article

REPORTAGE: A Not Entirely Neutral Report

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> ''What is the public interest in putting the allegation in the public domain and leaving the public to make its own mind up about whether it is true or not?''[1]
>
> ''Journalism without checking is like a human body without an immune system. If the primary purpose of journalism is to tell the truth, then it follows that the primary function of journalists must be to check and to reject whatever is not true. But something has changed and that essential immune system has started to collapse.''[2]

Reynolds qualified privilege: the new regime

In *Reynolds v Times Newspapers Ltd*[3] the House of Lords decided how the balance between the competing demands of freedom of expression and protection of reputation ought to be struck with respect to defamatory publications of a factual nature to the world at large; specifically, via the media. Their Lordships concluded that in such a case, absent some statutory defence, a defendant would not invariably need to be able to prove what it had published was true in order to have a complete answer to a libel claim. Qualified privilege at common law, to be applied by the court more liberally than before in respect of publications to the world at large, would be available if the defendant could show that the circumstances of publication were such that the public was entitled to know the information comprised in it.[4] To take advantage of the defence, the defendant would need to establish not only that what it had published was of genuine public interest, but that in all the circumstances it had behaved responsibly.[5] Having authoritative, objectively reliable sources and taking appropriate steps to verify the information such sources provided were to be regarded as integral to responsible journalistic conduct.[6] The defendant would have to prove the relevant circumstances and that it had behaved responsibly. To impose any lighter burden on a defendant as a quid pro quo for being relieved of the need to justify would not adequately safeguard reputation. At the heart of the *Reynolds* project lay the encouragement of high quality, public interest journalism, of the investigative (bloodhound) variety in particular.[7]

1. *Al Fagih v HH Saudi Research & Marketing (UK) Ltd* unreported, July 28, 2000, Smith J. at [56].
2. Nick Davies. *Flat Earth News* (Chatto & Windus, 2008), p.51.
3. *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127.
4. See Ward L.J. in *Charman v Orion Publishing Group Ltd* [2008] 1 All E.R. 750 at [66](7): "*Reynolds*'s case must be seen as the House's attempt 'to redress the balance. . .in favour of greater freedom for the press to publish stories of genuine public interest' (per Lord Hoffmann [in *Jameel v Wall Street Journal Sprl* [2006] UKHL 44; [2007] 1 A.C. 359] at [38]). Lord Bingham's criticism of the Court of Appeal (at [35]) was that its 'ruling subverts the liberalising intention of the *Reynolds* decision'. . .Baroness Hale (at [150]) was of the view that '[w]e need more such serious journalism in this country and our defamation law should encourage rather than discourage it'."
5. "To attract privilege the report must have a qualitative content sufficient to justify the defence should the report turn out to have included some misstatement of fact. It is implicit in the law's insistence on taking account of the circumstances in which the publication, for which privilege is being claimed, was made that the circumstances include the character of that publication. Privilege does not attach, without more, to the repetition of overheard gossip whether attributed or not nor to speculation however intelligent": *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127, Lord Hobhouse at 238H–239A.
6. As confirmed in *Jameel v Wall Street Journal Sprl* [2006] UKHL 44, per Lord Bingham at [32]: "The rationale of this test [of responsible journalism] is, as I understand, that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify. As Lord Hobhouse observed with characteristic pungency [in *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127] at 238, 'No public interest is served by publishing or communicating misinformation'. But the publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication"; see also *Jameel* at [149] per Baroness Hale.
7. "The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment. In this regard it should be kept in mind that one of the contemporary functions of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of

Alternative formulation of defence rejected

The House of Lords formulated the defence in this way having considered and rejected various alternative proposals:

> • the three-stage duty, interest and ''circumstantial'' test adopted by the Court of Appeal (rejected as being not soundly based[8] amongst other grounds);
> • a privilege for political discussion subject to proof of malice (rejected because a generic privilege for political information ''regardless of the status and source of the material and the circumstances of the publication'' subject only to malice would not provide adequate protection for reputation[9] and it would be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern);
> • a privilege for political discussion, subject to proof by the claimant that the defendant newspaper had behaved either negligently or unreasonably[10] (rejected because the shift in the burden of proof would ''turn the law of qualified privilege upside down''[11] and because ''it would seem to leave a newspaper open to publish a serious allegation which it had been wholly unable to verify. Depending on the circumstances, that might be most unsatisfactory''[12]).

New defence of reportage emerges fully-fledged

Nevertheless, in *Al Fagih v HH Saudi Research & Marketing (UK) Ltd,*[13] the Court of Appeal upheld a defence of qualified privilege, notwithstanding that the defendant had made no effort to verify the factual accuracy of the serious defamatory allegation it published, on the ground that the offending newspaper article consisted of ''reportage''.[14]

Over a period of about two weeks, the newspaper *Ash-Sharq Al-Awsat* reported an unfolding dispute between the claimant, Dr Sa'ad Al Fagih (AF) and Dr Mohammed Al-Mas'aari (AM), prominent members of a Saudi Arabian dissident group (the Committee). The article complained of stated that AF, according to AM, had spread malicious rumours about AM, including that AM's mother had procured women to have sex with him at his home (i.e. to the effect that AF was a dishonest purveyor of grossly offensive sexual gossip). AF sued for libel. The newspaper's defences were justification and qualified privilege. After a trial Smith J. held that both defences failed, as regards privilege, principally because the newspaper had made no attempt to verify its allegation against AF. She entered judgment for AF. She subsequently awarded AF £65,000 in damages. The newspaper appealed.

The Court of Appeal (by a majority (Simon Brown and Latham L.JJ.), Mantell L.J. dissenting) allowed the defendant's appeal, held that the publication was privileged, set aside judgment, and remitted the claim to the High Court for a trial of the issue of malice. In reaching this conclusion, the court made the following observations:

> ''[Simon Brown L.J.:]
>
> [49] This publication occurred in the course of what was undoubtedly a political dispute. The judge. . .was prepared to accept. . .''the defendant's claim that it did not adopt the allegation or in any way imply that it was true''. To my mind she should not in these circumstances have concluded that, without an attempt to verify the allegation, the publication could not be regarded as being in the public interest. . .If, as the judge accepted, and seems to me plain, ''the mere fact that such allegations are being made is of public interest and importance''[15] notwithstanding that the reader could

the press and the media generally. . .The press discharges vital functions as a bloodhound as well as a watchdog": Lord Nicholls, 200G–H & 205E. See also Lord Steyn at 214D–215A.

8. See, e.g. *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127, Lord Steyn at 213A.

9. *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127, Lord Nicholls at 200B & 204G; Lord Steyn at 210H; Lord Cooke at 219H & 220E–F.

10. Akin to the political discussion privilege formulated by the High Court of Australia in *Lange v ABC* (1997) 189 C.L.R. 520.

11. *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127, Lord Nicholls at 203D; see also Lord Steyn at 212F: "In my view such a development would involve a radical rewriting of our law of defamation. . .I also do not think it is a satisfactory way of redressing the imbalance between freedom of speech and defamation in England".

12. *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127, Lord Nicholls at 203B.

13. *Al Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634 ; [2002] E.M.L.R. 13.

14. "'Reportage' (a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper), [the defendant] argues, certainly in the context of a political dispute such as arose here, should more readily attract qualified privilege than publications, as in *Reynolds* itself, by which the newspaper make the allegation its own": *Al Fagih,* unreported, July 28, 2000, Simon Brown L.J. at [6]. "Reportage is a fancy word. The *Concise Oxford [English] Dictionary* defines it as 'the reporting of news by the press and the broadcasting media'. It seems we have Mr Andrew Caldecott Q.C. to thank—or blame—for its introduction into our jurisdiction": *Roberts v Gable* [2007] EWCA Civ 721 ; [2008] Q.B. 502, Ward L.J. at [34].

15. Reading Smith J.'s judgment, it is difficult to understand Simon Brown L.J.'s "difficulty". The "allegations" to which Smith J. was referring here were allegations "of *an obviously political nature*". As she explained at [55]: "I refer. . .to [AM]'s allegations that [AF] was a closet supporter of the Saudi regime and that he sought to exercise complete control of the Committee's activities without consulting his colleagues. Such allegations are damaging and defamatory but are of obvious political importance. The mere fact that *such allegations are being made is of public interest and importance*". Smith J. then, at [56], went on to distinguish carefully between such political allegations and the nature of the allegation complained of: "[AM]'s accusation that [AF] is a purveyor of malicious sexual gossip". As regards the allegation complained of, in contrast with the allegations of a political nature, Smith J. did not accept that the mere fact that such an allegation was being made was of public interest and importance. On the contrary, she pointed out (at [56]) that, absent some indication from the newspaper as to whether it was saying the claim was true or false, readers "are left to speculate about the truth. This is the kind of material which the public might find very interesting but in which they could have only a very limited proper interest in receiving. That limited public interest will have to be considered in conjunction with the obvious potential damage to [AF]'s reputation if the material turns out to be untrue".

Mantell L.J., dissenting, recognised that Smith J. had drawn this distinction and stated that he had "no quarrel with the judge's

not determine whether they were true or false, then I have a difficulty with the view that the public interest in being informed of the particular allegation complained of was only ''very limited''. . .What was clear from these mutual allegations. . .is that one or other if not both of these leading Committee members [i.e. AF and AM] were being shown to be disreputable and that basic fact seems to me something which the appellant's readership were entitled to be kept informed about.[16] In my judgment, there was no need for the newspaper, at any rate at this early stage of mutual accusation, to commit itself to preferring and adopting the contentions of one side over the other.

[50] In short, the case for finding qualified privilege here seems to be not merely very much stronger than in *Reynolds*. . .but strong enough not to have been held forfeit by the appellant's failure to turn an objective report into a verified and adopted allegation. To my mind AK [the journalist] was entitled in this case to publish without attempting verification. Indeed in the present context verification could even be thought inconsistent with the objective reporting of the dispute. . .

[51] I am not, of course, saying that verification (or at least an attempt at verification) of a third party's allegations will not ordinarily be appropriate and perhaps even essential. In rejecting the general claim for qualified privilege for political discussion Lord Nicholls said in *Reynolds* at 203B: ''One difficulty with this suggestion is that it would seem to leave a newspaper open to publish a serious allegation which it had been wholly unable to verify. Depending on the circumstances, that might be most unsatisfactory''.

[52] I am saying, however, that there will be circumstances where, as here, that may not be ''most unsatisfactory''—where, in short, both sides to a political dispute are being fully, fairly and disinterestedly reported in their respective allegations and responses. In this situation it seems to me that the public is entitled to be informed of such a dispute without having to wait for the publisher, following an attempt at verification, to commit himself to one side or the other. . .

[55] . . .malice. Despite what Smith J. said in her damages judgment. . .it could not now be contended, having regard to what we are saying on the issue of qualified privilege, that recklessness and therefore malice is established merely by AK's failure to verify. That would be inconsistent with the very basis of our decision. Rather the claimant's plea of malice, which has always remained outstanding and will now require determination, will have to be sustained, if at all, by reference to the other main limb of AF's case, his contention that the appellant's real agenda here was to damage the Committee rather than disinterestedly inform their readership of the dispute between its leaders.

[Latham L.J.:]

[65] . . .the paper was reporting a split in a political group which was clearly of significant interest to its readers. It seems to me that in this context, what is said by the one side in relation to the other is itself of considerable interest. This is so whether what is said is of high political importance, or merely scurrilous gossip[17] or personal accusations. The fact that allegations of the latter sort are made rather than the former enables the interested reader to obtain some insight into the nature of the dispute. It is the fact that the allegation of a particular nature has been made which is in this context important, and not necessarily its truth or falsity. . .

[67] (as regards Smith J.'s finding that the public interest in the newspaper's readers being informed of the allegation complained of was ''very limited'') I disagree. It seems to me that in the context of allegation and counter-allegation as was undoubtedly the case here, the interested reader was entitled to know what type of allegations were being made from time to time by one side against the other, for the reason which I have already given. Provided that the paper did not, and there is no question here of it having done so, in any way suggest that it was adopting the allegation, the fact that the allegation was made was a matter of proper interest to the reader and the paper had an appropriate duty to publish it. This is the more so as the structure of the reporting was such that the interested reader would, it seems to me, have clearly understood that the allegation was likely to be met by refutation and/or counter-allegation. This indeed was what subsequently occurred.

[68] It is in this context that need for verification has to be considered. Whether or not there has been verification is only one of the criteria to which consideration has to be given. Whether verification is necessary in any given case in order to obtain the protection of qualified privilege would clearly depend upon the facts. . .But if, as here, the publication of an allegation made in the context of allegation, counter-allegation and refutation, where attribution is clear, and where the paper has said nothing to suggest that it in any way adopts an allegation, verification is only likely to be of significance where the allegation is, for example, of criminality the ramifications of which may go well beyond the ambit of the dispute which is the subject-matter of the publication.

[69] In my judgment, the judge was wrong to conclude that in the present case the absence of verification was of such significance as to deprive the paper of the protection of qualified privilege. It could only have verified by asking for the tapes; the outcome of such a request was entirely unknown. It would have delayed publication in circumstances where it could, reasonably, be said that the interested readers were entitled to know the latest development in the dispute.

[70] I acknowledge that the allegations which were reported were clearly serious allegations. But they do not appear to me to have been of a different order to the allegations which had already been reported and about which no complaint is made. . .it seems to me that the overall picture is of a series of publications relating to a matter of proper interest to the paper's readership which did not go beyond an accurate report of a relevant allegation being made in that context, and accordingly should attract qualified privilege.''

reasoning" on these matters: [60]–[62]. This finding lay at the heart of his decision on the appeal that "the judge correctly applied the principles suggested in *Reynolds* and reached a conclusion which was properly available to her on the evidence": [63].

16. But what of Lord Nicholls's observations in *Reynolds* at 201A–C? "Reputation is an integral and important part of the dignity of the individual. . .Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely."

17. Despite Lord Hobhouse's observation in *Reynolds* at 239A that: "Privilege does not attach, without more, to the repetition of overheard gossip whether attributed or not. . .".

Requirements of reportage defence

So what are the parameters of this new reportage defence? In what circumstances will the media in principle have a privilege to publish serious, unverified defamatory allegations, a privilege which may extend to ''scurrilous gossip''? Clearly, this is an important question both for the media and those who consider they have been libelled by it. The recent decisions of the Court of Appeal in *Roberts v Gable*[18] and *Charman v Orion Publishing Group Ltd*[19] have shed some further light on the answer.

Distilling the key principles:

1. The material complained of must be a report.[20] It may but need not be a report of matters of political significance or of a dispute. ''The reportage doctrine. . .cannot logically be confined to the reporting of reciprocal allegations. A unilateral libel, reported disinterestedly, will be equally protected''.[21]
2. The report must concern a topic that was of genuine public interest at the time of publication.[22] The more personal and scurrilous the content of the reported controversy, the less likely it is that the controversy will be a matter of genuine public interest.[23]
3. Judging the thrust or effect of the report as a whole, the report must have the effect of reporting not the truth of the statements it contains, but merely the fact that they were made. There will be no privilege if the defendant adopts statements in the report as true or if it fails to report the story in a fair, disinterested and neutral way.[24]
4. The question of the thrust or the effect of the report as a whole is for the judge to rule upon. The test is objective, not subjective. ''All the circumstances surrounding the gathering in of the information, the manner of its reporting and the purpose to be served will be material.''[25] The court should not get embroiled in issues of the report's meaning to answer the question of whether or not the defendant has adopted the allegations so as to make them its own.[26]
5. Provided that these conditions are satisfied, proof that the defendant failed to take reasonable steps to verify defamatory allegations contained in the report will not affect the validity of the defence.[27]
6. Although in such cases the defendant is absolved from not having taken steps to verify, its conduct must nonetheless have been responsible.[28]
7. In this regard, the fact that the report overall is of genuine public interest does not mean that the defendant was at liberty to drag in damaging allegations which serve no public purpose. The fact the allegations were made must be part of the story. The more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the report.[29]

Critically, in *Roberts* and *Charman* the Court of Appeal has emphasised, where it did not in *Al Fagih*, that to qualify for privilege, reportage not only has to be neutral, it has to be *responsible*, notwithstanding that a defendant need not have attempted to verify any defamatory allegations—a matter recognised ordinarily

18. *Roberts v Gable* [2007] EWCA Civ 721; [2008] Q.B. 502.
19. *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972 ; [2008] 1 All E.R. 750.
20. A "report", in this context, may be distinguished from a piece of investigative journalism in which the journalist makes primary allegations of fact: see, e.g. *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972; [2008] 1 All E.R. 750 at [49].
21. *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972, Sedley L.J. at [91]. Re whether the report must be concerned with "politics", see Ward L.J. in *Roberts* at [71]: "Reference to 'goings-on in political parties, including disputes" does not pitch the case too wide so long as the 'goings-on', of whatever kind, are matters which are of enough public concern. . .to justify the press bringing them to the attention of their readers" and in *Charman* at [47]. Nonetheless, it is true to say that in the (only) two cases in which the defence has so far been upheld—*Al Fagih* and *Roberts*—the court found that the offending material had been published in the course a report of a political dispute.
22. *Roberts v Gable* [2007] EWCA Civ 721 , Ward L.J. at [61](1) & (9).
23. *Roberts v Gable* [2007] EWCA Civ 721, Sedley L.J. at [76].
24. *Roberts v Gable* [2007] EWCA Civ 721, Ward L.J. at [61](3) & (5). "No matter how overwhelming the public interest, it is not reportage simply to report with perfect accuracy and in the most neutral way the defamatory allegations A had uttered of B. . .[because] '[r]epeating someone else's libellous statement is just as bad as making the statement directly'. . .*It will depend on the context whether the material is published to report the fact that it was said or to report what was said as a fact*": *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972, per Ward L.J. at [50] (emphasis added).
25. *Roberts v Gable* [2007] EWCA Civ 721, Ward L.J. at [61](4).
26. *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972, Ward L.J. at [55]-[56].
27. "If upon a proper construction of the thrust of the article the defamatory material is attributed to another and is not being put forward as true, then a responsible journalist would not need to take steps to verify its accuracy. He is absolved from that responsibility because he is simply reporting in a neutral fashion the fact that it has been said without adopting the truth": *Roberts v Gable* [2007] EWCA Civ 721, at [61](3) per Ward L.J.. But note that in *Galloway v Telegraph Group Ltd* [2006] EWCA Civ 17; [2006] E.M.L.R. 221, the CA did not, apparently, think that "reportage" meant that a journalist was absolved from the responsibility to put his allegations to their intended target for comment before publication: "If the documents had been published without comment or further allegations of fact Mr Galloway could have no complaint since, in so far as they contained statements or allegations of fact it was in the public interest for the 'Daily Telegraph' to publish them, *at any rate after giving Mr Galloway a fair opportunity to respond to them*": at [48] (emphasis added).
28. "To justify the attack on the claimant's reputation the publication must always meet the standards of responsible journalism as that concept has developed from *Reynolds*, the burden being on the defendants. In this way the balance between art.10 and art.8 can be maintained. All the circumstances of the case and the 10 factors listed by Lord Nicholls adjusted as may be necessary for the special nature of *reportage* must be considered in order to reach the necessary conclusion that this was the product of responsible journalism": *Roberts v Gable* [2007] EWCA Civ 721, Ward L.J. at [61](6); *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972, Ward L.J. at [48].
29. *Roberts v Gable* [2007] EWCA Civ 721, Ward L.J. at [61](7), quoting Lord Hoffmann in *Jameel v Wall Street Journal Sprl* [2006] UKHL 44 at [51].

to be a prerequisite of responsible journalism: see *Jameel*, Lord Bingham at [32] and Baroness Hale at [149].

Is reportage a sound defence in the public interest?

Be that as it may, in the spirit of inquiry embodied in Lord Nicholls's 9th criterion in *Reynolds*,[30] is reportage a sound and principled defence in the public interest; or, to put it another way, is it really in the public interest that reportage so defined should represent a defence to a libel complaint? Would the House of Lords/the Supreme Court approve it as such if it was called upon to address the matter directly?[31] There are some reasons to think not.

No authority

There is not a trace of reportage as a defence to a libel claim at common law in any domestic or Commonwealth authority up to and including *Reynolds* in which the whole legal landscape was comprehensively reviewed and a number of possible alternative formulations for a public interest defence were considered and rejected. The defence emerged fully-fledged in *Al Fagih*.[32] The absence of authority for reportage is not a sufficient reason to think it unsound, particularly in the post-HRA era when jurisprudential sacred cows may need to be culled.[33] But bear in mind how Lord Steyn approached the issue of the ''soundness of the circumstantial test'' in *Reynolds* at 211–213:

> ''. . .it is important to appreciate that the judgment of the Court of Appeal marked a development of English law in favour of freedom of expression. . .the development was well within the power of the Court of Appeal. On balance, however, I am satisfied that the support for it in the authorities is not great. Except for obiter dicta in *Blackshaw v Lord* [1984] Q.B. 1, 42 the other decisions relied on by the Court of Appeal. . .are cases of institutional reporting which are materially different from reports resulting from investigative journalism. . .I would not accept the circumstantial test is soundly based''.

"Adoption" an unsound criterion for application of repetition rule?

Is lack of adoption or subscription to the truth of defamatory allegations a sound criterion for the application or non-application of the repetition rule? The repetition rule is a well established common law principle which ''reflects a fundamental canon of legal policy in the law of defamation dating back nearly 170 years'' to the effect that ''a hearsay statement is the same as a direct statement'' (Lord Devlin in *Lewis v Daily Telegraph*.[34] because, for the purpose of the law of defamation, ''repeating someone else's libellous statement is just as bad as making the statement directly'' (Lord Reid in *Lewis* at 260).[35] In these circumstances, where a writer chooses to report a serious defamatory allegation, is it right that the applicability of this important rule of policy—and so, potentially, whether the person defamed can obtain any redress at all (see para.9.4 below re ''malice'')—should be governed by whether or not the writer states or suggests that he subscribes personally to the truth of that allegation?[36] To adapt the facts of *Al Fagih*: if the journalist, AK, had stated or suggested that he believed in the truth of AM's allegation that AF had spread malicious rumours of a sexual nature about AM and his mother, instead of remaining neutral about its veracity, would publication of the allegation in this form have been significantly more damaging to AF's standing and reputation in his community? So much more damaging that publication in this form would have entitled AF to substantial damages for libel if the defendant was unable to prove that the allegation was true, whereas, by contrast, on the actual facts of AF, because AK had not adopted the allegation as his own, AF was entitled to nothing? I would suggest not. In reality, damage to reputation, if there has been any, is caused by the appearance of the allegation in a newspaper, regardless of whether the journalist positively subscribes to its truth or not. It is the fact of publication of the defamatory allegation that gives it currency and raises the question mark about the probity of the individual defamed, not the journalist's stated evaluation of the veracity of the allegation. This, indeed, is the very consideration that underlies and justifies the repetition rule.[37] In *Roberts*, Sedley L.J. stated that ''because the reportage defence modifies the repetition rule in the interests of *Reynolds* privilege, it needs to be treated restrictively''.[38] But will restrictive treatment of reportage be enough to safeguard the policy underlying the repetition rule? However hard the court tries to square the circle in this type of way, reportage and the policy underlying repetition rule appear to be fundamentally incompatible.

30. "9. . . A newspaper can raise queries or call for an investigation. . .": at 205C.
31. As Ward L.J. noted in *Roberts v Gable* [2007] EWCA Civ 721 at [43], there was "some endorsement of the [reportage] doctrine" by the HL in *Jameel v Wall Street Journal Sprl* [2006] UKHL 44: see Lord Hoffmann at [62] and Baroness Hale at [149], although these remarks were obiter. In both *Al Fagih* and *Roberts*, the HL refused the claimant(s)' petitions for leave to appeal.
32. "The doctrine first saw the light of day in *Al Fagih*": *Roberts v Gable* [2007] EWCA Civ 721, Ward L.J., at [34].
33. See *R. v Lambert* [2002] 2 A.C. 545 at [6].
34. *Lewis v Daily Telegraph* [1964] A.C. 234, 284).
35. *Curistan v Times Newspapers Ltd* [2008] EWCA Civ 432, [2008] 3 All E.R. 92, Arden L.J. at [2] & [53].
36. As regards how fine the line between adoption and non-adoption may be, see Arden L.J.'s remarks in *Curistan v Times Newspapers Ltd* [2008] EWCA Civ 432 at [54]–[55]
37. See *Lord Denning in Truth (NZ) Ltd v Holloway* [1960] 1 W.L.R. 997, 1003: "If the words had not been repeated by the newspaper, the damage done [by the maker of the allegation] would be as nothing compared to the damage done by this newspaper when it repeated it. It broadcast the statement to the people at large. . .". Also, see Simon Brown L.J. in *Mark v Associated Newspapers Ltd* [2002] EWCA Civ 772; [2002] E.M.L.R. 38 at [29]: "that [the repetition rule dictates the meaning to be given to the words used] is by no means to say that the meaning dictated is an artificial one. Rather, the rule accords with reality. If A says to B that C says that D is a scoundrel, B will think just as ill of D as if he had heard the statement directly from C. . .If moreover, A is a respectable newspaper, D's position will be worse that if B had merely heard the statement directly from C. It will be worse in part because there will be many more Bs, *and in part because responsible newspapers do not generally repeat serious allegations unless they think there is something in them so that the very fact of publication carries a certain weight*" (emphasis added).
38. *Roberts v Gable* [2007] EWCA Civ 721 at [74].

Absence of verification inconsistent with "responsible journalism"?

Can publishing serious defamatory allegations of fact without verification outside the framework of statutory reporting privileges ever be responsible or in the public interest? According to Lord Bingham in *Jameel*[39]:

> ''The rationale of this test [of responsible journalism] is, as I understand, that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify. As Lord Hobhouse observed with characteristic pungency [in *Reynolds*] at 238, 'No public interest is served by publishing or communicating misinformation'. But the publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication''.

If this is, as Lord Bingham says, the very rationale of responsible journalism, how can journalism be responsible if no steps to verify are taken? And yet in *Al Fagih*, this is precisely what happened: the publisher was protected even though (a) its journalist had made no effort to verify the serious, personal allegation about AF he proposed to published, (b) taking steps to verify would not have been unduly onerous (asking AM to confirm that he had heard the tape recording of AF supposedly saying the things AM had alleged; asking AM to produce the tape; putting the allegation to AF for his response[40]); and (c) it is hard to see why taking these steps and then either reflecting in the report what had been learned in the course of those inquiries or, on reflection, deciding not to publish the allegation complained of would have been inconsistent with or detracted from the stated purpose of the exercise, objective reporting of the ongoing dispute between AM and AF. In *Roberts* and *Charman* the Court of Appeal has emphasised that in a reportage case the defendant will still have to demonstrate that it has behaved responsibly if it is to take the benefit of privilege. But if a journalist does not need to verify or even put his defamatory allegation to its intended target before publication, what will he have to do to be seen to have conducted himself responsibly? What are the components of responsible journalism if you don't have to try to verify? Can the ''bald retailing of libels''[41] ever be responsible?

Absolute privilege in all but name?

In ordinary (non-reportage) *Reynolds* cases, a finding of malice is not a real possibility because the defendant must establish, as part and parcel of demonstrating responsible journalism, that it took reasonable steps to ensure that what it proposed to publish was accurate and fit for publication.[42] If the defendant establishes this, there is no simply no room for a finding of dishonest or reckless publication. The hallmark of a reportage defence, by contrast, is that the defendant does not need to show that he took any steps to verify. And yet it is apparently not open to a claimant in such circumstances to seek to defeat a reportage defence by proving that the defendant published the defamatory allegation complained with reckless indifference to its truth or falsity. In *Al Fagih*, Smith J., in ruling upon the issue of damages at a hearing subsequent to her ruling in AF's favour on liability, found that the defendant had published the allegation complained of recklessly.[43] On appeal, AF submitted that:

> ''the subsequent finding of recklessness would in any event be decisive against the appellant on the issue of malice even had the publication been protected by qualified privilege''.[44]

However, Simon Brown L.J. rejected this submission on the ground that, if recklessness and therefore malice could be established merely with reference to AK's failure to verify:

> ''[t]hat would be inconsistent with the very basis of our decision. Rather the claimant's plea of malice. . .will have to be sustained, if at all, by reference to the other main limb of AF's case, his contention that the appellant's real agenda here was to damage the Committee rather than disinterestedly inform their readership of the dispute between its leaders''.[45]

But as Eady J. observed in *Lillie & Reed v Newcastle City Council*[46]:

> ''I am not aware of any example of malice having been found (in a case where the judge or jury concluded that the relevant defendant was honest) simply on the basis that the dominant motive was to injure the claimant. It is, in the light of Lord Diplock's speech [in *Horrocks v Lowe*], at any rate a theoretical possibility. It may be, however, that it is an increasingly remote one in the light of recent authorities''.

Thus reportage, it seems, is an absolute privilege in all but name: a privilege which permits reporting of unverified defamatory allegations, which cannot (in reality) be defeated by proof of malice. Yet in *Reynolds*, in deciding to reject the defendant's proposal of a generic privilege for political speech, Lord Hope observed[47]:

> ''Qualified privilege. . .should not be given to a category where the occasion of the communication is such that the privilege is at risk of becoming, in practice, absolute''.

In short, if in a reportage case the publisher is not obliged to verify to obtain the benefit of the defence and it is not open to the person defamed to defeat the defence by proving that the publication was reckless or dishonest, what is the safeguard for the person defamed?

Not compelled by Strasbourg jurisprudence

It is a mistake to think that reportage as a defence is compelled by Strasbourg jurisprudence. The decision of the ECtHR in *Thoma v Luxembourg*[48] played no part in the Court of Appeal's reasoning

39. *Jameel v Wall Street Journal Sprl* [2006] UKHL 44 at [32].
40. *Al Fagih,* unreported, July 28, 2000, see Smith J.'s at [58].
41. See Sedley L.J. in *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972 at [91].
42. *Loutchansky v Times Newspapers Ltd (Nos.2–5)* [2002] Q.B. 783, [34].
43. *Al Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634 ; [2002] E.M.L.R. 13 at [24].
44. *Al Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634 ; [2002] E.M.L.R. 13 at [25].
45. *Al Fagih v HH Saudi Research & Marketing (UK) Ltd* unreported, July 28, 2000, at [56].(Simon Brown L.J).
46. *Lillie & Reed v Newcastle City Council* [2002] EWHC 1600 QB at [1091].
47. *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127 at 230E.
48. *Thoma v Luxembourg* (2003) E.H.R.R. 21 (Mar 29, 2001).

in *Al Fagih* (it is not mentioned at all in the judgments, although it was cited to the court). In any case, *Thoma* seems to stand for little more than the proposition that a principle of liability for defamation which turns on nothing other than whether or not the journalist has ''systematically and formally dissociated himself'' from defamatory allegations attributed to others in a report he has written is not art.10 compliant. Moreover, whatever *Thoma* stands for, it has been superseded by more recent Strasbourg authority which accords enhanced recognition to the importance of reputation[49]: see, most recently, *Rumyana Ivanova v Bulgaria*,[50] final judgment of the ECtHR, May 14, 2008. In unanimously rejecting the applicant's complaint that her criminal conviction for defamation violated her art.10 rights, the European Court considered:

> ''whether the research done by the applicant before the publication of the untrue statement of fact was in good faith and complied with the ordinary journalistic obligation to verify a factual obligation''

and concluded:

> ''The Court's case-law is clear on the point that the more serious the allegation is, the more solid the factual basis should be. . .The applicant's allegation appears quite serious. . .and therefore required substantial justification, especially seeing that it was made in a popular and high-circulation national daily newspaper. . .Special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations''.[51]

The notion that, if the Court of Appeal in *Al Fagih* had rejected the mooted reportage defence and had upheld Smith J.'s findings on liability and damages, the defendant could have successfully complained to Strasbourg that its art.10 rights had been violated is nothing less than fanciful. On the contrary, in light of the more recent Strasbourg authorities, if the facts of *Al Fagih* presented themselves again and the English court reached the same conclusion, one wonders whether the European Court would find such a decision art.8 compliant.

A mandate for "churnalism"?

The above points are all legal reasons to doubt the desirability of reportage as a defence to a libel claim. However, there is also good reason to think that reportage does not serve the public interest because it is bad for journalism. Nick Davies in his valuable critique of contemporary journalism in the United Kingdom, ''*Flat Earth News*'',[52] points out that analysis[53] of domestic news stories in five daily national newspapers[54] over a two-week period suggested that:

- 60 per cent of all the stories published consisted wholly or mainly of wire copy and/or PR material;
- A further 20 per cent contained clear elements of wire copy and/or PR to which, more or less, other material had been added;
- Only 12 per cent of the stories consisted of material which reporters had generated themselves;
- In the case of stories which relied on a specific statement of fact, in 70 per cent of them the claimed fact passed into print without any verification at all; only 12 per cent of these stories showed evidence that the central statement had been thoroughly checked.[55]

Davies memorably describes this phenomenon as ''*churnalism*'':

> ''This is journalists failing to perform the simple basic functions of their profession. . .This is journalists who are no longer out gathering news but who are reduced instead to passive processors of whatever material comes their way, churning out stories, whether real event or PR, important or trivial, true or false. . .This is the heart of modern journalism, the rapid repackaging of largely unchecked second-hand material, much of it designed to service the political or commercial interests of those who provide it''.[56]

And what of the product?

> ''The great blockbuster myth of modern journalism is objectivity, the idea that a good newspaper or broadcaster simply collects and reproduces the objective truth. . .All stories have to view reality from some particular point of view—just like somebody walking into a room has to view it from a particular point. . .Media managers enjoy the comfort of life behind the myth of objectivity. It allows them to pretend that they have a special claim on the truth. In reality, what they generally promote is not objectivity at all. It's neutrality, which is a very different beast.
>
> Neutrality requires the journalist to become invisible, to refrain deliberately. . .from expressing the judgements which are essential for journalism. Neutrality requires the packaging of conflicting claims, which is precisely the opposite of truth-telling. If two men go to mow a meadow and one comes back and says 'The job's done' and the other comes back and says 'We never cut a single blade of grass', neutrality requires the journalist to report a controversy surrounding the state of the meadow, to throw together both men's claims and shove it out to the world with an implicit sign over the top declaring, 'We don't know what's happening—you decide.'
>
> Travelling under the alias of objectivity, this approach has become respectable—has made churnalism seem respectable''.[57]

Is this not precisely the sort of journalism which the new defence of reportage, in the name of the public interest, tends to encourage?

49. See, in particular: *Radio France v France* (2005) 40 E.H.R.R. 706; *Cumpana v Romania* (2005) 41 E.H.R.R. 200; *Lindon v France* (2008) 46 E.H.R.R. 761; and *Pfeifer v Austria* (12556/03) (ECHR) 24 B.H.R.C. 167 November 15, 2007.
50. *Rumyana Ivanova v Bulgaria* 36207/03.
51. *Ivanova v Bulgaria* at [64]–[65].
52. Davies. *Flat Earth News* (Chatto & Windus, 2008).
53. Conducted by researchers from the journalism department of Cardiff University.
54. *The Times*, *The Independent*, *The Guardian*, *The Daily Telegraph* and the *Daily Mail*.
55. Davies. *Flat Earth News* (Chatto & Windus, 2008) pp. 52–53.
56. Davies. *Flat Earth News* (Chatto & Windus, 2008) pp. 59–60.
57. Davies. *Flat Earth News* (2008), Chatto & Windus, pp. 111–112.