Good news for Fleet Street

he House of Lords restatement of Reynolds privilege will have a significant impact on the scope of the media's public interest defence. Sarah Palin reports

.public interest and the Reynolds principles

.Jameel—victory for responsible journalism

Jameel v Wall Street Journal Europe SPRL [2006] UKHL 44, [2006] All ER (D) 132 (Oct) has been greeted with jubilation on Fleet Street, as a breath of life for the defence of Reynolds privilege in libel actions. In an emphatic and unanimous judgment, the House of Lords reaffirmed the liberalising intention of the Reynolds defence. It rejected the manner in which the defence had been applied by the lower courts which would discourage the publication of public interest articles. This is undoubtedly good news for Fleet Street, but what is the extent of this regeneration?

Reynolds privilege

When the Reynolds privilege defence was created by the House of Lords seven years ago, it was heralded as a new dawn for freedom of speech (see Reynolds v Times Newspapers Ltd [2001] 2 AC 127, [1999] 4 All ER 609). The law lords' ruling in the case brought by the former Irish premier, Albert Reynolds, against The Sunday Times, considerably widened the scope for reporting matters of public interest and was, on paper at least, a radical departure for England's hitherto restrictive libel laws.

A defence of privilege allows the defendant to evade the ordinary rule of English law that a defamatory statement of fact can only be defended if it is true. It is based on the consideration that there are circumstances in which the public interest dictates that a statement should be protected regardless of whether it is true or false. Until Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22, [2004] 2 All ER 995, the defence had been essentially confined to private communications, such as employment references, and its capacity to protect publications to the public at large was limited.

In Reynolds the House of Lords attempted to redress the balance in favour of greater freedom for the press to publish stories of genuine public interest. The judgment developed the traditional form of qualified privilege to confer the protection on statements in the media which were in the public interest because the public had a 'right to know' the information conveyed, even if it was ultimately shown to be false.

However, in the years since the case was decided, media lawyers had come to regard Reynolds as a false dawn, as time and again Reynolds defences failed in the lower courts. As Lord Hoffmann remarked, Jameel "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."

Jameel—the facts

Jameel arose from the publication of an article in the Wall Street Journal Europe to the effect that the Saudi Arabian Monetary Authority, at the request of the US Treasury, was monitoring the accounts of certain named Saudi companies to trace whether any payments were finding their way to terrorist organisations. The principal director and the holding company of a group named in the article sued for libel. The newspaper's principal defence was Reynolds privilege. There was no plea of justification. Following a three-week trial in 2004, the claimants were awarded modest damages of £30,000 and £10,000 respectively, after the trial judge ruled the newspaper's Reynolds defence failed. The defendant appealed unsuccessfully to the Court of Appeal which upheld the trial judge's denial of Reynolds privilege on the sole ground that there was no urgency to justify publishing the story without giving the claimants a meaningful opportunity to comment.

The decision

Their Lordships were unanimous in finding that the lower courts had given Reynolds privilege too narrow a scope and that the defence should have been upheld. Lord Bingham described the Court of Appeal judgment as subverting "the liberalising intention of the Reynolds decision". All the judges were persuaded that, in the words of Lord Bingham, the article in question "was the sort of neutral, investigative journalism which Reynolds privilege exists to protect". Baroness Hale was of the view that: "If the public interest defence does not succeed on the known facts of this case, it is hard to see it ever succeeding...We need more such serious journalism in this country and our defamation law should encourage rather than discourage it." Reynolds marked a sea-change which had "carried the law forward in a way which gave much greater weight than the earlier law had done to the value of informed public debate of significant public issues".

The correct approach

Lord Hoffmann held that the correct approach to, what he termed, the "Reynolds public interest defence" was in three stages:

* the public interest of the material;
* the inclusion of the defamatory statements; and
* the test of responsible journalism.

The first question is an objective test to be decided by the judge, who "should consider the article as a whole and not isolate the defamatory statement". It is not necessary to find a separate public interest justification for each item of information within the publication. Where the defamatory allegation is severable from the material as a whole, this question is approached by considering the thrust of the article. Once this initial question of public interest was decided, according to Lord Hoffmann, "the duty and interest are taken to exist".

If the article as a whole passed this first general test, the next question to ask was "whether the inclusion of the defamatory statement was justifiable" and in so doing "allowance must be made for editorial judgment". Lord Bingham said this means that "weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner". While it is sometimes a "valid point" that the story "could have been published without inclusion of the particular ingredient complained of", the defence is not lost if the judge "with the advantage of leisure and hindsight, might have made a different editorial decision" since "that would make the publication of articles which are, ex hypothesi, in the public interest, too risky and would discourage investigative reporting".

The editor will be expected to justify the decision to include the defamatory allegation in the article on grounds that it must have made "a real contribution to the public interest element in the article", but this will no longer be judged, as it was in the lower courts, by asking the question whether the story needed or required the particular allegation to be included.

Responsible journalism

If both the above stages are satisfied, one passes to the question of responsible journalism; whether the defendant behaved fairly and responsibly in gathering and publishing the information, and whether the conduct of the journalists met the standard of care that a responsible publisher would take to verify the information published.

Lord Nicholls' 10 factors

In an attempt to give guidance about what might be taken into account in deciding whether the test of responsible journalism was satisfied, Lord Nicholls had in Reynolds setout a list of 10 factors. These were not intended to be exhaustive and included the tone of the article, the status of the information, whether comment was sought from the claimant and whether the article contained the gist of the claimant's side of the story. When these factors were applied to the newspaper's conduct by the trial judge and the Court of Appeal, the newspaper was found to have fallen short of the standards of responsible journalism.

The lower courts' transformation of Lord Nicholls' 10 factors into 10 "hurdles at any of which the defence may fail" met trenchant criticism from their Lordships. These were not "a series of hurdles" or "tests" that "the publication has to pass" but factors the court could usefully look at, in a "practical and flexible manner" having "regard to practical realities", to see whether the defendant had met the required standard of journalistic responsibility.

The truth or falsity of the story-and the defendant's inability to prove its truth at trial—were not relevant to the success or failure of the defence. As the broad question is essentially one of conduct, "the defence is not affected by the newspaper's inability to prove the truth of the statement at the trial": the actual falsity of the defamatory statement is a "neutral circumstance" which is "assumed" for qualified privilege to be a "live issue".

Applying the factors

The House of Lords said the failure of the newspaper to obtain comment from the claimants should not have been fatal to the defence. The question of whether the claimant is given the opportunity to comment is, as Lord Nicholls in Reynolds recognised, not always fatal to the defence. The importance of approaching the claimant was based on the fact that "he may have information others do not possess or have not disclosed". This was not the case here, Lord Hoffmann stated: the claimant would have no knowledge of whether there was covert surveillance of his bank account and could only say he knew of no reason why anyone should want to monitor his accounts. He added that "the newspaper's refusal to postpone publication of the story was not, in my opinion, a circumstance of any real weight in the scale for measuring the presence or absence of 'responsible journalism'."

In this case the article was a "serious contribution in measured tone to a subject of very considerable importance". The claimants' response was sought, although at a late stage, and the newspaper's inability to obtain a comment recorded. Their Lordships recognised that the Wall Street Journal Europe's reliance on anonymous sources was an important and credible part of the news-gathering process. There was simply "no basis for rejecting the newspaper's Reynolds defence". By a majority they held that no retrial was needed to decide that the publication was privileged.

A new dawn?

Overall the judgment is undoubtedly good news for those who want to produce unsensational, neutral, measured articles on matters of importance. But what of the sensational, accusative piece whose main thrust consists of prejudging serious allegations against the claimant?

In other words, would Grobbelaar v News Group Newspapers Ltd [2002] UKHL 40, [2002] 4 All ER 732 (The Sun's exposé of match-fixing allegations) or Galloway MP v Telegraph Group Ltd [2004] EWHC 2786 (QB) (The Daily Telegraph's adoption of Iraqi documents suggesting that the member of Parliament was in the pay of Saddam Hussein) be decided the same way if they were tried today? It remains to be seen how, if at all, the judgment will affect cases in which the publisher adopts or asserts the truth of allegations.

Where will it be held inexcusable that the publishers had not obtained the comment of the claimant before publication and included it in the article? It may be that in other cases, where the claimant is in a position to respond positively to the allegation, the defendant will still be expected, so far as it is practicable for it to do so, to obtain the claimant's response before publication.

How far the allowance for the practical realities of journalism will stretch is unclear. While the House of Lords rejected the narrow approach of asking the question whether the story needed or required the defamatory allegation to be included, the editor must still justify the inclusion of the particular defamatory statement on the grounds that it must have made a real contribution to the public interest element in the article, albeit giving due weight to editorial decision-making.

Exception to the rule

As a coda, it is worth bearing in mind that, whatever its scope may now be, the Reynolds defence is the exception to the rule that a defamatory statement of fact published to the world must be proved to be true.

Articles which engage the interest of the public but are not in the public interest, or which drag in damaging allegations which serve no public purpose or make no real contribution to the public interest in the article will find no greater protection than they did before.

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