

Article

Reynolds and Public Interest: What about Truth and Human Rights?

JONATHAN COAD

SWAN TURTON

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In 1999 the whole law of libel so far as it concerned the relationship between the individual and media underwent a radical change. In the action brought by Albert Reynolds against *The Times* the House of Lords created a new defence which permitted media defendants which had acted in a way deemed "responsible" to escape liability for the publication of untrue and defamatory allegations.¹ The effect of this was to rob the victim of such allegations of the right to either redress or vindication. The speeches of their lordships in *Jameel*² have robustly confirmed this fundamental erosion of the rights of the individual.

The purpose of this article is to establish that, contrary to the claims made that the *Reynolds* defence serves the public interest, in fact it serves only the interests of the media; and in particular, the press. The recent decision of the House of Lords in *Jameel*, which has emphatically affirmed and extended the *Reynolds* defence, has served only to make this clearer. It is evident from the speeches of their Lordships in that case that the *Reynolds* defence is (on proper analysis) not only completely unworkable in practice, but also—partly for this reason—directly contrary to the public interest.

This article also seeks to show that the decisions of the House of Lords in *Reynolds* and *Jameel* are irreconcilable with Art.8 of the ECHR, since this defence entirely robs the claimant of his or her Art.8(1) rights in circumstances which fall outside the terms permitted by Art.8(2). It argues that the first instance judge (Eady J.) and the Court of Appeal were therefore right both to reject the defence in the *Jameel* case, and thereby keep the bounds of this defence narrow. It argues therefore that the first instance judges who have overwhelmingly rejected the defence by not upholding it in the vast majority of cases to date were also right to do so.

No one has ever pretended that the testing of issues of truth and falsity via libel proceedings is a perfect system, but as yet no better means have been devised. It was nevertheless until the decision in *Reynolds* common ground that this was (save in very exceptional circumstances) an essential role for the courts to play where assertions made by the media were concerned; rather as they had historically played the role of protector of the individual against the excesses either of the state or some other powerful detractor. The remarkable effect of the speeches in *Reynolds* was for that role to be lost—unless the *media* defendant elects otherwise by seeking to prove the truth of the allegations that they have published. One subsequent case in particular³ shows the dangers inherent in such a defence.

The law should of course protect serious and responsible journalism. The purpose of this article is not to suggest otherwise, but to set out why this means of doing so (in the form of the *Reynolds* defence) is neither compatible with European human rights law nor in the public interest. On a personal note, the writer of this article has fought a number of fierce battles to defend good and responsible investigative journalism and believes that it can be defended effectively without recourse to the *Reynolds* defence.

The defence of qualified privilege applied to the media

There are a number of exceptions to the principle that one person may not make untrue and defamatory statements against another which have been developed through statute and the common law. One of those well-established defences is qualified privilege, which essentially provides a defence for defamatory publication where there is a duty of an appropriate kind on the publisher and a corresponding interest on the recipient of the publication which confers immunity from suit (save where the claimant can prove malice).

1. [1999] 3 W.L.R. 1010.
2. [2006] UKHL 44.

3. *Campbell-James v Guardian Media Group* [2005] EWHC 893 (QB).

As a result of the introduction of Art.10 of the European Convention on Human Rights into UK law, and a massive investment in legal fees by News Group Newspapers (and more recently by the *Wall Street Journal*), the House of Lords created in *Reynolds* this new species of qualified privilege for the media, which fundamentally changed the law of libel as it concerns the media; and in particular the protection provided to the individual whose rights are infringed by the media.

The loss of the right to reputation is a problem inherent in all species of qualified privilege defences and therefore inevitably can create injustice. However, when it is accorded to the "larger media" then the Art.8 rights of the individual are lost entirely to an organisation which has published untrue and defamatory statements which it cannot verify with a view to profit. The *Reynolds* defence means that the media can make untrue and defamatory statements about an individual (or company) which they are neither obliged to correct nor for which it is obliged make redress just so long as the newspaper has acted in a way which the courts consider "responsible". If a court does find that the publication was "responsible", the subject of those allegations has entirely lost the right to any redress.

The rights of the individual are lost absolutely

One of the most remarkable aspects of this defence is that *even if the media defendant is found to have acted irresponsibly*, the claimant still cannot now obtain vindication from the court in the form of a determination that the allegations made against him are untrue.⁴

One of the reasons given by the court for refusing the right of an individual to seek a declaration of falsity where the media defendant deploys a *Reynolds* defence was that to permit such applications would cause the media to incur too much expenditure in defending them! This decision was taken despite the fact that such a jurisdiction was instigated by the legislature, and thereby sanctioned by Parliament in the 1996 Defamation Act. This provides at s.8 for such a remedy to be available in the summary procedure instigated by that Act. If available in the summary procedure, it is difficult to imagine how it could be refused on economic grounds for more substantial issues. Is it therefore appropriate for the appellate courts unilaterally to take from the individual an entitlement which not only the press itself has asserted should be permitted (see below), but also which Parliament has expressly given to it?

As set out below, the *Reynolds* defence therefore applies no matter how wrong the allegations against the individual actually are, no matter how seriously the public has been misled, no matter what the severity of the consequences are to the victim of the allegations, and no matter how much unjustified reputational damage they have caused. The rights of the individual are thereby entirely lost in the face of the supposed public interest, and yet the public is then left to labour under the uncorrected misinformation. This defeats the whole purpose of the law of libel.

4. See Coad, Jonathan "The Price of Truth in the New Law of Libel" (2003) 153 N.L.J. 600–601.

The public interest in protecting the human rights of the individual—the first key purpose of the law of libel

The robbing from the individual of his/her right to the protection of the libel courts is a serious erosion of that individual's Art.8 and common law rights, and the consequent dangers are not merely theoretical. By way of example, in 2005 a claimant (and his family) against a supposedly responsible media organisation, the Guardian Media Group, was placed in very obvious physical danger.

Colonel Jonathan Campbell-James was a distinguished soldier who had served for nearly 30 years in the army intelligence corps. The article was published in *The Guardian* and headed "UK Officers linked to UK Torture Jail", and falsely linked Colonel Campbell-Jones with the notorious abuses at the Abu Ghraib prison in Iraq in 2003. *The Guardian* refused, despite the obvious physical risks which were faced by the claimant and his family, to correct the article for a period of months, despite the fact that it knew it was wrong, and despite the fact that the Press Complaints Commission Code required the correction to be published "promptly".

As Eady J. observed, the issues at stake in this action were of the highest importance both to the claimant and his family:

"One of the unique features of this case, apart from the obvious implications for the Claimant's reputation, is the security risk created by the article. It is common knowledge that there was widespread outrage in the Arab world when these abuses were revealed in the media. It requires little imagination to envisage the risk imposed to the Claimant and his family once he became 'publicly linked' with the behaviour of those American troops. It need not be a matter for imagination, however, since there is solid evidence to that effect before the court.

Despite this, the offer of amends was not forthcoming until . . . more or less three months after the article."

As recorded by Eady J. in his judgment, *The Guardian* initially claimed that had a complete defence to any libel claim citing the *Reynolds* defence, implying that there had been a "social or moral duty" to link Col. Campbell-James to the "torture jail" and that the article could therefore be categorised as "responsible journalism". *The Guardian* was of course (post *Reynolds*), under no legal obligation whatsoever to correct such errors where it considered that it has acted "responsibly" in publishing them. Had the newspaper chosen to persist in its intransigence, and run the *Reynolds* defence, Colonel Campbell-James (and his family) would have had no recourse to a UK court to establish his innocence. This then is Eady J.'s stinging comment on the editorial judgment to which the House of Lords considers the law should defer:

"It could not have hurt *The Guardian* to acknowledge promptly on the basis of uncontroversial facts that the Claimant had nothing to do with the Abu Ghraib abuses and was not even in Iraq when they took place. For some reason *The Guardian* felt unable to take those basic steps. It was not simply a matter of good journalistic practice; it was a matter of elementary human decency."

The public interest in truth (i.e. not being misinformed)—the second key purpose of the law of libel

The law of defamation, especially for media publications, used to provide not only for the aggrieved party, but also for society as a whole, an essential means of establishing whether defamatory allegations made against that individual (or corporation) are true or false. Not only did it thereby serve the purposes of the individual, preserving the right not unjustly to be deprived of his or her good name, it also served the purposes of society, since the courts provided the means whereby the truth or otherwise of public allegations of wrongdoing could be tested. At the conclusion of the process, society was then informed whether what it had previously been told by the media about this individual should be believed or not.

However, the deployment by the media of the *Reynolds* defence now means that despite its applying to untrue and defamatory material, the public remains misled, because the legal right of the individual to correct damaging misinformation about himself/herself has been lost. As set out above, the court has determined that even a successful claimant faced with the *Reynolds* defence has no right to a judicial determination that the allegations against him/her were untrue. This is a radical judicial transfer of rights from the individual to the corporation.

Since the media may freely elect to deploy this defence in any libel claim, the courts have thereby passed the historic role as arbiter of truth and falsity on to the media. It is, however, difficult to conceive how this can possibly be in the public interest. Surely there was (for example) the clearest possible public interest in the UK public, its Muslim citizens in particular, and also the wider world being told that a distinguished British army officer was not in fact in any way linked to the dreadful events of Abu Ghraib.

The unlawful stripping of the rights conferred by Art.8

The first fundamental difficulty with the *Reynolds* defence is that in upholding the Art.10 rights of the journalist/publisher, the UK court entirely robs the victims of "untrue and defamatory statements" not only of their well-established right to a reputation under UK law, but also their rights under Art.8. Article 8 itself provides that there must be a lawful basis to do so. It sets out clearly both the right conferred by it, and the circumstances in which that right may be abrogated:

1. Everyone has the right to respect his private, family life, his home and his correspondence.
2. There shall be no interference . . . with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, the protection of health or morals, or for the protection of the rights and freedoms of others" (emphasis added).

Section 6(1) of the Human Rights Act provides that it is unlawful for a public authority to act in a way which is incompatible with a

Convention right. The expression "public authority" in s.6(3)(a) is defined to include a court. It is difficult to see how therefore the speeches of the House of Lords both in *Reynolds* and *Jameel* do not abrogate that principle in stripping the individual of his Art.8 rights. One of the remarkable aspects of their Lordships' speeches in *Jameel* is that none of them made any reference to Art.8 to justify the stripping of Mr Jameel's fundamental human rights under that Article.

The House of Lords has already made it clear that in upholding the rights enshrined in Art.10, you cannot simply ignore the rights enshrined in Art.8. As Lord Nicholls made clear in *Campbell v MGN Ltd*: "both are vitally important rights. Neither has precedence over the other."⁵ He also said later:

"Any restriction of the right to freedom of expression must be subjected to very close scrutiny. So too must any restriction on the right to respect for private life. Neither Article 8 nor Article 10 has any pre-eminence over the other in the conduct of this exercise. As Resolution 1165 of the Parliamentary Assembly of the Council of Europe 1998 pointed out they are neither absolute nor in any hierarchical order, since they are of equal value in a democratic society".⁶

The right to reputation comes within Art.8

In summary then, there must be "no interference with the exercise of this right" unless it is "necessary in a democratic society". For our purposes the only necessity that can justify the decisions in *Reynolds* and *Jameel* is that they are necessary to protect the "rights and freedoms" either of the media in particular, or of society as a whole. It is now beyond reasonable challenge that the right to a reputation is part of the Art.8 basket of rights. Here are some quotations which make the point:

"91. The Court must also ascertain whether domestic authorities strike a fair balance between, on the one hand freedom of expression as enshrined in Article 10, and on the other hand, the protection of the reputation of those against whom allegations had been made, a right which, as an aspect of private life, is protected by Article 8 of the Convention . . .".⁷

"70. . . . the Court must verify whether the authority struck a fair balance when protecting the two values guaranteed by the Convention which may come into conflict with each other in this type of case, namely, on the one hand, freedom of expression protected by Article 10, and on the other hand the right of the persons attacked by [the publisher] to protect their reputation, a right which is protected by Article 8 of the Convention as part of the right to respect to private life."⁸

"31. . . . The Court would observe that the right to protection of one's reputation is of course one of the rights guaranteed by Article 8 of the Convention, as one element of the right to respect for private life.

32. . . . Freedom of expression constitutes one of the essential foundations of a democratic society and one of the conditions for its progress and for each individual's self fulfillment . . . As set forth in Article 10, this freedom is subject to exceptions,

5. [2004] UKHL 22 at [12].

6. *ibid.*, [113].

7. *Cumpana v Romania* [2004] E.C.H.R. 692.

8. *Chaupy v France* [2004] E.C.H.R. 295.

which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

The adjective "necessary" within the meaning of Article 10 (2), implies the existence of a 'pressing social need'.⁹

Certainly Lord Hoffmann regards reputation as integral part of the rights conferred by Art.8 as this passage from his speech in *Campbell v MGN Ltd* shows:

"Instead of the cause of action [to protect Art.8 rights] being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity—the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people" (emphasis added).

The individual's common law right to a reputation

The common law right on the part of an individual to a reputation is hardly novel or esoteric. It was succinctly described by Diplock J. in *Silkin v Beaverbrook Newspapers Ltd*¹⁰:

"In the first place, every man, whether he is in public life or not, is entitled not to have lies told about him; and by that is meant that one is not entitled to make statements of fact about a person which are untrue and which redound to his discredit, that is to say, tend to lower him in the estimation of right-thinking men."

Lord Hobhouse in *Reynolds* was also apparently in no doubt that such right existed when he said: "The law of civil defamation is directly concerned with the private law right not to be unjustly deprived of one's reputation . . ."¹¹ That is the nearest that any of their Lordships came to recognising the right that was being stripped from the individual by this defence—using language which clearly reflects the appropriate place that reputation has as an Art.8 right.

As Lord Nicholls reminded us in both *Reynolds* and *Campbell* (see below), the Art.10 right of freedom of expression is not an absolute right, and will properly be subject to necessary restrictions in order to protect (where appropriate) the rights of the individual. The Art.10 right is specifically qualified in its para. 2, which reads as follows:

"The exercise of [the right to freedom of expression], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others . . ." (emphasis added).

So even the Art.10 right which the House of Lords is protecting expressly provides that it may be curtailed to protect the rights of others, and particularly their reputation. It was, certainly until *Reynolds*, thought necessary for individuals be able to exercise that right by having the means to challenge serious allegations of wrongdoing.

9. *Radio France v France* [2004] E.C.H.R. 127.

10. [1958] 1 W.L.R. 743 at 746.

11. *Reynolds v Times Newspapers* [2001] 2 A.C. 238c.

So it is clear not only that the right to a reputation is not only one recognised by the UK common law, but also one of those rights enshrined in Art.8. It is also clear that it is only in circumstances where there is a "pressing social need" that those rights can be stripped from the individual. None of the Lordships' speeches in either *Reynolds* or *Jameel* begins to make a case for there being a "pressing social need" for this defence. It would be difficult to do so not least because the print press at least has managed a very profitable and effective existence without it for hundreds of years. Even the press has conceded the need for misinformation to be corrected. In fact, as the writer also sets out below, the "pressing social need" is substantially in the other direction.

Is there a "pressing social need" to rob the individual of his/her rights?

The answer to that question is plainly no. For allegations which are impossible fully to justify, there are the grades of defamatory meaning available on the basis of well-established authorities such as *Chase v News Group Newspapers Ltd*.¹² As one wise broadcast lawyer observed to the writer, the problem with *Reynolds* is that it protects poor journalism—i.e. allegations made by a journalist which cannot be sustained under the flexible *Chase* principles. All that *Chase* requires is that a journalist publishes allegations only to the extent that he has material to justify them. Is that such an unreasonable burden to place on the media in order to protect the public from being misinformed? If the "information" is wholly unverifiable, does it therefore have sufficient quality to justify either its publication or legal protection?

The whole "chilling effect" argument deployed principally by the print press to establish this defence is in any event impossible to sustain if subjected to careful analysis. First, the "chilling effect" is purely an economic one. Injunctions for libel are virtually unobtainable. The media is therefore doing no more than trying to preserve its profit margins by evading liability for its mistakes. It is not as if the press in particular does not make a profit from the publication of defamatory material. Is it so unreasonable therefore that when it does so wrongly it is asked to bear the consequences? In the case of *The Sun* that might mean making £145 million rather than £150 million per annum. Can such prospect either be truly said to be a "chilling effect"; or its avoidance really be said to be a "pressing social need"?

Even if a review of the media's turnover/profit margins were not enough, a reasoned appraisal of the risk posed to it by libel actions should put the matter beyond doubt. On any particular day, the press will publish thousands of stories, most of which will contain inaccurate material to a greater or lesser extent. Only those stories which are defamatory (i.e. only a fraction of all the stories published) even begin to pose them any financial risk. For 90 per cent of those stories which are defamatory, they will be readily justifiable (allegations made against convicted criminals, etc.) and therefore pose no financial risk. As to most

12. [2003] E.M.L.R. 11.

of the residue, the risk is negated almost completely by the inability of most claimants to face the financial risk constituted by libel proceedings. For the remaining tiny residue, there are other defences (justification, fair comment, etc.) which only need to be proved on a balance of probabilities. If all the stories published by the press on a particular date are then multiplied by 365, and then set against the number of libel claims against the press in a year, the real financial risk posed by the law of libel is negligible compared with the press's turnover and other overheads.

As to the real measure of financial risk faced by the media, the print press at least is also well capable of major unnecessary and self-inflicted financial wounds, indicating that it has plenty of money to waste on legal fees when the whim takes it. The *Daily Mirror* in the recent high profile *Paul McKenna* libel action¹³ chose to invest what will become a seven figure sum when it pays the claimant's costs in trying unsuccessfully to defend a set of false allegations that had been recycled by the same journalist no less than nine times. The paper made this massive investment in legal fees while making other journalists redundant to save money, despite the fact that the allegations that they were defending were the product of both a sacked and discredited editor and journalist. It could surely have bought a lot of good quality journalism for the money wasted in defending an action where there was never any evidence that the allegations were true and the claimant had only asked for the correction of the unsustainable allegations at issue.

While the sole "pressing social need" argument in favour of *Reynolds* is the "need" to preserve the media's profit margins, the consequences (by contrast) to the individual of the media infringing their rights go way beyond the theoretical. Colonel Campbell-James's need for vindication (and that of his family) was more "pressing" than the mere financial comfort of the Guardian Media Group. The writer has acted for clients for whom the consequences of press abuse have included attempts at suicide, risk of serious assault/attempted murder, nervous breakdown, divorce and unemployment; which is doubtless why on three occasions the European Court has identified a right to reputation as part of the general Art.8 right to a private life. The consequences of unwarranted allegations can be to rob individuals of their family, friends and livelihoods—one reason why such rights plainly fall within the ambit of Art.8. There is therefore a "pressing social need" for there to be a means of correcting serious journalistic error because it is not only the individual claimant that suffers if there is no effective means of doing so.

The public interest in the public not being misled

The second difficulty with this defence is that its effect is to render beyond challenge serious untrue and defamatory allegations against a person, corporation or institution. This has the obvious consequence that the public continues to labour under misinformation. Article 10, however, states that one of the rights conferred by it is the right of society to receive information. Not

only is the information imparted which is at issue in the *Reynolds* defence false, and therefore not in the true sense information at all, the *Reynolds* defence robs society of the right to be told when the media has misled it, which seems to be an abrogation of its rights under Art.10.

This may also have the practical consequence of the loss to society of valuable individuals or institutions. As to the mischief which can thereby result here are some extracts from the speeches of their Lordships in *Reynolds*:

"Those who read or hear [defamatory] allegations are unlikely to have any means of knowing whether they are true or not . . . Thus, in the absence of any additional safeguard for reputation, a newspaper, anxious to be the first with a 'scoop', will in practice be free to publish seriously defamatory misstatements of fact based on the slenderest of materials. Unless the paper choose later to withdraw the allegations, the politician defamed would have no means of clearing his name, and the public would have no means of knowing where the truth lay. Some further protection for reputation is needed if this can be achieved without a disproportionate incursion into the freedom of expression" (Lord Nicholls).

"A liberty to communicate (and receive) information has a similar place in a free society but it is important always to remember that it is the communication of information not misinformation which is the subject of this liberty. There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed and not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed. These are general propositions going far beyond the mere protection of reputations" (Lord Hobhouse).

The problem is, with great respect to Lord Hobhouse, that while he says "There is no human right to disseminate information that is not true", the right to do that very thing is enshrined in the *Reynolds* defence, as the speeches in *Jameel* clearly show. The media's right by virtue of Art.10 is to impart "information". It is difficult to see how that can include untrue and defamatory misinformation—certainly Lords Hobhouse and Bingham (see below) seem to make that distinction. The defence of qualified privilege, extended in *Reynolds* to the media, expressly gives immunity for the publication of false and defamatory statements, as Lord Steyn accepted in his speech in *Reynolds*. What right is therefore being protected by this defence?

Their Lordships in *Jameel* seem to have taken no account of the price which not only the individual but society as a whole risks paying when the remnant of claimants who take issue with the media (most of which are filtered out by the massive financial and logistical imbalance of such a contest) are denied what was previously thought to be their constitutional right. As the Master of Rolls observed in *Loutchansky v Times Newspapers Ltd*,¹⁴ the protection of truth is also in the interests of the media as well as the general public:

"It is in the interest of the public as well as the defamed individual that, wherever possible, truths and not untruths should be told.

13. *McKenna v MGN Ltd* [2006] EWHC 1996 (QB).

14. [2001] EWCA Civ 1805.

This is in the interest of the media too: once untruths can be published with impunity, the public will cease to believe any communications, true or false.”

The European Assembly of the Council of Europe, despite its proximity to the birthplace of Art.10, has no difficulty in recognising the public interest in correcting false information. Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe was adopted on June 26, 1998, and provides at para.14(iii):

“When editors have published information that proves to be false, they should be required to produce equally prominent corrections at the request of those concerned.”

Even the press accepts the need to correct misinformation

There is certainly no “pressing social need” so far as either the journalistic profession or the press is concerned. The National Union for Journalists’ Code of Conduct sets out unequivocally the need to correct inaccuracies. Paragraph 4 of its Code reads as follows: “a journalist shall rectify promptly any harmful inaccuracies, ensure their correction and apologies receive due prominence”.

Even the equally partisan Press Complaints Commission (a.k.a. the press) accepts that misinformation published by the print media should be corrected. The self-regulatory PCC Code has as its opening paragraph:

“1. Accuracy

- (i) Newspapers and periodicals should take care not to publish inaccurate, misleading or distorted material including pictures.
- (ii) Whenever it is recognised that a significant inaccuracy, misleading statement or distorted report has been published, it should be corrected promptly and with due prominence.”

Nobody could possibly regard the PCC as anything other than the campaigning arm of Fleet Street—it is only necessary to read its submissions to the Culture, Media and Sport Committee of Parliament to understand that. If this is the obligation which the newspaper industry has voluntarily entered into, it is surely right then to allow a claimant to establish in a court of law (if necessary) whether what has been published about him is *false*.

The Master of Rolls in *Loutchansky* makes the point that the common law can justifiably enforce standards that the press sets itself:

“Lord Nicholls at p. 202B referred to ‘the sad reality . . . that the overall handling of these matters by the national press, with its own commercial interests to serve, does not always command general confidence’. Lord Cooke at p. 220D-E suggested that ‘experience of libel litigation is apt to generate a suspicion that’ the restriction of freedom of speech thought necessary to give reasonable protection to personal reputation tends rather to shield the publication of untruths and of material which may be true but cannot be proved to be true. Lord Hope too spoke of situations in which the ‘chilling’ effect of the law ‘is a necessary protection for the individual.’ Perhaps one need look no further than Lord Nicholls’ dictum in *Reynolds* at p. 202E-F.

“The Common Law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse. An incursion into press freedom which gives no further than this would not seem to be excessive or disproportionate” (emphasis added).

Since we know then that both the NUJ and the PCC both regard the (prompt) correction of inaccuracies to be an element of responsible journalism, and a fortiori a matter of public interest, how then is it that the highest court of this country has effected a change in the law which directly contradicts these well-established principles?

The decision of the House of Lords in Jameel

After expending what must amount to several million pounds in legal fees, the *Wall Street Journal* eventually won its long battle with Mr Jameel. After failing to establish the *Reynolds* defence both at first instance and in the Court of Appeal, the claimants (Mr Jameel and his company) in this closely observed legal battle won their appeal in the House of Lords.

In February 2002 the *Wall Street Journal* Europe published an article by an Arabic-speaking reporter with specialist knowledge of Saudi Arabia. The gist of the article was that the Saudi Arabian monetary authority (the Kingdom’s Central Bank) was, at the request of the US Enforcement Agency, monitoring bank accounts associated with some of that country’s most prominent businessmen in a bid to prevent them from being used (wittingly or unwittingly) for the funding of terrorist organisations. The information was attributed in the article to “US officials and Saudis familiar with the issue”. A number of companies and individuals were named, and among them was the “Abdullatif Jamil Group of companies”.

Clearly the article as a whole concerned matters of the clearest public interest. That was never in doubt. The real issue was whether the decision by the newspaper to name the claimants in circumstances where there was no proof that they were subject to this activity was also in the public interest. Needless to say, the association of claimants with terrorist activity could have had the same severe consequences for them as those faced by Colonel Campbell-James when he was associated with the abuse of prisoners at Abu Ghraib.

The jury found that the article was defamatory of the claimants, and according to Lord Bingham:

“They may have understood the article to mean that there were reasonable grounds to suspect the involvement of the [claimants], or alternatively that there were reasonable grounds to investigate the involvement of the [claimants] in the witting or unwitting funding of funds to terrorist organizations”.

The newspaper chose not to justify either of those modest defamatory meanings but relied on the form of defence developed by the House of Lords in *Reynolds*. The defence was rejected by both the first instance judge and the Court of Appeal. The *Wall Street Journal* appealed again to the House of Lords. All five Law Lords rejected the approach to the *Reynolds* defence adopted by Eady J. and the Court of Appeal as too rigid, holding (by a majority of four to one) that no retrial was needed to determine whether in this case the *Reynolds* defence had been established. Despite

their Lordships' disparate views concerning the scope of *Reynolds* defence, they used *Jameel* to bring both first instance judges like Eady J, and the Court of Appeal into line by insisting on a "flexible approach" to the *Reynolds* defence.

In the respectful opinion of the writer, Eady J.'s instinct to confine the terms of the *Reynolds* defence to narrow bounds and within traditional duty and interest concepts was entirely correct. The desire of Eady J. to do so was informed by something which none of their Lordships had experienced—a long and distinguished defamation practice. In addition to his innate advantage of having been the trial judge, this gave him a perspective on the relevant issues based on practical experience that the House of Lords lacked. This emerges clearly from their speeches, which show an alarming lack of practical and informed thinking on the key issues specific to the law of libel.

A summary of the Law Lords' speeches in *Jameel* as they concern the *Reynolds* defence

Lord Hoffmann

Lord Hoffmann was the most trenchant in his criticism of the lower courts, and in particular, of the trial judge. His speech set out a three-stage test for the *Reynolds* defence. The first stage was to decide "whether the subject matter of the article was one of public interest". Lord Hoffmann said that in order to answer this question "one should consider the articles as a whole and not isolate the defamatory statement".

If the first question is answered in the affirmative, the next question was whether the inclusion of the defamatory statement was justified. Lord Hoffmann warned that "the fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose". Pausing here, since the allegations against the claimant to which Lord Hoffmann is referring are by definition both untrue and defamatory, it is therefore difficult to see what public purpose can possibly be served by their publication (per the dictum quoted above of Lord Hobhouse in *Reynolds*).

Furthermore, unlike Mr *Jameel*, 99.9 per cent of claimants cannot afford a long and expensive journey to the House of Lords to determine whether or not the naming of them in an article was or was not in the public interest, not least because the outcome of such a decision is plainly going to depend substantially on the constitution of any of the particular court—a lottery most claimants cannot afford. The problem is precisely the same for the second stage of the test. In the case of Mr *Jameel*, if the "information" upon which the decision was made to name him and his company was beyond the newspaper's ability to verify, how was it justified in including it? In those circumstances, what possible public interest was served by his being named?

Assuming, however, the first two stipulations are met, the third stage of Lord Hoffmann's test was "whether the steps taken to gather and publish the information were responsible and fair". The test is of course for all practical purposes impossible to work from the perspective of a claimant who does not have any of this information. The "sources" are not disclosed by the media defendant, unfairly disadvantaging the claimant, and raising

possible Art.6 implications (i.e. the right to a fair trial). The key information upon which the case will turn will remain almost exclusively in the knowledge of the defendant.

So for example in the recent libel action which was brought by Paul McKenna against the *Daily Mirror* the newspaper and journalist both maintained until only weeks before the trial that key research was conducted by the journalist to whom the article was attributed (asserted twice in Statements of Care, supported by a Statement of Truth). It was only much later at the exchange of witness statements a few weeks before trial that it emerged that the article was actually only co-written by the journalist to whom it was attributed and the paper admitted that in effect the previously unknown journalist had undertaken that little research or checking before the relevant article was published.

Even when the facts/documents relied on by the media defendant are fully set out (by which time the claimant may well have had to invest a six-figure sum in legal fees), it is then likely to be an unaffordable gamble for all but the most wealthy claimant as to whether the court will decide first whether it believes the journalist's version of events, and when that has been established whether these particular steps taken to "gather and in publishing the information were responsible and fair". It is invariably the richer and more powerful litigants—in this case the media—who benefit from such uncertainty. But if the right to clear your name has been taken from you, why would anyone take on the might of the media in libel proceedings anyway?

Lord Hoffmann also clashed with three of his fellow Law Lords (Lords Bingham, Hope and Scott) by rejecting the applicability of the traditional duty and interest test in the context of media publications:

"I do not think it helpful to apply the classic test for the existence of a privileged occasion and asked whether there was a duty to communicate the information and interest in receiving it."

Lord Bingham

The inherent and irreconcilable contradiction which underlies the *Reynolds* defence emerges clearly from this remarkable paragraph of the speech of Lord Bingham in *Jameel*, which demonstrates that notwithstanding the assertion by Lord Hobhouse in *Reynolds* that there is no public interest in misinformation, this defence establishes just that:

"Qualified privilege as a live issue only arises where a statement is defamatory and untrue. It was in this context and assuming the matter to be one of public interest, that Lord Nicholls proposed (at p202) a test of responsible journalism, a test repeated in *Bonnick v Morris* [2003] 1 A C 300, 309. The rationale of this test is, as I understand, that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify. As Lord Hobhouse observed with characteristic pungency (p238), 'no public interest is served by publishing or communicating misinformation'. But the publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication" (emphasis added).

So even though according to Lord Bingham (and Lord Hobhouse) there is no public interest in communicating misinformation, he then goes on to say that he and his colleagues will nonetheless

uphold a defence which absolves the publisher that has published this misinformation for profit of any responsibility either to correct such misinformation, or to compensate its victim. Lord Bingham did not explain how any "responsible" publisher would not wish the public not to be disabused of any false information.

Lord Bingham stressed that responsible editorial decisions, while they should be judicially reviewed, should also be judged in the context that they were made:

"Weight should ordinarily be given to the professional judgement of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner."

He did not, however, explain how practitioners advising claimants were supposed to formulate their advice faced with the vagueness of these principles, the problem that each Law Lord approached the issue differently, and the problem that the factual data needed by practitioners to advise their client will not be available to them until the conclusion of the trial. Only a tiny fraction of claimants can afford to take that risk.

Lord Hope

Lord Hope rejected the contention that a "test which seeks to set a general standard which must be achieved by all journalists is bound to involve a degree of uncertainty and subjectivity". However, if it were otherwise Eady J. and the entire Court of Appeal would have not taken a different view from the entire House of Lords in that case. Lord Hope observed, however, that

"'Responsible journalism' is a standard which everyone in the media and elsewhere can recognise. The duty-interest test based on the public's right to know, which lies at the heart of the matter, maintains the essential element of objectivity. Was there an interest or duty to publish the information and a corresponding interest or duty to receive it, having regard to its particular subject matter? This provides the context within which, in any given case, the issue will be assessed".

For the reasons set out in the commentary section of the speech of Lord Hoffmann, with great respect to Lord Hope, the "responsible journalism" test involves a huge degree of uncertainty. So much that their Lordships cannot even decide between themselves on how it should be tested. This is simply the communal placing of judicial heads in convenient sand, particularly as in libel litigation it is almost invariably only the defendant which can afford to bear the financial cost of such uncertainty.

One element of "responsibility" that journalists at least seem to be agreed on is the need to correct misinformation.

Lord Scott

Lord Scott reminded himself of the 19th-century case which was the basis of this defence,¹⁵ where Baron Parke observed on the subject of privileged communications:

"if fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them in any narrow limits."

Two obvious points emerge here however. First, this was over a century before the Human Rights Act brought Art.8 into UK

15. *Toogood v Spyring* (1834) 1 C.M. & R 181.

law. Secondly Art.8(2) requires that the individual's basket of Art.8 rights be lost not for the purposes of the "convenience and welfare of society", but only when it is "necessary in a democratic society". As a result of no less than three ECHR decisions, it is now beyond challenge that the right to reputation is one of those rights protected by Art.8. This means that the right to reputation must only be stripped from an individual when it is truly necessary. It cannot possibly be said to be so in this instance.

Lord Scott went on to say that he considered the term "responsible journalism" had been "usefully coined as succinct summary—but only a summary—of the circumstances in which a defamatory article in a newspaper can claim . . . protection".

Lord Scott then considered that

"there is . . . information the public interest of which is real and unmistakable. In relation to information of that character it makes sense to speak of the newspapers having a 'duty' to publish. They and their reporters should, of course, take such steps as are practicable to find the truth of what is reported. Fairness to those whose names appear in the newspapers may require, if it is practicable, an opportunity to comment being given to them and/or an opportunity to have a response published by the newspaper. These are all circumstances the weight of which in assessing whether a report should be protected by qualified privilege will vary from case to case."

In this passage Lord Scott directly contradicts the observation by Lord Hobhouse in *Reynolds* that "no public interest is served by publishing or communicating misinformation". He also does not explain how in those circumstance there can possibly be a duty to publish it. This further illustrates the intellectual contortions which are necessary to justify this defence.

However, the allusion to the need for "fairness" to the subject of these untrue and defamatory allegations is a yet more remarkable example of the contradictions which this defence is replete. How can it possibly be "fair" to someone like Col. Campbell-James (and his family) to rob him of his right to rebut in a court of law that the untrue allegations that placed himself, his family and his career in jeopardy?

Baroness Hale

Baroness Hale made her more radical views clear from the outset:

"It should now be entirely clear that the Reynolds Defence is a 'different jurisprudential creature' from the law of privilege, although it is a natural development of that law. It springs from the general obligation of the press, media and other publishers to communicate important information upon matters of general public interest and the general right of the public to receive such information. It is not helpful to analyse the particular case in terms of a specific duty and a specific right to know. That can, as experience since *Reynolds* has shown, very easily lead to a narrow and rigid approach which defeats its object. In truth, it is a defence of publication in the public interest."

Baroness Hale thereby contradicted in clear terms three of her colleagues, who clearly did base their speeches (more or less) on the duty and interest test and then made it clear that there would be both appropriate safeguards and specific boundaries to the defence. Lord Hoffmann was also critical of the test. Lord Hope, however, described the test as being "at the heart of the matter". Baroness Hale went on to set out her own two-stage test:

"This does not mean a free for all to publish without being damned. The public only have a right to be told if two conditions are fulfilled. First, there must be a real public interest in communicating and receiving the information . . .".

Again, one must remember that the "information" to which Baroness Hale is alluding is both untrue and defamatory, and according to the dicta of Lords Hobhouse and Bingham, there is no public interest in its publication. Baroness Hale went on to set out the second stage of her test:

"Secondly, the publisher must have taken the care that a responsible publisher would take to verify the information published. The actual steps taken will vary with the nature and sources of the information. But one would normally expect that the source or sources were ones which the publisher had good reason to think were reliable, that the publisher himself believed the information to be true and that he had done what he could to check it."

Again, with great respect to Baroness Hale, it is hard to imagine that she paused for a minute in writing her speech to consider how a practitioner is to advise an individual (or company) based on such a test. How, when faced with an individual whose career, social circle, family life, etc. have been annihilated by a series of allegations which are wholly untrue (like Col. Campbell-James), is a practitioner going to begin to answer these questions when looking at a newspaper article and trying to advise a client whether to take legal action? What is the point anyway if at the end of it you cannot clear your name?

The difficulty faced by the claimant in testing the sources relied on in an article was discussed by all five Law Lords in *Reynolds*, and also considered by the Court of Appeal in *Loutchansky*. Remarkably, however, despite the fact that it was clearly relevant to the issues to be determined by the House of Lords in *Jameel*, none of the Law Lords deals with it. The problems faced by the claimant are, however, immense. Usually a journalist will say nothing about the source, claiming that this may lead to his or her identification. There is therefore no way for the claimant to test what the journalist has said about those sources. Baroness Hale seems to consider this not to be a problem, saying that "one would normally [i.e. not always] expect that the source(s) [were ones which the] . . . publisher had good reason to think were reliable". First instance judges with direct experience of the print press tend to be less naive.

Some of the jury's answers in *Jameel* confirm that they did not believe these sources. In the writer's experience, a jury will with good reason frequently disbelieve a journalist's assertions as to the fairness and care with which the article was prepared. Despite the answers given by the jury in *Jameel* four out of five of the Law Lords considered their finding (in effect) that the journalist had misled the court was not a good enough reason to order a re-trial. They nonetheless found that the journalist had acted "responsibly".

Then how is the practitioner advising a claimant to judge whether that journalist is likely to be believed or not when it comes to the factual background. Secondly (as *Jameel* indicates), the claimant can be put in a position where the first instance judge can reject the article (on whichever test he chooses) as not being

responsible journalism. The Court of Appeal can unanimously come to the same conclusion, and then the House of Lords can unanimously (but for widely divergent reasons) come to a different conclusion. This is a lottery way beyond the means of all but the very richest claimant.

The additional problems created by this defence from the decision in *Jameel*

As Mr Jameel observed at the conclusion of his action, his own interests and rights became irrelevant in the very legal proceedings which he instigated to clear his name as indeed did the issue of whether or not these allegations are true. We have reached the point where the claimant in a libel action has effectively been reduced to the status of a spectator while judges debate whether or not the journalist in question complied with vague and disparate concepts of fairness and responsibility—ones which they themselves cannot even agree upon. How can that be either fair or in the public interest?

Unsurprisingly, Mr Jameel was therefore not impressed with the United Kingdom's legal process, exposing its lack of common sense in this case in these few well-chosen words:

"Mr Justice Eady and the Court of Appeal ruled that I was libelled. The House of Lords ruled that I was not, because it was reasonable [i.e. in the public interest] for the Wall St Journal Europe to print something that was false. So be it. I was only ever interested in proving that the allegations were untrue".

As Mr Jameel trenchantly observes, the *Reynolds* defence decrees that it can be in the public interest for the media to publish material which is false—not an easy proposition to sustain with any degree of intellectual honesty. Mr Jameel also reasonably observed that really he just wanted to clear his name of the allegations against him. The decision of the newspaper to run the *Reynolds* defence had however robbed him of his opportunity to do so. But surely it is the reasonable expectation of an individual (and "fair") that he should be able to clear his name of untrue and defamatory allegations in any properly conducted democracy? That is particularly so when those allegations have been published for profit. That is, however, no longer the case in the United Kingdom. As set out above, the House of Lords speeches which sought to justify this remarkable state of affairs are consistent neither internally nor between themselves.

Unfortunately, as the speeches of the Law Lords in *Jameel* show, the application of the law of qualified privilege to publications in the media also differs from senior appellate judge to senior appellate judge. It is all very well Hoffmann L.J. (in his leading speech) castigating Eady J. for having described the phrase "responsible journalism" as too vague and subjective. However, the disparate and inconsistent way in which their Lordships addressed the issue of how to defend "responsible journalism" via the *Reynolds* defence, and in particular their inability to agree even on the applicability of the duty and interest test, rather proves Eady J.'s point.

The inability of the House of Lords to formulate any consistent basis for this defence, or to produce any workable

principles for practitioners to apply in advising libel clients on publications where such a defence might be relied on, will further deter legitimate claimants. This means that even more misinformation published by the media will go uncorrected. This is because libel proceedings are the only mechanism whereby such misinformation is corrected, the PCC being far too impotent and compromised by both its membership and paymasters to do the job.

As set out above, the loss of the right to refute untrue and defamatory allegations published by the media could prove catastrophic not only for individuals such as M.P.s and for senior figures in education, industry, the armed forces and the church, etc., but also for the institutions they serve. As the Law Lords themselves in *Reynolds* make clear, society as a whole could also suffer if such individuals are unable to clear their names of untrue and defamatory allegations. Accordingly the defence of qualified privilege, which was originally created for the "common convenience and welfare of society", has in this modern incarnation really become one for the common convenience and welfare of the media.

Reynolds and Jameel ignore the imbalance of power between the individual and the media corporation

As Piers Morgan observed in his recent book (*The Insider*): "the media is growing more powerful and more aggressive every day". The press in particular often does not take kindly to the individual having the temerity to exercise what was at least once his or her constitutional right to seek an independent judicial adjudication of whether an allegation a newspaper has made is true. Here is a sentence from a response to a claim letter sent by the *Daily Mirror* while Mr Morgan was its editor, which ushered in Paul McKenna libel proceedings which the paper then lost at trial:

"if your firm is foolish enough to advise your client that he should issue proceedings over this matter, and in turn, your client is foolish enough to accept that advice then ... your client will find—to his immense cost, both personally and financially—that he has picked the wrong fight, about the wrong article and with the wrong newspaper".

This taunt comes from the confidence on the part of the newspaper that it can afford to lose the action but the claimant cannot. It is presumably not necessary in this article to do more than remind the reader of the massive imbalance of power that exists between the claimant and defendant in virtually every libel action against the media. Concentrating on the press, *The Sun* alone makes more than £150 million per year. All national newspaper groups deploy their massive resources to take their pick of the specialist media lawyers—most of whom regard writing articles calling for greater press "freedom" as an essential marketing activity. Because of their buying power they then get these lawyers at a substantial discount on the rates charged to the claimant. So far as research in the context of litigation is concerned, they have all the information-gathering resources deployed to produce the newspaper available to their lawyers.

Unlike nearly all libel claimants, newspapers also have the immense tactical advantage of being able to afford to lose litigation. If they do, they can substantially filter the public perception of the outcome both via their own titles, and with the collusion of other Fleet Street titles who for obvious self-interested reasons will generally report any litigation brought against the press in a way which will characterise it as unsuccessful. So (for example) Associated Newspapers reported the successful action brought by Michael Douglas and Catherine Zeta Jones against *Hello!* magazine with this headline: "Michael Douglas and Catherine Zeta Jones Lose Privacy Battle".

In persuading the House of Lords to instigate this defence in *Reynolds* and then further bolster the ascendancy of the media in *Jameel*, the print press has now achieved a vantage point where it can unilaterally decide whether the truth of an allegation it has made will be tested by a court. Once it has made this election, a claimant who is entirely innocent of the allegations made against him/her not only has been denied the right to challenge them, but also can invest millions of pounds (as doubtless did Mr Jameel) in trying to clear his/her name only for that individual to suffer a crippling costs order at the end of it because, after succeeding at first instance and the Court of Appeal, he is finally defeated by sheer force of arms in the House of Lords, which interprets the term "responsible" in a manner entirely different from the lower courts.

Furthermore, the frequent self-interested and inaccurate reporting of libel actions by the press (particularly when the press is the subject of them) is likely to bring the result that the losing claimant will be assumed by newspaper readers to be guilty of the allegations at issue. This is notwithstanding the fact that by the media defendant's choice the court has not actually tested them. Even if the claimant wins, the one key right which that claimant has lost (at the unilateral election of the media defendant) is the right to ask a court to absolve him/her of the allegations at issue. If the print press in particular can now force a claimant to invest hundreds of thousands of pounds in a lottery as to whether the journalism in question was responsible or not, then the intimidation inherent in such correspondence takes on a very obvious "chilling effect" on the Art.8 rights of the individual.

Where else can an unjustly accused individual go to protect himself from the might of the media corporation other than the courts? On the face of it para.1(ii) of the PCC Code provides an extra-legal remedy. Leaving aside the Commission's general lack of forensic rigour, inability to make financial provision or lack of power to compel, the principal difficulty is the policy and practice of the PCC which shamelessly favours the press in its adjudications—even when it means departing from explicit representations it has made to Parliament.¹⁶ The PCC is in any event useless for this purpose because, as it repeatedly tells us in its adjudications, it is not equipped to resolve serious factual disputes. If the courts' role as the sole arbiter of those disputes has now been lost, particularly where "public interest" issues are at stake, how can that possibly be said to be in the public interest?

¹⁶ See Jonathan Coad, "The Press Complaints Commission—Are we Safe in its Hands?" [2005] Ent. L.R. 167.

Conclusion

Good quality investigative journalism which uncovers information of sufficient quality to warrant publication and which is then reported in a way which fairly reflects its credibility should both be encouraged and protected. However, it was surely possible for the *Wall Street Journal* to write up the information that it had gleaned which underlay the article that gave rise to these proceedings in a manner which reflected the extent to which its decision to name Mr Jameel could be justified.

In those circumstances, Mr Jameel could have retained his right to contest the accuracy of the content of the article, thereby at least retaining the right to take steps to protect his Art.8 rights. The quality of the *Wall Street Journal* journalism would also have been more thoroughly tested—the test being whether the journalist who wrote up the story fairly and accurately represented in his choice of words the quality of the information that his journalism had gleaned.

At the end of the process the claimant would therefore either have been vindicated, by the article being shown to have misrepresented the information that the journalist has gleaned, or the journalism would have been vindicated in a contest where the quality of his journalism was put to an appropriate acid test. The general public would then have had the benefit of a proper judicial overview and determination as to whether these allegations were true or false. Its Art.10 right to receive information would have thereby been protected.

By contrast we have now reached the point in the UK law of libel where if a claimant begins proceedings for libel on a serious matter of public interest, it is by the sole election of the media defendant as to whether the truth or otherwise of those allegations will be addressed by the court. Furthermore, whereas establishing the truth of the allegations affords a complete defence to the defendant if it chooses to justify, establishing (should he choose to do so) the falsity of the allegations where the defendant chooses not to apparently avails the claimant nothing.

Can it be appropriate that a finding by a court that the publication was in the public interest should be a sufficient basis for denying that claimant the right to go on to establish that those allegations are untrue? Is it also appropriate that a claimant can now be robbed of his right both to protect his reputation and to restore public perception of what is and is not true by the unilateral choice of the media to defend libel proceedings by inviting the court only to scrutinise the care with which it published the allegations in question? Is it also so unreasonable for the enormous and immensely rich media corporations to be asked to pay for their own mistakes, rather than that burden falling on the far less rich and powerful victim of the misinformation it has published for profit?

This defence defeats the whole object of libel proceedings which is both to restore the individual's reputation and to inform the public where untrue allegations have been communicated to them to the detriment of that individual's reputation. Do we really want to delegate to the media the unchallengeable role of arbiter of how the "truth" will be perceived by the public as a whole? If the media is (for example) immune from any means of being challenged as to the truth of allegations that it makes against politicians, then complete voter apathy will ultimately be the result of the consequent cynicism towards the political class.

Surely it is even more important for there to be a viable challenge to the accuracy of serious journalism than for non-serious. Otherwise the unchecked right of freedom of expression starts to be a truly dangerous force and directly contrary to "the common convenience and welfare of society".