



Neutral Citation Number: [2005] EWHC 2787 (QB)

Case No: HQ04X02769

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 December 2005

Before:

THE HON. MR JUSTICE GRAY

Between:

MARION HENRY

Claimant

- and -

BRITISH BROADCASTING CORPORATION

Defendant

RICHARD RAMPTON QC and JACOB DEAN
(instructed by **Carter Ruck**) for the **Claimant**
ANDREW CALDECOTT QC and CATRIN EVANS
(instructed by **BBC Litigation**) for the **Defendant**

Hearing dates: 16-22 November 2005

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HON. MR JUSTICE GRAY

Mr Justice Gray:

The issue

1. This is the trial of the issue whether the publication of which the Claimant, Mrs Marion Henry, complains in this libel action took place on an occasion which is protected by the defence of qualified privilege. The publication in question was a report which was broadcast by the Defendant, the BBC, on BBC West as part of an early evening news bulletin called *Points West*. The subject matter of the report was the outcome of an enquiry into allegations that the waiting list figures at a local hospital, the Weston General Hospital NHS Trust (“WGH”), had been falsified.
2. An unusual feature of the defence of qualified privilege advanced on behalf of the BBC is that it is an amalgam of various species of the privilege: traditional common law privilege (duty/interest and reply to attack); *Reynolds* privilege and statutory privilege (fair and accurate report of governmental information and of a public meeting). The contention for Mrs Henry is that none of these species is available to the BBC in the circumstances of the case. There is no allegation of malice in relation to the various heads of privilege, so that the defence of qualified privilege, if made out, will be a complete answer to the claim.
3. I should for completeness add that there is in addition a defence of justification. There is a detailed Reply in which Mrs Henry denies the allegations of her complicity in the falsification of any waiting list figures. It has been agreed that this issue should, if necessary, be tried at a later date. This course carries with it the advantage that there should be no risk of account being taken of evidence which, though relevant on justification, is not relevant on the question of privilege. So far at least as non-statutory privilege is concerned, the court is principally concerned with the state of knowledge and the state of mind of the defendant publisher. In this case that means the journalist responsible for the broadcast, Mr Matthew Hill.
4. It does not unfortunately follow that the evidence relevant to the privilege issue comes within a narrow compass; far from it. I fear that it will be necessary for me to set out at considerable length the extensive evidence which bears on that issue.

NHS Waiting lists

5. I should set out, by way of preface to a narrative history of events, the procedures for the management of waiting lists which were or should have been in operation in NHS hospitals generally and at WGH in particular.
6. In January 1996 the NHS Executive issued a document entitled “NHS Waiting Times – Guidelines for Good Administrative Practice”. The Guidelines refer to a Patients’ Charter, which had come into effect in April 1995 and which guaranteed 18 months as the maximum In-Patient and day-case wait. According to the Guidelines, the waiting list fulfils two principal functions: firstly, to record the patients identified as needing admission for treatment and, secondly, to quantify at any given point in time the number of patients needing treatment on an In-Patient or day case basis.
7. The Guidelines contain detailed provision for the structure of waiting lists; the circumstances under which patients should be added to a list; how the list should be

maintained (including the recording of information) and by whom and according to what criteria the list should be reviewed. Waiting list targets are said now to be “very public”. The Guidelines confirm that the reputation of a hospital is partly determined by its success in managing its waiting lists. Waiting list information is said to have an important bearing on clinical and resource decisions. There is some anecdotal evidence that waiting list achievement is linked to extra payments being made to the hospital concerned. Section C of the Appendix to the Guidelines makes it clear that waiting time performance is monitored nationally through monthly fast track returns made by providers and purchasers. Health authorities and hospital trusts are required to explain why any patient has had to wait for 18 months. Patient Charter breaches could indicate fundamental waiting time problems or poor management of waiting lists.

8. It is common ground that the subject of waiting lists and the long periods the public have to wait for treatment at NHS hospitals was and remains a very sensitive political issue.
9. It is common ground in the present case that, in order to monitor waiting lists and to ensure that hospitals like WGH were performing according to prescribed standards, the Department of Health had put in place guidance as to how long patients should be left on waiting lists before they receive treatment. The parties are agreed that at the material times government guidance was that patients on the In-Patient Active List and the Out-Patient List should not remain there for longer than 18 months without receiving treatment. The Active In-Patient List was designed for patients who are ready and fit for surgery once an appointment could be made. The Out-Patient List is self-explanatory. There was in addition an In-Patient Deferred List for patients who needed treatment in due course but who, for medical or personal reasons, were not yet in a position to have it. Government guidance as to this last List was that patients should remain on it for a maximum of three months, after which they should either be placed on the In-Patient Active List or removed from the lists altogether.
10. WGH at the material times fell under the Somerset Health Authority and the Avon Health Authority (“the SHAs”) and subsequently the Avon, Gloucestershire and Wiltshire Strategic Health Authority Trust (“the AGW Health Authority”). Both authorities would monitor the WGH In-Patient Active List and the Out-Patient List on a monthly and year-end basis to ensure that targets were being met. It is the BBC’s case that, if targets were not met, the authorities might hold back funds or require WGH to pay for patients to be treated at another hospital. The case for Mrs Henry is that WGH would not necessarily receive extra funding for meeting targets or suffer a reduction in funding if targets were not met. It is, however, common ground that there was always a lot of pressure on WGH to ensure that it met its waiting list targets.

Background facts

11. Much of the background is uncontentious. WGH provides services mainly for North Somerset Primary Care Trust, which is part of the AGW Health Authority. WGH has approximately 360 beds and about 1,600 staff. It is run by a Board of Directors consisting of six executive directors and five non-executive directors. At the material times the Chief Executive of WGH was Mr Roger Moyse; the Director of Finance and

Resources and Deputy Chief Executive was Mr Meredith Collins and the Director of Personnel was Mr John Edwards.

12. The department within WGH which is responsible for managing waiting lists is the Waiting List Office (“the WLO”), formerly called the Admissions Office. The role of the WLO was to manage WGH’s in-patient waiting lists and to make arrangements for patients to come in for treatment. The way the system then operated was that, once it had been decided that a patient needed an operation, a medical secretary (or sometimes the consultant himself) would fill out a waiting list card. This card would find its way internally to the WLO, where the patient would be added to the waiting list of the relevant consultant. When the time came for the patient to be admitted, a “to come in” (or TCI) card would be sent to the patient. Patient data relating to the lists was maintained on a waiting list module on the hospital’s computer software system called Patient Administration System (“PAS”).
13. The WLO was also responsible for a process called “Validation”, whereby in-patients on the lists were reviewed in order to see whether they should be moved onto the Active List (because they were fit or willing to go ahead with treatment) or whether they should be taken off the List altogether (because, for example, they had moved out of the area or had decided that they did not want the treatment).
14. The position in regard to out-patients was different. They were not managed by the WLO but by WGH’s Out-Patient Department.
15. The Claimant, Mrs Marion Henry, by 2000 had worked at WGH for 20 years. She had worked her way up through various posts until in April 1988 she was promoted to become Patient Services Manager. Thereafter she was given additional responsibilities and became Support Services Manager in 1994. In December 1998 she was appointed Facilities and Administration Manager. In that capacity she had line management responsibility for a very wide range of WGH’s activities. Thirteen staff reported directly to her. Mrs Henry was also Data Protection Officer for WGH and as such was direct line manager of the two PAS co-ordinators.
16. In addition Mrs Henry became “caretaker” of the Medical Sciences Department in early 2001, which added substantially to her duties and meant that 11 heads of department were directly responsible to her. In November 2001 her job title changed to General Manager. By that time she was indirectly managing 26 staff.
17. Ms Michele Storey (who was to become Mrs Masson, by which name I shall refer to her) was appointed internally as Admissions Co-ordinator in the WLO in January 1999. Although Mrs Masson was an experienced employee of WGH at that time, the evidence indicates that she probably had little knowledge of waiting list management or processes when she started working in the WLO. (Mrs Masson did not give evidence at the hearing before me). Mrs Masson’s direct line manager at the relevant time was Mrs Linda Marvin, whose job title was Patient Services Manager and later Out-Patient Improvement Manager. Mrs Marvin’s direct line manager was Mrs Henry, who thus was indirectly Mrs Masson’s line manager. There is an issue between the parties as to the extent to which Mrs Henry was involved in the management of Mrs Masson and as to the extent to which, if at all, Mrs Henry monitored in detail what went on in the WLO. Mrs Henry did, however, chair monthly Team Brief meetings which were attended by Mrs Masson.

Mrs Masson's dossier

18. Since the sole issue with which I am at present concerned is the BBC's claim to privilege, it is unnecessary for me to say any more about the background. I turn to the matters bearing directly on the question whether the claim to privilege in respect of the BBC broadcast is well-founded, starting with the circumstances under which the allegations of manipulation of waiting lists first came to light.
19. It appears that by the autumn of 2002 Mrs Masson had decided she would leave WGH because she was fearful she might be made redundant. On 20 October 2002 Mrs Masson wrote to Mrs Henry agreeing to attend a meeting on her return from sickness. Her letter included the following reference to waiting lists:

“Managing the waiting lists together with all the other responsibilities that have been placed upon me has been onerous. However, I have always given 100% commitment and worked very closely with the executives and my line manager, following their instructions at all times to ensure that targets for both outpatients and electives are met, at any cost; always documenting and retaining such instructions for future reference should this be necessary in the future”.
20. On 23 October 2002 the meeting took place between Mrs Henry, Mrs Masson and Mr Hodgkinson (also from WGH). According to a note of the meeting made by Mrs Masson the following day (which Mr Hill saw before the broadcast complained of), Mrs Masson made clear her disgust at the way she had been treated by WGH in relation to her sickness and performing “on call” duty. The note indicated that Mrs Masson wanted to leave WGH. There was a discussion about the terms on which she might leave; she would only do so if WGH would agree a financial package. Mrs Henry told her she had received written allegations that Mrs Masson had said that, if redundancy was not forthcoming, she would “go to the press”. Mrs Masson had replied that she had gained a great deal of information over the years, which she had had the forethought to document and retain. She denied that she had any intention of blackmailing WGH but she was well aware of her rights under the Whistleblower's policy and, if she wished to exercise her right, that would be her decision. Mrs Masson said she was not going to hand over the information to anyone at WGH. According to Mrs Masson's note, she told Mrs Henry that, if WGH wanted her to leave, she should be offered a mutually agreeable financial package. The note also records Mrs Henry as having repeatedly requested to be allowed to be the whistleblower. Mrs Henry is also recorded as having questioned Mrs Masson's sickness (she had been off work for some days).
21. On 25 October 2002 Mrs Masson was suspended from duty at WGH pending (as Mrs Henry put it in her letter to Mrs Masson) “the outcome of an investigatory process concerning both the allegations which you have raised regarding mismanagement of waiting lists and also the allegations about your commitment to the Trust. In addition, the investigation will relate to an allegation that you have endeavoured to obtain a financial advantage through the misuse of confidential information and, moreover, endeavoured to intimidate the Trust and its Senior Managers”.

22. There followed a meeting on 31 October 2002 between Mrs Masson, Mr John Edwards (Director of Personnel at WGH) and a representative from Deloitte & Touche. In the course of the meeting Mrs Masson handed over to Mr Edwards certain documents which she had listed in a document entitled “information to be handed over to John Edwards”. I will refer to those documents as “the dossier”. Amongst the documents provided to Mr Edwards was a short personal statement by Mrs Masson in which she described her decision not to perform “on call” duty and chronicled the subsequent demeaning of her position at WGH which culminated in her suspension. The wording of that statement suggests that Mrs Masson felt that she had been harassed and victimised by Mrs Henry. Mrs Masson also handed to Mr Edwards at this meeting various lists of patients or their hospital numbers who she claimed had been removed from the waiting list and others who had been placed on the Deferred List. Mrs Masson also gave Mr Edwards some of her notebooks which, according to her, recorded on a daily basis notes of meetings and the numbers of patients who Mrs Masson claimed she had been instructed by managers at WGH to remove from waiting lists. The senior managers identified by Mrs Masson as having been implicated in waiting list malpractice during the years she worked in the WLO included Mr Moyse, Mr Collins, Mrs Henry and Mrs Marvin. Mrs Masson also provided information about patients she said she had been instructed to remove from the Deferred List.
23. The types of malpractice identified by Mrs Masson in the dossier as having been carried out on the instructions of senior managers were as follows: removal of patients from the Out-Patient Waiting List (because they would cause WGH to miss its target of maximum patient numbers); removal of patients at or near the 18-month target from the In-Patient Waiting List onto the Deferred List; deliberately withholding “TCI” cards (so that patients would not show on the In-Patient Waiting List at the end of the month) and giving priority to long wait “routine” patients over patients classified as “soon” to ensure that long waiters would be admitted sooner.
24. Mrs Masson also gave Mr Edwards various memoranda and other documents including memoranda which she had sent to Mr Collins; a two-page e-mail discussion about taking patients off lists prior to data leaving WGH and various documents about the validation of patients. Another e-mail which Mrs Masson handed over to Mr Edwards was described by her in a written list of the information she was providing in these terms:

“Email to Facilities and Administration Manager (now known as Hospital General Manager) [Mrs Henry] following conversation with her earlier that day expressing my concerns that I had been requested once again to remove long wait patients from the waiting list. Memo sent and requested her agreement to the action being undertaken. Meeting organised for later that day when the situation was explained in more detail to the above manager who informed me to undertake the request. The Patient Services Manager (now known as Outpatient Manager) [Mrs Marvin] was copied in to this email.”

This e-mail, which was not included in the papers before me, was described as “the paragraph 17 e-mail”.

25. I do not think that for the purpose of resolving the privilege issue it is necessary or appropriate for me to say any more about the circumstances under which Mrs Masson and WGH parted company. What matters is what Mr Hill of the BBC was told about it and how he reacted to what he was told. I deal with that below. It is sufficient therefore to say that on 13 December 2002 Mrs Masson resigned her position with WGH. Shortly afterwards, she married and went to live in Spain.

WGH issue a press statement

26. Although the evidence does not reveal that any public announcement was made about it at the time, an investigation which was to result in the so-called Langran report (as to which see paragraphs 34-39 below) commenced on 7 January 2003. It would seem that it was prompted by the allegations which Mrs Masson had made about waiting list manipulation as described above. Her allegations had not at this stage received any publicity in the media.
27. Shortly before the Langran report was completed (see paragraph 35 below), WGH issued a press statement. It is dated 25 February 2003. It included this passage:

“Towards the end of last year a member of staff at [WGH] removed some papers from the hospital, which contained confidential patient information.

This was a potentially serious disciplinary matter ...

[WGH] recovered all the patient documents but subsequently the member of staff concerned suggested that in the late 1990s she had placed a small number of patients (approximately 40 people in total) on the wrong deferred waiting list at the hospital. She told colleagues on more than one occasion that if she was not given a valuable financial package she would make this information public”.

28. Mrs Henry claimed in her witness statement that she had no involvement with the preparation of that statement and had not seen it before it went out. In her oral evidence Mrs Henry went further and said that in her time in the NHS she had never gone to the press to get her voice heard. In cross-examination, she initially stood by her claim to have had nothing to do with the WGH press statement quoted above. However, when a number of e-mails were put to her, she was constrained to accept that the press statement had not been issued until 28 (not 25) February and that she had requested and received a copy before it was released. Mrs Henry further accepted that she had, contrary to her initial denial, spoken about it to Mr Edwards and to a Mr Underwood of Clear Communications, a PR firm retained by WGH. She had expressed the view that no names should be mentioned in the Langran report. She accepted that the press statement clearly misrepresented the nature and status of the allegations which Mrs Masson had made and that she could have pointed them out at the time.

The involvement of the BBC

29. On 6 March 2003 Mr Matthew Hill, an experienced radio and television journalist who had been the Health Correspondent for the BBC in the West of England since 1995, happened to read a story in the Sun newspaper entitled “NHS made me fiddle waiting lists”. It reported a claim by Mrs Masson that waiting lists at WGH had been manipulated and that she had been instructed to “fiddle” waiting lists by “her bosses”. The article detailed the types of fiddling alleged, namely wrongful transfer to the Deferred List of patients already on the Active List; holding patients back who should have been on the Active List and removing patients from the Out-Patient List. The article also gave details of a wider dispute between Mrs Masson and WGH: a spokesman for WGH was quoted as saying that Mrs Masson had tried to obtain payment for the return of patient data that she had refused point blank to co-operate in an investigation and that she was “malicious”. The article quoted a spokesman for WGH saying that an external investigation had to date found no evidence that any patient waited longer than necessary for an operation during the period concerned and that there was no suggestion of any discrepancy involving patients currently waiting for appointments or operations at WGH. That was a reference to the Langran report.
30. WGH was in Mr Hill’s area. He had in the past covered a number of stories about WGH. He was aware of what he described in his evidence as “the sensitive and political nature of waiting lists to the government”. He had previously read a lot of reports about the issue of waiting lists. He took the view that there was a clear public interest in the public hearing about such an issue. He thought that the story reported in the Sun was one which it was important for him to follow up.
31. Accordingly Mr Hill contacted the Sun journalist two days later. She gave Mr Hill Mrs Masson’s telephone number in Spain and promised to send him some of the key documents which Mrs Masson had given to her. The documents which Mr Hill subsequently received from the Sun included correspondence in September and October 2002 between Mrs Masson, Mrs Henry and Mrs Marvin which documented the breakdown of Mrs Masson’s relationship with WGH. Mr Hill also received the note by Mrs Masson of the meeting on 23 October 2002, attended by her, Mrs Henry and the WGH personnel manager which is referred to at paragraph 19 above.
32. Over the following four months, that is between March and July 2003, Mr Hill was provided with a considerable number of additional documents. Some were provided by the Sun and others by Mrs Masson. The documents are described in paragraph 30 of Mr Hill’s first witness statement. It will suffice for present purposes if I summarise the documents. They included:
 - i) e-mails chronicling the breakdown in the relationship between Mrs Masson and WGH;
 - ii) letters and e-mails recording Mrs Masson’s allegations of waiting list manipulation. Several of these e-mails passed between Mrs Masson and Mrs Henry. Others included an e-mail from Mrs Marvin to Mrs Masson dated 22 October 2002 in which Mrs Marvin explained why she was accessing Mrs Masson’s e-mails in her absence from work;

- iii) a letter from Mrs Henry to Mrs Masson dated 25 October 2002 in which Mrs Henry informed Mrs Masson that, following the meeting on 23 October 2002 referred to at paragraph 19 above, she had decided to suspend her (see paragraph 17 above);
 - iv) the dossier referred to at paragraph 22 above and
 - v) the personal statement referred to at paragraph 22 above.
33. According to the evidence of Mr Hill, he had a number of short telephone conversations with Mrs Masson during March 2003. He was trying to find out whether the story was worth investigating further. His evidence was that Mrs Masson explained in some detail how she had manipulated the waiting list statistics. She explained how the PAS worked and said that patients were being removed from the system in order that they did not show up on any statistics that the system generated. The patients were later “trickled back” onto the PAS. Mrs Masson also mentioned in the course of these telephone conversations other practices which she said had been going on for years, including moving in-patients onto the Deferred List, removing out-patients from the waiting list and holding back “TCI” cards. Mrs Masson gave Mr Hill several names of people whom he could approach to corroborate her allegations. Mr Hill questioned Mrs Masson about her refusal to do “on call” duty and asked if there was any medical documentation of the injuries which had resulted in her being on sick leave in September 2002. According to Mr Hill, he also asked Mrs Masson about the claim that she had tried to blackmail WGH. She denied this. The BBC has disclosed in these proceedings notes made by Mr Hill of these conversations.

The Langran report

34. The Taylor report, with which I deal at paragraph 59-69 below, refers to three enquiries or investigations into allegations of waiting list irregularities at WGH having taken place prior to January 2003. As already stated, the investigation which was to produce the Langran report commenced in early January 2003. It was chaired by Keith Johnston, former director of Human Resources at Portsmouth Hospital NHS Trust who was assisted by a senior consultant, Mr John Langran. Their report has been called “the Langran report”.
35. The Langran report itself was and remains a confidential report. However, an Executive Summary dated 14 March 2003 was made public. One of the matters investigated was whether there had been transfers to and from the Deferred List in February and August 1999 which were inappropriate according to the prevailing guidelines at the time. The Summary referred to “two key issues” raised by Mrs Masson relating, firstly, to the removal of patients from the Out-Patient Waiting List in the spring of 2001 and, secondly, to in-patients being placed on the Deferred List in March 1999. The Summary asserted that unsuccessful attempts had been made to contact Mrs Masson in Spain. It is unclear who else, if anyone, was interviewed.
36. In relation to the first issue, namely the alleged removal of patients from the Out-Patient Waiting List in the spring of 2001, the Summary refers to a clear conflict between Mrs Masson’s version of events and that of other managers. The summary continues:

“Failing further information from [Mrs Masson] that offers a clear factual base for her allegations, we can only conclude that, if she acted inappropriately, she was not acting under the instruction of any other manager. Alternatively it is possible that her actions were entirely appropriate”.

As to the second issue, the placing of in-patients on a Deferred List in March 1999, the Summary records that the critical issue was whether the deferrals were justified. The investigation was said to have found no evidence to suggest that the deferrals were not justified. The authors concluded, on the basis of the information available, that there was no wrongdoing by any managers of [WGH] in the management of waiting lists in the spring of 1999. According to the summary, the overall conclusion and recommendations of the report were:

“[Mrs Masson’s] complete lack of co-operation in the conduct of this investigation must raise considerable concern regarding her motivations and the robustness of her allegations. We can only speculate as to the motivation driving [Mrs Masson], but we are concerned that she seems to prefer voicing her concerns through a national newspaper, rather than through other more appropriate channels.

Because [Mrs Masson] has failed to assist this independent investigation we can only conclude that there is no basis for her allegations and we prefer to rely upon the evidence of the witnesses we have interviewed and the written evidence we have reviewed”.

37. On 25 March 2003 an e-mail was circulated to all staff at WGH which stated that the Langran report had completely exonerated all senior staff; there was no wrongdoing by any managers of WGH and WGH’s reporting of its waiting list position was accurate. The e-mail added that it was the responsibility of WGH “to protect staff against whom malicious allegations are made”. The maker of these “malicious” allegations was Mrs Masson. On the same day, Mr Moyse issued a press statement in which he said:

“The investigation team has concluded there was no wrongdoing by any managers of [WGH], with the possible exception of Mrs Masson herself. [WGH’s] reporting of the position was accurate.

The managers accused have been completely exonerated. The report says there is no evidence that any of the staff identified by Mrs Masson have acted in an improper way in conducting their management functions.

Mrs Masson’s allegations were unfounded. It is our view that Mrs Masson’s actions were questionable and the investigation discovered the truth”.

This statement received wide publicity in the local press. The Western Daily Press published a report on 26 March 2003 which was headed “Hospital figures ‘correct’”. An article in the Evening Post of the same date headed “Report clears health bosses” quoted the Executive Summary of the Langran report and its conclusions. It also included a lengthy quotation from Mr Moyse that there had been no wrongdoing on the part any managers with the possible exception of Mrs Masson herself. Mr Moyse was also reported as having said that Mrs Masson had asked for payment for returning the confidential information she had removed from WGH.

38. Mrs Henry’s reaction to the Langran report was different: she expressed her broad agreement with an e-mail sent to her by Mr Collins on 25 March 2003 in which he said that its conclusion might be undermined by the “palpably inept” manner in which the investigation was undertaken. Mr Collins also observed that the lack of knowledge about waiting list issues was “painfully evident”.
39. Mr Hill received the Executive Summary of the Langran report in around late March 2003. His evidence was that he spoke to Mrs Masson about it shortly afterwards. As Mr Hill’s notes on the electronic version of the Executive Summary confirm, Mrs Masson reiterated to him her claim about the Out-Patient Waiting List and the Deferred List. As to the reference in the Executive Summary to her “complete lack of co-operation in the conduct of the investigation”, Mrs Masson told Mr Hill that she had tried through the union, through the hospital and the whistle-blowing organisation.

Mr Hill’s initially confidential sources

40. As I indicated in paragraph 33 above, Mr Hill was provided by Mrs Masson with the names of people he might approach to corroborate her allegations. Mr Hill gave evidence that of the several names which Mrs Masson gave him, two agreed to talk to him. In his first witness statement Mr Hill referred to them as Confidential Sources A and B. However, both subsequently agreed to give evidence on behalf of Mrs Henry with the result that their names were revealed. Confidential Source A is Mrs Sheila Webber. Now retired, she worked at WGH for 27 years, of which the years from 1997 to 1999 were spent in the WLO reviewing the patients on the Deferred List. Confidential Source B is Mrs Sue Lambourne, also now retired, who was at WGH for even longer. For most of that time she was the manager of the WLO.
41. According to Mr Hill, Mrs Webber told him on the telephone that senior managers were aware that waiting list manipulation was going on. Mr Hill said that when he mentioned to her the names of Mr Moyse, Mr Collins, Mrs Henry, and Mrs Marvin, Mrs Webber replied that “they all knew” and that this was “common knowledge”. According to Mr Hill, Mrs Webber said that Mrs Henry had “probably” authorised Mrs Masson to give instructions to manipulate data. Mr Hill’s evidence was that Mrs Webber also told Mr Hill that they had been told to put all routine out-patients on a pending list so that they did not show up on waiting list statistics. Mrs Webber said that in 1999 there had been a “black hole” of 400 patients who had been on the Deferred List for a long time, many of whom should never have been on that list. Mr Hill made a note of one of his conversations with Mrs Webber but none which implicated Mrs Henry in any wrongdoing.

42. Mr Hill stated that in the course of one of their conversations Mrs Webber told him of an e-mail which she thought he would find very interesting. Subsequently she provided a copy of the e-mail, which purported to have been sent by Mrs Masson to Mrs Marvin on 2 March 1999. It read:

“Subject: Validated Patients

We have a list of patients (10) that Mr Gough decided should be taken off the list – we discussed this some time ago I (sic) a letter was sent to the patients advising them that the notes had been reviewed again and they had now been put back on the list.

I obviously don’t want to put them on to the Active List – are you in agreement that they return to the deferred list?”

Beneath those words there was a manuscript endorsement which appeared to read “2.3.99 Agreed. L. Marvin”. That e-mail has been referred to in the course of the hearing as “the Marvin e-mail” and I shall so refer to it. As it appeared to Mr Hill, this e-mail was suggesting that patients were to be put on the Deferred List, despite having been told by letter that they were going back on the Active List. The reason why Mrs Masson “obviously” did not want to return patients to the Active List would appear to be her concern about the adverse effect that would have on targets.

43. Mrs Webber agreed that she had several telephone conversations with Mr Hill. She believed that misconduct had taken place and she did not see why the hospital should be allowed to get away with it. Her view was that allegations made by Mrs Masson should be properly investigated. However, she firmly denied that she told Mr Hill that Mrs Henry was among senior managers who were aware that waiting list manipulation was going on. She also denied having told Mr Hill that Mrs Henry authorised Mrs Masson to carry out such manipulation. She would not have told Mr Hill that because she did not believe it to be true. According to Mrs Webber, Mrs Henry was simply not in the line of management which was involved in the manipulation. Nor, according to Mrs Webber, is Mr Hill right when he says that in 2004 she “re-confirmed” that Mrs Henry had known about the manipulation. She said she did no such thing.
44. In her oral evidence Mrs Webber said that, whilst she was working in the WLO reviewing the 768 patients who were on the Deferred List (some of them having been on that List for several years), no fiddling went on. In cross-examination, Mrs Webber was asked about what she had said to Mr Taylor in the course of her evidence to his Inquiry. She agreed that, after she had been recruited by Mrs Henry to work in the WLO on the Deferred List, she had had “many tussles” with Mrs Masson over the Deferred List because Mrs Masson wanted to put in-patients back on that list and she was not prepared to do it because she had spent 18 months taking them all off. Mrs Webber agreed that the Deferred List had been “a black hole”. Management senior to her “all the way up” had been putting patients on the Deferred List both before and after 1999. Mrs Webber told Mr Taylor that she could not imagine that Mrs Masson did this “off her own bat”. She thought it would have been Mrs Marvin who told Mrs Masson to do that. Mrs Webber did not tell Mr Taylor in the course of her interview that Mrs Henry had been complicit in the manipulation.

45. Mr Hill's evidence as to the information provided to him by his second source, Mrs Lambourne, was that he had seven telephone conversations with her. The main conversation with her took place on 14 May 2003. She told him that she worked in WGH's Admissions office. The team of which she was a member had been really irritated by a local newspaper article quoting Mr Moyse as having said that there had been no wrongdoing by any senior member of the Trust except perhaps Mrs Masson. According to Mr Hill, Mrs Lambourne told him that she had just worked on in-patients and that the practice had been that if they were long-waiters approaching the 18-month deadline, they would be taken off the Active List and put on to the Deferred List overnight at the end of the month and put back again on the Active List the next day. This was done so that the patients in question did not show up on the waiting list statistics. Mrs Lambourne could not remember if this was done every month or every quarter. She said that the instructions were always given verbally. She was not prepared to tell Mr Hill who gave those instructions, although she confirmed that it was not Mrs Masson. Mrs Lambourne said she thought that manipulation was probably still going on at WGH and that the whole enquiry had been a cover-up.
46. Mrs Lambourne said that she agreed to speak to Mr Hill because she had been angered by remarks in the media by Mr Moyse suggesting that the concerns raised by Mrs Masson were without foundation and that WGH had done nothing wrong. That was why she had agreed to be interviewed for *Inside Out*. She described the very senior managers (who did not include Mrs Henry) as having "closed ranks", by which she meant that they had not owned up to the malpractice. She was appalled at the way Mrs Masson had been victimised and made a scapegoat. She had herself been instructed temporarily to transfer patients from the Active List to the Deferred List to make the hospital look as if it was performing better than it actually was. She agreed that patients were being hidden. She felt uncomfortable about that. Mrs Lambourne's evidence was that it was not Mrs Henry who instructed her to make those transfers. She said that she does not have any reason to believe that Mrs Henry was aware that such manipulation was taking place. Mrs Henry's involvement with waiting lists was minimal. Mrs Lambourne said that she is certain that she did not suggest to Mr Hill that Mrs Henry was involved in what had gone on or that she knew about it. She agreed to give evidence at this trial because she feels that Mrs Henry has been wrongly accused.
47. Mr Hill met both Mrs Webber and Mrs Lambourne on an "off the record" basis on 2 June 2003. (Mr Hill had in the meantime travelled to Spain to meet Mrs Masson: see paragraph 53 below). The transcript shows that at that meeting Mrs Webber and Mrs Lambourne confirmed the main thrust of Mrs Masson's allegations about deferred patients and in-patients. Mrs Lambourne refers to being asked to take patients off the list before the figures were run off and to putting them back the next day. She told Mr Hill that she had expressed disapproval to the (unnamed) person who had given these instructions. She said the practice had been going on for several years. Mrs Lambourne thought there had been a cover-up and Mrs Webber added that "they" (i.e. senior management) had just "closed in". Mrs Webber expressed the view that Mrs Masson would not have acted "off her own bat". Both women said they felt it was appalling that she should have been victimised. It was grossly unfair of WGH to say that the only person guilty of wrongdoing had been Mrs Masson. Neither Mrs Webber nor Mrs Lambourne implicated Mrs Henry in the manipulation.

48. Mrs Webber and Mrs Lambourne agreed to give a television interview on condition that their identities were pixillated and their voices disguised. The interviews were broadcast on the BBC's *Inside Out* programme to which I will shortly come.
49. Much later in late August 2004, after the BBC had been requested by solicitors acting for Mrs Henry to publish a statement by way of explanation or contradiction, Mr Hill says that he contacted Mrs Webber, who reconfirmed that Mrs Henry had definitely known about the manipulation. Mr Hill made a note of that conversation. It does not on its face bear out Mr Hill's claim that Mrs Webber re-confirmed Mrs Henry's knowledge of the manipulation. The concluding words are, however, "Marion Henry and Linda Marvin were aware ...".
50. Mrs Webber also gave evidence to Mr Taylor that, after she left the WLO, she thought that "all sorts of things" were being covered up. One such issue concerned out-patients on the Deferred List who were not being brought into hospital. A management decision had been taken at about the end of 1999 to bring in "a pending list" onto which all routine out-patients were put. When Mrs Webber expressed her concerns about this to Mrs Marvin, she replied that she would "take it on board", by which Mrs Webber said she thought Mrs Marvin meant that there was nothing that she could do about it. Mrs Webber told Mr Taylor that there was unease amongst staff at WGH when Mr Moyses made the statement referred to in paragraph 37 above that WGH had been exonerated by the Langran report. People were saying, "We know it's going on".
51. Mrs Webber was asked by Mr Taylor about the Marvin e-mail and whether she felt that manipulation of that kind had happened in WGH. Mrs Webber replied that she agreed with what Mrs Masson wrote because Mr Bevan (a consultant at WGH) was her nightmare. He did not like to find all these patients being kept waiting when she was doing it. Mrs Webber said in her oral evidence that she thought the Marvin e-mail established the malpractice going on at WGH. However, Mrs Webber did not suggest to Mr Taylor that Mrs Masson's instructions had come from Mrs Henry. What she said was that the responsible line of management went "all the way to the top".

Mr Hill interviews Mrs Masson in Spain

52. On 29 April 2003 Mr Hill flew to Spain to interview Mrs Masson. His decision to do so was prompted by his receipt of the Marvin e-mail which I have quoted at paragraph 42 above. Whether anything would be broadcast depended, according to Mr Hill, on what Mrs Masson told him during the interview.
53. Mr Hill spent a whole afternoon with Mrs Masson and a further two hours the following morning. He went through the documents with her on camera. His evidence is that he challenged Mrs Masson on a number of topics. He put to her various allegations which had been made against her, including criticisms of her motivation; the claim that she had removed confidential medical data from WGH and the allegation that she had been trying to bribe WGH. Mr Hill accepted in cross-examination that the documents which he was shown, including a letter and e-mails containing what were described as "veiled threats" about the action which she might take, constituted some evidence that Mrs Masson had attempted to blackmail WGH.

54. In the course of the interview there was discussion about the two types of Deferred List; the allegation that 400-odd patients had been on the Deferred List when Mrs Masson came into post, some of them having been waiting for several years; the validation of those 400 patients; the removal of patients from the waiting list counted by the Health Authority; the inappropriate placing of patients on the Deferred List; the raising of Mrs Masson's concerns about inappropriate practices with Mrs Marvin, Mrs Henry and Mr Collins; the instructions she received from those three individuals, including the instruction which Mrs Masson claimed she received from Mrs Henry to remove long wait patients from the waiting list; the "trickling" of patients from the Deferred List back onto the Active List and the instruction to Mrs Masson that she remove 120 so-called "Somerset patients" from the Out-Patients' List. According to Mr Hill, he also asked Mrs Masson about the signature on the Marvin e-mail (which Mr Edwards was later to denounce as a forgery). She confirmed it was Mrs Marvin's. Mr Hill said (and the tape recording confirms) that at one point in the interview Mrs Masson referred by name to Mr Collins, Mrs Henry and Mrs Marvin as having been implicated in the manipulation. He asked her to repeat the allegations she was making in front of the camera but without naming individuals, so that he would have the choice whether or not to name them in the version of the interview to be broadcast.
55. Mr Hill's evidence is that, having interviewed Mrs Masson, he left Spain feeling confident about her account of waiting list manipulation. He had not detected any discrepancies in what she had told him. Her account had been consistent. He said that he still had reservations about her motivation for "whistle-blowing" but did not consider that this called into question the broad thrust of what she was saying about systematic manipulation of waiting lists.

The BBC broadcast *Inside Out*

56. Following Mr Hill's return from Spain, a decision was taken that he should prepare a report for a regional current affairs series called *Inside Out* which is transmitted on BBC1. For the purposes of that report, Mr Hill interviewed a former patient at WGH who told him that he had been referred to WGH by his GP but later found out that he was not on the waiting list. The patient had to wait more than three years before finally seeing the consultant. Mr Hill asked WGH if it was possible for him to see the full Langran report. He was told that this was not possible because the report might be libellous if published. Mr Hill also met his sources, namely Mrs Webber and Mrs Lambourne on 27 May 2003. Mr Hill's account of the meeting is summarised at paragraph 44 above. The two women agreed to do anonymous interviews for the *Inside Out* programme. Finally, Mr Hill interviewed Mr John Edwards of WGH on 27 June 2003.
57. Just under a week before the broadcast, Mr Hill said he telephoned Mrs Henry at work and left a voicemail on her phone. According to his evidence, Mrs Henry phoned back within 48 hours. Mr Hill told her he was investigating Mrs Masson's allegations and wanted to speak to her either on or off the record. Mr Hill said that Mrs Henry told him that an investigation had been undertaken and she had no comment to make. In the witness box she said that she did not think having a "slanging match" in the media was the right way to proceed.

58. The *Inside Out* report was broadcast on 7 July 2003. It consisted of extracts from the interviews which Mr Hill had conducted with Mrs Masson, the patient, his two sources and Mr Edwards. The transcript runs to six pages. Mr Edwards was quoted on the programme as saying of Mrs Masson's allegations that they had been thoroughly investigated by an independent internal investigator who had concluded that the waiting lists reported were accurate and that there had been no wrongdoing on the part of any senior managers within WGH. The day after the broadcast Mr Edwards circulated to all WGH staff an e-mail which said that "it is very difficult for public bodies and their staff to protect themselves against malicious allegations but it is heartening when such allegations are thoroughly investigated and overwhelmingly rejected".

The Taylor report

59. The *Inside Out* report generated publicity in local papers. Several articles appeared in mid-July which repeated Mrs Masson's claim that there had been a cover-up and called for a new investigation. WGH asked Mr Hill for the original of the Marvin e-mail. There followed an announcement by the AGW Health Authority on 30 October that there was to be another investigation into the claims made by Mrs Masson. That evening Mr Hill interviewed Mrs Masson at Bristol Airport for *Points West*. The BBC had paid for Mrs Masson's flight from Spain. She again said that she had been instructed to manipulate waiting lists and that there had been a cover-up. The interview was broadcast that evening. Other similar publicity appeared in late October and early November.
60. The investigation was conducted by Mr Michael Taylor, a member of the NHS Confederation's National Panel of Investigators. His terms of reference were:

"The external team will check whether previous investigations have conclusively investigated allegations of waiting list mismanagement at [WGH], and if this work reveals that any allegations have not been conclusively investigated, the team will undertake a full investigation.

The investigation will establish whether there have been prima facie case of wrongdoing and a breach of the DoH Code of Conduct for NHS Managers".

61. For the purposes of his investigation, Mr Taylor carried out numerous interviews with Mrs Masson (the transcript of which is 105 pages long); Mrs Webber (one of Mr Hill's sources) and many others. It would have been apparent to Mr Taylor from what Mrs Masson said in interview (as would also have been apparent to Mr Hill when he was shown the transcript of the interview provided to Mrs Masson) how completely the relationship between her and Mrs Henry had broken down. Mr Taylor also analysed formal records, correspondence, interviews and telephone conversations. He was, however, unable to see some pages from the notebooks in which Mrs Masson claimed to have recorded information relating to the manipulation of waiting lists. Mrs Masson had given those pages to Mr Edwards at their meeting on 31 October 2002 (see paragraph 22 above). Mr Taylor was given to understand by WGH that the notebooks had been mislaid.

62. The Taylor report is dated April 2004. It was a confidential report. I have read it but will not refer to its detailed terms because it was not made available to Mr Hill at the time. Mr Hill's evidence was that when he approached WGH for a comment about the report, he was told there was none to make. In late April or early May he made a number of approaches to Mr Andrew Millward, who worked in the press office of the AGW Health Authority. Mr Hill had been told by Ms Val Morrall of WGH that Mr Millward was in charge of handling the media for the Taylor inquiry. Mr Hill said he asked for interviews with Mr Collins, Mrs Henry and Mrs Marvin, telling Mr Millward that it was important for him to speak to them because they had been in senior positions at the time. None was prepared to be interviewed.
63. Subsequently on about 20 April Mr Hill was told by Mr Millward that the new Chief Executive, Mr Mark Gritten, would be available for interview. According to Mr Hill, he asked Mr Millward again if he could interview Mr Collins, Mrs Henry and Mrs Marvin. He was told it would not be possible. Mrs Henry's evidence that the request to interview her was not passed on to her was not challenged. Mr Hill said he then telephoned Ms Morrall to make sure his request for these interviews was being taken seriously. He did not, however, tell her what were the allegations which he had in mind to publish. Mr Hill accepted that the BBC Editorial Guidelines imposed a presumption that those criticised should be given a right to reply and that there was a journalistic obligation to present a balanced programme. He said, however, that he did not approach any of the three directly for fear that they might complain that he was hectoring them.
64. On 11 May 2004 Mr Millward telephoned Mr Hill to inform him that the Taylor report would be released next day. He was told to come to WGH for a briefing at 1.45pm the following day. No other journalist was to be present. Mr Hill said he then telephoned Mrs Masson and arranged to interview her briefly in the late morning of 12 May at the WGH car park. This was for inclusion in a short live broadcast which Mr Hill was planning to transmit at 1.30pm. Mrs Masson was filmed arriving in her car at WGH and the interview with her took place. Mr Hill's evidence was that later that morning Mrs Masson told him she was going to hold a press conference after the briefing. She had already prepared a typescript statement which he looked at briefly. Mr Hill said he recalled seeing the initials "MH" and "JP" at the side of the page where the names of Mr Collins and Mrs Marvin had been written in pen. Mr Hill said that it was clear to him that Mrs Masson wanted to name those who she believed shared responsibility for the manipulation and who she blamed for making her a scapegoat.
65. Mr Hill had expected that at the briefing he would be shown the complete Taylor report. However he was shown an Executive Summary of the Taylor report and a press release from WGH. The former document is plainly important and deserves extensive quotation. Its coversheet explained that it was a fair and accurate summary of the full report which could not be published for legal and disciplinary reasons. It described the report as having been endorsed by AGW Health Authority. The material parts of the summary read as follows:

“Introduction

I was asked by [AGW Health Authority] to conduct an independent investigation into alleged waiting list mismanagement at [WGH].

They felt it necessary to conduct a formal investigation – undertaken to Department of Health guidelines and with input from the Audit Commission – due to the nature of allegations made by Mrs Michele Masson, a former member of staff at [WGH].

The terms of reference of the independent investigation were to ‘check whether previous investigations had conclusively investigated allegations of waiting list mismanagement at [WGH]’ and, if necessary ‘to undertake a full investigation’.

The allegations

The allegations made by former employee Mrs Masson related to events from 1999 to 2002...

The allegations were that between 1999 and 2002 [WGH] was responsible for the following inappropriate practices in respect of patient waiting list management:

- Deliberate holding back of patient data from the Active Waiting List;
- Inappropriate deferral of patients from the In-Patient Waiting List;
- Inappropriate deferral of patients from the Out-Patient Waiting List;
- Failure to remove patients from Waiting Lists after validation that treatment was no longer needed;

Conclusions

I concluded that although five attempts had been made to secure a comprehensive investigation, the allegations had not been conclusively investigated.

With respect to the deliberate holding back of patient data from the Active Waiting List, the inappropriate deferral of patients from the In-Patient Waiting List and the failure to remove patients from Waiting Lists after validation that treatment was no longer needed I concluded that the allegations were proven.

With respect to the inappropriate deferral of patients from the Out-Patient Waiting List I found that the allegations were partly proven and partly unproven.

I also concluded that Mrs Masson was complicit in condoning inappropriate practices and was at fault for not exposing the issue and the disquiet of her staff until it suited her personal circumstances to do so but that this culpability is mitigated by the fact that I believe Mrs Masson received direct instruction from her superiors to implement these practices. I have, however, been unable to definitely prove all of the sources of these instructions.

Mrs Masson also alleged that a number of patients who may have been deferred prior to 1999 were never reported on the Waiting List. I believe this allegation to be invalid.

Why did the allegations remain unresolved?

I consider the fundamental reason for the allegations remaining unresolved was that the circumstances associated with Mrs Masson's departure from her employment at [WGH] dominated the analysis. Consequently, establishing the veracity of the specific allegations relating to practices in the area of patient activity management became a subordinate issue...

Contributory factors

There were a number of contributory and mitigating factors that impacted upon the areas under scrutiny:

...

- A culture of 'heavy handed pressure and bullying' against certain groups of staff had developed at the Trust...

Recommendations

My full report contains a number of recommendations including the following:

- The [WGH] Board should adopt a more enquiring approach to reports presented by Executive Directors
- The [WGH] Board should explore whether disciplinary action needs to be taken against any individual.

...”.

66. The WGH press release provided to Mr Hill included the following passages:

“A number of inappropriate practices in respect of patient waiting list management took place at the [WGH] between 1999 and 2002, according to a report published today.

...

The report found evidence that a small number of patients were held back from the Trust's active waiting list, that some patients were inappropriately deferred from waiting lists and that some patients were not removed from the waiting list even when it became clear that they did not need treatment.

The Trust has today begun formal investigations into the conduct and performance of a few of its staff to decide what actions need to be taken..."

Another press release issued on behalf of the AGW Health Authority also said that the report had concluded that "a small number of patients" had been intentionally held back or deferred from waiting lists or not removed from them.

67. Mr Hill noted that the Executive Summary of the Taylor report referred to Mrs Masson having received direct instruction from her "superiors" in the plural. He then recorded an interview with the new Chief Executive of WGH, Mr Gritten. In the course of that interview and a later interview on a hospital ward, Mr Gritten told Mr Hill that the Marvin e-mail had been substantiated and that many of the 50 people, mainly in the WLO, would have known about the fiddling. Mr Gritten also said that Mrs Masson was due an apology.
68. Mr Hill's evidence was that at about 2.30pm on 12 May he met Mrs Masson in the garden at the back of the hospital. She was using her mobile telephone to call local papers to ensure that they came to her press conference. According to Mr Hill, Mrs Masson showed him an extract from the Taylor report which had been provided to her. This extract consisted of passages in the full report which related to Mrs Masson. Mr Hill noted passages which read:

"Allegation relating to the deliberate holding back of patient data from the Active Waiting List

Mrs Masson was complicit in condoning such practices and is at fault for not exposing the issue and the disquiet of her staff until it suited her personal circumstances to do so. This culpability is mitigated by the fact that I believe Mrs Masson received direct instruction from her superiors to implement this practice. I have however been unable to definitively prove the actual source of these instructions.

I consider Mrs Masson's allegations in this area to be proven".

Inappropriate deferral of patients from the In-Patient Waiting List

Mrs Masson and (another employee) were wrong to undertake inappropriate practice. I consider that they would not have acted without instructions from more senior managers.

...

Failure to remove patients from the waiting list after validation that they no longer required treatment

Mrs Masson was complicit with this irregular practice. I do not consider that she acted without the overt knowledge of certain senior managers. Direct proof has not been found to identify which managers authorised this practice.

... ”.

Mr Hill’s evidence was that it appeared to him from his investigations that the obvious candidates as the superiors from whom Mrs Masson received her instructions were Mr Collins, Mrs Henry and Mrs Marvin.

69. Mr Hill then conducted an exclusive interview with Mrs Masson and obtained her agreement to give a further interview for transmission on the *Points West* programme that evening.

Mrs Masson’s press conference

70. Mr Hill gave evidence that at around 3pm he attended Mrs Masson’s press conference in the WGH car park. The information about the press conference is sparse. Mr Hill said various other journalists were present. A journalist and cameraman from HTV/ITV were there, so were at least two other local journalists. There may have been a local newspaper photographer as well. There was no evidence from anyone else as to what transpired at the meeting or as to how it was convened. Mrs Masson was not called to give evidence at the hearing of the privilege issue. Mr Hill simply says that Mrs Masson read out her press statement and the BBC filmed her doing so. In the course of it Mrs Masson named Mr Collins, Mrs Marvin and Mrs Henry as the senior management team at WGH who had covered up the removal of patients from the Waiting List and blamed her for irregularities. No interview of Mrs Masson by any of the journalists present took place.

The preparation and transmission of the broadcast complained of

71. Mr Hill then left WGH and returned to the newsroom, arriving at about 4.45pm. The intention was to transmit the story about the Taylor report as part of the news programme at 6.25pm. There was what Mr Hill described as “the usual rush” to get the story ready. He said it would have been inconceivable to hold the story back and let others run it first, since it was a story that BBC West had already featured. At about 5pm Mrs Masson did a live interview with BBC Radio Bristol. Mr Hill then did what is called a “two-way”, that is, an interview between the presenter and himself as the correspondent. The purpose of these reports was, according to Mr Hill, to inform viewers about the publication of the Taylor report which had confirmed waiting list manipulation. There had been no time to script Mrs Masson’s contribution to the radio interview, so Mr Hill asked her not to name individuals in that interview.

72. Mr Hill's evidence was that he considered that the news item that he was preparing covered a subject of significant public interest. He was aware of the downsides of hospitals failing to meet targets and the positive benefits of doing so. He knew that WGH had received substantial financial benefits from meeting its targets or supposedly doing so. He was also aware that waiting list manipulation had been taking place at other West Country hospitals. It reported what appeared to be a credible and detailed investigation into serious issues of waiting list manipulation and mismanagement. His view was that people in the west of England needed to be told what had happened since they or their relatives might have been affected by what had gone on. Mr Hill said that his own belief was that the three people named by Mrs Masson were amongst those complicit in the manipulation. Nevertheless he was not himself, as the BBC reporter, going to name any of them as being likely to have been involved in the malpractice. When preparing the report for transmission, Mr Hill said he gave careful thought to whether he should use that part of the film of Mrs Masson's press conference in which she had named Mr Collins, Mrs Marvin and Mrs Henry. He made sure that the producer of the programme saw his script and also took legal advice. It would, as Mr Hill accepted, have been technically feasible to obliterate the names. But he decided that he could include the names mentioned by Mrs Masson. His evidence was that he thought that Mrs Masson was entitled to give her response to the report because she had been subjected to what had, in the light of the Taylor report, been shown to be an unjustified attack on her by her managers at WGH. He would have preferred to have included a response from one of Mrs Masson's superiors at the time but his requests had been refused (see paragraphs 63 and 64 above).
73. The early evening news bulletin on *Points West*, which is the subject of Mrs Henry's complaint in this action, was as follows:

“Sally Challoner (BBC Points West presenter):

Tonight, hospital waiting lists scandal, senior managers found guilty of fiddling the figures.

...

Chris Vacher (BBC Points West Presenter):

First tonight, senior managers at a major hospital in the West systematically fiddled patient waiting lists.

Challoner:

That's the conclusion of a new independent inquiry into allegations that records were falsified at Weston General in order to win a better star rating for the hospital than it deserved. Two previous inquiries concluded that there had been no wrongdoing and this latest investigation was only carried out after fresh evidence was unearthed by a special Points West report. Our health correspondent Matthew Hill has the full story.

Matthew Hill:

This is the first time Michele Masson's come back to the hospital that got rid of her. She was in charge of waiting lists until 2002, when she took the brave decision to speak out about how staff were being pressured into fiddling the figures. She maintained that patients were simply vanishing from the list without having their treatment. The hospital and two inquiries said she was lying; today a third investigation came up with a very different conclusion and a chance for her to clear her name.

Michele Masson:

I am really glad that after 18 months we're finally going to get to see hopefully an independent report.

Hill:

After making her allegations Ms Masson was forced to resign. She spent the last year working in a Spanish bar, her career and reputation in tatters. It was only after the second inquiry that the BBC in the West uncovered new evidence that supported her case. It prompted today's report that concluded that patients were removed from waiting lists over the period.

Masson:

The first inquiry, which was set up by the former Chief Executive in 2003, was undoubtedly a cover up and clearly laid the blame for any irregularities at my foot, despite evidence to the contrary. As a result, the senior management team including the Finance Director, Meredith Collins, Linda Marvin and Marion Henry Justice of the Peace, were permitted to continue in post.

Hill:

Today the hospital's new boss apologised.

Mark Gritten, Chief Executive Weston Hospital:

I think at the time there was a culture that didn't promote openness, didn't promote staff coming forward and stating their concerns.

Hill:

The scandal happened under the leadership of Roger Moyse. The report says there was a culture of heavy handed pressure

and bullying against certain groups of staff. Mr Moyse left the NHS shortly after the new information came to light.

Member of the public:

I am surprised that it's a cover up. We are supplying money into the National Health Service, they should respond by providing the service for which they have been paid.

Member of the public:

Well, it's fiddling innit?

Hill:

Today's report shows that it wasn't just one or two individuals who knew about the fiddling of waiting lists but dozens of people here at Weston. It took years for this to come out and patients may have suffered. Matthew Hill, BBC Points West, Weston-super-Mare.

...

Vacher:

Well, Michele Masson joins me now in the studio for an exclusive interview. Good evening to you. You must feel totally vindicated by what has happened today. What sort of pressure have you been under since you exposed this?

Masson:

It's been horrendous over the last 18 months actually waiting for the inquiry after the first inquiry when the blame was, you know, put at my foot basically and I was publicly maligned through the press and through the media when all the time I knew that, I knew the truth. So it's been a long time in coming in getting this report out now.

Vacher:

And what was this bullying like of you, and other staff presumably, to make sure these figures did what they did?

Masson:

I was basically, whenever I questioned what I being instructed to do by my senior managers I was always told that basically this is your job, you do it, if you want to get anywhere in this Trust or in this organisation, you have to do as you are instructed.

Vacher:

And do you think others suffered this too?

Masson:

I am sure because other managers worked with me to remove patients from the waiting list.

Vacher:

Do you think patients have suffered because of this?

Masson:

I am not a clinician so I can't really say but all I can say is when I went into post there were several hundred patients that have been either removed from the active waiting list or were not on the waiting list.

Vacher:

So their operations were delayed for instance?

Masson:

Oh absolutely, you know we could be talking by several years.

Vacher:

Because the hospital says there is no evidence of that.

Masson:

No, well when I went into post there were many medical records in the office and I arranged for the hospital numbers to be put into my workbooks which I gave as evidence to the inquiry team, unfortunately those pages have been removed from my books.

Vacher:

Do you think this has been going on at other hospitals, other hospitals have fiddled their waiting lists too?

Masson:

I think there is a strong possibility, everybody was anxious to meet targets.

Vacher:

We must leave it there. Thank you very much. ...”

Mrs Henry requests the BBC to publish a statement of explanation or contradiction

74. Carter-Ruck, solicitors instructed on behalf of Mrs Henry, wrote to the Editor of *Points West* on 18 June 2004 complaining that the broadcast had been highly defamatory of their client. The letter sought a full apology, an undertaking not to repeat the allegation complained of, the payment of compensation and legal costs. The response of the BBC Litigation Department said that the defences of justification and qualified privilege would be relied on. Carter-Ruck wrote on 21 July 2004 refuting the claim that either defence was available to the BBC. The last paragraph of the letter included a request that a statement be read out on *Points West* within the next seven days in terms set out in an attachment to the letter. That request was made pursuant to section 15(2) of the Defamation Act 1996. The terms of the statement requested were:

“On 12 May 2004, BBC *Points West* broadcast a feature concerning the findings of an independent Report, known as the Taylor Report, into allegations of waiting list manipulation at Weston General Hospital. The *Points West* feature suggested that senior managers at the hospital had been found guilty of fiddling waiting list figures. It also suggested, amongst other things, that there was a culture of heavy-handed pressure and bullying against certain groups of staff. The article specifically named me as one of the “senior managers” in question.

In fact, and quite contrary to what the *Points West* feature suggested, the Taylor Report found that there was no evidence whatsoever of any wrongdoing by me. The Report accepted that I have not been involved in, and was not aware of, any improper management practices.

A subsequent independent report published in June 2004 confirmed the findings of the Taylor Report and expressly commended me for my efforts in ensuring that a thorough investigation into the waiting list allegations had been undertaken”.

75. The response of the BBC to the request that a statement in those terms be published was to request copies of the two reports relied on, namely the Taylor report and the subsequent confidential independent report of June 2004 (the Gammage Report), which were said by Carter-Ruck to show that Mrs Henry had not been involved in or aware of any improper management practices. That request was initially denied by Carter-Ruck but by letter dated 25 August 2004 copies of the two reports were provided together with an internal “Team Brief” published within WGH on 28 June 2004.
76. The extract from the Taylor Report provided to the BBC included the following (from which the name of another line manager had been redacted):

“... I have been puzzled that within a relatively small Trust, the immediate line managers to ..., i.e. ... and Mrs M. Henry, profess to be unaware of unease among junior Trust personnel within the Admissions Office. This unease centred on certain practices within the Admissions Office that occurred during the tenure of My puzzlement is compounded by the fact that numerous interviewees were at pains to point out that informal communication and networking within the Trust was, and remains, very strong.

Equally, in a relatively small Trust, the day-to-day supervision of ..., by ... and Mrs Henry, appears to have been extremely light touch. This situation was also evident during the early period of ...’s employment in the Admissions Office. This suggests that ... and Mrs Henry had a high degree of confidence in ... and/or felt that the supervision of her more important duties came from a more senior level in the executive hierarchy.

... and Mrs Henry deny any awareness of, or involvement with, inappropriate managerial practices. No contrary evidence has emerged. Accordingly, I accept their statements.

...

I also remain uneasy about the knowledge of such practices held by ... and to a lesser extent Mrs Henry. They both deny any knowledge or involvement and I have no proof to implicate them; except for some subjective comments against My principal concern is that they were the immediate line managers of Mrs Masson and presumably supported the extension of her responsibilities in 1999, and again in 2000. My second concern is that it was made clear to me, and on a number of occasions, that in a comparatively small trust, with a very flat management structure, that a great amount of informal communication and networking occurs. I do accept that Mrs Henry and ... held a wide portfolio of responsibility. No evidence of wrongdoing by Mrs Henry and ... has emerged.”

77. The extract from the Gammage Report, also sent to the BBC, included these words:

“3. Key issues

3.1 The SHA investigation [the Taylor Report] concluded that there was no evidence that either Mrs Henry or ... were aware of the waiting list manipulation. Numerous e-mails were sent by ... many of which were copied to Mrs Henry and ... and some sent directly to them. However, both individuals have stated that they did not read all of these e-mails and were not aware of any malpractice. There is no evidence to suggest that this was not in fact the case.

3.2 ... and Mrs Henry have stated that they felt 'left out of the loop' with communication being directed between others - ... and ... - with only copies of e-mails sent to themselves. This would appear to have been the case and most correspondence is between the senior staff and ... with Mrs Henry and ... being copied in. However there are examples of direct correspondence between ... and ... (Appendix 5(v) of the SHA investigation) and ... and Mrs Henry (Appendix 5(vii)) which appear to explain difficulties in deferring patients and the risks involved in doing this.

3.3 Mrs Henry and ... questioned whether the e-mails were authentic and written contemporaneously. A subsequent meeting was held with Richard Watkins, head of IT, and Mark Gammage, at which Mr Watkins explained the difficulties in retrieving data. However the data used in the SHA report was authentic...

4. Conclusions

...

4.2 ... and Mrs Henry were the line managers of ... and had line management responsibility for waiting list administration. To this extent they have to take some responsibility for the way the administration was managed during this time. However there are factors which must be taken into account in mitigation:

- ... was widely viewed as being very competent
- She had a better understanding of waiting list administration, particularly In-Patient administration, than either ... or Mrs Henry
- They had particularly large spans of control and workload and had raised issues with senior management with regard to aspects of this
- The culture at the time militated against a proper debate regarding working arrangements

...

4.4 ... and Mrs Henry were often bypassed in correspondence with ... and ... communicating directly with one another and only sending copies to ... and Mrs Henry. However there is evidence that some direct e-mails were sent to them. Mrs Henry and ... have explained that they receive many e-mails and simply did not read them all. In

hindsight they did have the option of either asking (or indeed instructing) ... to only include them in e-mails of significance or to read and question the e-mails that were sent to them. It is difficult to see how ... could have been effectively managed when one-to-one meetings were rare and correspondence was not read.

- 4.5 ... and Mrs Henry are to be commended for their tenacity in endeavouring to ensure that a thorough investigation was undertaken.

5. Recommendations

...

- 5.2 The SHA investigation concluded that there was no evidence to suggest that either ... or Mrs Henry were complicit with waiting list malpractice, and this report will confirm this conclusion.

- 5.3 The report has concluded that some responsibility for the management of waiting lists must rest with ... and Mrs Henry as the line managers. As managers with experience and some seniority they could have taken steps to manage communication with ... differently. However it is recognised that there were significant mitigating factors which would have impinged on their ability to have managed the situation completely differently.

- 5.4 Therefore it is recommended that no formal disciplinary action on the grounds of conduct or capability should be taken against either individual and no notes regarding this investigation placed on their personal files.

...”.

78. Having considered those extracts, the BBC took the view that they did not bear out what had been said by Mrs Henry’s solicitors. No statement of explanation or contradiction was published. In the meantime these proceedings had been commenced.

Preliminary observations on the claim to privilege

79. I am conscious that I have had to set out the circumstances leading up to the *Points West* broadcast at very considerable length. As I think the parties agree, it is necessary to do so in order to address the matters which I need to take into account when deciding whether the BBC’s claim to *Reynolds* privilege is made out. Having dealt with the facts, I am now in a position to address the arguments which had been deployed in relation to the privilege.

80. I start with some general observations. It should not be overlooked that Mrs Henry has brought this action because she says she was libelled by a broadcast which accused her of
- i) systematically falsifying waiting list figures at WGH and had been found to have done so by an independent enquiry report;
 - ii) heavy-handed pressuring and bullying of staff at WGH under her management into falsifying the figures;
 - iii) having been complicit in a cover-up of the waiting list fraud.

I am paraphrasing the defamatory meanings which are pleaded in paragraph 4 of the Particulars of Claim. I accept that viewers would have understood the broadcast to bear the meanings which I have set out above.

81. I should not approach the issue whether the broadcast is privileged with any presumption that its sting in relation to Mrs Henry was false: see *Jameel v Wall Street Journal (No 2)* [2005] 4 All ER 356. That issue will be determined if and when the trial of the issue of justification takes place. The issue of privilege with which I am now concerned raises two different aspects of the public interest. On the one hand there is the undoubted public interest in ensuring freedom of expression. On the other hand it is necessary to bear in mind that protection of reputation is conducive to the public good and that no public interest is served by publishing or communicating misinformation. These points were made by Lords Nicholls and Hobhouse in *Reynolds v. Times Newspapers Limited* [2001] 2 AC 127 at 201B and 238B respectively. The two aspects of the public interest are reflected in Article 10 of the European Convention on Human Rights (ECHR): the right to freedom of expression is subject to such conditions as are prescribed by law for the protection of the reputation of others.
82. Sometimes the public interest requires that information be published irrespective of its truth or falsity. It is the function of the defence of privilege, as it applies in the field of defamation, to identify the circumstances in which the public interest in free publication should outweigh the public interest in the protection of reputation. In some instances, with which this case is not concerned, the privilege will be absolute. In others it is a qualified privilege. In former times the publisher normally had to establish that he was under a duty to publish the information in question and that those to whom the information was published had a reciprocal interest in that information. Traditionally that privilege was qualified in the sense that malicious publications would not be protected.
83. The formulation of the test to be applied when deciding whether a publication enjoys qualified privilege has been adapted by recent authority. Nowadays, since the decision in *Reynolds*, the position is different at least in most cases involving the media. All the members of the House in *Reynolds* said they were applying the traditional duty/interest test: see Lord Nicholls at 204; Lord Steyn at 213; Lord Cooke at 224; Lord Hope at 229 and Lord Hobhouse at 239. However, Lord Nicholls at 197C expressed a preference for a simpler and more direct test, namely whether the public was entitled to know the particular information. That approach effectively dispensed with the concept of malice defeating privilege: malice is effectively

subsumed in the right-to-know test. That preference may have been due in part to the conceptual difficulty about an editor being under a “duty” to communicate information to the world at large. I do not subscribe to the view that the duty/interest test is, as Mr Caldecott put it, no more than an “archaeological” relic. But I bear in mind that in *Loutchansky v. Times Newspapers Limited (No.s 2-5)* [2002] QB 783 Lord Phillips at paragraph 32 said that *Reynolds* privilege, although built on an orthodox foundation (viz the duty/interest test) is in reality *sui generis*. In the same case at paragraph 35 it was said that it should be recognised as “a different jurisprudential creature”. In *Jameel* (op cit), the Court of Appeal said at paragraph 87 that, in order for privilege to attach, the publication must be of such a nature that it is in the public interest that it should be published; this is a more stringent test than that the public should be interested in receiving the information. In the light of those – and no doubt other – authorities both Mr Richard Rampton QC for Mrs Henry and Mr Andrew Caldecott QC for the BBC agreed that the test which I should apply in the present case is whether the public had a right to know the particular information which was published.

84. To say that the test is whether the public had a right to know the particular information which was published begs an important question. Mr Caldecott advanced a cogent argument to the effect that the subject matter of the *Points West* news bulletin was of high public interest. It was, he said, concerned with internal corruption within a public institution over a prolonged period. Not only was patient data corrupted, so too were the junior employees who were sucked into fiddling the figures. The malpractice found by the Taylor report to have taken place involved the deception of the public. Once it came to light, there was a cover-up which involved Mrs Masson being made a scapegoat for the manipulation of waiting lists which had in fact been authorised at a very senior level. With all of this I entirely agree. But it is vital to bear in mind, when considering the availability of *Reynolds* privilege, that the broadcast also included a claim by Mrs Masson that named individuals, including Mrs Henry, had been complicit in the “irregularities” and had thereafter participated in a cover-up.

Statutory privilege

85. As already pointed out, the BBC relies on an amalgam of various species of qualified privilege. There is nothing objectionable about that: *Tsikata v. Newspaper Publishing plc* [1997] 1 All ER 655 is but one example of a case where the defendant relied on both statutory and common law privilege. Both were upheld in the Court of Appeal.
86. Ultimately it will be necessary for me to stand back and consider the various species of privilege collectively. However, for the purpose of analysis it is necessary that I take them in turn. It is convenient if I consider first the BBC’s claim that the broadcast was privileged by virtue of the provisions of s15 of the Defamation Act, 1996. So far as material s15 provides:

“(1) The publication of any report or other statement mentioned in Schedule 1 to this Act is privileged unless the publication is shown to have been made with malice, subject as follows.

- (2) In defamation proceedings in respect of the publication of a report or other statement mentioned in Part 2 of that Schedule, there is no defence under this section if the plaintiff shows that the defendant
- (a) was requested by him to publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction and
 - (b) refused or neglected to do so.

For this purpose “in a suitable manner” means in the same manner as the publication complained of or in a manner that is adequate and reasonable in all the circumstances.

- (3) This section does not apply to the publication to the public, or a section of the public, of matter which is not of public concern and the publication of which is not for the public benefit”.

Schedule I Part 2 is headed “Statements privileged subject to explanation or contradiction”. The categories relied on are 9 and 12 which are in these terms:

“9(1) A fair and accurate copy of extract from a notice or other matter issued for the information of the public by or on behalf of ...

- (b) the government of any member State or any authority performing governmental functions in any member State ...

...

12(1) A fair and accurate report of proceedings at any public meeting held in a member State

- (2) In this paragraph a “public meeting” means a meeting bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of a matter of public concern, whether admission to the meeting is general or restricted”.

87. Before I come to the various conditions which must be established if statutory privilege is to attach to the *Points West* broadcast, I should refer to the submission of Mr Rampton that the broadcast, considered as a whole as he says it must be, is not reportage but rather is editorialised to an extent that the availability of statutory privilege is ruled out. In support of that submission Mr Rampton referred firstly to *McCartan Turkington Breen v. Times Newspapers Limited* [2001] 2 AC 277. Lord Bingham at paragraph 2 emphasises the distinction between the role of the press in exploring factual situations and reporting the results of its investigations on the one

hand and the role of press as reporter on the other hand. The same distinction is recognised in the Strasbourg jurisprudence: see *Pedersen v. Denmark* (Application No. 49017/99 (78)). Mr Rampton submits that s15 is designed to protect only publications which come within the category of reportage. Mr Caldecott replies that such an approach is too narrow.

88. I have set out the terms of the broadcast at paragraph 73 above. True it is that it included a summary of the conclusions of the Taylor report and reports of what Mrs Masson said at her press conference. But there is also a substantial amount of what Mr Rampton called “editorialising”. Examples include the introductory words of Mr Hill referring to Mrs Masson’s brave decision to speak out; his reference to her reputation having been in tatters; his description of what took place as a “scandal” involving “heavy-handed pressure and bullying” and his comments that dozens of people at WGH knew about the manipulation.
89. I have come to the conclusion that the news bulletin is so heavily laden with editorial comment that it does not qualify for protection under s15 of the 1996 Act. There is simply too much in the broadcast which is plainly not reportage of the kind which s15 is designed to protect. The BBC was in effect adopting the Taylor conclusions as its own and indeed embroidering them.
90. This does not mean that statutory privilege is irrelevant in the present case. As Lords Steyn and Cooke pointed out in *McCartan, Reynolds* privilege is capable of conferring the protection on reportage as well as media reports of their own investigations. *Al Faghi v. HH Saudi Research* [2002] EMLR 215 is a (somewhat unusual) case in point. Mr Caldecott accepted in the course of his closing submissions that in the final analysis the question is whether *Reynolds* privilege attaches to the *Points West* broadcast.
91. Such being my conclusion on the claim to statutory privilege, it is not necessary for me to address at any length the arguments which have been advanced in relation to the conditions which must be satisfied under s15. I will therefore confine myself to saying:
- i) that I accept that those parts of the broadcast which summarise the Executive Summary of the findings of the Taylor enquiry do fall within paragraph 9(1)(b) of the Schedule to the 1996 Act. I reject the submission of Mr Rampton that those parts in themselves are materially unfair or inaccurate. I also reject his submission that the AGW Health Authority, on whose behalf the Executive Summary was issued, is not “an authority performing governmental functions” in the UK within the meaning of paragraph 9(1)(b). AGW Health Authority is what is described as a “Strategic Health Authority”. It is clear from the NHS (Functions of Strategic Health Authorities and Primary Care Trusts and Admission Arrangements) (England) Regulations, 2002 that, as such, the AGW Health Authority is exercising the Secretary of State’s functions relating to the health service for the benefit of its area. I am satisfied that the Executive Summary was issued by an authority exercising governmental functions in the UK. I accept also that the publication of those parts of the broadcast was of public concern and for the public benefit within the meaning of 15(3) of the 1996 Act.

- ii) Mr Rampton conceded, in the light of observations made in *McCartan* by Lord Bingham at 229b-c and by Lord Steyn at 298d-e, that Mrs Masson's press conference (as to which see paragraphs 65-71 above) constituted a "public meeting" within the meaning of paragraph 12 of the Schedule. However, I am not persuaded it was of public concern or for the public benefit for the BBC to publish Mrs Masson's claim that Mrs Henry (and the other two individuals named) had manipulated waiting lists and participated in a cover-up. A relevant consideration was said by Ward LJ in *Tsikata* (op cit) at 670j to be the status and source of the information. Mrs Masson's allegations had no special status; they were not the result of any investigation; they were about to be the subject of an enquiry.
- iii) Finally the BBC are in my judgment disentitled from relying on statutory privilege by reason of the provisions of s15(2) of the 1996 Act. I have set out at paragraphs 74 to 78 above the terms of the statement which Carter-Ruck on behalf of Mrs Henry requested the BBC to broadcast and the exchanges which thereafter followed. Mr Caldecott submits that the statement as submitted by Carter-Ruck was not a reasonable one because its terms did not faithfully reflect what the Taylor and Gammage reports had said. There is some force in that submission: for example I can understand the BBC's reluctance to accept that the Taylor report found that there was no evidence "whatsoever" of any wrongdoing on the part of Mrs Henry. However, it was in my view incumbent on the BBC to raise such objections as were considered appropriate and to endeavour to reach agreement on any points of difference. This is what often happens in practice when a statement is requested pursuant to s.15.

General approach to *Reynolds* privilege

- 92. It is customary in cases where *Reynolds* privilege is relied on for counsel and the judge to go through the ten factors in Lord Nicholls' non-exhaustive list. No doubt it will in most cases be necessary to carry out that exercise. But, as Mr Caldecott rightly points out, Lord Nicholls described them as no more than "matters to be taken into account". They are certainly not definitive criteria. If one focuses too closely on those ten matters, there is some danger of missing the wood for the trees: the central underlying question is always whether in the particular circumstances the public interest in freedom of expression should yield to the public interest in an individual being able to vindicate his or her reputation.
- 93. It was no doubt at least in part for that reason that Mr Caldecott placed at the forefront of his submissions on *Reynolds* privilege the very real public interest in the subject matter of the *Points West* broadcast. I have already summarised his submissions at paragraph 85 above. In my opinion in many cases where *Reynolds* privilege is relied on it is necessary to identify the nature and extent of the public interest engaged in the publication before embarking on Lord Nicholls' ten matters to be taken into consideration. As I have also already said, in the present case I accept that in the respects set out at paragraph 84 above, the subject matter of the broadcast was of clear public interest. It does not, however, follow from that that the public also had the right to know that Mrs Henry was implicated. To that question I shall have to return.
- 94. Another question which arises in this case is whether it can be said of the broadcast that it was a reply to attack and, if so, how that is to be taken into account in deciding

whether the claim to privilege is made out. A reply to attack is one of the particular situations identified in *Gatley on Libel and Slander* 10th Edition at paragraph 14.49, where the duty/interest test may be satisfied. In the context of the present case, where the action is brought on a media publication, the preferable course seems to me to be to treat the issue of reply to attack as being one of the matters to be taken into account in deciding *Reynolds* privilege rather than as a free-standing ground on which privilege at common law may be established. I think both Mr Rampton and Mr Caldecott were in agreement with this.

95. Another matter to be taken into account in addition to the ten matters listed by Lord Nicholls is the fact that the *Points West* broadcast consisted in part at least of a report of Mr Taylor's conclusions and what Mrs Masson had said at what I have accepted qualified as a public meeting for the purposes of s15 of the 1996 Act. I think those are relevant considerations, notwithstanding that I have rejected the defence of statutory privilege.
96. Finally, at this point I should mention that I accept Mr Hill's evidence that he did not at the time intend the broadcast to convey the meaning that the Taylor report had found as a fact that Mrs Henry had been complicit in the wrongdoing at WGH. As is clear from *Bonnick v Morris* [2003] 1 AC 300, it is permissible for me to take his interpretation into account when determining the issue of privilege and I will do so. His answers in cross-examination suggest that Mr Hill may since have had second thoughts on the question of meaning.

Lord Nicholls' matters to be taken into account

97. I turn to the matters to be taken into consideration. As Mr Caldecott pointed out, they overlap to a considerable extent. But I shall nevertheless take them in turn.

i) *The seriousness of the allegation*

This must refer to the allegation against Mrs Henry. I assume for present purposes that the broadcast would not have been understood to be reporting findings made by the Taylor report. Even so the allegations were plainly serious: that Mrs Henry had participated in the falsification of waiting lists; bullied other members of staff to do likewise and then taken part in a cover-up to divert blame wrongly onto Mrs Masson. Charges of this kind, if untrue, would obviously harm her considerably.

ii) *The nature of the information and the extent to which it is a matter of public concern*

I have summarised at paragraph 84 above the nature of some of the information which was broadcast. Information as to the findings of an independent inspector who has carried out a detailed investigation into grave malpractices within a public body is clearly a matter of public concern. I have already so found in the context of statutory privilege: see paragraph 91(i) above.

I note, however, that I have to consider also "the extent to which the subject matter is a matter of public concern". That formulation appears to me to

require me to take into account those parts of the publication which are not or may not be of public concern. As to this I accept that such elements of the broadcast as Mr Hill's commentary; the quotes from members of the public and even what Mrs Masson had to say about the what she had done may properly be regarded as being of public concern.

I am not, however, persuaded that this extends to Mrs Masson's claim that senior managers, including Mrs Henry, had been complicit in the wrongdoing. The Executive Summary of the Taylor report contained no such findings: see paragraph 65 above. In fact Mr Taylor had accepted the evidence of Mrs Henry that she had been unaware what had been going on: see paragraph 76 above. Moreover, Mr Taylor had recommended that various steps should be taken including the Board exploring whether disciplinary action needed to be taken against any individual. Mr Gammage had yet to carry out his investigation. I repeat the view I expressed at paragraph 91(ii) above, namely that this part of the broadcast was not of public concern.

iii) *The source of the information*

A considerable amount of time was spent in the course of the hearing exploring the question what were the sources for the information broadcast about Mrs Henry. Plainly the primary source was Mrs Masson. She was a first-hand source and she was not anonymous. Moreover her allegations of the malpractices at WGH had been accepted by Mr Taylor.

Mr Rampton says that Mrs Masson was a source who had an axe to grind. Lord Nicholls' illustrative comments specifically mentioned this type of source. The relationship between her and Mrs Henry had broken down, as Mrs Masson had made clear in her evidence to Mr Taylor. There were allegations that she had made veiled threats to WGH as to what she might do with the information she had about manipulation of waiting lists. It was said that she had tried to blackmail WGH (see paragraphs 19 to 21 above). Mrs Henry had suspended Mrs Masson and she then resigned. The documents provided to Mr Hill by the *Sun* and by Mrs Masson herself (see paragraphs 31 and 32 above) to an extent confirmed the doubts about the reliability of Mrs Masson as a source.

Mr Hill was pressed in cross-examination on the question whether he had regarded Mrs Masson as being a person who had an axe to grind. Mr Hill said that he had questioned Mrs Masson on these points both on the telephone (see paragraph 33 above) and at their meeting in Spain (see paragraph 54 above). I accept that evidence. Mr Hill struck me as a conscientious journalist who was genuinely alarmed about the goings-on at WGH but who at the same time was alive to the doubts about Mrs Masson's reliability. I accept the evidence which Mr Hill gave and which I have summarised at paragraph 56 above. Experience suggests that journalistic sources tend to have mixed motives. He was entitled to treat Mrs Masson as a credible source.

Given the seriousness of the allegations against Mrs Henry, it is pertinent to consider what corroborative sources there were that Mrs Henry was complicit in wrongdoing. I have set out in paragraphs 40 to 51 above the dealings which

Mr Hill had with Mrs Webber and Mrs Lambourne. As will be apparent from what I have there said, there is an issue as to what the two sources told Mr Hill about Mrs Henry. In my judgment all three were doing their best to recollect what took place in conversations which took place over two years ago. I have no doubt that the name of Mrs Henry came up in the course of some of those conversations between Mr Hill and Mrs Webber. But I do not accept that in any of their conversations Mrs Webber told Mr Hill that Mrs Henry was aware of the manipulation of waiting lists, still less that she had authorised or participated in it. I do, however, think that Mrs Webber said words to the effect that “they were all in it” and that it was “common knowledge”. I accept the evidence of Mrs Lambourne that she named no names but I think she too told Mr Hill that senior managers had been involved. The transcript of the meeting on 2 June 2003 bears this out. Although he had not been told so in so many words, I believe that Mr Hill not unreasonably assumed, because Mrs Henry was indirectly the line manager of Mrs Masson, that Mrs Henry had known about the manipulation.

The fact is, however, that Mr Hill’s only live source was Mrs Masson. The question then arises what, if any, corroborative evidence in document form was available to Mr Hill. One candidate is the Marvin e-mail quoted at paragraph 42 above. But it does not even indirectly implicate Mrs Henry. Then there is the so-called paragraph 17 e-mail to which I refer at paragraph 24 above. As described to Mr Edwards by Mrs Masson it was an e-mail sent to Mrs Henry (who was at the time the Facilities and Administration Manager) and copied to Mrs Marvin (who was then the Patient Services Manager). Mr Taylor asked Mrs Masson about it when he interviewed her: he asked her where he should look for proof that Mrs Henry had seen that e-mail if Mrs Henry were to deny ever having done so. The reason which Mr Taylor gave for asking that question was that there were no minutes in the waiting list team. Mr Taylor does not mention that evidence had been given to him that the paragraph 17 e-mail had not been sent to Mrs Henry. Mr Hill had read the transcript of Mr Taylor’s interview of Mrs Masson. Mr Caldecott was able to point to documents which could be regarded as providing circumstantial evidence of Mrs Henry’s complicity but the only contemporaneous document which was corroborative of what Mrs Masson had told him about Mrs Henry’s complicity in the manipulation was the paragraph 17 e-mail.

iv) *The steps taken to verify the information*

Mr Hill tried to obtain corroboration of Mrs Masson’s allegations and to that extent took steps to verify the information about malpractice at WGH which had been authorised or condoned by senior managers. But he had no reason to be concerned about Mrs Henry specifically until he saw that Mrs Masson was going to name her in the course of her press conference. By then it was too late to verify the information concerning her.

v) *The status of the information*

A distinction needs to be drawn between the reporting of the findings of the Taylor enquiry on the one hand and the identification of Mrs Henry and others as having been implicated in the manipulation. The status of the former was

plainly high, whereas the latter was based almost exclusively (see paragraph (iii) above) on the say-so of Mrs Masson.

vi) *The urgency of the matter*

According to Mr Caldecott, the urgency arises from the publication that day of the Taylor report. As noted at paragraph 71 above it would have been inconceivable to hold back a story already featured on BBC West and let others publish it first. I have considerable sympathy with that. It is, I think, what Lord Nicholls had in mind when he said the “news is a perishable commodity”. Allowance must in my view be made for the constraints under which journalists, and especially news journalists, have to operate.

The problem, as I see it, is that the urgency attached to what Taylor had found rather than to what Mrs Masson chose to say about Mrs Henry. The possibility of disciplinary action being taken against Mrs Henry was a reason for postponing the publication of allegations against Mrs Henry.

vii) *Whether comment was sought from Mrs Henry*

I have set out at paragraphs 62 to 64 above the attempts made by Mr Hill to obtain comments about the Taylor report from, amongst others, Mrs Henry. I do not think Mr Hill is to be criticised for his decision not to approach Mrs Henry direct. The fact remains, however, that no-one on behalf of the BBC tried to obtain a response from Mrs Henry or even from WGH to the specific charges which Mrs Masson levelled against her at the press conference and which the BBC proposed to broadcast that evening. It does not appear that Mr Hill considered doing so. In my judgment this was a case where an approach to Mrs Henry or at least someone who could speak on her behalf was necessary.

viii) *Whether the broadcast contained Mrs Henry’s side of the story*

The short answer is that it did not.

ix) *The tone of the article*

It is clear from Lord Nicholls’ illustrative comments that the distinction which he had in mind is between the broadcast which raises queries or calls for an investigation and a broadcast which adopts allegations as statements of fact. When dealing with the defence of statutory privilege at paragraphs 88 and 89 above I set out my reasons for concluding that the BBC did adopt the allegations by Mrs Masson that she had been bullied into falsifying the waiting lists and that she had thereafter been blamed for what she had done. The *Points West* bulletin was far from being a detached account of the Taylor findings.

x) *The circumstances of the broadcast, including its timing*

Nothing turns on this.

Reply to attack

98. I have explained at paragraph 94 above why I think it best to treat this as the eleventh matter to be taken into account in relation to *Reynolds* privilege.
99. The case for the BBC is that Mrs Masson was entitled to say what she did about Mrs Henry at the press conference because she was defending herself against an attack. It is important to include what constituted the attack, when it took place and who were the attackers.
100. Mr Caldecott was in my opinion entirely right to assert that Mrs Masson has been the victim of appalling treatment at the hands of WGH and probably the AGW Health Authority as well. I think that in the period leading up to her departure from WGH Mrs Masson behaved foolishly in what she said and did about the information in her possession relating to the falsification of waiting list data. But that comes nowhere near justifying the way WGH treated Mrs Masson once it became apparent that, after she had left the hospital, she was intent on exposing the wrongdoing.
101. The matters relied on by the BBC as constituting the attack on Mrs Masson are pleaded in paragraph 7.6D of the Defence. The WGH press statement quoted at paragraph 27 above is one example of WGH's conduct towards Mrs Masson. Mr Caldecott did not mince his words in relation to that statement and he was in my view right not to do so: he described it (and in particular its third paragraph) as "not just spin but downright misrepresentation". The word "subsequently" is not only wrong in terms of the chronology; it also appears to have been inserted so as to suggest that Mrs Masson made her claim about the waiting list because she had been caught out removing patient documentation. The number of patients was certainly not "small". It was not just a question of placing patients on the "wrong" list; patients were also removed from lists altogether. The press statement gives the appearance of WGH being more concerned about the removal of papers from the hospital than they were about the manipulation of waiting lists. It was an exercise in disinformation. As WGH no doubt hoped and intended, it received extensive coverage in the local press: see for example the issue of the *Weston and Somerset Mercury* for 28 February 2003.
102. When the Langran report was published in late March 2003 Mr Moyse circulated the e-mail and made the public statement denigrating Mrs Masson to both of which I referred at paragraph 37 above. On the basis of what senior managers must have realised was a perfunctory investigation, WGH was described as having been "completely exonerated" and Mrs Masson was described as the sole villain of the piece. Again there was extensive local press coverage.
103. There are two reasons why I do not feel able to give much weight to this factor when considering *Reynolds* privilege. In the first place, the attacker was WGH rather than Mrs Henry. I do not overlook the fact that Mrs Henry had some hand in the production of the press statement of 25 February 2003: see paragraph 28 above. But that evidence does not in my view warrant the conclusion that Mrs Henry was responsible for that attack on Mrs Masson. Secondly, there is the fact that by the time of the broadcast complained of, over a year had passed since WGH had issued the press statement. Mr Caldecott argues that the publication of the Taylor report was the first effective opportunity which Mrs Masson had to reply. But that is to ignore the chance which the *Inside Out* programme broadcast on 7 July 2003 (see paragraph 59

above) gave for Mrs Masson to reply. Besides there is some truth in Mr Rampton's claim that the publication of the Taylor report killed off the need for a reply.

Statutory privilege

104. Although for the reasons given in paragraphs 85 to 91 above I have rejected the defence of statutory privilege, I nevertheless think it right to take into account in relation to *Reynolds* privilege the fact that a significant part of the *Points West* broadcast was reporting a summary of the findings of a report commissioned by a body exercising governmental functions. That part of the broadcast was of undoubted public interest. Little weight can, however, be given to the fact that Mrs Masson said what she did at a "public meeting", because, as I have found at paragraph 91(ii) it was not of public concern or for the public benefit that the BBC should have named Mrs Henry.

Overview and conclusion in relation to *Reynolds* privilege

105. As I have already indicated, the appropriate starting point appears to me to be to assess the nature and extent of the public interest in the subject matter of the publication complained of. I am of the clear view that, in so far as it reported the findings of the Taylor report, the *Points West* broadcast was of high public interest. But I am required to take into consideration the matters identified in *Reynolds* plus, in the circumstances of this case, the considerations addressed at paragraphs 98 to 104 above. In doing so, I must have regard to the broadcast as a whole but always bearing in mind those parts of the broadcast which give rise to Mrs Henry's complaint. As I have pointed out, several of the *Reynolds* considerations are directed at the information of which the Claimant complains, including (i), (vii) and (viii).
106. Standing back and taking account of the contents of the whole broadcast together with the circumstances preceding and surrounding it, I find myself unable to accept that, in the circumstances as they obtained at the time of the broadcast, the public had a right to know what Mrs Masson had to say about Mrs Henry. Mr Caldecott suggested that, if names are not named in cases of serious institutional abuse such as the present, the abusers will not be found and may do it again and people will be discouraged from speaking out. I remind myself that the issue in the present case is not whether the guilty should be named but rather whether privilege should attach to a broadcast in which the allegedly guilty were named at a time when (as the BBC was aware) disciplinary proceedings were likely to be taken against those named. It was not necessary for Mrs Henry to be named. I do not accept that it was in the public interest that the broadcast should have been published in a form which named Mrs Henry as one of those complicit in manipulation of waiting lists at WGH and in the cover-up of that dishonest conduct. Accordingly my decision is that the broadcast was not privileged.