

Lowering the hurdles - for serious journalism

Have the law lords made life easier for investigative reporters? It depends on the newspaper, says Richard Rampton QC

The House of Lords' judgment in *Jameel v Wall Street Journal Europe* has, understandably, been hailed in the media as a new dawn for press freedom, a renaissance for investigative journalism. Is this true? Well, partly.

In 1999, their Lordships decided (in *Reynolds v Times Newspapers*) that there were occasions when information was of such public importance that its publication in the media should be protected even though it made defamatory allegations which could not be proved to be true. At the time, this new defence seemed a significant breakthrough for the media. Its touchstones were whether the information conveyed by the publication was of such importance that the public had a right to know it; and whether the defendant had acted "responsibly" in publishing it.

As time went by, however, successive defeats for media defendants seemed to suggest that this new freedom was more apparent than real. So how far has this latest decision gone in redressing the position?

It is certainly true that their Lordships found that the approach of the lower courts had had the effect of "subverting the liberalising intention of the Reynolds decision." Put bluntly, there was simply "no basis for rejecting the newspaper's Reynolds defence". The judgment is thus a ringing vindication for the newspaper and its journalists, whose article was "a serious contribution in a measured tone to a subject of very considerable importance". But, now the dust has settled, what does it mean for the future?

This is the first time the House of Lords have considered the Reynolds defence since they 'invented' it in 1999. In the interim, the success or failure of the defence – usually the latter – increasingly came to depend on the extent to which the defendants could satisfy the 10 "considerations" which Lord Nicholls had suggested in *Reynolds* might be used to judge whether the publication should be protected.

It became increasingly apparent that these supposedly "non-exhaustive" considerations were being applied almost as a catechism – a "series of hurdles" which the defendant had to negotiate in order to win. So it was perhaps not surprising that of the 15 times the defence reached final decision, it succeeded only three times.

In *Jameel*, the House saw that this trend was apt to discourage investigative reporting on matters of public interest, and set about restoring the "spirit of Reynolds". So the judgment is clearly good news for anyone interested in producing serious articles on issues of public importance. But just how far does it go?

There are several reasons to be cautious.

First, the Reynolds defence is an exceptional defence. The general rule of English law is that a defamatory statement of fact published to the world at large must be proved to be true, and special circumstances will always be needed to justify departure from it.

Second, while the House of Lords rejected a narrow approach to the question of public interest, preferring to focus for this purpose on the overall "thrust" of the article rather than the particular allegation complained of, the editor must still justify the inclusion of the particular allegation - though the House warned against second-guessing editors on this question: the defence ought not

to fail just because the judge “with the advantage of leisure and hindsight, might have made a different editorial decision”.

Finally, a striking feature of the judgment is its emphasis on the need to protect serious - “unsensational”, “neutral”, “measured” - journalism. How far it may serve to protect articles which give sensational and tendentious treatment to serious allegations against named individuals is another question entirely.

And the 10 “hurdles”? This is probably the most significant aspect of the judgment: the House was highly critical of what it regarded as an over-rigorous application of Lord Nicholls’ 10 “considerations” by the lower courts. The defence was meant to be “practical and flexible”, and the test of “responsible journalism” has undoubtedly become less strict. No longer will the defence fail simply because there isn’t a tick in every box.

So how many ticks does one need? That will depend, even more than it does now, on the facts of each case. For example, in Jameel, the only reason why the newspaper lost in the Court of Appeal was that it hadn’t ticked the box which says “Get the response of the claimant and put it in the article”. The House of Lords held that, in this instance, that was not a box which needed to be ticked. But the reason for the absolution was a special one: there was nothing useful the claimant could have said anyway. In many cases, this will not be so.

So, for editors, lawyers and judges, the future looks interesting, but not necessarily easier. Flexibility is no doubt a good thing. But so is certainty.

Richard Rampton QC

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