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Wall Street Journal Europe Sprl v Jameel and others

House of Lords gives ***Reynolds*** qualified privilege a radical overhaul. The law should encourage responsible journalism and the standards required should be applied by judges in a practical and flexible manner

The uncommon law of qualified privilege

Appellate Committee
House of Lords
[2006] UKHL 44
Lords Bingham of Cornhill, Hoffman, Hope of Craighead, Scott of Foscote and Baroness Hale of Richmond
London, October 11, 2006

The House of Lords has reinvigorated *Reynolds* privilege.

The decision in *Wall Street Journal v Jameel* has implications for the future development of common law qualified privilege in Australia. At some stage, the High Court will be required to consider whether to adopt a similar, liberal approach.

Until that occurs, the media and other participants in public communications remain uncertain about the scope of common law qualified privilege in this country outside of the realm of communications governed by *Lange v ABC* (1997) 197 CLR 520.

The trial and the Court of Appeal

The case arose from an article in *The Wall Street Journal Europe*, which on February 6, 2002 reported that the Saudi Arabian Monetary Authority was, at the request of US law enforcement agencies, monitoring bank accounts associated with some of the country's most prominent businessmen in a bid to prevent them from being used, wittingly or unwittingly, to fund terrorists organisations.

This information was sourced to "US officials and Saudis familiar with the issue". Among a number of named companies and individuals was the second respondent, an international trading conglomerate based in Saudi Arabia. The first respondent, Mohammed Jameel, a prominent businessman, was president of the group.

The claimants succeeded at trial and were awarded 30,000 and 10,000. The trial judge rejected the newspaper's claim to *Reynolds* privilege.

On appeal, the Court of Appeal supported the judge's denial of *Reynolds* privilege because the newspaper had not given sufficient time to the claimants to comment on the proposed publication. The judge found there was no compelling reason why Jameel, who was in Japan on business when the group was contacted, could not have been afforded 24 hours to comment on the article.

The House of Lords weighs in

The House of Lords unanimously allowed the newspaper's appeal. Three themes emerge from the separate speeches.

First, the House of Lords unshackled the *Reynolds* privilege from a rigid application of a duty/interest analysis.

Second, in applying the *Reynolds* privilege, courts should look at the whole article, not just the particular ingredient complained of.

Third, the House of Lords emphasised that the standard of conduct required, namely responsible journalism, must be applied in a practical and flexible manner, with weight given to the professional judgment of an editor or journalist.

This aspect distinguishes the House of Lords' decision from many other cases in England and Australia in which judges, with the advantage of hindsight and with the knowledge that the article is presumed false, deny the media the protection of qualified privilege.

The speeches of the House of Lords

Lord Bingham (with whom Lord Hope agreed) explained the rationale for the test of responsible journalism propounded in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 that applies when the matter published relates to a subject of public interest.

It is 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" (para [32]).

The matters listed by Lord Nicholls in *Reynolds* at 205, that might be taken into account in deciding whether the test of responsible journalism was satisfied, were "pointers which might be more or less indicative, depending upon the circumstances of a particular case" and not "a series of hurdles to be negotiated by a publisher" before it could successfully rely on qualified privilege.

The fact that it fell to the court to decide whether a publication is protected by qualified privilege "does not mean that the editorial decisions and judgments made at the time, without the knowledge of falsity which has the benefit of hindsight, are irrelevant". Lord Bingham said that:

> "Weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner." (para [33])

Lord Bingham corrected a misunderstanding engendered by Lord Nicholls' judgment in *Reynolds* proposing a simple and direct test of "whether the public was entitled to know the particular information".

Lord Bingham observed that the defence has to be considered with reference to the particular publication complained of as defamatory, but difficulties can arise where the complaint relates to one particular ingredient of a composite story. He said that:

"... consideration should be given to the thrust of the article which the publisher has published. If the thrust of the article is true, and the public interest condition is satisfied, the inclusion of an inaccurate fact may not have the same appearance of irresponsibility as it might if the whole thrust of the article is untrue." (para [34])

The Court of Appeal's decision to deny *Reynolds* privilege because the newspaper failed to delay publication of the respondents' names without waiting long enough for the respondents to comment was described by Lord Bingham as "a very narrow ground on which to deny the privilege", and the rulings were said to "subvert the liberalising intention of the *Reynolds* decision". (para [35])

The subject matter of the article was of "great public interest, in the strictest sense". The article was written by an experienced specialist reporter and approved by editorial staff who sought to verify its contents. It was unsensational in tone and apparently factual in content.

The respondents' response was sought, although at a late stage, and the newspaper's inability to obtain a comment recorded. Lord Bingham observed that it was very unlikely that a comment, if obtained, would have been revealing, since even if the respondents' accounts were being monitored, it was unlikely they would know. The article was described as "the sort of neutral, investigative journalism which *Reynolds* privilege exists to protect".

Lord Hoffmann stated that the case suggested that *Reynolds* has had little impact upon the way the law is applied at first instance, making it necessary for the House of Lords to restate the principles.

He found the use of the term "*Reynolds* privilege" historically accurate, but misleading. The word "privilege" is not being used in its traditional technical sense of a privileged occasion, which may be defeated if the claimant proves malice.

In *Reynolds*, it is the material which is privileged, not the occasion, and there is "no question of the privilege being defeated by proof of malice because the propriety of the conduct of the defendant is built into the conditions under which the material is privileged". (para [46])

The defence was more appropriately called the *Reynolds* public interest defence rather than privilege.

Lord Hoffmann recognised the relevance of editorial judgment in determining the question of whether the defendant "behaved fairly and responsibility in gathering and publishing the information":

> "... whereas the question of whether the story as a whole was a matter of public interest must be decided by the judge without regard to what the editor's view may have been, the question of whether the defamatory

> statement should have been included is often a matter of how the story should have been presented. And on that question, allowance must be made for editorial judgment. If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, ex hypothesi, in the public interest, too risky and would discourage investigative reporting." (para [51])

The *Reynolds* public interest defence is available "to anyone who publishes material of public interest in any medium". (para [54])

If the publication concerns a matter of public interest, the inquiry shifts to whether the steps taken to gather and publish the information were responsible and fair. Lord Hoffmann said that the standard of conduct required "must be applied in a practical and flexible manner. It must have regard to practical realities". (para [56])

It was inappropriate to revert to the old law of qualified privilege and to inquire whether the publisher had a duty to publish.

Lord Hoffmann analysed the newspaper's work in verifying the story, the opportunity given to the respondents to comment and an argument that it was improper to publish in the light of US diplomatic policy at the time.

He concluded that there was no basis for rejecting the newspaper's *Reynolds* defence. In particular, the failure to delay publication and the effect on diplomatic relations were insufficient reasons.

Lord Hope agreed with the speech of Lord Bingham and made additional observations supportive of the standard of "responsible journalism" recognised in *Reynolds*. He concluded that:

> "The editorial judgment that the respondents' name should be included, with the comment that the Group could not be reached for comment, is not conclusive. But much weight must be given to it, in light of the thrust of the whole article of which the particular information forms part." (para [111])

Lord Scott reviewed the *Reynolds*' jurisprudence and observed that in *Reynolds* the House of Lords was, in the context of journalistic reporting, re-investing qualified privilege with the flexibility that it was originally accorded in the mid-19th century.

He adopted earlier Court of Appeal observations that the interest of the public in a modern democracy, in free expression and, more particularly, in the promotion of free and vigorous press to keep the public informed, was reflected in a corresponding duty of a journalist to play a proper role in discharging that function.

The task was to "behave as a responsible journalist". The question whether the publisher has behaved responsibly was necessarily and intimately bound up with the question whether the defence of qualified privilege arises.

The trial judge in the Court of Appeal in the present case had not correctly applied the principles for which *Reynolds* stood as authority, including the finding that the criterion of "responsible journalism" required the publication of the article to be postponed until Mr Jameel could be contacted.

> "... Mr Jameel did not know that his group's accounts were being monitored. He was not in a position to deny that they were being monitored. He could say no more than his subordinate had already told Mr Dorsey [the journalist], namely, that his companies had no connection of any sort with terrorism and there was no reason for their accounts to be monitored. He could have requested, or demanded, publication in the next edition of the Wall Street Journal Europe, of a response on those lines, but he never did so. In the circumstances the newspaper's refusal to postpone publication of the story was not, in my opinion, a circumstance of any real weight in the scale for measuring the presence or absence of "responsible journalism". (para [141])

Lord Scott concluded that the information in the article was of high importance and the circumstances in which it was written satisfied the criterion of responsible journalism. The journalist obtained confirmation from a reliable Washington source.

Baroness Hale identified two steps in the *Reynolds* defence. First, there must be "a real public interest in communicating and receiving the information". Second, the publisher must have taken the care that a responsible publisher would take to verify the information published.

This normally required a source or sources to be ones which the publisher had good reason to think reliable, that the publisher believed the information to be true and that it had done what it could to check it.

Part of the checking process involved taking reasonable steps to contact the people named for their comments. The "tone in which the information is conveyed" will be relevant (para [149]).

Baroness Hale agreed with Lord Hoffmann's demonstration that the newspaper's story passed the test of responsible journalism. The article related to a serious matter of public interest. Baroness Hale concluded:

> "We need more such serious journalism in this country and our defamation laws should encourage rather than discourage it." (para [150])

The position in Australia

The principled development of the defence of common law qualified privilege in Australia has been diverted by the excursion into the defence recognised in *Lange v ABC* in relation to communications about "government or political matters".

In that realm, a defendant is required to prove, among other things, that its publication was reasonable in all the circumstances.

This test has been thought to pick up much of the baggage of s.22 of the New South Wales 1974 *Defamation Act*.

In practice, it involves harsh assessments by judges, with the benefit of hindsight, about editorial and journalistic decisions.

It is inconsistent with the approach articulated by all of the Law Lords in the *Wall Street Journal* case.

The High Court's decision in *Roberts v Bass* (2002) 212 CLR 1 left open the possibility that some mass communications might escape the requirement of proving reasonableness under the Lange defence by resorting to traditional common law qualified privilege.

That involves proving that the defendant had a duty or interest in publishing the matter and that the recipients had a corresponding, legitimate interest in receiving it. This may not be an impossible task as the pre-*Lange* decision of *Toyne v Everingham* (1993) 91 NTR 1 illustrates.

But it is a course that is unlikely to be sanctioned by the High Court if and when the occasion arises for it to consider the application of the defence of qualified privilege at common law to communications that are published "to the world".

If a requirement of reasonableness applies to communications about "government or political matters" then it is hard to see the High Court applying a more liberal standard to other mass communications. But the High Court will need to revisit this issue when a defendant argues that the common law of Australia should recognise the same privilege as the House of Lords recognised in *Reynolds*, as restated in *Wall Street Journal*.

Arguably, the test of proving that the defendant acted fairly and responsibly is less demanding than proving that the publication was "reasonable in all the circumstances".

In the meantime, *Wall Street Journal* provides a highly persuasive authority on how courts should approach the existing requirements of reasonableness under the *Lange* test and under s.30 of the *Uniform Defamation Act*.

It discourages courts from substituting their own decisions, made with the benefit of hindsight, for editorial decisions that are made by professional journalists in deciding what should be included in a story and how the story should be presented.

Most importantly, *Wall Street Journal* encourages the courts not to focus on the inclusion of an inaccurate fact as one component of a larger story, but to have regard to the thrust of the story as a whole.

Conclusion

Before the decision in *Wall Street Journal* many commentators feared that the House of Lords' decision in Reynolds had not delivered on its promise.

The House of Lords' decision reinvigorates the *Reynolds* decision and encourages trial courts to have regard to the practical realities confronting those who practise responsible journalism.

The result is that the defence of qualified privilege at common law diverges between England and Australia. Our respective common laws of qualified privilege increasingly have very little in common.

Appearances

For the appellants: Geoffrey Robertson QC, Rupert Elliott and Guy Vassall-Adams, instructed by Finers Stephens Innocent LLP.

For the respondents: James Price QC and Jacon Dean, instructed by Carter-Ruck and Partners.