

# The 'Doctrine of *Reportage*' and the Evolution of Common Law Qualified Privilege in England and Wales

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## Background: *Reynolds* qualified privilege and public interest speech (I)

- Cause of action complete as soon as defamatory allegations are made
- Burden is on the publisher to provide a defence
- Truth (called 'justification')
- Fair comment (also called 'honest opinion') – facts must be true
- Truth will be difficult (sometimes impossible) to prove in practice
- Evidentiary burdens on the respondent can have a 'chilling effect' on freedom of speech

## Background: *Reynolds* qualified privilege and public interest speech (II)

- Absolute privilege (eg statements made in parliament or in court)
- Qualified privilege – can be defeated by showing actual malice
  - Type 1: Fair and accurate reports
  - Type 2: Duty-interest (legal, moral or social interest)
- Duty-interest qualified privilege did not apply to widespread/media publications

## Background: *Reynolds* qualified privilege and public interest speech (III)

- Liberal approach to duty-interest qualified privilege
- Must meet the 'responsible journalism', judged according to the '*Reynolds factors*'

# Background: *Reynolds* qualified privilege and public interest speech (IV)

## '*Reynolds* factors'

1 The seriousness of the allegation	2 The nature of the information
3 The source of the information (*)	4 The steps taken to verify the information (*)
5 The status of the information (*)	6 The urgency of the matter
7 Whether comment was sought from the claimant (*)	8 Whether the article contains the gist of the claimant's side of the story
9 The tone of the article	10 The circumstances of the publication, including its timing

# *Reynolds* and the 'doctrine of *Reportage*'

## Republication

- Republication gives rise to a separate cause of action
- Repetition rule

## Neutral Reportage

- Early English cases – *The Earl of Northampton's Case*
- US – constitutional privilege

# *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd*

- At trial, Smith J rejected a defence of *Reynolds* QP
- Court of Appeal: protected by *Reynolds* QP
- Latham LJ:

‘[i]t is the fact that the allegation of a particular nature has been made which is in this context important, and not necessarily its truth or falsity.’
- Simon Brown LJ:

where, in short, both sides to a political dispute are being fully, fairly and disinterestedly reported in their respective allegations and responses...[t]he public is entitled to be informed of such a dispute without having to wait for the publisher, following an attempt at verification, to commit himself to one side or the other.

# *Roberts v Gable: developing a 'doctrine of reportage'*

## 'News from the Sewers: BNP London Row Rumbles On'

Perhaps the police are now more interested in Roberts and his brother Barry. Hill and Jeffries recently issued a long letter attacking Griffin and his supporters, including Chris Roberts. It explains that it was Roberts who stole the money from the rally and that although it went against the grain, Hill and Jeffries reluctantly threatened to report him to the police. After Roberts angrily returned the money, the letter alleges, he and his brother Barry threatened to 'kneecap, torture and kill' Hill, Jeffries, and their respective families.

The letter complains that the Griffith leadership described Roberts as a self-made millionaire who was leaving the city to devote his time and fortune to the BNP, but he turned out to be a disappointment. 'It was now quite obvious that a little village somewhere, was missing its idiot!'

## *Roberts v Gable*: developing a 'doctrine of *reportage*' (I)

- Eady J: protected under the 'recently emerging' *reportage* doctrine recognised in *Al-Fagih*
- Reported both sides of a political dispute in 'a disinterested way'
- What was important was the way in which the dispute was reported

# *Roberts v Gable*: developing a 'doctrine of *reportage*' (II)

- Upheld trial court
- Nature of the defence:
  - ‘a form of, or special example of, *Reynolds* qualified privilege, a special kind of responsible journalism but with distinct features of its own’
- Requirements:
  - 1) the information published must be in the public interest and the article, ‘judging the thrust of it as a whole, must have the effect of reporting, not the truth of the statements, but the fact that they were made’.
  - 2) Must meet the standard of responsible journalism – therefore, the *Reynolds* factors remain relevant

# *Reportage analysis*

- ‘Culpability criteria’ have no relevance
- Most of the other *Reynolds* factors also irrelevant
- *Reportage* involves a very different analysis
- Will appear to arise where:
  1. there is a dispute of public interest;
  2. allegations are made by one party to the dispute, A, about another party to the dispute, B;
  3. the publication, judged as a whole, has the effect of fairly reporting the dispute, including the substance of the allegations;
  4. the allegations are attributed to A; and
  5. the publication does not adopt or embellish the allegations.
- *Reynolds* and *reportage* treated as distinct defences

# Doctrinal inconsistency

*Reynolds* - Lord Bingham in *Jameel Wall Street Journal Europe*:

The rationale of [the responsible journalism] 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*...[T]he 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.

*Reportage* – not concerned with truth – two apparent goals:

1. Public interest in the attributed speaker
2. Public interest in the nature of the dispute

# Known or suspected falsehoods?

- *Reynolds* – Lord Hobhouse:

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 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.

- Fair reports protects known or suspected falsehoods
- US ‘neutral reportage’ defence

# Further Issues

- Malice
- Strength of the *reportage* and its compatibility with Article 8 of the European Convention on Human Rights