

Privilege, but only in principle?

The Reynolds defence was meant to herald a new dawn of free speech. But in the seven years since it was decided, little has changed

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It was heralded as a new dawn for freedom of speech. The law lords' ruling in the case brought by the former Irish prime minister, Albert Reynolds, against Times Newspapers, would be a radical departure for England's hitherto restrictive libel laws. But it did not quite work out in practice - and from today, their lordships have the first opportunity to reflect on the true nature and extent of the so-called Reynolds defence since they "invented" it in 1999.

The case is called Jameel (Mohammed) v Wall Street Journal Europe, and arises from an appeal by the newspaper against a decision by the court of appeal, which rejected a defence of "Reynolds" privilege it had raised to a libel claim.

The defence of privilege has always been exceptional, as it allows the defendant to evade the ordinary rule of English law that a defamatory statement can only be defended if it is shown to be true. It is based on the consideration that, notwithstanding the obvious justice of the general rule, there are circumstances in which the public interest may dictate that a statement should be protected regardless of whether it is true or false. Hence its name - "privilege".

Until Reynolds v Times Newspapers, this privilege had been essentially confined (with some well-defined, mostly statutory, exceptions) to "private" communications, such as employment references. Its capacity to protect publications to the public at large was limited.

Reynolds changed all that - or seemed to. It conferred the protection of common law on statements in the media which the court could conclude 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. But, in deference to the countervailing public interests that militate in favour of the right to reputation and against the dissemination of false information, the circumstances in which this "new" defence might be available were rather closely drawn. At least, that is how it looks now.

When the case was decided, many saw grounds for optimism, perhaps even a radical departure from the English courts' apparent obedience to the primacy of reputation. They were fortified in this by the seductive wording of section 12 of the Human Rights Act, enacted soon after Reynolds, which, likewise, seemed to give priority to journalistic freedom.

So, what happened? New dawn or false dawn? Well, in the seven years since the case was decided, 15 Reynolds defences have been the subject of final decisions in England. Of these, only three have succeeded (of which two were in the narrow reportage category, which allows a newspaper to report contending sides of a controversy, so long as it stays out of the arena), while 12 have failed. Why is this?

In an attempt to give guidance about the circumstances that the court should consider in evaluating the defence, Lord Nicholls had, in Reynolds, enunciated a list of 10 relevant "considerations". These, he said, were not intended to be "exhaustive". In the event, given English law's traditional (and, generally speaking, wholly desirable) devotion to precedent, definition and certainty, Lord Nicholls' list has become almost a catechism - tick enough of the right boxes and you pass; but woe betide

you if you only get 50% or less. In consequence, in the 12 Reynolds cases that have failed, woe did indeed betide the defendants.

For a time, it seemed that the jurisprudence of the European Court of Human Rights (ECtHR) might provide a route to salvation. A number of cases seemed to offer a warmer hand to embattled journalists than our courts were apt to do. This was recently recognised by our own court of appeal in the case of George Galloway's action against the Daily Telegraph. The present position in England was, the court said, that "the adoption of defamatory statements contained in reports made by others has been treated as fatal to a defence of qualified privilege". But the court went on to acknowledge that, in the light of the Strasbourg jurisprudence, English law might, in an appropriate case, be persuaded not to adopt "quite such an inflexible rule".

Some hope. There have been two recent, unanimous decisions of the Grand Chamber (17 judges) of the ECtHR affirming the validity of two decisive distinctions: (1) between value judgements (usually protected) and defamatory statements of fact (in principle requiring appropriate "verification"); and (2), in relation to the latter, between reports of statements made by others (often, if the conditions are right, protected) and the adoption or embellishment of such statements by the defendant (which, if proof of their truth is lacking, almost certainly would not be).

Then add in the ECtHR's rejection at the end of last year of the Sunday Times' application in the Loutchansky case. In effect, this tells us that the Nicholls "catechism" is indeed an appropriate mechanism for deciding whether Reynolds privilege is available. So, at least for the present, Strasbourg does not appear to hold out quite the hope of salvation that it earlier seemed to promise. The question is whether the decision of the House of Lords in Jameel may do so. We shall see.

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