Judgment Title: Hickey & Anor -v- Sunday Newspapers Ltd

Neutral Citation: [2010] IEHC 349

Court of Criminal Appeal Record Number: 2006 4257 P

Date of Delivery: 08/10/2010

Court: High Court

Composition of Court:

Judgment by: Kearns P.

Status of Judgment: Approved

Neutral Citation Number: [2010] IEHC 349

THE HIGH COURT

2006 4257 P

BETWEEN

RUTH HICKEY

AND

JESSE ISAAC AGNEW (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND RUTH HICKEY)

PLAINTIFFS

AND

SUNDAY NEWSPAPERS LIMITED

DEFENDANT

JUDGMENT of Kearns P. delivered the 8th day of October, 2010

This is a case in which the first-named plaintiff seeks damages, including

exemplary and punitive damages, against the defendant newspaper both on grounds of alleged breach of rights of privacy enjoyed by her and her son, the second-named plaintiff herein, and also in respect of alleged defamation of her character in articles published by the defendant's newspaper, The Sunday World, on 14th May, 2006, and 27th August, 2006.

The first-named plaintiff, Ruth Hickey, was born on 19th April, 1974. Following completion of her secondary schooling, she studied music at Trinity College and at the College of Music in Dublin. For a number of years she worked as a classical musician and part-time teacher before switching careers to work as a full-time PR consultant with a training firm called The Communications Clinic.

On 15th February, 2006 she gave birth to a baby boy, Jesse Isaac, fathered by David Agnew, a professional musician, who at the time was married to the well-known entertainer, Adele King, more commonly known as 'Twink'. The relationship between Mr. Agnew and the first-named plaintiff had commenced sometime prior to Mr. Agnew's departure from the family home he shared with Ms. King in 2004. In 2004 Mr. Agnew moved into the first-named plaintiff's home in Castleknock. These events attracted widespread publicity in the media and understandably caused great hurt and offence to Ms. King, who spoke publicly on more than one occasion about her sense of outrage, not least, it would appear, because Mr. Agnew had fathered another child by a different woman some years previously. It emerged in evidence that Ms. King's annoyance included harassment of the first-named plaintiff which ultimately led to complaints being made by the plaintiff to the gardaí.

In August, 2005, the first-named plaintiff wrote an article for the magazine Social and Personal in relation to the spa resort at Powerscourt Springs which described a stay she had had there with "partner" David Agnew and in which they appeared photographed together. She became pregnant in 2005 and in September of that year gave details of the impending birth to a journalist, Mr. P.J. Gibbons, including the information that they expected the baby would be a boy, and the information thus imparted appeared in the Irish Examiner on 17th September, 2005. In the course of her evidence, the first-named plaintiff explained that, in discussion with Mr. Gibbons, she had decided to publicly release this information herself in an effort to control media speculation which had been ongoing since 2004.

Following the announcement by the first-named plaintiff and Mr. Agnew of the birth of their son on 15th February, 2006, a voicemail message containing a torrent of abuse from Ms. King against her husband and Ms. Hickey was left on Mr. Agnew's telephone. Whether this message was left on a mobile phone owned by Mr. Agnew or on the landline in the first-named plaintiff's home was not clarified in evidence. Nor was there evidence to clarify exactly when or in what circumstances this notoriously abusive voicemail message subsequently ended up on the internet. It was certainly there prior to the second publication complained of by the plaintiff because the article itself so states and this fact was not disputed at the trial. In evidence the first-named plaintiff stated that she had no knowledge as to how this had happened. In the course of the particular tirade delivered by Ms. King, the first-named plaintiff was referred to as a "whore" and her child as a "bastard". The general tone of the message may be deduced from one of its milder passages in which Ms. King's described Mr.

Agnew as a "fat, bald, middle-aged dickhead".

On 10th May, 2006, the first-named plaintiff and Mr. Agnew attended at the Registry of Births, Deaths and Marriages Office in Dublin's Lombard Street. They were photographed emerging from the office by a photographer employed by the defendant. In the photograph the first-named plaintiff is seen carrying some baby clothes and Mr. Agnew is shown carrying baby Jesse in a carrycot. The baby's features are not seen in the photograph.

According to the first-named plaintiff, a person present at the Registry Office pointed out the presence of the photographer to the couple. On being spotted the photographer rapidly drove off in a Nissan motor car and the first-named plaintiff was only able to secure a portion of the registration number. The plaintiff learned that the photographer in question was employed by the defendant and on 12th May, 2006 caused her solicitors to write a letter to the editor of The Sunday World protesting at the photographer's behaviour. The letter alleged, although no evidence was given in court in support, that the first-named plaintiff was being "kept under surveillance" by the media. The letter made clear the first-named plaintiff's view that this was a private occasion and that there was no legitimate public interest in the taking and/or publication of photographs or herself or her family engaged in private family activities.

On 14th May, 2006, under the byline "exclusive\Twink's Ex Shows Off Love Child" the photograph in question was published with an accompanying article by Eugene Masterson in which he stated that the photograph illustrated "Twink's estranged husband David Agnew and girlfriend Ruth Hickey making their first public appearance with their love child."

The article went on to describe the circumstance in which Mr. Agnew had left his family home after the "Panto Queen" found out about his affair with the first-named plaintiff. It also referred to the fact that he had a daughter from "a previous fling" and the remainder of the article contained remarks allegedly made by Ms. King, including a reference to the first-named plaintiff as a "whore" in a scrapped TV interview with the late Gerry Ryan.

In the aftermath of this publication, the first-named plaintiff's solicitors wrote a further letter to the editor of The Sunday World on 18th May, 2006, complaining both of the invasion of their client's privacy and alleging that the article written by Mr. Masterson had defamed their client by describing her as a "whore". The letter sought undertakings that the newspaper would:-

> *"(a) Cease surveillance of our client immediately*
>
> *(b) Refrain from publishing photographs of our client and/or her child engaged in private activities and in particular family activities*
>
> *(c) Refrain from defaming our client and in particular using the term "whore" in relation to her."*

By letter in reply dated 19th May, 2006, the defendant's solicitors stated, one might say somewhat disingenuously, the following:-

"(1) There is no surveillance of your clients ongoing and our clients will not cause any surveillance to be carried out on your clients.

(2) Our clients will not publish photographs of your clients and/or your clients child engaged in any private activities including any family activities

(3) Our client does not accept that it has written anything defamatory of your client but nonetheless confirms it will not defame your client in any fashion."

By further letter written on the first-named plaintiff's behalf on 8th June, 2006, her solicitors wrote:-

"We await hearing from you with your clients' proposals to provide an apology and compensation to our clients. Should we fail to receive a satisfactory response from you within ten days of the date of this letter proceedings will issue without further notice."

This appears to be the first occasion upon which compensation of a monetary nature was sought by the plaintiff in respect of the matters complained of. On 27th August, 2006, the defendant published a further article under the byline "Exclusive\Cheated Star's Rage Hits Net" which described in detail the "startling phone message" left by Ms. King for Mr. Agnew after she learned that the first-named plaintiff had given birth to a son. Accompanying the article was a further photograph which had also been taken on 10th May, 2006 of the first-named plaintiff and Mr. Agnew. This photograph was taken outside the precincts of the Registry Office as the couple prepared to enter a motor car. Again, Mr. Agnew is shown holding the carrycot containing the baby. None of the baby's features are visible in the photograph.

By letter dated 1st September, 2006, the first-named plaintiff's solicitors complained bitterly to the defendant that the breach of undertakings given on behalf of The Sunday World by their letter dated 19th May, 2006, had "*devastating consequences for Ruth Hickey and her baby son this week and into the future. Legal obligations, moral standards and respect for human dignity have all been subverted by your clients in the apparent belief that any consequence which may arise will be outweighed by the profits of scandalous journalism."*

By letter dated 4th September, 2006, the defendant's solicitors indicated that in their view there had been no breach of any undertakings and that they were prepared to accept service of any proceedings.

The evidence at the hearing at the trial consisted of that given by the first-named plaintiff. Mr Agnew did not either attend or give evidence and no evidence was called on behalf of the defendant. In evidence Ms. Hickey said she left the registration of her child until he was almost three months old as she did not wish to be sitting in a room full of people who might be curious or looking at her. Whilst in the Registry Office she observed another woman who had a mobile phone and who was looking at her and sending a text message. When they emerged from the Registry Office a man walking past on the street said that there was a photographer taking photographs. She looked across the road and

saw a man sitting in a Nissan Primera motor car double-parked beside a row of parked cars with a long camera lens pointing in her direction. Her partner put the baby into the back of the car and when she looked over again the photographer was still taking photographs before driving off. She said she rang a friend who is a photographer and who was able to identify the driver of the Nissan Primera as a Sunday World employee. She then caused the letter dated 12th May, 2006, to be sent on her behalf.

She was very upset on reading the article in The Sunday World on 14th May, 2006. She did not regard herself as having made a public appearance and found the reference to her baby as a "love child" derogatory. A reference in the article that she was wearing "colour co-ordinated pink and white" conveyed to her that she had planned a wardrobe for the occasion, a suggestion she found absolutely ridiculous. She thought it was disgusting to read that she had been referred to as a "whore". Her baby was planned and wanted and she found the newspaper piece both cheap and nasty and highly offensive. She said she had to visit her GP as a result and take some medication.

She said that all she wanted was for the media to stop taking photographs of her and to stop following her and that she could be left alone. She had believed the defendant's letter of 19th May, 2006, containing undertakings not to publish photographs of her or her child would be honoured.

She was even more upset by the second article in those circumstances.

In cross-examination she accepted that Ms. King was enraged by her affair with her husband and that both Ms. King and Mr. Agnew were well known public figures. She was aware that Ms. King had spoken publicly about her hurt when Mr. Agnew moved in with her. She felt that Ms. King had every right to express her hurt but felt she had expressed it to an excessive level and that it did not need to be repeated in the newspapers for everyone to read.

She agreed that in August, 2005 she had posed for photographs in an article she wrote for Social and Personal which referred to various treatments which her partner, Mr. Agnew had received in Powerscourt Springs. She accepted she spoke with Mr. P.J. Gibbons prior to the publication of an article by him in the Irish Examiner in September, 2005, and that she had told Mr. Gibbons that she was expecting a baby boy. He had convinced her that it would be good to confirm that she was pregnant so as to control the information on the topic. She hoped by doing so that she would not be subjected to further articles similar to those which had already been published and which speculated as to whether or not she was pregnant. She accepted that the photographs which appeared in the two Sunday World articles did not show her son's face and that he was unidentifiable. She accepted she had written letters to other newspapers complaining about surveillance, but the Sunday World was the only newspaper which published photographs of her and her son. She said she had no idea how Ms. King's voicemail message got into the public domain but accepted that it could be fairly described as a "tirade of abuse".

SUBMISSIONS

On behalf of the plaintiffs, it was submitted that although the photographs of the plaintiffs were taken in a public place, the context in which they were used and

linked to the articles amounted to an unacceptable intrusion into their private lives. That the right to privacy is an unenumerated constitutional right had been made clear in a number of Irish cases, originating in *Kennedy v. Ireland* [1987] 1 I.R. 587 and continuing through *Norris v. The Attorney General* [1984] I.R. 36 and, more recently, *Herrity v. Associated Newspapers (Ireland) Ltd* [2009] 1 I.R. 316.

The right to privacy is, it was submitted, a right to be left alone and derives in large measure from the commitment contained in the preamble to the Constitution which sets out a clear commitment to maintaining the dignity of the citizen. It was submitted that nothing could have been more intrusive and damaging to the first-named plaintiff's dignity than the "merciless contempt" manifested towards her by the two publications in question. As regards the test to be applied to determine if information is or is not private, Counsel for the plaintiffs adopted the test from the decision of the House of Lords in *Campbell v. MGN Limited* [2004] 2 A.C 457, which is to ask whether a reasonable person of ordinary sensibility, if placed in the same situation as the subject of the disclosure, rather than its recipient, would find the disclosure offensive. In that case the plaintiff had been photographed in a public place but was nonetheless awarded damages by way of compensation. Similarly, in *Von Hannover v. Germany* [2004] E.C.H.R 294 publication of photographs of Princess Caroline of Monaco carrying out mundane activities in public such as horseback riding, shopping, dining at a restaurant and cycling were considered to be intrusions upon her privacy.

Insofar as the allegation of defamation was concerned, it was submitted that to ascribe the word "whore" to any woman is certainly capable of being defamatory and should be seen by the Court as such, not least as meaning, as pleaded in the statement of claim, that the first-named plaintiff engaged in sexual acts other than in furtherance of a loving relationship. It was submitted that that was the particular meaning that any ordinary woman or reader would take from the use of the word in the context in which it was to be found in the publications. The defence which had been offered that it was no more than vulgar abuse was a defence more appropriate to a case of slander than to a newspaper article which is published and printed after careful consideration.

In response, counsel on behalf of the defendant accepted that the right to privacy is one of the unenumerated rights recognised under Article 40.3 of the Constitution. However, the submissions on the part of the plaintiffs altogether failed to recognise that freedom of expression was also afforded recognition in the Constitution under Article 40.3.1 and Article 40.6.1. It was recognised by the Supreme Court in *Mahon v. Post Publications* [2007] 3 I.R. 338 that a balancing exercise must be carried out by any court between these rights, similar to the balancing exercise which is required under Articles 8 and 10 of the European Convention on Human Rights. The right of freedom of expression does not require justification by reference to public interest in any given case. It is its own public interest.

That privacy rights will outweigh freedom of expression in rare cases only was made clear by Dunne J. in *Herrity v. Associated Newspapers (Ireland) Ltd*. [2009] 1 I.R. 316. In that case the learned trial judge had instanced cases where the right to privacy might prevail over the right of freedom of expression,

offering by way of example, proposed publication of details of a diagnosis of serious illness in respect of an individual, bearing in mind the nature of the confidential doctor patient relationship or, as in the case before Dunne J., a case in which private telephone conversations had been accessed unlawfully.

It was submitted that this was manifestly not a case where the defendant had "gone through the plaintiff's front door". The plaintiffs were attending a public office in a public place and performing a public function. The cases of *Campbell v. MGN Limited* [2004] 2 A.C. 457 and *Von Hannover v. Germany* [2004] E.C.H.R 294 were clearly distinguishable and had their own special features. Were the Court in the instant case to hold against the defendant, it would have the extraordinary consequence that no public figure could be photographed, for example, attending a funeral or performing any other function in a public place.

The defence relied in particular on a decision of the Court of Appeal in New Zealand in *Hosking v. Runting* [2005] 1 N.Z.L.R 1, the facts of which were remarkably similar to the facts of the present case. Furthermore, the plaintiffs did not establish in evidence that there had been any ongoing surveillance of the plaintiffs or either of them. There was no evidence of any other photographs being taken or published by the defendant and no evidence of the plaintiffs being followed or bothered by any photographer employed by the defendant. Furthermore the photographs did not disclose anything that could not have been seen by any other person who turned up at the same time. The existence of the second-named plaintiff, his age and identity of his parents were already a matter of public record and the first-named plaintiff accepted that she had spoken to a journalist with the specific intention of publicity being accorded to the very matters in respect of which she now sought privacy. Nothing in the photographs published identified the second-named plaintiff or exposed that child to risk or danger of any sort whatsoever.

In relation to the alleged defamation, the context and circumstances of publication of the words complained of had to be taken into account. Words which on their face appear innocent can be defamatory when placed in context and the converse is also true. In this case the article itself made the context clear. It was not direct speech but rather reported speech on the part of Ms. King. It was plain from the article that Ms. King was extremely upset by the affair between her husband and the first-named plaintiff. No ordinary reasonable reader could believe, on reading Ms. King's tirade, that it was being seriously suggested that the first-named plaintiff was a prostitute. Ms. King was clearly expressing her anger in strong, perhaps offensive language, about what had occurred between her husband and the first-named plaintiff.

DECISION

It is readily to be understood that in an increasingly technological age people generally are more and more concerned about unwanted surveillance from external sources, be it government agencies, the media, corporate or private interests. That a right to privacy exists in Irish law, the breach of which entitles an injured party to damages, is indisputable. Such was the case in *Kennedy v. Ireland* [1987] I.R. 587. There, however, the situation was simple and straightforward, because the unlawful surveillance of telephone communication in that case did not have to be placed in the balance with the right of freedom of

expression.

The jurisprudence of this jurisdiction as to where the line is to drawn between these two competing rights is an evolving process and judges must be careful to note where their powers begin and end in this respect. As stated by Fennelly J. in *Mahon v. Post Publications Ltd.* [2007] 3 I.R. 338 at pp. 374-375:-

> *"The courts do not pass judgment on whether any particular exercise of the right of freedom of expression is in the public interest. The media are not required to justify publication by reference to any public interest other than that of freedom of expression itself. They are free to publish material which is not in the public interest.*
>
> *The right of freedom of expression extends the same protection to worthless, prurient and meretricious publication as it does to worthy, serious and socially valuable works. The undoubted fact that news media frequently and implausibly invoke the public interest to cloak worthless and even offensive material does not affect the principle."*

Fennelly J. referred to *R. v. Central Independent Television Plc*. [1994] Fam. 192 in which Hoffmann L.J. said that:-

> *"Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute."*

Similarly, Lord Woolf C.J. said in *A. v. B. plc* [2003] QB 195 at p. 205 that:-

> *"Any interference with the press has to be justified because it inevitably has some effect on the ability of the press to perform its role in society. This is the position irrespective of whether a particular publication is desirable in the public interest. The existence of a free press is in itself desirable and so any interference with it has to be justified."*

Thus while it is clear that newspapers are free to publish all sorts of matters regardless of public interest, the right to freedom of expression, like the right to privacy itself, is not an unqualified right. Restricting freedom of expression for privacy considerations requires circumstances which can be very clearly identified. This was emphasised by O'Hanlon J. in *M. v. Drury* [1994] 2 I.R. 8. That was a case in which the court was asked to restrain the publication of allegations by a father that his marriage had broken down by reason of the adulterous relationship of his wife with a priest. Having set out the passage from *R. v. Central Independent Television Plc*. that is cited above, O'Hanlon J. continued at pp. 16-17:-

> *"While we are undoubtedly administering a different legal system in this jurisdiction, underpinned by the constitutional guarantees, I am of opinion that the general approach supported by the judgment of Hoffman L.J. is to be recommended in cases where the freedom of the press is sought to be circumscribed on the basis that publication may be a source of distress to persons named or even to their children who are totally innocent of blame in matters alleged against one or both of their parents.*
>
> *There are extreme cases where the right to privacy (which is recognised as one of the personal rights, though unspecified, guaranteed protection by the Constitution…) may demand the intervention of the courts. An example might be the circumstances illustrated in Argyle v. Argyle [1967] Ch. 302 where confidential communications between husband and wife during their married life together, were protected against disclosure. Generally speaking, however, it seems desirable that it should be left to the legislature, and not to the courts to "stake out the exceptions to freedom of speech" (in the words of Lord Denning).*
>
> *In the present case the court is asked to intervene to restrain the publication of material, the truth of which has not as yet been disputed, in order to save from the distress that such publication is sure to cause, the children of the marriage who are all minors. This would represent a new departure in our law, for which, in my opinion, no precedent has been shown, and for which I can find no basis in the Irish Constitution, having regard, in particular, to the strongly-expressed guarantees in favour of freedom of expression in that document".*

In *Herrity v. Associated Newspapers (Ireland) Ltd*. [2009] 1 I.R. 316 Dunne J. carefully examined the circumstances in which a claim based on privacy will overcome a claim based on freedom of expression. She also considered the nature of matters which might warrant the description of being 'private'. Having found in that case that the right to privacy outweighed freedom of expression, essentially because the case concerned the publication of telephone messages which had been obtained in breach of the express prohibition imposed by s. 98 of the Postal and Telecommunications Services Act 1983, she noted at p. 340 that:-

> *"One must bear in mind that the provisions of s. 98 of the Act of 1983 are there to protect the privacy of an individual's telephone conversations. No one expects to see their private telephone conversations printed in a newspaper to excite the prurient curiosity or to provide amusement for the paper's readers.*
>
> *There may be other circumstances where the right to privacy prevails. For example, could a newspaper be entitled to publish details of a diagnosis of serious illness in respect of an individual bearing in mind the nature of the confidential doctor patient relationship? What if the individual was a well known public figure? Would it make a difference if the individual was a celebrity or, say, a senior politician? I would have thought that the circumstances*

> *which could justify a publication of such private information would seldom arise and only if there was some clear, demonstrable public interest".*

It is thus far from easy to determine to determine where the parameters to the right of privacy may lie when placed in balance with the right of freedom of expression. One intuitively feels that a right of privacy is less easily established in public places where a person, in the words of T.S. Eliot, has had time "to prepare a face to meet the faces that you meet". That is particularly the case when one is performing a function of a public nature which I am satisfied the plaintiff and Mr Agnew were performing on this occasion. This was not a private celebration or event in the plaintiff's own home or at some other location to which a legitimate expectancy of privacy attached. That is not to say, however, that there will never be occasions where a person photographed in a public place can successfully invoke privacy rights.

In this context I am satisfied, however, that the two cases upon which the plaintiffs place much reliance are of no great assistance to their case. In *Von Hannover v. Germany* [2004] E.C.H.R 294 the European Court of Human Rights did of course state that the publication of photographs taken in public places could in certain circumstances constitute a breach of privacy rights under Article 8 of the Convention. However, as appears from paragraph 68 of the court's judgment, the court was particularly impressed in that case by the fact that the photographs in question were part of a campaign of harassment of a public figure and by the fact that a number of the photographs of the applicant were taken from a public place while she was in a club to which access by journalists and photographers was strictly regulated. The case is not an authority for the proposition that every occasion on which an unwanted photograph is taken or published of a private person in a public place constitutes a breach of privacy. As the European Court has repeatedly emphasised, all the circumstances of the individual case have to be taken into account.

Similarly, the facts of *Campbell v. MGN Ltd*. [2004] 2 A.C. 457 make that case clearly distinguishable from the present case. In Campbell, the House of Lords found that the publication of photographs of the plaintiff leaving a meeting of Narcotics Anonymous was in the particular circumstances a breach of privacy although they were taken in a public place. It determined that the publication of information relating to the plaintiff's treatment was a breach of privacy because an assurance of privacy, confidentiality and anonymity was essential to the type of treatment that the plaintiff was undergoing, such that a person in her position would find disclosure highly offensive and might also be deterred from continuing with the therapy, thereby causing a set-back to recovery. In that case Baroness Hale stated at p. 501:-

> *"Publishing the photographs contributed both to the revelation and to the harm that it might do. By themselves, they are not objectionable. Unlike France and Quebec, in this country we do not recognise a right to one's own image: cf Aubry v Éditions Vice-Versa Inc [1998] 1 SCR 591. We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private. If this had been, and had been*

> *presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint. She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life. It may not be a high order of freedom of speech but there is nothing to justify interfering with it. (This was the view of Randerson J in Hosking v Runting [2003] 3 NZLR 385, which concerned a similarly innocuous outing; see now the decision of the Court of Appeal [2004] NZCA 34.)."*

I accept in this case the submission of counsel for the defendant that the most relevant decision for this Court to consider with regard to the publication of the photographs is that of the Court of Appeal in New Zealand in *Hosking v. Runting* [2005] 1 N.Z.L.R. 1. In that case the plaintiffs had infant twin daughters. One of the plaintiffs was a presenter on national television and was widely known in the community. Their daughters were photographed by the first defendant on a public footpath. Several days later the plaintiffs were informed that the photographs had been taken and that they had been commissioned by the second defendant, a magazine publisher, with a view to publication in one of its magazines. The plaintiffs made it clear to the publisher that they strongly opposed the publication of the photographs and expressed their concern about the risk to the children's safety should the photographs be published. The plaintiffs issued proceedings alleging that the taking of the photographs and/or the publication without consent amounted to a breach of their children's right to privacy.

It is important to note that the legal background in New Zealand is not dissimilar to that applying in this jurisdiction. In fact, the Court of Appeal expressly recognised that Article 17 of the New Zealand Bill of Rights was couched in similar terms to Article 8 of the European Convention of Human Rights. In delivering the leading judgment of the court, Gault P. said at paras. 125-127:-

> *By living in communities individuals necessarily give up seclusion and expectations of complete privacy. The concern of the law, so far as we are presently concerned, is with widespread publicity of very personal and private matters. Publication in the technical sense, for example as applies in defamation, is not in issue.*
>
> *Similarly publicity, even extensive publicity, of matters which, although private, are not really sensitive should not give rise to legal liability. The concern is with publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned. The right of action, therefore, should be only in respect of publicity determined objectively, by reference to its extent and nature, to be offensive by causing real hurt or harm. In the Restatement the requirement is "highly offensive" to a reasonable person'; the formulation expressed in Australia by Gleeson CJ (drawn from the United States cases) and referred to by the English Court of Appeal in Campbell imbues the reasonable person with "ordinary sensibilities". In similar vein the Privacy Act, in s 66 defining*

interference with the privacy of an individual, requires "significant" humiliation, loss of dignity or injury to feelings.

We consider that the test of highly offensive to the reasonable person is appropriate. It relates, of course, to the publicity and is not part of the test of whether the information is private.

The court went on to point out that, even where material fell within this definition of private information, publication could be justified by a test of legitimate public concern. Then, dealing with the facts of the case in terms that have a resonance in the instant case, Gault P. stated at paras. 161-165:-

"The real concern of the appellants as parents relates not to the publication of photographs of their two children in the street, but to publication of the photographs along with identification and the association of them with a "celebrity" parent. We accept the sincerity of their anxiety for the wellbeing of the children and their concern at the prospect of recurring unwanted media attention. They wish to protect the freedom of the children to live normal lives without constant fear of media intrusion. They feel that if publication of the present photographs is prevented there will be no incentive for those who, in the future, might pursue the children in order to capture marketable images…

We are not persuaded that a case is made out for an injunction to protect the children from a real risk of physical harm. We do not see any substantial likelihood of anyone with ill intent seeking to identify the children from magazine photographs. We cannot see the intended publication increasing any risk that might exist because of the public prominence of their father.

The inclusion of the photographs of Ruby and Bella in an article in New Idea! would not publicise any fact in respect of which there could be a reasonable expectation of privacy. The photographs taken by the first respondent do not disclose anything more than could have been observed by any member of the public in Newmarket on that particular day. They do not show where the children live, or disclose any information that might be useful to someone with ill intent. The existence of the twins, their age and the fact that their parents are separated are already matters of public record. There is a considerable line of cases in the United States establishing that generally there is no right to privacy when a person is photographed on a public street. Cases such as Peck and perhaps Campbell qualify this to some extent, so that in exceptional cases a person might be entitled to restrain additional publicity being given to the fact that they were present on the street in particular circumstances. That is not, however, this case. We are not convinced a person of ordinary sensibilities would find the publication of these photographs highly offensive or objectionable even bearing in mind that young children are involved. One of the photographs depicts a relatively detailed image of the twins' faces. However, it is not sufficient that the circumstances of the photography were considered intrusive by

> *the subject (even if that were the case, which it is not here because Mrs Hosking was not even aware the photographs had been taken). The real issue is whether publicising the content of the photographs (or the "fact" that is being given publicity) would be offensive to the ordinary person. We cannot see any real harm in it."*

The court thus concluded that the intended publication of the photographs was not even *prima facie* a breach of privacy.

Overall, therefore, I am not satisfied that the publication of these photographs amount to breaches of privacy and central to my conclusion are the following considerations:-

> (a) The photographs were taken when both the photographer and the plaintiffs were in a public place and performing a routine public function;
>
> (b) The photographs do not disclose anything that could not have been seen by anyone else who turned up at the Registry Office at the relevant time;
>
> (c) The existence of the second-named plaintiff, his age and the identity of his parents are already matters of public record. The defendant could have gone into the Registry Office, found the information, and published it;
>
> (d) Nothing in the publication exposes the plaintiffs or either of them to any risk of physical harm from any person with ill–intent;
>
> (e) No evidence was adduced to establish the contention that a campaign of surveillance had been carried out on the first-named plaintiff, her partner or child;
>
> (f) The features of the second-named plaintiff were not recognisable from the photograph. Furthermore, the child himself could not have suffered any hurt or humiliation from any aspect of the two publications having regard to his age at the relevant time;
>
> (g) The plaintiffs were at the relevant time performing, in my view, a public function which they were required to fulfil. No evidence was placed before the Court to suggest that is was necessary to bring the child to the Registry Office on the occasion in question;
>
> (h) The first-named plaintiff and her partner themselves elected to bring the child to the Registry Office. Furthermore the first-named plaintiff had spoken to a journalist with the specific intention of publicity being accorded to the very matters in respect of which she now seeks to claim privacy.
>
> (i) The voicemail message reproduced in the defendant's

newspaper was already posted on the internet and was in the public domain.

The consideration mentioned at (h) above is important because the most significant element of hurt and distress may readily be understood as deriving from the juxtaposition of the photographs with the accompanying text which is undoubtedly offensive to a high degree, notwithstanding that it consists of a repetition of abusive utterances from an angry Ms. King. It is thus particularly relevant to inquire if the plaintiff had herself sought or contributed to any publicity in respect of the matters complained of. In *Woodward v. Hutchins* [1977] 1 W.L.R. 760 the Court of Appeal discharged an injunction that had been granted to a well known group of singers against their former press officer to restrain him from publishing articles which dealt with aspects of their private life. Lord Denning noted (at pp. 763-764) that the singers had actively sought publicity:-

> *"If a group of this kind seek publicity which is to their advantage, it seems to me that they cannot complain if a servant or agent of theirs afterwards discloses the truth about them."*

Similarly in *Lennon v. News GroupNewspapers Ltd*. [1978] F.S.R. 573, the fact that both the claimant and the second defendant had discussed their relationship in public was held by the Court of Appeal to mean that the relationship had ceased to be their own private affair. The fact that the material in question was different from that which the couple themselves had revealed was not regarded as significant.

I am thus satisfied that the first-named plaintiff has herself actively sought publicity from the press and media concerning her partnership with Mr. Agnew and the birth of their child. She has herself made public statements concerning her family life and taken part in photo shoots and interviews for public consumption. Their relationship had by the time of the relevant publications become well known to the Irish public. In evidence the first-named plaintiff accepted that Ms. King was entitled to speak publicly about the hurt and distress that she felt as a consequence of her affair with Mr. Agnew, which is a feature of this case which places it in a somewhat different context from other cases on this topic. I would have taken a different view of this case had the plaintiff herself maintained her silence and if the disclosure of the voicemail message had emanated in the first instance from the defendant newspaper. As it was, the voicemail message was already in the public domain via the internet, a fact which highlights the very dangers and concerns to which modern technology gives rise and to which I referred at the outset of my judgment. As Fennelly J made clear in *Mahon*, there is an inherent illogicality in asserting rights of privacy over material which is already in public circulation and which was, I would add in this case, notoriously so.

I cannot therefore see anything in this case which has been placed in the balance by or on behalf of the first-named plaintiff to outweigh the right of freedom of expression to which the defendant is entitled.

Were I to hold otherwise, it would represent a radical ratcheting up of the right to privacy at the expense of the right of freedom of expression to a degree which, in my view, should more properly be the subject matter of legislation. A finding in favour of the plaintiffs would also give rise to a situation where a

newspaper might feel itself inhibited from publishing a photograph of any public person attending, for example a funeral, or leaving or entering a court building or polling station. In any of these situations it is not difficult to imagine circumstances where a claimant could invoke some consideration of privacy.

Insofar as the allegation of defamation is concerned, I find the following passage from "Gatley on Libel and Slander" to be particularly helpful:-

> *"The same principles (referring to context and circumstances of spoken words) would apply to vulgar abuse, the question being whether the circumstances in which the words were used would convey a defamatory implicated to those who use them. Insults or abuse are not actionable as defamation though they may be subject to some criminal sanction as tending to a breach of the peace or public order. In some cases the words may so clearly be insults or abuse that there are probably no circumstances in which they could be understood to be defamatory, in other cases it will be a question whether the circumstances make it plain to the hearers that no defamatory implication was intended."*

The plaintiff in this case makes a claim to damages in defamation arising out of the article of 14th May, 2006, in which she maintains that the use of the word "whore" means and was understood to mean:-

> (a) That the first-named plaintiff was a prostitute;
>
> (b) That the first-named plaintiff engaged in sexual acts for financial rewards;
>
> (c) That the first-named plaintiff engaged in sexual acts other than in furtherance of a loving relationship.

However, as Gatley (11th Ed) states at par. 3.29:-

> *"It is necessary to take into consideration not only the actual words used but the context of the words."*

In this particular case the article itself makes the context clear. It is the reported speech on the part of Ms. King who is plainly extremely angry at the affair between her husband and the first-named plaintiff. While the repetition of something said by another person affords no defence to a newspaper who publishes a defamation, and while the word in question is clearly capable of being defamatory, I am quite satisfied that any ordinary or reasonable reader, on reading Ms. King's comment, would simply see it as vulgar abuse expressed in strong and offensive terms. Indeed during the course of the hearing, the first-named plaintiff's counsel effectively confined themselves to contending that the expression complained of in reality meant that the first named plaintiff engaged in sexual acts other than in furtherance of a loving relationship.

I am satisfied, therefore, that while in other circumstances the deployment of such an expression could constitute a serious defamation it does not do so in the context in which it appeared in this case.

Finally, I have given serious consideration as to whether the "undertakings" contained in the defendant's letter dated 19th May, 2006, created some form of

contractual obligation the breach of which *per se* would entitle the plaintiffs to damages. A close reading of those supposed "undertakings" persuades me, however, that they were of little real value or benefit to the plaintiffs. They appear to me, notwithstanding the comfort apparently derived from them by the first-named plaintiff, to have been formulated with the assistance of legal advice to leave the defendant at large to the greatest degree possible.

There are many strange and unexplained aspects of this case which I have found disquieting, but on my interpretation of the applicable legal principles the defendant is entitled to a dismiss of the plaintiffs' claims. In making such an order, and prior to hearing any application which may follow in respect of costs, I feel compelled to state that the exercise in which the defendant newspaper engaged in respect of these two publications represented the lowest standards of journalism imaginable. It is a regrettable fact of life that such material sells newspapers.