

# Libel and freedom of expression in English law

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So far as the English media are concerned the most important ruling of the courts last year was without doubt the decision of the House of Lords in a libel case, *Reynolds v Times Newspapers* [1999] 4 All ER 609. Albert Reynolds, a former Prime Minister of Ireland, had brought civil proceedings against the Sunday Times, a leading Sunday paper; it had published an article suggesting he had deliberately concealed vital information from the Irish Parliament concerning a judicial appointment. At the trial the jury decided these allegations were untrue, so the newspaper could not rely on the defence of justification.

## Qualified privilege for publications to the general public

It argued both at trial and on appeal that it was entitled to rely on a defence of qualified privilege. English common law has, for example, established in a number of cases over the last hundred years, that, for example, employment references and complaints to the police are covered by qualified privilege; this means that the writer of a reference or a complaint has a defence to a libel action in respect of allegations contained in the communication, unless he wrote them maliciously, that is, he knew that they were false. It does not matter whether the information in the reference is true or not, or whether the writer was careless. The question for the courts in *Reynolds* was whether the media could claim a privilege of this kind for communications to the public on a matter of political interest. (It should be remembered that Reynolds had played a significant role in the Northern Ireland peace process, and therefore his honesty was a matter of interest to the public in England.) In earlier decisions the courts had rejected claims by the media to take advantage of such a privilege. The argument made by the newspaper in this case for

providing the media with a wide defence to actions for libel is that otherwise the press and broadcasters would be unwilling to publish stories of real political importance and interest to the public, because they fear that the jury will not find that their truth has been established. (It must be remembered that in English law juries, often biased against the media, generally decide whether allegations are true or not. Further, there is a presumption of falsity, so it is for the media to show that they are accurate.) The argument that the rules of libel law exercise an unacceptable «chilling effect» on press freedom was accepted by the United States Supreme Court as long ago as 1964 (*New York Times v. Sullivan*, 376 US 254). Many Commonwealth jurisdictions, notably Australia, New Zealand, and India (but not Canada) have also accepted the argument. As a result they have significantly expanded the defences available to the media against libel actions, at least when the publication concerned the conduct of politicians or election candidates.

The House of Lords, however, in the *Reynolds* case refused to recognise a general privilege in respect of all communications by the media to the public on a matter of political importance. First, it held that such a privilege would fail to ensure adequate protection for the right to reputation, enjoyed by politicians as much as by ordinary members of the public. If the defence of privilege were expanded to cover all media communication on political matters, the victim of an untrue defamatory allegation could only recover damages for libel if he was able to prove malice. Second, it would be wrong to draw a sharp distinction between political discussion and discussion of other matters of social concern to the public.

But the House of Lords did hold that in some circumstances the defence of qualified privilege should be available to the

**Zusammenfassung:** Das House of Lords hat kürzlich über Rechtfertigungsgründe für Medien bei Persönlichkeitsverletzungen debattiert. Die Frage stellte sich im Rahmen einer Klage des früheren irischen Ministerpräsidenten Albert Reynolds wegen unrichtigen und verleumderischen Behauptungen in der Zeitung Sunday Times. Das House of Lords weigerte sich, breit gefasste Medienprivilegien, wie sie etwa im Jahre 1964 vom Obersten Amerikanischen Gerichtshof anerkannt worden sind, im Fall Reynolds anzuwenden. Es hielt jedoch dafür, dass sich die Medien im Einzelfall mit einem qualifizierten Rechtfertigungsgrund bei Prozessen zum Schutz der Persönlichkeit zur Wehr setzen können, auch wenn die Behauptungen im Medienbericht unrichtig waren. Ob diese Verteidigungsmöglichkeit zugänglich ist, hängt von einer grossen Zahl von einzelnen Faktoren ab. Es ist nicht sicher, ob die Medien diesen neuen Privilegien Vertrauen schenken werden. In jedem Fall bedeutet jedoch die Entscheidung Reynolds einen Fortschritt für die Medienfreiheit.

**Résumé:** *La Chambre des Lords a récemment débattu des motifs justificatifs des médias en cas d'atteintes à la personnalité. La question se posait dans le cadre d'une action de l'ancien ministre irlandais Albert Reynolds contre une affirmation fautive et diffamatoire contenue dans le Sunday Times. La Chambre des Lords a refusé d'appliquer au cas Reynolds les importants privilèges de la presse tels qu'ils ont été définis par la Cour suprême des États-Unis en 1964. Cependant, dans les procès en protection de la personnalité, les médias pourront se défendre de cas en cas à l'aide d'une justification qualifiée, même si l'affirmation publiée était fautive. Cette ligne de défense dépend de nombreux facteurs particuliers. Il n'est pas certain que les médias auront confiance en ce nouveau privilège. Dans tous les cas, la décision Reynolds est un progrès pour la liberté des médias.*

media for communications to the general public. But whether a defence is in fact available will depend on a number of considerations to be assessed by the judge in each case. In the leading judgement in Reynolds Lord Nicholls mentioned a number of relevant factors for the judge to consider. Had, for example, the journalist taken steps to check the truth of the story; was there a reliable source for the story; was it urgent to publish it; had the subject of the story been given an opportunity to comment on the allegations? In all, he listed ten factors and concluded that they were not exhaustive. In this case, the newspaper had relied on Reynolds' political opponents as sources for its story and failed to check their allegations with him. In these circumstances, both the Court of Appeal and the House of Lords understandably rejected the newspaper's claim to take advantage of a qualified privilege defence.

### More freedom for investigative journalism

The decision in Reynolds is potentially a significant development for press and media freedom in England. For the first time, the courts have recognised that on some occasions the media may claim a common law privilege for communication to the general public of stories containing defamatory allegations which cannot be proved to be true. There will be more freedom for investigative journalism, the value of which some judges in the House of Lords explicitly recognised. But the decision did not go as far as the press would have liked. In particular, the House declined to recognise a general

privilege which would protect the media whenever it disclosed information of political importance. Such a rule would have the advantage of certainty, but it would, in the view of the House, have given the media too much protection to the cost of the right to reputation. The House of Lords was clearly aware that newspapers frequently publish salacious allegations to boost their circulation, without any serious attempt to check their accuracy.

From a comparative perspective English law seems more hesitant than the law in the United States and some Commonwealth countries to give priority to freedom of expression through the formulation of a defence to libel actions, applicable to the broad category of political information. Interestingly, Lord Steyn was influenced by the approach of the European Human Rights Court and the German courts, which prefer to balance the factors in each individual case.

It is of course too early to tell what use in practice will be made of the expanded common law privilege defence. The media were unenthusiastic about the decision. They feel that the approach of the House of Lords does not remove the inhibiting effect of the libel laws. It will be difficult for journalists faced with an urgent deadline, to know whether it is legally safe to publish a story, given the range of considerations relevant to a decision whether publication is covered by a privilege or not. On the other hand, the media can draw comfort from a remark in Lord Nicholls' judgement, that in the case of doubt the law should lean in favour of freedom of publication. ■