

Photographs, Celebrities and the Law

Recent cases and media attention to them mean that great care has to be taken when taking and publishing photographs of people. All sorts of legal banana skins lay in the path of the unwary.

The Data Protection Act 1998 (DPA) can be a powerful stick with which individuals can beat data public authorities if they fail to respect their privacy when it comes to using their photographs. In October 2001, at a High Court hearing, Newham Council agreed to pay a disabled girl £5,000 in damages and approximately £50,000 towards legal costs after using her photograph without permission. Jacklyn Adeniji was shunned after friends saw her face on the front of a brochure setting out Newham's Aids strategy and mistakenly believed she was HIV-positive.

The legal action, brought by Miss Adeniji's parents, cited breach of confidence as well as breach of the DPA and the Human Rights Act 1998. Newham Council apologised but made no formal admission of liability. The judge said the hearing was "ground-breaking litigation", with no guidelines for appropriate compensation. "Clearly, there was no commercial exploitation but there was an error aggravated by repetition," the judge added.

Another interesting case, not least because of its subject, is *Campbell v Mirror Group Newspapers*. In March 2002 the High Court awarded £3,500 damages to Naomi Campbell following the publication of an article and photographs in the *The Mirror* about her leaving a Narcotics Anonymous meeting. The trial judge ruled that the supermodel had established she was entitled to damages for both breach of confidence and under the DPA. This was the first time that a trial court awarded compensation under the DPA. Whilst the decision was overturned on appeal, the judges comments about the applicability of the DPA to photographs is still good law.

Mr Justice Morland, said that the information contained in the *Mirror* article as to the nature of, and details of, the therapy that Campbell was receiving, including the photographs with captions, was clearly related to her physical or mental health or condition and was therefore "sensitive personal data" as defined by the DPA. He ruled that *The Mirror* did not have one of the legitimising conditions in Schedule 3 of the DPA to enable it to lawfully publish such material. This second sentence was later overturned by the Court of Appeal. Naomi Campbell has vowed to fight on to the House of Lords

Naomi Campbell was followed into the High Court by Michael Douglas and Catherine Zeta-Jones. In April 2003 they won a ruling that said *Hello!* magazine breached their rights of commercial confidence by publishing photographs of their wedding. The couple had sold the exclusive photo rights to the event to *OK!* magazine for £1 million. A paparazzo intruder gained access to the wedding by bribing staff and surreptitiously took photographs, which were then bought by *Hello!* It then published the unauthorised photographs on the same day as *OK!*'s authorised coverage.

Mr Justice Lindesay ruled that the couple were entitled to damages for breach of commercial confidentiality as being celebrities they would normally expect to control their image and receive substantial payment for rights to their photos on such an occasion. With regard to the DPA, it was ruled that Hello! could be taken to be Data Controllers, the unauthorised pictures represented personal data, and publication of them was processing covered by the Act. The publication was held as not fair under the First Data Protection Principle. However this did not add a separate route to recovery for damage or distress beyond a nominal award.

Its not just celebrities who can bring a claim for use of their image. The case of Peck v United Kingdom (2003) concerns a man whose suicide attempt was captured by Brentwood Council's CCTV cameras and released to newspapers and TV companies. The European Court of Human Rights in Strasbourg ruled that Geoffrey Peck's right to respect for his private life was violated and that he had no remedy under the UK's existing law at the time. He was awarded him £7,800 in damages and nearly £12,000 costs. The Strasbourg court said the council's action had been a "disproportionate and unjustified interference with his private life".

Even criminals are "getting in on the Act". Recently Police have been banned from featuring a convicted burglar and car thief in a controversial poster campaign to cut crime. The posters, which would have been the first of a series, were designed to make youngsters think twice before committing crimes and to reassure victims that criminals were being dealt with. If the scheme was successful about eight other forces were interested in using similar posters. However the offender's lawyers won a High Court injunction in April banning the name and shame posters. They argued that they were a breach of his human rights.

On June 12th 2003 the scheme was considered again in general by the High Court in R (on the application of Ellis) v the Chief Constable of Essex Police. The court stated that in such cases there should only be disclosure where there was a pressing need to make details available to the public by way of this or any other similar scheme, whilst the police should always consider the views of all other agencies as fully as possible.

Furthermore, the court made it clear that had it been necessary to rule on E's individual case it would have done so in E's favour on the grounds that Essex police had not given adequate consideration to the concerns of the probation service. The court also took into account the potential damage that could have been done to E's family and child despite their change of address, as they had rights under Article 8 that must also be considered. The court made it clear that similar factors would be considered in every case such as this, where an individual's fundamental freedoms were being challenged by the demand to publicise details of the individual and the offence that he/she may have committed.

These cases come as a salutary reminder to all public authorities that they must be aware of privacy issues when taking and using photographs of

people. Steps must be taken to obtain consent, especially where an individual is photographed in circumstances which may put them in a bad light either through the photograph itself or the use to which it is put. For example, a simple photograph of people walking in a high street may be fine without consent but a shot of an individual walking into a sex shop may not. A couple of council's in the UK have addressed the issue and issued guidance on the subject. It's an excellent starting point for any organisation that needs a policy on use of personal images. The document has been reproduced with permission on the Act Now website under articles (www.actnow.org.uk).

So what can public authorities do to minimise the risk of falling foul of the law in this area. I suggest some simple rules :

1. Photographers should tell people that they are about to take a photograph or at least make it obvious so they can get out of the way if they want to.
2. If the photographer is in a place where people may not want to be seen or photographed their consent should be sought.
3. If the photograph is going to be used for a purpose that the subject may not be aware of then consent should be sought, especially where it may show the subject in a bad light (as in the Newham Case above). It is therefore important to have notes with photographs stating when where and in what context they were taken.
4. Photos of children should not normally be taken without informing or perhaps even getting the consent of parents depending on the type of photograph.
5. Do not give out specific details of children appearing in photos without considering the potential for misuse.
6. In all cases consider the human rights of individuals especially their right to privacy. Consider where they are, what they are doing and whether or not they have an expectation of privacy.
7. Have a policy on the use and publication of photographs
8. If in doubt consult your legal section.

The majority of court cases in this area have been brought by celebrities but, as some of the cases discussed above show, you don't have to be a media darling to take enforce your rights in this area. The man or woman on "the Clapham omnibus" is equally protected.

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