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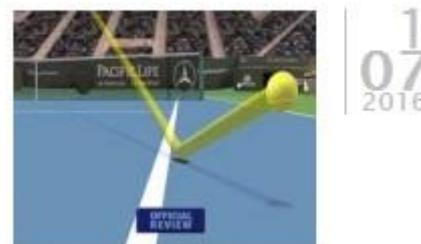
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## The Sun and Mail Websites and Pippa Middleton: Double Fault – Sarah Webb and Emily Gailey

It appears that the press have learned nothing after the Daily Mail lost the Paul Weller appeal last November ([2015] EWCA Civ 1176). Whilst that case involved the photographing of children, the Court of Appeal reasserted the five criteria to be considered as to whether the use of a photograph breaches an individual's Article 8 rights.



- Contribution to a debate of general interest;
- How well known is the person concerned and what is the subject of the report;
- The prior conduct of the person;
- The content, form and consequence of the publication;
- The circumstances in which the photographs were taken

The press's failure to adhere to these criteria is demonstrated when looking at the Mailonline photographs of Pippa Middleton at Wimbledon, crossing her legs, under the headline *"Not Very Regal – Pippa Middleton Suffers Wardrobe Malfunction"*. Ms Middleton, who was wearing a knee-length dress, was subjected to a string of photographs appearing in the Mail of her seating herself and crossing her legs.

The Sun was even more blatant when publishing the photograph; their article, under the headline *"Blimey! Pippa Middleton teases tennis fans with Sharon Stone moment at Wimbledon"*, makes direct reference to the infamous Sharon Stone scene from *"Basic Instinct"*, and also maintain that Ms Middleton deliberately crossed her legs in such a way as to expose her thighs.

That Ms Middleton is in a public place is obvious from the photographs but this factor is not determinative of her Article 8 rights and these prurient opportunistic photographs are a shocking intrusion into her privacy.

The process by which this photograph has been published is also likely to give rise to a breach of Ms Middleton's data protection rights. It is well established that a photograph can constitute personal data, and consequently the taking, storing, enhancing and transmitting of such photographs amounts to data processing within the meaning of section 1(1) of the Data Protection Act 1998 ("DPA").

This has important ramifications for publisher, the photographer and the relevant photographic agency (if applicable). Each would have to demonstrate that their data processing did not fall foul of any of the provisions in the DPA. The publishers of Mailonline may seek to argue that they can rely on the journalistic exemption under s. 32(1) DPA which requires that "the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest."

In these circumstances, it is all but impossible to see how this would be the case.

Consequently, no exemption would apply and in the absence of such an exemption the data controller would have to demonstrate that one of the conditions of Schedule 2 DPA would apply in order for the processing to be lawful. As these comprise scenarios where, for example, the subject has given their consent, or is where the processing is necessary for compliance with a legal obligation, or in the administration of justice. It therefore seems likely that the process by which these photographs came to be published amounts to a breach of the DPA.

Finally, IPSO's Editors' Code may also have been breached. Photographing Ms Middleton without her consent, could be in breach of Section 2(iii), which stipulates that "it is unacceptable to photograph individuals without their consent in public or private places where there is a reasonable expectation of privacy". We would suggest that she should have a reasonable expectation that a fleeting sight of what is under her dress should remain private.

The Code also provides that the press must avoid prejudicial or pejorative references to an individual's sex. The Mail puts the blame for the photograph on "a wardrobe malfunction" when it was no such thing. The Sun accuses Ms Middleton of being deliberately provocative in circumstances where there is nothing to suggest that Ms Middleton was aware that the cameraman, who was there to photograph the tennis, had a long lens focused on her. The photograph of her crossing her legs together with the headlines is highly pejorative and renders any woman in a dress at the mercy of opportunistic photographers and publishers.

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