



## A Duchess's Gambit - Part 2

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### TRANSCRIPT

Hello! I am Carol Brennan, module convenor for Tort.

A year ago, I published a blog on the VLE, previewing an upcoming privacy action being brought by the Duchess of Sussex, the former Meghan Markle, against Associated Newspapers, concerning articles published in early 2019 in the newspapers, the Mail on Sunday and the Mail Online.

These articles contained and commented upon excerpts from a 'private and confidential' letter written by the claimant to her father, Thomas Markle, discussing the difficulties in their relationship. Damages were being sought for misuse of private information, breach of data protection regulations and infringement of copyright.

The legal basis for her claim lies in the Human Rights Act 1998, where privacy in the UK gradually came to be protected by the evolving new tort of 'misuse of private information'. A groundbreaking case had been brought by Naomi Campbell, who might arguably be described as 'royalty' in the world of super-models. *Campbell v Mirror Group Newspapers in 2004* concerned revelations in a tabloid newspaper about her attendance at a support group for those struggling with substance abuse. In finding in favour of Ms Campbell, the House of Lords focused on the need to balance the article 8 ECHR right to private and family life with that under the article 10 ECHR, the right to freedom of expression. According to Lord Nicholls, 'Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.' If such an expectation is established, then article 8 is engaged, opening the way for the court to perform a balancing exercise between articles 8 and 10, as detailed in s 12 of the Human Rights Act 1998.

In *HRH Duchess of Sussex v Associated Newspapers (ANL)* [2021] EWHC 273 (Ch) (in early 2021) Mr Justice Warby heard the action and on the issue of misuse of private information applied a two-stage test, based upon *Campbell*. Firstly, did the claimant have a reasonable expectation of privacy in relation to the subject of the publication? He acknowledged that as a public figure the Duchess needed to accept 'a degree of intrusion' but that did not mean giving up a right to a private life. He concluded that the claimant had had a reasonable expectation of privacy in respect of her letter to her father, given its sensitive personal nature, and that the defendants had interfered with that expectation. The second stage involved determining whether in all the circumstances the Duchess's privacy rights must yield to the demands of the freedom of expression enjoyed by the publisher and their audience, as embodied in article 10. This was answered in the negative. There had been a limited justification in correcting inaccuracies in the public domain, however the defendant's publication of 'long and sensational articles' was neither necessary or proportionate. The disclosures were 'manifestly excessive and thus unlawful'. Here, it was necessary and proportionate to interfere with freedom of expression in pursuit of the legitimate aim of protection of privacy.

It would be an understatement to say that the decision was greeted with dismay by the media industry. There is a context in which younger generations of the British royal family have made no secret of their resentment of press intrusion into their lives. On the other side, claims of

'censorship' of a free press were also made. More cautiously, commentators stated that the decision was very fact-specific and that the judge had erred by drawing the line too strictly against the press and freedom of expression.

The claimant was requesting an account of profits which had been made as a result of the publications, but the issue of compensation was deferred pending appeal. This appeal was heard recently in November 2021. The appellants' main argument was that the judge had applied the wrong legal tests in reaching his decision. In a summary decision, delivered by the Master of the Rolls Sir Geoffrey Voss the appeal was denied. The Court unanimously held that there was no need to examine all the facts at a full trial. Some evidence which had emerged suggesting that the Duchess had foreseen that the letter would be made public was held not to be significant enough to change the outcome. She had not released the letter into the public domain herself or demonstrated any ambivalence on the issue.

Meghan Markle welcomed the decision, against what she termed the 'cruel tabloid newspapers', claiming a victory for 'anyone who has ever felt scared to stand up for what's right.' One expert legal commentator Mark Stephens, observed. 'This will result in a more primped and preening versions of celebrities and the famous. Those who want to publish the unvarnished truth about them will find it difficult to do so.'

The press are now considering a last appeal to the Supreme Court. Given that this is basically a question of application of the law, rather than new law – that it is, a fact-based interpretation, I would be surprised if leave to appeal will be granted. We must wait and see though if there will be a third instalment of this saga!