# LIBEL AND PUBLICATION IN THE PUBLIC INTEREST

DESMOND BROWNE QC: 5RB

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## 1. *REYNOLDS* PRIVILEGE – IS IT REALLY PROTECTING PUBLIC INTEREST STORIES ?

1.1 None of us can possibly forget the words of Lord Nicholls in ***Reynolds v. Times Newspapers*** *(2001) 2 AC 127, 202E-F*, that *"the common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse".* A pointer to the fact that there are likely to be differing views as to what constitutes responsible journalism in any given case can be found in his earlier remark that *"the sad reality is that the overall handling of these matters by the national press, with its own commercial interests to serve, does not always command general confidence": 202B*.

1.2 Many are the judges who (like Sir John Donaldson MR in ***Francome v. Mirror Group Newspapers*** *(1984) 1 WLR 892, 898A-B*) have pointed out that *"the media are peculiarly vulnerable to the error of confusing the public interest with their own interest"*. Usually these interests march hand in hand, but not always. As Lord Wilberforce said in ***British Steel v. Granada Television*** *(1981) AC 1096, 1168*: *"There is a wide difference between what is interesting to the public and what it is in the public interest to make known."*

*Jameel v. Wall Street Journal Europe (2005) EMLR 377*

1.3 In two high-profile and hotly contested cases, ***Loutchansky v. Times Newspapers*** *(2003) QB 783* and ***Jameel v. Wall Street Journal Europe*** *(2004) EMLR 218*, decided by Gray J and Eady J respectively, the media defendants have failed to establish ***Reynolds*** defences. Judgment in the ***Jameel*** case *(2005) EMLR 377*, dismissing the Defendant's appeal was handed down by the Court of Appeal on 3 February 2005. Since then, on 4 May 2005 the House of Lords has given the Defendant leave to appeal on two issues, the scope of ***Reynolds*** privilege and the presumption of damages.

1.4 The issue in relation to damages is whether a company, (in particular, a foreign company not doing business within the jurisdiction) is entitled to reply on the presumption in English law that the libel has caused some general damage or whether it must prove that it has suffered some actual (special) damage.

1.5 The issues in relation to ***Reynolds*** privilege are far-reaching:

(1) whether ***Reynolds*** privilege should be re-stated as a privilege for fair and non-negligent reporting of facts believed to be true about a matter of genuine public interest, and

(2) the extent to which the defendant's belief concerning the subject-matter of the article is relevant to ***Reynolds*** privilege; and if it is relevant, what it is that the defendant must show that he believed to be true.

*Galloway v. Telegraph Group Ltd. (2005) EMLR 115*

1.6 Prior to the Court of Appeal giving judgment in ***Jameel***, on 2 December 2004 Eady J had delivered his much publicised judgment awarding George Galloway MP damages as high as £150,000 against *The Daily Telegraph.* At first sight the result appears a little surprising, but it is necessary to examine the detail of the judgment in some depth to do justice to the manner in which Eady J arrived at his conclusion. At the time of completing these notes (22nd November 2005) the Court of Appeal had heard argument in ***Galloway***, but had not yet delivered judgment.

1.7 *The Telegraph's* articles published on two consecutive days in April 2003 were said to be based on documents found by their reporter in the badly damaged offices of the Foreign Ministry in Baghdad. The main allegation in the documents, which the defendants never sought to justify, was that Mr Galloway had been receiving at least £375,000 a year from Saddam Hussein's regime under the UN oil for food programme. An editorial was in damning terms:

*"There is a word for taking money from enemy regimes: treason. What makes this allegation especially worrying, however, is that the documents suggest that the money has been coming out of Iraq's oil-for-food programme..... out of the revenue intended to pay for food and medicines for Iraqi civilians; the very people whom Mr Galloway has been so fond of invoking."*

1.8 On meaning the Judge rejected as "quite unsustainable" ***[62]*** the defendants' argument that the words did not impute personal greed at all. He thought that the imputation was of both

personal greed on Mr Galloway's part and of hypocrisy over his professed concern for the suffering of Iraqi people *[65]*. He construed the first day's coverage as conveying the clear message that, despite Mr Galloway's protestations and despite the lack of any enquiry into the authenticity or veracity of the documents, the newspaper had concluded that the evidence was overwhelming. Thus, the defendants' reliance on the doctrine of neutral reportage, derived from *Al Fagih v. HH Saudi Research Marketing (2002) EMLR 215* and Strasbourg cases such as *Thoma v. Luxembourg (2003) 36 EHRR 21,* failed because they had effectively adopted the allegations as their own *[159]*:

*".... here the Defendants were not neutral. They did not merely adopt the allegations. They embraced them with relish and fervour. They then went on to embellish them...".*

1.9 In reading the Judge's application of Lord Nicholls' ten non-exclusive criteria in *Reynolds* to the facts of the case, it quickly becomes apparent that even-handed reporting is treated as critical to responsible journalism.

- There could be no doubt about the seriousness of the allegations.

- The subject matter was undoubtedly of public concern; but the Judge cautioned that this was a different question from whether it was in the public interest to publish the specific allegations about Mr Galloway at the particular time in question *[160]*.

- The sources of the information, if the defendants were correct, were operatives in Saddam's regime. Whether or not they had "axes to grind", they could hardly be classified as inherently reliable.

- No steps were taken to verify the information, because the defendants did not think that they were capable of carrying out any meaningful verification. That would have required powers which a newspaper lacks *[161]*.

- As regards the status of the documents, the allegations were not contained in some official report compiled after full enquiry, nor had they been (to quote Lord Nicholls again) "the subject of an investigation that commands respect". Eady J pointed out that the documents were not even "public documents", like the pre-trial records which were at the heart of *Selistö v. Finland*, a decision of the ECHR handed down on 16 November 2004, the second day of the Galloway trial *[162]*.

- Considering the urgency of the matter, the Judge distinguished between an urgent need for the public to be told of untested allegations and the defendants' need to maintain security for what they later called a scoop *[163]*. Whilst news was "a perishable commodity", this story (if it could be stood up) was of interest at any time and would not become stale. The urgency from the public point of view was not so great as to justify either not giving Mr Galloway a proper opportunity to comment on the Baghdad documents or omitting to carry out any attempt at all at verification *[164]*.

- Eady J held that the defendants should have put to Mr Galloway for comment in advance of publication the allegation that he had been in receipt of hundreds of thousands of pounds from Saddam Hussein, but they had not done so *[166]*. Nor had they put to him "with complete frankness" the underlying factual basis for the charge of treason contained in the leader. Thus the gist of what Mr Galloway said related to a different story from that published *[167]*.

- Finally, the Judge considered the tone of the coverage to be "dramatic and condemnatory". It did not merely "raise queries or call for an investigation, it chose to "adopt allegations as statements of fact". Indeed, said Eady J, it went beyond the documents and drew its own conclusions *[168]*.

1.10 Eady J thought that in the last analysis, the question to be answered was the objective one stated by Lord Phillips MR in *Loutchansky v. Times Newspapers (2002) QB 783, [23]*, "whether in all the circumstances the 'duty-interest test or the right to know test' had been satisfied so that qualified privilege attaches". He concluded *[172]*:

> *"To put it another way, did The Daily Telegraph have a duty* [Judge's emphasis] *to publish the material to the effect that Mr Galloway was an 'MP in Saddam's pay' at all ? Did they have a duty to do so without putting that allegation to him ? To my mind the answer must clearly be in the negative."*

1.11 In writing its judgment, the issue with which the Court of Appeal must be wrestling is whether the *Telegraph* went beyond the bounds of permissible comment premised on the assumption that the contents of the documents were true, or whether they effectually adopted those contents and presented them to readers as true. If lessons are to be gleaned from the judgment at first instance in *Galloway,* they relate to the importance of caution and care prior to publication: caution in ensuring that a neutral stance is adopted in relation to the reporting of a third party's allegations, and care in putting to the subject of the article for comment the real gist of what is to be published. As Lord Nicholls said in *Reynolds*, *203G* "failure to report the plaintiff's explanation is a factor to be taken into account", and "depending on the

circumstances, it may be a weighty factor". An article which fails to accompany a serious charge with the gist of any explanation given faces "an uphill task" in claiming privilege if the allegation proves to be false, *206D-E.*

1.12 It would not be safe to draw any definitive conclusions about the protective effect of ***Reynolds*** for the British press from ***Galloway*** (or indeed from ***Loutchansky*** or ***Jameel),*** since these three cases merely reflect the outcome of the trial process. The experience of most practitioners is surely that ***Reynolds*** introduced a sea-change in British journalism so that now almost invariably the subject of a defamatory story is approached for his response in advance of publication. Sometimes this has the effect that the story is not published at all, and sometimes that it is published but in a somewhat attenuated form. Naturally it is impossible to quantify the very many cases where claimants do not start proceedings, because the gist of their comments has been properly sought and then published. Most practitioners advising potential claimants would say that the existence of the defence *does* serve to dissuade claimants from suing, not least because it is often difficult for a claimant to be able to assess at the start of litigation the full extent of the efforts made by the newspaper before publication to investigate and verify the story. This leaves the weaker ***Reynolds*** cases to be raked over at trial. There is no reason to think that ***Reynolds*** could never have protected the publication in a neutral fashion of the contents of the documents found by the *Telegraph* in Baghdad. But as Lord Phillips MR said in ***Loutchansky, [40]***:

*"In the final analysis it must be for the court, not the journalist, to decide whether he was acting responsibly."*

*Jameel v. Wall Street Journal Europe SPRL (No.3) (2005) EMLR 377*

1.13 The judgments of the Court of Appeal in the appeal from Eady J's judgment in ***Jameel v. Wall Street Journal Europe SPRL (No.2): (2004) EMLR 196*** resolve a number of important practical issues regarding the defendant's obligations in a ***Reynolds*** case.

- In ***Jameel*** the article alleged that Saudi officials were monitoring the bank accounts of certain named individuals and businesses, with a focus on those with "Potential terrorist ties". The Defendants pleaded that they reasonably and honestly believed that monitoring was taking place as they described. However, the inferential sting of the defamation was the implication that there were grounds to suspect that the claimants were involved in transferring funds to terrorists. The Defendants did not claim that they believed that this was so. This therefore raised the question whether ***Reynolds*** privilege could extend to the neutral reporting of the fact of an investigation which carries a

defamatory implication, *notwithstanding* that the reporter does not have an honest belief in the truth of the implication. In other words, was all that was required an honest belief on the part of the reporter that an investigation was being carried out ?

- It seems that the answer to this question turns on whether the article is investigative journalism or mere reporting (sometimes called "neutral reportage"), such as succeeded as a defence in ***Al Fagih v. HH Saudi Research & Marketing (UK) Ltd. [2002] EMLR 215***. There the defendants were reporting a political slanging match, and Simon Brown LJ considered that they had "*fully, fairly and disinterestedly reported [the] respective allegations and responses*" ***[52]***. In such eventuality they did not have to attempt to verify what they published and then commit themselves to one side or the other. At a very late stage in the Court of Appeal, the Wall Street Journal tried to rely on reportage: see ***[22]***, but given the terms of the article, the attempt was hopeless.

- After considering the Privy Council case of ***Bonnick v. Morris [2003] 1 AC 300***, which was an unusual case since the journalist could plausibly claim that she did not appreciate that her article carried a defamatory inference, Lord Phillips MR concluded that *"it may be necessary or at least admissible to allege and prove subjective belief in order to establish a defence of* ***Reynolds*** *privilege"* ***[29]***.

- This means that in future ***Reynolds*** cases, the pleadings will have to be much more precise than they have tended to be in the past, and than they were in ***Jameel.***

  A defendant will now have to say where he is relying on reasonable belief in the truth of matters published, or their implications, and where he is not.

  A claimant will have to clarify whether or not he denies that the belief was held, or whether he merely contends that the belief was not reasonable ***[31]***.

1.14 The Court of Appeal also dealt with the role of the so-called "presumption of falsity" in libel trials.

- In the first place, this arose because a late attempt was made to argue that the presumption infringed ***Articles 6 &10 ECHR***, and that the Jameels should have been required to plead and prove that the defamatory meaning of the article was untrue, even in the absence of a plea of justification. The Court held that it was too late to raise this point which, if it had been right, would require a major change in our law of defamation to make it compliant with the Convention ***[55]***.

- However, the Wall Street Journal got a more sympathetic hearing about the use to which the Judge put the presumption of falsity when directing the jury on the question of whether the journalist reasonably and honestly believed that the claimants were being monitored. Eady J directed them that they must proceed on the presumption that the claimants were not on any such list ***[58]***. The Court of Appeal considered that it was not *"appropriate for the jury to apply the presumption of falsity when considering the issues of fact that were relevant to* ***Reynolds*** *privilege"* ***[59]***.

- It is now clear that in future juries will have to perform some elaborate mental gymnastics ***[61]***.

  They must presume that the defamatory allegation is false, when considering liability and damages.

  But they must not make any such presumption, when resolving issues of fact relevant to the claim to ***Reynolds*** privilege. These issues will normally be the existence of the facts underlying the defendant's subjective belief in the truth.

- The defendants' success on this limited point got them nowhere, because it had not been raised at the trial. The Court of Appeal re-emphasised the importance of the principle that it will not entertain a complaint of misdirection in a libel action, if counsel has failed to avail himself of the chance of raising it at the trial ***[63]***.

1.15 More fundamentally, the Court of Appeal had to address the submission based on its judgment in ***Loutchansky v. Times Newspapers (2002) QB 783, [36]*** that the essence of the test for ***Reynolds*** privilege was whether the publisher had exercised responsible journalism. Eady J rejected this as a simple test on the ground that it was imprecise and suggested that the test was subjective. The Court of Appeal agreed with the Judge, stating that responsible journalism did not constitute the sole test for ***Reynolds*** privilege, but merely denoted the degree of care which a journalist should exercise before publishing a defamatory statement ***[87]***. In the Court's view, there is a further element to be demonstrated:

> *"The subject matter of 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."*

1.16 The final issue tackled by the Court of Appeal in ***Jameel*** was the bold submission that it was no longer the law that *"a trading corporation is entitled to sue in respect of defamatory matters*

*which can be seen as having a tendency to damage it in the way of its business":* per Lord Keith in *Derbyshire CC v. Times Newspapers (1993) AC 534, 574*. It was contended that it was unnecessary under *Article 10* to allow a company to recover libel damages, when it had not shown that the libel had caused it pecuniary damage *[109]*. The Court, like Eady J, considered that vindication was an important objective of the law of defamation, and that a requirement to prove special damage would leave many an injured company without a remedy. They did not believe that "such a requirement would go far enough to provide necessary protection for the reputation of corporations that are at risk of being damaged by inaccurate press reports" *[113]*. However, they pointed out that it was "likely in practice that a foreign corporation which trades outside this jurisdiction but does not trade within it will have greater difficulty in establishing that it has a trading reputation within this jurisdiction."

*Armstrong v. Times Newspapers (2005) EWHC Civ 1007*

1.17 On occasions the perceived liberality of the *Reynolds* doctrine has led to hopeless defences being raised in cases where little or nothing had been done by the defendants to verify the information published or to put it to the claimant in advance of publication. Where this occurs, claimants have invoked *CPR Pt.24* to strike out the defence on the ground that it has no realistic prospect of success. It is also open to the claimant, if he is willing to confine his damages to £10,000, to apply for summary disposal under *s.8 Defamation Act 1996*. One such case was *Gilbert v. MGN Ltd. (2000) EMLR 681*, where Eady J held that the tests under *CPR Pt.24* and *section 8* were the same.

1.17 *Armstrong v. Times Newspapers Ltd (2004) EWHC 2928 (QB)* initially appeared to be another instance of a *Reynolds* plea with no prospect of success being prevented from going to trial. In December 2004 Eady J struck out the defence, but in July 2005 it was restored by the Court of Appeal.

1.18 The Claimant, the multiple winner of the *Tour de France,* complained of a *Sunday Times* article suggesting he had taken drugs to enhance his performance. The allegation had not been the subject of any official report or public investigation *[87]*, and the newspaper did not appear to have taken any steps to verify its article or to contact the claimant for his comments on the full range of the serious allegations it intended to make. Brooke LJ pointed out that a failure to put allegations to a claimant was not necessarily determinative *[82]*. He gave two illustrations:

- In *Reynolds* itself no effort was made to contact Mr Reynolds before publication, and his defence of himself in the Dail was not mentioned. Yet the House of Lords was split 3-2 as to whether this was fatal to the defence.

- In *GKR Karate v. Yorkshire Post (No.2) (2000) EMLR 410* Popplewell J upheld a *Reynolds* defence, even though the journalist had made only one inadequate attempt to put the defamatory allegations to the claimant.

*Selistö v. Finland: ECHR (2005) EMLR 178*

1.19 In *Armstrong* Eady J contrasted the factual position there with that in *Selistö v. Finland: ECHR: 16 November 2004*, where the articles about the surgeon claimant were derived from a public document, the police's pre-trial record *[60]*. The ECHR noted that the surgeon had been provided with an opportunity to comment *after* publication of each article, but not in advance *[67]*, but they also attached "considerable weight" to the fact that at no point was his name, age or gender mentioned *[64]*, nor was it claimed that the actual facts in the contested articles were erroneous as such *[60]*.

1.20 The approach of the ECHR inevitably strikes the English domestic lawyer as a little curious, which perhaps explains Sir Nicholas Bratza's trenchant dissent from the majority view of his colleagues that there had been a breach of *Article 10.* For a start, the Court did not find it necessary "*to resolve the question as to how the newspaper articles would be interpreted by the ordinary reader" [58]*. They therefore did not consider whether the inferential meaning of the article as a whole was justifiable, even though it was agreed that the articles concerned factual statements and not value judgments *[55]*.

1.21 The Finnish court based its conviction on what was *not* mentioned in the article (namely the public prosecutor's decision not to press charges and a statement of the National Medico-Legal Board that it had found no negligence or mistake) and thus on the overall impression conveyed to the reader *[57]*. The ECHR ignored this impression and thought that what they described *[63]* as "a certain selectiveness of quotation" could not be regarded as a sufficient and relevant justification for the applicant's criminal conviction:

*"Generally, journalists cannot be expected to act with total objectivity and must be allowed some degree of exaggeration or even provocation".*

1.22 Important though it undoubtedly is, it is difficult to draw any definitive conclusion from the decision in the *Selistö* case. Strasbourg jurisprudence is concerned with reviewing the facts of

particular cases overall, and not with the domestic legal rules of contracting states. ***Selistö*** is certainly a reminder of Lord Nicholls' warning in ***Reynolds, 203G,*** that failure to report the plaintiff's explanation was a weighty factor against the existence of privilege, but should not be elevated into a rule of law. Eady J bore this warning in mind in ***Armstrong [89]***, but added that where the allegations were as serious for the claimant as in that case, *"it is likely to be very rare that an approach will not be regarded as necessary".*

## 2. INTERNET LIBELS: IS THE WEBSITE YET ANOTHER LIABILITY FOR JOURNALISTS?

*Loutchansky v. Times Newspapers Ltd. (No.2-5) (2002) QB 783*

2.1 The decision of the Court of Appeal in ***Loutchansky v. Times Newspapers Ltd (No.2-5) (2002) QB 783*** shows that there are real risks in continuing publication on a website of an article which has given rise to proceedings in relation to its original publication in the paper. It is clear that the protection of the Limitation Act does not start to run whilst the publication on the website continues. This is because there is no "single publication rule", treating the hard copy and electronic publications as having occurred on the same original date. Instead the Courts apply the long-standing rule dating back to the mid-19th century that each publication of a libel gives rise to a separate cause of action subject to its own limitation period: ***Duke of Brunswick v. Harmer (1847) 14 QB 185***.

2.2 The Court of Appeal in ***Loutchansky, §74 p817H***, down-played the social utility of newspaper archives, whether hard-copy or electronic, and did not consider that the law of defamation need inhibit the responsible maintenance of archives. Lord Phillips MR thought that:

> *"Archive material is stale news and its publication cannot rank in importance with the dissemination of contemporary material.... Where it is known that archive material is or may be defamatory the attachment of an appropriate notice warning against treating it as the truth will normally remove any sting from the material* ".

2.3 In the ***Loutchansky*** case, *The Times* failed to attach any qualification to the articles on the Internet, even though they were not seeking to justify them. This proved fatal to their ***Reynolds*** plea. The Court of Appeal could not see *"how the failure to attach any qualifications to the articles published over the period of a year..... could possibly be described as responsible journalism"*: ***§79, p819C***.

*"Libel tourism": foreign claimants and off-shore websites*

2.4 Following the decision of the House of Lords in ***Berezovsky v. Michaels (2000) 1 WLR 1004*** it was only a matter of time before a foreign claimant who could demonstrate a reputation in this country successfully initiated proceedings against a foreign defendant in respect of Internet publication within the jurisdiction, even though the publication was directed from off-shore and even though the bulk of the publication took place outside the jurisdiction. The claimant must, however, confine his complaint to publication within the jurisdiction, since it is impermissible to obtain leave to serve out of the jurisdiction on the basis of publication within it and then to add a claim in respect of publication outside: ***Diamond v. Sutton (1866) LR 1 Ex 130, 132*** (approved by Lords Steyn and Hope in ***Berezovsky*** at ***1012h*** and ***1032d-e*** respectively).

*Lennox Lewis v. Don King (2005) EMLR 45*

2.5 In ***Lennox Lewis & Others v. Don King (2005) EMLR 45*** the Court of Appeal dismissed an appeal by the Defendants from Eady J who had allowed an action by the boxing promoter, Don King, to proceed on words published on an American boxing website which the evidence showed had been extensively downloaded in this jurisdiction. Eady J reached his decision by applying the following well-established principles of defamation law to the technology of the Internet:

- Publication takes place where defamatory words are heard or read: ***Bata v. Bata (1948) WN 366***, approved by Lord Steyn in ***Berezovsky*** at ***1012***.

- Each publication is a separate cause of action. This rule goes back to ***Duke of Brunswick v. Harmer (1849) 14 QB 185***, approved by Lords Steyn, Hoffmann and Hope in ***Berezovsky*** at ***1012c, 1024f & 1026g*** respectively.

- The law presumes damage upon proof of the publication of words which are defamatory of the claimant: ***Ratcliffe v. Evans (1892) 2 QB 524, 529***, cited by Lord Steyn in ***Berezovsky*** at ***1012***.

- There is no *de minimis* principle when it comes to establishing publication: ***Harrods v. Dow Jones & Co. Inc. (2003) EWHC 1162, [39]*** per Eady J. In that case there had been publication of a mere ten copies to subscribers and some very limited Internet publication, but Eady J considered ***[41]*** that a claimant whose reputation was damaged within the jurisdiction was entitled to seek vindication here. This principle will need to

be re-considered in the light of the recent Court of Appeal decision in *Dow Jones & Co. Inc. v. Yousef Jameel (2005) EWCA Civ 75*, where the Court of Appeal dismissed as an abuse of process a claim based on a mere five hits in the UK on the Wall Street Journal website.

- Publication on the Internet takes place where the website is accessed or downloaded by the user: *Godfrey v. Demon Internet (2001) QB 201, 208*, cited with approval by the Court of Appeal in *Loutchansky v. Times Newspapers (2002) QB 783, [58-59]*.

2.6 A challenge to the applicability of these guideline principles was mounted unsuccessfully before the High Court of Australia in *Gutnick v. Dow Jones Inc.* at the end of 2002. Gleeson CJ held:

(1) that those who post material on the worldwide web do so, knowing that their material is available to all and sundry without any geographic restriction *[35]*,

(2) publication takes place within the jurisdiction where it is downloaded *[44]*.

(3) a claim for damage to reputation will warrant an award of substantial damages only if the claimant has a reputation in the place where publication takes place *[53]*.

2.7 The decision of the House of Lords in *Berezovsky* established the following:

- The jurisdiction in which the tort was committed is a weighty circumstance pointing to that jurisdiction as the place where the tort should be tried. Lord Hoffmann referred at *1020a* to a dictum of Phillips LJ in *Schapira v. Ahronson (1999) EMLR 735* in which the latter described the displacement of the burden as "an uphill task".

- If the claimant has a reputation to protect in England, that adds a further significant English dimension to the case: see Lord Steyn at *1015*. As Lord Nolan put it at *1017e*, *"a businessman... takes his reputation with him wherever he goes, regardless of the place where he acquired it."*

- Where a case is solely concerned with the claimant's reputation in England, and he seeks to have his reputation judged by English standards, England is the natural forum: see Lord Nolan at *1017*.

2.8 In the Court of Appeal in the *Don King* case *(2004) EWCA Civ 1329*, the defendants attacked Eady J's refusal to set aside service on the ground that he had misapplied the law in a case involving parties resident in the USA on both sides and a publication on a US website. There was no challenge to the rule that words on the Internet are published at the place where they are downloaded ***[2]***.

2.9 In giving the judgment of the Court, Laws LJ rejected the appellants' invitation to adopt a special rule for "trans-national" or Internet libels. However, it agreed that the court must consider what Lord Steyn in *Berezovsky* at *1012* called "the global picture". Because a defendant who published on the web might in theory find himself vulnerable to multiple actions in different jurisdictions, the place where the tort was committed ceased to be a potent limiting factor ***[28]***. However, there was no "single-publication rule", and *"a global publisher should not be too fastidious as to the part of the globe where he is made a libel defendant" **[31]**.*

2.10 Laws LJ concluded that in an Internet case the court's discretion would tend to be more "open-textured" than otherwise, for that was the means by which the court might give effect to the publisher's choice of a global medium. However, the Court rejected "out of hand" any consideration of whether the defendant *intended* to target the publication towards the jurisdiction in which he was sued ***[33-4]***, since in truth he had targeted every jurisdiction where the text might be downloaded.

*Richardson v. Schwarzenegger (2004) EWHC 2422 (QB)*

2.11 Since the *Don King* case, Eady J has also refused to set aside service out of the jurisdiction in another case involving an English journalist, who claimed to have been sexually assaulted by Arnold Schwarzenegger, and sued him and his spokesman. In ***Richardson v. Schwarzenegger (2004) EWHC 2422 (QB)*** the claimant relied on the spokesman's denial in an interview with *The Los Angeles Times* that Schwarzenegger had engaged in improper conduct. She claimed that this made her appear a liar, and that the denial had been published in England. In deciding that the action should be tried in the UK, Eady J took account of the following features of the case:

- The correct forum was the one where it was just and reasonable for the defendants to answer for their alleged wrongdoing.

- The claimant was a UK citizen, living and working here and with an established reputation here. England was the place where the damage to her reputation was to be presumed.

- The claimant had no comparable connection with any other jurisdiction, and the underlying events in the action (the interview at which the assault allegedly took place) took place here.

*Dow Jones & Co. Inc v. Yousef Jameel (2005) EMLR 353*

2.12 *The Times* greeted this decision as "calling a halt to libel tourism", but this is really to read too much into the judgments. The significance of the case was the willingness of the Court to dismiss the action as an abuse of process on the basis that the five publications (three of them to the claimant's associates) did not, individually or collectively amount to a real and substantial tort. For some reason the Defendant did not apply to set aside service out of the jurisdiction, but it is clear that if it had, the application would have been allowed ***[70]***. This is nothing new; it follows a line of cases from ***Kroch v. Rossell (1937) 1 AER 725***. Because the Defendant submitted to the jurisdiction, the Court needed to operate its jurisdiction to dismiss as an abuse. It is here that the case *does* make new law, since the jurisdiction to dismiss as an abuse would be just as applicable when the defendant was served within the jurisdiction. Thus the Court commented ***[56]*** that they did not believe that today the ***Duke of Brunswick v. Harmer (1849) 14 QB 185*** could have survived an application to strike out. This was because his cause of action was technical and no more: he had procured the republication to his agent of an article published many years before for the sole purpose of bringing proceedings which would otherwise have been statute-barred.

2.13 The Court was not impressed by the argument that Yousef Jameel needed vindication in this country, or that he was being deprived of his ***Article 6*** rights. Lord Phillips MR ***[69]*** thought that even if he succeeded and was awarded a small sum in damages:

*"The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick."*

2.14 Consideration of issues of proportionality in approaching the question of whether an action is an abuse shows how much the Court's approach has changed over the last decade. In ***Joyce v. Sengupta (1993) 1 WLR 337, 343E-G***, Nicholls LJ described as "hopeless" the submission" that an action was an abuse if only nominal damages were likely to be recoverable by the plaintiff. He thought that even if damages were at best modest, if the plaintiff won, she would have cleared her name and achieved her main purpose.

2.15 Although US media groups are naturally resentful of the long reach of the English court, provided that they have no assets within this jurisdiction or one where an English judgment can

be enforced, they will usually be able to ignore an English judgment with impunity. The American courts have consistently declined to enforce English libel judgments on grounds of public policy, ruling that English law flies in the teeth of the protection afforded by the First Amendment.

*The Law Commission study*

2.16 Issues in relation to publication on the Internet will continue to be controversial. The ***Law Commission in their Scoping Study in December 2002*** acknowledged that there was a problem, but did not think that it could be solved within the short or medium term. They expressed "sympathy" about the levels of global risk to which Internet publishers were exposed, but considered that *"any solution would require an international treaty, accompanied by greater harmonisation of the substantive law of defamation."*

## 3. OFFERS OF AMENDS: HAS THE DEFAMATION ACT 1996 PROVIDED A CHEAP WAY OUT ?

*Abu v. MGN (2003) 1 WLR 2201*

3.1 The new offer of amends procedure created by ***s.2-4 Defamation Act 1996*** was only brought into effect on 28 February 2000, and initially media defendants were surprisingly slow to take advantage of it. But within the past two or three years it has been used more and more by media defendants to provide what Eady J has called "*a fair and reasonable exit route for defendants confronted with unreasonable demands from... manipulative or powerful claimants, who felt no doubt sometimes that they had them over a barrel": **Abu v. MGN Ltd (2003) 1 WLR 2201, [8]***.

3.2 It was not until November 2002 that guidance as to the operation of the new procedure was provided by Eady J in his judgment in ***Abu***. In it he traced the origins of the new procedure back to ***Chapter VII: Report of Sir Brian Neill's Committee on Practice and Procedure in Defamation.*** The Judge had himself been a member of that Committee and pointed out that times had changed, since the measures were first proposed in July 1991, when feelings were running high about massive jury awards ***[5]***. Perhaps conscious that the procedure was getting off to a slow start, the Judge tried to ensure that the statutory provisions were attractive to use, providing an incentive to defendants to make the offer and to claimants to accept. In either case, he said, a rational decision could only be made if it was possible to predict the range of outcomes to which a party was committing himself ***[8]***.

3.3 The Judge therefore emphasised that the offer of amends was to be construed as relating to the complaint *as notified* [his emphasis]: ***[9]***. This has important practical consequences for claimants' advisers in relation to what they put into their letter before action or particulars of claim. As Eady J said ***[8]***:

"*..... before making an offer a defendant needs to be able to assess the gravity of the impact of the libel upon the complainant's reputation and feelings, and this will generally have to be done in the light of the particulars of claim and/or letter before action. It would not seem fair if an offer is made and accepted on one basis, and the complainant then reveals for the first time elements of pleadable damage not previously mentioned, such as for example that his marriage had broken down or that he had lost his employment."*

3.4 Eady J went on to point out that the provisions of the Act were all the more attractive to defendants to use, since the restrictions proposed by the ***Neill Committee*** on the manner in which the defendant could mitigate damages had not found their way into the statute ***[10]***. The ***Neill Committee*** had accepted that defendants should be allowed to rely on matters in mitigation which were purely defensive in character, but proposed a ban on attacks on the claimant's character and on raising matters tending to show that he or she was not entitled to an unblemished character. The practical consequences for claimants are serious:

*"So far as claimants are concerned.... they will have little option but to accept such an offer because otherwise they will find themselves up against a defence under section 4."*

3.5 At first instance in ***Nail v. News Group (2004) EWHC 647 (QB), [66]*** Eady J stated that claimants were generally entitled, so far as possible, to be informed of anything disparaging which the defendants proposed to introduce before deciding whether to accept the offer. Since the rejection of an offer of amends was generally a complete defence, it was "*not proper under that very powerful incentive to lure a claimant into accepting what appears to be a genuine offer to put matters right, only for him to find that his reputation will be 'rubbished' anyway."*

*Rigg v. Associated Newspapers (2004) EMLR 52*

3.6 There may also be cases where the claimant will need to consider whether to seek limited disclosure against the defendants before reaching the decision whether to accept the offer. Thus, in ***Rigg v. Associated Newspapers (2004) EMLR 52,*** Gray J ordered disclosure of the journalist's notes of an interview with the Claimant, where there was a dispute as to whether the offending article accurately recorded what had been said. The Judge ruled that the notes bore directly on the pleaded issues of false attribution and malice, and since they would be disclosable later whether or not the offer of amends was accepted, there was no sense in postponing the moment of disclosure.

*Milne v. Express Newspapers (2003) 1 WLR 927*

3.7 Three weeks after the *Abu* judgment, the difficulties confronting a claimant seeking to overcome a *section 4* defence became clear with Eady J's judgment in *Milne v. Express Newspapers (2003) 1 WLR 927*, where he struck out a claimant's reply alleging that the information available to the defendant was such that it reasonably should have known that the statement complained of was false. The Judge held that Parliament's intention in *section 4(3)* was that those who made an offer of amends which was rejected should only be deprived of the resulting defence in the event of bad faith, and not in cases of mere negligence or reasonable grounds to suspect falsity. The scale of the task confronting a claimant in such circumstances is shown by the way in which the Judge defined "bad faith": *[41]*:

> *"... that is to say, where a defendant knows that what he is alleging is untrue... or where he has reason to believe that the words are false. What this means is that he has chosen to ignore or shut his mind to information which should have led him to* ***believe*** [the Judge's emphasis] *(not merely suspect) that the allegation is false."*

3.8 Thus "*reason to believe"* in *section 4(3)* is not to be equated with either "reasonable grounds to suspect" or with constructive knowledge *[44]*. The burden for the claimant to discharge is made still greater by the presumption in the section that, until the contrary is shown, the defendant did not know and had no reason to believe that the statement was both false and defamatory. The Court of Appeal dismissed the claimant's appeal, *(2004) EMLR 461*, holding that *section 4(3)* imported the familiar concept of recklessness (in the sense of utter indifference to the truth) which was discussed by Lord Diplock in the classic passage in *Horrocks v. Lowe (1975) AC 135, 149-150*.

*Cleese v. Clark (2004) EMLR 37*

3.9 With the exception of *Cleese v. Clark (2004) EMLR 37* and *Nail v. News Group Newspapers (2004) EWHC 647 (QB)*, once the offer of amends has been accepted, the parties have been able to agree damages and it has not been necessary to proceed to a contested hearing under *section 3(5)*. Doubtless this is because defendants have been willing to make realistic offers and, if necessary, well judged payments into court. At this stage the Act enjoins the Court to take account of any steps carried out in fulfilment of the offer and (so far as not agreed between the parties) the suitability of any apology and the reasonableness of the manner of publication. In *Cleese, [20]*, Eady J advised defendants who for some reason were unable to agree an apology "*to publish as prompt and generous apology as the circumstances permit, with a view to moderating the level of compensation".*

3.10 In *Cleese, [22-4]* Eady J noted that it was in accordance with Parliament's intention and the *CPR* for an informal round-the-table meeting to take place, if practical, to identify and resolve any issues still outstanding. The judge tried to discourage attempts to reach agreement through a prolonged exchange of solicitors' letters ***[24]***:

*"Once solicitors enter into correspondence, there is a tendency to keep cards up sleeves and there is also scope for obfuscation and posturing. It is best avoided in this context... there can be no form of human communication more stilted than letters between litigation solicitors of the type with which we are all familiar, where endless points are scored of the 'We are surprised to note....' variety."*

3.11 The cheapness of the exit route provided by the offer of amends procedure was underlined by the award in *Cleese* of a mere £13,500 damages for an article "obviously spiteful on its face" and "manifestly vitriolic" ***[41]***, which suggested "a long, slow decline in [the claimant's talents and professionalism had finally ended with a bump" ***[42]***. Such apology as was published was "without any great enthusiasm or generosity of spirit" ***[43]***.

3.12 In *Abu, [22]* Eady J pointed out that *section 3* does not artificially cap damages in a comparable fashion to *section 9(1)(c)*, which is concerned with the summary disposal procedure under *sections 8-10* and provides for a ceiling of £10,000. Thus, not only may very serious allegations fall to be dealt with under the offer of amends procedure, but the claimant has effectually been deprived by the legislation of his constitutional right to trial by jury. The Judge therefore warned that there must be *"nothing in any sense 'rough or ready' about the assessment of a claimant's reputation under the offer of amends procedure".* Proportionality does not mean that corners need to be cut, and in the case of grave allegations, it may well be that justice requires that significant time and money be spent in arriving at the right answer.

*Nail v. News Group Newspapers (2004) EWHC 647*

3.13 The second case in which a contested trial on damages needed to take place was *Nail v. News Group Newspapers & Harper Collins (2004) EWHC 647*, where allegations of coarse sexual misconduct and arrogant bullying of those with whom he worked had been made against the actor, Jimmy Nail, in both a book and an article in *The News of the World*. Eady J awarded "modest but by no means nominal" damages of £7,500 for the book, and £22,500 for the newspaper article. In relation to the latter, he said that his "starting point valuation" had been £45,000, but that taking account of mitigating factors, he made a reduction of 50% ***[76]***. His view was that "a healthy discount" was in order ***[41]***:

*"Media defendants who act promptly when confronted with a claim are entitled to be rewarded for making the offer and, correspondingly, the claimant's ordeal will generally be significantly reduced with immediate effect.".*

3.14 In the Court of Appeal, Nail's counsel argued that the Judge had been wrong in principle to discount compensation in order to encourage other defendants to use the offer of amends procedure. The claimant ought to receive proper compensation, not discounted compensation which penalised him for being conciliatory. Irresponsible newspapers must not be tempted to make defamatory publications confident that, if they are sued, a relatively cheap procedure was available which was likely to result in modest compensation. Nevertheless, counsel accepted that £45,000 was an appropriate starting point for the newspaper article. The question for the Court of Appeal was therefore whether the discount of as much as 50% was excessive.

3.15 In his judgment delivered on 20 December 2004, May LJ acknowledged ***[39]*** that the court must be careful not to drive down damages to a level which publishers might with equanimity be tempted to risk having to pay, or to set the level of damages so high that freedom of expression was unduly curtailed. Whilst May LJ thought ***[42]*** that Eady J's use of the word "rewarded" was "superficially open to misinterpretation", he commented that:

*"The adoption of the procedure will have what the judge referred to as a major deflationary effect upon the appropriate level of compensation because adopting the procedure is bound to result in substantial mitigation.... there is no distinction in substance between a reduction in compensation on account of the substantial mitigation bound to result from the use of the procedure and a 'reward' for using the procedure, providing that the mitigating factors are not brought into play twice."*

3.16 The Court of Appeal refused to increase ***[47]*** Eady J's award; he had made no error of principle and had given proper and full consideration to all relevant factors. Even if another judge might have reached a somewhat amount, that did not mean his conclusion was wrong. May LJ was at particular pains to *"reject entirely any idea that there might be a conventional or standard percentage discount when an offer of amends has been accepted and an agreed apology published."* Whilst it is true that each case will be different and require individual consideration, it seems likely that the 50% discount will set a benchmark in cases where an agreed apology has been published, and there are no unusual aggravating or mitigating features.

### *Campbell-Jones v. Guardian Media Group Plc (2005) EMLR 542*

3.17 The decision of Eady J in *Campbell-Jones v. Guardian Media Group (2005) EMLR 542* in May 2005 illustrates the importance of conciliatory handling of complaints in the early stages, if the defendants are to gain the advantage of a generous discount. The claimant was a Colonel

in the Intelligence Corps posted to Iraq. The *Guardian* published an article linking him to the torture jail at Abu Ghraib, and which the Judge thought conveyed the impression that British ministers had given a false impression when denying any involvement by British troops in abuses at the jail.

3.18 Initially the defendants had responded to the claimant's complaint by asserting that it had a complete defence, including one of fair comment. Eady J thought this was an insulting suggestion and "a grave error of judgment": *§7*. He also thought it was "a case for a speedy, unequivocal and prominent apology" (*§10*), not least to minimise the security risks to the claimant. In fact, the apology was only published three months later. The Judge took as his starting point a figure for damages of £90,000, and then applied a reduced discount of only 35% on the ground of the belated offer of amends and apology.

## 4. A FOOTNOTE ON DAMAGES FOR LIBEL: SHOULD COMPENSATORY DAMAGES SERVE TO DETER ?

4.1 Since the decision in ***Lillie & Reed v. Newcastle City Council (2002) EWHC 1600***, the ceiling on general damages for defamation has conventionally been treated as being set at £200,000. In ***Lillie & Reed*** the allegations of child abuse were as grave as can be imagined, they had led to the claimants having to go into hiding and were sought to be justified during a trial over many months. The same Judge's award of £150,000 to George Galloway therefore came as something of a surprise, even when account is taken of what the Judge called the "undoubtedly aggravating features of the conduct of the trial" ***[218]***. Eady J rightly reminded himself that general damages must be proportionate to the objectives the tort of defamation sets out to achieve (including both solatium and vindication) and to the harm done. So was £150,000 too high ?

4.2 In ***Galloway [212]*** Eady J explained that it had been important to him in ***Lillie & Reed*** to identify the maximum permitted, since he intended to award compensation on that scale. By contrast, in the ***Galloway*** case, he felt he could compensate the claimant *"without needing to isolate that cut-off point (if indeed there still is one) with any degree of precision".* This remark makes it sound as if the Judge's mind had been influenced by the citation to him of the Privy Council decision in *The Gleaner Co. Ltd. v. Abrahams (2004) 1 AC 628*. On the other hand, the Judge expressly stated that he did not consider that "the somewhat uncertain state of the law in this area [was] going to have any effect on the compensation exercise" in the ***Galloway*** case.

*The Gleaner Co. Ltd. v. Abrahams (2004) 1 AC 628*

4.3 In *The Gleaner* case, the Privy Council declined to interfere with an award of £533,000 general damages made by the Jamaican Court of Appeal in substitution of a jury award of £1.2m. The Claimant, a former Minister of Tourism, had been accused of taking bribes, and a plea of justification stood on the record for some seven years before it was struck out in the absence of pleaded facts to support it. An apology was then published, but the claimant produced strong evidence of a ruined career, public humiliation and prolonged stress.

4.4 The Jamaican Court of Appeal declined to follow the English practice derived from *John v. MGN Ltd (1997) QB 586* of using personal injuries damage as a reference point in the quantification of libel damages, and the Privy Council held that they had not erred in this respect. It was a question of policy "open to legitimate differences of opinion" and did not, in Lord Hoffmann's view ***[62],*** involve any question of legal principle:

> *"[The Court of Appeal] were entitled to hold the opinion that a conventional figure established for an award performing one social function was no guide to what should be the conventional award for an award performing a different social function."*

4.5 Whilst the Privy Council expressed no view on the current practice in England, Lord Hoffmann acknowledged that it was arguable that the assessment of general damages in both personal injury and libel cases was far more complicated than trying to value the damage ***[50].*** Other factors entered into the calculation. These included:

- Personal injury awards were almost always made in actions for negligence or breach of statutory duty rather than intentional wrongdoing.
- Personal injuries damages are almost always paid out of public funds or by insurers under policies not very sensitive to the claims records of individual defendants. The cost is therefore borne by the public at large.
- The exemplary or deterrent elements in personal injury awards are minimal or non-existent.
- The total sums of compensation paid for personal injury are very large, and have an effect on the economy which libel damages do not.

4.6 Lord Hoffmann pointed out that defamation cases had important features not shared by personal injury claims ***[53]***, particularly in relation to deterrence:

> *"The damages often serve not only as compensation but also as an effective and necessary deterrent. The deterrent is effective because the damages are paid either by the defendant himself or under a policy of insurance which is likely to be sensitive to the incidence of such claims.... Awards in an adequate amount may also be necessary to deter the media from riding roughshod over the rights of other citizens."*

4.7 Eady J ***[209]*** picked up this passage from Lord Hoffmann in ***Galloway***, and commented that *"it may indeed be thought that deterrence is a function not confined to punitive damages".* He is not the only judge to have considered deterrence recently in the context of the assessment of libel damages. In ***Kiam v. MGN Ltd (2003) QB 281, 304 [75],*** Sedley LJ commented that *"the ineffectiveness of a moderate award in deterring future libels is painfully apparent".* But he pointed out that there was a conundrum:

> *".... compensation proportioned to personal injury damages is insufficient to deter, and... deterrent awards make a mockery of the principle of compensation."*

4.8 Deterrence is normally considered to be an aspect of punishment, and the courts may have to wrestle in the future with its appropriateness as a consideration when quantifying compensatory damages, even when they include an aggravated element. In the meantime the award in the ***Galloway*** case poses the question whether damages in future will be fixed at a level intended to *deter* the press from conduct which fails the ***Reynolds*** test of responsible journalism. If that is to be the case, the level of damages will inevitably start to rise.

*Rupert Lowe v. Times Newspapers Ltd.*

4.9 From the recent award to the Chairman of Southampton Football Club of £250,000 against *The Times* on 26 October 2005, it appears that these issues are not just academic and that juries can still be prone to setting damages at the deterrent level: ***Rupert Lowe v. Times Newspapers Ltd***. The libel certainly fell short of the top-end of the scale of gravity: it accused Mr Lowe of having acted shabbily in sacking the club's manager when he was facing criminal charges. The jury found that the article was comment, but that the comment was not such as an honest person could make on the facts as stated or referred to in the article.

4.10 Not surprisingly, the editor of *The Times* greeted the award as *"absolutely extraordinary and disproportionate.... for the use of one mild adjective".* The Judge granted permission to appeal

on damages, but was not asked for permission on liability. (Since then, the defendants have asked for permission from the Court of Appeal.)

4.11 There appear to have been two possible causes for the very high award, each of which provides some consolation that such awards can be avoided in the future:

(1) Firstly, the Judge was apparently not asked to give, and did not give, the jury guidance on a bracket for figures for damages, as was done in ***Kiam v. MGN Ltd. (2003) QB 281***.

Such a bracket is not a straitjacket, and if the jury exceed it by a small margin (as in fact they did in ***Kiam***), that will not invalidate the award. But, unless they are given a bracket with mention of specific figures, there will remain a risk that they go off the permissible scale. It certainly appears from his judgment in ***Kiam, 300B,*** that Simon Brown LJ envisaged that guidance on figures should come from the Judge.

(2) Secondly, Mr Lowe was cross-examined in a manner which caused it to emerge, quite permissibly, that he had agreed with the club that any damages should go to charity. Such evidence would normally be quite inadmissible, but the effect in this case was to allow the jury to give rein to their philanthropic instincts from someone else's purse.

2 DECEMBER 2005

DESMOND BROWNE QC
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