

UK DEFAMATION UPDATE

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Law Commission Report on ISP Liability

[129] At the very end of December 2002, the Law Commission published an interim report on how laws relating to defamation and contempt of court can cause difficulties in relation to the Internet. The interim report came almost a year after the Lord Chancellor had requested it and involved extensive consultation with Internet Service Providers (ISPs), online publishers and lawyers.

The report identified four main areas of concern.

Liability of ISPs for innocent dissemination of defamatory material

Increasingly, ISPs receive complaints from aggrieved individuals or their lawyers about material on their systems. In *Godfrey v Demon Internet Ltd*,² the High Court held that an ISP can be liable for defamatory material posted by a third party on websites and newsgroups hosted on their servers on the basis that it is 'publishing' the comments of users. As a result of that decision, many ISPs now remove any material that is alleged to be defamatory or even shut down websites completely without any investigation into the truth of the content or even if it might be in the public interest. Some people argue that even this method is not safe as authors could claim this violates their freedom of expression under the European Convention of Human Rights.

The interim report urged the Government to reconsider the law in this area. While not advocating the US approach which allows ISPs complete exemption from liability, the Law Commission recommends extending the innocent dissemination defence in s 1 of the *Defamation Act 1996*, and producing a new code of conduct for ISPs dealing with complaints of this nature.

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² [1999] 4 All ER 342.

The application of the law of limitation to online archives

Under English law, a new cause of action in libel accrues every time a libel is disseminated. Due to the nature of the internet, the result is that the limitation period under the *Defamation Act 1996* restarts every time the website containing the allegedly defamatory remark receives a hit. This leaves newspapers open to the risk of having to defend libel actions many years after the initial publication.

[130] The Law Commission was of the opinion that this is unfair on newspapers and those who maintain archives, and recommends a review of the law in this area. One solution might be to adopt the US approach where an article is deemed to be published when first posted on an archive.

The exposure of Internet publishers to liability in other jurisdictions

Since the Internet is available globally, Internet publishers in theory need to be aware of and comply with defamation laws in every country that has access to the internet. This problem was borne out by the Australian case of *Dow Jones & Company Inc v Gutnick*³ where an Australian entrepreneur was allowed to bring a defamation action in Australia against Dow Jones, a US-based news group.

The Law Commission does not think that the problem can be solved in the short term: any solution would likely involve an international treaty and harmonisation of the substantive laws of defamation. It does not, therefore, recommend reform for the time being.

The risk of prosecution for contempt of court

Newspapers and other online publishers fear that it would be possible for them to be held in contempt of court for storing archived material on their sites which might be prejudicial to a trial, even though they were completely unaware of the trial.

The Law Commission did not see this as a priority for reform and concluded that there are already sufficient safeguards in the existing law to ensure that Internet publishers are protected against inappropriate, arbitrary or trivial prosecution.

³ [2002] HCA 56.

Loutchansky v Times Newspapers Ltd

This was a libel action brought against *The Times* by a Russian businessman, Dr Loutchansky.⁴ In a series of articles during September 1999, *The Times* linked Dr Loutchansky and his group of Nordex companies to the Russian mafia, money laundering and the smuggling of nuclear weapons.

The defendant sought to rely on a *Reynolds*⁵ defence. Under a *Reynolds* duty-interest test in this case, the requisite standard was that of 'responsible journalism'. The defendants had not met the requisite standard of responsibility in respect of one article. Another article was held to fall well short of the standard of responsible journalism. Neither article was held to be protected by qualified privilege.

Having been refused leave to appeal to the House of Lords against the decision of the Court of Appeal in relation to qualified privilege, *The Times* filed an application to amend their defence so as to plead justification. This application was dismissed.

The defamatory meanings of the articles which *The Times* sought to justify were that:

- the claimant had been involved in money laundering through the ownership or control of various companies; and
- the claimants had given reasonable cause by his conduct to suspect him or those companies of involvement in money laundering.

The Times relied on, among other documents, a report of an Italian public prosecutor which had requested the pre-trial detention of a large number of individuals, including the claimant, in respect of the transfer of proceeds of unlawful activities. The report mentioned a number of companies which the Claimant was alleged to control.

In dismissing the application, the Court took into account the general principle that amendments should be allowed so as to permit the real dispute between the parties to be adjudicated. However, the Court thought that, on balance, other factors weighed against accepting the amendments. Firstly the evidence in support of the amendments

⁴ [2002] EWHC 2490 (QB); [2002] EWHC 2726 (QB).

⁵ [2001] 2 AC 127; see further discussion of *Al Misnad v Azzaman Ltd* on p 133.

was insufficient to auger any real prospect of success for either [131] claim. Secondly, the lateness of the application and the prejudice which Dr Loutchansky would suffer if the amendments were allowed pointed against allowing them. Thirdly, although Dr Loutchansky was wealthy and able to bear increased trial costs, the burden of having to prepare for a complex trial at this point in the proceedings was sufficient to cause real prejudice.

This decision shows that, although the Court is reluctant to prevent defendants from pleading legitimate defences, it may not allow amendments if they are requested at a very late stage and are likely to cause real prejudice to the claimant.

Tanner v Blue Print Books Ltd & Filby

This case concerned the publication in a magazine of letter which criticised the claimant who sold car kits. The claimant alleged the comments were defamatory and issued proceedings accordingly.⁶ The defendants pleaded defences of fair comment and justification and the claimant attempted to have the defences struck out on the basis of estoppel. The court dealt with the issue of estoppel, and whether an earlier small claims court decision relating to the car kit could be used to prevent the defendants from criticising the claimant, or being able to defend themselves in a High Court action.

The second defendant had purchased a car from the claimant's company. The car encountered a long-running stream of problems which caused the defendant considerable inconvenience, expense and distress. The second defendant took action via the small claims route, and obtained a judgment for a small sum against the claimant. The court did not rule completely in his favour however and found that he could have mitigated his losses and that not all of the problems with the vehicle were necessarily there from the start.

Having seen an advertisement in a magazine (owned and edited by the first defendant) asking for comments on the make of car that he had purchased, he naturally wrote in

⁶ [2003] All ER (D) 279 (Feb).

complaining about the quality of the car and the complete lack of after-sale support he had received.

The published letter was the subject of the defamation action, and the claimant sought to strike out their defences either on grounds of estoppel or abuse of process, on the basis that the issues had already formed the subject matter of the previous small claims proceedings.

The High Court held that the defendants were not barred from their defences by virtue of estoppel for the following reasons:

- Although the subject matter of the small claims proceedings overlapped with the current issue, it had not been between exactly the same parties and there were some different issues to be determined.
- More importantly, the argument would be “unsustainable” against the right to freedom of expression and the right to a fair trial under Articles 10 and 6 of the European Convention on Human Rights.

Kearns v General Council of the Bar

As detailed in *Media & Arts Law Review* 8 (1) (April 2003), this case concerned a letter from the General Council of the Bar to heads of chambers, senior clerks and practice managers stating that the claimants were not solicitors, nor did they have a Bar direct licence. Very soon after it emerged that they had been mistaken, and an apology was dispatched immediately.

At first instance, as reported, the court held that the defence of qualified privilege applied as the letters were sent without malice to parties with a common interest and there was therefore no need to go to the same lengths of verification [132] as with duty-interest cases. The claimants appealed on the basis that there was no distinction between the two cases, and that the question of whether qualified privilege applied should be on the facts of each individual case.

On appeal, the Court of Appeal held that where there is an established relationship between parties it should be protected, and free and frank communication between them should be encouraged.⁷ The relationship in question was one 'which plainly requires the flow of free and frank communications in both directions on all questions relevant to the discharge of the Bar Council's functions'.

The defence of privilege should attach 'more readily to communications within an existing relationship than to those between strangers'.

ICN Photonics Ltd v Dr Mervyn Patterson

The issue in this case⁸ was whether an allegedly defamatory letter reflected adversely on the manufacturer and the conduct of his business as opposed to being disparaging merely of his product.

The manufacturer of a laser treatment system for the reduction of wrinkles brought the defamation claim against a medical practitioner over a letter sent to beauty salon customers. The claimant contended that the letter was capable of meaning that the manufacturer had been responsible for the introduction into and use in Warwickshire of the laser machine without necessary medical supervision and was, therefore, defamatory of him.

The Court of Appeal reversed the first instance decision holding that nothing in the letter (which had not even referred to the claimant) suggested that the claimant was personally responsible for the introduction or use of the laser machine without medical supervision.

The Court of Appeal also had to address whether it should interfere with the first instance ruling. It fully accepted the principles in *Gillick v Brook Advisory Centre*:⁹ 'The Court of Appeal will always be very reluctant to reverse an interlocutory finding of a judge at first instance that the words alleged to be libellous are capable of bearing the defamatory meaning alleged.'

⁷ [2003] EWCA Civ 331.

⁸ [2003] EWCA Civ 343.

⁹ [2001] EWCA Civ 1263.

However the Court of Appeal went on to state that:

...those principles do not, however, prevent this court from intervening in an appropriate case, where it is satisfied that the judge has clearly gone wrong as a matter of approach or has reached a conclusion which is patently unsustainable. There will occasionally if infrequently be cases where the court is satisfied that it should intervene in such a case.

The case before the Court of Appeal was one of those unusual cases where they had to intervene.

Maccaba v Litchenstein

The parties were both members of the Orthodox Jewish community. The claimant brought proceedings alleging slander and harassment over nine statements made by Mr Litchenstein.¹⁰ They shared common stings, including that the claimant was promiscuous and had committed adultery.

Not all of the nine statements were made within the one year limitation period for bringing a libel action provided under Section 4A of the *Limitation Act 1980*. They were all made, however, within the six year limitation period for bringing the harassment action and all the statements would have gone before the jury.

The claimant sought to disapply the one year limitation period, arguing that to do so would not cause the defendant undue prejudice because other, similar allegations would remain in issue. The claimant [133] also argued that to exclude some of the statements would create an artificial situation at trial, with the jury being asked to exclude certain similar statements on the basis simply of when they had been made.

The Court agreed with the claimant. The statements which fell outside the limitation period for the slander action would still need to be decided in the harassment action and little prejudice would be caused to the defendant by disapplying the limitation period. While there was no real explanation for the delay in issuing proceedings, this in itself was not determinative.

¹⁰ Unreported, 15 April 2003.

Al Misnad v Azzaman Ltd

*Reynolds v Times Newspapers Ltd*¹¹ made a major change in the common law defence of qualified privilege for communications in the media. Provided journalists meet the requirements for 'responsible journalism', they will have a privilege defence to a defamation action concerning a matter of public interest. Relevant factors include the source, status and nature of the material, the urgency of publication and the steps taken by the defendant to verify the information, including whether a response was sought from the claimant. But should these factors be applied in the same way across the board to different stories written in different contexts?

Further guidance has now been given by Mr Justice Gray in *Al Mismad v Azzaman Ltd*.¹² The case concerned a series of articles in *Azzaman Arab International Daily*, an international newspaper mainly sold abroad. The articles made various allegations about the claimant, Sheikha Mouza, the second of the three wives of the Emir of Qatar, concerning her alleged abuse of her position, including bringing pressure to bear on Qatar's media and improperly interfering in governmental matters. The allegations continued and suggested she had given instructions to security service officials to arrest opposition members, and her having disreputable dealings with Israeli parties doing business in the Gulf.

The claimant applied for summary judgment, arguing that Azzaman's privilege defence was bound to fail as it had failed to verify its sources and had not approached the claimant for her side of the story.

Azzaman argued that the Reynolds test is flexible and has to take into account the facts of the individual case, particularly where the publication is directed at a non-English audience in non-democratic countries, discussing matters of public concern in a country where there is no free press and opposition is not permitted. The newspaper argued that, had Azzaman approached the claimant, she would not have responded anyway. Given the political situation in Qatar, it was also impossible for Azzaman to verify its sources due to the threat of reprisals facing those who dissented against the ruling family.

¹¹ [2001] 2 AC 127.

¹² [2003] EWHC 1783 (QB).

Mr Justice Gray held, therefore, that Azzaman's defence should not be rejected without a full trial. He recognised that the application of the Reynolds test is still in the early stages of development and is an area of law where summary determination is inappropriate. He also emphasised the need for particular care in cases where granting summary judgment would interfere with the journalists' rights to freedom of expression.

This is not the first time that the *Reynolds* test has been modified to take account of the particular circumstances of the case (see *Al Fagih v HH Saudi Research and Marketing (UK) Ltd*).¹³

The case does not depart from the principle that, in order to benefit from the privilege defence, journalists must exercise true professional skill and care. However [134] it does show that, in cases with an international dimension, it may be unreasonable to expect journalists to verify their sources where political factors make it very difficult to do so or to seek the claimant's side of the story where this would prove a pointless exercise.

Mr Justice Gray also held that, as the summary judgment application had lasted two days, with skeleton arguments running to 50 pages and more than 34 authorities being cited, the case did not belong in the class of action which section 8 of the *Defamation Act 1996* 'intended should be filtered out cheaply and expeditiously by the summary disposal procedure'. As the claim included not only damages but also injunctive relief to restrain publication in a number of foreign jurisdictions, the judge felt that 'an English court should think long and hard before granting injunctions which would have extraterritorial effect'. The need for caution was all the greater given the evidential presumption that foreign laws were much the same as English law which had been much criticised and described as 'quite unrealistic and curiously egocentric in the post-imperial age'.

Mr Justice Gray's judgment did not determine whether qualified privilege would apply in this case. He merely decided that Azzaman's defence was not so weak as to

¹³ [2001] EWCA Civ 1634.

deny it the right to a full trial. It will be interesting to see how the *Reynolds* defence is applied at trial and in other cases with an international dimension.

The Gleaner Company Ltd v Abrahams

This was an appeal to the Privy Council¹⁴ from the Court of Appeal of Jamaica concerning a libel action brought by Mr Abrahams, the Minister for Tourism for Jamaica between 1980 and 1984 against two Jamaican newspapers: *The Gleaner* and the *Star*. The newspapers had accused Abrahams of fraud. Their defence was struck out, leaving the only issue as the amount of damages. The Court of Appeal of Jamaica substituted the original award of J\$80.7m (£1.2m) for J\$35m (£533,000). The defendants appealed to the Privy Council on the ground that the damages were still excessive.

Their Lordships held that the Court of Appeal of Jamaica was entitled to take the view that, if the amount of damages had a chilling effect upon the kind of conduct displayed in the instant case, then that would be no bad thing. The Jamaican Court of Appeal was in the best position to determine the correct level of damages and had applied the correct test in doing so. Their Lordships were, therefore, not prepared to substitute a lower award.

Their Lordships referred to a number of English cases in the 1990s, including those brought by Elton John and Esther Rantzen, which had the effect of reducing the level of damages awards in this jurisdiction. Since those cases, the test for an excessive award has been whether a reasonable jury could have thought that the award made was necessary to compensate the claimant and to re-establish his reputation. Relevant factors here for determining such an amount are the purchasing power of the award, comparisons with other libel awards and comparisons with general damages in personal injury cases. The defendants sought to argue that the Jamaican Court of Appeal's failure to take account of personal injury awards was an error in law. Their Lordships rejected this argument. The comparison with personal injury awards was one of policy. The fact that English courts may take personal injury awards into account did not mean that the Jamaican courts were required to do so.

¹⁴ [2003] UK PC 45.

The most worrying aspect of this case for journalists is the bold stance taken by the Privy Council on the 'chilling effect' of high damages awards. Although Privy Council decisions are not binding on the English courts, they are highly persuasive. Their Lordships saw no reason why an award of £533,000 in the special circumstances of this case, would inhibit responsible journalism. Indeed they applauded its deterrent effect of preventing the media from riding roughshod over the rights of other citizens. Many journalists may well hold a different view.

Before journalists become too concerned, it is important to recognise the importance which their Lordships placed upon local factors, such as the standing of the newspapers in Jamaica and the local, [135] political, social and business situation. The serious libel in this case had caused Mr Abrahams great financial loss and damage to his health. Moreover, for 16 years the defendants had doggedly resisted Mr Abrahams' attempts to clear his name, despite having no evidence against him. Given these factors, which the Jamaican Court of Appeal was in the best position to assess, their Lordships felt in no position to re-assess the correct amount of damages. Such a high award from the English Court of Appeal may well not receive the same treatment.

Keays v Guardian Newspapers

Sara Keays has sued *The Observer*, its editor and the journalist, Carol Sarler, over an article published on 13 January 2002, 'The Mother of All Women Scorned'. This was a comment piece flowing from a television programme, 'Flora's Story', which was screened in January 2002 after the expiration of the gagging order which had been placed on both Sara Keays and her daughter, Flora Keays, to prevent material being disclosed about Flora. There was also an exclusive three part serialisation published in the *Daily Mail* and syndicated articles appeared in the *News of the World*.

The claimant complained of three allegations in the article. First, that she had cynically exploited her handicapped daughter to further her vituperative campaign of revenge against Cecil Parkinson; secondly, that she had lied in stating that her rationale for allowing her daughter to participate in the programme was that publicity was inevitable when Flora turned 18, when really she was just motivated by revenge; and, thirdly, that on 14 October 1983 she gave a kiss-and-tell story to *The Times*

containing details of her affair with Cecil Parkinson in order to exact revenge upon him.

At a hearing in June 2003, Mr Justice Eady was invited to rule on whether the statements complained of were purely comment.¹⁵ He held that they were and that they were not capable of being statements of fact which had to be justified. The views expressed regarding Miss Keays' motivation were obviously, when seen in the context of the previous broadcast and surrounding publicity, inferences drawn by the author which were quite clearly statements of her own opinion. The accuracy of her views was irrelevant, so long as they were expressed honestly.

In *Edgington v Fitzmaurice*,¹⁶ Lord Justice Bowen famously stated that 'the state of a man's mind is as much a fact as the state of his digestion'. This discouraged journalists from writing comment pieces concerning motivation as this would be so difficult to prove. However, in November 2002, *Branson v Bower (No 1)*,¹⁷ the court took a broader view of what can be classed as opinion. In that case it was stated that the reasonable reader would conclude that Bower's comment was speculation about Branson's motivation for trying to run the lottery and not a statement of fact. It was clear to readers that the author had no special knowledge of Branson's mind and, therefore, that his comments must be conjecture.

It was noted in Keays that the article appeared in the newspaper's Comment section and contained information which was both topical and widely known. There was no hint that the author was privy to details of which her readers would be unaware. She did not assert or imply that her suppositions regarding Miss Keays were facts. Her readers were free to decide for themselves whether they accepted the author's opinion or not.

It was further noted that, when 'private individuals enter the arena of public [136] debate, they lay themselves open to scrutiny'. Miss Keays had launched the

¹⁵ [2003] EWHC 1565 (QB).

¹⁶ (1885) 29 ChD 459.

¹⁷ [2001] EWCA Civ 791.

information into the public domain and it was natural for journalists to comment on this.

This case, in tandem with *Branson*, has opened up the defence of fair comment by broadening what can be classed as a comment in the first place. This is good news for commentators.