**Hanna and Dodd: McNae's Essential Law for Journalists 25th edition**

**Additional material for chapter 23: The public interest defence**

*Section numbers from the book are used where relevant. The book should be read. It has more content and context*

**The *Galloway* case**

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 which had been based on the documents - 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)). See 22.3.1.2 in *McNae’s* for other detail of this case, considered in the context of the honest opinion defence which replaced fair comment.

**23.4 The Economou case**

This defamation case arose after Alexander Economou, a shipping magnate’s son, 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, aged 23, who suffered from bipolar disorder, killed herself.

Seven publications followed which led to Mr Economou suing her father Mr David de Freitas for defamation. 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 *T*he 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 decided it would continue with the prosecution of her. Mr de Freitas wanted the inquest into his daughter’s death expanded to include an examination of the role of the CPS.

These publications did not name Mr Economou. But in his defamation claim against Mr De Freitas, Mr Economou said they had in effect identified him as the man she had accused of rape. Mr Economou’s case was that what Mr De Freitas said in these publications had accused him of falsely prosecuting Ms de Freitas for perverting the course of justice, and had alleged that he had in fact raped her, when that was not true.

But Mr Economou’s defamation claim was dismissed by Mr Justice Warby in the High Court.

The judge, 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 the defendant Mr de Freitas, who argued he had the public interest defence, had satisfied that defence’s ‘reasonable belief’ requirement. As regards this defence, the truth or falsity of the allegation complained of – that is, whether the alleged rape occurred - was not one of the relevant circumstances, Mr Justice Warby said.

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 of 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 House of Lords had said in *Reynolds* about the journalistic approach required. This was a reference to its judgment in *Reynolds v Times Newspapers Ltd* ([2001] 2AC 127) – see 23.1 and 23.7 in *McNae’s*. That judgment set out factors a court should consider when deciding whether that defence applied, including what journalistic inquiries had been made to verify the information later published.

On Mr Economou’s behalf, it was argued in the High Court that Mr de Freitas had not met the journalistic standards set out in the *Reynolds* judgment as being necessary for such a public interest defence to prevail, because – for example - before the publications complained of, he had sought no comment from Mr Economou and failed to include even the gist of Mr Economou’s side of the story in those publications

But Mr Justice Warby 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 (*Alexander Economou v David de Freitas* ([2016] EWHC 1853 (QB)).

Mr Economou appealed, arguing that the public interest defence should fail because Mr de Freitas’ conduct fell far below the standard of journalistic responsibility required by the *Reynolds* judgment

The Court of Appeal rejected the appeal. There were, the court said, three questions to be answered when considering the public interest defence in section 4 of the Defamation Act 2013:

* + Did the publication form part of a statement on a matter of public interest?
  + Did the publisher believe that publishing it was in the public interest?
  + Was that belief reasonable?

The appeal concerned only the third question – whether Mr de Freitas had held such a reasonable belief - and raised issues considered by the High Court about the extent to which ‘citizen journalists’ were to be held to the same standard of responsible conduct required of professional journalists if they were to be able to use the section 4 defence.

While section 4(1) required that the publisher should believe that publication was in the public interest, the *Reynolds* defence had focused on the responsibility of the publisher's conduct, the Court of Appeal said.

But the rationale for the two defences was not materially different – the principles underpinning the *Reynolds* defence, which sought to hold a fair balance between freedom of expression on matters of public interest and the reputations of individuals, were relevant when interpreting the public interest defence in section 4, it added.

In this case, the public interest considerations in play were particularly strong as Mr Justice Warby had said.

The Court of Appeal added that Mr Justice Warby had been correct in interpreting the phrase ‘the statement complained of’ in section 4(2) as meaning the words themselves rather than the defamatory imputation they conveyed, and in considering that Mr de Freitas’ intended meaning, rather than simply the imputed defamatory meaning, was relevant to assessing the reasonableness of his belief.

The Court of Appeal also ruled that it was reasonable for Mr de Freitas to have left it to the media to conduct further investigations or seek out publish Mr Economou's side of the story, if that was required.

Although the factors crucial to a *Reynolds* defence might be relevant, a defendant's failure to comply with one or more of them might not necessarily tell against him; the weight to be given to each factor would vary from case to case, and – as Mr Justice Warby had recognised in the High Court - section 4 of the 2013 Act required that all the circumstances of the case should be taken into consideration, the Court of Appeal said (*Alexander Economou v David de Freitas* [2018] EWCA Civ 2591).

**Careless journalism**

A community blogger and local activist who published an article suggesting that a building developer was involved in a bid to defraud members of a rugby club out of millions of pounds, then reported - inaccurately - that he had been arrested on an allegation of blackmail was ordered to pay a total of £37,500 in libel damages.

Patrick Smith, a member of the Parish Council at Caddington, Bedfordshire, also faced a large bill for legal costs after being found by the High Court to have defamed Stephen Doyle in two articles on Mr Smith’s Caddington Village News website.

The case arose over a series of four articles published on the website between November 2015 and July 2016 concerning a plan put forward by Mr Doyle to buy and redevelop the ground held by Luton Rugby Football Club, which would move to a greenfield site nearby.

Although Mr Doyle, owner of Templeview Developments Ltd, was concerned about all four articles, the trial in the High Court – which took place because Mr Doyle sued Mr Smith for libel - concerned only the second and third in the series.

The second article, published on July 13, 2016, was headed ‘“The £10 Million Fraud” .. Stephen Doyle accuses Luton RFC of sending false documentation to members’, while the third, which was available to be read on and after July 19, 2016, was headed ‘Stephen Doyle has been Arrested’.

Mr Doyle’s defamation claim was that the second article accused him of being involved in perpetrating a £10 million fraud on members of Luton Rugby Club, and that the third meant that there were reasonable grounds to suspect him of blackmail and sending malicious communications in connection with his proposal.

The case centred on a document - an ‘Important Notice’ - outlining the proposed redevelopment plan which the club had sent to members in advance of a special general meeting to discuss the proposal.

The document contained a number of inaccuracies - it suggested that Mr Doyle had an option to purchase the site to which it was envisaged the rugby club would move, that he already reached an understanding with relevant planning authorities, and that there was potential for building development on the site to which the rugby club would move.

Mr Justice Warby said that Mr Smith originally pleaded the defence of truth, but by the time of the trial was relying on the public interest defence in section 4 of the Defamation Act 2013 in relation to the second article, and arguing that the third article had failed to cause serious harm to Mr Doyle's reputation or was in any event an abuse of process.

The judge rejected all the defences, describing Mr Smith as ‘a careless journalist who acted with a closed mind and in some respects irrationally’.

The second article, the judge said, had the meaning that there was good reason to believe that Mr Doyle was guilty of taking part in an attempt an attempt to defraud members of the Club of many millions of pounds, by allowing the Club to issue what he knew to be false and deceptive documentation about a proposed land sale and then, with a view to ensuring the proposal went through, asking the Club not to correct it.

The section 4 defence, the judge said, required that the article in question had to be on a matter of public interest, or form part of a statement on such a matter - and he accepted that the article was of public interest.

But the section 4 defence also required that the defendant reasonably believed that publishing the statement was in the public interest - and it was here that Mr Smith's defence failed.

‘Critically, in my judgment, the defence nowhere asserts that Mr Smith believed (reasonably or otherwise) that it was in the public interest to publish the key words in paragraph [5] of the Second Article: “Most controversially of all Mr Doyle confirmed that he had read the false documentation before it went to the Members ...”,' the judge went on.

‘Indeed, the pleading does not assert that Mr Smith believed those words to be true. Nor does his witness statement contain any such assertion. The reason is that he knew those words to be false. The evidence shows this unequivocally.’

Mr Smith had decided to inform his readers, falsely, that Mr Doyle had made the incriminating admission attributed to him in the Second Article.

‘This was a deliberate falsehood in what on any view is a part of the offending statement which is of critical importance. It is something for which, in my judgment, Mr Smith plainly cannot claim the protection of the public interest defence,’ said Mr Justice Warby.

In *Reynolds v Times Newspapers Ltd* ([2001] 2 AC 127), the case from which the section 4 defence had developed, the defendant newspaper had detailed allegations that the then Taoiseach had misled the Dail, but failed to report, or even mention the existence of, a statement in which Mr Reynolds had detailed his response to the claims - because the journalists involved had not believed the Taoiseach's explanation.

‘The House of Lords were not prepared to accept that privilege could protect the publication of a misleading account of events, provided the defendant believed that the defamatory imputation conveyed was true,’ said Mr Justice Warby.

In the current case, Mr Smith had obtained Mr Doyle’s side of the story but chose not to publish it because he disbelieved it – which was enough to deprive him of the benefit of the public interest defence.

‘But Mr Smith went further. He did not merely suppress the claimant's innocent account, he invented a false confession of guilt and published that as an accurate version of events, thereby positively deceiving readers,’ the judge went on.

‘He did so prominently, presenting the falsely attributed confession as the 'most controversial' aspect of the story.

‘I can see that a public interest defence might not fail just because the statement complained of contained some insignificant mis-statements, which the defendant did not reasonably believe.

‘But that is not this case, and it is hard to envisage a defence being upheld where the author knew that a major component of the factual picture presented to readers was untrue.’

The judge added: ‘Journalists must be allowed considerable latitude for decision-making as to the manner in which they present the facts, and allowance must be made for a degree of exaggeration. Sometimes it may be reasonable to compress a quotation so that it is not literally exact.

‘But in my judgment, making all due allowance for editorial discretion, no journalist could reasonably believe that deliberate fakery of this kind was in the public interest.’ (*Stephen Doyle v Patrick Smith* EWHC 2935 (QB), *Media Lawyer,* November 8, 2018)

**23.7.1 Seeking comment from the claimant**

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 claim 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 found that the article over 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 and others v Wall Street Journal Europe* *Sprl* [2006] UKHL 44).

**Defence goes to the Supreme Court**

The scope of the public interest defence was due to be considered by Supreme Court in 2020, as the 25th edition of *McNae’s* was going to press. The Court of Appeal decision in the case, *Serafin v Malkiewicz and others* [2019] EWCA Civ 852, is summarised in the book’s Late News section (which replaces the case study originally planned to be here). Check updates on [www.mcnaes.com](http://www.mcnaes.com) for the Supreme Court decision.