

A TALE OF TWO PRIVACY ACTIONS

CIVIL WATCH – CASE ANALYSIS

Elisabeth Traugott of Goldsmith Chambers compares two privacy actions against the Daily Mail — one in California and the other in England — and highlights what a difference jurisdiction can make



INTRODUCTION

1. You're famous, glamorous, and left-leaning and the Daily Mail has published your secrets. You live in California and but the article has been distributed internationally. What are your legal options?
2. This was the situation faced recently by two public figures: Meghan Markle, the Duchess of Sussex, and Katie Hill, a former Congresswoman from California's 25th District. Ms Markle filed claims against the Daily Mail in the High Court in England and won. Ms Hill sued the Daily Mail in California and lost. Both outcomes were definitive; neither case even made it to trial.
3. Though these two recent cases had a defendant in common, the balance between the right to keep private information out of the news and a news outlet's right to publish it tipped in very different directions. Whether or not this discrepancy is due to jurisdiction, marking a potential trend in the push-me pull-you battle between the tabloid press and where those they expose should sue, or simply turns on the facts of these two cases and the extent of the intrusions alleged, is worth a closer look.

THE FACTS AND THE CLAIMS

4. Ms Hill was elected to Congress in 2018 as a Democrat. Shortly after she entered office, she and her husband, Kenneth Heslep, began divorce proceedings. It emerged that Ms Hill and her husband had had a polyamorous relationship with a campaign staffer, a serious and very public ethical breach given Ms Hill's position of power. To make matters worse, in October 2019 the Daily Mail published an intimate photograph of Ms Hill with the third-party. Another photo published at the same time showed the Congresswoman smoking a water pipe containing a brown liquid substance. On 27 October 2019, Ms Hill resigned from Congress.
5. Ms Markle married Prince Harry on 6 March 2018 in Windsor. Her father, Thomas Markle, did not attend and rumours of their estrangement circulated amidst claims that he cooperated with paparazzi in the run-up to the wedding.

6. On 27 August 2018 Ms Markle sent a handwritten letter to Mr Markle that described her sadness at their falling-out and her disappointment in his penchant for flirting with media attention. Mr Markle gave a copy of the letter to the Daily Mail and, not one to miss an exclusive, on 9 and 10 February 2019 the Daily Mail published extracts, without Ms Markle's permission, under the sensational banner headline: *Revealed: the letter showing the true tragedy of Meghan's rift with a father she says has 'broken her heart into a million pieces'*.
7. Ms Markle filed a High Court action against the Daily Mail on 29 September 2019 claiming misuse of private information, among other things. In allowing summary judgment in Ms Markle's favour on her privacy claim on 11 February 2021, Mr Justice Warby found that the publication of the letter was "manifestly excessive and hence unlawful". He found that the resulting interference with freedom of expression the Daily Mail's legal team so vociferously advocated against, "is a necessary and proportionate means of pursuing the legitimate aim of protecting the claimant's privacy". [128] On 12 May 2021, the High Court also granted Ms Markle summary judgment on her copyright infringement claim.
8. Back in California, Ms Hill filed a complaint in a California state court, claiming, among other things, that the Daily Mail (through its US parent company) violated the state's revenge porn law that makes it unlawful to intentionally reproduce material in which a person had a reasonable expectation of privacy, without that person's consent. *Cal Civ Code* § 1708.85. She named her ex-husband as a co-conspirator for leaking the photos.
9. Her lawsuit, filed on 22 December 2020, was dismissed after a hearing on 7 April 2021 on the Daily Mail's motion to strike brought under California's anti-SLAPP legislation, a statute that allows a defendant to defeat at an early stage claims that arise "from any act of that person in furtherance of that person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue". *Cal Code Civ Proc* § 425.16. That is, to strike out Strategic Lawsuits Against Public Participation that threaten the right to free speech and of the press codified in the First Amendment.

DIFFERENT JURISDICTION, DIFFERENT EXPECTATION OF PRIVACY

10. The Daily Mail argued in both cases that neither claimant had a reasonable expectation of privacy in the published material. The argument proved successful in California but was defeated in England. The swift and brutal end to Ms Hill's lawsuit tells us, if nothing else, that the answer to the question in California about what is "fair game" for the tabloid press is now, "pretty much anything. Ms Markle's trouncing of the Daily Mail in London may, by contrast, highlight a potential new route for international claimants who fall victim to the Daily Mail's reporting of their innermost secrets.

11. Under English law, misuse of private information is shown when both limbs of a two-stage test are met: 1) whether the claimant enjoyed a reasonable expectation of privacy in the information taking into account all of the circumstances (known as the *Murray* factors); and 2) whether the claimant's privacy rights should yield to the right of the publisher (and its audience) to freedom of expression. *Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 273 (ch), (30-31).
12. Applying *Murray*, the High Court found that whilst Ms Markle is a public figure by virtue of her role as a "prominent member of the Royal Family", her private correspondence "was not an aspect of her public role or functions" and the letter "was sent to [Mr Markle] alone, privately". Moreover, the court said, the purpose of the intrusion into her privacy was to sensationalise and was "likely to cause the claimant at least some distress." [69].
13. To the Daily Mail's argument that the existence of the letter was a fact already in the public domain and that its contents had been disclosed by Ms Markle to a close circle of her friends, thereby depriving it of its status as private information, Mr Justice Warby retorted that it is "fanciful" to argue that these disclosures meant that Ms Markle had relinquished her right to privacy in its contents. [86]
14. Turning to the second prong, the High Court was equally dismissive of the Daily Mail's contention that Ms Markle seeks out the attention of the press and has inserted herself in public life. Mr Justice Warby said that whilst it may be true in some cases that someone "who actively seeks the limelight may have a correspondingly reduced expectation of privacy", it does not mean that every last detail of their lives can be exposed. In the High Court's view, nothing in the Daily Mail's defence as a matter of fact was "capable of showing that the disclosures complained of contributed to a debate of general interest". [101]
15. The Daily Mail's argument about public interest and newsworthiness was far better received in Los Angeles, where Superior Court Judge Yolanda Orozco dismissed Ms Hill's lawsuit at the first opportunity.
16. Anti-SLAPP procedure has two prongs. First, a defendant must show that the lawsuit arises from a protected activity, in this case, free speech. Once shown, the burden shifts to the claimant (the plaintiff in US legal parlance) to rebut the presumption that the intention behind the claim was to chill the exercise of free speech, by demonstrating a "reasonable probability of success on the merits". *Hill v Heslep et al*, Case No 20STCV48797, LA Sup Court, 4 July 2021.
17. Judge Orozco had little trouble finding the first prong met as the Daily Mail website is a public forum that reports the news. Ms Hill argued that "non-consensual distribution of her private sexual images" was not speech, however, much less protected speech. Judge Orozco disagreed, finding that "the intimate images published by [the Daily Mail]", which included a photograph of Ms Hill completely naked and another of her smoking a cannabis pipe when the drug

was illegal in California, “spoke to Plaintiff’s character and qualifications for her position” and were therefore a matter of “public issue or public interest”. *Id.*

18. In deciding whether Ms Hill had any real prospect of success under the revenge porn statute, Judge Orozco took Ms Hill’s case at its highest, accepting her allegations as true. She compared that statute’s exception for material that “constitutes a matter of public concern” to the newsworthiness defence to the tort under California law of invasion of privacy for disclosure of private facts. Like the tension between the Article 8 right to a private life and the Article 10 right to freedom of expression in England under the ECHR, Judge Orozco had to weigh Ms Hill’s right to privacy against the Daily Mail’s First Amendment free speech rights.
19. According to the Daily Mail, the photos demonstrate both the intertwining of Ms Hill’s public and private life and her abuse of power whilst in office. They also raised questions about her “political hypocrisy”. Far be it from the courts, the Daily Mail argued, to second-guess what newspaper and website editors think the public will deem of interest.
20. Unlike the High Court in England, which very much assumed the role of the arbiter of public interest, the California court agreed that the Daily Mail should be left to make an independent assessment of what its readership finds interesting: “The photos show a sitting Congresswoman engaging in conduct some might consider highly inappropriate and perhaps unlawful. The facts of which these photos speak are about Plaintiff’s character, judgment and qualifications for her congressional position. Of course, these are matters of public concern.”

ANALYSIS

21. It would be difficult to argue that Ms Markle’s letter to her father was in any way more private than the photographs taken of Ms Hill in an intimate setting. That Ms Hill claims that the photographs were released by an abusive ex-husband makes their publication and the California court’s decision to condone their publication all the more shocking. But the different treatment these two women experienced may in some measure be explained by the way the courts in the respective venues view the role of the media in society.
22. By analogy, it is accepted that there is a significant difference in approach to defamation claims as between English and American courts. In the US, a plaintiff must prove that a statement is false in order to succeed. By contrast, in England, a defendant may rely on truth as a defence, but a claimant need not prove that a statement is untrue. Underlying the presumption of truth in US jurisprudence is the hallowed First Amendment, relied on to permit the press to delve as deeply as it can into the workings of government. As the US Supreme Court noted in *New York Times v United States*, the famous “Pentagon Papers” case that exposed details of the US involvement in the Vietnam War, “without an informed and free press there cannot be an enlightened people”.

23. Putting to one side whether pornographic photographs of a Congresswoman smoking a water pipe fulfils the same important check on government envisioned by the Supreme Court, there may be an important lesson here. As with the presumptions and burdens in defamation cases, it might be possible to read into the Markle decision a starting point in English law that one's life is private even if one lives it in the spotlight unless and until a news outlet can show that specific details further public discourse. In the US, by contrast, public figures may not be afforded the same protection.
24. Procedurally, there may be another difference. The High Court had no trouble determining what is or is not a matter of public interest for an English readership. As Ms Hill's case makes plain, this is not a role that American courts may be willing to take on. Though it is possible that there was a material difference in the status of the claimants and specifically, that Ms Markle is not an elected official, a more logical conclusion is that US courts tend to give news outlets far freer rein.
25. Whether the English High Court will become a haven for those whose private information is splashed all over the virtual front pages, as it once was for libel tourists, is an open question. It does seem possible, however, that a court that found a private but certainly not salacious or illegal letter to a family member private, would also say that the photos of Ms Hill would fall foul of the Strasbourg jurisprudence cited by Mr Justice Warby: "Articles aimed solely at satisfying the curiosity of a particular readership regarding the details of a person's private life, however well-known that person might be, cannot be deemed to contribute to any debate of general interest in society." [103]

CONCLUSION

26. Whether Ms Hill will consider trying her luck in England is a not yet known. The California court's recent order that she pay over \$100,000 to the Daily Mail for its legal fees may make this option cost-prohibitive. But her loss and Ms Markle's success may very well inform future claimants' decision about the best venue for privacy claims against English tabloids with a penchant for titillating and sensational reporting about women of a certain ideological bent.

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