Additional Material for Chapter 23: The public interest defence

Section numbers from the book are used. Its content provides fuller explanations and context.

23.6 Defining the public interest

Six elements a defendant must prove

Six elements which a defendant is required to prove when seeking to use the public interest defence in section 4 of the Defamation Act 2013 were detailed by Mr Justice Warby in *Alexander Economou v David de Freitas* ([2016] EWHC 1853 (QB)), which is believed to be the first in which the defence has been subject to close analysis.

Section 4 offers a defence if a publication was or formed part of a statement on a matter of public interest, and the defendant reasonably believed that publishing it was in the public interest.

Mr Justice Warby said six elements had to be present for the defence to succeed:

1. It was not simply enough for the statement complained of to be, or be part of, a publication on a matter of public interest - it also had to be shown that the defendant reasonably believed that publication of the particular statement was in the public interest;
2. This 'reasonable belief requirement' meant the defendant must both prove as a fact that he/she believed publication was in the public interest, *and* persuade the court that this belief was reasonable;
3. The reasonable belief must be held at the time of publication;
4. Section 4 (2) required a court considering the issue to consider circumstances which went to whether or not the belief was held, and whether or not it was reasonable;
5. The focus therefore had to be on things the defendant said or knew or did, or failed to do, up to the time of publication – events which happened later, or were unknown to him at the time of his role in the publication, were unlikely to have any bearing on the key questions;
6. The truth or falsity of the allegation complained of was not one of the relevant circumstances.

He said that section 4 (4) also required a court considering the 'reasonable belief' requirement to make 'such allowance for editorial judgment as it considers appropriate' – and it was not only those who edited media publications who were entitled to the benefit of this provision.

Mr Justice Warby highlighted these points in a case in which a shipping magnate's son was suing for defamation the father of a girl who had accused shipping magnate's son of rape.

The claimant, Alexander Economou, had been accused of rape by Eleanor de Freitas. They had met at a party in 2008 or 2009, and in 2012 met again, and spent an evening and night together. She complained to police 11 days later that he had raped her. He has consistently denied this allegation, saying they had consensual sex. As a result of her claim he was arrested but was never charged with rape. He subsequently launched a private prosecution against her for allegedly perverting the course

of justice by making a false claim of rape. That prosecution against her was taken over – and continued – by the Crown Prosecution Service (CPS). Shortly before her trial was due to start, Ms de Freitas, who suffered from bipolar disorder, killed herself.

Her father, David de Freitas then started seeking answers as to why the CPS had taken over and continued Mr Economou's prosecution of his daughter. Seven publications which followed sparked Mr Economou's defamation claim against Mr de Freitas. These were two articles in *The Guardian* quoting a press statement written by Mr de Freitas, a BBC Radio 4 *Today* interview of him, another interview he gave to the BBC TV News channel, coverage in *The Daily Telegraph* and *The Guardian* of a further press release issued in December 2014 on his behalf by his solicitors, and a *Guardian* article he wrote himself. In what was published Mr De Freitas said, for example, that his daughter was vulnerable young woman because of her bi-polar disorder. He queried why the CPS had continued with the prosecution of her. These publications did not name Mr Economou but he said they had identified him as the man she had accused of rape.

In the defamation case, Mr de Freitas pleaded that the public interest defence covered these publications. Mr Economou claimed that what was published had the libellous meaning that he had falsely prosecuted Ms de Freitas for perverting the course of justice by accusing him of rape. Therefore, he argued, there was libellous meaning too that he *had* raped her.

Mr Justice Warby, noting that the publications had not named Mr Economou, and having considered what their meanings were, ruled that some had not caused him 'serious harm' - for that aspect of law, see in 21.2.1 in *McNae's* - and therefore the judge ruled that the claim for defamation could not succeed in respect of them. This meant, for the other publications, the central dispute related to whether Mr de Freitas had satisfied the public interest defence's 'reasonable belief' requirement.

The judge said it was not in dispute – and he also ruled - that each of the publications complained was, or was part of, a publication on a matter or matters of public interest.
These were:

- Whether the CPS, a public authority, might have gone wrong in deciding to prosecute Ms de Freitas;
- Whether the CPS might have been mistaken in its assessment of the strength of the evidential basis for the prosecution and/or the public interest in prosecuting a rape complainant who was mentally unwell, and ended up killing herself;
- The extent to which the inquest process ought to accommodate an investigation of the public interest issues raised by the facts of the prosecution;
- The desirability of permitting private prosecutions for allegedly false complaints of rape or for sexual crime more generally.

Mr Justice Warby said the law required a belief that publication of 'the statement' was in the public interest. 'In my judgment this must refer to the words complained of, rather than the defamatory imputation which those words convey,' he said. The belief that publication was in the public interest

would be reasonable 'only if it is one arrived at after conducting such inquiries and checks as it is reasonable to expect of the particular defendant in all the circumstances of the case', he went on.

'Among the circumstances relevant to the question of what inquiries and checks are needed, the subject-matter needs consideration, as do the particular words used, the range of meanings the defendant ought reasonably to have considered they might convey, and the particular role of the defendant in question.'

He rejected Mr Economou's argument that Mr de Freitas was in the role of a 'citizen journalist' and that judged on that basis his conduct fell far short of what the *Reynolds* approach required. The judge said that Mr de Freitas was not acting as a journalist, or doing investigative journalism.

Mr Justice Warby went on: 'It seems to me wrong in principle to require an individual who contributes material for inclusion or use in an article or broadcast in the media to undertake all the inquiries which would be expected of the journalist, if they are to rely on a defence of public interest.

'The inquiries and checks that can reasonably be expected must be bespoke, depending on the precise role that the individual plays.

'It is hard to see how an individual could rely on the public interest defence to escape liability for a false factual statement about events within their own knowledge ....But I see no reason why the defence should not avail an individual source or contributor who passes to a journalist for publication information the truth or falsity of which is not within the knowledge of the contributor.

'The contributor may well be entitled to rely on the journalist to carry out at least some of the necessary investigation and to incorporate such additional material as is required, in order to ensure appropriate protection for the reputation of others.'

It was reasonable, the judge said, for Mr de Freitas to leave it to the media to conduct further investigations or to seek out and publish Mr Economou's side of the story, if that was required. Bearing in mind the need for courts to take a strict approach to interference with political speech, Mr de Freitas's belief - that what was published in the relevant publications was in the public interest - was 'reasonable', the judge said. He ruled that Mr Economou's defamation action in respect of them failed because the public interest defence applied.

23.7.1 Seeking comment from the claimant

Case study: In 2006 the House of Lords overruled both the High Court and Court of Appeal by holding that the Wall Street Journal was entitled to the *Reynolds* public interest defence in a defamation case brought by Saudi Arabian businessman Mohammed Abdul Latif Jameel.

The story, headlined 'Saudi Officials Monitor Certain Bank Accounts', and with a smaller sub-heading reading 'Focus Is On Those With Potential Terrorist Ties', said the bank accounts of a number of Saudi companies, including Mr Jameel's, were being monitored by the Saudi Arabian authorities. The jury at the High Court trial ruled that the article about which Mr Jameel was complaining was defamatory. The newspaper appealed, arguing that it was entitled to the *Reynolds* defence because its story was on a matter of public interest. But the Court of Appeal rejected that argument, saying the newspaper had not given Mr Jameel long enough to respond to its inquiries. The House of Lords unanimously overruled that decision. Lord Bingham said the Court of Appeal's reason for denying the newspaper the defence 'seems to me, with respect, to be a very narrow ground on which to deny the privilege' adding that 'the ruling subverts the liberalising intention of the Reynolds decision'. He went on: 'The subject matter was of great public interest, in the strictest sense. The article was written by an experienced specialist reporter and approved by senior staff on the newspaper and The Wall Street Journal who themselves sought to verify its contents...The article was unsensational in tone and (apparently) factual in content. The respondents' response was sought, although at a late stage, and the newspaper's inability to obtain a comment recorded.' He added: 'It is very unlikely that a comment, if obtained, would have been revealing, since even if the respondents' accounts were being monitored it was unlikely that they would know…It might be thought that this was the sort of neutral, investigative journalism which Reynolds privilege exists to protect' *(Jameel v Wall Street Journal Europe* [2006] UKHL 44).

23.10 Neutral reportage

Case study: In 2004 the *Daily Telegraph* failed in its claim that its news coverage of documents found in the ruins of the Iraqi Foreign Ministry in Baghdad was 'neutral reportage'. A judge ruled that the newspaper's allegations - that left-wing MP George Galloway had received funds diverted from Iraq's oil-for-food programme - conveyed a defamatory meaning that was not protected by *Reynolds* qualified privilege. Mr Galloway won £150,000 damages for these false allegations. The newspaper's costs in the defamation action were estimated at £1.2 million. In court, the newspaper did not assert that the allegations were true, but claimed that *Reynolds* qualified privilege applied to the coverage, and also argued that some material it published was protected by the defence of fair comment. The newspaper said that the public had a right to know the contents of the documents, even if they were defamatory of Mr Galloway, and irrespective of whether the allegations were true.

But the judge said *Reynolds* privilege protected the neutral reporting of attributed allegations rather than their adoption by a newspaper as if they were fact. *The Telegraph's* articles had not 'fairly and disinterestedly' reported the Baghdad documents, but went beyond, by assuming them to be true (*George Galloway MP v Telegraph Group Ltd* [2004] EWHC 2786 (QB)). There is other detail of this case in 22.3.1.2 in *McNae's,* explained in the context of the honest opinion defence, which is similar to fair comment.