com/music/2014/apr/16/paul-weller-privacy-damages-children-photos-mail-online>> accessed 26 April 2016

<sup>56</sup> *Weller*, n2, [125] 2014

<sup>57</sup> Hannah Weller’s campaign site can be found at: <[www.childrensprivacy.co.uk](http://www.childrensprivacy.co.uk)> (accessed 20 March 2016)

of 2,024 British adults surveyed, almost 80% agreed that magazine and newspapers should not publish photographs of children without parental consent. Almost the same percentage believed that parents should not have to take legal action to protect their children's privacy, whilst over two-thirds believed that the government should act to make it a criminal offence to publish photographs of children without parental consent.<sup>58</sup>

*Sciacca v Italy* suggests that the applicant's status as an 'ordinary person' serves to enlarge the zone of interaction that may fall within the scope of private life.<sup>59</sup> In the context of *Sciacca*, the European Court of Human Rights held that the publication of a photograph of a person, despite the public interest of being subject to criminal proceedings, was not sufficient to justify interference with the applicant's article 8 rights as they were not a public figure. At one time the preserve of the rich and "professionals", now there is the capability for every person to be a photographer and, consequently, the law needs to adapt and evolve. In a twenty-four hour news culture, with images and stories able to be shared instantly, globally and potentially by anyone, the convergence of technologies has compounded the situation, and the enforceability of the *Weller* decision can be questioned. For example, would an ordinary person (not a journalist) taking a picture of a famous person or a famous person's child be treated in the same way as the media? With research indicating that young people will feature in almost

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<sup>58</sup> See Daniel Boffey, 'Hannah Weller: I'm fighting to protect everyone's children' (*The Guardian*, 3 January 2015)

<<http://www.theguardian.com/media/2015/jan/03/paul-weller-hannah-weller-battle-for-privacy-children>> accessed 27 February 2016

<sup>59</sup> *Sciacca v Italy* (2006) 43 EHRR 400

one thousand online photographs by the age of five years,<sup>60</sup> do images serve to be an essential record of growing up or an unnecessary invasion into private lives? Potentially the greatest threat to a child's privacy can come from their own parents, able to sacrifice the rights of their children, perhaps through an act as simple as publishing embarrassing baby pictures on the internet of children too young to have a voice themselves. Under the current law, as emphasised in *Weller*, parents' actions towards their children's privacy are taken into account.

In the present day it is not just photographs taken by the press which threaten an individual's article 8 rights but, with social media, photographs can be published and individuals made identifiable by anyone - perhaps individuals inadvertently caught up at scenes of crime or natural disasters, with consequences potentially life-changing and long-lasting. Consequently, should legal protection be limited to the realm of the rich and famous - or applicable to all? Social media has the power to change everything and, in the future, it may be that everyone will be required to have an understanding of the law to protect both themselves and those they are photographing.

The potential permanency of the image is a point that has been highlighted by the courts, Dingemans J noting the 'particular importance' attached to photographs, there being a 'very relevant difference in the potentially intrusive effect of what is witnessed by a person on the one hand, and the publication of a permanent

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60 --'Today's children will feature in almost 1,000 online photos by the time they reach age five' Research carried out by Parent Zone on behalf of Nominet, 26<sup>th</sup> May 2015 <[www.nominet.uk/todays-children-will-feature-in-almost-1000-online-photos-by-the-time-they-reach-age-five/](http://www.nominet.uk/todays-children-will-feature-in-almost-1000-online-photos-by-the-time-they-reach-age-five/)> (accessed 18 March 2016)

photographic record on the other hand'.<sup>61</sup> As danah boyd suggests, people enjoy security through obscurity, yet the recording of images has the potential to make the ephemeral permanent,<sup>62</sup> which perhaps points to the key problem. Had the media simply reported seeing Weller and his children in Los Angeles, it is questionable whether it would have resulted in the same reaction; in similar vein to *Campbell v MGN*,<sup>63</sup> it was the photograph which tipped the balance in favour of privacy. With news of photography bans and restrictions very prevalent in recent years, if a balance is not found soon, the danger is perhaps overreaction, and guidance on photography and consent is long overdue.

#### SIGNIFICANCE OF THE CASE

In a particularly fast moving and developing area of law, perhaps this case demonstrates the increasing trend towards the protection of privacy, particularly for children, and may signal the start of a number of celebrity parents taking legal action, keen to protect their children from the spotlight, such as popstar Adele who settled a privacy case with a photographic agency after bringing a case concerning photographs taken and published of her two-year-old son.<sup>64</sup>

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<sup>61</sup> *Weller*, n5, [63]

<sup>62</sup> danah boyd 'Privacy and Publicity in the Context of Big Data' (Talk, North Carolina, 29 April 2010)  
<<http://www.danah.org/papers/talks/2010/WWW2010.html>> accessed 05 May 2016

<sup>63</sup> *Campbell*, n3

<sup>64</sup> See the Guardian report for more information on this; Press Association 'Adele's son gets payout in privacy case' (*The Guardian*, 23 July 2014)  
<<http://www.theguardian.com/media/2014/jul/23/adele-son-payout-privacy-corbis-angelo-adkins>> accessed 20 April 2016



Subsequent to ANL recently being refused permission to appeal to the Supreme Court, it seems the situation regarding misuse of private information and photography is settled for the moment at least, with further development of the law dependent on future cases. ANL submitted that the situation was unsatisfactory, as an editor would be unable to know whether it is safe to publish photographs, the case law needing to 'give editors a reasonably clear idea of what is safe to publish in most cases'.<sup>65</sup> With the current law taking a somewhat piecemeal approach, developing through various legislation and different approaches taken towards the taking, sharing and publication of images, perhaps this is a fair criticism. If the Court of Appeal had developed the concept of an image right for children further in line with the UK's European counterparts, undoubtedly this would have created greater certainty and protection for not only children of the famous, but children in general, yet at what cost to the media and photography? The IPSO Editor's Code of Practice goes some way to identify situations where photographs are appropriate or special considerations may be required, but this Code of Practice does not apply to the everyday citizen journalist, hence it is important that appropriate guidelines are in place for editors, journalists and the public to know when it is appropriate to both take and publish images.

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<sup>65</sup> *Weller*, n2 [58]