Privilege, and this time we mean it

In 1999, the House of Lords in Reynolds v Times Newspapers Limited recognized a privilege defence for public interest journalism. Liberalising the law doesn't always achieve the desired effect, however, and in the more recent Jameel v Wall Street Journal their Lordships restated the principle. Defamation practitioner Adam Speker of 5 Raymond Buildings explains the background and where we are now

The journalist and one time libel litigant Adam Raphael ended on a pessimistic note his 1989 book, *My Learned Friends, An Insider's View of the Jeffrey Archer Case and other Notorious Libel Actions.* He wrote:

> *'The scene is thus set for many more years of wrangling and many more libel millionaires. But who really benefits? Neither the public nor the press. Neither plaintiffs nor defendants. Ogden Nash got it right: 'Professional people have no cares. Whatever happened they get theirs'.'*

Journalists will seldom if ever be happy with the state of the libel laws in England but much has changed since 1989. Jeffrey Archer has been exposed as a liar, sent to prison and had to pay back his libel damages. The eye-watering jury awards of the past are now rare, as damages have generally decreased owing to the interventions of the Court of Appeal. The changes to civil procedure have resulted in fewer trials. There is now a defence of public interest for newspapers. Perhaps for Mr Raphael and Ogden Nash the most surprising development would be the introduction into this field of conditional fee agreements and cost-capping, which has meant that solicitors and barristers are no longer always getting theirs.

Good news

It is just one of those developments - the public interest defence - which is the focus of this article. The recent House of Lords decision in *Jameel v Wall Street Journal*[1] is good news for journalists although it is neither new nor radical. It is a re-statement of the liberalising judgment of the House of Lords in *Reynolds v Times Newspapers Ltd*[2], which in 1999 recognised a common law qualified privilege defence for public interest journalism to the world at large, but it should breathe new life into *Reynolds* since this latest message from that House is that the new defence it recognised has been too restrictively applied at first instance.

The impact of *Jameel* should not be seen in isolation from the other recent developments in media law. Lord Hoffman said at [38] that, 'until recently, the law of defamation was weighted in favour of claimants and the law of privacy weighted against them. True but trivial intrusions into private life were safe. Reports of investigations by the newspaper into matters of public concern which could be construed as reflecting badly on public figures domestic or foreign were risky. The House attempted to redress the balance in favour of privacy in *(Naomi) Campbell v MGN*[3] and in favour of the press to publish stories of genuine public interest in *Reynolds.* But this case suggests that *Reynolds* … has had little impact upon the way the law is applied at first instance. It is therefore necessary to restate the principles'.

In addition to the shift in the law's treatment of the private and the public, there should be awareness of the appellate decisions on the test to be applied for interim injunctive relief to restrain media publications[4] and the correct test to apply. The latter requires balancing the competing rights under Articles 8 (respect for private and family life) and 10 (freedom of expression)[5] as well as important decisions from Strasbourg confirming the extent to which Article 8 can give protection to an individual's reputation[6] and freedom from harassment and intrusion by the press[7]. Whilst *Jameel* has had parts of Fleet Street dancing, it is likely that the *Campbell* decision (and subsequent case law) will have a greater impact upon journalism in this country.

The tests, old and new

English defamation law has long been seen as claimant friendly. To establish a prima facie cause of action a claimant merely has to prove that defamatory words that refer to him were spoken or published to at least one third party. If so, they are presumed to be false and to have caused damage. The burden shifts to the defendant to show that the words are true or protected by law in some other way. Before 1999, there was very little protection if it was not possible to prove the statements were true.

The House of Lords decision in *Reynolds,* directly influenced by the imminence of the Human Rights Act 1998, was intended to bring English law into line with the Strasbourg jurisprudence, which stressed both the high value to be attached to political speech and the vital role played by the press in a democratic society. The House unanimously rejected an argument by *The Times* which would have recognised a new subject matter category of qualified privilege whereby all political information would be protected whatever the circumstances (subject to malice). Instead, building upon the traditional common law principles of duty and interest, the House of Lords decided in favour of a qualified privilege defence for responsible journalism covering stories of significant public interest, political or otherwise. Giving the lead speech, Lord Nicholls acknowledged the vital role of the press and identified ten indicative factors that would assist the court to judge whether the material complained of was the product of responsible journalism in the public interest, such that privilege should be accorded. Such factors included the tone of the article and whether comment was sought from a claimant before publication. Lord Nicholls recognised that the elasticity of such a defence would mean some uncertainty but he thought that 'over time, a valuable corpus of case law will be built up.' By this means, there were introduced into English libel law, new concepts which became known as 'Reynolds privilege', 'responsible journalism' and the 'Nicholls factors'.

High hopes

Some academics and lawyers in other common law jurisdictions criticised this solution, but it was, unsurprisingly, welcomed on Fleet Street as the dawning of a new age. Here were judges who appeared to understand that the press 'discharges functions as a bloodhound as well as a watchdog' and who stipulated that the 'court should be slow to conclude that a publication was not in the public interest… any lingering doubts should be resolved in favour of publication.' Hopes were high.

'Reynolds privilege' succeeded on its next outing. Despite George Carman Q.C.'s submissions that there would be 'champagne corks popping in Wapping' if the *Yorkshire Post* was entitled to privilege for an article warning that a local karate company was selling 'rip-off' lessons, Sir Oliver Popplewell upheld the new defence at trial[8].

It was not to last. There were well publicised defeats for the newspapers in the cases involving the politician and (subsequently) *Celebrity Big Brother* contestant George Galloway MP, the former Liverpool goalkeeper Bruce Grobbelaar and the international businessman Gregori Loutchansky. Ironically, its infrequent successes have been in cases where the courts have developed a sub-

specie of the defence to protect what has been described as 'neutral reportage' where the mere fact that allegations were being made was in the public interest even if verification (one of the Nicholls criteria) was impossible.

A *Reynolds* defence had been successful at first instance or on appeal five times out of the seventeen in which the defence had been adjudicated upon by the court.[9] Of the ten failed *Reynolds* defences, four were disposed of as unviable before trial[10] and six failed at trial[11]. As for the others, one settled before determination after it was deemed arguable[12] and another which had been struck out at first instance was reinstated by the Court of Appeal before the case settled.[13]

Those statistics led Lord Hoffman in *Jameel* to consider that 'Reynolds has had little impact upon the way the law is applied at first instance' and it was necessary to re-state the principles.

The facts

Before considering those principles the facts in Jameel were as follows. The Wall Street Journal ('WSJ') reported that the Saudi Arabian monetary authorities were monitoring, at the US Government's request, certain bank accounts in connection with the witting or unwitting funding of terrorism. The Abdul Latif Jameel Group was named by WSJ as one of the account holders. The main company in the Group and its president sued for libel. The substantive defence was *Reynolds* qualified privilege. There was no plea of justification. At trial Eady J ruled that the plea of privilege failed. The WSJ appealed to the Court of Appeal which dismissed the appeal but on narrower grounds. The House of Lords gave permission to appeal on both the scope of *Reynolds* and also on the application to corporate claimants of the presumption of damage in defamation claims.

The appeal on *Reynolds* privilege[14] was unanimously allowed for fundamentally the same reasons. Despite some reservations by Lords Bingham and Hope, the Lords reversed the decisions of the High Court and the Court of Appeal, and did not remit the case back. Unusually, therefore, the Lords overturned the decisions, both at first instance and in the Court of Appeal, on the facts, which is what they did in the *Naomi Campbell* case two years earlier.

The speeches in *Jameel* re-stated *Reynolds* and did not apply any different or new test. In fact, the development of a new test contended for by the *WSJ* – one of protection for high quality journalism that was 'newsworthy' - was rejected as unnecessary. According to Baroness Hale, *Reynolds,* properly applied, was sufficient protection for serious journalism which needed to be encouraged and not discouraged.

The decision

Lord Hoffman explained the decision in *Reynolds* by boiling down the test into three questions: was the subject-matter of the article as a whole in the public interest? If so, was it justifiable to include the particular defamatory allegation about the claimant? If so, were the steps taken to gather and publish the information responsible and fair? Responsible journalism was not to be judged too harshly and was not that different to concepts such as reasonable care.

Baroness Hale considered that the first question was whether or not there was a 'real public interest in communicating and receiving information' which did not mean 'vapid tittle-tattle about the activities of footballers' wives and girlfriends'. The second was whether or not the publisher had 'taken the care that a responsible publisher would take to verify the information published.' Such care normally required the publisher to believe the information was true and that he had done what he could to check it. This included contacting those concerned for comment.

And now?

That is all well and good but how will *Jameel* go on to affect defamation cases generally? Even without this re-statement *Reynolds* has had a considerable impact upon defamation practice through the advice now given to clients, both claimants and defendants. Whether or not a *Reynolds* defence has a reasonable prospect of success is crucial when considering whether a claimant should issue proceedings. Whilst many such defences may ultimately fail – and it is of course usually the weak or uncertain ones which get to court - few libel claimants who are concerned about their reputations and the often serious allegations leveled at them want to spend hundreds of thousands of pounds litigating whether a journalist made enough telephone calls or spoke to a sufficient number of unnamed sources to check the story before publication. Media organisations, moreover, know that if their conduct pre-publication performs well when subject to the scrutiny of the Nicholls factors, for instance by putting allegations to a potential claimant and giving proper coverage to the response, they are less likely to receive complaints and, ultimately, less likely to be the recipient of a claim form.

Some indication of the practical effect of the Jameel decision may come shortly from the Court of Appeal in the appeals in *Roberts v Gable,* heard in February, and *Charman v Orion* in March. The defence was upheld in *Roberts* but rejected in *Charman* although it was common ground that there was a public interest in both the subject-matter and the particular allegations about which the claimant complained. The main challenges to the defence post-*Jameel* will still be the same although the emphasis will be shifted in a defendant's favour. Claimants will still argue that information is not genuinely in the public interest and even if the subject-matter of the article was in the public interest it was unnecessary to include the defamatory allegations about the claimant. Few would disagree with Baroness Hale's reference to vapid tittle-tattle about footballers wives and girlfriends not being in the public interest but, as the privacy cases demonstrate, there is no bright line between what is of public interest and what is not. The decision still leaves much room for disagreement about whether the identities of individuals alleged to be guilty of, or suspected of, criminal or anti-social behaviour should be included in a general discussion about such matters although in *Jameel* their inclusion was considered to be an editorial decision. With a greater value being attached by the courts to the individual's reasonable expectation of privacy, even where the information subsequently turns out to be false, what is or is not in the public interest will not necessarily prove as clear-cut as it appeared to the House of Lords in *Jameel* where the allegations related to the funding of terrorism.

Again whilst the House emphasized that editorial decisions were for journalists all of the speeches stressed that the journalism had to be responsible. The WSJ employs fact-checkers. Most British publications do not. Whilst the press here will benefit from the emphasis that responsible journalism is not a gold standard, and from the dicta that weight should be given to the professional judgment of a journalist at the time, absent some indication that those judgments were made in a 'casual, cavalier, slipshod or careless manner' there will be arguments aplenty about what is to be condemned as casual, cavalier, slipshod or careless and as to the requirements of responsible journalism in any particular factual context. Although journalism about political figures attracts strong support in Strasbourg a reading of one of the chapters in Andrew Marr's book, *My Trade (The Dirty Art of Political Journalism)* shows that it can indeed often be dirty.

Overall though, *Jameel* should benefit and encourage serious journalism by reducing the number of libel actions about non-private matters. If so, it remains to be seen whether the press will, as their Lordships hoped, feel less inhibited about publishing stories of immense public interest that previously would not have seen the light of day.

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[1] [2006] UKHL 44

[2] [2001] 2 AC 127

[3] [2004] UKHL 22; [2004] 2 AC 457

[4] See, in particular, *Cream Holdings v Banerjee* [2004] UKHL 44; [2005] 1 AC 253

[5] *In re S (A Child)* [2004] UKHL 47; [2005] 1 AC 593

[6] See eg *Radio France v France* (2005) 40 EHRR 706

[7] *Von Hannover v Germany* (2005) 40 EHRR 1

[8] GKR Karate v Yorkshire Post [2000] EMLR 410

[9] *GKR Karate v Yorkshire Post* [2000] 1 WLR 2571, *Lukowiak v Unidad Editorial* [2001] EMLR 1043, *Al Fagih –v- HH Saudi Research & Marketing* [2002] EMLR 215; *Bonnick v Morris* [2003] 1 AC 300, *Roberts v Gable* [2006] EMLR 692

[10] *Gilbert v MGN* [2000] EMLR 680, *Baldwin v Rusbridger* [2001] EMLR 47, *Miller v Associated Newspapers* [2004] EMLR 698, *McKeith v News Group Newspapers* [2005] EMLR 780

[11] *Grobelaar v News Group Newspapers* [2002] 1 WLR 3024; *Loutchansky v Times Newspapers* [2002] QB 783, *English v Hastie* (31 January 2002, Gray J), *Jameel v Times Newspapers* [2006] UKHL 44, *Henry v BBC* [2005] EWHC 2587; *Galloway v Telegraph* [2005] EMLR 7; *Charman v Orioin Publishing* [20006] EWHC 1756.

[12] *Sheikha Mouza al Misnad v Azzaman Ltd* [2003] EWHC 1783

[13] *Armstrong v Times Newspapers* [2005] EMLR 797

[14] (see Lord Bingham at §35; Lord Hoffman at §§88-89; Lord Hope at §§110-112; Lord Scott at §144 and Baroness Hale at §151)