23 The public interest defence

Chapter summary

This defence grew from the common law *Reynolds* defence, which was developed to allow journalists to fulfil their duty to report stories of public interest, even if they included defamatory material they could not prove to be true. Attempts to use the *Reynolds* defence led to the courts closely examining whether publication of a story was truly in the public interest, and whether it was the result of responsible journalism. Parliament then introduced and developed the defence through section 4 of the Defamation Act 2013. This chapter details the requirements of the statutory defence. Journalists should never consider using this defence without taking legal advice.

23.1 Introduction: The birth of the defence

The 'public interest' defence created by the Defamation Act 2013 was intended to help liberalise libel law by protecting the publication of defamatory material about a matter of public interest, even if at the time the publisher cannot prove the material to be true. The defence originated from the '*Reynolds* defence', which evolved in **common law** and took its name from a 1998 case in which former Irish premier Albert Reynolds sued Times Newspapers, publisher of the *Sunday Times* (*Reynolds v Times Newspapers* [2001] 2 AC 127).

The history of the public interest defence is explained in the Additional Material for this chapter on www.mcnaes.com.

23.2 The defence

The defence of publication on a matter of public interest is set out in section 4 of the Defamation Act 2013, which abolished and replaced the *Reynolds* defence.

Section 4 makes it a defence to an action for defamation for the defendant to show that:

(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and

(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

As can be seen, the defence involves three elements. The first, in section 4(1)(a) requires that the words complained of were about a matter of public interest. If the publication passes this

test, it then has to meet the requirements of section 4(1)(b), which has subjective and objective elements.

The subjective element is a requirement that the defendant must believe that publishing the story was in the public interest; the objective element is whether it was reasonable for the defendant to hold that belief.

Section 4(2) says a court considering these issues must have regard to all the circumstances of the case, while section 4(4) says a court determining whether a defendant reasonably believed that publishing the statement was in the public interest must 'make such allowance for editorial judgment as it consider appropriate'.

Thus, if a story is about some matter of public interest, the statutory defence focuses on the issue of whether those responsible for it reasonably believed at the time that it was in the public interest to publish it. One effect is to liberalise the defence by depriving judges, who always have the benefit of hindsight, of the opportunity to hold that the publication in question was not itself in the public interest and that therefore the defence is not available to the publisher.

In *Alexander Economou v David de Freitas* ([2016] EWHC 1853 (QB)), the first case in which the defence was subject to close analysis, Mr Justice Warby said there were six elements involved for the section 4 defence to succeed. These were:

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 publishing it 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.

The *Economou* case is examined in more detail in the Additional Materials which accompany this chapter online.

23.3 The *Serafin* case

The Supreme Court issued guidance on the defence in *Serafin v Malkiewicz and others (Media Lawyers Association intervening)* [2020] UKSC 23; [2020] 1 WLR 2455, in June 2020, a case which arose over an article published in a London-based Polish-language magazine about a businessman who had been made bankrupt. The businessman sued for defamation.

At first instance Mr Justice Jay dismissed his claim, saying the publication was protected by the section 4 defence. Mr Serafin appealed. The Court of Appeal held that Mr Serafin, a litigant in person, had not received a fair trial because of the manner in which the judge had involved himself in the proceedings.

But it also overturned the judge's finding on the section 4 defence, saying it did not protect the publication, in part because the magazine had failed to meet the 'requirement' that the allegations should have been put to Mr Serafin before publication. In reaching its conclusions, the Cour tof Appeal used as a 'checklist' the 10 points listed by Lord Nicholls in *Reynolds*.

The Supreme Court described this approach as wrong, and gave its own analysis of the section 4 defence. It also ordered a new trial – at which, it said, the judge should ignore the Court of Appeal's approach to the defence.

In the decision Lord Wilson, with whom the other Supreme Court Justices agreed, made clear that while the section 4 defence evolved from the common law *Reynolds* defence, and was justified by the same rationale, there were major differences between the two. Courts had to approach the statutory defence on the basis of the wording of the Act, and not on the basis of the previous common law decisions.

It was wrong to refer to the defence as a form of privilege, said Lord Wilson, adding: 'The concept of qualified privilege is laden with baggage which, on any view, does not burden the statutory defence.'

While cases involving the *Reynolds* defence had featured the list of 10 factors given by Lord Nicholls as elements to be considered when considering whether the article in question was the result of responsible journalism, it was clearly Parliament's intention that these factors were not to be used as a 'checklist'– a list of factors which to which a court should refer, particularly in order to confirm a preliminary conclusion – as this would rob the statutory defence of the flexibility it was clearly meant to have, said Lord Wilson.

It was not, and never had been, a *requirement* that an allegation had to be put to the subject of the story before it was published, although this, and other factors in Lord Nicholls' list, might on occasion be relevant issues for the court to consider. Lord Nicholls' list is considered at 23.8, Responsible journalism.

23.4 **The public interest**

The first element of the section 4 defence is whether the publication which provokes the complaint was about a matter of public interest.

The Supreme Court pointed out that in *Serafin* the Court of Appeal appeared to have considered whether the material was published 'in the public interest' – an echo of the *Reynolds* defence, but a different approach to that required by the wording of section 4(1)(a).

So a defendant who can show that the subject of an article was *about* a matter of public interest – which should be easier than having to convince a court that publishing it was *in* the public interest – will meet the first requirement of the section 4 defence.

Lord Wilson also pointed out that the Court of Appeal had considered the claimant's privacy rights when deciding this public interest question – and said that this was wrong, as it was clear that the statutory defence was developed under the principles enshrined in the European Convention on Human Rights and was therefore flexible enough to ensure that it would operate without breaching rights to privacy or freedom of expression.

23.5 Defining the public interest

The 2013 Act does not define the public interest, and the Explanatory Notes for the legislation say simply that it is a concept 'well-established in the English common law'.

Both the Broadcasting Code and Editors' Code include some definitions of what journalism can be considered to be 'in the public interest'—for example, exposing crime, or showing that someone is misleading or endangering the public. The wording of those definitions was influenced by legal judgments in breach of confidence cases about the circumstances when the public interest justified publishing confidential or private material against someone's wishes.

To be protected by the section 4 defence, the publication must be, or form part of, a statement about a matter of public interest, meaning that the court can either deal solely with the words complained of or take a holistic view of them in the wider context of the document or article or book in which they appear when deciding if overall this is a matter of public interest.

The *Reynolds* defence was held in *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972 ; [2008] EMLR. 16, to be available to protect material published in the public interest in a book. An analysis of the case, which involved a book about police corruption, is in the Additional Material for this chapter on www.mcnaes.com.

The Supreme Court made clear in *Serafin* that judges must consider whether material is *about* a matter of public interest — a test which is not as strict as saying the public *needs* to know.

The concept is also flexible—the degree of public interest required will vary according to the publication and market, as in the *GKR Karate* case (cited later in the chapter) in 2000, in which a judge found in favour of *Leeds Weekly News*, a free newspaper which was sued over a front-page article warning readers about the activities of doorstep salesmen selling karate club membership. The judge said the fundamental question was one of public interest and the people of Leeds clearly had an interest in receiving this information (*GKR Karate Ltd v Yorkshire Post Newspapers Ltd* [2001] 1 WLR 2571).

23.6 The court must consider all the circumstances

Section 4(2) of the 2013 Act says that, in determining whether the public interest defence is made out, the court must have regard to all the circumstances of the case.

Courts will doubtless examine how the journalism was conducted, and might consider one or more of the 10 factors given in Lord Nicholls' list to be relevant. In *Alexander Economou v David de Freitas* [2018] EWCA Civ 2591 the Court of Appeal held that a father sued for defamation by a young man who had been accused of raping his daughter, a mentally

vulnerable young woman who killed herself while awaiting trial for allegedly fabricating the rape allegation, was entitled to rely on the defence. It also held that, while section 4 made no reference to Lord Nicholls' list, one or more of the factors on it might be relevant, although the weight to be given to them would vary from case to case.

Online resources The *Economou* case concerned in part to what extent a citizen contributor to a newspaper has to follow professional journalistic practice to successfully use the section 4 defence. For a case study of *Economou* see the Additional Material for this chapter on www.mcnaes.com at 23.2.

23.7 Audit trails to justify the public interest element and prove the reasonable belief element

Sir Brian Leveson suggested in his 2012 report into the press that any new regulator should require investigative journalists and their editors to produce an 'audit trail' of the development of a story, the investigation itself, and the issues considered and factors discussed when deciding whether to publish and whether the story was in the public interest.

See 2.1.1, Fragmentation of press regulation for context about the Leveson report.

As the public interest defence requires a publisher to prove there was a 'reasonable belief' that publication was in the public interest, keeping a documentary 'audit trail' of how this belief was established is good practice for legal as well as regulatory matters.

Editors of mainstream media organisations should already be familiar with such 'audit trail' practices. For example, the BBC Editorial Guidelines require that use of undercover tactics must be approved by senior managers as being in the public interest, and the Editors' Code requires that publications facing a relevant complaint about what was published and/or reporters' methods should be able to demonstrate fully that their editors held a reasonable belief that 'public interest' considerations applied. Chs. 2 and 3 of the book explain these codes.

Section 4(4) of the 2013 Act states that, when deciding whether it was reasonable for a defendant to believe that publication was in the public interest, the court 'must make such allowance for editorial judgement as it considers appropriate'.

23.8 **Responsible journalism**

A major element in the *Reynolds* defence and cases in which defendants sought to use it was whether the article published was the result of 'responsible journalism' – and it was the 10 points listed by Lord Nicholls which were used to decide whether the journalism was responsible.

But in *Serafin v Malkiewicz and others* Lord Wilson made clear that, just as Lord Nicholls' factors were not to be used as a checklist, it was also best to avoid referring to acting 'responsibly'.

Lord Wilson also said that the factors Lord Nicholls had listed might still be releant to the court's consideration of whether a defendant could use the section 4 defence, as the Court of Appeal had pointed out in *Economou v De Freitas* (see 23.5, The court must consider all the circumstances). So be warned – the quality of the journalism and information-gathering is likely to come under close scrutiny when this defence is employed.

Lord Nicholls' list (with summarised explanation added in italics)

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. *Therefore, the more serious the allegation, the greater should be the reporter's efforts to ensure that what is published is correct if the story is to be protected by the defence.*

2. The nature of the information, and the extent to which the subject matter is a matter of public concern. *The less the matter is of public concern, the weaker the defence. The defence will fail if a judge decides that the story is not about a matter of public interest.*

3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. *Note that courts are wary of unidentified informants, although a newspaper or broadcaster will not necessarily be penalised for refusing to identify a source.*

4. The steps taken to verify the information. *It is always important to check, whenever possible, to ensure that what you have been told is true or correct. Making no or insufficient checks before publication will lose you the defence.*

5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. *For example, if a reputable agency—such as a police force—has already decided the relevant allegations are not true, then the media must have sufficient reason to air them if the defence is to apply.*

6. The urgency of the matter. News is often a perishable commodity. *The courts, when deciding if the defence applies, must take into consideration that journalists need to work and publish quickly.*

7. Whether comment was sought before publication from the claimant [*the person who claims he/she was defamed*]. He may have information others do not possess or have not disclosed. An approach to the claimant will not always be necessary. *Generally the person who is the subject of an allegation should be approached. It is also important to make it clear in a story that, if the person about whom allegations have been made cannot be contacted, efforts have been made to reach him/her. Only rarely will an approach to the subject not be necessary.*

8. Whether the article contained the gist of the plaintiff's [*claimant's*] side of the story. *The journalism must be fair if it is to benefit from the defence. Leaving out the claimant's side is almost certainly a recipe for disaster.*

9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. *For example, the defence may not apply to material which brashly and unfairly suggests that unproven allegations are true. It is important to mind your phrasing. Make sure that what you write is what you mean—and that your meaning is clear to anyone who reads your copy, including the man on the Clapham omnibus. Sloppy writing will almost undoubtedly prove expensive.*

10. The circumstances of the publication, including the timing. *Was it really so urgent that the story had to be published when it was? Could it have waited an hour or two, or a day or so?*

The Reynolds case: Former Irish premier Albert Reynolds sued Times Newspapers, publisher of the *Sunday Times*, over an article he claimed meant he deliberately and dishonestly misled the Irish parliament by suppressing information about the appointment of Ireland's Attorney General as President of its High Court. Times Newspapers argued in its defence that, in keeping with Article 10 of the European Convention on Human Rights, the

public interest in media coverage of political issues and in scrutinising the conduct of elected politicians should be protected by a common law form of qualified privilege.

Although the House of Lords established the *Reynolds* defence in its decision, it also held, by a majority, that the *Sunday Times* could not take advantage of it as it had conspicuously failed to 'give the gist of the subject's response' (point 8 on Lord Nicholls' list).

Asked at the trial why his account contained no reference to Mr Reynolds' explanation, the reporter said: 'There was not a word of Mr Reynolds' defence because I had decided that his defence … there was no defence.' Mr Reynolds had addressed the Irish parliament on the issue, but the paper did not report his statement.

On the steps taken to verify the story (Lord Nicholls' point 4), the reporter, asked why he took no notes during his inquiries, said: 'I was not in note-taking mode.'

Loutchansky: In 1999 *The Times* published articles alleging that international businessman Grigori Loutchansky controlled a major Russian criminal organisation involved in money-laundering and smuggling nuclear weapons.

The High Court judge rejected its claim to a *Reynolds* defence. The case went to the Court of Appeal, which agreed that the articles dealt with matters of public concern (Lord Nicholls' point 2), but made the following points.

- Implicating Mr Loutchansky in misconduct of the utmost gravity was manifestly likely to be highly damaging to his reputation, so a proportionate degree of responsibility was required of both journalist and editor (Lord Nicholls' point 1). *The Times* had failed to show this—the allegations were vague, the sources unreliable, insufficient steps were taken to verify the information and no comment was obtained from Mr Loutchansky before publication.

- The High Court judge was entitled to find that 'such steps as were taken' by the reporter in his unsuccessful attempts to contact either Mr Loutchansky or his company, Nordex, or its lawyers were far less diligent than required by the standards of responsible journalism (Lord Nicholls' point 7).

- On the question whether the coverage contained the gist of Mr Loutchansky's side of the story (Lord Nicholls' point 8), it only contained the bare statement that he had 'repeatedly denied any wrongdoing or links to criminal activity', which was insufficient, given the seriousness of the unproven allegations published.

The Court of Appeal rejected the newspaper's appeal (*Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805).

Both the *Reynolds* and *Loutchansky* cases show that journalists must have a good shorthand note to support what they write. Asked in court in the *Loutchansky* case to produce the note he made of a vital conversation he had had with his most important source, the reporter replied that he thought he must have made the note on a scrap of paper which he subsequently threw away (Lord Nicholls' point 4).

The source of the information and the steps taken to verify it—Lord Nicholls' points 3 and 4—require more than a journalist making a number of calls which do not actually yield useful information or verification. In *Lord Ashcroft v Stephen Foley, Independent News and Media and Roger Alton* [2011] EWCA 292 (QB) Mr Justice Eady agreed with the claimant's argument that if sources provided no relevant information or none that was relied upon, the fact that they had been contacted was irrelevant. He added: 'Journalists, in other words, cannot collect "brownie points" for having rung round a number of people who had no relevant information to give.'

23.7.1 Seeking comment from the claimant

Any damaging story should be put to the subject before publication. As Lord Nicholls said (point 7): 'He [the subject] may have information others do not possess or have not disclosed.'

But point 7 also states: 'An approach to the claimant will not always be necessary'—the view the court took in the *Jameel* case because of its special circumstances (*Jameel v Wall Street Journal Europe* [2006] UKHL 44. See www.mcnaes.com for details of this case). Although the Supreme Court also made clear in *Serafin* that a pre-publication approach to the subject of a story was not a *requirement* of the section 4 defence, journalists should always try to put defamatory or damaging allegations to the subject.

23.8 Websites

The section 4 defence is available to anyone who publishes material—so covers bloggers, Twitter users and everyone else with access to the internet.

Times Newspapers Ltd and others v Flood and others [2017] UKSC 33; [2017] EMLR 19; [2017] 1 WLR 1415 concerned a *Sunday Times* report that Detective Sergeant Gary Flood of the Metropolitan Police extradition unit was being investigated following an allegation of

corruption. The officer was later exonerated by an inquiry. The Supreme Court held that the newspaper was protected by the *Reynolds* defence in relation to the copy of the story in its internet archive only until the date on which it learned that Det Sgt Flood had been exonerated. Mr Justice Tugendhat said its failure to make clear that Det Sgt Flood was innocent—for example, by adding an indication to this effect to the online story—was not responsible journalism.

Journalists should keep the internet in mind when dealing with investigative stories—and ensure that online archive material is updated to reflect changes in circumstances.

23.9 A delicate balance

The public interest defence in the 2013 Act is extremely important to the media, journalists and editors, seeking to strike a balance between the right to reputation and a free press. But when it succeeds it means that a would-be claimant is deprived of any remedy for what might be a defamatory publication which severely damages his/her reputation.

Mr Justice Warby suggested in September 2017 that the time might have come to change the law so that claimants who found that defamatory statements were protected by the public interest defence would nevertheless be able to secure corrections.

Editors and journalists should consider publishing corrections in such cases, but take legal advice before doing so.

Chs 2 and 3 of the book detail the 'correction' requirements of the Editors' Code and the Broadcasting Code.

23.10 Neutral reportage

The section 4 'public interest' defence also protects neutral reportage—that is, when a dispute or issue is being reported even-handedly in instances in which the fact that allegations are being made by one person against another, or that something is a matter of controversy, is itself a matter of public interest, even though the publisher cannot prove which people in a dispute are telling the truth.

Section 4(3) says that if the complained-of statement (the reportage) is 'an accurate and impartial report of a dispute to which the claimant is a party', a court must, when determining whether it was reasonable for the publisher to believe that publishing it was in the public interest, disregard any omission by the publisher 'to take steps to verify the truth of the imputation conveyed by it'. But editors must be wary of reporting disagreements which have

been generated artificially so as to give the impression of a 'dispute' which can reasonably be reported as a matter of public interest.

23.10.1 The *Al-Fagih* case

In *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634 the Court of Appeal held that a newspaper could rely on the *Reynolds* defence where it reported, in an objective manner, an allegation about someone made by an opponent during a political dispute. The defence was not lost merely because the newspaper had not verified the allegation. The newspaper had argued that, where two politicians made serious allegations against each other, it was a matter of public importance to report the dispute, provided that this was done fairly and accurately and that the parties were given the opportunity to explain or contradict.

23.10.2 The *BNP* case (*Roberts v Searchlight*)

Another case showed that a 'neutral reportage' defence could be used even when, by contrast with *Al-Fagih*, the journal and its staff were clearly not neutral. The test was whether the journalist had reported the matter neutrally. The anti-fascist magazine *Searchlight* reported a dispute between British National Party (BNP) factions, repeating defamatory allegations made in the BNP's own bulletin. The magazine, its editor and a journalist successfully argued that they had a defence of qualified privilege in common law as they were merely reporting the allegations, not adopting or endorsing them (*Christopher Roberts and Barry Roberts v Gerry Gable, Steve Silver and Searchlight Magazine Ltd* [2006] EWHC 1025 (QB)).

Recap of major points

- The statutory 'public interest' defence has three principal elements—the publication must be a statement on or about a matter of public interest, the defendant must believe that publishing it was in the public interest, and that belief must be reasonable from an objective point of view.
- The defence can protect 'neutral reportage'—accurate and impartial reports—of a dispute in which the claimant is involved.

Useful Websites

www.legislation.gov.uk/ukpga/2013/26/contents/enacted

Defamation Act 2013

www.legislation.gov.uk/ukpga/2013/26/notes/contents

Explanatory Notes to the Act

https://www.bailii.org/uk/cases/UKSC/2020/23.html

The Supreme Court decision in *Serafin v Malkiewicz and others*

www.bailii.org/uk/cases/UKSC/2012/11.html

Supreme Court's decision in *Flood v Times Newspapers Ltd*

www.bailii.org/uk/cases/UKHL/2006/44.html

House of Lords' decision in *Jameel*

www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/rey01.htm

House of Lords' decision in *Reynolds*