

# Royals and the Right to Privacy: Comment on the Recent Claim by the Duchess of Sussex

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The recent decision by the Duchess of Sussex to sue the *Mail on Sunday* and its parent company came as a surprise to many people – including, it has been reported, senior members of her staff. The Duchess, Meghan Markle, is among the most prominent public figures in the UK; a new member of a family that does not often litigate.

The case has been filed in the midst of a protracted debate about what protections should, or should not, be afforded to the fourth estate. It may have important implications for the development of privacy law in England and Wales, and elsewhere.

## The claim

The Duchess claims that the *Mail on Sunday's* publication of portions of a letter she wrote to her father: (1) was in breach of copyright, as she wrote the letter and did not agree to its publication; (2) invaded the right she has to a private life pursuant to the *Human Rights Act 1998* (UK) (which incorporates the rights set out in the *European Convention on Human Rights*); and (3) violated obligations regarding the handling of personal data pursuant to the *Data Protection Act 2018* (UK) (which generally reflects the European Union's *General Data Protection Regulations*). The paper is defending the claim and continues to host the relevant article on its website.

Media reports have suggested that the case was rushed on urgently

so that it would be heard by the Chancery Division of the High Court of England and Wales (broadly similar to the Equity Division of the NSW Supreme Court).<sup>1</sup> A change to civil procedure rules at the Court means that it would likely have been allocated to a new 'Media and Communications List' in the Queen's Bench Division if filed after 1 October 2019;<sup>2</sup> commentators suggest that this List may be less claimant-friendly than the Chancery Division has been.

Prince Harry released a statement on a personal website in which he indicated support for 'media freedom' as a 'cornerstone of democracy' but claimed that his wife had fallen 'victim' to 'powerful forces' in a world in which '[o]ne day's coverage is no longer tomorrow's chip-paper'.<sup>3</sup> The *Mail on Sunday* published a long piece five days later with new quotes from Meghan Markle's father: 'I decided to release parts of the letter because of the article from Meghan's friends in *People* magazine [an earlier publication the *Mail on Sunday* is likely to rely on in defending the claim]. I have to defend myself. I only released parts of the letter because other parts were so painful. The letter didn't seem loving to me. I found it hurtful'.<sup>4</sup>

The case has received widespread global coverage. Seventy-six female UK politicians recently weighed in to the dispute by signing an open

letter addressed to the Duchess: 'we wanted to express our solidarity with you in taking a stand against the often distasteful and misleading nature of the stories printed in a number of our national newspapers concerning you... we expect the national media to have the integrity to know when a story is in the national interest, and when it is seeking to tear a woman down for no apparent reason'.<sup>5</sup>

## Prior litigation by the Royal Family

Members of British royalty – among the most prominent, and media-conscious, families in the world – have sued before.

Kate Middleton won a privacy claim against French magazine *Closer* for publishing photos of her sunbathing during 2012 that British media had declined to publish.<sup>6</sup> Earlier this year Prince Harry accepted a financial settlement from a photographic agency that had taken pictures of his house from a helicopter.<sup>7</sup> It has also recently been reported that Prince Harry has filed a 'voicemail interception' claim against two media organisations.<sup>8</sup>

However, the royal claim most similar to the Duchess's is probably one brought by her father-in-law in 2006. Prince Charles convinced the Court of Appeal (England and Wales) that his privacy interests in a personal journal outweighed the public interest in his unfiltered thoughts about a

1 See, eg, Alex Barker, 'Royal legal action against press was timed to pick where case heard', *Financial Times* (7 October 2019).

2 Ministry of Justice, *109th Update to the Civil Procedure Rules*, <<https://www.justice.gov.uk/courts/procedure-rules/civil>>.

3 Statement by His Royal Highness Prince Harry, Duke of Sussex (1 October 2019) <<https://sussexofficial.uk/>>.

4 Caroline Graham, 'Why I shared Meghan's 'hurtful' letter: Duchess's father Thomas Markle reveals he kept note secret for SIX MONTHS and never intended to share it until HER friends spoke to a US magazine about it and 'misrepresented' its contents', *Mail on Sunday* (6 October 2019).

5 Statement published by @HollyLynch5 on Twitter, reported eg in Alan Yuhas, '72 British Lawmakers Condemn 'Colonial' Coverage of Meghan' *New York Times* (29 October 2019).

6 Telegraph Reporters, 'French *Closer* magazine loses appeal over topless photos of Duchess of Cambridge', *The Telegraph* (19 September 2018).

7 'HRH the Duke of Sussex and Splash News and Picture Agency Limited – Unilateral Statement in Open Court' (16 May 2019), available at: <<https://www.harbottle.com/wp-content/uploads/2019/05/Statement-in-Open-Court-16-May-2019.pdf>>.

8 'Harry Sues *Sun* and *Mirror's* owners in phone-hacking claim', *BBC* (4 October 2019) <<https://www.bbc.com/news/uk-49940905>>.

state visit (a claim about copyright in the material did not ultimately require examination).<sup>9</sup> The Court was sympathetic to what it deemed the 'public interest in the observance of duties of confidence' – even if a 'disloyal typist' were to sell a copy of the federal budget, 'there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech.'<sup>10</sup>

### Why this case is interesting

There are many reasons why the Duchess's recent claim may be of interest to Australian media lawyers, even though, as Dr Matt Collins QC addressed in the last edition of the *CAMLA Bulletin*, Australia does not recognise a cause of action for invasions of privacy of the kind that has developed in the United Kingdom and elsewhere.<sup>11</sup>

As above, the *Mail on Sunday* is likely to argue that the Duchess first released information about the letter herself. Whether there was

a public interest in the publication is a key consideration to both the privacy and data protection claims. The *Mail on Sunday's* sister paper, the *Daily Mail*, has also recently run stories about the Duchess's general efforts to court media attention.<sup>12</sup> Facts such as these may be deployed in a debate about the interaction between Article 8 of the European Convention on Human Rights, which provides a right to privacy, and Article 10, which provides a qualified right to freedom of expression and information.

The specific facts in this case, and the vigour with which both parties have expressed their desire

for litigious vindication, mean that the dispute could lead to an important authority in an influential jurisdiction. It may also take place against the backdrop of the UK exiting the EU.

The possibility of an Australian cause of action for privacy has of course been the subject of public debate and inquiry for a long time. Invasions of privacy are already actionable in Australia in some circumstances – such as where they involve a breach of confidence.<sup>13</sup> The topic appears likely to remain of interest as our courts grapple with balancing rights in a rapidly changing media environment.

9 *HRH Prince of Wales v Associated Newspapers Limited* [2008] Ch 57.

10 *HRH Prince of Wales v Associated Newspapers Limited* [2008] Ch 57, 124.

11 Volume 38(3), at page 23.

12 See, eg, Katie Hind 'The Night Meghan Markle begged me to get her IN the tabloids: The Duchess of Sussex spoke movingly about the pressures of the media spotlight, but as KATIE HIND reveals, she wasn't always so reticent', *Daily Mail* (27 October 2019).

13 See generally, eg: Barbara McDonald, 'A statutory action for breach of privacy: Would it make a (beneficial) difference?' (2013) *Australian Bar Review* 241, particularly at 245-248; Des Butler, 'Protecting personal privacy in Australia: Quo vadis?' (2016) 42 *Australian Bar Review* 107.

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