

CRIMINAL LIABILITY FOR "PHOTOGRAPHIC PIRACY"?

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The author is a Professor Emeritus of Cambridge University, where for many years Tony Smith was his friend and valued colleague. In this article he critically analyses the existing law in relation to taking or publishing photographs of other people without their consent and considers the desirability of extending criminal liability for such behaviour by the creation of a new criminal offence.

I INTRODUCTION

Joseph Dean's amusing anthology of defamation cases, *Hatred, Ridicule, or Contempt*, features a case from 1937 called *Plumb v Jeyes Sanitary Compounds Co Ltd*.¹ On a hot summer's day PC Plumb was photographed mopping his brow while on point duty directing traffic, the photo then appearing in the press with the caption "A warm arm of the law wipes the sweat from his brow". Some years later it was used without his permission in an advertisement which had him saying "Phew! I'm going to get my feet into a Jeyes' Fluid Foot-bath!" – a product made by the firm well known for its strong and pungent disinfectant. Enraged, Plumb reacted to this by suing the manufacturers in defamation, alleging that the advertisement defamed him because of the innuendo that:²

... by reason of slovenly and uncleanly habits or otherwise, the exudation and/or general condition of his feet was so unpleasant and noisome, that a bath or wash would be inadequate and a solution of Jeyes' Sanitary Compound would be necessary to deodorise or disinfect his feet.

Despite the efforts of defendant's counsel, Norman Birkett KC, to get the case laughed out of court, his claim succeeded and the jury awarded him £100 damages – the equivalent of around £8,000 today. When I read about the case as a law student many years ago I thought the defamation case was very weak – but felt that PC Plumb deserved to win because it was outrageous to pirate another

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1 Joseph Dean *Hatred, Ridicule, or Contempt: A Book of Libel Cases* (Penguin Books, Harmondsworth, 1964) at 172.

2 At 173.

person's photograph in this sort of way. As the saying goes, "There ought to be a law against it", and I was glad there was.

In the United Kingdom, sellers no longer seem to pirate people's photographs for advertising purposes, presumably because the Advertising Standards Authority's code forbids it.³ But the broader phenomenon – the taking or publishing of photographs without the subject's consent – is very present. Indeed it is much more common now than it was when *Plumb v Jeyes Sanitary Compounds* was tried, because important changes in technology have made it far easier to do it. Photographs no longer need to be developed from negatives but are taken digitally, and so are instantly available for distribution. Digital photos can be taken by smart phones as well as cameras, so people can be snapped on the spur of the moment and with no forward planning. Organisations now have websites which often carry photographs of key personnel, which can then easily be copied and put to hostile use (as I discovered when a tabloid newspaper, wishing to monster me for saying the law on sex offences against children was too wide, took my photo from the Cambridge Law Faculty website and printed it next to one of an aged paedophile who had just been sent to prison yet again!). Another major development are the ubiquitous CCTV cameras, which often record people's actions unawares – as with Matt Hancock's torrid embrace with a female member of his staff, in disregard of COVID lockdown regulations, when he was the United Kingdom Secretary of State for Health, the publication of which led to his rapid resignation.⁴ Lastly, we now have the Internet and social media, on which pirated material can be circulated far and wide, where it remains accessible forever unless taken down – which will be impossible if the material has "gone viral". If "there ought to be a law against it" was a valid assessment 50 years ago, it is clearly no less valid now.

The rest of this article will examine the extent to which "photographic piracy" – the unauthorised taking or publication of photographs of other people – is unlawful under English law today. The final section will then consider whether the current law is adequate and whether there is a case for legislation making some forms of this behaviour a criminal offence.

II CIVIL LIABILITY

In the 1930s PC Plumb was not the only victim of advertisers making pirate use of his image to invoke the law of defamation. A more famous case is *Tolley v JS Fry and Sons Ltd*.⁵ Cyril Tolley was a well-known amateur golfer and the defendants, chocolate manufacturers, used an image of him – a caricature rather than a photograph – to advertise their chocolate. Tolley sued in defamation, alleging that the use of his image for advertising purposes would make people think that he had been paid for

3 Committee of Advertising Practice *The CAP Code: The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing* (12th ed, 2014).

4 Emma Harrison "Matt Hancock quits as health secretary after breaking social distance guidance" *BBC News* (online ed, United Kingdom, 27 June 2021).

5 *Tolley v JS Fry and Sons Ltd* [1931] AC 333 (HL).

it, thereby prostituting his status as an amateur player. Having won £1,000 damages at first instance he then lost in the Court of Appeal, which thought the Judge should have withdrawn the case from the jury. The House of Lords, by a majority, thought otherwise and reinstated his first instance victory – albeit ordering a retrial on the issue of damages.

As in PC Plumb's case, the case in defamation was marginal and this comment from Greer LJ in the Court of Appeal suggests that the real issue was something else:⁶

I have no hesitation in saying that in my judgment the defendants in publishing the advertisement in question, without first obtaining Mr Tolley's consent, acted in a manner inconsistent with the decencies of life, and in doing so they were guilty of an act for which there ought to be a legal remedy.

As also does this remark from Lord Buckmaster in the House of Lords:⁷

... it seems to me the question of whether a well known and respectable trader would be assumed to have the effrontery to use a man's portrait and his reputation to advertise goods without his assent is exactly the class of question on which the opinion of a jury might well be invoked.

These plaintiffs resorted to defamation, and torturing the facts to make them yield an innuendo, because at that date English law gave no remedy for breach of privacy. A person whose privacy had been infringed could sue only if they could mount their grievance on the back of a claim for something else: trespass to land, for example,⁸ or, as with Tolley and PC Plumb, defamation. This remained the position until relatively recently, as the extraordinary case of *Kaye v Robertson* in 1990 shows.⁹

In *Kaye*, the star of a popular TV series, *Allo! Allo!*, was injured in a traffic accident that caused him severe injuries to his head and brain. While he was in hospital recovering, but still in no position to understand what was going on, a journalist and a photographer from the *Sunday Sport* entered the ward as trespassers, where they photographed him in bed and purported to interview him before the security team evicted them. His agent, as his "next friend", obtained an injunction prohibiting the defendants from publishing either the photograph or the supposed interview. In seeking to uphold the injunction he then argued that publishing the material would make the *Sunday Sport* liable in trespass to the person, passing off, defamation and malicious falsehood. Having held the first three torts to be inapplicable, the Court of Appeal, with their fingers crossed behind their judicial backs, ruled that there was a possible claim in malicious falsehood: because if the material was published as intended this would suggest that Kaye had consented, which would hinder his selling an interview about his sufferings and recovery to another media outlet later on. On that basis the defendants were prohibited

6 *Tolley v JS Fry and Sons Ltd* [1930] 1 KB 467 (CA) at 478 per Greer LJ.

7 *Tolley v JS Fry and Sons Ltd*, above n 5, at 344 per Lord Buckmaster.

8 As was unsuccessfully attempted in *Bernstein v Skyviews & General Ltd* [1978] QB 479 (QB).

9 *Kaye v Robertson* [1991] FSR 62 (CA).

from publishing the material in any form suggesting Kaye had given his consent: so leaving them free to publish it if, adding insult to injury, they did so telling their readers that the material was obtained without it! In granting Kaye this limited victory, the Judges expressed their regret at their inability to go further. As Glidewell LJ said:¹⁰

It is well known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.

In 1989 the Home Secretary set up a committee chaired by Sir David Calcutt QC to consider the law on privacy and press intrusion. In its report¹¹ it considered, among other things, the creation of a statutory tort of infringement of privacy; concluding, rather lamely, that it would be feasible to create one, but that the press should be given another chance at self-regulation first.¹² Two years later the Government invited Sir David Calcutt, this time on his own, to report on the progress of press self-regulation. He concluded it had failed and said that the Government should now consider the introduction of a tort of infringement of privacy.¹³ In its response the Government declined the invitation. So the hopes of legislation expressed in *Kaye v Robertson* were disappointed.¹⁴

The Judges in *Kaye v Robertson* assumed that the right to privacy had been so long denied in English law that an Act of Parliament would now be required to create one. Their successors, however, have thought otherwise; and if *Kaye v Robertson* were to come before the courts today it seems likely that an injunction would be granted against the publication of the photograph and supposed interview on the simple ground that it would invade his right to privacy. In this change in position there were two underlying strands.

The first was the notion of "confidentiality", and the long-standing willingness of the courts to enforce respect for it. The starting point for modern law on the subject is a 19th-century case that involved the Royal Family: *Prince Albert v Strange*.¹⁵ Queen Victoria and Prince Albert had used their artistic skills to make some sketches of scenes from their domestic life, of which they then had

¹⁰ At 66.

¹¹ David Calcutt *Report of the Committee on Privacy and Related Matters* (HMSO, CM 1102, June 1990).

¹² A proposal which, as a member, I can reveal to have been a compromise devised to enable a committee divided on the issue to agree!

¹³ David Calcutt *Review of Press Self-Regulation* (HMSO, CM 2135, January 1993).

¹⁴ Department of National Heritage *Privacy and Media Intrusion – The Government's Response* (HMSO, CM 2918, 17 July 1995) at [7.42].

¹⁵ *Prince Albert v Strange* (1849) 2 De G & Sm 652, 64 ER 293; and *Prince Albert v Strange* (1849) 1 H & Tw 1, 47 ER 1302 (Ch).

prints made to give to their family and favoured friends. One of the printer's workmen improperly made some prints for his own use which he then sold to the defendant, who made a catalogue of them, with a view to mounting an exhibition and making money. At this Queen Victoria was Not Amused, and her husband instituted proceedings in the Court of Chancery. The Vice-Chancellor granted an injunction against publishing the catalogue, and ordered the defendant to destroy the prints on the ground that the material had been obtained in breach of confidence. The Chancellor affirmed the decision on appeal. Much of the discussion in the case turned on the issue of proprietary rights, but the judgments also make it clear that the Royal Family's right to privacy was an important factor in the decision too. As Knight-Bruce V-C said (rather wordily):¹⁶

I think ... not only that the Defendant here is unlawfully invading the Plaintiff's right, but also that the invasion is of such a kind and affects such property as to entitle the Plaintiff to the preventive remedy of an injunction; and if not the more, yet certainly not the less, because it is an intrusion—an unbecoming and unseemly intrusion—an intrusion not alone in breach of conventional rules, but offensive to that inbred sense of propriety natural to every man—if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life—into the home (a word hitherto sacred among us), the home of a family whose life and conduct form an acknowledged title, though not their only unquestionable title, to the most marked respect in this country.

The underlying notion in "breach of confidence" was originally the existence and breach of some confidential relationship of which the plaintiff should have been the beneficiary. But over the years this requirement was gradually abandoned and "breach of confidence" became a phrase the courts invoked when confronted with the publication of material which they felt should properly remain private. As Lord Nicholls put it in a much later case:¹⁷

This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. ... Now the law imposes a "duty of confidence" whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase "duty of confidence" and the description of the information as "confidential" is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called "confidential". The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.

The second and more recent strand is art 8 of the European Convention on Human Rights, and as given a measure of direct effect in United Kingdom law by virtue of the Human Rights Act 1998 (UK). To remind us, it reads as follows:

16 *Prince Albert v Strange* (1849) 2 De G & Sm 652, 64 ER 293 at [698] per Knight-Bruce V-C.

17 *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at [14] per Lord Nicholls.

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The first and most obvious application of art 8 is to limit what the state may do to invade the privacy of its citizens. A clear example is *Peck v United Kingdom*.¹⁸ Peck, suffering from depression, tried to slash his wrists with a kitchen knife in Brentwood High Street in an attempt to end his life. His behaviour was caught on a CCTV camera belonging to Brentwood Borough Council, which then released the footage to the media as part of a campaign to demonstrate the advantages of CCTV cameras in public places. On this footage Peck's face was clearly shown, making him readily identifiable to anyone who knew him. Having failed to get satisfaction from a range of public bodies, he took his case to Strasbourg, which found the United Kingdom to be in breach of its art 8 obligations and ordered it to pay him £11,800 in damages.

However, in *Von Hannover v Germany* the Strasbourg Court made it clear that art 8 also has a "horizontal" application – meaning the contracting states must ensure that their laws protect its citizens against excessive interference with their privacy by their fellow citizens as well as by the state itself.¹⁹ Princess Caroline of Monaco had failed in the German courts to stop the German press publishing pirate photographs of her in her private life – including one of her on a beach taken with a telephoto lens. The Strasbourg Court upheld her complaint against this result, saying:²⁰

The Court reiterates that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. That also applies to the protection of a person's picture against abuse by others.

...

Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.

18 *Peck v United Kingdom* (2003) 36 EHRR 41 (ECHR).

19 *Von Hannover v Germany* (2005) 40 EHRR 1 (ECHR).

20 At [57] and [77] (citations omitted).

Even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the Court's view, yield to the applicant's right to the effective protection of her private life.

Shortly before the judgment in this case, confidentiality and Convention rights were brought together by the British courts in *Campbell v MGN Ltd*.²¹ Naomi Campbell, a well-known model, sued the *Daily Mirror* for publishing a story about her fight against drug addiction, illustrated with a photograph of her clandestinely taken in the street outside a meeting of Narcotics Anonymous. Because she had admitted that she had a drug problem the case was held to turn upon the legitimacy or otherwise of the publication of the details of her treatment, and of the photograph. At first instance, Moreland J upheld her claim and awarded her £3,500 damages. The Court of Appeal reversed the decision. The House of Lords, by a majority of three to two, reinstated the decision at first instance. In reaching their decisions the Judges at all levels tried to balance the claimant's right to privacy under art 8 of the Convention with the defendant's art 10 right to freedom of expression; and it was publication of the details of Ms Campbell's treatment and the clandestinely-taken photograph that tipped the balance in her favour.

Even before the *Campbell* case the English courts were prepared to accept that the publication of a photograph was a significantly greater intrusion on a person's privacy than the revelation of the circumstances relating to it. So in *Theakston v MGN Ltd* the Judge granted an injunction to prevent the *Sunday People* publishing photographs of a man who was well known as the presenter of a BBC programme in a brothel, though the Judge was disinclined to grant an injunction against the publication of the story:²²

[78] The authorities cited to me showed that the Courts have consistently recognised that photographs can be particularly intrusive and have showed a high degree of willingness to prevent the publication of photographs, taken without the consent of the person photographed but which the photographer or someone else sought to exploit and publish. This protection extended to photographs, taken without their consent, of people who exploited the commercial value of their own image in similar photographs, and to photographs taken with the consent of people but who had not consented to that particular form of commercial exploitation, as well as to photographs taken in public or from a public place of what could be seen if not with a naked eye, then at least with the aid of powerful binoculars. I concluded that this part of the injunction involved no particular extension of the law of confidentiality and that the publication of such photographs would be particularly intrusive into the Claimant's own individual personality. I considered that even though the fact that the Claimant went on to the brothel and the details as to what he did there were not to be restrained from publication, the publication of photographs taken there without his consent could still constitute an intrusion into his private and personal life and would do so in a

21 *Campbell v MGN Ltd*, above n 17.

22 *Theakston v MGN Ltd* [2002] EWHC 137 (QB).

peculiarly humiliating and damaging way. It did not seem to me remotely inherent in going to a brothel that what was done inside would be photographed, let alone that any photographs would be published.

A string of cases decided after the *Campbell* case have reaffirmed this approach. In *Jagger v Darling* an injunction was granted against the publication of images, recorded by a security camera at a nightclub, of the claimant, the daughter of a pop star, engaged in sexual intimacies with her boyfriend.²³ In *Murray v Express Newspapers plc* the Court of Appeal, reversing the decision of the first instance Judge, held that the author JK Rowling's small child had a prima facie right to sue the defendant for publishing a clandestinely-taken photograph of him being pushed in a buggy in the street by his parents.²⁴ *AAA v Associated Newspapers Ltd* concerned the publication by the *Daily Mail* of another clandestinely-taken photograph of a little child, this one recently fathered out of wedlock by Boris Johnson.²⁵ The first instance Judge awarded the child £15,000 damages, which the defendants did not contest on appeal. But when, on appeal, the child sought to challenge the Judge's refusal of a remedy against publishing the story about her paternity, the Court of Appeal upheld the refusal.

An issue related to those discussed above concerns the position of the police. The powers of the police to photograph suspects in police stations are set out in detail in s 64A of the Police and Criminal Evidence Act 1984 (UK). But do they have the power to take photographs of members of the public who are behaving lawfully – at a demonstration, for example – but who the police think might behave unlawfully in future? When this issue came before the Court of Appeal in 2009 it was held, by a majority, that to do so was a breach of the person's art 8 right to privacy.²⁶ (The other side of this issue, namely whether it is lawful for members of the public to take photographs of the police, will be discussed later.)

III CRIMINAL LIABILITY

A The Current Law

Until the early years of the present century, photographic piracy (as I have called it) might incidentally have fallen within one of a range of offences primarily aimed at other things – but it was not the subject of any specific criminal legislation.

²³ *Jagger v Darling* [2005] EWHC 683 (Ch).

²⁴ *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481.

²⁵ *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554.

²⁶ *Regina (Wood) v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414, [2010] 1 WLR 12, noted in ATH Smith "Cops With Cameras — What Can They Do?" (2009) 68 CLJ 501; and see *R (Mengesha) v Commissioner of Police of the Metropolis* [2013] EWHC 1695 (Admin).

The range of possible offences that could potentially apply to some forms of it included – and still does include – any of the following.

First, if the photograph was indecent and was of a person under 18 years of age,²⁷ taking, possessing or publishing it will usually constitute the child pornography offence created by the Protection of Children Act 1978 (UK).²⁸ This would be so irrespective of the child or young person's consent, if any.

Secondly, if done repeatedly, taking or publishing photographs of another person without their consent could constitute the offence of harassment contrary to the Protection from Harassment Act 1997 (UK), or the related offence of stalking added to that Act by the Protection of Freedoms Act 2012 (UK).²⁹ (An extreme example was the conviction in 2022 of Alex Belfield, a former BBC presenter, for using the Internet to harass eight people, most of whom were current or former BBC employees.)³⁰

Thirdly, depending on the circumstances, photographing another person without their consent could sometimes involve one of the cascade of "threatening, abusive or insulting conduct" offences contained in ss 4, 4A and 5 of the Public Order Act 1986 (UK).³¹

Fourthly, depending on the nature of the picture, the sender's intention and the means used to send it, publishing or circulating another person's photograph without their consent could constitute one of the two "communications offences": sending a malicious communication contrary to s 1 of the Malicious Communications Act 1988 (UK), and making improper use of a public communications network contrary to s 127 of the Communications Act 2003 (UK).³²

27 The age was raised from 16 to 18 by the Sexual Offences Act 2003 (UK).

28 The offence carries a maximum penalty of 10 years' imprisonment.

29 For a full discussion, see David Ormerod and Karl Laird *Smith, Hogan, and Ormerod's Criminal Law* (16th ed, Oxford University Press, Oxford, 2021) at ch 16.14.2.

30 See "Alex Belfield: Former BBC presenter jailed for stalking" *BBC News* (online ed, United Kingdom, 16 September 2022).

31 Section 4: threatening, abusive or insulting conduct intended, or likely, to provoke violence or cause fear of violence – summary offence, maximum penalty six months; s 4A: threatening, abusive, insulting or disorderly conduct intentionally causing harassment, alarm or distress – summary offence, six months; and s 5: threatening or abusive conduct likely to cause harassment, alarm or distress – summary offence, punishable with a fine. For a recent example of the use of s 5 in such a case, see *Hicks v Director of Public Prosecutions* [2023] EWHC 1089 (Admin).

32 The first carries a maximum penalty of two years' custody; the second a maximum penalty of six months. As explained below, these offences are destined to be repealed and replaced by the Online Safety Bill, before Parliament at the time of writing.

Fifthly, if the subject of the photograph is a serviceman, police officer or intelligence agent, taking their photograph without their consent could potentially contravene s 58A of the Terrorism Act 2000 (UK), which carries a maximum penalty of 15 years. This provision, which is controversial,³³ is as follows:³⁴

- (1) A person commits an offence who—
 - (a) elicits or attempts to elicit information about an individual who is or has been—
 - (i) a member of Her Majesty's forces,
 - (ii) a member of any of the intelligence services, or
 - (iii) a constable,

which is of a kind likely to be useful to a person committing or preparing an act of terrorism,
or
 - (b) publishes or communicates any such information.

Sixthly and finally, if another person's photograph is published in breach of copyright this would contravene s 127 of the Copyright, Designs and Patents Act 1988 (UK);³⁵ though in practice this will rarely be the case, because – contrary to popular belief – the copyright of a photograph usually belongs to the person who took it rather than the subject.

To this list of offences that occasionally catch instances of photographic piracy there have now been added four specific offences which are aimed at it directly. All involve "intimate images": images of parts of the body, or bodily functions, which for reasons of modesty are not usually exposed to other people's gaze. All are contained in statutory provisions that take a worm's eye approach to one specific type of case. The provisions are also long and complicated and for that reason I do not tax the reader's patience by setting them out. And the result they collectively produce is very messy.

1 Voyeurism

The first of these offences is contained in s 67 of the Sexual Offences Act 2003 (UK), which makes voyeurism a criminal offence. Section 67(1) and (2) penalise "peeping Toms" who peep with their unaided eyes and s 67(3) creates a further offence to penalise the person who records the vision with a camera. Though highly detailed, the drafting is inept in two obvious respects. First, it makes it an ingredient in the offence that the defendant's act be done "for the purpose of obtaining sexual gratification". So it is not committed if the act is done in order to humiliate the victim or to play a stupid prank – though the victim's modesty is no less trampled upon and they are likely to be equally

33 See Victoria Bone "Is it a crime to take pictures?" *BBC News* (online ed, United Kingdom, 16 February 2009).

34 Section 58A(1).

35 The maximum penalty for which is 10 years' imprisonment.

upset. Secondly, it only covers taking pictures of "private acts" (as laboriously defined in s 68) – and hence fails to cover taking photos of the private parts of people who are doing nothing with them. Hence it fails to cover "upskirting": using a concealed camera to take photographs up women's skirts.³⁶

2 *Upskirting*

In 2019, Parliament tried to remedy the second of these deficiencies by enacting a new offence. The Voyeurism (Offences) Act 2019 (UK) added a new 710-word provision to the Sexual Offences Act 2003, s 67A, to deal with this explicitly. Unlike the voyeurism offence in s 67, this offence is committed if the act is done with intent to "humiliate, distress or alarm" the victim, as well as to cause sexual gratification; but it is not committed if the defendant does it merely as an ill-considered joke. And the picture must be of the victim's genitals or buttocks, or underwear that covers them. So although the offence covers upskirting, it does not cover another practice which, though less common, is equally upsetting to the victim: "down-blousing".³⁷

3 *"Breast pests"*

In 2022 a different but related issue attracted the attention of the British legislator: the "breast-pest", who uses binoculars or a camera with a long-range lens to observe or photograph a woman who is breast-feeding; and Parliament dealt with this by inserting another 328 words of text into s 67A of the Sexual Offences Act 2003 to deal, in exquisite detail, with this specific issue.³⁸ Here the mental element is defined – and hence limited – in the same way as in the upskirting offence.

In all three of these offences the *actus reus* consists of taking the picture and none of them covers the related problem of people sharing or circulating the image once it has been taken. So if without her consent A takes a photograph of V's "private act", or private parts, or breast-feeding, and forwards it to B, who then publishes it on the Internet, B does not commit any of them: whatever his intention in doing so.

4 *"Revenge porn"*

In 2015 Parliament filled this gap to a limited extent by creating the fourth of this group of specialised offences: "Disclosing private sexual photographs and films with intent to cause distress". This is aimed at the rejected lover who publishes photographs of his or her former partner's private acts or private parts out of spite. It is contained in s 33 of the Criminal Justice and Courts Act (UK)

36 And so in *Regina v Hamilton* [2007] EWCA Crim 2062, [2008] QB 224, the Court of Appeal – to everyone's surprise – ruled that it was a form of the common law offence of outraging public decency.

37 Shockingly, an Internet check by the author on 1 December 2022 threw up links to no less than four sites that advertised collections of photographs so taken.

38 Section 67A(2A) and (2B), inserted by the Police, Crime, Sentencing and Courts Act 2022 (UK).

of that year. This provision is also very long and detailed – 600 words in all. The key elements are contained subs (1), which is as follows:

- (1) A person commits an offence if—
 - (a) the person discloses, or threatens to disclose, a private sexual photograph or film in which another individual ("the relevant individual") appears,
 - (b) by so doing, the person intends to cause distress to that individual, and
 - (c) the disclosure is, or would be, made without the consent of that individual.

The requirement for the act to be done with the intention of causing distress greatly limits the scope of the offence. It means that it is not committed if, without intending to cause distress to the victim, the defendant circulates the image hoping it will give the recipients a sexual thrill, or as an ill-considered prank – or indeed for no identifiable reason.

As this article goes to press,³⁹ English criminal law regarding "photographic piracy" is in a state of flux.

In 2021, a report from the Law Commission of England and Wales criticised the deficiencies of the "communications offences" mentioned earlier, recommending their repeal and replacement.⁴⁰ The Government accepted its recommendations and clauses intended to implement them were included in pt 10 of the Online Safety Bill – introduced in the House of Commons in 2022 and currently in its later stages in the House of Lords.⁴¹ If enacted as they stand, these clauses will replace the two existing offences with no less than five.⁴² One of these will add a new and wordy s 66A to the Sexual Offences Act 2003, designed to criminalise those who send other people pictures of a person's genitals.⁴³

Then, in 2022, a further report from the Law Commission criticised the four existing "intimate image offences", including the "revenge porn" offence described above. Following this, in June 2023 the Government announced its intention to move amendments to the Online Safety Bill that would

³⁹ In August 2023.

⁴⁰ Law Commission of England and Wales *Modernising Communications Offences: A final report* (HMSO, Law Com No 399, 20 July 2021).

⁴¹ See Online Safety Bill 2023 (HL Bill 164).

⁴² A "false communications" offence, a "threatening communications" offence, an offence of sending flashing images and an offence of sending pictures of a person's genitals.

⁴³ The gist of the new offence, as contained in the opening clause of the proposed new s 66A, is as follows:

A person (A) who intentionally sends or gives a photograph or film of any person's genitals to another person (B) commits an offence if—

- (a) A intends that B will see the genitals and be caused alarm, distress or humiliation, or
- (b) A sends or gives such a photograph or film for the purpose of obtaining sexual gratification and is reckless as to whether B will be caused alarm, distress or humiliation.

repeal the "revenge porn" offence in s 33 of the Criminal Justice and Courts Act 2015 and replace it with four new offences: (i) a new "base offence" of sharing an intimate image without consent; (ii) a new offence of sharing an intimate image with intent to cause alarm, humiliation or distress; (iii) a new offence of sharing an intimate image for the purpose of obtaining sexual gratification; and (iv) a new offence of threatening to share an intimate image. The first of these would carry a maximum penalty of six months' imprisonment, the other three a maximum of two years. The letter from the Lord Chancellor and Justice Secretary announcing this forthcoming package of amendments also said that the Government intends to bring forward further legislative proposals when parliamentary time permits.⁴⁴

At present, a matter of increasing public concern is the issue of what are often called "deepfakes": photographs of other people that have been distorted in some way to make them misleading – often, but not always, by sexualising them. A famous example that came before the courts some years ago, and illustrated the law's inability to deal with them, is *Charleston v News Group Newspapers Ltd*.⁴⁵ A tabloid newspaper, purporting to express outrage that such things were possible, published a story about a new computer game that enabled users to put the heads of well-known people onto pictures of the naked bodies of other people having sex: which it illustrated with photos of two well-known actors from the Australian television series *Neighbours* that had been treated in this way. Whilst expressing sympathy with their actors' claim in defamation, the House of Lords ruled that it failed, because any reasonable person reading the text together with the pictures would understand that they were fakes. As technology has advanced, so the problems caused by "deepfakes" has grown. A study on deepfakes published by the British Government in 2019 tells us, among other things, about an app called DeepNude – now happily discontinued – that enabled users to create images of what real women would look like if they were undressed.⁴⁶ Though the publication of deepfakes that are sexual may be caught in future by some of the new offences proposed in the Online Safety Bill, deepfakes can be offensive, or dangerous, even where they were faked to make them misleading in other ways; and it may be that the "further legislation" that the Government says it plans to introduce when time permits will attempt to tackle deepfakes as a wider problem.

While the detailed shape of future English criminal law in relation to "photographic piracy" remains unclear, one thing at least seems certain. In the short term, we are set to see a further

44 Letter from Rt Hon Alex Chalk MP (Lord Chancellor and Secretary of State for Justice) to Sir Robert Neill MP (Chair of Justice Select Committee) regarding intimate image abuse and the Online Safety Bill (26 June 2023).

45 *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 (HL).

46 Centre for Data Ethics and Innovation *Snapshot Paper – Deepfakes and Audiovisual Disinformation* (12 September 2019).

proliferation of specific offences, which will make the resulting picture even more complicated than it was before.

B Should There Be a Wider Offence of "Photographic Piracy"?

This proliferation of specific offences prompts a further thought. Has the time now come to stop creating new offences that are specific in their scope and to consider each of the issues they are aimed at as part of the broader issue of photographic piracy: taking photographs – intimate or otherwise – of people without their consent, or publishing without their consent photographs of them already taken?

A case that suggests this is the outrageous behaviour of the *Sunday Sport* journalists in *Kaye v Robertson*, which was discussed above. Surely most people would think that what they did should constitute a criminal offence; but as English law then stood, and still stands today, no criminal offence would be committed.

This thought is further prompted by the New Zealand case of *Rowe v R*.⁴⁷ Rowe was seen by a police officer using a camera with a telephoto lens to take photographs of three girls, aged between 12 and 15, who were playing on a beach when clad in bikinis. The parents were, in one case, "a little upset" and in another, "particularly upset". Rowe was found to have a computer with a file entitled "girls" which contained many similar photographs – but like the photos taken on the day in question, all were clad and none of the pictures were indecent. For this he was prosecuted for the offence of carrying out an "indecent act" with intent to insult or offend, contrary to s 126 of the Crimes Act 1961, tried by jury, and convicted. The New Zealand Supreme Court, after hearing lengthy and wide-ranging arguments, quashed the conviction because it found – unsurprisingly – that his conduct fell outside the scope of the offence.

But on principle, should someone like Rowe be free to do what he did, without incurring any kind of criminal liability? Fifty years ago his behaviour, if distasteful and mildly disquieting, might not have seemed harmful enough to merit criminal sanction. But in the present digital age, when such a collection of photos could be put on the Internet and made available to the whole world at the flick of a button, I think that most people would react differently. (This belief is reinforced by my discovering, from conversations with friends who are not lawyers, that many people assume that taking or publishing photographs of other people without their consent already constitutes a criminal offence.)⁴⁸

47 *Rowe v R* [2018] NZSC 55, [2018] 1 NZLR 875; I am grateful to Tony Smith for drawing this case to my attention.

48 At a meeting of a Parish Council of which I was then a member there was a discussion about enforcing the law against dog-owners who fail, in breach of a local by-law, to clean up their dogs' droppings when they foul the streets and other public places. When it was suggested that vigilant citizens could photograph the offenders and send the pictures to the enforcement officers for action, this was said to be impossible because to take their photographs without consent would be a criminal offence!

It is clear that taking or publishing photographs of people without their consent infringes an interest which the law should recognise and in principle protect. In human rights law terms, it falls within the scope of the right to privacy under art 8 of the European Convention. As the Strasbourg Court said in the *Von Hannover* case, "the concept of private life extends to aspects relating to personal identity, such as a person's name, or a person's picture",⁴⁹ and as Laws LJ put it in *Regina (Wood) v Commissioner of Police of the Metropolis*,⁵⁰ "an individual's personal autonomy makes him – should make him – master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image". As we saw earlier, English law already protects this interest by granting civil remedies, and in the limited case of "intimate images", criminal liability. And moving from the abstract to the practical, taking or publishing photographs of people without their consent, if less serious than physically assaulting them, is still behaviour which often causes embarrassment and hurt – even where the images are not "intimate".

The question here is whether the adequate protection of this aspect of the right to privacy requires protection by the criminal law in a wider range of cases. In principle, criminal liability is a product that should be sparingly applied – and not applied at all if a less drastic product – civil liability – can deal with the problem adequately. But can it? In many cases a civil action would be inadequate, for at least the following two reasons.

The first is that for many victims of photographic piracy a civil claim would be prohibitively expensive – at least as English law now stands today. With no legal aid available, a claimant with slender means would be dependent on finding a lawyer who would take the case under a conditional fee agreement (CFA). Lawyers who take cases on CFAs get no fee unless they win; but if they do, the fee to which they are entitled is a bigger one than if they had acted on the usual basis. At one time, a successful claimant could recover the "success fee", or "uplift", as part of a claim for costs against the defendant. But after Naomi Campbell had recovered £1,086,295.47 in costs from the *Daily Mirror* for the claim in which she had won only £3,500 damages⁵¹ the Strasbourg Court ruled that a system imposing such disproportionate costs on defendants put the United Kingdom in breach of their art 10 right to freedom of expression.⁵² This led Parliament to change the law to preclude the inclusion of success fees in orders for costs against defendants.⁵³ So as the often-quoted saying goes, "In England the courts are open to all – like the Ritz hotel".

49 *Von Hannover v Germany*, above n 19, at [50].

50 *Regina (Wood) v Commissioner of Police of the Metropolis*, above n 26, at [21].

51 See *Campbell v MGN (No 2)* [2005] UKHL 61, [2005] 1 WLR 3394.

52 *MGN Ltd v United Kingdom* [2011] ECHR 66.

53 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (UK), s 44.

The second is that in the present state of English civil law, such a civil claim will often be a risky gamble. The judge who decides the case will have to balance the claimant's right to privacy under art 8 of the Convention against the defendant's right to freedom of expression under art 10, both rights having equal value. Requiring such a balancing act makes sense when imposed on a legislator drawing up a detailed set of rules, but imposing it on judges charged with deciding individual cases does not, because equally good judges will perform the balancing act in different ways: as in *Campbell v MGN*, for example, where out of the nine Judges involved at different levels, five found that the defendant's art 10 rights prevailed and four – including the majority in the House of Lords – found that it was art 8. This makes the result of a civil action often highly unpredictable.

So for the sake of argument, let us now postulate a possible criminal offence of which the actus reus would be intentionally taking a photograph or film of another person, or publishing one already taken, knowing that the subject does not consent, or in circumstances where it would be reasonable to expect them to object; and then consider the potential problems, and whether it would be possible to deal with them by creating exceptions.

The first problem is that there are occasions when the unauthorised taking or publication of a photograph serves the public interest; as with the famous CCTV footage of Matt Hancock, when Health Secretary, breaking COVID lockdown rules, or the equally famous photos of Boris Johnson when Prime Minister taking part in lockdown-breaking parties in Downing Street. The proposed new offence would obviously need a "public interest" defence to cover taking or publishing photographs recording or disclosing the commission of a crime, or other forms of serious misconduct.

A particular aspect of that issue concerns the position of the police: both when taking photographs of other people and when other people are taking photographs of them. At present s 64A of the Police and Criminal Evidence Act 1984 gives the police a closely regulated power to photograph those who are detained in police stations, and any new offence would need to be subject to this and to any other similar statutory powers. The power of the police to photograph people in other circumstances is subject to the limits set out in case law, in particular *Regina (Wood) v Commissioner of Police of the Metropolis*.⁵⁴ As these are necessarily a little vague, in principle it would surely be better if their powers to do this were also clearly set out in a statute, which would be drafted to take precedence over any new criminal offence. Turning to the second issue, members of the public are at present generally free to take photographs of police officers. Some of these are uneasy at this practice and unwelcome photographers have sometimes been threatened with prosecution for the offence of obstructing the police;⁵⁵ though official guidance issued by a number of police forces accepts that the

54 *Regina (Wood) v Commissioner of Police of the Metropolis*, above n 26.

55 See for example Dominic Ponsford "Photographer is arrested taking pictures of police" *Press Gazette* (online ed, United Kingdom, 6 April 2006).

public have a right to do this.⁵⁶ Since 2009 this freedom has been limited by s 58A of the Terrorism Act 2000,⁵⁷ which (as we saw earlier) makes it an offence to do this if the picture "is of a kind likely to be useful to a person committing or preparing an act of terrorism". But despite disquiet expressed when this provision was enacted,⁵⁸ the police have so far avoided making heavy-handed use of it. This is as well, because the freedom of the public to take pictures of the police in action can be an important safeguard against police misconduct; it was a video taken by a passer-by, it should be remembered, that eventually led to the successful prosecution of the police officer for the murder of George Floyd in Minneapolis in 2020.⁵⁹ A general offence of the sort under discussion would need to be carefully drafted to take account of this.

Secondly, such an offence would be undesirably oppressive if it inhibited people taking photographs of scenes in which other people are incidentally included: like street scenes, for example, or beach scenes, or photographs of public events. So an exception would also be required to deal with cases such as this, and it would need to be drafted so as to distinguish between that type of case and cases such as *Rowe*, where a particular person present in a public place is deliberately targeted. Such an exception would be justified by the broad principle, recognised in the case law on art 8 of the Convention,⁶⁰ that a right of privacy only applies to situations where the person concerned has a reasonable expectation of privacy. For the same reason, a further exception would be required to cover the reproduction, without alteration or distortion, of a picture which the subject has chosen to make publicly available – as by permitting its inclusion on a website that is accessible on the Internet.

The possible creation of a general offence of the nature discussed in the last few paragraphs is one that is put forward for consideration – but consideration with due care. Regrettably, the most obvious feature of the criminal law in recent years has been the continual expansion of its scope, often through overbroad legislation hastily enacted. Before any new offence is created, two questions should be asked, as they should before the creation of any new criminal offence. First, how much harm does the behaviour really cause? And secondly, is it bad enough to justify expanding criminal liability to counter it?

56 See for example Metropolitan Police Service "Photography advice" <www.met.police.uk>.

57 Added to the 2000 Act by the Counter-Terrorism Act 2008 (UK).

58 Bone, above n 33.

59 "Teen who filmed George Floyd's murder given journalism award" *BBC News* (online ed, United Kingdom, 11 June 2021).

60 For a summary, see *Regina (Wood) v Commissioner of Police of the Metropolis*, above n 26, at [24]–[25] per Laws LJ.

