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The MeToo movement and the public interest defence in libel

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Abstract - The article examines the first reported case in which an individual who was sexually assaulted and named their perpetrator successfully relied on the defence of public interest under section 4 of the Defamation Act 2013. The analysis explores the significance of this rare ruling for survivors of sexual abuse against the backdrop of the MeToo movement, considers its limitations and spotlights the financial challenges that sexual assault victims may face when defending defamation actions.

Introduction

On 26 April 2023, Mrs. Justice Heather Williams handed down judgement in the case of *Hay v Cresswell*,¹ in which the defendant, a victim of sexual abuse, successfully defended a libel claim brought by the perpetrator. The defendant prevailed by relying on the defences of truth and public interest under the Defamation Act 2013. *Hay v Cresswell* concerned historic sexual assault claims and is believed to be the first reported case in which the public interest defence triumphed in circumstances where an abuser sued their victim for libel. The article discusses the powerful message this rare judgment sends to survivors of abuse in the MeToo era, considers its precedential force, and highlights the implications of the cost barrier that victims of sexual assault may encounter in defending libel claims.

Background

William Hay, a tattoo artist, filed a libel claim against Nina Cresswell for publishing allegations that he sexually assaulted her on the night of 27-28 May 2010 after they had met at a nightclub in Sunderland. The morning after the incident, the defendant (then a student) reported the attack to Northumbria Police who rapidly determined that Ms. Cresswell's complaint would not be treated as a crime. Ms. Cresswell mostly remained silent about the assault until 2020, when she felt empowered by the emergence of the MeToo movement to publicly accuse the claimant in the hope that this could protect other women from being harmed by the tattooist.

The MeToo movement is a global social justice campaign that emerged in 2017 to raise awareness about the prevalence of sexual harassment and assault, particularly in the workplace. It gained momentum with the help of social media platforms, where survivors shared their personal experiences using the hashtag #MeToo. It was initially sparked by accusations of sexual misconduct against disgraced Hollywood producer Harvey Weinstein,² but quickly spread across various industries and countries, leading to the exposure and downfall of several high-profile individuals.³ Accusations

¹ [2023] EWHC 882 (KB).

² Ben Hoyle, 'Shamed mogul Weinstein faces up to 29 years in jail: Movie producer's conviction for sex crimes is watershed for MeToo movement' *The Times* (London, 25 February 2020) 1.

³ More recently, former President Donald Trump was found to have sexually abused a magazine columnist in a New York department store in the 1990s. Trump was also found liable for defamation after calling the writer's accusations 'a hoax and a lie'; see Ed Pilkington, 'Donald Trump accused of sexually assaulting writer

of sexual assault have also been levelled at artists in the tattoo space, which had its own wrenching and revelatory #TattooMeToo campaign, aimed at exposing the prevalence of sexual abuse and misogyny in the industry.⁴

MeToo has fostered a cultural shift towards accountability and justice for survivors by highlighting the systemic nature of sexual abuse and shedding light on power imbalances in gender relations. The movement has prompted discussions about consent and victim-blaming. It has also mobilised several organisations to reassess their policies on sexual harassment and implement preventive measures to promote safer environments. MeToo has had a profound impact on public consciousness by breaking a culture of silence surrounding sexual abuse and pushing for greater accountability in addressing sexual violence. Some concerns have, however, been expressed that by facilitating or even encouraging extra-legal online justice-seeking, the MeToo movement could ignite uncontrollable witch-hunts.⁵ It is against this background that *Hay v Cresswell* should be seen.

Ms. Cresswell reached out to the Tattoo Sexual Abuse Survivor Support group in May 2020 and sought guidance on where she could share her story about ‘another predator in the industry.’⁶ In July 2020, she published her allegations on a blog, Facebook, Instagram, and in an email addressed to the tattooist’s studio. She said her primary intention was ‘to alert women who could otherwise become victims of sexual assault at the hands of the claimant’.⁷ Following her public disclosures, Mr. Hay sued for defamation, stating that ‘serious harm’⁸ to his reputation had been caused as a result and that he had lost bookings as a self-employed tattooist. Ms. Cresswell primarily relied on the defences of ‘truth’ and ‘publication on matter of public interest’ under ss. 2 and 4 of the Defamation Act 2013 respectively.

The Judgment

Mrs. Justice Heather Williams found that the meaning in relation to each publication was that ‘the claimant had violently sexually assaulted the defendant’.⁹ The defendant accepted that this meaning was defamatory and that the statutory ‘serious harm’ test was met. The central question for the court was whether or not the defendant proved the ‘sting’ of her allegation, i.e., that she had been sexually assaulted by the claimant in 2010.

The defence of truth

The court was faced with ‘starkly opposing accounts’¹⁰ which, based on both sides’ claims, left little space for the likelihood of error or misinterpretation as the explanation for this disparity. With the exception of the police incident log, the court had access to a restricted amount of evidence: there was no forensic evidence, CCTV footage, police witness statements, or direct witnesses to the incident, apart from the two parties involved.

E Jean Carroll' *The Guardian* (London, 22 June 2019) 39 and Benjamin Weiser et al., 'Jury Finds Trump Sexually Abused Carroll in 1990s' *The New York Times* (New York, 10 May 2023) A1.

⁴ Emma Garland, 'The Tattoo Industry Is Facing "A Reckoning"' *Vice* (London, 6 July 2020)

<<https://www.vice.com/en/article/bv87gd/tattoo-industry-sexism-racism-uk>> accessed 19 May 2023; Alice Snape, 'The Tattoo World is having a Me Too moment – and it's long overdue' *Cosmopolitan* (London, 16 January 2023) <<https://www.cosmopolitan.com/uk/reports/a42305031/tattoo-artist-sexual-assault/>> accessed 19 May 2023.

⁵ Bianca Fileborn and Nickie Phillips (2019), 'From "Me Too" to "Too Far"? Contesting the Boundaries of Sexual Violence in Contemporary Activism' in Bianca Fileborn and Rachel Loney-Howes (eds), *#MeToo and the Politics of Social Change* (Palgrave 2019) 100.

⁶ *Hay v Cresswell* (n 1), para. 133.

⁷ *Hay v Cresswell* (n 1), para. 6.

⁸ Defamation Act 2013, s. 1.

⁹ *Hay v Cresswell* (n 1), para. 99.

¹⁰ *Hay v Cresswell* (n 1), para. 12.

In her detailed ruling, Mrs. Justice Heather Williams, concluded that the defendant's claims were 'substantially true'.¹¹ She was satisfied that Ms. Cresswell had proved on the balance of probabilities that she had experienced a severe sexual assault of a violent nature, matching her account,¹² and her evidence 'strongly pointed'¹³ to the claimant as the perpetrator. Ms. Cresswell's evidence remained unaffected by the police incident log, which indicated that her complaint was 'not to be crimed'.¹⁴ Notably, the judge criticised the paucity of the police investigation. She acknowledged that the police officers displayed a lack of sympathy towards the defendant, and their approach was likely influenced by an apparent belief that the incident would not result in a charge or successful prosecution.¹⁵ 'Minor inconsistencies'¹⁶ in Ms. Cresswell's account between 2010 and 2020 did not undermine her credibility, nor did the fact that she had not publicly disclosed her allegation at the time of the assault.

The evidence of the claimant and his witnesses, on the other hand, was marred by significant deficiencies which inevitably affected its trustworthiness. Particularly, Mr. Hay changed his account during the legal proceedings, claiming initially that he had only danced and conversed with Ms. Cresswell at the nightclub but in his written statement admitted leaving the establishment with her and trying to kiss her. The claimant was 'notably evasive'¹⁷ when asked about his real intentions for leaving the nightclub with Ms. Cresswell. His evidence was described by the judge as 'less than credible'¹⁸ and 'unsatisfactory'¹⁹ and at times not 'at all convincing'.²⁰

Mrs. Justice Heather Williams gave short shrift to the claimant's attempt to invoke the 'presumption of regularity' to suggest that the police's records of the 2010 incident were reliable, proper, and accurately compiled.²¹ The judge took the view that the claimant sought to substantially extend the use of the presumption in a way that was not supported by previous precedent and not justified by the circumstances either. In any case, such a presumption could be rebutted with evidence. The court proceeded to examine the public interest defence, even though the finding of truth was dispositive of the case.

The public interest defence

There are three questions to be addressed under s. 4 of the Defamation Act 2013: (a) Was the statement complained of (or did it form part of) a statement 'on a matter of public interest'? (b) If so, did the defendant believe that publishing the statement complained of was 'in the public interest'? (c) Was that belief reasonable?²² Mrs. Justice Heather Williams found that each of the requisite elements of the defence was met.

As regards the first objective question, Ms. Cresswell's publications were on a matter of public interest. The judge accepted that the prevalence of sexual abuse in the tattoo industry, the need to protect women from sexual abuse, and the failure to prosecute sexual abuse cases were all topics contributing to a matter of public interest.²³ As regards the second question concerning the defendant's subjective belief, the judge found that Ms. Cresswell believed that her publications were in the public interest. As for the third question, a belief will be reasonable if it is arrived at after

¹¹ Defamation Act 2013, s. 2(1).

¹² *Hay v Cresswell* (n 1), para. 172.

¹³ *Hay v Cresswell* (n 1), paras. 178 and 183.

¹⁴ *Hay v Cresswell* (n 1), paras. 114, 177.

¹⁵ *Hay v Cresswell* (n 1), para. 178 (vii).

¹⁶ *Hay v Cresswell* (n 1), paras. 158-160.

¹⁷ *Hay v Cresswell* (n 1), para. 188(ii).

¹⁸ *Hay v Cresswell* (n 1), paras. 188(ii), 188(iii) and 189.

¹⁹ *Hay v Cresswell* (n 1), paras. 188, 193 and 195.

²⁰ *Hay v Cresswell* (n 1), paras. 188(ii).

²¹ *Hay v Cresswell* (n 1), paras. 47-57.

²² *Turley v Unite the Union* [2019] EWHC 3547, para. 138(ii).

²³ *Hay v Cresswell* (n 1), para. 201.

conducting such enquiries and checks as it is reasonable to expect *of the particular defendant in all the circumstances of the case*.²⁴ In this case, the defendant was held to have a genuine and reasonable belief that the publications were in the public interest, given the inadequacies of the police response and the growth of the MeToo movement. Typically, in libel cases, a defence based on public interest requires the publisher to reach out to the person who is being criticised for their comments, or at the very least, include any counterbalancing material or any denial of the allegation. The judge ruled, however, that in circumstances where a survivor of sexual assault makes allegations, the defence can be established even without the aforementioned actions:

Given that the defendant was writing from her own knowledge of the sexual assault upon her, it would be unreasonable to expect her to seek out and include a comment from the claimant [...]. Furthermore, given that she reasonably disagreed with and held legitimate concerns about the approach taken by the police in 2010, I do not consider that a failure to reference the officers' earlier conclusion adversely impacts upon the reasonableness of her belief that publication was in the public interest.²⁵

Mrs. Justice Heather Williams also confirmed that the normal expectation that a successful public interest defence would require the publisher to maintain a measured tone was unnecessary in a case where a sexual assault survivor makes allegations:

Given the subject matter and the fact that the defendant was writing about her own experience of a frightening and violent sexual assault, this is hardly surprising and does not in my view in these particular circumstances detract from the factors that point to her belief being reasonably held.²⁶

In light of these conclusions, Mr. Hay's claim failed.

Comment

Ms. Cresswell's account of the assault was emphatically validated. In determining the truth defence, Mrs. Justice Heather Williams exhibited a distinct understanding of victims' responses to sexual assault and the impact of trauma on memory. Addressing the claimant's submission about Ms. Cresswell's silence in the intervening years, the judge said:

There are all sorts of reasons why a victim of sexual assault might not want to air that publicly. They include: a fear of being disbelieved; a disinclination to re-visit a traumatic event; internalised shame; and concern about a negative backlash and/or being sued by the alleged assailant. [...] I do not consider that the period of time before the defendant published these allegations in the way that she did in 2020 assists me one way or the other in terms of deciding upon the honesty of her account.²⁷

However, the outcome in *Hay v Cresswell* does not mean that a defendant (or others) may publish allegations of sexual assault with impunity. Each case will come with its own strengths and weaknesses, and a fact-sensitive evaluation will be required. It is entirely possible that other claims made in different circumstances could, if published, amount to an actionable tort and there is a material risk of aggravating damages where a defence of truth has been unsuccessfully pleaded.

In historic sexual abuse libel claims, evidence will often rely on the parties' competing accounts. Not all defendants will be able to establish the truth of the allegations, but it may be possible to rely on other defences, such as publication on a matter of public interest, the common law defence of

²⁴ *Economou v De Freitas* [2018] EWCA Civ 2591, para. 101 and *Serafin v Malkiewicz* [2020] UKSC 23, para. 67 (emphasis added).

²⁵ *Hay v Cresswell* (n 1), para. 211.

²⁶ *Hay v Cresswell* (n 1), para. 211.

²⁷ *Hay v Cresswell* (n 1), para. 162.

qualified privilege,²⁸ or honest opinion.²⁹ In such situations, it is implicit that the defendant lacks confidence in the existence of a more expedient way of defeating the claim. Although it remains uncertain whether a survivor sued for defamation could successfully argue their case solely on the grounds of these more technical defences, *Hay v Cresswell* is the first case in which a *victim* has successfully relied upon the s. 4 defence, confirming that the latter is not confined to the media but is also available to anyone who publishes material of public interest in any medium.³⁰ The case also highlights the interaction between the defence under s. 4 and the defence of the truth under s. 2. The judge warned that *all the circumstances* were relevant for the s. 4 defence to succeed; in this case, the finding that the defendant's allegations were substantially true was critical for the success of the public interest defence.³¹

Despite its limitations, *Hay v Cresswell* is a warning shot to those wishing to use libel actions to silence allegations of abuse and may be seen as plugging a gap in the Supreme Court's reasoning in *Stocker v Stocker*,³² which in 2019 found in favour of the defendant, Mrs. Stocker, after holding that the trial judge had erred in determining the meaning of the phrase 'tried to strangle'. With its narrow focus on rules of meaning, the Supreme Court judgment in *Stocker* did not take the opportunity to directly address victims' right to alert others to violent and abusive perpetrators. Nearly five years later, the High Court emphasised in *Hay v Cresswell* that safeguarding other women from assault was a crucial aspect of the public interest and as such provided a valuable source of encouragement for other women who contemplated speaking out against sexual abuse but remained apprehensive about potential libel actions from their assailants.

Finally, *Hay v Cresswell* brings to the fore the inability of victims of sexual assault to meet the costs of libel claims. The financial burden associated with such claims creates a significant barrier to seeking justice and reclaiming victims' narratives. Ms. Cresswell lacked legal representation for a year. She was subsequently supported by the Good Law Project and its crowd fundraiser,³³ but it is unclear whether these sums will be sufficient to meet all her costs. Defending a libel claim places an additional strain on survivors, who may already be grappling with the emotional and psychological aftermath of their assault. In many cases, survivors who come forward to share their experiences face the daunting challenge of proving the truth of their allegations, often against individuals with greater financial resources and legal support. This imbalance can result in victims feeling permanently silenced and can leave an indelible imprint on their emotional and psychological well-being, much like an invisible tattoo.

²⁸ To a more limited extent, Ms. Cresswell also relied upon the common law defence of qualified privilege in relation to the email publication (on the grounds that there was a reciprocal relationship of duty and interest between the publisher and publishee), but both parties accepted that it was unnecessary for the judge to address this defence too.

²⁹ Defamation Act 2013, s. 3.

³⁰ *Economou v De Freitas* (n 24), paras 80 and 110.

³¹ *Hay v Cresswell* (n 1), paras. 37 and 200.

³² [2019] UKSC 17.

³³ The Good Law Project, 'She said #MeToo. Now she's being sued' (26 April 2023)

<<https://goodlawproject.org/case/she-said-metoo-now-shes-being-sued/>> accessed 19 May 2023.