Public interest journalism – a look at the defences under s4 of the Defamation Act 2013 and s32 of the Data Protection Act 1998

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“Publication on matter of public interest” – Defamation Act 2013, s4

- s4(1): defence for D to show:
  (a) statement was (or formed part of) statement on a **matter of public interest**; and
  (b) D **reasonably believed** publication was in the public interest.

- Court **must** have regard to all the circumstances: s4(2)
- On reasonable belief, court **must** disregard any failure by D to take steps to verify truth *if* publication is an **accurate and impartial account** of a **dispute** to which **C** was party: 4(3).
- Court makes such allowance as it considers “appropriate” for editorial discretion: 4(4)
- Applies whether statement is fact or comment: 4(5)
- Common law *Reynolds* defence abolished: 4(6)

What is the difference between *Reynolds* and section 4?

- What effect will the common law "responsible journalism" cases have:
- ***Reynolds v Times Newspapers Limited*** [2001] 2 AC 127
- ***Jameel v Wall Street Journal Europe Sprl*** [2007] 1 AC 359
- ***Flood v Times Newspapers Ltd*** [2012] UKSC 11, [2012] 2 AC 273

- ***Pinard-Byrne v Linton*** [2015] UKPC 41, [2016] EMLR 4 (12.10.15) *Reynolds* failed. Key factors: no attempt to verify allegations; allegations not put to C.

- ***Barron v Vines*** [2015] EWHC 1161 (QB) (Warby J) (29.4.15).
  J gave the self-represented litigant chance to take advice about potential s4 defence; D decided he did not wish to do so: [61-65], [69]. s4 is a "new statutory defence", not yet the subject of any decision; Explanatory Notes suggest based on and intended to reflect *Reynolds*, but there is "inevitably some room for argument about its exact scope and application to particular facts" [64].

From the Explanatory Notes on s4....

29.....This section creates a new defence to an action for defamation of publication on a matter of public interest. It is based on the existing common law defence established in ***Reynolds*** *..* and is intended to reflect the principles established in that case and in subsequent case law. *Subsection (1)* provides for the defence to be available in circumstances where the defendant can show that the statement complained of was, or formed part of, a statement on a matter of public interest and that he reasonably believed that publishing the statement complained of was in the public interest. The intention in this provision is to **reflect the existing common law** as most recently set out in ***Flood*** *..*It reflects the fact that the common law test contained both a subjective element – what the defendant believed was in the public interest at the time of publication – and an objective element – whether the belief was a reasonable one for the defendant to hold in all the circumstances.

..bit more from the Explanatory Notes on s4....

30. In relation to the first limb of this test, the section does not attempt to define what is meant by “the public interest”. However, this is a concept which is well-established in the English common law. It is made clear that the defence applies if the statement complained of “was, *or formed part of*, a statement on a matter of public interest” to ensure that either the words complained of may be on a matter of public interest, or that a holistic view may be taken of the statement in the wider context of the document, article etc in which it is contained in order to decide if overall this is on a matter of public interest.

..and a last bit from the Explanatory Notes on s4.

35. *Subsection (6)* abolishes the common law defence known as the Reynolds defence. This is because the statutory defence is **intended essentially to codify the common law defence.** While abolishing the common law defence means that the courts would be required to apply the words used in the statute, the current case law would constitute a **helpful (albeit not binding) guide to interpreting how the new statutory defence should be applied**. It is expected the courts would **take the existing case law into consideration where appropriate**.

Hold on to the ten Nicholls factors (*Reynolds*)

1. Seriousness of the allegation (the more serious = the more the public is misinformed, and C harmed, if allegation not true).
2. Nature of the information / extent to which subject of public concern.
3. Source of the information – direct knowledge? axe to grind? being paid?
4. Steps taken to verify the information.
5. Status of the information (prior investigation commanding “respect”)
6. Urgency of the matter – news often a perishable commodity.
7. Whether comment sought from C – who may have information others do not possess/have not disclosed – approach to C “not always” necessary.
8. Whether publication contained gist of C's side of the story.
9. Tone of the article – can raise queries/call for investigation (not adopt as fact).
10. Circumstances of the publication, including the timing.

Factors are illustrative – not exhaustive – weight depends on the facts of the case.

Public interest reporting – lessons from *Yeo* – first: the route to trial

Yeo v Times Newspapers Ltd – tried before Warby J (October 2015)

Yeo (1) [2014] EWHC 2853 (QB), [2015] 1 WLR 971. 1st CMC (20.8.14).
- Application for jury trial (by TNL): rejected [16-80].
- Application to determine meaning and whether fact/comment (below) [81-139]
- Relief from sanctions (costs budgets) [140-148]

Yeo (2) [2015] EWHC 209 (QB), [2015] 1 WLR 3031. 2nd CMC and 1st costs MC (4.2.15). Malice plea struck out (below). Costs budgets.

Yeo (3) [2015] EWHC 2132 (QB), [2015] 4 Costs LR 687. (22.7.15)
Parliamentary privilege, witness statements (strike out), costs budgets.

Yeo (4) [2015] EWHC 3375 (QB) (25.11.15) – judgment after trial.

Yeo - determining meaning – and fact / comment

- **Yeo (1)** (ref above): statement of the familiar principles [84-98].

- J rejected C's meaning [104], finding a different (but similar) allegation of fact [112]: that C was prepared to, and had offered himself as willing to, act in a way that was a breach of House of Commons rules – by acting as a paid parliamentary advocate who (for money) would push for new laws for a client and approach Ministers/others to advance the client's private agenda.

- J also found defamatory comments [107-110]: by behaving in the way referred to in the Articles, C had acted scandalously and shown himself willing to abuse his position in Parliament to further his own financial/business interests, in preference to the public interest [121-122].

- Following the ruling: C amended his claim and Ds amended their Defence.

Yeo on the *Reynolds* defence: Yeo (4) - [128-194] & [242]

- The defence sets a lower threshold than proving truth – it "should be less challenging" to show that the articles represented responsible journalism on a matter of public interest [128].

- J had "no hesitation" in finding the subject-matter was public interest: current (legitimate) concerns about standards of behaviour in Parliament in relation to lobbying by commercial organisations [129].

- Considered general principles on "responsible journalism" [132]: includes at (7) reference to need for a journalist to have honest *and reasonable* belief in the truth of an allegation of misconduct (where the public interest lies in the fact it is, or may be, true).

- The court will examine the relevant part of the "process" of publication [134].

Yeo on *Reynolds* / public interest (2)

- J considered whether Article 8 of ECHR was engaged [140-147] (no).

- J considered whether TNL's "conduct in gathering and publishing the defamatory information" was responsible: the requirements of responsible journalism were "comfortably met" [148]. He considered, **at each stage**, whether the honest beliefs and other relevant conduct of the journalists and TNL staff "were or were not reasonable and responsible" [152].

- This included the initial email to Yeo (not too vague), setting up the meeting (not too eager), the meeting itself (reasonably interpreted by the journalists), the preparation of the articles (not distorted), the "front up letter" (afforded a reasonable opportunity to Yeo to comment) and the content of the Articles (not unfair or inaccurate) [156ff].

Yeo on *Reynolds* / public interest (3)

- No requirement on TNL to publish the entire transcript of the meeting [174]. The defence protects, on public interest grounds, the publication of factual statements that are not proved to be true. “In short, a publication can be wrong but “fair” for these purposes”. J put it this way: “in a case such as this it will be “fair” to present readers with factual conclusions honestly and reasonably drawn by journalists who were themselves witnesses to the key events; it is permissible to summarise, and to be selective; if the evidential picture is misrepresented or presented in a wholly unbalanced way, that may well be unfair; but fairness does not require the publisher to present the reader with all the factual material that could support a competing assessment” [175]

- “it is not incumbent on the responsible journalist to lay out for the reader all the pros and cons relevant to a particular conclusion” [179]. (Would be different if there were items that undermined the central message of the article).

No room for malice

Yeo (2) (ref above): malice struck out [22-42].

- The plea made allegations of dishonesty against the journalists. The **only** reason to plead malice was in response to the “fair comment” defence [25] – an allegation that D “dishonestly expressed an opinion..they did not hold” [26].

- “Clarity and precision are always required in statements of case, but never more so than when an allegation of dishonesty is being made.” [30].

- The court must be vigilant to ensure the principles are adhered to; they “represent an important safeguard for freedom of expression” [35].

Yeo – the trial judgment on truth: Yeo (4) - [195-231] & [243]

- TNL had to prove Yeo's state of mind during a meeting with undercover reporters (who had offered a paid job): the J considered what Yeo had *understood* them to want and what he was *willing to do* [197].

- J rejected Yeo's evidence as implausible: J was unable to accept that Yeo had "forgotten" the reference to a "generous remuneration package" [202]. Yeo gave evidence "unconvincingly"; his "diversionary tactic" failed [205].

- The meeting was preliminary – but Yeo must have appreciated "what the meeting was preliminary *to"* (a paid job) [208]. A contemporaneous email, inconsistent with his evidence, was a better guide to his state of mind [222-225].

- TNL had proved the substantial truth of the words complained of.

Yeo on comment/opinion – interim judgment and trial

- **Yeo (1)**: J summarised principles on comment [88-96].

- J found "explicit comment" in the front-page article, where C said to be "implicated" in a "scandal". The ordinary reader would understand this as a comment / opinion / value judgment about C's behaviour (that it was "scandalous") [107]. There were also comments about C's motivation [108-110] & [121-122].

- **Yeo (4)**: At trial, J found the objective test satisfied [232] (the "generous" test: whether the comment could have been made honestly, even if by a person who is prejudiced or who holds exaggerated or obstinate views; see [19-24]). It was not necessary to decide whether the common law *Reynolds* defence could protect defamatory comment [234].

Remember: s4 means the "journalistic process" is under examination

- Another example of how to succeed in *Reynolds* defence:
  Hunt v Times Newspapers Limited [2013] EWHC 1868 (QB) (Simon J)
  D had behaved "fairly and responsibly in gathering the information and in ensuring what was published was accurate and fair". This was a "serious piece of investigative journalism which was expressed in forthright, but not extravagant, terms; and without tangential additions in order to 'liven up' the story."

- And an example of how *not* to succeed:
  Galloway v Telegraph Group Ltd [2005] EMLR 7 (trial: Eady J);
  [2006] EWCA Civ 17; [2006] EMLR 11 (appeal) at [72-77]
  D had "gone a long way" to "adopt and embellish" allegations in documents; no attempt to verify the allegations; serious allegation not put (during phone call) with C; articles did not include gist of his response; tone was dramatic and condemnatory.

The process – and the people who followed the process (or were meant to) – are on trial.

Economou v De Freitas

- Trial before Warby J – [2016] EWHC 1853 (QB), [2017] EMLR 4 (27.7.16)

  Seven broad points about s4 – understood not to be in dispute [139]:

(1) It is not enough for the statement complained of to be, or to be part of, a publication *on* a matter *of* public interest. It must also be shown that the defendant reasonably believed that publication of the particular statement was *in* the public interest.
(2) To satisfy this second requirement, which I shall call "the Reasonable Belief requirement", the defendant must (a) prove as a fact that he believed that publishing the statement complained of was in the public interest, and (b) persuade the court that this was a reasonable belief.
(3) The reasonable belief must be held at the time of publication.
    ....

Economou – broad points on s4

....

(4) The “circumstances” to be considered pursuant to s4(2) are those that go to whether or not the belief was held, and whether or not it was reasonable.

(5) The focus must therefore be on things the defendant said or knew or did, or failed to do, up to the time of publication. Events that happened later, or which were unknown to the defendant at the time he played his role in the publication, are unlikely to have any or any significant bearing on the key questions.

(6) The truth or falsity of the allegation complained of is not one of the relevant circumstances.

(7) It is not only those who edit media publications who are entitled to the benefit of the allowance for “editorial judgment” which s4(4) requires (see paragraph 33 of the Explanatory Notes).

Findings on section 4(1)(a) and 4(1)(b)

- The statements related to a number of topics of undoubted public interest [143-150].

- As to what a D must believe [153]: “What s4(1)(b) requires is a belief that the publication of “the statement” is in the public interest. In my judgment this must refer **to the words complained of, rather than the defamatory imputation which those words convey**. That is consistent with the wording of the statute, which uses the term “imputation” to refer to the meaning of a statement.”

- As with *Reynolds*, the meaning that D *intended* to convey is relevant (even if the publication *unintentionally* conveyed a different meaning): and see ***Bonnick v Morris*** [2003] 1 AC 300 PC.

Economou – carry on *Reynolds*

- Role of *Reynolds* factors considered [237-240]. There was "much to be said" for the argument that the Nicholls factors should guide the court in deciding whether D had the reasonable belief under s4(1)(b). Some *Reynolds* factors "must on any view" carry through to the new law: flexibility; adaptability to circumstances of individual case; recognition that there is little scope (under Art 10.2 ECHR) for restrictions on questions of public interest; and the allowance for editorial judgment. Plus a restriction must be "necessary and proportionate" [240].

- "[241] I would consider a belief to be reasonable for the purposes of s4 **only** if it is one arrived at after **conducting such enquiries and checks as it is reasonable to expect of the particular defendant in all the circumstances of the case**. Among the circumstances relevant to the question of what enquiries and checks are needed, the **subject-matter** needs consideration, as do **the particular words used**, the **range of meanings** the defendant ought reasonably to have considered they might convey, and the **particular role** of the defendant in question."

Economou – s4 not just for journalists

D's role was closer to a source/contributor than journalist; he was an interviewee [242].

It would be "wrong in principle" to require an individual who contributes material for inclusion or use in an article/broadcast in the media to undertake all the enquiries which would be expected of the journalist, if they are to rely on a defence of public interest. "The enquiries and checks that can reasonably be expected must be **bespoke**, depending on the precise role that the individual plays. It is hard to see how an individual could rely on the public interest defence to escape liability for a false factual statement about events within their own knowledge ... But I see no reason why the defence should not avail an individual source or contributor who passes to a journalist for publication information the truth or falsity of which is not within the knowledge of the contributor. The contributor may well be entitled to rely on the journalist to carry out at least some of the necessary investigation and to incorporate such additional material as is required, in order to ensure appropriate protection for the reputation of others" [246].

And see [248]: C suggested that D should not have attacked the CPS as he did.

Data Protection Act 1998 (DPA)

- DPA gives effect to Council Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data.
- http://eur-lex.europa.eu
- www.opsi.gov.uk

- Now, of course, see the General Data Protection Regulation – Regulation (EU) 2016/679 (27 April 2016) that repeals 95/46. But that's for another glorious day...

Rights under the DPA

- Section 7: **access to** personal data
- Section 10: **prevent processing** of personal data likely to cause damage or distress
- Section 13: right to **compensation** for failure to comply with certain requirements of the DPA
- Section 14: right to **rectification, blocking, erasure and destruction** of **inaccurate** personal data
- Section 12: rights in relation to **automated decision-taking**
- Section 12A: rights in relation to **exempt manual data**

DPA: some definitions - (outline)

- ‘data’: information being processed automatically
- ‘personal data’: data which relate to a living individual who can be identified (includes expressions of opinion)
- ‘sensitive personal data’: personal data relating to specified matters, including racial or ethnic origin, political opinions, religious beliefs, trade union membership, physical or mental health, sexual life, commission of any offence.

Duty of the ‘data controller’

Unless the data or the processing is ‘**exempt**’ – it is the **duty** of the data controller to **comply with** the **data protection principles** in relation to all personal data: s4(4), 27(1).

- **Eight** data protection principles: DPA Sch 1
- **Personal data** shall not be processed unless at least one of the conditions in **Sch 2** is met; and
- **Sensitive personal data** shall not be processed unless at least one of the conditions in **Sch 3** is met.
- And note duty to register as ‘data controller’: s17-19.

DPA: the eight data protection principles

- ‘fairly and lawfully’
- obtained for one or more ‘specified and lawful purpose’ and not processed in a manner incompatible with such purpose(s)
- ‘adequate, relevant and not excessive’ in relation to the purpose
- ‘accurate’ and, where necessary, ‘kept up to date’
- not kept longer than necessary
- processed in accordance with the rights of the data subject under the DPA
- taking of measures against unauthorised use, loss of data etc
- no transfer of data outside the EEA (unless rights protected adequately)

DPA – first data protection principle - ‘fairly and lawfully’

- Must comply with at least one condition in Sch 2 and, if processing ‘sensitive personal data’, at least one in Sch 3.

- Regard will be had to the ‘method by which [the data] are obtained’ – whether any person ‘deceived or misled’ as to the purpose for which data would be processed.

- Data will not be treated as processed ‘fairly’ unless the data subject is informed of: the identity of the data controller – the purpose(s) for which data are intended to be processed – and any further information ‘necessary’ to enable the processing to be ‘fair’.

DPA Schedule 2 - conditions include:

1. Data subject has given ‘consent to the processing’.

3. Processing ‘necessary’ to comply with legal obligation (other than contractual obligation).

5. Processing ‘necessary’ for the administration of justice.

6(1) Processing ‘necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed’ – but not where the processing is ‘unwarranted’ in any particular case by reason of ‘prejudice to the rights and freedoms or legitimate interests of the data subject’.

DPA Schedule 3 - conditions include:

1. Data subject has given ‘explicit consent’ to the processing.

5. Information contained in the data made public by steps ‘deliberately’ taken by data subject.

6. Processing is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings) – for obtaining legal advice – or for ‘the purposes of establishing, exercising or defending legal rights’.

7. Processing necessary in the administration of justice.

DPA – the ‘special purposes’

Section 3 provides that the ‘special purposes’ are

- ‘the **purposes of journalism**’
- ‘artistic purposes’
- ‘literary purposes’

DPA s32 – ‘journalism, literature and art’

Personal data which are processed ‘only’ for the ‘special purposes’ – journalism, literature, art - are exempt from key requirements under the DPA:

- the data protection principles (except the 7th)
- section 7
- section 10
- section 12
- section 12A
- section 14(1)-(3)

IF

DPA s32(1) processing data for ‘purposes of journalism’ exempt if...

(a) The processing is undertaken with a **view to the publication** of journalistic material;

(b) Data controller **reasonably believes** that, having regard in particular to the special importance of the public interest of freedom of expression, **publication would be in the public interest**; *and*

(c) Data controller **reasonably believes** that, in all the circumstances, compliance with that provision is **incompatible** with the special purposes.

DPA s32

- In considering whether the belief in s32(1)(b) that publication would be in the public interest – regard 'may' be had to the data controller's compliance with any 'code of practice' relevant to the publication and designated by the Secretary of State: s32(3).

- 'publish' means 'make available to the public or any section of the public': s32(6)

- *Note the provisions in s32(4) & 32(5) (special procedure for "stay" of proceedings, pending a determination by the Information Commissioner, if the data is being processed with a view to publication and has not previously been published by the data controller).*

Processing for the “purposes of journalism”

Law Society v Kordowski [2011] EWHC 3185 (QB) [2014] EMLR 2 (Tugendhat J): “[99]....Journalism that is protected by s32 involves communication of information or ideas to the public at large in the public interest. Today anyone with access to the internet can engage in journalism at no cost. If what the Defendant communicated to the public at large had the necessary public interest, he could invoke the protection for journalism and art.10...”.

- And see Information Commission decision in ***Steinmetz v Global Witness*** (15.12.14): the campaigning NGO could invoke the exemption; its purpose was “to publish information, opinions or ideas for general public consumption. It is our view that this constitutes a journalistic purpose even if they are not professional journalists and the publication forms part of a wider campaign to promote a particular cause.” https://www.globalwitness.org/sites/default/files/141215%20letter%20from%20ICO%20to%20GW%20(2)%20(1).pdf

Campbell v MGN Ltd - [2003] QB 633 CA

- The DPA applies to publication of newspapers and other hard copies – ‘processing’ included ‘obtaining the information’ at one end of the process and ‘using the information’ at the other end – the ‘entire set of operations’ falls within the DPA: see [103], [101-106].

- The s32 exemption applies both before and after publication: [120-127].

- The s32 exemption applies to publication: [128-129]. Where the data becomes exempt as a result of the reasonable belief of the journalist that publication ‘will be’ in the public interest, ‘the data remains subject to that exemption thereafter’.

Campbell v MGN Ltd

- CA (3:0 for D) [2003] QB 633
- Court held it was reasonable to publish the whole 'journalistic package' in the public interest. It would not have been 'reasonably practicable' to comply with the data protection principles while making the publications. The three s32(1) conditions were satisfied: [136].

- HL (3:2 for C) [2004] 2 AC 457
- DPA not considered. See [32] (Nicholls) agreed DPA claim 'stands or falls' with main claim; and [130] (Hale) DPA claim 'adds nothing'.

- **BUT** note difference in the relevant question:
- Privacy claim: **is** publication in the public interest?
- DPA claim: does the data controller (editor) **reasonably believe** that publication was in public interest?

When will it be 'reasonable' to believe that there is a public interest in publication (even if, in fact, there is none)?

- Perhaps in a case like *Campbell* – esp. given difference of judicial opinion?

- *Mosley v News Group Newspapers* [2008] EWHC 1777 (Eady J)

- It is 'only the court's decision' that counts on the question of 'public interest' in a privacy claim [135-137]. But the court considered whether the decision to publish 'could have been taken by a responsible journalist on the information available to him at that time' [143]. There was no public interest, even if the question depended on the 'reasonable judgment' of the journalists [171].

- Why? There had been no 'rational analysis' of the material; the belief that there was a 'Nazi element' in the sexual acts was a 'precipitate conclusion'; the countervailing factors (such as absence of Nazi insignia or 'mocking' of Holocaust victims) were not considered. The decision was, at least, 'casual' and 'cavalier'. It was not 'responsible journalism'.

DPA and the media

- S32 important – but not a ‘get out of jail free’ card.

- s32(1)(b) – must be reasonable belief that publication would be in the public interest.
    - no (reasonable belief in) public interest, no exemption.

- s32(1)(c) – must be reasonable belief that compliance with the provision (eg, the data protection principles) would be ‘incompatible’ with the purposes of journalism.
    - no reasonable belief that compliance would be incompatible, no exemption.

  The data controller has to *think* about it – has to form the specified belief - *and* show that belief is “reasonable”.

Is there a need for a better exemption?

Don’t hold your breath.

Remember the amendment to the defence to the s55(1) criminal offence - without consent, ‘knowingly or recklessly’ to obtain or disclose personal data or the information contained in it (or to procure disclosure to a third party)?

- The original defences included that, in the particular circumstances, the obtaining, disclosing or procuring **was justified** as being in the public interest: s55(2)(d)

- Amended (Criminal Justice and Immigration Act 2008 s78) to add a defence that D acted for the special purposes – with a view to publication of journalistic material - and in the **reasonable belief that** in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest: DPA s55(2)(ca).

  Not yet in force: date to be appointed.

And, besides, would reform be for better or for worse?

Remember the recommendations in the Leveson Report – on the Culture Practices and Ethics of the Press (November 2012) - about amending s32?

See the response of the Information Commissioner to those proposals:

- https://ico.org.uk/media/about-the-ico/documents/1042562/ico-response-to-leveson-report-012013.pdf

And see the Information Commissioner's "Data Protection and journalism: a guide for the media" (September 2014)

- https://ico.org.uk/media/1552/data-protection-and-journalism-media-guidance.pdf

Have a process – follow the process – show you followed the process

"Practical tips" from the ICO on the s32 exemption (page 38 of the "guide"):-

- have clear policies about what needs editorial approval
- give all staff some basic data protection awareness training
- have an inbuilt public interest check at key stages of a story
- consider the data protection implications at key stages of a story
  and
- keep an audit trail for unusually high-profile or intrusive stories.

The "audit trail" – now key to success (or failure) in DPA s32 *and* DA s4?

For background - more on "audit trail": House of Lords, Communications Committee - Third Report – "The future of investigative journalism" (Chapter 3) (2010) http://www.publications.parliament.uk/pa/ld201012/ldselect/ldcomuni/256/25602.htm

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