

# Clara Cordero on Kate Provence Pictures

*Clara Cordero Alvarez teaches Private International Law in Madrid (Universidad Complutense). She has written her PhD on the protection of the right to honour, to personal privacy and image.*

Nowadays, almost all the people around the world have already heard something about the new scandal that has arisen concerning the British royal family: the topless photos of Catherine, Duchess of Cambridge. The pictures – that were taken when she was privately sunbathing during a vacation in a chateau belonging to her husband's uncle in Provence- were initially spilled into public view by the French magazine Closer, but Kate's private images were rapidly spread all over the world. New photos were published later by different tabloids in several Member States, such as the Italian gossip magazine Chi (owned by the same company that had previously published the pictures in France) and the potential harmful content was uploaded in Internet. This is another example where the violations of personality rights are connected with acts in which the alleged offender exercises the fundamental freedom of expression or information.

In this particular case, from a civil perspective, the claimants exclusively asked a French court to stop further publication of the pictures. Based on article 9 of the French Civil Code they were seeking an injunction barring any future publication – online or in print – by the French magazine of the Duchess' topless photographs. They neither have pushed for existing copies of the magazine to be withdrawn from sales points nor for financial damages. The court has partially accepted the claimants' request distinguishing between photos published on the internet and photos published in the hard copy of the tabloids. Regarding the damages already occurred, the court has barred the defendant from assigning or forwarding all digital forms of the pictures to any third party, ordering to surrender all of them to the plaintiffs. However, no action was taken regarding the potential future publication of these images by the defendant.

Although injunctions to halt or prevent damages are subject to Private Int'l Law general rules on non-contractual obligations, their specific notes in this field must be highlighted. The spatial scope of injunctions to halt or prevent

damages -contained either in a provisional measure or in a final judgment on the merits- is linked to the basis on which the jurisdiction of the court of origin is founded. In this case, an unlimited jurisdiction based on the defendant's domicile -article 2 Brussels I Regulation- or on the place of origin -the establishment of the publisher, in accordance with article 5.3- (both of them available in this case), allows obtaining injunctions to halt or prevent damage in any Member State where these damages could be suffered. Nevertheless, in this case the ruling is limited to French jurisdiction. If the court had resorted to this possibility the main problem would be the eventual recognition and enforcement of the French judgment in each EU Member State in which the publication had been distributed and where the victim was known (for example, Italy, Ireland or Denmark where several tabloids have already published the controversial photos), apart from the potential circulation of these photos on the Internet.

The freedoms of speech and information tend to prevail in most legal systems over rights related to the protection of privacy provided that certain conditions are met. Notwithstanding this finding, the different balance between these fundamental rights determines that their respective scopes -and the consideration of certain acts as illegitimate- vary deeply from one Member State to another. In this field, public policy plays a decisive role not only in the application of the provisions on choice of law but also on the recognition and enforcement of judgments. In particular, the recognition and enforcement of decisions-especially in international defamation cases- public policy has a particular relevance as the main cause to deny recognition and enforcement of a judgment (art. 34.1 Brussels I Regulation). Although within the EU the use of public policy not to recognise a decision originating in another Member State should be exceptional in practice, since all Member States belong to the European Convention on Human Rights and they are all bound by the Charter of Fundamental Rights, such a possibility is still available. In fact, the Italian newspaper that published recently the new photographs has already expressed that, in accordance with the Italian law, the publication of these photographs does not imply a violation of the Duchess right to privacy and that they are protected by the freedom of press. This only an example, since the number of countries -Member and not Member of the EU- in which the photographs could be distributed using Internet, is potentially numerous.

This scenario would not improve if a European uniform rule of conflict of

laws in this field is finally established (Rome II Regulation) without a parallel revision of the recognition and enforcement provisions of the Brussels I Regulation. Looking at the Proposal of December 2010 for the review of the Brussels I Regulation, the recognition and enforcement provisions establish that the judgments arising out of disputes concerning violations of privacy and rights relating to personality will be excluded from the abolition of exequatur and subject to a specific procedure of enforcement (public policy being kept as reason for the refusal of recognition). Hence, in the current circumstances, victims could only ensure the success of their actions in multiple States by bringing their claims before each national jurisdiction where damages occurred (*locus damni*) with limited jurisdiction (*Shevill*, latter confirmed by *eDate*).

In conclusion, as long as the unification of conflict of laws rules in personal rights within the EU is pursued -in search for a common balance between the interests in conflict-, the exclusion of recognition and enforcement of the decisions in this field from Brussels I would seem clearly detrimental for victims. For the time being, the Duchess will therefore would have to require a large number of courts intervention to achieve a complete and effective protection.