Case No: A2/2000/3681

Neutral Citation Number: [2001] EWCA Civ 1634
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
(Mrs Justice Smith)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Monday 5 November 2001

B e f o r e :

LORD JUSTICE SIMON BROWN
LORD JUSTICE MANTELL
and
LORD JUSTICE LATHAM

- -

AL-FAGIH — Respondent

- and -

H.H. SAUDI RESEARCH & MARKETING (U.K.) LTD — Appellant

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- -

Mr Andrew Caldecott QC & Mr Timothy Atkinson (instructed by Wedlake Bell of London WC2E 9HF) for the Appellant
Miss Adrienne Page QC & Mr Harvey Starte (instructed by Davenport Lyons of London W1S 3NL) for the Respondent

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Judgment

LORD JUSTICE SIMON BROWN:

1. This is the defendant's appeal in a libel action against that part of Smith J's interim order on 28 July 2000 which ruled that the publication complained of, an article in the defendant's newspaper Ash-Sharq Al-Awsat on 7 March 1996, was not protected by qualified privilege. Following that ruling, a further hearing took place before Smith J on the issue of damages, resulting in a final judgment for the claimant on 28 November 2000 for £65,000.

2. The words complained of comprised an allegation made by Dr Mohammed Al-Mas'aari (AM) about the claimant (AF) in the course of a dispute between the two men, both prominent members of a Saudi Arabian dissident political organisation known as the Committee for Defence of Legitimate Rights (the Committee) which is opposed to the existing Saudi Arabian government and seeks by non-violent means to bring about human rights reforms. The defendant's newspaper supports the Saudi Arabian government and is in part owned by the Saudi Arabian royal family. It sells about 1500 copies a day in London mainly to persons from the Saudi Arabian community with a particular interest in Saudi Arabian affairs and personalities. The newspaper reported the unfolding dispute over a period of some two weeks.

3. The particular report complained of stated that AM had told the defendant's journalist, Mr Al-Khamees (AK), that AF had spread malicious rumours about him (AM) and had said that AM's mother had procured women to have sexual intercourse with him at his home. At the liability hearing it was common ground that AM had made that allegation to AK and that it was in fact untrue. Although there was a defence of justification, this was based not upon the truth of that allegation, but rather upon a particular letter allegedly written by AF to AM's elderly father, a founder member of the Committee, which contained serious allegations of sexual impropriety against AM. The appellant contended that this letter showed AF to be a purveyor of malicious and scurrilous gossip so that the words complained of were substantially true and their publication was incapable of doing further harm to AF's reputation. That defence, however, was roundly rejected, the appellant failing to satisfy the judge either that AF was the author of the letter or, even if he was, that it would have sustained the defence of justification. There is no appeal from that part of the judge's order.

4. As to the appellant's claim for qualified privilege, the judge in her subsequent damages judgment summarised her earlier ruling as follows:

> "The defendant also claimed qualified privilege, submitting that his readership had a need and right to know what [AM] and the claimant were saying about each other. The defendant had done no more than provide an accurate day-to-day account of the unfolding dispute. It had not taken sides. It had not adopted the allegations and counter-allegations as true but had merely reported what each had said. Its staff had no reason to believe that the words complained of were not true. The defendant had observed the standards of responsible journalism. I rejected that defence as I did not accept that the defendant had observed the standards of responsible journalism. [AK] had made no attempt to verify the truth of [AM's] allegation as he could and should have done. When the series of articles was viewed as a whole, I considered that the defendant had taken sides

> and had implied that the allegation was true. Although I recognised that there was some public interest in the reporting of this dispute, I held that the potential harm to the claimant from the publication of the unverified allegation outweighed the public interest in publication."

5. The principal argument advanced below was to the effect that where two politicians make allegations against each other relating to their policies and fitness for office, reports of that debate are of such public importance that provided the exchanges are clearly attributed and fairly and accurately reported, and a fair opportunity is given for each to explain or contradict, public interest requires publication and the usual requirement for verification does not apply. The duty on the publisher was contended to be an "intermediate duty", intermediate that is between the full range of duties associated with responsible journalism in a case where the newspaper investigates a story and reports the facts as true, and the minimal duties of fair and accurate reporting of public proceedings in cases falling within schedule 1 to the Defamation Act 1996.

6. Since the ruling below, the appellants has instructed fresh solicitors and counsel and Mr Caldecott QC on its behalf has abandoned the contention of an intermediate duty. He accepts that the claim for qualified privilege falls to be determined in accordance with the approach laid down by the House of Lords in *Reynolds v Times Newspapers Limited* [2001] 2 AC 127, and submits that on that approach it should be upheld. "Reportage" (a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper), he 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 makes the allegation its own. The essential distinction, he submits, is between on the one hand the press's role as "watchdog" to report on matters of public concern, and on the other its role as "bloodhound" which it pursues by investigative journalism. Mr Caldecott abandons too the appellant's earlier contention that the claim for qualified privilege fell to be judged in the light of its coverage of the whole dispute; rather he contends that the court should focus on the more immediate context in which the publication complained of was set, in particular the articles published on 6, 7 and 8 March 1996.

7. With that relatively brief introduction let me turn now, as inevitably I must, to the more detailed facts of the case which for the most part I gratefully take from the admirably careful and thorough judgment below.

8. Both AF and AM had been in prison in Saudi Arabia on account of their political activity but on release in about 1994 each had come to London. AF became the manager of the Committee's London office; AM its official spokesman. Differences arose between the two men which came to a head in March 1996. AF disapproved of AM's association with another Muslim dissident group and thought he should be replaced as spokesman. He postponed action on this, however, because AM was preoccupied with his asylum application. This had not been granted. Instead the Home Secretary had ordered his removal to the Dominican Republic. AM's appeal against that decision was determined on 5 March 1996. The Immigration Appeal Tribunal invited the Secretary of State to reconsider his decision and in the result AM was permitted to remain here.

9. On 5 March, as AM came out of court, he distributed a press release in which he announced the expulsion of AF from the Committee. This release was also sent by fax to those on the Committee's mailing list. The newspaper received a copy. AK recognised its potential interest and obtained the editor's permission to cover the story.

10. AM's press release accused AF of having "an unlimited desire for control and domination" in the Committee's affairs and of being unwilling to consult with his colleagues. It alleged that recently AF had changed the locks on the office and had barred AM and two others (who also signed the press release) from the Committee's premises. He had also stopped the payments to the law firm handling AM's asylum appeal. There then followed six specific allegations against AF. The first and second alleged infidelity to the Committee; it was suggested that AF was in effect a closet supporter of the Saudi regime. The third alleged that by his carelessness in security matters he had exposed activists to danger in Saudi Arabia, leading to a number of arrests. Fourth, he had insisted on employing certain people in London despite their "suspicious links" with the British and other security services. Sixth, it was said that he had withheld money needed by colleagues working for the Committee in London as "an arm twisting tactic". The fifth allegation was of a wholly different nature. It said: "He (AF) defamed the honour of his brethren who are members of the Committee and of their families and spread malicious rumours about them in his private conversations. He went on to defame the honour of entire provinces: the women of Hijaz and the women of Ramah are such and such, may God preserve us". Finally it was said that the decision to dismiss AF from the Committee had been taken after long deliberation by the Council within Saudi Arabia.

11. During the afternoon of 5 March AK telephoned AM to confirm the contents of the release and if possible to obtain more information. Because AM was very busy they spoke only for a few minutes. It appears, however, that AM told AK that he had documentary evidence of some of his allegations against AF.

12. AK then telephoned AF who by this time was aware of the contents of the press release. AF said that he did not wish to comment in detail on it but would be issuing a specific statement to the effect that the Committee had decided to remove AM from his position because of his associations with other dissident groups and because he had not kept to his undertaking to work solely with the Committee. AF said that this decision had been taken not by him but within Saudi Arabia. Its implementation had been delayed on account of AM's court case. He congratulated AM on having won his case and wished him a safe life in the UK. Now the case was over, however, he could be removed. He denied all the allegations in AM's press release and said that he did not wish to enter into a war of words. He stressed that the work of the Committee would continue in the same way as before. AK asked him about his personal relationship with AM and he said there was no personal problem. AK observed that AM had accused AF of defaming the families of his colleagues and spreading malicious talk about them. He replied that those who knew him would know that he was above such suspicions. AK sought his comments on every allegation. AF rejected the allegations that he had withheld funds from his colleagues and said that the allegations about changing the locks were laughable. He rejected the allegations of treachery. He said that the Committee would continue with its work under the direction of the founder members in Saudi Arabia and he was optimistic about the future. He said that maybe God would send them someone better than AM and those who had been working for the Committee.

13. The following morning, 6 March, the newspaper published an article written by AK as its main front page item. The headlines, which were written by the editor, said: "Mutual Personal Accusations between Al-Houkook elements (the Committee). Divisions amongst Saudi dissidents." The text claimed that there had been a dramatic development within the "so-called" Committee for the Defence of Legal Rights in Saudi Arabia. This had taken the form of a split within the Committee and the exchange of personal accusations among its members. In the main it faithfully reported the contents of AM's press release. However, AK modified the fifth allegation. He wrote: "The statement also criticised AF's attacks on the honours of the Committee's members and their relatives and his spreading of unsavoury rumours against them in his private circles; he also spread rumours against the honour of provincial citizens." In evidence AK explained that the actual words used in AM's press release implied that the women in the two named provinces (one of which contains the holy places including Mecca) were immoral, an allegation which would cause such deep offence that he had toned it down. The article then set out AF's denials. In respect of the alleged slur on the honour of his colleagues and their families it reported AF as saying that those who dealt with him knew that he was a man of honour and above suspicion. The article then, however, repeated AM's allegation that AF had defamed the "families and honour of his brothers in the Committee and their relatives [and had spread] malicious rumours about them in his private conversations. He even went as far as attacking the morality of whole regions etc. etc. God preserve us".

14. Later that day, 6 March, AF published a press release announcing the decision of the Committee to remove AM as official spokesman. This said little more than AF had told AK the previous day and which had already been published in that morning's article. It said that the reasons for the decision would be made known at a later date. AK said that on receiving this press release he telephoned AM for his reaction. He wished in any event to continue the conversation of the day before which AM had cut short because he wished to investigate further the reasons for the split between the two men. This conversation took place at about 5 p.m. and began where it had left off the day before with a reference to AM's claim to have written proof of some of AF's allegations. AM said that mediators were seeking to resolve the present situation because they wished to stop AF from washing more dirty linen in public.

15. AK asked about the fifth allegation, in particular about the women of Hijaz and Ramah. He asked whether AM thought AF had reached a bad state of mind in order for him to say such words. AM replied that AF's state of mind had deteriorated in the last few months and that he had tapes to prove it. AK asked for confirmation that he had tapes. AM replied: "Yes, it was taped by one of his acquaintances. Yes, an improper act but what could we do? This man was telling me that [AF] was saying this and that about you. I told him 'You are a liar and you have no proof. You either tape him and let us hear him or we will not believe your words'. He said 'I will swear on the Koran'. I said 'Leave the Koran in your heart. We want evidence'." AK asked AM what kind of bad things AF had said. AM replied: "For example there was a woman to whom I wanted to propose marriage who came to my house when I wasn't at home – she came to get to know my mother. He said about that, that the man's mother brings him women at home. He also said: His daughters are loose and other things, filthy words'." AK said that it was very strange. AM then said: "We will bring you the tapes, God willing. We will extract them from the man's hands and enable you to hear them".

16. AK did not speak to AF that afternoon before writing an article based on his conversation with AM which contained the words complained of in this action. He said he had very little time to do so because his deadline for producing copy was 6 p.m. The article which appeared on 7 March was the main front page item. The headlines said: "Curses and Accusations between Officials of the Saudi Al-Houkook Committee. War of pamphlets and statements between Al-Mas'aari and Al-Fagih". The text claimed that disagreements had escalated further despite the efforts of mediators. AF's press release of 6 March was reported with reasonable accuracy. It was reported that AM had responded by saying he had written evidence of AF's attempts to halt his legal representation and evidence that he had changed the locks of the office. Then came the words complained of:

> "Al-Mas'aari said 'Sa'ad Al-Fagih accused my mother of bringing women to me at home after he saw a woman I had intended to marry enter my house in London to visit my mother when I was not in the house. It seems that his state of mind has deteriorated in recent months to the stage where he would say this. One of Al-Fagih's acquaintances had recorded statements by Al-Fagih saying improper things about me. I said to that acquaintance that he is a liar. He said he will swear by the Koran that this is true. I said to him 'Leave the Koran in your heart. I require a recorded tape of these accusations.'"

17. AF read the article on 7 March with, he said in evidence, shock and disbelief. He was deeply upset. He said that in Muslim society an allegation that a person had made imputations of a sexual nature such as he was alleged to have made was regarded with greater censure than the person of whom the imputations were made.

18. Later that day, AK telephoned AF to seek his comments on the article and the words complained of. AF denied having said any such things and quoted a proverb: "Tell a wise man some unbefitting things. If he believes them he is no longer a wise man". AK asked him if he intended to sue AM for libel and AF said that he did not as it would only inflame the situation. He said in evidence that at that time he did not believe that AM could have said what had been reported about the defamation of his mother. It was not until much later, when the tape recording of AM's telephone conversation with AK was disclosed in these proceedings, that he came to realise that AM had indeed made that allegation against him.

19. On 8 March the newspaper published another long article on the split within the Committee. Included within it was AF's response to the article of 7 March including the words complained of.

20. So much for the facts. Let me turn next to the way in which the judge dealt with the defence of qualified privilege in the light of those facts. Again it is necessary to set out the matter in some detail, this time quoting a number of passages from the judgment, although I shall be as selective as possible.

21. Having directed herself in accordance with *Reynolds* and rejected the appellant's argument for "an intermediate duty", the judge said this:

> "53. … the House of Lords in *Reynolds* set their faces firmly against the creation of any special categories of material. They did so for a variety of reasons, one of which is the difficulty of deciding where to draw the boundaries of the category. The House preferred the flexibility of the duty-interest test, considered in the light of the particular circumstances. I accept [the defendant's] submission to the extent that the duty to verify the underlying truth of an allegation may be of less importance in a case where a newspaper provides a fair and accurate report of what has been said and does not state or imply that it is true. That would be so especially in cases where the very fact that the allegation has been made is a matter of genuine public interest. But acceptance of that submission is no more than the provision of an example of a general proposition that the weight to be attached to any particular factor will vary from case to case."

22. The judge then turned to consider "whether the question of privilege should be determined by reference to the whole of the newspaper's coverage of the unfolding story or … only the events leading up to the moment of publication", and concluded:

> "54. … In my view the decision on whether qualified privilege attached to the publication of the words complained of must in the end be determined in the light of what was known to the defendant at the time of publication or, more accurately, at the time the decision was taken to publish. However, the existence and coverage of the continuing dispute is relevant to the assessment of the importance of the material to the public interest and the balancing of that with the way in which and the extent to which the claimant's reputation was damaged. So, the journalist's conduct is to be judged principally at the time of the decision to publish although the rectification of his omission to put the claimant's side of the story on the following day is obviously relevant. The public interest and the final balancing exercise must be considered in the context of the whole coverage of the dispute."

23. Turning then to what she considered to be the relevant factors for determining whether the claim to qualified privilege was established (against the background of Lord Nicholls' non-exhaustive list of ten such factors identified in *Reynolds* at 205A-D), she said:

> "55. … I consider first the nature of the material published in the whole dispute and the extent to which that was a matter of concern to the limited section of the public which comprised the readership of Ash-Sharq Al-Awsat in the U.K. … I do accept that the news of the split within the Committee was a matter of real interest and concern to the readership. It was important news. … The reports included many damaging allegations made by [AM] against [AF], besides the words complained of. [AF] also made some statements which were damaging of [AM], although these were fewer, less specific and much less damaging. Much of the material reported covered allegations which were of an obviously political nature. I refer, for example, 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. I observe also that such allegations are the common currency of political warfare and by their very nature difficult if not impossible to verify. In respect of this kind of allegation I accept [the defendant's] submission that where two politicians voluntarily enter into a public dispute they must expect to have this kind of allegation published about them.

56. However, that material is not complained of. I am concerned only with the dissemination of [AM's] accusation that [AF] is a purveyor of malicious sexual gossip. I accept that such an allegation, if it could be stated with reasonable reliability to be true, is a matter of proper public interest as many would think such a man unfit for office or political leadership. If the allegation were known to be untrue and was stated to be untrue, there would be a legitimate public interest in that the report would show that [AM] was a man willing to make untrue and scurrilous allegations about a colleague. The readers would have a legitimate interest in knowing the kind of man he was and some might say he was unfit for office. 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? That is what [AK] said he was doing. He said he thought the allegation was true or at least that there was something in it because [AM] had said it and he was a religious man. Moreover, the original press release of 5th March had been signed by two others besides him. But he agreed that he did not know whether it was true. He said there was no way he could tell. He could not suggest any method by which the public would be able to make their minds up. Accepting for the moment the defendant's claim that it did not adopt the allegation or in any way imply that it was true, it seems to me that the only possible proper public interest in the allegation as presented is that it could be said to show the public the kind of people there were on this Committee. Where ever the truth of the allegation lay, one or other (or possibly both) of the leading members of the Committee was a purveyor of scurrilous gossip. Either or both were disreputable men. I can see that that may provide some basis for a proper public interest which would not depend upon the underlying truth of the allegation. But apart from receiving the message that the Committee comprised disreputable men, the public is left without any greater understanding of the situation. They do not know whom they are supposed to believe or disbelieve or whom they are to approve or disapprove of. They are left to speculate about the truth. This is the kind of material which the public might find very interesting but 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.

57. I consider next the seriousness of the allegation. As Lord Nicholls observed, the more serious the charge, the more the public is misinformed and the individual harmed if the allegation is not true. It is common ground that I must look at the seriousness of the words complained of through the eyes of the Arab or Muslim readership of Ash-Sharq Al-Awsat. [AK] said that allegations of a sexual nature are very serious in Muslim society and allegations against women are more serious than against men. [AF's] unchallenged evidence was that in Muslim society the making of allegations about sexual matters brings greater opprobrium on the maker of the allegation than upon the person spoken about. Also he said that to say something about somebody's mother is 'the lowest of the low'. I note also that the victims of the alleged gossip were people who were supposed to be [AF's] close friends. Perhaps I am there introducing a 'western' element into consideration as neither witness mentioned that point. However, on any view, this was a very serious allegation indeed. It struck at [AF's] personal integrity, his credentials as a man of deeply held religious belief and his fitness for political leadership.

58. [AK] accepted that when considering whether to publish a potentially harmful allegation such as this, a responsible journalist should usually consider whether he has reasonable grounds for believing it to be true. He agreed that if he had believed it to the untrue, it would be wrong to publish it. But he said that as he was only reporting what [AM] had said and was not adopting it or implying that it was true, he was not under any duty to verify it. He considered it would be impossible to verify. Accepting for the moment and for the sake of argument that the report was fair and accurate and did not imply that the allegation was true, in my judgement there may still remain some duty to verify. This will arise particularly in a case where the source of the material cannot be regarded as reliable and authoritative. The duty will also depend on how damaging the material is, how important it is for the public to receive the material straight away and how easy or difficult it will be to find verification. [AK] said he thought the allegation was true. Whatever he believed about its truth, he knew that [AM] and [AF] were on opposing sides in a serious dispute. In his witness statement he described the two men as 'bitter rivals'. He knew that [AF] had emphatically denied the general allegations in the press release. He also knew that [AF] was supposed to be a religious man just as [AM] was, In my judgment, no reasonable journalist in his position could have regarded [AM] as an authoritative or reliable source. Anyone should have seen that he had an 'axe to grind'. [AM] did not actually assert that he had heard the tape recording of [AF] saying these scurrilous things. He implied that he had done. But [AK] did not even ask him to confirm that he had. Nor did he ask that [AM] should obtain them for him. He wrote his article and sent it off. He did not contact [AF] for his response. He said there was no time. Even accepting that this was so and his deadline for that night was 6pm, he should at the very least have repeated [AF's] general denial from the day before. He accepted that that was so. But in my view that would not have been enough. Objectively considered, there was

no real need to include that particular allegation in that night's copy. The story was obviously going to run a little longer and publication should properly have been delayed pending verification and comment from [AF]. It is not for me to speculate about what the situation might have been when [AK] found that [AM] could not produce a tape recording. That might or might not have caused him to doubt [AM's] word. I say no more of that. I say only that bearing in mind the damaging nature of the material and the partisan position of its source, a responsible journalist would have waited and sought to verify the truth of the allegation and [AF's] response.

59. That is my view of the position on the assumption that the article concerned was a fair and accurate report of what had been said by [AM] and did not contain any assertion or implication that the allegation complained of was true. In fact I accept that looked at in isolation, the article met those criteria, save that it did not include anything of [AF's] side of the story. But even so, I take the view that [AK's] duty of responsible journalism required him to undertake the obvious and simple step of verification by seeking production of the tape. In my view, the correction on the following day of the omission not to put [AF's] side of the story does not meet the real gravamen of the complaint against him, which is his failure to verify.

…

61. As I have said [the defendant] can properly say that the words complained in the text of the article of 7th March are an accurate report of what [AM] said to him and the words are clearly attributed to him. There is nothing in that article by which [AK] adopts the words as true or implies that they are. … I would not say that that article was unfair or inaccurate except in that it did not contain [AF's] side of the story and not even a repetition of his general denial made the day before. But that was rectified the next day. However, I do not think that [the defendant] can make good his claim to fair, accurate and pure reportage when the whole series is considered. … The longer the dispute went on the more it appeared that the newspaper believed and invited its readers to believe in[AM] as being generally truthful and [AF's] denials as untrue …

62. However I look at the publication of the words complained of, whether as an individual article or as a part of the coverage of an important dispute, I reach the same conclusion. In the balance in favour of free publication is the public interest to know everything about this dispute but, as I have said, the interest in hearing this allegation without knowing whether it is supposed to be true is modest. Once the series of articles begins to imply that the allegation is true, the public interest may be increased. In the other side of the scales, it is clear that the repetition of the allegation would be seriously damaging to [AF's] reputation if it turned out to be untrue. As the series begins to imply that the allegation is true, the potential damage increases correspondingly. No attempt was ever made to verify the allegation although the source was obviously partisan. An

> attempt at verification would have been very easy. In my judgement, the balancing exercise results in a clear conclusion that the public interest in unfettered communication ought in this case properly to be restricted as being necessary for the protection of [AF's] reputation. I hold that the defence of qualified privilege fails."

24. The judge's essential reasoning in those paragraphs appears to have been this: Accepting that the defendant did not adopt AM's allegation, the report showed no more than that either AF or AM or both were disreputable purveyors of scurrilous gossip. The public interest of being informed of this was "very limited" (or "modest"). It was "a very serious allegation indeed" and, if it turned out to be untrue, seriously damaging to AF's reputation. AK could very easily have attempted to verify the allegation by asking AM to produce the tapes he said had been made. Although it is unclear what would have happened had he done so and found no tapes available, his failure to make this attempt at verification was to be regarded as fatal to the claim for qualified privilege. The overriding importance in the judge's mind of this failure appears perhaps even more plainly from her subsequent judgment on damages:

> "[Counsel] submitted that some mitigation lay in the fact that [AK] was not recklessly indifferent to the truth of the allegation and that he had 'understandable reasons to believe that verification was not appropriate'. I do not accept that [AK] was not reckless. I think he was."

25. Before examining Mr Caldecott's criticisms of that reasoning (and, indeed, Miss Page QC's submission 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 held protected by qualified privilege), it is convenient next to consider the rival submissions advanced more generally as to how political reportage publications of this character ought to be approached following *Reynolds*.

26. I must take as read the bulk of what was said in each of the five speeches in *Reynolds*. To cite even the most important passages would unduly lengthen this judgment. In essence the case held that the question whether a particular publication attracts qualified privilege at common law should be decided simply by asking whether in all the circumstances "the duty-interest test, or the right to know test" (per Lord Nicholls at 197G) is satisfied. Amongst the relevant circumstances are likely to be the ten specific factors identified by Lord Nicholls at 205A-D. This approach reflects the ECHR jurisprudence under Article 10 of the Convention and is designed to enable a proper balance to be struck between on the one hand the cardinal importance of freedom of expression by the media on all matters of public concern, and on the other the right of an individual to his good reputation. Neither right is absolute but the former, particularly in the field of political discussion, is of a higher order, a constitutional right of vital importance to the proper functioning of a democratic society. That is why "any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved" (per Lord Nicholls at 200F-G), and why "Any lingering doubts (as to how the balance should be struck) should be resolved in favour of publication." (per Lord Nicholls at 205F)

27. In abandoning "the intermediate duty" argument advanced below – in effect an argument for a new genus of political speech where all that is required is correct attribution by the journalist and a fair and accurate record of the relevant dispute – Mr Caldecott recognises its incompatibility with *Reynolds'* rejection of a new category of qualified privilege to cover the publication of all political information. He accepts that the general approach set out in *Reynolds* must now apply in every case, irrespective of whether or not it is within the field of political discussion and irrespective of whether the defamatory allegation is adopted or unadopted, attributed or unattributed. That said, however, he submits that within the broad *Reynolds* approach these will be important and often decisive considerations and, he submits, given that that the allegation here sued upon was attributed, unadopted, and in the political sphere, the judge should have held that qualified privilege applied.

28. Mr Caldecott further submits that, although in every case the balancing exercise must necessarily be performed by the trial judge, this court should be readier than usual, at least at this early stage of the developing jurisprudence, to interfere with first instance decisions. As the House of Lords itself recognised in *Reynolds*, the difficulty with the approach it laid down is that of unpredictability and uncertainty. In effect the court is to ask simply in each case: is it in the public interest to publish this information even though it may turn out to be false? Nevertheless, observed Lord Nicholls, "With the enunciation of some guidelines by the court, any practical problems should be manageable" (202E-F); "Over time, a valuable corpus of case law will be built up." (205E) The early decisions which apply the *Reynolds* test will obviously, therefore, be influential in determining the correct approach. Mr Caldecott urges us to assist in the law's development and in particular to guard against its deflection from a proper course.

29. I turn to consider the rival submissions upon each of the three important features of this publication to which I have already referred.

1. Its political dimension

30. Mr Caldecott referred us to several Strasbourg decisions including the well-known passage from the ECtHR's judgment in *Lingens v Austria* (1986) 8 EHRR 407:

> "41. Whilst the press must not overstep the bounds set, *inter alia*, for the 'protection of the reputation of others', it is nevertheless incumbent on it to impart information and ideas on political issues, just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them …
>
> 42. Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.
>
> The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close

> scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10(2) enables the reputation of others – that is to say, of all individuals – to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues."

31. Most of the ECHR's jurisprudence, however, save for one or two recent cases, was discussed in *Reynolds* and to my mind it adds little of value to the English caselaw, at any rate in the context of the present appeal. The importance of freedom of expression with regard to political matters was fully acknowledged in all their Lordships' speeches. As Lord Nicholls said at 200G-H "… there is no need to elaborate on the importance of the role discharged by the media in the expression and communication of information and comment on political matters. It is through the mass media that most people today obtain their information on political matters"; and, at 205F:

> "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."

32. Miss Page urges upon us a countervailing interest in reputation in the political field. Again reliance is placed upon Lord Nicholls' speech in *Reynolds*, at 201A-C:

> "Reputation … forms the basis of many decisions in a democratic society which are fundamental to its well-being: [including] whom … to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. ... It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad."

33. Even under this head, therefore, there are competing considerations in play: alongside the particular need for full political discussion stands not only the politician's legitimate private interest in his good reputation but also the public interest in the electorate being assisted to make informed rather than misinformed decisions.

2. Reportage

34. The defamatory allegation in the present case was specifically ascribed to a political rival and was not adopted by the newspaper. That, submits Mr Caldecott, is in striking contrast to the facts of *Reynolds* where the newspaper, under the headline "Goodbye gombeen man" and the sub-heading "Why a fib too far proved fatal …," published what Lord Nicholls at 206E-F called "serious allegations … presented as statements of fact but shorn of all

mention of Mr Reynolds' considered explanation". It is, I may further note, at the very opposite end of the spectrum from the sort of publication with which this court was concerned in *Grobbelaar v News Group Newspapers Ltd* [2001] 2 AllER 437, 448: "exposés …unambiguously asserting the criminal guilt of those they investigate."

35. At first blush one might wonder why a correctly attributed and unadopted allegation is defamatory at all; to state that the allegation has been made is, after all, true. Such a report is, however, plainly defamatory under what is known as the repetition rule: a report of a defamatory remark by A about B is not justified by proving merely that A said it; rather the substance of the charge must be proved. The jury cannot be invited to treat the allegation as reported as bearing any lesser defamatory meaning than the original allegation – see *Stern v Piper* [1997] QB 123 and *Shah v Standard Chartered Bank* [1999] QB 241. As, indeed, *Stern v Piper* points out, the whole law of statutory privilege presupposes such a rule: why else would it be necessary to afford qualified protection to reports of proceedings and the like?

36. What, however, Mr Caldecott stresses is that the repetition rule concerns only the scope of the defence of justification in report cases; it does not limit the scope of qualified privilege at common law. Least of all does it require that an unadopted allegation is to be treated in the same way as an allegation asserted to be true. That this is so, moreover, is plain from the ninth of Lord Nicholls' ten factors in *Reynolds*: "The tone of the article. A newspaper can raise queries or call for an investigation. *It need not adopt allegations as statements of fact.*" (emphasis added). This is implicit too in Lord Hobhouse's comment at 238B-C: "Misleading people and the purveying *as facts* statements which are not true is destructive of the democratic society and should form no part of such a society." (again, emphasis added)

37. Miss Page accepts that argument as far as it goes but submits that it overlooks an important consideration: publication in a newspaper, whether adopted or not, disseminates the allegation to the public at large. As Lord Denning said in *Truth (NZ) Limited v Holloway* [1960] 1 WLR 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. … "

38. Miss Page further submits that the very fact that the newspaper is publishing the allegation is likely to carry with it some measure of endorsement: newspapers should be responsible and selective and generally filter out unverified allegations. She further submits that no clear distinction can be drawn between on the one hand investigative journalism and on the other mere reportage: in this very case, she submits, the borderline is blurred given that AK, on the afternoon of 6 March, of his own initiative telephoned AM to explore the fifth allegation and thereby prompted the further allegation now sued upon.

3. Attribution

39. It is, submits Mr Caldecott, an important feature of this case that the article clearly attributes the allegation to AM and reports it, moreover, in the context of a personal dispute involving mutual accusations between him and AF. True, as the judge pointed out, AK could not reasonably regard AM "as an authoritative or reliable source. Anyone should have seen that he had an 'axe to grind'." But so too could the reader recognise this. AM was not being portrayed as a neutral source but rather as one engaged in a bitter dispute with AF. And there is this consideration too: when the source is disclosed, not only is his reliability more easily assessed, but the defamed person can sue him and thereby secure vindication. Although: "[i]n general, a newspaper's unwillingness to disclose the identity of its sources should not weigh against it" (per Lord Nicholls at 205E], the disclosure of the source avoids the especial difficulty referred to by Lord Nicholls at 201B (in the passage cited in paragraph 32 above): "… [where] there is no opportunity to vindicate one's reputation".

40. Considerations such as these underlie Mr Caldecott's reliance upon *McCartan Turkington Breen v Times Newspapers Limited* [2001] 2 AC 277, where the House of Lords again considered the scope of qualified privilege, this time in the context of the statutory defence of fair and accurate reporting of the proceedings of a "public meeting". Mr Caldecott draws our attention in particular to Lord Bingham's speech at 290G-291C:

> "1. In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction.
>
> 2. Sometimes the press takes the initiative in exploring factual situations and reporting the outcome of such investigations. In doing so it may, if certain conditions are met, enjoy qualified privilege at common law, as recently explained by this House in [*Reynolds]*. In the present case the role of the press is different. It is that of reporter. The press then acts, in a very literal sense, as a medium of communication."

41. It is Mr Caldecott's submission that in the present case too the newspaper's role was essentially that of reporter, the medium of communication of a political dispute between AM and AF, rather than that of an investigator exploring the actual facts and reporting the outcome of such investigations. True, he acknowledges, statutory privilege does not in fact

attach to publications of this sort and they must find protection, if at all, at common law. But, he submits, the essential similarity between the reporting of a public meeting (and, in that case, a press release integral to it) and the role which this appellant was discharging should predispose the court to find qualified privilege here too.

42. Miss Page urges on the contrary the obvious differences between this case and *McCartan Turkington Breen* and points in any event to the many statutory safeguards to which the privilege attaching to reports of proceedings of a public meeting is subject. These were listed by Lord Steyn at 295F-G as follows:

> "a. The meeting must be *bona fide* and lawfully held for a lawful purpose. b. It must be one for the furtherance or discussion of a matter of public concern. c. It must be a fair and accurate report of the proceedings. d. The report must be of a matter of public concern and for the public benefit. e. The defence is lost if the publication is proved to have been made with malice. f. The newspaper loses the privilege if it refuses or neglects to publish a requested explanation or contradiction."

43. Miss Page would, I think, contest any suggestion that comparable safeguards were satisfied here.

44. The submissions outlined above represent, I fear, a limited part only of the very full arguments addressed to us on all aspects of this appeal. But I hope they indicate at least the central themes of each side's case. Let me now, therefore, with these arguments in mind, return to the facts.

45. At the end of the day it is necessary to stand back from much of the detail and ask oneself the root question whether in all the circumstances of the case the duty-interest test (or the right to know test) was satisfied. What precisely these tests involve has been the subject of some recent consideration, most notably perhaps by Gray J in *Loutchansky v Times Newspapers Limited* (No 4) [2001] EMLR 898. Since, however, that decision is under appeal and for imminent consideration by this court, rather than discuss it here I propose simply to adopt the approach suggested by Lord Hobhouse at 239E in *Reynolds*:

> "No genus is satisfactory, nor is any genus more satisfactory than the criterion of what it is in the public interest that the public should know and what the publisher could properly consider that he was under a public duty to tell the public."

46. This approach (or "criterion" to use Lord Hobhouse's word) seems to me properly to reflect on the one hand the importance of keeping the public informed and on the other the need for responsible journalism to guard against needless misinformation. A publisher could not "properly consider that he was under a public duty" to communicate the information to the public unless in deciding to do so he reasonably believed that he was acting responsibly.

47. In coming finally to state my conclusions let me begin by saying that this is a difficult case made still more so by the undoubted shift in the defendant's arguments between the hearing

at first instance and that before us. We are as ever conscious, moreover, that we lack certain advantages enjoyed by the trial judge in having heard all the evidence as it emerged over the space of several days. These considerations notwithstanding, we must, I believe, by reference to the facts found, address the central question arising so as to reach our own conclusion upon whether qualified privilege should properly be held to attach to this publication: I accept Mr Caldecott's submission that in this immediate post-*Reynolds* period it is important for the appellate courts to play a full part in ensuring that the law develops along the right lines.

48. Hesitant though I am to reach a different conclusion from that so carefully and skilfully reasoned below, I feel in the end entitled (and therefore, for the reason just given, compelled) to do so.

49. This publication occurred in the course of what was undoubtedly a political dispute. The judge herself rightly "accept[ed] that the news of the split within the Committee was a matter of real interest and concern to the readership. It was important news". She was prepared to accept too "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. That was the critical finding and I find her reasoning in this regard unconvincing. In the first place it must be recognised that both parties to the dispute had issued press releases and were ready to make allegations against the other. The fact that AF's allegations were "fewer, less specific and much less damaging" seems to me of limited relevance. Secondly, I am unpersuaded that there was in truth any fundamental difference between the allegation here complained of and those which had foreshadowed it in reason 5 of AM's initial press release, of which no complaint was made. More generally indeed, I cannot see that this type of allegation was to be regarded as different in kind from those identified in paragraph 55 of the judgment as "of obvious political importance". 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" notwithstanding that the reader could not determine whether they were true or false, then I have difficulty with the view that the public interest in being informed of the particular allegation complained of was only "very limited". These, it seems to me, are nice distinctions for which there is really no place in the reporting of an on-going dispute on a day-to-day basis. "News is often a perishable commodity." (Lord Nicholls in *Reynolds* at205B-C) "[I]t should always be remembered that journalists act without the benefit of the clear light of hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment." (Lord Nicholls at 205E-F) What *was* clear from these mutual allegations, however, is that one or other if not both of these leading Committee members 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. 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 to have been very much stronger than in *Reynolds* (and even there two of their Lordships dissented upon the need for a rehearing in the light of their newly formulated approach), 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 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. Assume, for example, that AK had asked for and been unable to obtain the tapes. Was he bound then not to have published the allegation? Or assume tapes *had* been available and had appeared to support the allegation. Should he have so reported? And should he in those circumstances have refused to publish AF's denial lest that were to defame AM? How would he know whether any tapes were genuine?

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.

53. I must touch briefly on three other matters before concluding this judgment. First, AK's recognition in evidence that in the article of 7 March "he should at the very least have repeated AF's general denial from the day before" – see paragraph 58 of the judgment. That, however, it is plain from paragraphs 59 and 61, was not what decided this case against the newspaper, and, indeed, in my judgment it could never properly have done so. Given that the dispute was receiving daily coverage, it seems to me implicit in the article of 7 March that AF's reactions to AM's latest allegations would be likely to be found, as indeed they were, in the next day's issue.

54. Secondly, I should refer to the judge's conclusion, stated in her later judgment on damages (quoted in paragraph 4 above) that, viewed as a whole, the newspaper "had taken sides and had implied that the allegation was true" – see also the last two sentences of paragraph 61 of the judgment under appeal. Although Mr Caldecott challenges that view, we did not think it necessary to explore it: the fact is that at the time of the publication complained of the newspaper was reporting the allegations entirely neutrally and, there being no complaint as to the later articles, it would be wrong to deny the claimed qualified privilege by reference to them. As this court recently decided in *Loutchansky v Times Newspapers Limited* [2001] 3 WLR 404, the duty to publish must exist at the time of publication. That duty, and correlative right, cannot sensibly be lost by reference to subsequent publications.

55. Third and finally, malice. Despite what Smith J said in her damages judgment (quoted in paragraph 24 above), 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.

56. The issue of malice, however, is for the future. For the present I would allow this appeal, set aside the final judgment on damages, and uphold the claim to qualified privilege.

LORD JUSTICE MANTELL:

57. I have had the opportunity of reading in draft the judgment of Lord Justice Simon Brown.

58. I gratefully adopt his summary of the facts as well as the statement, extracted from the speech of Lord Hobhouse in *Reynolds*, as to the approach which the court ought to adopt in confronting the facts of any particular case, namely to ask itself, "what it is in the public interest that the public should know and what the publisher could properly consider that he was under a public duty to tell the public."

59. It seems to me that in this case the judge adopted the self-same approach (see paragraph 53 of the judgment). She also recognised (paragraph 54) that:

> "The public interest and the final balancing exercise must be considered in the context of the whole coverage of the dispute."

60. She then went on to consider what the dispute was all about. She acknowledged that much of it consisted of cross-allegations of an "obviously political nature". Of these she said at paragraph 55:

> "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. I observe also that such allegations are the common currency of political warfare and by their very nature difficult if not impossible to verify. In respect of this kind of allegation I accept (the defendant's) submission that where two politicians voluntarily enter into a public dispute they must expect to have this kind of allegation published about them."

61. Then at paragraph 56 she focussed on the material which was the subject of the action which she characterised as "the dissemination of (AM's) accusation that (AF) is a purveyor of malicious sexual gossip." She was not, therefore, viewing the particular statement as having a clear cut political context and for that reason, to her mind, it would be of less interest to the public unless the statement could be accepted as true in which case it might show that the party of whom it was said was unfit for office or political leadership. Similarly if the allegation were known to be untrue and could be so stated the public would be entitled to know that fact as telling them something about its disseminator. However, if the public was

not to be told anything about the truth or otherwise of the allegation the interest it might have in learning of the allegation would be limited at best. I have no quarrel with the judge's reasoning as to that.

62. She was, therefore, seeking to apply the *Reynolds* criteria to what on her finding was no more than a malicious and gratuitous side swipe in the ongoing political debate and that was the starting point for what, I think, everybody acknowledges was a conscientious attempt to apply the correct test.

63. In doing so it is suggested that she set too much store by the failure to verify or attempt to verify the offending allegation and I have to allow that the judge gave that factor rather more weight than I might have done in her place. But also prominent amongst her reasons was the failure to obtain AF's response for publication at the same time as the defamatory statement coupled with the unnecessary haste with which the defendant rushed into printing this extremely damaging material. She held that in all those circumstances qualified privilege did not attach to the publication. I find myself quite unable to contradict her, particularly as she had the flavour of the case and I do not. All in all, therefore, I am of the opinion that the judge correctly applied the principles suggested in *Reynolds* and reached a conclusion which was properly available to her on the evidence which she had heard. That is what judges are expected to do and I would uphold her for having done it.

LORD JUSTICE LATHAM:

64. I have had the opportunity of reading in draft the judgments of both Simon Brown and Mantell LLJ. I share the concerns of Mantell LJ that we, in this court, do not have the advantage of having heard the evidence over a substantial number of days, which clearly gives the trial judge the opportunity to develop a feel for the case which is unlikely to be replicated on appeal. I also acknowledge, as does Simon Brown LJ, that the judge clearly had in mind all the criteria which the House of Lords indicated in *Reynolds* were relevant to the consideration of whether or not the particular publication was protected by qualified privilege. Nonetheless, I have come to the conclusion, like Simon Brown LJ, that the judge's application of those criteria to the facts of the present case was flawed in two fundamental respects.

65. I need not set out the facts, which are sufficiently summarised for my purposes in the draft judgment of Simon Brown LJ, to whom I am grateful. What emerges clearly from that summary is that 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 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.

66. In paragraph 56 of her judgment, reproduced in paragraph 23 of Simon Brown LJ's judgment, the judge described the words complained of in the following terms:

> "This is the kind of material which the public might find very interesting but which they could have only a very limited proper interest in receiving"

67. 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 the 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. That is a trite statement. But if, as here, the publication is 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 is interesting to note that the action was commenced at a time when the claimant believed that the report was false. In the light of what might be considered to have been the claimant's dignified and moderate response, fully and accurately reported later by the paper, 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.

71. Like Simon Brown LJ, I would allow this appeal.