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THE 3rd ANNUAL BOYDELL LECTURE

LORD STEYN

A former Law Lord; a Cross Bencher

DEFAMATION AND PRIVACY:

MOMENTUM FOR SUBSTANTIVE AND PROCEDURAL CHANGE?

It is a great honour to deliver a lecture in memory of Peter Boydell, a distinguished former leader of the Parliamentary Bar. At the same time I pay tribute to the memory of Christopher Kingsland. It was however adventurous of Francis Taylor Building to invite me to give this lecture. My record is not unblemished. I must disclose what happened in *MacFarlane v Tayside Health Board* [2000] 2 AC 59. In that case there was before the House of Lords a case of parents of an

unwanted healthy child born as a result of negligent sterilisation advice. The parents wanted compensation for the cost of bringing up the child. Unanimously, but for different reasons, the House ruled against the claim. Academic lawyers were unimpressed. Professor Thompson savaged our reasoning: Abandoning the Law of Delict 200 Scots L.T. 43. He was very severe on my colleagues. He said they had abandoned all principles of tort law. I thought he was going to say my judgment was a notable exception. Not a bit. He said I had not only abandoned the law of tort but law itself.

I turn now to a few aspects of the law of libel and privacy. Many barristers and solicitors will disagree with my opinions. But I must place my views before you as I now see matters. What I said earlier can be consigned to history. I make clear, however, that I will concentrate on selected topics which will not include issues of costs.

It is (I believe) a fact that very often British newspapers, when sued in libel, give up and settle when one would not expect them to do so.

The reasons for this state of affairs are to be found in centuries old strict liability in defamation law. Libel law is tilted against the media.

In a leader published in the Financial Times on 15 December 2009 it was acutely observed that “the law as currently configured protects the rich and powerful (and sometimes the corrupt), enabling them to intimidate the press, and provides next to no protection to the vulnerable”. Moreover, a report of the Libel Working Group of the Ministry of Justice dated 23 March 2010 considered in some detail the validity of a widespread perception that the London legal scene has become the forum of choice for those who wish to sue for libel and that this is having a “chilling effect” on freedom of expression. In a

speech to the Society of Editors on 16 November 2009 the Lord Chief

Justice commented:

“ I am not proud of reading, as I frequently do, that
‘London is the libel capital of the world’. I do not regard as a
badge of honour. I am deeply unsympathetic to ‘Forum
shopping’ . . .

Some libel specialists question that libel tourism is a significant
problem. In my respectful view the concerns of the Lord Chief Justice
are well-founded. A combination of the multiple publication rule, and
the even a small number of internet readers of the United Kingdom,
has created the risk of a cause of action here, and opened the door to
libel tourism.

There was some progress. In *Reynolds v Times Newspapers Ltd* [2001] 2
AC (HL), a newspaper published a story that the Irish Prime Minister

had misled the Irish Parliament. Mr Reynolds sued in libel. One defence was qualified privilege. The House of Lords refused to recognise a qualified privilege of all matters of public concern. But the House of Lords emphasized the importance of freedom of expression. The idea which emerged was a concept of “responsible journalism.” Guidelines in the form of 10 illustrative factors were enunciated in the leading judgment of the Lord Nicholls. The idea was that over time a valuable corpus of case law would be built up. But the defence failed.

Optimism about the practical utility of *Reynolds* privilege

unfortunately proved misplaced. The great majority of *Reynolds*

defences failed at first instance. The decision in *Reynolds* was

criticised by the New Zealand Court of Appeal in *Lange v Atkinson and*

Australian Consolidated N.Z. Limited [2003] 4 L.R.C. 596 a case

involving again a suit in defamation by a public figure. It held that the

Reynolds decision altered the law of qualified privilege in a way which added to the uncertainty and chilling effect of the existing law of defamation. The court also stated that the decision of *Reynolds* conflated the distinct concepts of the occasion of privilege and abuse of privilege by allowing factors relevant to abuse of privilege to determine whether the occasion was one of privilege. In 2005 in a public lecture I predicted that it may be necessary to re-examine *Reynolds*: 2000-2005: Laying the Foundations of Human Rights Law in the United Kingdom [2005] EHRLR 349.

Subsequently, in *Jameel v Wall Street Journal Europe* [2006] 3 WLR 642 there came before the House of Lords, the issue of Saudi Arabian cooperation with the United States following 11 September 2001 being a matter of high national importance. A Saudi Arabian businessman sued in the English courts in libel. He succeeded at first instance and in

the Court of Appeal. The House of Lords unanimously upheld the appeal. There are strong dicta to the effect that the press need not kowtow to governments in respect of the so-called “war on terror”.

The House of Lords urged greater liberalism in the application of the Reynolds privilege. Importantly Baroness Hale observed “we need much more serious journalism in this country and our defamation law should encourage rather than discourage it”: p.150. But the majority decided to retain the jurisprudential framework of *Reynolds* privilege.

Lord Hoffmann and Baroness Hale were also in a minority in contending that there is an analogy with other torts, which require proof of damage, such as malicious falsehood. As a matter of precedent *Jameel* did not amount to the much needed critical re-examination of Reynolds. Unfortunately as matters stand, the Reynolds privilege will continue to complicate the task of journalists and editors who wish to

explore matters of public interest and it will continue to erode freedom of expression.

But at the end of 2009 the Supreme Court of Canada gave judgments in two cases which in effect change the existing rules : *Grant v Torstar Corp.* 2009 SCC61 and *Quan v Cusson* 2009 SCC 62. In luminous judgments, given by one of the great lawyers of our time, McLachlan CJ, the court ruled that journalists can avoid liability, if they can show that the information they communicated - whether it turned out to be true or false - was of public interest and they were diligent in trying to verify it. The Supreme Court recognized the importance of a robust media in protecting freedom of expression.

In the case of *Grant v Torstav Corporation* the claimant brought a libel action against a newspaper and a reporter after an article was published concerning a private golf course development on the

claimants' lakefront estate. The article quoted a neighbour as saying "everyone thinks it is a done deal". At first instance the claimants succeeded. In the Court of Appeal a new responsible journalism defence succeeded. The Claimants appealed. Turning to the Reynolds privilege, as upheld in Jameel, McLachlin CJ in *Grant v Torstar Corporation* ruled:

"[92] The majority of the Law Lords in Jameel maintained the view that "Reynolds privilege" or "responsible journalism rests at least notionally on the duty/interest analysis associated with qualified privilege. However, Lord Hoffmann, with the concurrence of Baroness Hale, insisted that responsible journalism could not be assimilated to traditional qualified privilege, adopting Lord Phillips' view [expressed in *Loutchansky v Times Newspapers Ltd* [2002] 1

A ER 652 at pg 35] that it is “a different jurisprudential creature”. It is not the occasion which is protected by the new defence, but the published material itself.

Furthermore, it makes little sense to speak of an assertion of responsible journalism being defeated by proof of malice, because the absence of malice is effectively built into the definition of responsible journalism itself.

[93] Characterizing the change to the law as introducing a new defence is also supported by the fact that many forms of qualified privilege would not be well served by opening up the privilege to media publications. The Reciprocal duty and interest involved in a journalistic publication to the world at large, by contrast, is largely notional.

[94] The traditional duty/interest framework works well in its established settings of qualified privilege. These familiar categories should not be compromised or obscured by the addition of a broad new privilege based on public interest. Further, qualified privilege as developed in the cases is grounded not in free expression values but in the social utility of protecting communicative occasions from civil liability.

[95] I therefore conclude that the proposed change to the law should be viewed as a new defence, leaving the traditional defence of qualified privilege intact.”

For my part this analysis is entirely sound and ought to be adopted in England. I fear, however, that legislation will be necessary. If this

course is adopted it would greatly enhance the cause of freedom of expression in our country.

Fortunately there is now, among the senior judiciary, in other respects considerable momentum for substantive improvement of libel law. An enormous advance is the case of Dr Singh who was accused of libel by the British Chiropractic Association over a piece he wrote for the Guardian in April 2008 suggesting that there was a lack of evidence for claims some chiropractors make on certain childhood claims. The B.C.A. alleged that Dr Singh had, in effect, made accusations of bogus treatments. A High Court judge held that Dr Singh's comments were factual assertions rather than expressions of opinion, which meant the defence of fair comment was unavailable.

A very strong Court of Appeal consisting of Lord Chief Justice, the Master of the Rolls, and Lord Justice Sedley, allowed the appeal on 1

April 2010. In a judgement to which all members of the Court contributed the court observed that asking judges to rule on matters scientific controversy would be “to invite the court to become an Orwellian ministry of truth”. It is not for the courts in cases involving scientific controversy to disentangle fact from opinion. To introduce the chilling impact of litigation in this area is absurd. In the view of the Court of Appeal the statement in question was one of opinion, and one backed by reasons. The Court of Appeal ended its judgment with the trenchant observation that “Honest Opinion” better reflects the realities of the issue”.

Important as these topics are in the context of libel law. I would like to examine a broader context. For this purpose I turn to academic discussion. It is, however, not in Gately’s Law of Libel and Slander, 11th ed., that I find assistance. Instead I find it in Dario Milo’s book

Defamation and Freedom of Speech, published in 2008 by OUP. His central thesis is that constitutional rights must inevitably shape the contours of modern libel law. That involves freedom of speech and the rights to reputation and dignity. The author argues that defamatory speech on matters of public interest should receive greater protection than private defamatory speech.

The author puts forward a number of important arguments which require serious consideration. First he challenges the common law presumption that defamatory statements must be presumed to be false. Surely, he says, a presumption of falsity is unwarranted in the context of matters of public speech. Secondly, he makes a strong case that a plaintiff should have to establish a lack of care for public speech defamation. This would be consistent with the new substantive defence as developed in recent Canadian jurisprudence. Thirdly, the

author argues that the victim of a slur on matters of public concern must prove that he suffered actual damage to his reputation. In my opinion these ideas ought to be considered in an open minded way in order to render our defamation law fit for purposes.

I appreciate some will question the role of Judges in deciding what is or is not in the public interest. My view is that such distinctions are the very stuff of the law. I see no reason why Milo's analysis cannot be adopted.

In a valuable Foreword to Dario Milo's book Professor Eric Barendt of UCL pointed out that the most striking aspect of Milo's argument is his reliance on privacy jurisprudence in "illuminating, the distinction between private and public speech for the purpose of defamation law".

On this aspect I confine myself to saying about privacy jurisprudence that it is almost invariably in the public interest that the workings of

government should be the subject of intense journalistic scrutiny and criticism. And Milo is right in arguing that the fields of defamation and privacy cannot be viewed in splendid isolation. In passing I would add that reform of libel law must, of course, not result in greater rights of privacy discordant with that reform.

A practical point to which I want to direct attention in this book is Milo's observations about the appropriate fault element for secondary distributors such as internet providers and booksellers. He argues powerfully that the standard should be gross negligence.

Finally, I do not think the developments I have discussed can be left to the organic development of the law. Legislation will be necessary.

So far I have looked principally at aspects of substantive defamation law and privacy jurisprudence. But I propose to draw attention to two aspects of procedure which are of great practical importance.

The first is the subject of super-injunctions which prohibit reporting.

The effect of such injunctions is to outlaw publication of the very fact of an injunction having been granted. Possibly the most notorious is the super injunction granted to the oil traders Trafigura: Guardian, Saturday, 17 October 2009, p.1. My understanding is that a high level inquiry will deal with this subject. I hope the result will be that super injunctions will never, or virtually never, be granted.

But it seems to me important to examine also the question whether in the area of libel the use of specialist judges is necessary. In the Report of the Libel Working Group of the Ministry of Justice dated 23 March 2010 which I mentioned earlier the following comments are made [at p.42].

Specialist Judges

114. Differing views were expressed by the group on the appropriateness of libel cases being heard by specialist judges. From one perspective, the view was taken that a move to non-specialists could be desirable, but others considered that specialist judges were essential, and that a return to a non-specialist approach would be damaging.

Two members of the group drew attention to recent cases where non-specialist judges had granted injunctions in ignorance of section 12 of the Human Rights Act 1998.

Some members took the view that a wider spread of specialist judges would be helpful, and an extension in the number of judges (whether specialist or not) was suggested by one member to counter difficulties arising from the

concentration of decisions by one or two judges. One member also suggested a time limit on the period for which a judge should sit as a specialist in a particular area.

115. The group recognised that under the terms of the Constitutional Reform Act 2005, this issue is a matter relating to the deployment of the judiciary for which the Lord Chief Justice is responsible.

Conclusion

The Justice Secretary should write to the Lord Chief Justice drawing this particular area of the Working Group's report to his attention.

This is a rather inconclusive commentary. I would like to be a bit more forthcoming. One accepts that in certain fields there is an advantage in using specialist judges. That is, for example, the case in the family

field, commercial cases, and construction work. The use of specialist judges in these fields ensures speed of adjudication and, most importantly, public confidence in adjudication when some specialisation is seen to be a substantial advantage. But there is no reason for specialist judges to be used, for example, in the field of privacy jurisprudence. If that is so, why are specialist judges required in libel cases? The types of issues involved in libel case can quite appropriately and conveniently be tried by any Queen's Bench judges. Nothing in recent experience of libel cases demonstrates a clear advantage in using specialist judges. In saying that I am not expressing any criticism of any particular judge, I am making a general point. But I am satisfied that the change would improve the system and ought to be made now. I hope the Lord Chief Justice will be able to undertake

the change. If he feels unable to put it in effect, I regard the change as warranting legislation.

Finally after my perfunctory remarks I am reminded of the President of Liverpool Law Society, who made a very boring speech. He was sitting next to F.E. Smith, a legendary figure of the 20s. When the President of the Law Society sat down, he asked F.E. Smith —

“How would you have done it?”

F.E. Smith answered:

“Under an assumed name”. *

* I have had the great advantage of research by Sarah Sackman, a tenant in Francis Taylor Building.