

IN THE SUPREME COURT OF THE UNITED KINGDOM  
ON APPEAL  
FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)  
BETWEEN

UKSC 2009/0210

A2/2//09/1130

(1) CRAIG JOSEPH  
(2) JASON JOSEPH  
(3) ANTHONY RAYMOND

Respondents/Claimants

- and -

(1) JASON SPILLER  
(2) 1311 EVENTS LIMITED

Appellants/Defendants

(1) ASSOCIATED NEWSPAPERS LIMITED  
(2) GUARDIAN NEWS AND MEDIA LIMITED  
(3) TIMES NEWSPAPERS LIMITED<sup>1</sup>

Interveners

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CASE FOR THE INTERVENERS

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*[An Index to this Case is appended. A short resume of the history of the defence of fair comment is attached as Appendix 1.]*

*I. Introductory*

1. The common law defence of honest opinion to actions in defamation has since the nineteenth century caused more difficulty than any other defence. The Porter Committee in 1948 described it as having suffered greatly from "over-refinement"

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<sup>1</sup> This case and the intervention also has the support of the BBC, British Sky Broadcasting Limited and The Financial Times Limited.

during the last half century. One feature of almost all the authorities is a tendency to analyse specific questions relating to the overall test individually rather than in the round. It is submitted that this is unsatisfactory. Many of the controversies overlap. Liberalising or restricting one aspect of the defence may require revision of another.

2. By way of introduction the interveners summarise below the main issues which have arisen in relation to the defence of honest opinion and the extent to which they can now be said to be, or to appear to be, conclusively resolved (those asterisked arise directly from the Court of Appeal's judgment under appeal). The interveners also summarise below the position for which they would contend.

#### A. What is opinion and what kinds of opinion are protected

- (1) What may qualify as a comment as distinct from a defamatory statement of fact

3. In many cases the line between opinion and fact can be clearly drawn. A potentially problematic area exists where an allegation of fact is an opinion expressed as an inference from another fact or facts. It now seems clear that an opinion of this type, provided it is recognisable as opinion, is as entitled to protection as any other.<sup>2</sup> There is one unresolved issue. In *Hamilton v Clifford*<sup>3</sup> and *British Chiropractic Association v Singh*<sup>4</sup> Eady J held that the defence of fair comment cannot apply where the defamatory

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<sup>2</sup> Duncan & Neill on Defamation 3<sup>rd</sup> edn para 13.10

<sup>3</sup> [2004] EWHC 1542 (cited in *Singh*)

<sup>4</sup> [2010] EWCA Civ 350

sting is a matter of “verifiable” fact. In *Singh* the Court of Appeal rejected Eady J’s conclusion that the allegation in question was one of fact, but did not in terms, as the Appellant invited them to<sup>5</sup>, hold that there was no such limiting principle. It is submitted that an inferential statement of fact, which is recognisable as an opinion, is entitled to protection, whether or not it is verifiable. The words “I believe BP were responsible for the oil spill” may in context be defensible as opinion, even if BP’s responsibility (or lack of it) is ultimately verifiable as a fact. A statement may be defensible as comment and still be capable of being objectively proved to be true ie of being justified (eg *Sutherland v Stopes* [1925] AC HL 47 at 62 per Lord Finlay). It is true that an unverifiable statement will usually be comment for that reason. However it is not a precondition.

**Suggested principle 1:**

*To qualify for the protection of the defence of honest opinion a statement must be recognisable in its context as opinion. A statement of opinion may in context be an inference of fact drawn by the commentator from facts stated or indicated by him.*

- (2) Whether in relation to opinions imputing dishonourable motives there is a special test requiring the defendant to show the opinion was “warranted” or “reasonably warranted” by the facts

4. This striking restriction, principally derived from the judgment of Cockburn CJ in *Campbell v Spottiswoode*<sup>6</sup>, was defended by the Porter

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<sup>5</sup> See the submission recorded in paragraph 8 of the Court of Appeal’s judgment in *Singh*.

<sup>6</sup> (1863) 3 B. & S. 769 at 776-777

Committee in 1948 as maintaining “a just balance between liberty of speech and licence to defame”<sup>7</sup>. In 1975 the Faulks Committee<sup>8</sup> made a detailed critique of the rule and recommended its abolition (para 161 to 169). The objections are several. The words “warranted by the facts” would appear to be equivalent to, or difficult to distinguish from, a plea of justification. This confusion is reflected in authority in the early nineteenth century, which divided between treating the restriction as requiring such allegations to be justified or as imposing a requirement that the opinion should be “reasonably warranted by the facts”<sup>9</sup>. More fundamentally such a restriction emasculates the defence. Imputing dishonourable motives such as putting political advantage before principle or putting director’s interests before those of shareholders are part and parcel of public debate on public interest issues.

5. Though not addressed by statute, and not conclusively addressed by the Courts at the highest level, the restriction has in practice been substantially ignored since the Faulks Committee reported. Modern cases in the Court of Appeal<sup>10</sup> and the Privy Council<sup>11</sup> have included actions where allegations of this type were complained of and where the general test for honest opinion was treated as applicable. No such limitation appears in

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<sup>7</sup> Report of the Committee on the Law of Defamation, 1948 (chaired by Lord Porter) para 85

<sup>8</sup> Committee on Defamation, Cmnd 5909 (1975)

<sup>9</sup> *Dakhyi v Labouchere* [1908] 2 KB 325n at 329n per Lord Atkinson; *Hunt v Star Newspaper* [1908] KB 309 at 317, 320-321, CA; *Joynt v Cycle Trade Publishing Co* [1904] 2 KB 292, CA ; *Peter Walker Ltd v Hodgson* [1990] 1 KB 239 AT 253, CA

<sup>10</sup> *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 (approving *Silkin v Beaverbrook Newspapers Ltd* [1958] 1 WLR 743, which was referred to by the Faulks Committee); *Branson v Bower (No.1)* EMLR 32 and *(No. 2)* [2002] QB 737 at 746

<sup>11</sup> *Jeyaretnam v Goh Chok Wong* [1989] 1 WLR 1109; *Tse Wai Chun v Cheng* [2000] HKCFA 86; [2001] EMLR 31

the obiter summaries by Lord Nicholls of the core principles of the defence of honest opinion in *Reynolds v Times Newspapers Limited*<sup>12</sup> and *Tse Wai Chun Paul v Cheng*<sup>13</sup>. Both the leading text books, Gately on Libel & Slander<sup>14</sup> and Duncan & Neill on Defamation<sup>15</sup> suggest the limitation is no longer good law. Any such limitation would also run contrary to the width given to opinion and to the European jurisprudence on Article 10 and was rejected by the ECHR in *Nilsen v Norway*.<sup>16</sup>

6. Accordingly the interveners submit that Principle 1 should be confirmed as a general principle with no exception or special test for opinions critical of a person's motives.

(3) Whether the comment must be fair and, if not, what objective test the opinion must pass to qualify for protection

7. The "fairness" restriction on the objective test was always problematic, since there are conceptual difficulties with Lord Esher's theoretical commentator in *Merivale v Carson*<sup>17</sup> being both a fair man and yet one who might hold prejudiced, exaggerated or obstinate views. The Porter Committee recommended the substitution of "honest" for "fair" and recommended that the defence be reclassified as simply "Comment". Lord

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<sup>12</sup> [2001] 2 AC 127 at [12]-[15]

<sup>13</sup> [2000] HKCFA 86; [2001] EMLR 31

<sup>14</sup> Gately on Libel & Slander 11<sup>th</sup> edn para 12.24

<sup>15</sup> Duncan & Neill on Defamation 3<sup>rd</sup> edn para 13.04

<sup>16</sup> (23118/93) (2000) 30 EHRR 878 ECHR

<sup>17</sup> *Merivale v Carson* (1888) L.R. 20 Q.B.D. 275 at 280

Porter repeated that view in *Turner v Metro-Goldwyn-Mayer Pictures Ltd*<sup>18</sup>. In the recent Court of Appeal decision in *Singh*<sup>19</sup> the term “*honest opinion*” was suggested. In the European jurisprudence the favoured term is “*value judgments*” to be distinguished from defamatory allegations of fact.

8. There is a subordinate issue as to whether the objective test should be applied to the artificial single meaning or any meaning within the reasonable range of possible meanings. There is some support for the latter approach in the European jurisprudence: *Feldek v Slovakia*<sup>20</sup> where the ECHR held that there was an infringement of Article 10 on this basis:

*“Nor can the Court subscribe to a restrictive definition of the term “fascist past”. The term is a wide one, capable of evoking in those who read it different notions as to its context and significance. One of them can be that a person participated in a fascist organisation, as a member, even if this was not coupled with specific activities propagating fascist ideals.” (paragraph 86)*

9. In the recent case of *Singh*<sup>21</sup> the point does not appear to have been argued. Such a submission was made in *Lowe v Associated Newspapers*<sup>22</sup> and rejected by Eady J as being inconsistent with an objective test. Neither Duncan & Neill nor the current edition of *Gatley* advocate it.<sup>23</sup> It is clear that the single meaning rule does apply to justification. In view of the

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<sup>18</sup> [1950] 1 All ER 449 at 461F. See also Lord Nicholls’ statement in *Reynolds* at 193: “that the time has come to recognise that in this context the epithet “fair” is now meaningless and misleading”.

<sup>19</sup> *British Chiropractic Association v Singh* [2010] EWCA Civ 350

<sup>20</sup> (2000) 30 EHRR CD 291

<sup>21</sup> [2010] EWCA Civ 350

<sup>22</sup> [2007] QB 580

<sup>23</sup> Duncan & Neill on Defamation 3<sup>rd</sup> edn paras 13.42-13.43; *Gatley on Libel & Slander* 11<sup>th</sup> edn para 12.6

generosity of the objective test, the question is unlikely to present a problem in most cases. The most difficult area lies with ambiguous words such as “sharp”, which may impute dishonesty or merely sailing close to the wind. The safeguards of reasonableness built into the single meaning rule<sup>24</sup> should serve to moderate any theoretical problem. Further the test is objective.

Accordingly the interveners do not advocate that the commentator’s subjective view of meaning is material at this stage, though it is central where malice is alleged (see Issues (13)-(14) below).

**Suggested principle 2: The opinion will qualify for protection if any person, however prejudiced, exaggerated or obstinate his views, could have honestly expressed it on the proved facts<sup>25</sup> or on alleged facts protected by privilege (see Issue (10) below)**

(4) Whether the opinion must be on a matter of public interest

10. The orthodox view imposes this requirement, which is a constant feature in domestic cases. The Appellants’ case contends for its abolition. The issue of whether and, if so, to what extent, opinions on matters which are not of public interest must be proved to be true - has attracted very little analysis. It is not an issue, which arises directly on this appeal. There may well be circumstances, especially in cases of limited publication in a

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<sup>24</sup> *Skuse v Granada Television Ltd* [1996] E.M.L.R. 278

<sup>25</sup> This substantially reflects Lord Keith’s formulation in *Telnikoff v Matusevitch* [1992] 1 AC 343 at 354: “whether any man, however prejudiced and obstinate, could honestly hold the view expressed by the defendant”.

private context, where opinions on true facts do not qualify for the protection of qualified privilege and may yet merit protection.

11. However any abolition or partial relaxation of the public interest requirement would require close consideration of the potential impact on the developing law of privacy (which provides remedies in damages and an injunction for intrusion caused by the misuse of personal information) of allowing defamatory public comment on a person's private life within the considerable width of the objective test.
12. With one exception jurisdictions in which the defence of fair comment has been defined by statute, the public interest requirement has been maintained. It is also a requirement in Lord Lester's proposed Defamation Bill. The New Zealand Defamation Act 1992 does not expressly require the comment to be on a matter of public interest. Nor does it expressly remove it. The effect of the statute is controversial, since its long introductory title states that it is only in place to "*amend the law relating to defamation*". In obiter observations different views have been expressed as to whether this means that the common law public interest requirement is maintained or, by implication, withdrawn.
13. The interveners believe any reform of this aspect of the defence would require very close examination and detailed submission.
14. The interveners do not contend for the abolition of this requirement on the present appeal, where the issue does not directly arise, provided, as authority suggests and the Court of Appeal's decision in the present case confirms, a liberal approach is taken to what constitutes a matter of public interest within the meaning of the rule. Local issues, historical issues, and



even the relatively trivial, can provide in context important 'examples' of a particular malaise or public interest concern. Suggested principle 3 is therefore subject to the qualification that this issue may in due course merit further attention.

**Suggested principle 3: The opinion must be expressed on a matter of public interest**

**B. What facts the commentator may rely on**

- (5) Whether the facts relied on by the commentator must be set out in the words complained of, and, if not, whether and to what extent they must be "indicated" or "referred to" in the words complained of (and what those terms in practice mean)\*

15. This is a central issue of principle on this appeal and one of current controversy. In summary the interveners contend that there is no such restriction on many grounds including principle, workability, and compatibility with Article 10. This is addressed in detail below. It is closely connected with Issue (7). The principle for which the interveners contend in relation to qualifying facts is set out below:

**Suggested principle 4: The defendant may rely on any proved facts or privileged material in existence at the time of publication, provided those facts relate to the subject matter of the comment.**

- (6) Assuming facts not set out or indicated or referred to in the words complained of may be relied on, whether they must be known to the commentator (and what "known" in this context means)
16. Again this is a central issue of principle on this appeal and one of current controversy. In summary the interveners contend that there is no such restriction on many grounds including principle, workability, and compatibility with Article 10. This too is addressed in detail below and closely connected with Issue (7) - and also (13), since the knowledge of the commentator is in the interveners' submission adequately provided for by loss of the defence through malice (a subjective test).
- (7) In the light of the answers to Issues (5) and (6), is the position different for those (including the media) who report the opinions of others
17. There is some authority on this important question, which is considered in full below. If the interveners are right on Issues (5) and (6), this problem is substantially removed. If they are wrong on (5) and/or (6), important questions arise as to how the media stand, when reporting comments by others, in contrast to the original commentator.
- (8) Whether the commentator may rely on facts which do not exist at the time of publication\*
18. The appellants' case<sup>26</sup> argues for the introduction of such a principle. The interveners have conceptual difficulties with this proposal as a general proposition. A commentator is expressing an opinion - and perceived to

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<sup>26</sup> Appellants' case paras 82-83

be expressing an opinion - on the facts as they currently stand. Subsequent facts may be admissible as tending to prove contentious facts alleged to exist at the time of publication. Otherwise the interveners do not argue for such a far reaching relaxation. The interveners are unaware of any other jurisdiction, where subsequent facts can as a matter of general principle be relied on as supporting the comment complained of.

19. Justification is, of course, concerned with the proof of defamatory factual allegations, not opinions based on facts (defamatory or not). However both defences do require consideration of what facts may be proved and how. The rule on justification is not straightforward on this issue. In relation to a general charge (eg "X is a scoundrel" to quote Lord Denning's example in *Cohen v Daily Telegraph*<sup>27</sup>) subsequent facts *may* tend to prove the libel is true at the date of publication. In relation to a specific charge subsequent facts may be apt to prove motive at the date of publication, or may otherwise be admissible as similar fact evidence. However in all these cases the facts are admissible because they tend to prove the charge to be true at the time of publication - hence the observation in *Maisel v Financial Times Limited*<sup>28</sup> that subsequent events must be "*within a reasonable time after publication*". If that nexus were removed, there could be unfairness to claimants and defendants.

20. An example is where the allegation is of reasonable grounds to suspect the commission of a discreditable or criminal act. The balance of authority is firmly against admitting subsequent events as particulars of justification<sup>29</sup>

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<sup>27</sup> [1968] 1 WLR 916 at 919

<sup>28</sup> [1915] 3 KB 336 at 340 per Lord Cozens-Hardy MR

<sup>29</sup> Gately on Libel & Slander 11<sup>th</sup> edn para 11.6

- interestingly by way of analogy with the defence of fair comment<sup>30</sup>. As was pointed out in *Chase v News Group Newspapers Limited* that rule not only assists claimants: "*The viability of a plea of justification cannot, for instance, be weakened if subsequent events reveal that it is no longer reasonable to hold that suspicion*".<sup>31</sup>

21. Likewise a defensible opinion that a man's behaviour was "*disgraceful*" based on a criminal conviction cannot lose the protection of the defence of honest opinion, merely because an appeal after publication succeeds.
22. Accordingly while it may in particular circumstances be appropriate to refer to subsequent facts, the interveners accept that the objective test must be applied to the circumstances as they exist at the time of publication.
- (9) To what extent a claimant may rely on different facts so as to argue that on a full view the opinion fails the objective test\*
23. There are cases where it is obviously appropriate for a claimant to introduce facts, which demonstrate that the facts relied on by the defendant are false or materially distorted by omission. However this is but an aspect of the commentator's obligation to prove that the facts he relies on are true. Otherwise the scope for 'claimant's facts' should be limited, since they are only material if they could show that, when taken

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<sup>30</sup>*King v Telegraph Group Limited* [2004] EWCA Civ 613 [2004] EMLR 23 at [22]: "It is not permitted to rely upon post-publication events in order to establish the existence of reasonable grounds, since (by way of analogy with fair comment) the issue has to be judged as at the time of publication".

<sup>31</sup> [2002] EWCA Civ 1722; [2003] EMLR 11 at [52]

into account with the 'defendant's facts', the commentator cannot pass the objective test<sup>32</sup>. In view of the width of that test, such cases should be rare.

24. If the underlying facts are defamatory, they have to be separately justified, and the claimant is entitled to introduce other facts to demonstrate the falsity of the charge.

25. These observations are made for completeness. It is submitted that they do not require any amendment to the core principles.

(10) To what extent privileged material may qualify as facts for the purposes of protection

26. This general principle is well established<sup>33</sup> and indeed critical if the right to express opinions on public interest issues is to have real value. Much public interest criticism is based on conclusions or statements in official reports, court proceedings, public inquiries and the like, which enjoy statutory reporting privilege under sections 14 and 15 and Schedule 1 to the Defamation Act 1996 or an analogous qualified privilege at common law.

27. Further, moving from reporting privilege to investigative privilege, if the media responsibly investigate and report on allegations of fact, so as to enjoy *Reynolds*<sup>34</sup> qualified privilege at common law for their conclusions,

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<sup>32</sup> See observations of Eady J to this effect in *Branson v Bower (No. 2)* [2002] Q.B. 737 at [36] - [39].

<sup>33</sup> *Duncan & Neill on Defamation* 3<sup>rd</sup> edn para 13.40; *Gatley on Libel & Slander* 11<sup>th</sup> edn para 12.21 and the cases there cited.

<sup>34</sup> *Reynolds v Times Newspapers Limited* [2001] 2 AC 127. This defence enables the publisher of a defamatory statement to plead that it concerned a matter of general public interest and that he or she acted

there should be a correlative right to comment on that material, without being required to prove that those conclusions are true. Further there is no reason for that right not to enjoy the width which the defence of honest opinion allows. The *Reynolds* defence presupposes that it is in the public interest for defamatory material to be published (even though it cannot be proved to be true). On that hypothesis the right to comment on that material should be no narrower than it is in relation to commenting on third party privileged reports rather than the conclusions of the media themselves. In *Galloway v Telegraph Group*<sup>35</sup> Eady J held that a commentator may base his opinion on an article protected by *Reynolds* privilege just as he may on a report of court proceedings.

28. There is a third category of qualified privilege at common law, which has been termed '*reportage*'<sup>36</sup>. It exists to protect the neutral reporting of rival sides to a dispute in the context of public interest issues. The scope for opinion may here be less in view of the requirement of neutrality. However there is no reason in principle why the ordinary test for honest opinion should not again apply (eg that the dispute is '*unedifying*' or that a particular allegation is serious enough to warrant official inquiry). If it is sufficiently strong or partisan to invalidate the privilege, then sufficient '*facts*' in the conventional sense would have to be pleaded and proved.

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responsibly in checking his sources and, where appropriate, giving the person defamed a reasonable opportunity to rebut the allegation.

<sup>35</sup> [2004] EWHC 2786; [2005] EMLR 7 at [174]-[176]

<sup>36</sup> *Al-Fagih v HH Saudi Research & Marketing (UK) Limited* [2001] EWCA Civ 1634; [2002] EMLR 13. The majority of the Court of Appeal held that the publication was privileged on the grounds that the defendants had in no way adopted or endorsed the allegation; the publication was a report of a stage in an ongoing political dispute of legitimate interest to the readership and both sides of the political dispute were being fully, fairly and disinterestedly reported. The failure of the defendants to take steps to verify the allegation did not in such a case exclude the report being privileged. The House of Lords refused permission to appeal.

29. This principle is accommodated in suggested principle 2 above.

**C. What facts the commentator is required to prove to qualify for protection**

(11) The true construction of section 6 of the Defamation Act 1952 (which requires consideration of the position at common law prior to its introduction)\*

30. This issue is central to the appeal and the subject of detailed submission below. It is closely connected with issues (5), (6) and (7) above. It requires close examination of the historical context.

(12) Assuming extrinsic facts may also be relied on, whether the test is different in relation to facts referred to or set out in the words complained of and facts extrinsic to the words complained of (and, if so, why the test should be different)\*

31. The interveners repeat their comment on Issue (11) above. The interveners summarise their position on these issues as follows:

**Suggested principle 5: If the defendant proves sufficient facts to satisfy the objective test set out in principle 2, then (subject to malice) the defence succeeds irrespective of whether facts referred to in the publication or facts relied on extrinsic to the publication are not proved or misstated. This principle does not absolve a defendant of the obligation to prove defamatory statements of fact to be true (subject to section 5 of the Defamation Act 1952).**

#### D. Malice

(13) Whether the defence of honest opinion is defeated where the claimant is able to plead and prove malice

32. The interveners note the Appellants' submission in their Case that the requirement of malice should be removed. The interveners do not support the proposal. Indeed they rely on the retention of malice as an important safeguard in support of their submissions on Issues (5) to (7) above. This question is further developed below in this context.

33. Although the European jurisprudence does not expressly stipulate that a claimant may by proof of malice remove protection from an otherwise defensible opinion, it is a feature of Article 10 cases that the right to freedom of expression, as with all rights and freedoms, brings with it responsibilities. It is not obvious why a critic who lambasts a book, which he falsely and dishonestly claims to have read, should have the protection of the defence - merely because the book exists and he might have honestly expressed that opinion if he had read it.

34. The obligation on a claimant alleging malice to plead it has appeared in the rules of the Supreme Court from 1949<sup>37</sup> until the introduction of the Civil Procedure Rules when an equivalent rule was retained<sup>38</sup>. The loss of the defence through proof of malice (however defined) is a feature of the

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<sup>37</sup>RSC O.82 r.3(3) (formerly O.19, which had been introduced in 1949 as a result of the Porter Report on the Law of Defamation)

<sup>38</sup>CPR Part 53 r.2.9



Australian statutory defence<sup>39</sup> and Lord Lester's Defamation Bill. None of the leading textbooks suggest that the doctrine is flawed. It may be that its origins lie in the defence's shared ancestry with qualified privilege but that does not render the principle unsound.

(14) Whether malice (assuming the answer to Issue (13) is yes) is confined to proof that the defendant did not honestly hold the opinion expressed or whether it extends to honest opinions expressed for motives of spite or ill will (such as would defeat a defence of qualified privilege) or whether some other formulation is to be preferred

35. Until recently a similar test was applied to opinion as to qualified privilege, where the focus is on a dominant improper motive rather than honesty of belief<sup>40</sup>. With one important refinement the interveners adopt the statement of principle by Lord Nicholls in *Cheng*<sup>41</sup> to the effect that honest belief is "*the touchstone*" and that an "*improper motive*", such as spite or ill will, is not of itself enough.

36. There are occasions where a journalist may be asked to outline the argument for a particular cause and in doing so may express an opinion, which he does not in fact hold, while still acting honestly. Distinctly an editor will publish and edit many letters (and, these days, blogs) with which he does not agree. It is submitted that the true test for malice is that the protection is lost where the defendant "*does not act honestly in publishing*

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<sup>39</sup> See e.g. Defamation Act 2005 (Queensland), s.31. Under s10(3) of the New Zealand Defamation Act 1992 a "defence of honest opinion shall not fail because the defendant was motivated by malice" but it is for the defendant to prove that he held the opinion: s10(1).

<sup>40</sup> *Horrocks v Lowe* [1975] AC 135

<sup>41</sup> *Tse Wai Chun v Cheng* [2000] HKCFA 86; [2001] EMLR 31

*the opinion complained of*'. There may be other unusual situations where this more flexible formula is preferable.

37. There is a further subordinate issue as to whether honesty is decided by reference to the artificial single meaning or by reference to the commentator's intended meaning. The latter is now established as the rule in both *Reynolds* qualified privilege and more conventional duty-interest privilege.<sup>42</sup> Such an adjustment was canvassed by Lord Cooke in *Next Magazine Publishing Ltd v Ma Ching Fat*<sup>43</sup> in these terms:

*"Although Lord Nicholls did not need to and did not in fact discuss the question, it may well be that the strict "single meaning" rule is equally inapplicable to the defence of fair (i.e. honest) comment. So to hold would be consistent with the freedom of the press which, subject to essential safeguards, the modern law supports. Thus, in a case of ambiguity, the writer of an article could be heard to give evidence of what he or she actually meant and of his or her honest belief".*

38. The interveners support that approach. The principle as expressed below allows the commentator's honesty to be judged by reference to the meaning he intended to convey and not the artificial single meaning produced by the single meaning rule.

**Suggested principle 6: The defence of opinion is lost where a claimant proves that the defendant did not act honestly in publishing the opinion complained of (see also Issue (16))**

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<sup>42</sup> *Jameel v Wall Street Journal SPRL* [2007] 1 AC 359; *Bonnick v Morris* [2003] 1 AC 300 at [20]; *Loveless v Earl* [1999] EMLR 530 CA at 538

<sup>43</sup> [2003] HKLRD 751 at [145]

- (15) Whether the malice of the original commentator defeats the defence of a third party who without malice reports the original commentator's opinion and, if not, how the reporter's state of mind is to be approached

39. In the present appeal the Appellants are themselves the commentators. The interveners accept that ordinary rules of vicarious liability apply to opinions expressed by their servants or agents (see *Egger v Viscount Chelmsford*<sup>44</sup>). Otherwise it is submitted that each defendant must be considered separately. There is support for this view in an obiter observation by Scott LJ in *Lyon v Daily Telegraph Limited*<sup>45</sup> and Lord Keith in *Telnikoff v Matusevitch*.<sup>46</sup> On this basis suggested principle 3 needs no amendment.

## *II. Detailed Further Submissions on issues directly arising*

### *General considerations underlying a modern approach*

#### *(i) High order speech*

40. The interveners do not repeat the well known emphasis given to the importance of opinion (see, for example, the well known "*bulwark of free speech*" statement in paragraph 151 of the Faulks Report cited in paragraph 7 of the Appellants' case). The blogosphere, phone in programmes, letters pages, review sections, and

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<sup>44</sup> [1965] 1 QB 248 at 265

<sup>45</sup> [1943] KB 746 at 752

<sup>46</sup> A defendant who has published the comment of another does not have to show that he shares the opinion expressed in the comment: [1992] 2 AC 343 at 355 per Lord Keith.

editorials are rife with comment on a wide variety of public interest issues. The importance is obviously not in any way confined to the media and applies as much to the spoken as to the written word. Assuming the right to express defamatory opinions is restricted to matters of public interest (as current authority suggests), the approach should be liberal. There are a number of judicial statements illustrating this proposition<sup>47</sup>, for example the classic summing-up of Diplock J in *Silkin v Beaverbrook Newspapers Ltd*<sup>48</sup> :

*"What are the limits of the right of comment? Quite rightly they are very wide. First of all, who is entitled to comment? The answer to that is 'everyone'. A newspaper reporter or a newspaper editor has exactly the same rights, neither more nor less, than every other citizen, and the test is no different whether the comment appears in a Sunday newspaper with an enormous circulation, or in a letter from a private person to a friend or, subject to some technical difficulties with which you need not be concerned, is said to an acquaintance in a train or in a public house. So in deciding whether this was fair comment or not, you dismiss from your minds the fact that it was published in a newspaper, and you will not, I am sure, be influenced in any way by any prejudice you may have for or against newspapers any more than you will be influenced in any way by any prejudice which you may have for or against Lord Silkin's politics. Those are matters which you will, I am sure, all of you, dismiss from your minds.*

*"I have been referring, and counsel in their speeches to you have been referring, to fair comment, because that is the technical name which is given to this defence, or, as I should prefer to say, which is given to the right of every citizen to comment on matters of public interest. But the expression 'fair comment' is a little misleading. It may give you the impression that you, the jury, have to decide whether you agree with the comment, whether you think it is fair. If that were the question you had to decide, you realize that the limits of freedom which the law allows would be greatly curtailed. People are entitled to hold and to express freely on matters of public interest strong views, views which some of you, or indeed all of you, may think are exaggerated, obstinate or prejudiced, provided – and this is the important thing – that they are views which they honestly hold. The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury, and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it*

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<sup>47</sup> *Merivale v Carson* (1888) L.R. 20 Q.B.D. 275 at 280 per Lord Esher MR; *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449 at 461 per Lord Porter.

<sup>48</sup> [1958] 1 W.L.R. 743 at 746-7 (cited with approval by Lord Bingham CJ giving the judgment of the Court in *Reynolds v Times Newspapers Ltd* 2 AC 127 at 164.

*agrees with the comment instead of applying the true test: was this an opinion, however exaggerated, obstinate or prejudiced, which was honestly held by the writer?*

(ii) *Certainty*

41. This reflects the following well known passage in the judgment of the European Court of Human Rights in *Goodwin v United Kingdom*<sup>49</sup> that:

*"... the relevant national law must be formulated with sufficient precision to enable the persons concerned – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail"*.

The principle can be taken too far. The advantages of certainty must be measured against the disadvantages which tend to flow from rigidity. However in the context of opinion it is important that the governing rules are simple and workable.

(iii) *Mode of trial*

42. It is also material that ordinarily both the objective and subjective tests will be for a jury to apply, unless the exempting criteria in section 69 of the Supreme Court Act 1981 are met. If the applicable test, or any element of it, is difficult for judges, they are likely to be more so for juries, who ordinarily give only a general verdict and whose reasoning therefore is not open to review.

(iv) *Harm to reputation and Article 8*

43. Article 8 does not refer expressly to reputation and in early European cases reputation was primarily addressed by reference to Article 10.2. From about 2003

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<sup>49</sup> (1996) 22 EHRR 123, 140

a series of cases treated reputation as within the protection afforded by Article 8, culminating in the following statement in *Pfeifer v Austria*: “The Court considers that a person’s reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her “private life”. Article 8 therefore applies.”<sup>50</sup> In *An Application by Guardian News and Media Ltd and others in HM Treasury v Mohammed Jabar Ahmed & Ors*<sup>51</sup> the media argued for the old position, relying on *Karakó v Hungary*<sup>52</sup>. Analysing *Karakó*, the Supreme Court stated that the ECHR had not “departed from that earlier jurisprudence” and held that the right to reputation falls within the scope of Article 8<sup>53</sup>. It currently therefore remains a case of balancing competing Convention rights, not justifying as necessary exceptions to Article 10 under Article 10.2. However in domestic defamation law both the common law and statutory intervention has long sought to strike such a balance.

44. It is material to have in mind throughout that a defamatory statement of opinion is inherently less damaging to reputation than a defamatory statement of fact, because by definition it is only one person’s view of events and admits of disagreement<sup>54</sup>.

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<sup>50</sup> (2007) 48 EHRR 175, 183 at para 35

<sup>51</sup> [2010] 2 W.L.R. 325 at [37]-[51]

<sup>52</sup> *Karakó v Hungary* (Application No 39311/05) (unreported) given 28 April 2009, ECtHR

<sup>53</sup> The Supreme Court held that on the facts of *Karakó* the applicant had been unable to show that the publication in question “had constituted such a serious interference with his private life as to undermine his personal integrity”; and that therefore his reputation “alone was at stake in the context of the expression which was said to have damaged it.” This did not mean that the claim in respect of his reputation did not fall within Article 8; the ECHR being concerned in *Karakó* “with the application of Articles 8 and 10 in a situation where, in the court’s view, the applicant had not shown that the attack on his reputation had so seriously interfered with his private life so as to undermine his personal integrity.”

<sup>54</sup> There are exceptions where the opinion is self evidently true if the premise is correct, such as “X murdered his father and acted disgraceful”.

*(v) The availability of public interest data and developments in mass communications*

45. The availability of public interest data has been transformed by the Internet and access to it through browsers and search engines. The World Wide Web commenced in December 1990. It is comparable to the invention of the printing press in its revolutionary scope. It has dramatically expanded access to information and offered citizens new possibilities of discussing issues with one another and participating in public debate. Blogging and other forms of user-generated content mean everyone with access to the Internet can in effect operate his own publishing house and reach readers around the world. On most online media sites there is now a facility for readers to comment on topical news items.

*Detailed submissions on Issue (5): Whether the facts relied on by the commentator must be set out in the words complained of, and, if not, whether and to what extent they must be "indicated" or "referred to" in the words complained of (and what those terms in practice mean)\**

46. It is critical to keep distinct two quite separate issues - whether an opinion is recognisable as such (Issue (1)) and what facts may be relied on to support it (Issue (5)). The presence of facts in the words complained of will make it more likely that any deduction or inference from those facts is recognisable as an opinion.
47. The contest on this question primarily lies between contrasting statements of principle by Lord Nicholls in *Cheng* and by Eady J in *Lowe v Associated Newspapers Ltd*. Lord Nicholls in *Cheng* states: "*The comment must explicitly or*
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*implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well-founded*".<sup>55</sup> Eady J in *Lowe* held the position to be, adapting the words of Birkett LJ in *Kemsley v Foot* in the Court of Appeal: "*comment may be made, if the matter is already before the public, without setting out the facts on which the comment is based - provided the subject-matter of the comment is plainly stated*".<sup>56</sup>

48. It is respectfully submitted that Eady J's approach in *Lowe* (subject to one qualification) is correct for the following reasons:

(1) *Precedent*

49. *Kemsley v Foot* is clear authority for the proposition that the facts need not be set out or sufficiently indicated to enable the reader or listener to judge the merits of the opinion. The relevant passage from Lord Porter's speech is set out in paragraph 52 below. The Court of Appeal in *Kemsley* was of the same view (see Somervell LJ at 43-5, Birkett LJ at 61). Mr Mitchell (p179) cites Field J in *O'Brien v Marquis of Salisbury* (1889) 54 JP 215 as authority for the proposition that facts must be referred to in the words. The interveners question whether the case contains any such statement of general principle, but in any event it is superseded by *Kemsley*, which has been applied in several modern authorities since (eg by the Court of Appeal in *London Artists v Littler* [1969] 2 QB 375). In *Kemsley* Lord Porter said of his approach: "*In reaching the conclusion which I have*

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<sup>55</sup> [2000] HKCFA 86; [2001] EMLR 31 at [41], [19], [48]-[49] and Lord Nicholls' earlier statement to the same effect in *Reynolds v Times Newspapers Limited* [2001] 2 AC 127, 201 D-E.

<sup>56</sup> [2007] Q.B. 580 at [42] (adapting the words of Birkett LJ in *Kemsley* [1951] 2 KB 34, CA at 51). Eady J held that Lord Nicholls' statement in *Reynolds* was obiter while *Cheng* was of only persuasive authority and hence the statement of law in *Kemsley v Foot* was binding authority on the lower court: [41]-[42].



*stated I am not conscious of being at variance with the authorities or at any rate with cases decided in this country*".<sup>57</sup>

(2) *The stated policy reason for the restriction is unsound and logistically unworkable*

50. In relation to much criticism many viewers or listeners will not be able to judge the merits of an opinion, even if the facts were referred to or indicated. In *Telnikoff* Lord Ackner gave the example of a play<sup>58</sup>, which closes early - the same can be said of out of print books. Also in practice it would in many cases require many facts to be given to enable ordinary readers/listeners to judge for themselves whether they agree. This is especially true, where the opinion is expressed on the basis of a Report by a Public Inquiry or relates to complex scientific issues. Politicians and professionals commonly appear on the media to give their opinions by way of quick response. It is wholly unrealistic to impose an obligation to set out sufficient detail for the publishees to be able to make their own informed judgment about the opinion expressed. In *Kemsley* no specific coverage was identified at all. The words complained of were merely "*Lower than Kemsley*". As stated by Somervell LJ in the Court of Appeal in *Kemsley*: "*It seems to me plain, and McQuire's case (supra) shows it, that there are many cases where the reader cannot judge from what he reads whether the comment is fair or not...*"<sup>59</sup>
51. A further problem is that the publication may mis-state some facts, and yet the defence may still succeed by virtue of section 6 of the Defamation Act 1952 (see below). In such cases the reader/listener is likely to form his view by reference to all the alleged facts including those which are mis-stated.

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<sup>57</sup> Lord Porter attributes such contrary authority there was to a misreading of the judgment of Fletcher-Moulton LJ in *Hunt v Star* [1908] 2 KB 309: *Kemsley v Foot* [1952] AC 345, 359-360.

<sup>58</sup> *Telnikoff v Matusevitch* [1992] 2 AC 343 at 361

<sup>59</sup> [1951] 2 KB 34 at 44 (citing *McQuire v Western Morning News* [1903] 2 KB 100, CA)

52. It would on logistical grounds alone significantly chill freedom of expression if facts had to be sufficiently indicated so as to allow the reader or viewer to form his own opinion.

*Whether there is any restriction beyond the temporal on available facts*

53. This leaves the question as to whether there is any restriction on what facts may be relied on to support the comment other than that they must have existed at the time of publication (see the discussion in Issue (8) above). The starting point is

*Kemsley:*

- (1) *"The same observation is true of a newspaper. Whether the criticism is confined to a particular issue or deals with the way in which it is in general conducted, the subject-matter upon which criticism is made has been submitted to the public, though by no means all those to whom the alleged libel has been published will have seen or are likely to see the various issues. Accordingly, its contents and conduct are open to comment on the ground that the public have at least the opportunity of ascertaining for themselves the subject-matter upon which the comment is founded..." (Lord Porter, p355-6)*
- (2) *therefore the inquiry ceases to be - Can the defendant point to definite assertions of fact in the alleged libel upon which the comment is made? and becomes - Is there subject-matter indicated with sufficient clarity to justify comment being made? and was the comment actually made such an honest, though prejudiced, man might make?  
Is there, then, in this case sufficient subject-matter upon which to make comment (Lord Porter, p357)*
- (3) *It is not, in my opinion, a matter of importance that the reader should be able to see exactly the grounds of the comment. It is sufficient if the subject which ex hypothesi is of public importance is sufficiently and not incorrectly or untruthfully stated. (Lord Oaksey, p361)*

And in the Court of Appeal:

- (4) *But it is always to be left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not*

*allowed to overstep these limit". It cannot be doubted, I think, that the conduct of a newspaper is a public matter, and that the final judgment on fairness or unfairness is to be given by a jury on the subject-matter discussed, that is, the conduct of the newspaper. (Birkett LJ)*

In *Telnikoff v Matusevich* [1992] 2 AC 343 at 354 Lord Keith stated by reference to *Kemsley*: "There can be no doubt that where the words complained of are clearly to be recognised as comment, and the subject matter commented on is identified, then that subject matter must be looked at to determine whether the comment is fair..."

54. None of the above dicta support any restriction on the facts, which may be relied on, provided 'the subject matter' is identified. Whether that is so is an issue of fact, which will vary from case to case. There may be issues as to what precisely 'subject matter' means in this context. To give an example, I may express the view that a politician should resign by reference to his expenses claims either expressly or by implicit reference to the issue as a matter of current public controversy. In those circumstances I may not be permitted to rely on his hitherto unknown gambling habit. If the subject matter is broad, as in *Kemsley*, the scope for particulars is considerable. Accordingly the interveners do question Eady J's requirement that comment may be made without setting out all the facts "if the matter is already before the public". It is submitted that what is required is that the comment relates to a matter of public interest, and that the matter is sufficiently identified. There is no obligation to set out all the facts merely because the controversy is new.

Detailed submissions on Issue (6) Assuming facts not set out or indicated or referred to in the words complained of may be relied on, whether they must be known to the commentator (and what "known" in this context means)

55. This principle derives from the Scottish case of *Wheatley v Anderson and Miller*<sup>60</sup> where Lord Anderson stated:

*"The jury are entitled to know what was in a defender's mind at the time he made the comment, otherwise they will not be properly equipped for the discharge of their duty. It seems to me, however, to be quite incompetent for a defender, in support of a plea of fair comment, to aver and substantiate facts which were not in his mind at the time the comment was made, but which were discovered at a later date."*

56. In consequence the principle was stated to be the law in both *Gatley* and *Fraser on Libel & Slander* (7th edition, 1936) and *Gatley* (6th edition, 1967). The case was treated with caution by the Court of Appeal in *Cohen v Daily Telegraph* [1968] 1 WLR 916 and especially by Lord Denning who stated:

*"In order to make good a plea of fair comment, it must be a comment on facts existing at the time. No man can comment on facts which may happen in the future. There is a passage in Gatley on Libel and Slander (6th ed.), 1967, at p. 723 which goes further. It says: "The facts which the defendant seeks to prove as the basis of his comment must have been known to him when he made the comment." I do not know that I would go quite so far as that. A man may comment on existing facts without having them all in the forefront of his mind at the time. Nevertheless it must be a comment on existing facts..."*

57. There is undeniably a philosophical appeal in the notion that you can only comment on facts you know. However the interveners submit that in practice such a requirement is unworkable and contrary to principle. In *Lowe Eady J* at [74] set out the following criteria for establishing knowledge of supporting facts:

(1) *Any fact pleaded to support fair comment must have existed at the time of publication.*

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<sup>60</sup>1927 SC 133, Ct of Sess

(2) *Any such facts must have been known, at least in general terms, at the time the comment was made, although it is not necessary that they should all have been in the forefront of the commentator's mind.*

(3) *A general fact within the commentator's knowledge (as opposed to the comment itself) may be supported by specific examples even if the commentator had not been aware of them (rather as examples of previously published material from Lord Kemsley's newspapers were allowed).*

(4) *Facts may not be pleaded of which the commentator was unaware (even in general terms) on the basis that the defamatory comment is one he would have made if he had known them.*

(5) *A commentator may rely upon a specific or a general fact (and, it follows, provide examples to illustrate it) even if he has forgotten it, because it may have contributed to the formation of his opinion.*

....

(8) *A defendant who is responsible for publishing the defamatory opinions or inferences of an identified commentator (such as in a newspaper column or letters page) does not have to show that he, she or it also knew the facts relied upon-provided they were known to the commentator.*

58. The following practical difficulties arise with this approach:

(a) *Burden of proof*

The burden of proof lies on the defendant (save for malice). In consequence the defendant will have to prove that he knew the relevant facts.

(b) *Recollection*

The limitation period in defamation is one year. Often the facts will not have occurred contemporaneously with the comment. Also public interest issues can retain topicality for some time, making it more difficult to identify what was

known when. It is unreal to suppose that anyone will be able to give a compendious list of the facts known to them at any particular time. People variously rely on skim reading, summaries by others, and what they read and see in the media. Much knowledge is acquired from fleeting internet searches. Regard also has to be had to the volume of data available on public interest issues. Eady J's point (5) itself recognises that a defendant may rely on facts he has forgotten. If that is right, how is that sensibly to be investigated?

(c) *Jury direction*

Eady J's guidance is complex. There is a serious risk that trials would degenerate into debate as to what the defendant knew and what level of knowledge of a general fact is necessary to admit "specific facts" or "examples" of which the defendant was unaware.

(d) *Third party contributors*

Eady J's point (8) above requires the media to establish what a third party commentator knows. Pre-publication this would be an enormous burden. Post complaint it may practically be impossible. It is commonplace for the media entity alone to be sued. The third party commentator will often not co-operate.

59. Further any such knowledge requirement conflicts with the fact that the principal test is objective and formulated by reference to a notional honest man not the actual commentator. In *Adams v Sunday Pictorial Newspapers (1920) Ltd* the Court of Appeal disallowed interrogatories as to a defendant's state of mind in relation to a defence of fair comment. Lord Denning (then Denning LJ) stated:

*"The truth is that the burden on the defendant who pleads fair comment is already heavy enough. If he proves that the facts were true and that the comments, objectively considered, were fair, that is, if they were fair when considered without regard to the state of mind of the writer, I should not have thought that the plaintiff had much to complain about; nevertheless it has been held that the plaintiff can still succeed if he can prove that the comments, subjectively considered, were unfair because the writer was actuated by malice."*<sup>61</sup> (interveners' emphasis)

*Adams* was not cited in *Lowe*.

Detailed submissions on Issue (7) In the light of the answers to (5) and (6), is the position different for those (including the media) who report the opinions of others

60. As stated above, this does not present a difficulty if the interveners' position on Issues (5) and (6) is accepted. There is direct authority on reporting the opinions of third parties. In *Lyon v Daily Telegraph Ltd*<sup>62</sup> the letter complained of was submitted to the newspaper under a fictitious name, which necessarily meant that the newspaper could not prove what the commentator knew. The Court of Appeal did not disagree with the Judge's finding that the anonymous commentator was malicious, but still held that the newspaper was entitled to rely on the defence of fair comment. One stated reason for this approach was the impractical burden which verification (in this case of the writer's identity - a necessary precursor to any exploration of his knowledge of the facts) would impose on the newspaper and the tendency of such a burden to stifle opinion.

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<sup>61</sup> [1951] 1 KB 354 at 359

<sup>62</sup> [1943] KB 746

**Detailed submissions on Issue (11) The true construction of section 6 of the Defamation Act 1952 (which requires consideration of the position at common law prior to its introduction)\***

61. Section 6 of the Defamation Act 1952 provides:

**Fair comment**

*In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.*

62. It has to be read with section 5 of the Defamation Act 1952 which provides:

**Justification**

*In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.*

63. Section 5 means what it says and presents no difficulty.
64. Section 6 is plainly not saying that a defence of honest opinion relieves the defendant of his obligation to prove any defamatory statements of fact in the words complained of (see *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 1 WLR 805 at 818; *London Artists v Littler* [1969] 2 QB 375 at 391-2; *Truth (NZ) Ltd v Avery* [1959] NZLR 274), merely because a defamatory opinion within the words complained of is defensible on the proved facts. That would be a bizarre construction and contrary to principle. What remains contentious is:



- (A) Whether section 6 only governs the position, where the facts are set out or referred to in the words complained of as the express wording appears to suggest.
- (B) If (A) is right, whether that construction supports the proposition that the commentator must set out or refer to any facts he relies on, if he is to have a defence of comment - or whether that situation is catered for by some other common law rule.
- (C) Whether section 6 only governs the position where the facts are defamatory (note the words "*allegations of fact*") or whether it extends to assertions of fact, whether defamatory or not.

65. Some context for section 6 is needed. In the Porter Report the Committee criticised the rigidity of the rule, whereby defamatory statements of fact set out in the words complained of *all* had to be proved<sup>63</sup>. In *Kemsley v Foot* Lord Porter explained this rule in these terms:

*"In a case where the facts are fully set out in the alleged libel, each fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails in his defence. Does the same principle apply where the facts alleged are found not in the alleged libel but in particulars delivered in the course of the action? In my opinion it does not. Where the facts are set out in the alleged libel, those to whom it is published can read them and may regard them as facts derogatory to the plaintiff; but where, as here, they are contained only in particulars and are not published to the world at large, they are not the subject-matter of the comment but facts alleged to justify that comment. In the present case, for instance, the substratum of fact upon which comment is based is that Lord Kemsley is the active proprietor of and responsible for the Kemsley Press. The criticism is that that press is the low one. As I hold, any facts sufficient to justify that statement would entitle the defendants to succeed in a plea of fair comment. Twenty facts might be*

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<sup>63</sup> Porter Committee on the Law of Defamation, 1948 paras 87-90

*given in the particulars but only one justified, yet if that one fact were sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the defendants' plea."*<sup>64</sup>

Lord Oaksey stated at p.361:

*"What is meant in cases in which it has been said comment to be fair must be on facts truly stated is, I think, that the facts so far as they are stated in the libel must not be untruly stated."*

66. There therefore was at common law a distinction drawn between facts stated in the article (which might or might not be defamatory), where all had to be proved, and, facts not stated in the article, but set out in the supporting particulars in the defence, where no such restriction applied. It is submitted that section 6 was designed to mitigate the former common law rule without in any way abrogating the latter. The decision in *Kemsley* could hardly have been more topical when section 6 was passed. The hearing in the House of Lords took place in 1951. The speeches were delivered in February 1952 – the same month as the second reading of the Bill in the Commons. Its second reading in the Lords was in July 1952.
67. As to (C), it makes no sense to limit section 6 to defamatory statements of fact. The section applies to facts alleged (defamatory or not) as is clear from the penultimate line of the section as set out above. Moreover there is no reason in principle to distinguish between the two. If a defendant does not have to prove all defamatory statements of fact referred to in the words complained of (for the purposes of the defence of comment), it would be absurd to impose a tougher restriction, where the alleged facts are not defamatory.
68. The interveners clarify one discrepancy in the decision of Eady J in *Lowe v Associated Newspapers Ltd* where he observed:

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<sup>64</sup> [1952] AC 345 at 357-8

*"Whether such a stark distinction would be drawn today between facts stated and those pleaded is open to question. I should be surprised if it were now to be held that the omission to establish one important fact would lead to overall failure merely because it had been stated in the article. That would appear to be inconsistent with the policy underlying the rule, with regard to justification, that the words complained of need only be shown to be substantially accurate. I can see no principled distinction in this respect between the two defences. Moreover, I should be surprised if the proposition were to be found compatible with article 10 and the Strasbourg jurisprudence, which generally allows leeway for journalists in the exercise of their trade, so as to accommodate a degree of inaccuracy and exaggeration..."<sup>65</sup>*

Section 6 was nowhere referred to in the judgment and, it seems, was overlooked.

69. Two further refinements are worth mention. The reference to the "words complained of" in section 6 must be construed liberally. A claimant commonly edits the publication complained of in the Particulars of Claim so as to exclude statements which are true (defamatory or not). It would defeat the whole purpose of the section if section 6 was limited to the words selected for complaint by the claimant.
70. Second, though not the subject of express authority, it would seem that if there are sufficient facts to support the comment - when proved facts within the publication are combined with proved facts outside it - the defendant should succeed. That approach reflects the underlying policy behind section 6 and the common law rule for facts not contained in the publication itself.

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<sup>65</sup> [2007] Q.B. 580 at [35]

Detailed submissions on Issue (12) Assuming extrinsic facts may also be relied on, whether the test is different in relation to facts referred to or set out in the words complained of and facts extrinsic to the words complained of (and, if so, why the test should be different)\*

71. The interveners repeat their submissions under Issue (11) above. There is an established common law rule that where facts extrinsic to the words complained of are pleaded, the defendant need only prove sufficient to satisfy the objective test.

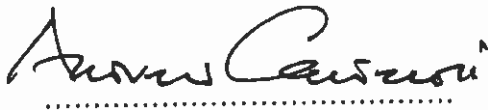
### *III. Concluding summary of reasons*

72. It is submitted that the following principles should govern the law of honest opinion:
- (1) *To qualify for the protection of the defence of honest opinion a statement must be recognisable in its context as opinion. A statement of opinion may in context be an inference of fact drawn by the commentator from facts stated or indicated by him.*
  - (2) *The opinion will qualify for protection if any person, however prejudiced, exaggerated or obstinate his views, could have honestly expressed it on the proved facts<sup>66</sup> or on alleged facts protected by privilege.*
  - (3) *The opinion must be expressed on a matter of public interest.*
  - (4) *The defendant may rely on any proved facts or privileged material in existence at the time of publication, provided those facts relate to the subject matter of the comment.*

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<sup>66</sup> This substantially reflects Lord Keith's formulation in *Telnikoff v Matusevitch* [1992] 1 AC 343 at 354: "whether any man, however prejudiced and obstinate, could honestly hold the view expressed by the defendant".

- (5) *If the defendant proves sufficient facts to satisfy the objective test set out in principle 2, then (subject to malice) the defence succeeds irrespective of whether facts referred to in the publication or facts relied on extrinsic to the publication are not proved or misstated. This principle does not absolve a defendant of the obligation to prove defamatory statements of fact to be true (subject to section 5 of the Defamation Act 1952).*
- (6) *The defence of opinion is lost where a claimant proves that the defendant did not act honestly in publishing the opinion complained of.*



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SARAH PALIN

## APPENDIX 1

### *A brief historical perspective*

1. The interveners set out below a short resume of the defence's history and suggest some reasons as to why its development has been sporadic and at times illiberal. The principal sources are the fifth edition of Odgers, *A Digest of the Law of Libel and Slander* (1911), Paul Mitchell's book on *The Making of the Modern Law of Defamation* (Chapter 8) (2005), and Lord Diplock's argument, when in silk, in *Kemsley v Foot*.<sup>67</sup> Both Mr Mitchell and Lord Diplock divide the history into three phases.

#### *(1) Eighteenth century and early nineteenth century*

2. The earliest example of a recognisable defence of fair comment dates from the 1790s and cases through to the beginning of the eighteenth century emphasise that the defence was concerned only with the criticism of literary works or public morals rather than criticism motivated by a desire to harm the plaintiff personally. At the time of the French Revolution, Peterloo and the Cato Street conspiracy, the Courts were unlikely to encourage criticism of public men as distinct from their works. These decisions were all concerned with the 'public sphere' and focussed heavily on the defendant's motive. The defence of fair dealing in copyright appears to have been evolving at or about the same time.
3. The principled basis for the defence was explained by Lord Ellenborough CJ in *Tabart v Tipper* and *Carr v Hood*.<sup>68</sup>

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<sup>67</sup> [1952] AC 345 at 349

<sup>68</sup> (1808) 1 Camp 350

*"Is [the plaintiff] to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir Robert Filmer [who had advanced an extreme version of the divine right of kings] after he had been refuted by Mr Locke? But shall it be said that he might have sustained an action for defamation against that great philosopher, who was labouring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to be perpetuity of error. Reflection on personal character is another thing. Shew me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship and I shall be as ready as any Judge who ever sate here to protect him"*<sup>69</sup>

Lord Ellenborough CJ took a broad approach; provided the defamation did not "concern the private character of the individual" and was spoken in good faith, the defendant had a defence. The rhetoric emphasised the importance of discussion and argument in elucidating understanding of any public subject. Lord Tenterden CJ and Best CJ, however, put forward a more restrictive view and sought to regulate the public sphere by requiring contributions to be "fair, reasonable and temperate"<sup>70</sup>.

4. Importantly for the principal issues on this appeal, *Cooper v Lawson*<sup>71</sup> identified two themes: first, the defence was not narrowly defined to matters of literary criticism: it embraced factual inferences on matters of public debate. The case concerned an election petition to which the claimant was proposed as surety and the newspaper had drawn the factual inference from affidavits made at the time

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<sup>69</sup> *Carr v Hood* (1808) 1 Camp 350 at 357-8

<sup>70</sup> *Soane v Knight* (1827) M & M 74 per Lord Tenterden CJ. In *Thompson v Shakell* (1828) M & M 187 at 188 Lord Best CJ directed the jury that "the question for you is whether the publication is a fair and temperate criticism on the painting of the plaintiff".

<sup>71</sup> (1838) 8 Ad & E 746

showing the claimant was insolvent and the claimant's counter-affidavit that "There can be but one answer...he is hired for the occasion". Second, a successful defence depended upon the inference being fairly drawn. In *Gathercole v Miall*<sup>72</sup> a narrow view of public interest was still apparent – criticism of the management of a charity and of unpublished sermons being held to be outside the defence.

(2) *The middle to the end of the nineteenth century*

5. There were a series of cases at Nisi Prius in the 1860s, where a more generous view of public interest was taken. A consistent theme was the right to express a comment as an inference or deduction from public facts or, as a contemporary commentator cited by Mr Mitchell put it, comment was limited to "what naturally arose out of what was already public"<sup>73</sup>. In *Wason v Walter Cockburn* CJ stated:

*"Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognised. Comments on governments, on ministers and officers of state, on members of both houses of parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or ex officio informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?"*<sup>74</sup>

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<sup>72</sup> (1846) 15 M & W 319

<sup>73</sup> Anon (Foster or Finlayson), "The Law of Libel, As Applied to Public Discussion" (1863) 15 The Law Magazine and Law Review 193 at 218 cited by Mitchell at chapter 8, page 179, footnote 89.

<sup>74</sup> (1868-9) LR 4 QB 73 at 93-94



6. However some of the cases confuse the objective and subjective tests, equating the requirement of fairness with the absence of malice. Also stricter tests for what fairness meant were mooted. The latter point was finally laid to rest in *Merivale v Carson*, where Lord Esher MR asserted the issue was: "is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question?"<sup>75</sup>. As explained in the interveners' case above "honest" was substituted for "fair" following the recommendation by the Porter Committee in 1948 and Lord Porter's subsequent statement in *Turner v Metro-Goldwyn-Mayer Pictures Ltd*<sup>76</sup>. Unhelpfully the Defamation Act 1952, s6 continued to use the term 'fair comment'.
7. Originally, the defence of fair comment was considered to be a form of qualified privilege and covered by the plea of "not guilty," which, unlike the defence of justification was not a special plea. Until the early twentieth century proof that defamatory words had been spoken created a presumption of malice (in the special meaning of "without lawful excuse") but that presumption could be rebutted by the defendant.<sup>77</sup>
8. The leading case of *Campbell v Spottiswoode*<sup>78</sup> made clear that fair comment was not a species of privilege but a distinct defence.<sup>79</sup> Crompton and Blackburn JJ explained that "privilege" was the wrong term to use as privilege meant that "a

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<sup>75</sup> (1888) L.R. 20 QBD 275 at 280.

<sup>76</sup> [1950] 1 All ER 449 at 461.

<sup>77</sup> Starkie, A Treatise on the Law of Slander and Libel, 2<sup>nd</sup> edn (1830 vol1 at 305, cited by Mitchell at page 183..

<sup>78</sup> (1863) 3 B & S 769.

<sup>79</sup> Fair comment first emerged as a distinct plea shortly after the Common Law Procedure Act, 1853: *Earl of Lucan v. Smith* (1856) 1 H & N 481

person stands in such relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in anyone else" whereas comment concerned a "general right which belongs to the public".<sup>80</sup> Having removed fair comment from the category of qualified privilege, the court then aligned it with justification as part of the question 'libel or no libel' with the practical consequence that it was a question of jury to decide whether all the elements of fair comment were present. The explanation for fair comment that prevailed in the textbooks focused on the relationship with justification, and emphasised that justification was for facts, fair comment for opinions.

9. Curiously as an apparent legacy of the defence's former categorisation as a branch of qualified privilege the issue of public interest in fair comment was for the Judge, whereas it now seems clear that in statutory qualified privilege cases it is for the jury (*Kingshott v Kent Newspapers Ltd*<sup>81</sup>).
10. The complexity of many of these issues was not helped by the emergence of the rolled up plea, which first appeared in *Penrhyn v Licensed Victuallers Mirror*<sup>82</sup> in 1890 and read: "*In so far as the words complained of consist of allegations of fact, the said words are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comment made in good faith and without malice upon the said facts, which are a matter of public interest*". The rolled-up plea, notwithstanding its name and the terms of the first half of it, raised one defence only, that being the defence of fair comment and not a plea of justification<sup>83</sup>. It was not until the decision of

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<sup>80</sup> *Ibid* at 780-1 per Blackburn J

<sup>81</sup> [1991] 1 QB 88, CA. In *Reynolds* defence public interest is also an issue for the Judge.

<sup>82</sup> (1890) 7 TLR 1

<sup>83</sup> This plea led to a conflict of judicial opinion as to whether it was merely a defence of "fair comment" or was a plea of justification coupled with "fair comment." In 1925 *Sutherland v. Stopes* [1925] AC 47 at 62, 77,

the Court of Appeal in *Control Risks Ltd v New English Library* [1989] 3 All ER 577 that a defendant was required to specify the meanings he sought to defend as defamatory opinion, following its equivalent decision in relation to justification in *Lucas-Box v News Group Newspapers Ltd* [1986] 1 All ER 177. The rolled up plea was finally laid to rest by the Faulks' Committee's recommendation that it be abolished.

(3) *From the start of the twentieth century*

11. Unfortunately the confusion between privilege and fair comment continued as evidenced by Collins MR's statement in *Thomas v Bradbury, Agnew & Co* that fair comment was "governed by precisely the same rules" as those for qualified privilege.<sup>84</sup>

*Sutherland v Stopes* finally recognised the important principle that opinions (or at least some opinions) may be shown to be true (i.e. justified).<sup>85</sup>

12. In his conclusion Mr Mitchell points out the subtle shift from a defence designed for allegations which are *unverified* except by the premises given to what has been characterised in the textbooks as a defence for *unverifiable* remarks. This relates directly to the discussion under Issue (1) in the interveners' case.
13. This short resume demonstrates the considerable problems of taxonomy, which have bedevilled this defence since its introduction and which require older cases to be treated with caution.

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99 resolved this controversy in favour of the former view; but all cases between 1890 and 1925 require careful reading in order to see on which basis they were decided.

<sup>84</sup> [1906] 2 KB 627, CA at 640

<sup>85</sup> [1925] AC 47, HL

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