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# 'The Shadowland between Improbability and Unreality'

Julian Petley

In February 2019 the *Mail on Sunday* published five articles about the Duchess of Sussex, Meghan Markle, some of which contained parts of a letter she had written to her father. She sued the paper's owner, Associated Newspapers, for misusing private information, infringing copyright and breaching the Data Protection Act. Thus started a legal battle which would last for nearly three years, in which the Associated titles and their press allies did their utmost to undermine the Duchess's credibility at every stage of their reporting of the case.

Indeed, so inaccurate and distorted was much of this reporting that it is necessary to begin with a recital of the actual facts of the case.

In January 2021 Markle sought 'summary judgement' that Associated had breached her copyright and privacy. This meant that her lawyers asked a judge to find in her favour without a trial, on the grounds that Associated had not offered any adequate defence. Associated's case was that (a) what it had published was in the public interest; (b) the Duchess had always intended the letter to be made public; and (c) it had been co-written by Jason Knauf of the Kensington Palace Communications Team, so the copyright did not reside solely with her. It also argued that if a full trial was held, fresh evidence was likely to emerge that would vindicate its claims

On 11 February, Lord Justice Warby concluded that Markle was entitled to summary judgement on the claim for misuse of private information and on the key aspects of the claim for copyright infringement, although in the latter case some minor issues relating to Knauf remained to be tried. In his view, Associated had no real prospect of successfully defending the misuse of private information claim, and there was no compelling reason for a trial of that claim.

In Warby's view, the letter

> was a communication between family members with a single addressee. Precautions were taken to ensure that it was delivered only to him. It was, in short, a personal and private letter … The claimant had a reasonable expectation that the contents of the letter would remain private. The articles interfered with that reasonable expectation.

Warby also found that the publication of the letter infringed Markle's copyright, and that the matter of Knauf's involvement, 'whatever it proves to have been' was of only 'minor significance in the overall context'. As the *Mail* titles and other friendly newspapers had represented the Knauf business as all but destroying Markle's case, it is worth noting what Warby had to say about it:

> The defendant's factual and legal case on this issue both seem to me to occupy the shadowland between improbability and unreality. The case is contingent, inferential and imprecise. It cannot be described as convincing, and seems improbable. It lacks any direct evidence to support it, and it is far from clear that any such evidence will become available. It is not possible to envisage a Court concluding that Mr Knauf's contribution to the work as a whole was more than modest. The suggestion that his contribution generated a separate copyright, as opposed to a joint one is, in my judgment at the very outer margins of what is realistic.

Altogether unsurprisingly, his words were not widely reported.

Warby did concede, however, that the degree of Knauf's involvement remained to be resolved by way of a trial The question of costs also had to be decided, and a hearing to deal with these matters was arranged for 2 March.

At this hearing, Warby concluded that he did not consider the Court of Appeal would reach a different conclusion regarding the outcome of the claim for misuse of private information, or on the major issues that he had decided upon regarding copyright, although he repeated that the

issue of Knauf's possible copyright carried with it the need for a trial. He thus refused Associated's application for permission to appeal, whilst stressing that it was entitled to seek permission from the Court of Appeal. Unless it appealed successfully, Associated would have to pay not only its own legal bills but also at least 90% of Markle's, then estimated at £1.5m. In the meantime, Warby ordered Associated to make an interim payment of £450,000 towards her costs.

Markle was seeking an 'account of profits' as a remedy for the copyright infringement. (This is a sum equivalent to the profits the paper made by breaching her copyright). After Warby had granted summary judgment, she made it clear that, in order to save time and cost debating the issue any further in court, she would accept nominal damages in relation to the misuse of her private information. Associated immediately claimed that this meant that the Duchess was effectively abandoning all her claims to compensation. However, Warby would have none of this, stating:

> I accept the explanation provided on the claimant's behalf: that she is seeking to adopt a sensible and proportionate approach to the next stages of this case. The defendant's submission on this point does not seem to me to belong to the real world of this litigation.

Warby also decreed that the *Mail on Sunday* would have to publish a statement announcing its defeat on its own front page and a slightly longer account on page five. These would also have to be published in the *MailOnline*. The wording and font size would be specified by the court. This was necessitated at least partly because of the way in which the *Mail* titles had misreported the summary judgement, doing so in such a way as to make it appear that Markle had failed in her claims. Matters had also been aggravated by the offending articles remaining online even after the summary judgement, leading Warby to observe:

> This cannot be accidental, or an oversight. In the absence of any explanation, I am tempted to infer that it is a form of defiance. Whatever the reasons, this conduct could easily

suggest – certainly to the casual reader – that the Court has taken a different view from the one I expressed in the judgment.

Associated duly appealed, and the case came to court in November. The chair of the panel was Sir Geoffrey Vos, the Master of the Rolls, and the other two judges were Dame Victoria Sharp, President of the Queen's Bench Division, and Lord Justice Bean.

Again, it needs to be stressed that, entirely contrary to the impression given by the *Mail* and other titles in what had by now become a fantasy narrative, the business of the court was *not* to judge whether the *Mail on Sunday* and *MailOnline* were legally justified in publishing Markle's letter to her father, still less to decide on Markle's veracity. The only matter in question was whether Lord Justice Warby had been right to reach his conclusions without the benefit of a trial. These concerned whether Markle had a right to privacy and copyright in these circumstances, and, if so, whether that right was outweighed by other rights, such as the Associated titles' right to freedom of expression. If Associated won the appeal, the case would go back to the High Court for a full trial.

Associated produced new evidence from Knauf alleging that Markle was aware at the time the letter was written that her father might make it public and that there was at least indirect contact between her and the authors of a book, *Finding Freedom*, which discussed the letter. This proved, Associated argued, that the letter was never really private and that Markle herself was complicit in making its contents public.

On the day the appeal hearings began, the coverage in the *Mail* and its allies was dominated by just one thing: Markle had apologised to the court after having to revise her story about a briefing given on her behalf to authors of *Finding Freedom*. The papers crowed that Meghan had been caught lying – indeed, she might even be charged with perjury. However, in the actual appeal the matter of the apology scarcely figured at all, and Sir Geoffrey Vos stressed

that he did not consider relevant to the appeal any of the allegations about Markle's dealings with others over the letter. Indeed, it played only a minor role in Associated's case in court, even though it dominated coverage of the appeal in its newspapers and those of its allies.

Associated's case was unanimously rejected and the court found that Warby had been entirely correct in his summary judgement. As Sir Geoffrey Vos concluded: 'Despite prompting from the bench, Associated Newspapers has not, even after a two-and-a-half-day hearing, clearly identified the triable issues that falsify this reasoning'. In other words, Associated's legal team had brought nothing new and substantive to the Appeal Court

Associated could appeal to the Supreme Court, but decided against it. It agreed to pay an undisclosed sum in settlement of the Duchess's copyright action and a nominal sum of £1.00 for breach of privacy (as agreed earlier by the Duchess), as well as her legal costs. The settlement was undoubtedly substantial – in particular, substantial enough to avoid Associated the embarrassment of having to disclose to the court the profits it made from infringing her copyright. The admissions of defeat would also now have to be published in the *Mail on Sunday* and *MailOnline* within two weeks. They appeared on Boxing Day, without editorial comment or any form of apology to the Duchess.

This case raises at least two fundamental questions: (a) why did Associated run articles which any student of media law would realise breached the law; and (b) why did it continue to pursue the case though the courts when it became increasingly obvious that it was doomed to failure?

The first answer is that the longer the case went on, the more opportunities it gave the *Mail* titles and their press friends to heap opprobrium on Markle. Second, they were clearly desperate to get her into court. This was particularly evident in a furious diatribe by Stephen Glover in the *Mail*, 3 December, who raged that Markle's

> misleading testimony calls into question her credibility. If I were a judge, I would want Meghan Markle's veracity to be tested under cross-examination … If Meghan really wanted to fight for the truth, she would come to court. And, in what is supposed to be a land of liberty, judges who are not awed by royalty and cherish a free press would allow a proper trial.

But in the event of the full trial that Associated so clearly craved, Markle would almost certainly have felt compelled to give evidence and would have then been exposed to the full force of cross-examination by Associated's legal team. Furthermore, she would have to endure testimony by her father. But as Brian Cathcart argued in *Byline Investigates*, 11 November:

> Unpleasant as this prospect would be for her, the ugliness would be magnified many times by the likely conduct of the *Mail* papers and their allies across most of the UK press, which loathe the Duchess and have long shown a shameless willingness to lie and distort the facts about her to stir hostility.

Third, even if Associated finally failed to get its way, it could turn this to its advantage, arguing in the pages of its papers, and backed up by its loyal allies the *Telegraph*, *Sun*, *Express* and *The Times*, that there had been a miscarriage of justice brought about by 'liberal' judges who loathed the popular press, and that their defeat was all the fault of their favourite hate objects – the Human Rights Act (HRA) and the European Convention on Human Rights (ECHR). And indeed this is *precisely* what did happen in the absolute deluge of hostile coverage which followed the Appeal Court judgement

Regarding the judges, Glover enquired: 'Might these learned judges be displaying, whether consciously or not, a prejudice against the popular press and in favour of celebrities who jealously guard every aspect of their privacy while striving to obtain the best possible media coverage?' Endless indignation about 'judge-made privacy law' was exemplified by a *Mail* editorial, 3 December headed 'A Dark Day for Truth and Freedom of Expression' which

concluded that the Court of Appeal 'placed privacy ahead of freedom of expression' and thus created a 'dangerous precedent'. However, no such precedent had been created for the simple reason that the judgments reached by the courts in this case were entirely in line with what has become settled English privacy and copyright law.

It must be admitted, of course, this is partly, but by no means wholly, consequent upon the influence of the HRA and the ECHR on court judgements in England. It should be remembered that when the HRA was passing through Parliament, sections of the British press mounted a vociferous campaign to have it exempted from its provisions, and this was primarily because it espied in Article 8 a threat to its ability to pry with impunity into people's private lives. Having failed in this endeavour, papers such as the *Mail* have vilified the Act on almost a daily basis ever since. Thus its 3 December editorial complains that this 'troubling decision' is 'rooted in Labour's iniquitous Human Rights Act', whilst the *Sun*, 14 December, blames 'Labour's toxic Human Rights Act'.

A secondary theme here is that only the privacy of a wealthy minority is protected by Article 8. Thus a *Sun* editorial, 3 December, headlined 'Meg-alomaniac', warns that 'the rich and the famous will use privacy laws to crush negative coverage', the same day's *Mail* editorial concludes that 'the beneficiaries will not be ordinary people but wealthy wrongdoers', and the *Sun*, 14 December, states that the judgment 'hands the rich and famous power to muzzle free speech in the Press'. But this is nonsense, because Article 8 guarantees absolutely *everybody's* privacy, although the stark fact is that very few people can afford to fight for their privacy rights in court against newspapers with fabulously wealthy proprietors such as Lord Rothermere and Rupert Murdoch.

On 2 December, the *Telegraph* noted that 'MPs and peers will now come under pressure to investigate a new Bill of Rights – to replace the Human Rights Act – that would give more

power to free speech over privacy'. (Of course, much of this pressure would come straight from papers such as the *Telegraph*). This takes us straight back to the passage of the HRA when, after strenuous lobbying by Press Complaints Commission chair Lord Wakeham, the government added what would become section 12. This provides that in cases involving the media, a court 'must have particular regard to the importance of the Convention right to freedom'. But if this was supposed to elevate Article 10 over Article 8, it signally failed to do so, since it could not alter or override the ECHR, under which freedom of expression is not an absolute right and must be balanced against other rights. And as is always conveniently forgotten by press defenders of Article 10, its second section contains numerous exceptions to which it may be subject, including the 'rights of others', which, of course, include the right to privacy.

However, sections of the press are clearly determined to revisit Wakeham's enterprise, and they are now fortunate in having a Justice Secretary, Dominic Raab, whose 2009 book *The Assault on Liberty* and numerous subsequent pronouncements have made abundantly clear his hostility to both the HRA and the ECHR. On 5 December he discussed human rights on Times Radio, and his remarks were enthusiastically endorsed by the *Telegraph*, *Mail*, *Sun* and *The Times*. For example, the *Telegraph*, 6 December, approvingly quoted his judgment that 'the drift towards continental-style privacy laws innovated in the courtroom, not by elected lawmakers in the House of Commons, is something that we can and should correct'. However, this would seem to imply that all EU states share the same or similar privacy laws, whereas in fact different states have very different privacy laws. Of course, these do have to be compatible with the ECHR – but this still allows for considerable leeway. However, this is where the campaign against human rights becomes inextricably intertwined with Europhobia and the battle over Brexit – not least as many Brexiters, both in the press and elsewhere, mistakenly believed that leaving the EU would entail exiting the ECHR (which, in fact, derives from the Council of Europe).

The papers returned en masse to this theme when on 14 December Raab outlined his plans for a Bill of Rights, which, according to that day's *Mail*, will mean that 'creeping European-style privacy laws will take a back seat to freedom of speech – a key component of British democracy for centuries', whilst the same day's *Telegraph* evoked the 'quintessentially British' right of freedom of expression. However, centuries of this kind of rhetoric cannot get round the awkward fact that there was no statutory right to freedom of expression in this country until it was enshrined in Article 10 of the HRA. As the Law Lords put it in 1936: 'Free speech does not mean free speech; it means speech hedged in by all the laws against blasphemy, sedition and so forth. It means freedom governed by law'. Thus freedom of expression was residual: that is, everything was permitted except that which was expressly forbidden – and that was a very great deal.

Writing in *The Times*, 14 December, Raab promised that: 'We'll end the duty on UK courts to take into account the case law of the Strasbourg court which has at various points been applied as a duty to slavishly follow Strasbourg'. Most judges would vehemently disagree with the word 'slavishly' (also employed by Attorney General Suella Braverman in her article in the same day's *Telegraph*), but, leaving this aside, does this mean, for example, that judges in privacy cases in English courts will no longer be able to cite as a precedent the famous Strasbourg judgment in 2005 involving Princess Caroline of Hannover? Or, indeed, to cite the numerous cases heard in English courts which subsequently cited this case as a precedent and then themselves became precedents?

Raab also stated that: 'We'll make crystal clear that the UK Supreme Court, not Strasbourg, has the ultimate authority to interpret the law in the UK'. But as this is already the case, as every judge must surely know, what is the point of such a remark? Strasbourg's rulings are not binding in British law: as a signatory to the ECHR the government is obliged simply to ensure

that British laws are compatible with those rulings. The final word therefore lies with parliament to decide whether and how it wishes to amend British law accordingly

Raab made it clear that he did not wish the UK to leave the ECHR. But as an editorial in *The Times*, 14 December, explained, this means that his scope for reforming the human rights legal machinery is limited because 'the HRA simply allows British citizens who believe their rights have been infringed to seek redress in the British courts. Introducing a British bill of rights would not affect their right to seek redress at the European Court of Human Rights in Strasbourg'. A similar point was made in the *Telegraph*, 15 December, by Yuan Yi Zhu, senior research fellow at Policy Exchange's Judicial Power Project, which has been highly critical of what it terms 'judicial activism': 'Domestic legislation cannot itself change the UK's international legal obligations under the ECHR'. And as that implacable enemy of both the HRA and ECHR, Melanie Phillips, had already put in *The Times*, 7 December, unless the government 'exits the human rights convention altogether, it will merely be rearranging the deckchairs on the constitutional Titanic'.

Raab may have claimed that he does not want to withdraw from the ECHR, but it is difficult not to conclude that this is what his planned British Bill of Rights will ultimately entail. And, judging by over twenty years of their attacks on both the HRA and the ECHR, it is most certainly what the papers quoted in this article ardently desire.