



Neutral Citation Number: [2005] EWCA Civ 1007

Case No: A2/2005/0306 and 0306(B)

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL APPEALS DIVISION)**  
**ON APPEAL FROM QUEEN'S BENCH DIVISION**  
**Mr Justice Eady**  
**[2004] EWHC 2928 (QB)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 29 July 2005

**Before :**

**LORD JUSTICE BROOKE**  
**Vice-President of the Court of Appeal (Civil Division)**  
**LORD JUSTICE TUCKEY**  
and  
**LADY JUSTICE ARDEN**

-----  
**Between :**

**LANCE ARMSTRONG**

**Claimant/  
Respondent**

**- and -**

**TIMES NEWSPAPERS LTD**  
**DAVID WALSH**  
**ALAN ENGLISH**

**Defendants/  
Appellants**

-----  
Andrew Caldecott QC and Heather Rogers (instructed by **Gillian Phillips of Times Newspapers Ltd**) for the **Appellants**  
**Richard Spearman QC and Matthew Nicklin** (instructed by **Schillings**) for the **Respondent**

Hearing dates: 11th and 12th July 2005  
-----

**Approved Judgment**

**INDEX**

	<i>Paragraph</i>
<i>Part 1 Introduction</i> .....	1
<i>Part 2 The three defendants</i> .....	3
<i>Part 3 The dialogue between the parties before the article was published</i> .....	9
<i>Part 4 The Sunday Times article</i> .....	15
<i>Part 5 The defence of qualified privilege and the response to the claim for aggravated damages</i> .....	25
<i>Part 6 The claimant’s application pursuant to CPR 3.4(2) and CPR Part 24</i> .....	31
<i>Part 7 The judge’s ruling on meaning</i> .....	36
<i>Part 8 The claimant’s skeleton argument, served on 3rd December 2004</i> .....	40
<i>Part 9 Other features of the hearing before the judge</i> .....	48
<i>Part 10 Qualified privilege: the judge’s application of the Reynolds criteria</i> .....	54
<i>Part 11 The arguments on the appeal</i> .....	70
<i>Part 12 Conclusions</i> .....	76

**APPENDIX**

A. <i>The VO<sub>2</sub>max issue</i>	
(1) <i>The judge’s ruling</i> .....	86
(2) <i>The claimant’s case</i> .....	87
(3) <i>The defendants’ case</i> .....	89
(4) <i>Conclusion</i> .....	93



Lord Justice Brooke:

*Part 1 Introduction*

1. This is an appeal by the defendants Times Newspapers Ltd and others, and a cross-appeal by the claimant Lance Armstrong, from parts of an order made by Mr Justice Eady at a case management conference in this libel action in December 2004. The judge struck out the defendants' pleas of qualified privilege and their statutory defence under section 5 of the Defamation Act 1952, and severely truncated their particulars of justification. He also reduced the range of meanings on which they sought to rely, and dismissed their applications for security for costs and a cost-capping order. On their appeal the defendants seek to reinstate their pleas of qualified privilege and to restore a few of the many particulars of justification which the judge struck out. The claimant, on the other hand, wishes this court to overrule the judge in relation to a few of the particulars of justification which he allowed to remain in the pleadings.
2. In order to understand the issues we have to decide, I must explain something of the history leading up to the publication of the article complained of, which appeared in the sports section of *The Sunday Times* on 13<sup>th</sup> June 2004. I take it largely from the assertions contained in the defence, which are assumed to be true for the purposes of this pre-trial skirmish.

*Part 2 The three defendants*

3. The second defendant, David Walsh, has worked as a sports journalist since 1978. He first covered professional cycling in 1980, and he has covered the Tour de France in most years since 1985. He wrote a biography of Sean Kelly (then the world's top ranked cyclist) in May 1985, and a biography of Stephen Roche in 1987. In 1993 he wrote a book called "Inside the Tour de France": he interviewed Mr Armstrong in connection with that book. In 1986 he became the chief sports writer for an Irish newspaper, for whom he covered the 1988 Seoul Olympics and the controversy surrounding Ben Johnson's failed drug test. Eight years later he covered the 1996 Atlanta Olympics for *The Sunday Times*, and he was one of three journalists who expressed doubts about the Irish triple gold medal winner Michelle Smith, who failed a drug test two years later and was then banned from competitive swimming for four years.
4. Mr Walsh has for many years been aware of the problems of drug-taking in sport, and the ability of doping to destroy sport. He sees his job as a journalist covering sporting events not as a cheerleader, but as someone who asks questions. As a result of what he has learned over the years, he believes that the abuse of drugs is destructive to sports, that it is a pervasive problem, and that it is likely to have grave consequences for sport in the future.
5. Mr Alan English, the third defendant, has worked for *The Sunday Times* for nine years. In June 2004 he was its deputy sports editor. In 1999 he edited a best-selling book, *The Sunday Times Sporting Century*. This book featured his choice of the 50 most momentous sports stories of the 20<sup>th</sup> century. Three of these stories related to the use of drugs in sport. They included the death of the cyclist Tom Simpson. In his introduction to the book Mr English wrote: "as the new millennium approaches, the

problem of drugs has never been more acute.” He believes that newspapers should address this issue.

6. From 2003 onwards Mr Walsh was concerned with a project to produce the book which was ultimately called “*L.A. Confidentiel – les secrets de Lance Armstrong*”. The book was published in France on 15<sup>th</sup> June 2004. His co-author, Pierre Ballester, is well-informed and authoritative on cycling matters, and in particular on the problems associated with doping, and Mr Walsh had many discussions with him in which he learned a great deal about medical and other expert opinions relating to doping. He was also aware of the results of a statistical analysis of Mr Armstrong’s performance conducted by Antoine Vayer, a cycling expert, which gave rise to questions about how Mr Armstrong had achieved and maintained such high performance levels.
7. In the course of his research for the book, Mr Walsh interviewed a number of named sources, and one confidential source. He also drew on discussions he had had with many people concerned with different aspects of the cycling industry over the years. Some of these discussions were on a confidential basis, with confidential sources. Many of them were with professional cyclists and those who had worked with them, and from them Mr Walsh learned a lot about the doping culture within professional cycling, and the pressures put upon riders to join that culture in order to achieve results. The team doctor of Motorola, the first professional cycling team which Mr Armstrong joined, told him how he had been concerned about the doping culture in 1994: he had had to tell the team to focus on training, and not on taking pharmacological remedies.
8. Mr Walsh also learned about pharmacological advances from medical and other experts. They described how these advances had led to the introduction of ever-more sophisticated performance-enhancing products. He had followed closely the investigation into the activities of a doctor called Michel Ferrari and his prosecution by the Italian authorities in 2001. His sources were well-informed, authoritative and reliable. They did not have any axe to grind, so far as the defendants were aware, either in connection with Mr Armstrong or at all.

*Part 3 The dialogue between the parties before the article was published*

9. Mr Walsh had interviewed Mr Armstrong a number of times over the years. He attempted to contact him prior to the publication of the *Sunday Times* article, in order to obtain his answers to certain questions and to record any other comments he might wish to make. On 19<sup>th</sup> May 2004 he faxed a request for an interview to the office of Mr Armstrong’s agent, Mr Stapleton. Mr Stapleton asked if he could provide a list of the questions he wished to ask. Mr Walsh agreed to do this, and then left a message on Mr Stapleton’s cell phone asking him for his email address. He received no reply. On 28<sup>th</sup> May he emailed Mr Armstrong directly. He explained that he had tried to get in touch with him through his agent, because he was doing research on both him and his team. In this e-mail he asked eight questions:

“Many people have made a link between cancer and doping problems. Did your cancer doctor or doctors react in this way when you met them?”

I have heard you once admitted using performance-enhancing drugs to your cancer doctors?

Cycling is a sport where races have been bought and sold. Have you ever been involved in any way in a deal to buy off a member of an opposing team to help you win a race?

Witnesses claim you were involved in this kind of deal?

Witnesses claim they saw needle marks high up on your arm? What do you say about this?

Cycling specialists say needle marks on the arm are likely to have been caused by the injection of doping products? What's your reaction?

About your corticoid affair in the 1999 Tour de France, sources claim your positive test of July 4 was not caused by use of cemalyt cream but by a corticoid injection and that the medical prescription was anti-dated (sic). Do you still stand by your version?

During your years with the Motorola team (1992-96) sources say the issue of EPO use in the peloton was often discussed by team members, you included, and that there was a feeling something had to be done to allow the team to be more competitive. You have previously said these discussions never took place, that Motorola was 'as pure as the driven snow' – do you still claim this?"

10. At the end of his message Mr Walsh identified himself as the chief sports writer for *The Sunday Times*. At the same time he sent ten questions on topics concerned with drugs and cycling to Mr Johan Bruyneel, the manager of Mr Armstrong's team in the forthcoming Tour de France.
11. On 28<sup>th</sup> May Mr Stapleton emailed Mr Walsh to say that he would "visit" with Mr Armstrong and get back to Mr Walsh "in the next few weeks". He asked (for the first time) for a tape of an interview Mr Walsh had had with Mr Armstrong in 2001. Mr Walsh replied the same day, asking for an interview in the next 7-8 days. He added that he could not locate the tape. On 2<sup>nd</sup> June Mr Stapleton told him that an interview would not be possible over the next week, because Mr Armstrong would be preparing for the Tour de France: he suggested that something could be arranged afterwards. He expressed disappointment that the tape had not been found, and warned Mr Walsh that Mr Armstrong was willing to pursue legal options if he was not treated fairly or given an adequate opportunity to respond. He asked for all interview requests with Mr Armstrong to be directed to him.
12. Mr Walsh replied the same day, explaining that he needed a response sooner rather than later. He reminded Mr Stapleton of the history of his request for an interview and of the list of questions, and suggested that Mr Armstrong might want to reply in writing. Mr Stapleton replied on 3<sup>rd</sup> June, saying that Mr Armstrong would need

“adequate time” to make himself available to consider the questions. He did not explain why the questions sent on 28<sup>th</sup> May had not yet received any answer.

13. Nothing then happened until 8<sup>th</sup> June when solicitors instructed by Mr Armstrong, Mr Bruyneel, and a company called Tailwind and Sports LLC wrote a brief letter to Mr Walsh at *The Sunday Times* (with a copy to the Sports Editor and the Legal Department) in relation to an article they said he was proposing to write and publish in *The Sunday Times*. They said that they anticipated sending a “response” the following day. On 10<sup>th</sup> June they wrote a three-page letter to the same recipients on behalf of the two cyclists and the US Postal Team. They enclosed with their letter copies of the e-mailed questions, which they described as containing implicit allegations and insinuations which were false, defamatory, and highly damaging. They did not answer any of the questions, and they complained that these false allegations might be being repeated verbally when there was absolutely no evidence to support them.
14. They said it was difficult to imagine allegations which were more harmful to an athlete’s professional standing, honour or reputation, or a more damaging time to publish them, given the US Postal Team’s imminent attempt to win the Tour de France for a sixth time. They asked for the exact nature of any allegations Mr Walsh intended to publish, complaining that the allegations arising from the emails were vague in the extreme and lacked particularity, so that their clients could not be expected to comment on them, even if so minded. They also sought details of the book they understood Mr Walsh might also be writing (or co-writing) for publication. They ended their letter by asking for an undertaking from Mr Walsh and *The Sunday Times* by 6 pm on Friday 11<sup>th</sup> June to the effect that they would not publish any articles alleging improper, unprofessional or illegal behaviour by any of their clients.

*Part 4 The Sunday Times article*

15. This letter received no reply, and on 13<sup>th</sup> June *The Sunday Times* published an article written by Mr English which took up most of a page in its Sports Section. The article is headed:

" LA

CONFIDENTIAL

A book co-written by David Walsh of The Sunday Times will raise new questions about Lance Armstrong, five-time champion of the Tour de France and an icon of the sporting world. Alan English reports."

This heading appeared alongside a large photograph of Mr Armstrong, below which was the following caption:

"Heart of the matter: Lance Armstrong after victory in the Tour de France, a race he will attempt to win for a sixth time next month. The new book investigates the aftermath of a drug test on Armstrong during the 1999 Tour."

In the middle of the text appeared a photograph of Mr Walsh, with the caption:

“Armstrong claims David Walsh, left, is pursuing a vendetta against him. The publication of the book is likely to lead to further recriminations.”

Towards the bottom of the page there is a photograph of a racing cyclist superimposed on a photograph of a bespectacled man, with the caption:

“The views of Stephen Swart, left, on how pervasive EPO was during his time at Motorola will lead to fresh questions about Armstrong’s relationship with the Italian cycling doctor Michele Ferrari, above”

16. The article itself contained 34 paragraphs, which have been numbered for the purposes of these proceedings. Paras 1-2 contained a reference to a Dutch newspaper, *Der Telegraaf*, which on 9<sup>th</sup> June 2004 repeated comments purportedly made by Mr Armstrong about Mr Walsh, describing him as the worst journalist he knew, and complaining that he had no interest in ethics, standards, values or accuracy in his quest for a sensational story. Para 3 referred to the solicitors’ letter, and paras 4 and 5 suggested that the Dutch newspaper article had appeared because, as it said, “Armstrong is in front of the firing squad again”. A reference was then made to the forthcoming book, whose contents were a closely guarded secret. It said that it was certain to raise serious new questions about drug-taking in professional cycling, and to investigate the possibility that Mr Armstrong might have taken performance-enhancing substances in order to compete in “a sport riven with drugs”. Particular reference was made to “the blood-boosting product erythropoietin (“EPO”), which is then described in paras 6-7. EPO is said to have emerged in the early 1990s, and to be capable of altering the composition of the blood by boosting the production of oxygen-rich red blood cells. A blood test for EPO was not introduced until 2001, and “even today” it was said to remain difficult to detect.
17. Paras 8-9 say that it was understood that the book would contain an admission by Mr Swart, a team-mate of Mr Armstrong in the Motorola team in 1994-5, saying that he had taken EPO due to the pressure on the team to deliver results. It was said that Mr Swart’s views on how pervasive EPO was during his time with Motorola would lead to fresh questions about Mr Armstrong’s relationship with Dr Ferrari.
18. Para 10 says that Dr Ferrari was currently on trial in Italy for sporting fraud and doping offences (none of which were said to relate to Mr Armstrong). It mentions an article in *The Sunday Times* in July 2001 in which it was said that Dr Ferrari had been seeing Mr Armstrong. Dr Ferrari is quoted as having said in 1994 that, if used properly, EPO was no more dangerous than orange juice. The paragraph records that Mr Armstrong has strenuously denied that there was anything wrong in his relationship with Dr Ferrari.
19. Para 11 suggests that the book may force Mr Armstrong to answer questions about a rumour that he told doctors who had treated him for testicular cancer in 1996 that he had used performance-enhancing drugs. Paras 12 and 13 say that the book also investigates the circumstances surrounding the only positive drugs test ever returned by Mr Armstrong, when traces of the banned substance corticosteroid triamcicolone

were found in his urine on the second day of the Tour at Challans. His explanation that he had been taking a corticoidal cream because he was saddle sore was accepted by the UCI, cycling's governing body. Para 14 refers to a former *soigneur* who is said to have extraordinary stories to tell about the disposal of empty syringes and a furtive visit to Spain to collect a bottle of pills.

20. Para 15 describes how the UCI had warned journalists not to jump to conclusions in doping cases. Paras 16 and 17 tell how Mr Armstrong rounded on a journalist at the time of the positive test, and how a roomful of journalists dared not ask a follow-up question. The suggestion is made that most cycling journalists prefer to leave awkward questions unasked, so that these questions will soon go away. Para 18 describes how Mr Walsh has been one of the few exceptions to the sport's rule of silence: he has therefore earned Mr Armstrong's anger. For some time, he has claimed Mr Walsh has been pursuing a vendetta against him, and the publication of the new book was likely to lead to a renewed assault on his credibility, notwithstanding the fact that Mr Walsh was recently voted sports writer of the year in Britain for the third time.
21. Paras 19 and 20 describe Mr Armstrong's successes, and say how the Tour de France was due to start in 20 days' time. After a reference to his earnings, it is said that if there are questions about the legitimacy of his success, it is only right that they are posed and answered. Mention is then made of the fact that he has been tested many times throughout his career, with only the one positive test. In para 21 a reference is made to my judgment in the *Musa King* case where I praised fearless reporting, with the comment added that newspapers can sometimes be deterred from pursuing responsible investigative journalism, held to ransom by those who have the means to do so.
22. Para 22 states that allegations of a vendetta are unfair. It describes how Mr Walsh has written for eight years about the cancer of drugs in sport generally, not just cycling. It gives one illustration of his powerful writing in this regard. Paras 23 and 24 refer to a number of unexplained recent deaths in cycling, and include the comment that the health risks in using EPO are considerable. Para 25 contains a quotation from Greg LeMond, a three-time Tour de France champion, who said in the summer of 2001 of Mr Armstrong's successful return to the saddle after recovering from cancer, that if it was true, it was the greatest comeback in the history of sport, and if it was not true, it was the greatest fraud. Paras 26 to 29 speak of a heated telephone conversation between Mr Armstrong and Mr LeMond shortly after Mr LeMond said this.
23. Paras 30 to 32 describe how Mr Armstrong told Mr Walsh in April 2001 that the Motorola team did not think of EPO during his time with them. He said it was not an issue or an option for them. Para 33 contained a quotation from Mr Bruyneel in the *Der Telegraaf* article, saying how they had been accused from all corners for years, and "time and time again it is based on nothing". Para 34 refers to the list of questions, which are said to refer to the allegations made in *L.A. Confidential*, and how the two men had declined to answer them.
24. The claim in this action was issued three days later, and the particulars of claim were served on 29<sup>th</sup> June. The defence was served on 18<sup>th</sup> August, and for present purposes it is convenient to refer only to the plea of qualified privilege and to the response to the claim for aggravated damages.

*Part 5 The defence of qualified privilege and the response to the claim for aggravated damages*

25. The plea of qualified privilege begins by repeating the 102 particulars of justification, and the defendants now accept that they should not have included a plea of this type: I need not refer to this topic again. It is then contended that the article reported on matters of legitimate public interest, raising questions about Mr Armstrong's performance in his career as a cyclist, against a background of the significant problem of doping in the sport of professional cycling (para 5.2). *The Sunday Times* is described as a national newspaper, with a record of reporting on matters of legitimate public interest, and it is asserted that its publishers have a duty to report on such matters, so as to inform its readers. Reference is made to the role of the mass media and journalists in reporting on such matters (para 5.3).
26. Paras 5.4 to 5.8 contain the matters I have set out in paras 3-17 of this judgment. In para 5.9 it is said that the book was due to be published on 15<sup>th</sup> June 2004, an event which, in view of its subject-matter, was of itself a newsworthy matter and a proper subject for an article in *The Sunday Times*. It was said to be appropriate to publish such an article immediately prior to the publication of the book in France. The article was written by Mr English, and the defendants would rely on the whole of it for its tone and content.
27. Para 5.9 of the defence then continues:
- “(ii) The information which [Mr Walsh] learned in the course of his work and from evidence he had (including the first hand testimony [referred to in paras 7-10 of this judgment]) led him to believe that Mr Armstrong had taken performance-enhancing drugs during his cycling career. [*Times Newspapers Ltd* and Mr English] did not draw any conclusions in the article: they were scrupulous to ensure that the article set out the relevant evidence, together with [Mr Armstrong's] denial, for readers.
- (iii) As is apparent from the main headline, the article reported upon the ‘questions’ raised by the book. The article stated expressly that the book raises serious new questions about drug-taking in professional cycling and investigates the possibility that [Mr Armstrong] might have taken performance-enhancing substances in order to compete in a sport riven with drugs’, the most prominent of which was EPO. The article reported upon those questions; it did not allege that [Mr Armstrong] had in fact taken drugs.
- (iv) In addition to setting out a number of matters that gave rise to questions about [Mr Armstrong], the article also set out [his] position. Although [he] had not responded to [Mr Walsh's] questions ... the defendants were able to reflect [his] position fairly. Readers of the article would have been in no doubt about the fact that [Mr Armstrong] denied that he had ever taken performance-enhancing drugs. The article referred (among other things) to [his] solicitors' letter; to [his] denial of

any impropriety in his dealings with Mr Ferrari; to the fact that [he] had been tested many times throughout his career, but had tested positive only once (in the circumstances that were set out).”

In para 5.10 it is said that in the circumstances the publication of the article is protected by privilege.

28. Para 5.11 contained a plea, which was withdrawn prior to the hearing before the judge, in which complaint was made that “the respected Dutch newspaper *De Telegraaf*” had republished on 8<sup>th</sup> June 2004 an attack Mr Armstrong made on Mr Walsh and *The Sunday Times* in 2002, when he said that Mr Walsh was the worst journalist he knew, and added that there were journalists who were willing to lie, to threaten people and to steal in order to catch him out: “all this for a sensational story. Ethics, standards, values, money these are of no interest to people like [Mr Walsh]”. It was said that Mr Armstrong must have known and intended that such a public attack by him was likely to be repeated in future publications, and that the attack was unfounded, unwarranted and unfair.
29. In the defendants’ response to the claim for aggravated damages, it is said (in para 7.4) that Mr Armstrong was afforded ample opportunity to respond to the questions asked by Mr Walsh. He could have done so by meeting him or speaking to him on the telephone, and/or he could have communicated the substances of his responses in writing (by email or otherwise). The approach adopted by Mr Armstrong and his agents to Mr Walsh’s inquiries suggested that he had no wish to answer those questions; had the case been otherwise, he could have provided answers. He chose, instead, to instruct solicitors and commence this action. He could, of course, have given answers through his legal advisers: he had chosen not to do so.
30. In para 7.5 it is said that the article was sent to press on Saturday 12<sup>th</sup> June; that any responses by Mr Armstrong could have been included in the article, which in any event reflected fairly Mr Armstrong’s “side of the story”; and that Mr Armstrong had not suggested in his correspondence since the article was published that there was any fact or further information which he would have supplied for inclusion in the article. It is also said that *The Sunday Times* and Mr English had no involvement in the publication of the book.

*Part 6 The claimant’s application pursuant to CPR 3.4(2) and CPR Part 24*

31. Instead of filing a reply, on 30<sup>th</sup> September 2004 the claimant made the application which led to the appeal with which this court is concerned. A draft of the defence, with many paragraphs struck out, was attached to a schedule served with the application notice, which was itself in these terms:

“We, Schillings, on behalf of the claimant intend to apply for an order (a draft of which is attached) that

- (1) the paragraphs shown in the attached schedule be struck out of the Defence pursuant to CPR 3.4(2); and

(2) the claimant be given summary judgment on the Qualified Privilege Defence ... pursuant to CPR Part 24 because

- i) these paragraphs do not disclose no reasonable defence (sic) and/or are likely to obstruct the just disposal of proceedings; and
- ii) the Defendants have no real prospect of successfully establishing ... a *Reynolds* Defence...”

I (We) wish to rely on my statement of case.”

Part C of the application notice contained an assertion, backed by a statement of truth by the claimant’s solicitor, to the effect that the defendants had no real prospect of succeeding with their qualified privilege defence and he knew of no other reason why the disposal of these defences should await trial.

32. Served with the application notice, and apparently intended to form part of it, was a five page schedule, settled by counsel, to which was attached the copy of the defence to which I have referred. It is said that Mr Armstrong had already by letter dated [date] (sic) set out the basis for his objections to the paragraphs that he contended should be struck out. However, he would now repeat the summary reasons for the application which, in the event of a contested application, would be supplemented in his skeleton argument. In the event a 20-page skeleton argument was served on the Friday before the application was heard by the judge on the following Monday, which gave the defendants no opportunity at all to reply with evidence to anything it contained that called for an evidential response. The only part of this schedule that referred to the defence of qualified privilege was in these terms:

“The claimant contends that the entire *Reynolds* defence should be dismissed. The pleaded defence is not capable of supporting the article that was written.”

33. There followed an alternative contention that the first paragraph of that defence, in which reliance was placed on the 102 particulars of the defence of justification should be struck out. As I have said, nothing turns on that in this appeal, and the earlier correspondence, to which reference was made, was no more enlightening.
34. In view of the extremely general nature of the complaint in the application notice the defendants elected to file no evidence in response to the Part 24 application. Although they later agreed that the whole of the inter-party correspondence should be copied for the judge, there was never any suggestion from Mr Armstrong’s side that he wished to rely on anything asserted or disclosed in that correspondence (other than his solicitors’ very brief exposition of their complaint about the *Reynolds* defence) to form part of his evidence on the application.
35. Hearings took place before Eady J on 4<sup>th</sup> and 30<sup>th</sup> November at which he disposed of a number of issues that arose on a cross-application by the defendants, and he also made a ruling on meaning, which was one of the other matters the claimant had requested.

*Part 7 The judge's ruling on meaning*

36. In this ruling, which is not challenged on this appeal, the judge decided that in so far as the article might reflect upon Mr Armstrong in associating him with illicit performance-enhancing drugs, it was capable only of imputing either "guilt" (in the sense of having taken such drugs) or, at the least, that there were reasonable grounds to suspect him of having taken such drugs. He excluded a third meaning put forward by the defendants, to the effect that the article meant that there were grounds for investigating whether he had been taking such drugs. As a consequence of that ruling, many paragraphs of the original plea of justification fell away, and no attempt is being made to restore them.

37. Paragraph 4 of the defence was originally in these terms:

"If and in so far as the words complained of bore the following meanings, they are true in substance and in fact:

- i) That there are serious questions about drug taking in professional cycling including the question whether it was possible that the Claimant might have taken performance-enhancing substances in order to compete in a sport riven with drugs;
- ii) That there are reasonable and/or proper grounds to question, suspect that and/or investigate whether the Claimant might have taken performance enhancing substances in order to compete in professional cycling, a sport riven with drugs".

38. The judge struck out most of this paragraph. All he was prepared to leave was a meaning in these terms:

"That there are reasonable grounds to suspect that the Claimant has taken performance enhancing substances in order to compete in professional cycling".

39. Following this ruling, the 102 particulars of justification were significantly reduced, and at the hearing which started on 6<sup>th</sup> December the judge was concerned only with the numerous items over which there was still a dispute.

*Part 8 The claimant's skeleton argument, served on 3<sup>rd</sup> December 2004*

40. On 3<sup>rd</sup> December the claimant's legal advisers served a lengthy skeleton argument, settled by leading counsel (Mr Spearman QC), in which 10 single-spaced A4 pages were given up to an exposition of the reasons why the plea of qualified privilege should be struck out. Among other things, this document evidenced for the first time an unwillingness to accept, for the purposes of this application, the truth of a number of the matters that were asserted in the defence. Thus complaint was made about the relevance of the particulars relating to Mr Walsh's career and beliefs (for which see paras 3-4 above), on the grounds that none of this material provided, or contributed to, the qualified privilege defence. Its relevance was said to be even more clearly untenable, "due to the unsatisfactory nature of the defendants' case as to the role that

was actually played by [Mr Walsh] in the preparation of the article that is complained of.” Similarly, the description of Mr English (see para 5 above) was said to contain material that was irrelevant to the defence that the article attracted *Reynolds* immunity.

41. Para 5.6 of the defence, which contained an unequivocal plea that the defendants knew the matters set out in the particulars of justification (save for those matters which occurred after the date of publication) was challenged on the basis that if, as it appeared, this knowledge was attributed to all three defendants, “it would be remarkable if all these defendants shared every item of knowledge that is pleaded in paras 4.1 - 4.102 inclusive of the defence.” Paras 5.6 - 5.7 then went on to say that the article drew on the knowledge and expertise of Mr Walsh, and referred to the matters summarised in paras 6-12 above, as to which it was now being said that this material suggested that it was Mr Walsh alone who knew all these matters. This was said to be important, “having regard to the unsatisfactory nature of the defendants’ case” concerning Mr Walsh’s actual involvement in the preparation of the article.
42. Complaint was then made that the language of para 5.6 was “unclear and elliptical”, and suggested that the “sources” were, in truth, those of Mr Walsh alone (for reasons that were given). It was then asserted that it appeared from para 5.6(ix) that Mr Walsh had acquired his knowledge in the course of preparing to write a book, and not for the purposes of the article. This led to a complex complaint which commences “In short, although the defence has made use of a careful choice of words that glosses over this fact, the *true* case is that...” and contains the assertion that so far as the article was concerned, Mr Walsh was the only source for both the other defendants, whose reliance upon him extended no further than “drawing on his knowledge and expertise (to a degree that is unclear and that is certainly not spelled out with any particularity).”
43. It was then asserted that there was no pleaded allegation that the various items of information that were pleaded at sub-paragraphs (i)-(viii) inclusive were known to the other defendants before the article was published, “and sub-paragraph (ix) strongly suggests that they were not (as it makes clear that they were acquired by [Mr Walsh] for the purpose of writing a book, and not for the purposes of writing the article).” (The general effect of these sub-paragraphs of the defence are summarised at paras 6-12 above).
44. Critical comment is then made of the account given in the defence of the attempts made by Mr Walsh to interview Mr Armstrong and/or to obtain answers to questions before the article appeared. It is contended that all these attempts were clearly made for the purpose of Mr Walsh’s book, and not for obtaining comments on the proposed article. In a sustained attack on the defendants’ *bona fides* it is made clear for the first time that the claimant’s lawyers wished to found arguments on the contents of the e-mailed questions (which were not set out in anyone’s statement of case), which happened to be in the correspondence file prepared for the judge. It was also asserted that elements of Mr Armstrong’s pleaded case – to the effect that the defendants were not interested in his answers or his side of the story, and that the timing of the article was governed by commercial considerations rather than considerations of either urgency or fairness to him – were not met by the defence.

45. Further reference was then made (without any prior notice of an intention to do so) to the later contents of the correspondence file, to support the complaints about “the unsatisfactory nature of the defendants’ case” as to the role that was actually played by Mr Walsh in the preparation of the article. Detailed submissions followed, purportedly “going through the *Reynolds* factors and taking the defendants’ pleaded case at face value”. Among these was the unqualified assertion that “the only true source” for the article was Mr Walsh, “who plainly had an interest in promoting the thesis of his book”. It was then said that even if other sources were taken into account, the only person who appeared to have direct knowledge of Mr Armstrong’s conduct was Ms O’Reilly, and she had accepted that she never actually saw him taking performance-enhancing drugs.
46. Many of the matters of which Mr Spearman made complaint would have provided a good reason for a request for further information about the defence, if the claimant’s advisers were really unsure what the defendants were saying, even if they decided to postpone the service of any reply until after the final form of the defence had been resolved by the judge. They could also have been set out in the grounds for making the Part 24 application, so that the defendants could have decided what evidence it was appropriate to adduce from Mr Walsh and Mr English, whose journalistic integrity was being impugned, by way of answer to them, so as to show the judge that there were evidential issues that were fit to be determined at the trial. The speech of Lord Hope of Craighead in *Three Rivers DC v Bank of England (No 3)* [2001] UKHL 16; [2003] 2 AC 1, 260 at para 95 (appropriately modified so as to cater for a claimant’s Part 24 claim) shows how entirely unsuitable the claimant’s approach to this Part 24 application was:

“94. For the reasons which I have just given, I think that the question is whether the [defence] has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?

95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a [defendant] were to succeed in proving all the facts that he offers to prove he will not be entitled to the [successful defence] that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the [defence] is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by

all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with [defences] that are not fit for trial at all.”

47. The way the claimant’s legal advisers set about making this Part 24 application (until the eve of the hearing skeleton argument was served) gave the defendants no hint that they were facing a mini-trial for which they would have to prepare written evidence. Prior to that, the claimant’s lawyers were simply asserting, without any particularisation at all, that the pleaded defence was not capable of supporting the article that was written, and that the defendants had no reasonable prospect of establishing their *Reynolds* defence (presumably for the same reason, since no other reason was given).

*Part 9 Other features of the hearing before the judge*

48. We have been shown the skeleton argument prepared and served by Ms Rogers (who appeared for the defendants) on the same day. It understandably contained no response to an attack on the integrity or *bona fides* of her clients or to any suggestion that their defence was unclear or elliptical. She was at that time unaware that such an attack would be made.
49. At noon on the day of the hearing itself the claimant’s legal advisers served for the first time a schedule which compared what had been put to Mr Armstrong in the written exchanges in the immediate run-up to the article with the allegations as published in the article. It seems superfluous to observe that although CPR 23.6 requires an applicant to state briefly the grounds for seeking the order, no complaint along these lines had been indicated before the skeleton argument was served.
50. We have been shown the transcript of counsel’s oral submissions to the judge. Ms Rogers did not apply for an adjournment to file evidence in response to Mr Spearman’s last minute strictures. Instead, she submitted that it was not the role of that hearing to give an exhaustive account of everything Mr Spearman had said, and that the court was not in a position to evaluate all the circumstances without seeing what the evidence was. She argued that the resolution of the issues he raised should have to await the service of witness statements.
51. At the hearing the judge allowed further documentary evidence to be placed before him. In particular the judge allowed the defendants to submit two articles by Mr Walsh which were published in *The Sunday Times* on 8<sup>th</sup> and 15<sup>th</sup> July 2001. He was also shown an interview with Mr Ferrari that was published on the Internet during 2003, and an extract from a book co-authored by Mr Armstrong which was also published during 2003.
52. This selectively produced material raised more questions than it answered. This simply goes to illustrate the thoroughly unsatisfactory nature of the hearing before the

judge. For instance, it showed that much of the material in Mr English's article had appeared in Mr Walsh's articles two years earlier (after which it had encountered a comprehensive refutation by Mr Armstrong), and also that Mr Armstrong knew a lot about the characteristics of EPO and its dangers and the original difficulties that had surrounded the efforts to provide an effective way of testing its presence. Mr Walsh's second July 2001 article described what appeared to be a successful endeavour by Mr Stapleton, Mr Armstrong's agent, to stall answering questions put to him by Mr Walsh (which were never in fact answered) while he arranged an interview with a different journalist who was likely to paint Mr Armstrong's relationship with Mr Ferrari in a more favourable light.

53. In this judgment I can omit the items that are no longer in dispute, and concentrate entirely on those which raise issues we have to determine on this appeal. The range of issues open for decision on this appeal is therefore significantly reduced, when compared with the task that faced the judge. He started his judgment under appeal by saying that if ever there was a case for isolating the "real issues" between the parties in a libel action and excising superfluous material, this surely was it. He will have succeeded admirably in that task even if we were to allow the defendants' appeal in full, since there is now no continuing suggestion that many of the particulars of justification in the original defence should form part of the defendants' statement of case at the trial. My judgment on the dispute about particulars of justification raises no matters of any general issue and is included as an Appendix to this judgment.

*Part 10 Qualified privilege: the judge's application of the Reynolds criteria*

54. In his judgment on this aspect of the case the judge directed himself that he had to assume that all the factual allegations relied upon in support of the defence could be established by the defendants at trial. He said he could only strike out the defence if, on those assumptions, he was prepared to hold that the defendants simply could not bring themselves within the principles identified in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. He rejected the defendants' submission that it was necessary to wait for a jury to determine all the facts before the ruling could be made. In so far as they were controversial, all the facts had to be assumed in their favour. Specifically, he said he had to test the plea against the ten non-exhaustive criteria identified by Lord Nicholls in *Reynolds* at p 205.
55. He started by saying that the allegation of cheating by the taking of illicit drugs was plainly serious. He was prepared to assume that the subject matter was one of public concern: see eg *Grobbelaar v News Group Newspapers* [2001] 2 All ER 437.
56. Next, he had to consider the source or sources for the article. He clearly accepted Mr Spearman's arguments when he said that it would appear that the only "true source" for the information was Mr Walsh himself. He added that it might be that this could not be determined on a definitive basis at this stage. He said he had to bear in mind Lord Nicholls' observations in this context:

"Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories".

57. The judge mentioned in this context Mr Spearman's suggestion that it was possible that Ms O'Reilly should be classified as a "source" for this purpose, and his observation that it was accepted in the defence that she "never saw Mr Armstrong take any performance-enhancing drugs". He said that it was an unusual situation where the primary source for the relevant article was one of the defendants. This particular criterion in Lord Nicholls' catalogue might, therefore, loom less large than in other cases.
58. Fourthly, there was the question what steps, if any, were taken to verify the information published. There did not appear to be a claim on the part of the defendants to have taken any such steps – save in so far as Mr Walsh made some inquiries. The defence did not allege that those were made for the purposes of obtaining Mr Armstrong's observations on the contents of the proposed article (as opposed to Mr Walsh's book). The question therefore arose as to whether or not, applying the standards of "responsible journalism", Mr Walsh's efforts were adequate for the purpose.
59. Fifthly, on "the status of the information", the judge noted that this was not a case in which the allegations had already been the subject of an investigation which commanded respect. Mr Spearman had described the status of the allegations as being "... that Mr Walsh had formed the belief that Mr Armstrong was guilty of taking performance-enhancing drugs and *Times Newspapers* and Mr English were prepared to present material that they had obtained from Mr Walsh as 'the relevant evidence'". The judge said that it was perhaps fair to say that the status of much of the information was that of rumour or speculation. It certainly could not be said that it came from any kind of official report or "public document".
60. As to "urgency", the judge recorded Mr Spearman's submission that there was no urgency here at all, save in the sense that the book was about to be published in France, and added that the article was no doubt, to some extent at least, linked with the desire to promote that book. He said that there might also be said to have been a certain topicality by reason of the imminence of the 2004 Tour de France. But where the allegations were very serious, as they plainly were here, the judge said that one should not necessarily conflate topicality or commercial expediency with urgency, which had to be judged from the public's point of view.
61. Seventh, he had to consider whether comment was sought from Mr Armstrong. Lord Nicholls recognised that such an approach would not always be necessary, but the judge said that it seemed to him that where the allegations were as serious for Mr Armstrong as they were here, it was likely to be very rare that an approach would not be regarded as necessary. Closely linked, of course, was the question whether or not the article contained the gist of Mr Armstrong's "side of the story", and the judge recorded Mr Spearman's submission that the attempts to obtain comment from his client and to present his side of the story were both completely inadequate in view of the nature of the allegations that were to be made.
62. Ninth, there was the "tone" of the article. It was in the judge's view quite sensational and likely to "stir things up" for the purposes of the book and in the context of the Tour de France in July. Although it claimed merely to "raise questions", it could hardly be described as measured, impartial or neutral reportage. That did not necessarily matter, however, since journalists were in the business of stirring up

controversy and were fully entitled to express themselves vigorously. Yet sometimes, if they did so too enthusiastically, they must be prepared to establish the defence of justification.

63. Finally, there was Lord Nicholls' "sweep up" provision about "other circumstances". In this context the judge mentioned the suggestion that the article had been driven by commercial expediency and a desire to promote the book.
64. As I have said, no issue arises on the judge's decision to strike out para 5.1, by which all the particulars of justification were adopted as part of this quite different defence. The judge struck out para 5.2 (see para 27 above) although no doubt he would have allowed it to stand if it had been amended to reflect the meanings he had held the article was capable of bearing. He dealt with paras 5.3-5.5 quite briefly. He would have been willing to allow these descriptions of the three defendants to stand as background if the pleading had been otherwise unobjectionable.
65. He then adopted Mr Spearman's complaints about paras 5.6 and 5.7 of the defence, referring to "the equivocal case on the respective roles of the three defendants"; the problem of identifying which defendant had what knowledge; and the vagueness of the formula that "the article drew upon the knowledge and expertise of [Mr Walsh] gained over many years", particularly in a context in which he was not admitted to be an author of the article (as opposed to having caused its publication). The judge said that it was unclear, for example, to what extent *The Sunday Times* and Mr English "drew upon" Mr Walsh's knowledge other than by borrowing chunks of his book. He also adopted Mr Spearman's "pleading points" I have summarised in para 44 above.
66. The judge then went on to say that it would seem, although it was not spelt out, that Mr Walsh's contacts from mid-May to early June 2004 were for the purpose of his book rather than for the article. The article was written by Mr English, it seemed, and no attempt was made by him or anyone else from *The Sunday Times* to contact Mr Armstrong about the allegations they were going to make.
67. The judge then summarised the main allegations in the article which had not been put to Mr Armstrong for comment:
  - (1) that cycling was "a sport riven with drugs";
  - (2) as to the properties of EPO or whether he knew anything about them;
  - (3) that it would be extremely difficult for a clean cyclist to beat a rider taking EPO;
  - (4) that there were "experts" who took the view that it would probably be impossible for a clean rider to win the Tour de France when he was competing against those on drugs;
  - (5) that one of his team mates (Stephen Swart) had taken EPO;
  - (6) that there was pressure on the Motorola team to deliver results in 1994 and 1995, such as to lead to doping;

- (7) what his relationship with Mr Ferrari or his "controversial reputation" was;
  - (8) whether he knew of Mr Ferrari's 1994 statement about EPO being "no more dangerous than orange juice";
  - (9) what he had to say in response to Ms O'Reilly's "extraordinary stories" about the disposal of empty syringes and a furtive trip to Spain to collect a bottle of pills;
  - (10) the matters concerned with Mr LeMond in paras 25-29 of the article.
68. The judge said that on an application of this kind he had to decide (making all relevant assumptions in favour of the defendants) whether in all the circumstances the "duty-interest test or the right to know test" had been satisfied: *per* Lord Phillips MR in *Loutchansky v Times Newspapers (Nos 2-5)* [2001] EWCA Civ 1805 at [23]; [2002] QB 783. It was an objective test, but he had to bear in mind that the long established common law principles were adaptable to a great variety of circumstances. What was more, it was clear from *Reynolds* itself and from *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277 (at pp 300-301) that the courts were encouraged to invoke those principles more generously than in the past. The judge referred to the observation of Lord Nicholls in *Reynolds* at p 205:
- "Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication".
69. The judge said that after he had made due allowance for the width of the common law principles as now recognised, and made all relevant factual assumptions in their favour, he could not see that the defendants could be said to be under a duty to publish allegations to the effect that Mr Armstrong had probably taken performance-enhancing drugs or that, given his prowess in the Tour de France, he "must" have done so. The judge said he would readily accept, of course, that the use of forbidden drugs in sport is a matter of public concern. It was a different question, however, from whether or not they were under a duty to publish *these* allegations, about *this* Claimant, without at least affording him an opportunity of giving a measured response to the charges. For these reasons the judge struck out the paragraphs of the defence that related to a plea of qualified privilege. He said that the case would proceed on the limited plea of justification which remained on the pleadings.

#### *Part 11 The arguments on the appeal*

70. In opening his clients' appeal, Mr Caldecott QC took us to passages in each of the leading speeches in the *Reynolds* case. He observed, as did the judge, that a failure to put damaging allegations to a person before publishing them did not necessarily

deprive a defendant of a *Reynolds* defence. Lord Nicholls accepted that this was one of the matters that a judge had to place in the balance, and Mr Caldecott submitted that on the facts of this case it was simply unfair for the judge to have done the balancing exercise before hearing the defendants' witnesses give evidence.

71. He said that the judge had seriously misdirected himself both when he suggested that there was only one source for the story (Mr Walsh), and when he had been drawn by Mr Spearman into trying to determine the issues on the pleadings without hearing any evidence. For instance, he would have to hear evidence before he could be sure that the knowledge of Mr Walsh, who described himself as the newspaper's chief sportswriter, should not be treated as the knowledge of the newspaper itself. He would have to hear evidence before he could make any findings as to the knowledge of the author of the article, Mr English, who was said to know all the matters set out in the particulars of justification. He would have to hear evidence before he could make any assessment about the extent to which Mr Walsh, as a responsible journalist, was entitled to rely on the evidence of Ms O'Reilly (whom he interviewed three times), Mr Swart, Mr LeMond and the unidentified source referred to in para 7 above (whom he interviewed twice), and on all the other sources of information mentioned in paras 6-8 above: for the appropriate approach to an unidentified source, see Lord Nicholls in *Reynolds* at p 205E. He would have to hear evidence on whether Mr English was entitled to rely on what Mr Walsh told him about his sources, and on the extent to which it was meaningful to say that the research had been conducted for the purposes of the book, as opposed to the article.
72. Furthermore, Mr Caldecott argued that the judge should have recognised that it was quite unfair to place weight on technical pleading points raised by Mr Spearman without even a clear day's notice before the hearing, particularly as they involved an attack on Mr English and Mr Walsh which they did not have the opportunity of answering. For the purpose of a Part 24 application, the judge ought to have acted on his professed intention to accept the assertions made in the defence as true. These included the assertions that all the witnesses contacted by Mr Walsh were authoritative and had no axe to grind, and that all the defendants knew the matters set out in the plea of justification.
73. The submissions of Mr Spearman on behalf of the claimant were premised on the accuracy of his contention that the defendants had had fair notice of the nature of the claimant's case on the application, and that this court should be very slow to interfere with a decision of a very experienced specialist judge on a case management matter.
74. I readily accept the second of these contentions. Unhappily, however, the basis on which the application was prepared and put before the judge was very far from satisfactory, and it would not be surprising if a judge, with such a massive volume of allegations and counter-allegations before him, were to fall into error for failing to see the wood for the trees. In *Miller v Associated Newspapers Ltd* [2003] EWHC 2799 (QB); [2004] EMLR 33, Eady J commented on the tendency of defendants to plead qualified privilege since the *Reynolds* decision in "rather waffly generalities", and he was right to direct himself that such defences required close scrutiny. Nevertheless, if a challenge is made under Part 24 in terms as vague as those that featured in the claimant's application in this case, a judge must be very careful to ensure that he does in fact accept as true everything asserted by the defendants (unless there is no

reasonable prospect that some or all of it would be accepted as true), and on the present occasion Mr Spearman lured the judge away from this cardinal rule.

75. In his submissions Mr Spearman made a number of points which he will no doubt deploy with equal fervour at the trial, after disclosure has been completed and the various witnesses have been tested on their evidence. But for the reasons Lord Hope gave in *Three Rivers* (see para 46 above) it would in my judgment be quite wrong on the facts of this case to deny the defendants the benefit of the trial process, if that is what they wish to have. When we asked Mr Spearman how fair he would think the process before the judge had been if he had been one of the journalists who were being condemned unheard, we did not receive a very satisfactory answer.

## Part 12 Conclusions

76. I do not consider that it is necessary to say very much about the law, except to recognise that it is now in a state of development following the ground-breaking judgments in *Reynolds*. For present purposes it is sufficient to rely on what Lord Phillips MR said in *Loutchansky (Nos 2-5)* (for which see para 68 above) at paras 35-36:

35. ... “Once *Reynolds* privilege is recognised, as it should be, as a different jurisprudential creature from the traditional form of privilege from which it sprang, the particular nature of the ‘interest’ and ‘duty’ which underlie it can more easily be understood.

36. The interest is that of the public in a modern democracy in free expression and, more particularly, in the promotion of a free and vigorous press to keep the public informed. The vital importance of this interest has been identified and emphasised time and again in recent cases and needs no restatement here. The corresponding duty on the journalist (and equally his editor) is to play his proper role in discharging that function. His task is to behave as a responsible journalist. He can have no duty to publish unless he is acting responsibly any more than the public has an interest in reading whatever may be published irresponsibly. That is why in this class of case the question whether the publisher has behaved responsibly is necessarily and intimately bound up with the question whether the defence of qualified privilege arises. Unless the publisher is acting responsibly privilege cannot arise. That is not the case with regard to the more conventional situations in which qualified privilege arises. A person giving a reference or reporting a crime need not act responsibly: his communication will be privileged subject only to relevance and malice.”

See also Lord Phillips MR in *Jameel v Wall Street Journal* [2005] EWCA Civ 74 at [87], a case in which we were told that an appeal to the House of Lords is now pending.

77. It is also appropriate to note that in *Bonnick v Morris* [2002] UKPC 31; [2003] 1

AC 300 Lord Nicholls, giving the opinion of the Privy Council, said that although the law of defamation ordinarily adopts an artificial “single meaning” rule, it would be quite wrong to apply that rule when deciding whether a journalist or newspaper behaved responsibly. In other words, on the facts of this case, although a jury might find that the article meant for the purpose of the justification defence that Mr Armstrong was in fact guilty of taking performance-enhancing drugs, the words were capable of meaning no more than that there were reasonable grounds for suspecting that he had, and the defendants would be entitled to rely at the trial on this possible meaning when putting forward their claim for qualified privilege as responsible journalists.

78. In my judgment, the judge was wrong in his approach to the treatment of the source material, which he did not subject to any detailed examination. At the trial one of the critical issues, once the relationship between the roles of the different defendants has been sorted out (and in the absence of a request for information, this should become clear when the witness statements are served), is whether Mr Walsh was acting responsibly when he relied on the different people he interviewed, and whether Mr English was acting responsibly when he relied on the outcome of Mr Walsh’s interviews.
79. It was also wrong, in my judgment, of the judge to suggest, without hearing evidence, that the first and third defendants had probably merely borrowed “chunks of the book”, or that Mr Walsh had merely “made some inquiries” (see para 58 above), or that the status of much of the information was that of rumour or speculation (if by that phrase he intended to rely on the outcome of Mr Walsh’s inquiries). Again, given that the claimant’s advisers could have submitted a request for information, but failed to do so, the nature of the defendants’ case will no doubt become clearer as the trial process goes on. I accept Mr Caldecott’s submission that the detailed history of the article and its preparation and the quality of the research material was a matter for witness statements and disclosure, not for summary disposal on a Part 24 application in which most of the claimant’s complaints were sprung at the last moment.
80. Similarly, although the defendants’ case in relation to the way they gave Mr Armstrong an opportunity to answer their charges may fail at the trial, I do not consider that the judge was entitled to dispose of their defence summarily, particularly in the circumstances which I have outlined in paras 41-46 above. It should have been plain to the judge that there was some past history that might be relevant in this context, if the defendants had had a proper opportunity of appreciating that an attack along these lines was to be launched. Mr Armstrong had consistently denied that he had taken drugs or that he was aware that any member of any team of which he was a member had ever taken drugs, and this was reported in the article. He could have readily answered the questions he was asked on 28<sup>th</sup> May before the article was published if he had cared to do so: the questions put to Mr Bruyneel had similarly gone unanswered.
81. The defendants were afforded no opportunity of adducing evidence to explain why they had proceeded with the article in the light of the exchanges before publication, and it must have been obvious that the material which related to the pre-publication exchanges, and to Mr Walsh’s previous relationship with Mr Armstrong, was not complete. And given that Mr Walsh had identified his role with *The Sunday Times*

in his emails, and that the claimant's solicitors wrote to him in the belief that he was about to publish an article in that newspaper, it was not open to the judge, in advance of the trial, to conclude that his contacts were made in connection with the book alone, and that nobody on behalf of the newspaper tried to contact Mr Armstrong about the allegations it was going to make.

82. In any event, I accept Mr Caldecott's submission that a failure to put allegations to a claimant is not necessarily determinative (as the judge himself recognised). After all, in *Reynolds* no effort was made to contact Mr Reynolds before publication, and his defence, as given in the Dail, did not feature at all in the article complained of. Nevertheless, following a full trial of the action, the House of Lords was split 3-2 on the question whether this was fatal to the defence of qualified privilege. In *GKR Karate v Yorkshire Post (No 2)* [2000] EMLR 410 Popplewell J, at the end of the trial of the action, upheld a defence of *Reynolds* privilege, notwithstanding the fact that the journalist had made only one inadequate attempt to put damaging allegations to the claimant. After referring to Lord Nicholls's seventh factor in *Reynolds* Popplewell J simply said that this criticism of the journalist was a matter to be put in the balance on the claimant's behalf.
83. In a respondent's notice the claimant sought to rely on some further pleading points, but for the reasons I have already given, in my judgment fairness demands that the merits of the *Reynolds* defence in this action should be properly investigated at the trial and not disposed of in a summary way on the pleadings in the unsatisfactory manner that was essayed by the claimant's advisers before the judge.
84. For these reasons I would restore the defence of qualified privilege. It has now been amended, and in the absence of any opposition to the amendment as such, I would grant the defendants permission to amend on the usual terms as to costs. The contentions in relation to the plea of qualified privilege in the respondents' notice are rejected.
85. For the reasons set out in the Appendix, para 4.15 of the particulars of justification may be restored now that the defence has been significantly amended. I would also restore paras 4.74(i) and (ii). Paras 4.73 and 4.72 may be restored in a suitably amended form. Para 4.54(iv) should remain struck out and the struck out elements of paras 4.87 and 4.88 cannot stand in their present form. I would dismiss the claimant's cross-appeal in relation to the particulars of justification.

## **APPENDIX**

### **THE PARTICULARS OF JUSTIFICATION**

The dispute about the particulars of justification can be conveniently considered under four main headings

#### *A. The VO<sub>2</sub>max issue*

##### *(1) The judge's ruling*

86. *Paras 4.9-4.11:* The judge permitted a truncated form of pleading explaining the

concept of "VO<sub>2</sub>max" in these terms:

"4.9 In endurance sports, maximal oxygen intake, VO<sub>2</sub>max, is a major determinant of performance. An athlete's VO<sub>2</sub>max depends on a number of variables, including:

- (i) ventilation: the respiratory function of the lungs;
- (ii) transport of inhaled oxygen through the pulmonary membranes to the blood – the diffusion capacity of the lungs, diffusion-distance;
- (iii) oxygen transport capacity of the blood, determined by haemoglobin concentration and cardiac output;
- (iv) capacity of the working tissue to absorb and metabolise the delivered oxygen – enzymatic systems of the muscles, mitochondrium.

Maximal cardiac output is a key determinate of VO<sub>2</sub>max.

4.10 Some of the variables above can be influenced by endurance training; others cannot.

4.11 Haemoglobin is the protein contained in red blood cells that transports oxygen from lungs to tissue. Manoeuvres that increase total body haemoglobin increase VO<sub>2</sub>max; and manoeuvres that decrease total body haemoglobin reduce VO<sub>2</sub>max. The changes appear to be independent of total blood volume. Increased VO<sub>2</sub>max and total body haemoglobin increase performance".

These paragraphs should be read with para 4.13, in the form permitted by the judge, against which there is no challenge:

"Erythropoietin is one of a number of hormones that stimulate red cell production. Recombinant EPO ("EPO") was developed for clinical purposes and became available commercially in 1987."

(2) *The claimant's case*

87. The first three of these pleas should be struck out because the defence now contained no allegations concerning Mr Armstrong's VO<sub>2</sub>max or his total body haemoglobin. Nor did it contain any allegation that he increased his VO<sub>2</sub>max or total body haemoglobin at any material time, still less any basis for any allegation that there were reasonable grounds to suspect him of having increased his VO<sub>2</sub>max or his total body haemoglobin by taking performance enhancing substances in order to compete in professional cycling. Although para 4.94(i) of the original defence alleged that questions arose as to the increase in his haematocrit between December 1997 and February 1998, there was nowhere any allegation or suggestion that any questions arose as to the figures for his haemoglobin that were pleaded in para

94(ii). Moreover, paras 4.9 and 4.10, in the form permitted by the judge, expressly averred that an athlete's VO<sub>2</sub>max depended on a number of variables, some of which could be influenced by endurance training and others of which could not.

88. In these circumstances, even if new averments were permitted to the effect that Mr Armstrong had increased his VO<sub>2</sub>max at any material time, any such increase could not amount to reasonable grounds to suspect him of taking any performance enhancing drugs. It was therefore contended that the allegations in paras 4.9-4.11 were irrelevant, would provide unhelpful complication, and would distract the jury, and that the judge gave no reasons for allowing them to remain.

(3) *The defendants' case*

89. The defendants, for their part, contended that they had a positive right to explain how EPO worked. As a starting point, they must clearly be allowed to explain to the jury how EPO served to enhance performance in an endurance sport like cycling. The four paragraphs that appear in para 86 above explain this concisely. There is no challenge to the fourth. The second, for which no request for further information had been served, merely record that endurance training could influence some of the variables that made up VO<sub>2</sub>max but not others. The obvious implication is that EPO can stimulate red cell production in a manner which endurance training cannot.

90. The claimant's point that the reformulated plea did not allege that he was reasonably to be suspected of having increased his VO<sub>2</sub>max or his total body haemoglobin was obviously wrong. The particulars focus on EPO and on drugs with similar effects. The whole purpose of EPO is to stimulate red cell production, and therefore the volume of haemoglobin in the blood, and, therefore, the oxygen-transporting capacity of the blood. Mr Armstrong was seeking to distinguish the unchallenged particulars which questioned his haematocrit levels (paras 4.29(i) and 4.30, which contained details of measurements of his haematocrit levels on 2<sup>nd</sup> December 1997 and 14<sup>th</sup> February 1998, when they increased by 5.5% in 12 weeks) and the explanatory references in these four paragraphs to haemoglobin. However, as haematocrit is the measure of red cells as a percentage of total blood volume, and haemoglobin is the oxygen-carrying protein in those red cells, there is an inextricable link between haematocrit and haemoglobin levels.

91. Quite apart from its general value, the preliminary explanation in the first three paragraphs illuminated the defendants' unchallenged case on haematocrit. It was also material in considering Mr Armstrong's association with Mr Ferrari, who had recorded Mr Armstrong's haematocrit and haemoglobin levels in his records. This was also relevant to the defendants' general case on the problems of drug testing in this context. Although the pleas on this point were reduced by the judge, the defendants' appeal sought to restore certain particulars relating to EPO (see paras 94-97 below).

92. The defendants contended that the error of seeking to treat haemoglobin and haematocrit as unconnected neatly illustrated the dangers of seeking artificially to restrict their case on how EPO works on a narrow semantic approach to the pleadings alone.

(4) *Conclusion*

93. I agree with the defendants. I see no reason to disturb the decision of the judge.

B. *EPO: its performance enhancing effects and the risks it creates*

(1) *The judge's ruling*

94. *Para 4.15:* The judge disallowed this paragraph as unnecessary. It was in these terms:

“The use of EPO was of concern because its performance enhancing effects gave an unfair advantage to those competitors who abused it. It was also of concern because of the health risks involved. Rapidly expanding erythrocytic volume increases blood viscosity and, especially in endurance races, might predispose the athlete to blood clots or other complications. In 1996, the American College of Sports Medicine issued a Position Stand decrying the use of EPO because it was unethical, unfair and exposed athletes to health risks.”

(2) *The defendants' case*

95. The defendants wish to see this paragraph restored. They say that the judge rightly left in para 4.99, which sets out evidence that Mr Ferrari administered EPO to cyclists, and paras 4.93 and 4.94(ii) which give details of Mr Armstrong's contact with Mr Ferrari. Furthermore para 4.54(ii) relies on what the defendants will contend was Mr Ferrari's extraordinary remark to the effect that EPO was no more dangerous than orange juice. The plea in para 4.15 therefore bore directly on the suspicious nature of Mr Ferrari's observation. The danger to health was also said to be relevant general background to the contention that the only possible reason for taking EPO would be to enhance performance, having regard to the perceived health risks. The fact that EPO was taken by cyclists despite the health risks also underlined the enormous commercial pressures on professional cycling teams to win, and the paragraph is therefore not irrelevant to the issues. The defendants' article referred both to health risk and to Mr Ferrari's contacts with Mr Armstrong, and the defendants suggested that Mr Armstrong might well admit this paragraph.

(3) *The claimant's case*

96. Mr Armstrong contended that the judge did not allow para 4.99 to remain in the judgment: he said it would only be relevant if it were alleged that Mr Ferrari was guilty of supplying EPO to cyclists. They maintained that para 4.15 was rightly struck out as being irrelevant and not giving rise objectively to grounds upon which Mr Armstrong could be suspected of taking performance enhancing drugs. The alleged “danger to health” basis was erroneous. What had to be proved was that there were grounds to suspect Mr Armstrong of having taken EPO. Whether it was dangerous was irrelevant to whether it was taken.

(4) *Conclusion*

97. The judge's ruling was correct on the defence as it appeared before him. The allegations concerning Mr Ferrari in the defence have now been amended significantly, and it would be appropriate to permit this paragraph to be restored to the text in the light of the amendments.

*C. The alleged conversation about EPO within the Motorola team*

*(1) The judge's ruling*

98. It is convenient at this stage to set out the parts of the pleading which feature in the next round of challenges by both sides to the judge's ruling:

“4.54(iv) [struck out] There were discussions about EPO use within the Motorola team. In addition to the matters set out in para 4.74 below, Mr Swart discussed EPO at the end of 1995, at a race in Australia, with Bobby Julich, Kevin Livingston and George Hincapie. When asked for his views about EPO, Mr Swart replied that if they were going to make it in cycling, they would have to use EPO.

4.72 [struck out] The Claimant joined the Motorola cycling team when he turned professional in 1992.

4.73 [struck out] By 1994, there were discussions within the Motorola team about doping in cycling (the matters in para 4.54(iv) above are repeated). Max Testa, the team doctor, had discussions with individual riders and with the team about what products other teams might be using. Dr Testa was concerned about the ‘doping culture’ in cycling which led some riders to feel that, without medication, they would not have a chance of winning races. Dr Testa discussed EPO with the team on one occasion, seeking to persuade them to focus on training, rather than taking pharmacological remedies.

4.74 [not struck out] In 1995, during a training ride in Como, a discussion about doping took place between the Claimant and two other members of the Motorola team, Stephen Swart and Frankie Andreu.

(i) [struck out] The Motorola team achieved very poor results in 1994. Since Motorola's sponsorship contract was due to last only until the end of the 1996 season, there was concern among the team its sponsorship would not be renewed, unless the team achieved results.

(ii) [struck out] As set out above, the success achieved by the Gewiss team in the Fleche Wallonne in 1994 had had a big impact on cycling and on the Motorola team, being a blow to morale.

(iii) [not struck out] The initial stance in the discussion between the Claimant, Mr Swart and Mr Andreu was that if they were going to ride the Tour de France that year, they would have to be on a doping programme; their view was that, in order to get results, they would have to do so.

(iv) [not struck out] During their discussion, they planned that each team member would organise their own programme for himself; everyone riding the Tour de France would have to do so, if they were to be able to compete.

(v) [not struck out] Following that discussion, Mr Swart obtained EPO from a pharmacy in Switzerland. He was able to obtain it without prescription.

(vi) [not struck out] Mr Swart did not see the Claimant obtain or take EPO."

99. *Para 4.54:* The judge said that this paragraph mentioned Michel Ferrari in the context of his having expressed views during an interview in 1994 about EPO. It appeared that he was on record as having said that, if used properly, it was no more dangerous than orange juice. There was a dispute between the parties as to whether this is a fair or accurate summary of what he said, but the defendants wished to retain this in their pleading in order to support the argument that Mr Armstrong's consultation of Mr Ferrari, later, provided a ground for suspicion. To that limited extent, it seemed to the judge that parts of paragraph 4.54 were legitimate. Much of it, however, appeared impermissible, and he permitted a pared down version along these lines:

"In 1994, riders from the Gewiss Team were placed first, second and third in the Fleche Wallonne. At that time, Michel Ferrari was working for the Gewiss Team. Shortly after the victory, he was interviewed about EPO and said words to the effect that, if used properly, it was no more dangerous than orange juice. His comments about a performance-enhancing drug led people to believe that Mr Ferrari felt there was nothing wrong in principle with the use of EPO as part of a medical programme".

The judge was persuaded that this apparent public position on Mr Ferrari's part had a role to play in the material relied upon as reasonable grounds for suspicion.

100. *Paras 4.72 and 4.73:* These paragraphs were concerned with Mr Armstrong's membership of the Motorola Cycling Team from 1992 onwards. There was no objection, as such, to recording the fact that Mr Armstrong was a member of the team, but the judge said that it did not advance the case of "reasonable grounds to suspect". It was asserted that the team doctor encouraged the team to focus on training and discouraged them from taking pharmacological remedies. It was not suggested the advice was ignored. Nor was there anything to connect Mr Armstrong with the taking of drugs. The judge therefore ruled that para 4.73 should

be excluded, as a consequence of which para 4.72 would lose its relevance also.

101. *Paragraph 4.74:* The judge summarised the effect of the introduction to this paragraph and read sub-para (iii) in full. He stated that it was said that the men then decided that each team member would organise his own programme for himself. It was not alleged that Mr Armstrong thereafter used EPO, or indeed any other drug, although it was asserted that Mr Swart obtained EPO from a pharmacy in Switzerland. The defendants argued that this discussion (whatever Mr Armstrong chose to do after it) was relevant and constituted grounds for suspicion (particularly in the context of Mr Armstrong's denial that there were any discussions of doping at Motorola). The claimant submitted that there was a fallacy in this, highlighted by the words "whatever the claimant chose to do after it". The judge disagreed, since an apparent willingness to participate could provide grounds for suspicion that he did take drugs. He therefore permitted the introductory rubric to the paragraph together with sub-paras (iii) to (vi). For reasons similar to those already advanced in respect of other paragraphs, he considered that sub-paragraphs (i) and (ii) were impermissible.

(2) *The defendants' case*

102. The defendants wished to see paras 4.54(iv), 4.72, 4.73, 4.74(i) and (ii) restored to their pleading. They said that para 4.72 was on any view clearly relevant, having regard to para 4.74. Para 4.73 was highly relevant background to what even on the judge's ruling remained in para 4.74 (namely the introduction and paras (iii) to (v)). They said that the fact that these discussions took place despite a warning from the team doctor was relevant. It was hard to understand the judge's assertion that "it is not suggested that this advice was ignored" in the light of the discussions pleaded in para 4.74, and in any event their case was that there were reasonable grounds to suspect that Mr Armstrong ignored this advice. Mr Swart was allegedly party to those discussions with Mr Armstrong, and the fact that he had said to other members of the team in the same year (1995) "that if they were going to make it in cycling they would have to use EPO" (para 4.54(iv)) was also highly relevant background.

103. In the same way the commercial pressures on the Motorola team to improve their results (paras 4.74(i) and (ii)) were clearly both relevant and significant as evidence of possible motive. The judge's conclusion that sub-paras (i) and (ii) were impermissible for reasons similar to those already advanced in respect of other paragraphs contained no reasoned analysis for striking them out. The jury should not be deprived of a full picture of what preceded the discussion to which Mr Armstrong was allegedly party within his own team, let alone material going to motive.

(3) *The claimant's case*

104. The claimant, for his part, contended that even if para 4.74 were allowed to remain in its entirety, this did not permit the introduction of para 4.54(iv), which was simply material giving rise to suspicion against Stephen Swart. Objectively judged, casting suspicion (or even proving guilt) against one person did not (absent some clearly established common enterprise) provide grounds to suspect a different person. This was part of the guilt by association plea that was correctly struck out

by the judge.

105. There was no objection to the mere recitation that Mr Armstrong was a member of the Motorola team (4.72). What Max Testa believed about an alleged “doping culture in cycling” was, however, irrelevant (4.73). There was not even any suggestion that Dr Testa believed that Mr Armstrong was taking EPO, which was the only conceivable basis on which his subsequent warning could be said to be relevant. Even then, pleading his belief was a breach of the repetition rule. To be admissible the defendants would have to set out the facts, which, objectively judged, supported such belief.
106. The judge was right to strike out para 4.74(i) and (ii) of the defence, and his reference to “reasons similar to those advanced in respect of other paragraphs” was explicable by reference to earlier paragraphs of his judgment which Mr Spearman identified.
107. The effect of para 4.74(iii) – (vi) was then summarised. It was said that a discussion that allegedly led another cyclist to obtain EPO was not capable of providing objectively reasonable grounds for suspecting that Mr Armstrong took performance enhancing substances, especially when that other cyclist did not see Mr Armstrong obtain or take them. Moreover, in reasoning that “an apparent willingness to participate could provide grounds for suspicion that [the claimant] did take drugs”, the judge paid no or no sufficient regard to the fact that not merely was it not alleged that Mr Armstrong obtained or used performance-enhancing substances after the alleged discussion, but also that the defendants’ case is that the alleged discussion constituted grounds for suspicion, “whatever the claimant chose to do after it” (ie even if he did not obtain or use performance enhancing substances after it).
108. The meaning that the defendants sought to justify was that there were reasonable grounds to suspect that Mr Armstrong took performance-enhancing substances, and not a meaning that he expressed an apparent willingness to do so. An alleged discussion about doping that was not alleged to have been followed by Mr Armstrong obtaining or taking drugs was incapable of supporting the meaning that the defendants sought to justify. And Mr Armstrong’s denial that there were discussions of doping within the Motorola team added nothing. If, as contended above, a discussion that was not alleged to have been followed by his obtaining or taking drugs was incapable of providing objectively reasonable grounds to suspect that he took drugs, then the fact that he denied the discussion did not make it capable of doing so. The judge should therefore have struck out the whole of para 4.74, and not merely part of it.

(4) *The defendants’ response*

109. The defendants replied that the judge was right to conclude that “an apparent willingness to participate [in a doping programme] could provide grounds for suspicion that he [the claimant] did take drugs”. The fact that the defendants could prove that one of the other cyclists (who admits it) took EPO after the discussion strengthened the case rather than weakened it. The fact that the other cyclist did not see Mr Armstrong take EPO, and that the defendants do not plead that he did in fact take it (which would constitute a plea of guilt, rather than reasonable grounds

for suspicion), did not in any way destroy its weight as a plea establishing or tending to establish suspicion (and indeed strong suspicion), read both alone and in conjunction with the other particulars of justification).

(5) *Conclusion*

110. The judge was right to exclude para 4.54(iv) for the reasons he gave. So long as para 4.73 is redrafted so as to be limited to what Dr Testa told relevant members of the team, and to exclude his own alleged concerns, that paragraph (and, in consequence, para 4.72) may be restored, for the reasons put forward by the defendants. Paras 4.74(i) and (ii) should be restored, for the reasons advanced by the defendants. The judge was correct to permit para 4.74(iii) to (vi) for the reasons he gave.

D. *Ms O'Reilly's evidence*

(1) *The judge's ruling*

111. *Para 4.87-4.88:* These paragraphs, which the judge permitted to stand (apart from 4.87 (v) and the last sentence of 4.88) were in these terms:

“In May 1999, the claimant asked Ms O'Reilly [who was a soigneur in the US Postal team] to collect something from Luis Del Moral (the team doctor) in Piles, where there was a US Postal Service Course.

(i) Ms O'Reilly had to pick up a rental car from Beziers and drive to Piles.

(ii) On the following day, at Piles, Johan Bruyneel went up to her and discreetly, out of the view of anyone else, handed over a pill box (a brown one, with a white lid), containing white tablets. Mr Bruyneel was very pleasant to Ms O'Reilly, which indicated to her that she was doing him a favour.

(iii) When he asked her to collect those drugs, the claimant told Ms O'Reilly not to tell Simon (that is, Simon Lillistone, who was then her boyfriend). In fact, Ms O'Reilly travelled to Piles with her boyfriend and they spent the weekend there.

(iv) Ms O'Reilly handed the drugs to the claimant on 10 May 1999. They met at a McDonald's outside Nice. Ms O'Reilly was late, but the claimant made no fuss about that and was pleasant to her, suggesting that she was doing him a favour.

(v) [struck out] Ms O'Reilly did not know what the drugs were. However the circumstances (set out above) were such that she had reasonable grounds to believe that they were not paracetamol or any other permitted drug, which could have been obtained openly from the team doctor. She believed in the

circumstances, on these reasonable grounds, that what she had collected were illegal drugs.

4.88 On 10 June 1999, during the Dauphine, while Ms O'Reilly was massaging Mr Armstrong, he told her that his haematocrit level was 41%. Ms O'Reilly said that was terrible and asked what he was going to do. As set out above, such a level was widely regarded as being too low for high performance in an endurance sport. In response, Mr Armstrong looked at Ms O'Reilly and said words to the effect: 'Emma, you know what I am going to do – what everybody does'.

[struck out] Ms O'Reilly believed on reasonable grounds, that Mr Armstrong meant doping to improve his haematocrit level by pharmacological means, probably the use of EPO."

112. The judge said that para 4.87 was coming close to the high water mark of the defendants' case. He said that the facts alleged were capable of constituting reasonable grounds to suspect the acquisition by Mr Armstrong of illicit drugs. He therefore allowed this paragraph to stand, with the exception of sub-paragraph (v), which he struck out on the grounds that Ms O'Reilly's beliefs were irrelevant.
113. *Para 4.88*: Here one sentence only was challenged. The judge said that it related again to Ms O'Reilly's beliefs, and had to come out, since the test was an objective one.

(2) *The defendants' case*

114. The defendants wished para 4.87(v) and the whole of para 4.88 to be restored. They argued that they did not merely believe that this was Ms O'Reilly's reaction: they also pleaded that her reaction was reasonable. They also challenged the view that a witness to a conversation could not state how he or she interpreted what was said. Hearsay, whether of fact or opinion, was admissible under the Civil Evidence Act 1995. The defendants also relied on the criminal case of *R v Johnson* [1994] Crim LR 377, in which a witness in a rape case had been permitted to say that she believed that the victim's distress was genuine. They added that common sense also suggested that it was artificial to rule out such evidence, as it was almost bound to emerge in cross-examination in any event. Because such matters required careful consideration of the admissibility of evidence at trial, it was wholly inappropriate by their very nature to strike them out.

(3) *The claimant's case*

115. The claimant submitted that Ms O'Reilly's beliefs were irrelevant, as was the question whether the defendants believed that she said she believed. These beliefs were irrelevant even were they to be proved to be based on reasonable grounds. Proving that someone believed something which there were objectively valid reasons to suspect adds nothing to the fact (which is what is relevant) that there are reasonable grounds to support that belief.

116. The objection was not based on hearsay. The fact that hearsay might be admissible did not mean that the hearsay evidence was not objectionable on other grounds. Here, proof that Ms O'Reilly thought that the packet she collected contained drugs was entirely irrelevant. What the defendants were being allowed to advance was that the facts about the trip to Piles objectively gave rise to the suspicion that it was to collect a packet of drugs. Equally, what Ms O'Reilly thought Mr Armstrong meant when he said something was irrelevant on the same basis. Based on the same principles as the repetition rule, one could not seek to prove that suspicion fell on someone simply because an accuser believed him to be guilty. What the accuser believed was irrelevant and a breach of the repetition rule. The same principle informed the rejection as irrelevant of what Ms O'Reilly thought of these two incidents.
117. Whether an issue might emerge on cross-examination was palpably not a justification for allowing something to remain in a pleading.
118. The rape case analogy did not advance the defendants' case. What was sought to be established in a rape case was that the defendant had had sexual intercourse with the victim without her consent. Evidence of distress on the part of the victim was relevant to the question whether she consented. As the jury did not have the opportunity to assess for themselves the state of the victim at the relevant time, evidence from other witnesses as to her distress was admissible.
119. It was here that the analogy broke down. The jury in the defamation case would not be inquiring into whether there were actually drugs in the box, or whether Mr Armstrong was actually confessing to taking drugs by his remarks, but whether objectively judged the base facts gave rise to the suspicion. Unlike the distress of the victim in the rape example, the jury could assess for itself the base facts which were said to give rise to the suspicion. They could not legitimately be assisted in their task by being told what Ms O'Reilly made of base facts.

*(4) Conclusion*

120. The judge's ruling, and the claimant's' arguments in support of it, are well founded. Corroborative evidence in a rape case falls into a very special category. Of course, if there were any other indication, by way of demeanour, tone of voice etc, from which Ms O'Reilly derived her beliefs, or if more facts were introduced by amendment (such as the fact that paracetamol or any other permitted drug could be obtained openly from the team doctor without having to be delivered out of the sight of anyone else) an amendment along those lines might be permitted. The pleading certainly cannot stand in its present form in para 4.87 or 4.88.