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Qualified privilege in defamation and the evolution of the doctrine of reportage

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This article looks at the evolution of the doctrine of reportage, which has emerged as a sub-species of Reynolds v Times Newspapers Ltd [2001] 2 AC 127 qualified privilege as a defence to defamation in English law. It argues that the relationship between these two types of qualified privilege is an uneasy one because although they have some features in common, the emphasis in reportage on the neutral reporting of disputes is quite distinct from Reynolds. The Defamation Act 2013 (UK) does codify the defence to some extent but ignores this complex relationship. There is, however, scope for a limited form of the reportage in situations where the Reynolds defence would not be available.

<DIV>INTRODUCTION

In *Reynolds v Times Newspapers Ltd*,[1] the House of Lords ruled that there was a special type of defence of qualified privilege for the media in defamation cases where they had engaged in investigative journalism. Qualified privilege is described aptly by Smith J in *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* as "a limited right to publish with impunity untrue defamatory matter".[2]

At common law, that right is limited by the need to meet the standards of responsible journalism by showing overall that the story is in the public interest. Precisely how the new public interest defence[3] in the *Defamation Act 2013* (UK) (the Act) will be viewed by the courts remains to be seen. The emphasis in *Reynolds* was on meeting a threshold of responsible journalism rather than on focusing on a test based on reciprocal interests and duties, laid down in other cases on common law qualified privilege in non-media situations such as *Kearns v Bar Council*.[4]

This article will examine how reportage has evolved as a sub-species of *Reynolds*[5] qualified privilege and how the two defences differ.[6] It will also analyse the scope of the *Reynolds* defence and whether it is, or should be, limited to investigative journalism. Although both types of qualified privilege have

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[1] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

[2] *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2000] WL 1675201 at [48].

[3] Lord Phillips in *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11 at [27] said that the term "privilege is misleading" as a description of *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 privilege. It should be described as a "public interest defence".

[4] *Kearns v Bar Council* [2003] 1 WLR 1357; [2003] EWCA Civ 331.

[5] For analysis of *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 and *Jameel v Wall Street Journal Europe SPRL (No 3)* [2007] 1 AC 359; [2006] UKHL 44 at [50], see: Loveland I, "A New Legal Landscape? Libel Law and Freedom of Political Expression in the United Kingdom" (2000) 5 *European Human Rights Law Review* 476; Cram I, "Political Expression, Qualified Privilege and Investigative Journalism – an Analysis of Developments in English Defamation Law Post Reynolds v Times Newspapers" (2005) 11 *Canterbury Law Review* 143; Coad J, "Reynolds and the Public Interest" (2007) 18 *Entertainment Law Review* 5; Rowbottom J, "Libel and the Public Interest" (2007) 66 *Cambridge Law Journal* 8; Bonnington A, "Reynolds Rides Again" (2006) 11 *Communications Law* 147; Hooper D, "The Importance of the Jameel Case" (2007) 18 *Entertainment Law Review* 62.

[6] Reportage is described by Lord Phillips in *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11 at [35], as"a special kind of responsible journalism with distinctive features of its own".

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been argued in many of the cases analysed below, it is clear that the reportage defence is necessarily more limited covering "reports" rather than investigative pieces. It will also be argued that the precise nature of their inter-relationship is complex.[7] The Act,[8] which places the two in the same section, confirms that reportage is indeed a sub-species of *Reynolds* qualified privilege.[9] How, and to what extent, courts will refer to earlier case law remains unclear as it is debatable whether the case law on both *Reynolds* and reportage is indeed reflected in the new public interest defence.

The author will argue that there is an obvious need for a limited form of the reportage defence given the uncertainty, difficulties and expense of arguing *Reynolds* qualified privilege successfully[10] even though this might result in the publication of untrue defamatory material. Only large media organisations are likely to have the funds to mount a *Reynolds* defence.[11] These difficulties are evidenced by the lack of case law and by the very few cases that have reached the Supreme Court.[12] Reportage and *Reynolds* tend to be argued together or in the alternative, which is no less complicated than arguing *Reynolds* alone. However, s 4 of the Act attempts to draw a distinction between the two and so arguing pure reportage might become easier in the future. It is clear, however, that their foundations are the same.

<DIV>FOUNDATION OF THIS TYPE OF QUALIFIED PRIVILEGE

Analyses of this type of qualified privilege tend to begin with Lord Nicholls' judgment in *Reynolds*.[14] His Lordship laid down the criteria to be met by responsible journalists with reference to Arts 10 (the right to freedom of expression) and 8 (the right to respect for privacy which includes the right to reputation) of the *European Convention on Human Rights and Fundamental Freedoms* (1950) ETS 5; 213 UNTS 221 (ECHR) motivated by the desire to ensure that English defamation law was ECHR-compliant before the entry into force of the *Human Rights Act 1998* (UK).

The European Court of Human Rights (the Strasbourg Court) confirmed in *Pfeifer v Austria*,[15] that Art 8 of the ECHR encompassed a right to protection of reputation as part of the right to respect for private life. The Strasbourg Court held in *White v Sweden*[16] that it should balance the interests protected by Arts 8 and 10 of the ECHR[17] against one another in cases involving the right to protection of reputation as against preventing the publication of allegedly defamatory statements in

[7] *Roberts v Gable* [2008] 2 WLR 129; [2007] EWCA Civ 721 at [40] (Ward LJ).

[8] *Defamation Act 2013* (UK), s 4 is entitled "Publication on matters of public interest".

[9] Lord Lester suggested that there was no longer any need for a separate defence of reportage because it was already covered by the new public interest defence: see United Kingdom, *Hansard*, House of Lords, 5 February 2013, vol 743 at col 195 (Lord Lester), www.parliament.uk/business/publications/hansard/.

[10] Mark Stephens, in his evidence to the House of Commons Select Committee on Culture, Media and Sport, estimated the cost of running a *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 defence at somewhere between £100,000 and £200,000: see United Kingdom, *House of Commons Public Bill Committee: Defamation Bill PBC (Bill 005) 2012-13*, 19 June 2012 at [66] (Robert Flello MP), www.parliament.uk/business/committees.

[11] It is doubtful whether or not the *Defamation Act 2013* (UK) will change this very much.

[12] *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11 is the latest case although reportage was not an issue in the Supreme Court. The lack of cases might be due to lower courts taking a cautious approach to Lord Nicholls' criteria in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. The *Reynolds* defence only succeeded in the Supreme Court in *Flood* and *Jameel v Wall Street Journal Europe SPRL (No 3)* [2007] 1 AC 359; [2006] UKHL 44 which is further evidence of its complex nature.

[14] See also *Defamation Act 2013* (UK), s 4; *Polanco Torres v Movilla Polanco v Spain* [2010] ECHR 1341, where the Strasbourg Court examined *Reynolds*-like criteria on responsible journalism before concluding that the media as a public watchdog should have a special place in any democratic society and that freedom of expression should not be constrained without good reason.

[15] *Pfeifer v Austria* (2007) 48 EHRR 175; [2007] ECHR 935 at [35].

[16] *White v Sweden* (2008) 46 EHRR 3; [2006] ECHR 793 at [19], [30]. See *Ringier Axel Springer Slovakia AS v Slovakia (No 3)* [2014] ECHR 9 at [77].

[17] The *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 defence is said to promote "greater freedom for the press to publish stories of genuine public interest" according to Lord Brown in *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11 at [118].

newspapers.[18] These concerns are reflected In *Henry v British Broadcasting Corporation*[19] and in academic literature.[20]

Whilst the basis for the defence and the desire to strike the correct balance between Arts 8 and 10 of the ECHR might be clear,[21] the law of defamation has still had to adapt to encompass the *Reynolds* and reportage defences with a view to meeting those concerns, a key aim in the new legislation. Parliament seemed worried about the costs of running a *Reynolds*-type defence[22] and in particular the difficulties of arguing Lord Nicholls' criteria.

Despite the ruling in *Jameel v Wall Street Journal SPRL (No 3)*,[23] lower courts tended to view the criteria as a series of hurdles.[24] Whilst the criteria might have had the advantage of clarity, Parliament was keen to find ways of establishing a public interest defence that allowed the courts to look at all the circumstances of the case.[25] Section 4 of the Act abolishes Lord Nicholls' list by attempting to improve upon *Reynolds*, to be more ECHR-compliant and to take account of *Flood v Times Newspapers Ltd*.[26] The Act is intended to draw upon a well-worn theme emphasised by the Supreme Court in *Flood* that the press should be free to publish stories of genuine public interest. This begs questions about the scope of the defence.

<subdiv>Scope of Reynolds

Reportage or neutral reportage as opposed to *Reynolds* (which covered investigative journalism) is when a journalist reports both sides of a story, which is of legitimate and topical interest to its readers, without embellishing or adopting it as his or her own. The reportage defence has evolved as a sub-species of the *Reynolds* qualified privilege defence available to responsible journalists in situations where *Reynolds* might not apply although the foundation on which they are based is similar.

It was always assumed that *Reynolds* qualified privilege (and by extension reportage) only covered the media[27] until *Seaga v Harper*[28] where Lord Carswell held that *Reynolds* qualified privilege could extend to any type of publication that satisfied the tests of public interest and responsible journalism. This controversial proposition was upheld by Eady J in *Seray-Wurie v Charity Commission*.[29],Llater

[18] *European Convention on Human Rights and Fundamental Freedoms* (1950) ETS 5; 213 UNTS 221 (ECHR), Art 10(2) provides that the right to freedom of expression may be subject to restrictions "for the protection of the reputation or rights of others". In *Polanco Torres v Movilla Polanco v Spain* [2010] ECHR 1341; *Kania & Kittel v Poland* [2011] ECHR 978 at [36], [40], the Strasbourg Ccourt found that freedom of expression carried "duties and responsibilities" and that journalists had to act "in good faith" so as to provide "accurate and reliable information in accordance with the ethics of journalism". The test of "necessity in a democratic society" (in Art 10 of the ECHR) meant considering whether the interference with freedom of expression corresponded to a "pressing social need".

[19] *Henry v British Broadcasting Corporation* [2005] EWHC 2787 at [81].

[20] Barendt E, "Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court" (2009) 1 *Journal of Media Law* 49; Mullis A and Scott A: "The Swing of the Pendulum: Reputation, Expression and the Re-Centring of English Libel Law" (2012) 63 *Northern Ireland Legal Quarterly* 27.

[21] In *Affaire Axel Springer AG v Allemagne (No 2)* [2014] ECHR 745 at [56], the court found that both articles should be given equal weight.

[22] See text around n 10

[23] *Jameel v Wall Street Journal SPRL (No 3)* (2007) 1 AC 359; [2006] UKHL 44 at [50].

[24] House of Lords Select Committee on the Constitution, *Defamation Bill Report*, HL Paper 86 (December 2012) at [10].

[25] Tomlinson H, *Case Law: Flood v Times Newspapers, Supreme Court Allows "Reynolds" Appeal*, The International Forum for Responsible Media Blog (21 March 2012), https://inforrm.wordpress.com/2012/03/21/case-law-flood-v-times-newspapers-supreme-court-allows-reynolds-appeal-hugh-tomlinson-qc/.

[26] *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11.

[27] See also Lord Phillips in *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11 at [44] where his Lordship said that although *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 was not the exclusive preserve of the media, they were the more likely to rely upon it as they would publish to the whole world more often.

[28] *Seaga v Harper* [2008] 3 WLR 478; [2008] UKPC 9 at [11].

[29] *Seray-Wurie v Charity Commission* [2008] EWHC 870.

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courts have not however taken this position.[30] There are conceptual difficulties in applying *Reynolds* to non-media publications as it would be difficult to work out the relative standards of responsible conduct. The *Reynolds* defence seems aimed specifically at investigative journalism and was not therefore designed to cover other authors, such as bloggers.[31] Presumably a blogger would not have the resources to carry out investigative journalism and should not therefore be judged by the same standards.[32] It might also be rather difficult to work out an appropriate objective standard by which to judge a blogger as they are so varied in background and expertise. Nor is there a requirement that they conform to a professional standard of behaviour or ethical code.[33]

This theory would seem to be borne out by the case law on breach of duty in negligence.[34] Whilst learner drivers are judged by an objective standard of reasonable competency for policy reasons[35] and doctors (and other professionals) are generally judged by the standard of accepted professional opinion,[36] a jeweller who pierces your ears is not expected to have the same skills as a surgeon or to meet the same standards of hygiene as a hospital.[37] This suggests that a blogger would be judged by the standard of a reasonably competent blogger (if such a person were capable of existing) rather than by the same standard as an investigative journalist as the expertise, resources and infrastructure available to them are far greater than those available to most bloggers. Nor would most bloggers have the funds to defend a case[38] arguing *Reynolds* and/or reportage qualified privilege, although reportage alone should be more straightforward.

The Act might, however, change things radically as it seems designed to apply to any author.[39] Surely it would still exclude sloppy journalism but will require consideration of the difficulties of finding the appropriate standard bearing in mind the need to balance Arts 8 and 10 of the ECHR.

This article will look in particular at freedom of speech.[40] This will be seen against a background of political disputes which are viewed generally by the courts as in the public interest and which are at issue in many reportage cases. Free speech is especially important in this context as the voting public in a democracy is entitled to be informed of political disputes, particularly where one of the parties to that dispute is standing for election. In *Lingens v Austria*,[41] the applicant described the Austrian Chancellor as a Nazi sympathiser. He argued that his conviction for criminal defamation breached Art 10(2) of the ECHR and the Strasbourg Court agreed holding that political criticism is an important function of the media:

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[30] Cases such as *Bonnick v Morris* [2003] 1 AC 300; [2002] UKPC 31 assume that this is the case by linking *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 to the test of responsible journalism.

[31] See Barendt, n 20.

[32] The same would surely apply to tweeters considering in particular the maximum length of a tweet.

[33] The true impact of qualified privilege on social media remains to be seen. Bloggers cannot sign up to the *Draft Royal Charter for Proposed Body to Recognise Press Industry Self-Regulator* (2013) which begs the question as to whether they might need another mechanism: see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249783/Final_Draft_Royal_Charter_11_Oct_2013.pdf.

[34] Mitchell P, "The Nature of Responsible Journalism" (2011) 3 *Journal of Media Law* 19 argues that the standard of responsible journalism in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 looks very close to the standard by which breach of duty in negligence is judged. Defamation is clearly not a tort of negligence.

[35] See *Nettleship v Weston* [1971] 2 QB 691.

[36] See *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; *Bolitho v City of Hackney Health Authority* [1998] AC 232.

[37] See *Phillips v William Whiteley* [1938] 1 All ER 566.

[38] Assuming that it would be possible to hunt down a blogger.

[39] Explanatory Notes, *Defamation Act 2013* (UK) at [33], http://www.legislation.gov.uk/ukpga/2013/26/notes/contents.

[40] In *Prager & Oberschlick v Austria* [1995] ECHR 12 at [34] the Strasbourg Court held that even though the press: "must not overstep certain bounds set ... for the protection of the reputation of others, it is ... incumbent upon it to impart – in a way consistent with its duties and responsibilities – information and ideas on political questions and other matters in the public interest".

[41] *Lingens v Austria* [1986] ECHR 7.

<blockquote>

> Freedom of the press … affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders … freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.[42]</blockquote>

In *Roberts v Gable*,[43] (one of the few cases where reportage was argued successfully), one of the parties to the dispute was a potential candidate in the London Mayoral elections. The British National Party (BNP) had enjoyed some success in the local elections in 2002 and had put up more candidates. The party's profile had therefore been raised and the electorate had become more interested in their affairs.

There is no particular reason however why reportage should be confined to political disputes but those disputes are reported more widely, which might be why most cases cover them. It might also be easier to show that the story is in the public interest[44] where politics are involved.

Whilst the basis for responsible journalism involves a consideration of Arts 8 and 10 of the ECHR, the question arises as to what further criteria need to be met. This analysis will therefore turn again to Lord Nicholls in *Bonnick v Morris* in order to answer this question.[45]

<subdiv>Responsible journalism

In the words of Lord Nicholls:

<blockquote>

> Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputation of individuals. Maintenance of this standard is in the public interest and in the interest of those whose reputations are involved.[46]</blockquote>

The court does not have to determine whether or not it would have acted in the same way as the defendant but merely whether the defendant had acted responsibly.[47] Allowance is made for editorial judgment or discretion and all the circumstances of the case.

The media are therefore given considerable latitude by the *Reynolds* defence. The price that journalists have to pay however is meeting the standard of responsible journalism.[48] For instance, *The Times* in *Reynolds* failed to argue qualified privilege successfully because they had not reported Albert Reynolds' side of the story.[49] In *Jameel*,[50] however, the House of Lords held that it might not always be necessary to obtain the claimant's side of the story and courts should take a more flexible

[42] *Lingens v Austria* [1986] ECHR 7 at [42]. See *Bowman v United Kingdom* (1998) 26 EHRR 1; [1998] ECHR 4, where the Strasbourg Court held that free elections, freedom of expression and free political debate were the essence of democracy. See also *Aquilina v Malta* [2011] ECHR 928 at [44], "a constant thread running through the Court's case law is the insistence on the essential role of a free press in ensuring the proper functioning of a democratic society"; *Print Zeitungsverlag GmbH v Austria* [2013] ECHR 943 at [38]-[40].

[43] *Roberts v Gable* [2008] 2 WLR 129; [2007] EWCA Civ 721.

[44] The term "public interest" is not defined in the Act, so the common law will apply.

[46] *Bonnick v Morris* [2003] 1 AC 300 at [[23]; [2002] UKPC 31 at [23]; *Jameel v Wall Street Journal Europe SPRL (No 3)* [2007] 1 AC 359; [2006] UKHL 44 at [57]-[58] (Lords Hoffmann and Scott); *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11 at [123] (Lord Mance).

[47] *Radio France v France* (2005) 40 EHRR 29; [2007] ECHR 127 at [39]; *Jersild v Denmark* (1995) EHRR 1; [1994] ECHR 33 at [31].

[48] *Eerikainen v Finland* [2009] ECHR 255 at [60].

[49] See *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11, in particular the judgments of Lords Mance and Phillips.

[50] Kate Beattie describes *Jameel v Wall Street Journal Europe SPRL (No 3)* [2007] 1 AC 359; [2006] UKHL 44 as having a "liberalising intention" in Beattie K, "New Life for Reynolds 'Public Interest Fence'? Jameel v Wall Street Journal Europe" (2007) 1 *European Human Rights Law Review* 81 at 89 but was seen as a worry when drafting the new legislation.

approach to Lord Nicholls' criteria.[51] Section 4 of the Act does not refer to these criteria but does make reference to "editorial judgment",[52] an apparent reference to Lord Mance's judgment in *Flood*.[53] He distinguishes between whether the story is in the public interest, which is a question of law for the judge, and whether or not the defamatory statement should have been included which is a question of editorial judgment.[54] Judges are not meant to "second guess" editors with the benefit of hindsight for fear that this would discourage investigative reporting.[55] Arguably the wording of the Act gives editors even more discretion, making it even harder for judges to hold that the piece is not privileged. This is done under the auspices of promoting freedom of expression[56] seeminglyat the expense of protecting Art 8 of the ECHR rights.

It is against this background: the changing face of the law of defamation, taking on board human rights' concerns, and creating the concept of responsible journalism, that the courts have begun to develop the defence of "reportage"[57] as a sub-species of *Reynolds* qualified privilege. The essence of reportage will be analysed next, starting with the apparently strict requirement of neutral reporting.

<DIV>ESSENCE OF REPORTAGE

The essential characteristics of reportage can been seen in the judgment of Simon Brown LJ on appeal in *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* (the first English case to analyse reportage):

<blockquote>

> "Reportage" (a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper) … should more readily attract qualified privilege than publications, as in *Reynolds* itself, by which the newspaper makes the allegation its own. The essential distinction is between … the press's role as a "watchdog" to report on matters of public concern, and its role as "bloodhound" which it pursues by investigative journalism.[59]</blockquote>

This article will dwell on certain aspects of this quotation as it analyses the two types of qualified privilege. It will begin with the issue of neutral reporting; it will then turn to political disputes, and

[51] The quality and reliability of the source was crucial in *Jameel v Wall Street Journal Europe SPRL (No 3)* [2007] 1 AC 359; [2006] UKHL 44.

[52] See *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11; *Axel Springer AG v Germany* (2012) 55 EHRR 6; [2012] ECHR 227 at [81].

[53] *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11 at [132].

[54] Quoting from Lord Hoffman in *Jameel v Wall Street Journal Europe SPRL (No 3)* [2007] 1 AC 359; [2006] UKHL 44 at [51]-[52].

[55] *Jersild v Denmark* (1995) EHRR 1; [1994] ECHR 33 at [31].

[56] House of Lords and Commons Joint Committee on Human Rights, *Legislative Scrutiny: Defamation Bill*, HL Paper 84, HC 810 (December 2012) p 3.

[57] There are only three substantial academic articles on reportage: see Busuttil G, "Reportage: A Not Entirely Neutral Report" (2009) 2 *Entertainment Law Review* 44; Armstrong N, "The Emerging Defence of Reportage" (2009) 40 *Victorian University of Wellington Law Review* 441; Bosland J, "Republication of Defamation under the Doctrine of Reportage: The Evolution of Common Law Qualified Privilege in England and Wales" (2011) 31 *Oxford Journal of Legal Studies* 9.

[59] *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634 at [6]. The arguments made by counsel at first instance and on appeal are largely responsible for the introduction of reportage into English law. It is assumed that they drew on American cases such as *Edwards v Aubudon Society*, 556 F 2D 113 (NY, 1977) although this is not made clear in the reports of *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2000] WL 1675201 (for comment on *Edwards*, see, eg, Bowles D, "Neutral Reportage as a Defence against Republishing Libel" (1989) 11 *Communications & Law* 3). Other analyses of the law in this area in the United States, Canada and Australia include: Laidman D, "When the Slander is the Story: The Neutral Reportage Privilege in Theory and Practice" (2010) 17 *University of California Los Angeles Entertainment Law Review* 74; Comment, "Constitutional Law – Freedom of the Press – Pennsylvania Supreme Court Declines to Adopt Neutral Reportage Privilege – Norton v Glenn, 860 A 2d 48 (Pa, 2004)" (2005) 118 *Harvard Law Review* 2029; Donnelly M, "A Newsworthiness Privilege for Republished Defamation of Public Figures" (2009) 94 *Iowa Law Review* 1023; Mullender R, "Defamation and Responsible Communication" (2010) 126 *Law Quarterly Review* 368; Williams K, "Defaming Politicians: The Not so Common Law" (2000) 64 *Modern Law Review* 748.

the public interest followed by the distinction between the press as a "watchdog"[60] or "bloodhound". It will also show how difficult it is to argue reportage successfully, mainly because judges have limited its scope considerably. Although there is a danger that relying on reportage might result in the publication of untrue defamatory material, there is a clear need for a limited form of reportage given the difficulties of relying on *Reynolds.*

<subdiv>Neutral reporting

The requirement for neutral reporting is one of the ways in which courtshave limited the scope of reportage quite dramatically.[61] It is clear from cases such as *Galloway v Telegraph Group Ltd*[62] (where the defendants were found to have drawn certain conclusions about the receipt by Mr Galloway of funds diverted from Iraq's Oil for Food Program even though there was no decisive documentary evidence of this) that the defence of reportage will be lost where the defendant asserts the allegations directly rather than reporting them as facts. The same would apply in cases such as *Henry*, where Gray J held that the defence of reportage could not succeed because the British Broadcasting Corporation had adopted and "embroidered" the conclusions of a report.[63] In *Malik v Newspost Ltd*,[64] however, the defence could not show that both sides of the controversy had been reported in a neutral fashion.[65] Similarly in *Al-Fagih,* Smith J (at first instance) found that the reporting could not be seen as either completely fair or accurate as the journalist had tended to favour one side of the dispute and had adopted some of the allegations as his own.[66]

The case law therefore shows that there is a link between disinterested reporting and giving both sides of the story, the core of reportage. Meeting this burden is hard, which is why reportage has only rarely succeeded.[67] The requirement not to adopt the story as your own tends to limit reportage to a particular style of writing. Investigative journalists might be very reluctant to favour this style as there is little room for expressing personal opinions. The *Reynolds* defence would often therefore be more appropriate.

Even though the room for manoeuvre is restricted, when *Roberts v United Kingdom*[68] reached the Strasbourg Court, it agreed with the Court of Appeal that although the tone of the article was sarcastic, it was as neutral as could be expected of any article written in that particular publication in those particular circumstances. A degree of sarcasm if applied to both sides might not therefore be fatal to the application of the defence of reportage.

Although there is some limited scope for manoeuvre if the user is sarcastic, what if he or she is malicious in tone? Opinion seems to be divided as to what effect malice might have. Busuttil, for example, would seem to disagree with Ward LJ[69] in taking the view that *Reynolds* and reportage are "absolute privilege in all but name" and therefore would not be defeated by malice.[70] Malice might also indicate a lack of neutrality which would surely be fatal to reportage. Malice probably defeats reportage and possibly also the *Reynolds* defence.[71] Malice might become an issue as s 4(1)(b) of the

[60] *Prager & Oberschlick v Austria* [1995] ECHR 12 at [34], courts should be loath to restrict the freedom of the media as it is the purveyor of information to the public and acts as a watchdog.

[61] Neutral reporting is required by *Defamation Act 2013* (UK), s 4.

[62] *Galloway v Telegraph Group Ltd* [2006] EWCA Civ 17.

[63] See *Defamation Act 2013* (UK), s 4(2).

[64] *Malik v Newspost Ltd* [2007] EWHC 3063.

[65] See *Prince Radu of Hohenzollern v Houston* [2008] EWCA Civ 921; [2009] EMLR 839. Justice Eady J *Prince Radu of Hohenzollern v Houston* [2007] EWHC 2735 decided that the report was not neutral enough to be classified as reportage.

[66] Only Mantell LJ (who dissented) agreed with her on appeal.

[67] This requirement is largely preserved by the *Defamation Act 2013* (UK), s 4(3).

[68] *Roberts v United Kingdom* [2011] ECHR 1220.

[69] *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972 at [43].

[70] Busuttil, n 57 at 49.

[71] Malice is irrelevant for the *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 type of qualified privilege according to Lord Hoffman in *Jameel v Wall Street Journal Europe SPRL (No 3)* [2007] 1 AC 359; [2006] UKHL 44 at [46]. Howevernot

Act provides that the defendant must "reasonably" believe "that publishing the statement complained of was in the public interest". The word "reasonably" leaves room for debate about malicious intent. If reportage cannot cover stories reported in a malicious fashion, is it also limited to certain types of dispute?

<subdiv>Political disputes and public interest

Nearly all of the reportage cases involved political disputes,[72] but it is clear from cases such as *Mark v Associated Newspapers Ltd (No 1),*[73] *Flood*, and *Charman v Orion Publishing Group Ltd*[75] that reportage can extend into other fields.

Mark did involve a politician, namely the former Prime Minister Tony Blair. However, the newspaper dealt with aspects of his private life and particularly the lives of his children. This might not have been in the public interest[76] for the purpose of *Reynolds* or reportage. Interest in the private lives of famous people is not necessarily in the public interest, even though the public might have a lurid fascination in them.[77] However, it is possible that this type of story could attract the reportage defence albeit in different circumstances.[78]

Human rights' concerns underpin the issue of public interest as well as the question of responsible journalism. Indeed there are suggestions in *Reynolds* that political debate is so fundamental in a democratic society that it should not be curtailed unless the means justify the ends.[79] *Reynolds* also makes it clear that the defence of qualified privilege will be lost unless the journalist acted responsibly.[80] This might not include making revelations of a personal nature unless they are in the public interest.

Section 4 of the Act does not define the meaning of public interest and so the courts will draw on the existing case law.[81] The meaning of the term is similar for *Reynolds*, reportage, and honest opinion.

Lord Phillips in *Spiller v Joseph*[82] confirms that whether or not a question is in the public interest or not is a matter of law. That case involved a question of whether those entertaining the public could be relied upon to perform their contracts or not. The finding by Pill LJ (in the Court of Appeal) that this

according to Lord Phillips MR in *Loutchansky v Times Newspapers Ltd* [2002] QB 783, although he takes a different view in *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11 at [38].

[72] *Ziembinski v Poland* [2012] ECHR 1645 at [49] where the court said that the way in which a local government officer carried out his official duties would be a matter of public interest.

[73] *Mark v Associated Newspapers Ltd (No 1)* [2002] EWCA Civ 772 at [35].

[75] *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972. correct

[76] "The question of whether the subject matter of the article was a matter of public interest depends upon the effect of the article as a whole and not upon the effect of the particular defamatory statement which is complained of, which, unless it has no contribution to make to the overall effect of the article, should not be isolated for separate consideration": *Flood v Times Newspapers Ltd* [2009] EWHC 2375 at [126] (Tugendhat J), upholding *Jameel v Wall Street Journal Europe SPRL (No 3)* [2007] 1 AC 359; [2006] UKHL 44.

[77] Lord Justice Ward describes it as a "legitimate and topical interest" in *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972 at [43]; *Von Hannover v Germany (No 3)* [2013] ECHR 835 at [46], [52], where the court asked whether the material contributed to a debate on a matter of public interest.

[78] The requirements that must be met to argue reportage successfully will be analysed later but the defence failed in *Mark v Associated Newspapers Ltd (No 1)* [2002] EWCA Civ 772 because the defendants had not reported contradictory statements in a neutral fashion.

[79] See *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 200 (Lord Nicholls); *Jersild v Denmark* (1995) EHRR 1; [1994] ECHR 33 at [31].

[80] See *Loutchansky v Times Newspapers Ltd* [2002] QB 783; *Kania & Kittel v Poland* [2011] ECHR 978 at [49].

[81] Lord Mance in *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11 at [125] (quoting Lord Scott in *Jameel v Wall Street Journal Europe SPRL (No 3)* [2007] 1 AC 359; [2006] UKHL 44 at [128]-[138]) uses the term "real and unmistakeable public interest to the public".

[82] Spiller v Joseph [2011] 1 AC 852; [2010] UKSC 53

was in the public interest was not challenged on appeal. The concept is therefore a flexible one[83] dependent in part at least on the facts of the case.

The relationship between public interest and responsible journalism was analysed by Lord Phillips MR in the Court of Appeal in *Jameel* commenting on Eady J at first instance:

<blockquote>

> We agree ... that the phrase *responsible journalism* is insufficiently precise to constitute the sole test for *Reynolds* privilege. It denotes the degree of care that a journalist should exercise before publishing a defamatory statement. ... The subject matter of the publication must be of such a nature that it is in the public interest that it should be published. This is a more stringent test that the public should be interested in receiving the information …[84]</blockquote>

Lord Mance in *Flood* takes the view, correctly, that when the House of Lords' decisions in *Reynolds* and *Jameel* are read together, the effect is to tilt the balance in favour of greater freedom for the press to publish stories in the public interest as against protection of reputation subject of course to meeting the burden of responsible journalism.[85] Public interest has, however, been defined a little differently and rather more narrowly in cases such as *Al-Fagih.*

<subdiv>Public Interest in reportage cases

In *Al-Fagih*, the defendant's newspaper sold about 1500 copies a day in London. Its readership consisted mainly of members from the Saudi Arabian community with a special interest in both Saudi Arabian affairs and Saudi personalities. A split in a political group was of legitimate concern to its readers and could therefore be said to be of public interest. Similarly in *English v Hastie*[86] where an allegation of inter alia breach of contract and unlawful interference in the business of another firm by the managing director and underwriter in a reinsurance firm was published in a monthly subscription newsletter that would have been of interest to those involved in the insurance industry in London.

However, as Eady J pointed out in *Roberts v Gable*[87] at first instance, the case for reportage is stronger when it deals with issues of wider political significance.[88] *Roberts* concerned a political dispute within the BNP. Even though the issue of public interest is regarded as a question of law for the judge for both *Reynolds* and reportage, it would seem to be very fact dependent and so the value of precedent is necessarily somewhat limited.

Public interest is, of course, not the only issue to be considered in persuading the court that qualified privilege should succeed as a defence or in considering the differences between *Reynolds* and reportage. Whilst the concept of public interest and the role it played is, broadly speaking, similar for both types of qualified privilege, the key difference relates to how the press operates. Is it operating as a watchdog or as a bloodhound?[89]

<subdiv>Watchdog/bloodhound

Where a publication relies on a pure *Reynolds* defence, then it acts as a bloodhound carrying out a lengthy investigation.[90] The same cannot be said for reportage where the publication acts more as a

[83] *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11 at [68] (Lord Phillips), [177] (Lord Mance).

[84] *Jameel v Wall Street Journal Europe SPRL (No 3)* [2005] QB 904; [2005] EWCA Civ 74 at [87].

[85] *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11 at [176].

[86] English v Hastie [2002] All ER (D) 11

[87] *Roberts v Gable* [2006] EWHC 1025 at [35]. Stories of suspected illegality are also likely to be in the public interest, eg, *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11.

[88] *Ziembinski v Poland* [2012] ECHR 1645 at [49].

[89] *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2000] WL 1675201 at [6]. A bloodhound sniffs out a story, whereas a watchdog barks "to wake us up to a story already out there": *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972 at [49] (Ward LJ).

[90] Arguably some of the most famous pieces of investigative journalism include: the breaking of the Watergate scandal by Woodward and Bernstein at *The Washington Post*; *The Sunday Times* investigation into Thalidomide; *The Daily Telegraph*

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watchdog.[91] What therefore is meant by investigative journalism? English judges have not attempted to define it but it does merit some consideration.

It was defined by Hugo De Burgh as:

<blockquote>

> A man or woman whose profession it is to discover the truth and to identify lapses. This is called investigative journalism and is distinct from apparently similar work done by the police, lawyers, auditors and regulatory bodies in that it is not limited as to target, not legally founded and usually earns money for media publishers.[93]</blockquote>

Investigative journalism is to be contrasted with tabloid journalism[94] where the focus is on entertainment rather than:

<blockquote>

> Informed debate about important issues of public concern … Tabloid journalism conjoins the sentimental and the sensational, and the prurient and the populist, often exploiting personal tragedy for public spectacle with scandal and sensationalism, often masquerading as "human interest".</blockquote>

It might be possible, however, for a tabloid paper to engage in investigative journalism.[95]

This categorisation matters because the names of contributing journalists are very likely to be credited in an investigative piece, as journalists might stake their reputation on the piece. Whereas in reportage the journalist's investigation is rather different as it is much less likely to be originaland it does not involve necessarily "breaking" a story as an investigative journalist would. Instead reportage might well consist of assembling facts from existing press releases or reports and then extracting the key facts and assembling a report covering both sides of the picture.[96]

Writers on the other hand such as bloggers, are likely to express their views as there is little point in a blogging in a neutral fashion. However, it might be easier and cheaper to argue pure reportage if they were to be sued for defamation. Reportage might also play an important role where stories are "re-tweeted" without being adopted or embellished. However, it would be hard to remain neutral with a limit of 140 characters.

With this in mind, it would seem appropriate to consider and compare the nature of the relationship between the two defences further. The article will focus first on whether the journalist needs to establish the truth of the story for the defence of reportage to succeed, and then look at the narrow scope of reportage in more detail.

<DIV>RELATIONSHIP BETWEEN REYNOLDS AND REPORTAGE – SIMILARITIES AND DIFFERENCES

<subdiv>Verification

Courts have tended to consider first whether the issue is in the public interest and have then looked at Lord Nicholls' criteria in *Reynolds* before deciding whether the journalist has acted responsibly and

investigation into MP's expenses; and the story by the now defunct *News of the World* into spot-fixing by players in the Pakistani Cricket team.

[91] In *Jersild v Denmark* (1995) EHRR 1; [1994] ECHR 33 the Strasbourg Court held that reporting interviews was one of most important aspects of the press's role as a "public watchdog". Punishing a journalist for helping to broadcast an interview on a matter of public interest could well breach the *European Convention on Human Rights and Fundamental Freedoms* (1950) ETS 5; 213 UNTS 221, Art 10.

[93] De Burgh H, *Investigative Journalism* (2nd ed, Routledge, 2008) p 10. See Franklin B, *Key Concepts in Journalism Studies* (Sage Publications, 2005) pp 122-123 for another viewpoint.

[94] Franklin n 91, pp 258-260.

[95] See, eg, the revelations about spot-fixing at n. 90

[96] Busuttil, n 57 at 47 suggests that: "The material complained of must be a report … may be distinguished from a piece of investigative journalism in which the journalist makes primary allegations of fact: see, eg [*Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972]."

whether the public interest is served by publication. Questions about reportage ttend to be argued at this stage. For examplein *Jameel* the issue of whether or not the story was true came up in the context of a consideration of the tone of the article (one of Lord Nicholls' criteria for responsible journalism), and Lady Hale said that:

<blockquote>

> The requirements in "reportage" cases may be different but if the publisher does not himself believe the information to be true, he would be well advised to make this clear … the tone in which the information is conveyed will be relevant to whether or not the publisher has behaved responsibly in passing it on.[97]</blockquote>

The publisher does not therefore have to believe in the truth of the story for reportage, because he or she is reporting the fact that the allegations have been made[98] rather than asserting that they are true. For *Reynolds*, the public interest lies in the fact that the allegations have been made which is why they have to be verified. Section 4 of the Act is much broader when it comes to reportage than it is at common law. Section 4 could be interpreted as meaning that reportage could be argued successfully because of a public interest in the allegations themselves and not on the basis that the allegations have been made.[99]

the tone of the story is however relevant to both. Reportage cannot succeed where the publisher or journalist has adopted or embellished the story, or if there is any lack of neutrality.[100] Whereas those factors are at the heart of an investigative piece where the journalist adopts the story as his or her own and is most unlikely to take an entirely neutral stance.[101]

Reportage would usually mean that the author is just reporting the details of the dispute rather than asserting its truth. As the story has not been adopted, there is no need for the publisher to assert that it is true or even to verify it.[102] Indeed Simon Brown LJ in *Al-Fagih*[103] suggests that verification might even be inconsistent with objective reporting[104] which is at the very heart of reportage.[105] However, for the *Reynolds* defence to succeed the journalist or publisher would need to show that they have acted responsibly by checking on the accuracy of the story by asking, for example, for the claimant's version of events.[106] Seeking out the truth is a crucial part of investigative journalism (the bloodhound).

It is arguable that the judgments of Lords Mance and Phillips in *Flood* who dealt with the issue of verification in some detail, might not make much difference to the current law, even though they disagreed with the Court of Appeal in finding that enough had been done to verify the story. Indeed

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[97] *Jameel v Wall Street Journal Europe SPRL (No 3)* [2007] 1 AC 359; [2006] UKHL 44 at [149].

[98] *Roberts v Gable* [2008] 2 WLR 129; [2007] EWCA Civ 721 at [28]; Milmo P, Rogers WVH, Parkes R, Walker C and Busuttil G (eds), *Gatley on Libel and Slander: First Supplement to the Eleventh Edition* (Sweet & Maxwell, 2010) p 91; *Defamation Act 2013* (UK), s 4(3).

[99] Bosland J and Walker S, *Hanging by a Thread: Reportage and Clause 4 of the Defamation Bill*, The International Forum for Responsible Media Blog (11 February 2013), https://inforrm.wordpress.com/2013/02/11/hanging-by-a-threat-reportage-and-clause-4-of-the-defamation-bill-sophie-walker-and-jason-bosland/.

[100] *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2000] WL 1675201 at [61] (Smith J); *Flood v Times Newspapers Ltd* [2009] EWHC 2375 at [163] (Tugendhat J): "A defence of neutral reporting relieves the journalist of the obligation to verify – indeed it makes verification otiose, since it would involve the journalist in abandoning neutrality."

[101] *Roberts v Gable* [2008] 2 WLR 129; [2007] EWCA Civ 721 at [61]. See Hooper, n 5 at 63 where he says that "there may be reportage cases in which the public interest lies simply in the fact that the statement was made, when it may be clear that the publisher does not subscribe to any belief in it truth". Milmo et al, n 96, p 541 also supports the view that verification is not necessary as does Eady J at first instance in *Prince Radu of Hohenzollern v Houston* [2007] EWHC 2735.

[102] *Defamation Act 2013* (UK), s 4(3) preserves this.

[103] *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634 at [50].

[104] *Roberts v Gable* [2006] EWHC 1025 at [28]; *Roberts v Gable* [2008] 2 WLR 129; [2007] EWCA Civ 721 (Ward LJ).

[105] *Roberts v Gable* [2008] 2 WLR 129; [2007] EWCA Civ 721 at [40] (Ward LJ): "where there has been full attribution but not adoption of a political dispute … verification is not essential".

[106] *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11 at [158] (Lord Mance).

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Lord Clarke felt that the case should not be taken as laying down any general principles.[108] The accusations in *Flood* were serious as a fairly senior police officer had been accused of taking bribes from Russian exiles in exchange for information.[109] *The Time*s' investigation revealed a "strong circumstantial"[110] case in which all parties had been approached and given a chance to comment. The journalists seemed to have been satisfied that Sergeant Flood was likely to be guilty of corruption. The Supreme Court found (upholding the judge at first instance) that this was enough to satisfy the burden of verification.[111] The obligation to verify for *Reynolds* purposes is therefore very much alive although the extent of that obligation seems to be a matter for individual judicial opinion taking into account editorial judgement.[112]

According to Simon Brown LJ in *Al-Fagih*, there is another reason why verification might not be necessary in reportage cases:

<blockquote>

> [W]here … both sides to a political dispute are being fully, fairly and disinterestedly reported … the public is entitled to be informed of such a dispute without having to wait for the publisher, following an attempt at verification, to commit himself to one side or the other.[114]</blockquote>

This was important in *Al-Fagih* where the story was unfolding and being reported upon daily, and all the reports would have to be neutral. The related issue of the urgency of the story is also one of Lord Nicholls' criteria for responsible journalism in *Reynolds*, although that might not be so important for reportage.

In *Roberts v United Kingdom*, the applicants argued that there was a breach of Art 8 of the ECHR because the article had been published without verifying the facts. The Strasbourg Court found no breach because although the allegations were serious, it was clear that most readers would see a series of allegations and counter-allegations made in the course of a political dispute rather than assertions of truth. The article was also published at a time of heightened interest in the BNP and was therefore in the public interest. There would need to be very good reasons for "punishing" the journalist for writing about the dispute.[115]

Whilst *Reynolds* and reportage have much in common, the scope of reportage is undoubtedly more restricted both at common law and under the Act.

<subdiv>Narrow scope of reportage

There is undoubtedly a close link between the *Reynolds* type of qualified privilege which is sui generis and covers media publications and reportage.[116] The emphasis in the case law on *Reynolds* is on promoting freedom of expression provided that the investigative journalist meets the standard of responsible journalism. The same can be said of reportage, at least to some extent.[117] For instance,

[108] *Hunt v Times Newspapers Ltd* [2012] EWHC 1220 at [12].

[109] Clearly a matter of public interest.

[110] *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11 at [185].

[111] *Axel Springer AG v Germany* (2012) 55 EHRR 6; [2012] ECHR 227 at [82]; *Kania & Kittel v Poland* [2011] ECHR 978 where the court held that journalistic freedom could not be seen as giving journalists the right to act in a reckless or arbitrary way. They had to check the accuracy of the information.

[112] *Defamation Act 2013* (UK), s 4(4).

[114] *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634 at [52]. Neither of the other two judges based their judgments explicitly on reportage. Lord Justice Mantell held (upholding Smith J at first instance) that there was no qualified privilege because of inadequate verification. The claimant's side of the story had not been sought and publication was unnecessarily hasty in view of the damaging nature of the allegations. Lord Justice Latham did not think that the failure to verify was enough to deprive the defendants of qualified privilege even though the paper had not adopted the allegations.

[115] See *Verlagsgruppe News GmbH v Austria* (2007) EMLR 491; [2006] ECHR 1092*; Thoma v Luxembourg* (2003) 36 EHRR 21; [2001] ECHR 240.

[116] Milmo et al, n 96, p 540 takes the view, that reportage is "a form of *Reynolds* qualified privilege", at least that is their interpretation of *Roberts v Gable* [2008] 2 WLR 129; [2007] EWCA Civ 721.

[117] The Court of Appeal judgment in *Roberts v Gable* [2008] 2 WLR 129; [2007] EWCA Civ 721 at [74], where Sedley LJ suggests that reportage "needs to be treated restrictively."

reportage does not seem to require the same investigative methods nor does the piece need to be original. The analogy drawn above between the watchdog and bloodhound seems most appropriate[118] as analysed by counsel for the appellant in *Al-Fagih*:

<blockquote>

> the newspaper's role was essentially that of reporter … rather than that of an investigator exploring the actual facts and reporting the outcome of such investigations …[119]</blockquote>

The focus for reportage is on reporting the facts rather than analysing the story.[120] Whereas the public interest in *Reynolds* lies in the allegations themselves which is why there is an obligation to verify.

Reportage is therefore a type of *Reynolds* qualified privilege covering very limited situations.[121] The courts apply the tests for reportage fairly strictly so that where the story has been adopted or embellished, the journalist will not be able to rely on reportage although *Reynolds* or other defences such as truth[122] might still be available. There is room in the English law of defamation for the defence of reportage in view of the cost and difficulty of mounting a *Reynolds* defence. The existence of the reportage defence also acknowledges that there are different styles of reporting. Assuming that a blogger wanted to write a neutral report, then it would be theoretically possible to argue reportage or knowing that such a report could be defended more easily than arguing *Reynolds*. Perhaps Busuttil summarises it best:

<blockquote>

> To justify the attack on the claimant's reputation the publication must always meet the standards of responsible journalism ... All the circumstances of the case and the 10 factors listed by Lord Nicholls adjusted as may be necessary for the special nature of reportage must be considered ... to reach the necessary conclusion that this is the product of responsible journalism.[123]</blockquote>

The relationship between *Reynolds* and reportage is largely fluid and the *Reynolds* factors will be applied differently depending on the circumstances of the particular case. The Act would seem to encourage the flexible application of the *Reynolds* criteria as seen in *Jameel.*

<DIV>DEFAMATION ACT 2013 (UK) IN MORE DETAIL

The Act[124] came into force on 1 January 2014 and is intended to create "a more balanced and fair law".[125] Section 1 provides that all claimants should show that the publication has caused or is likely to cause serious harm.[126] Whilst the meaning of what is defamatory has not changed,[127] the threshold

[118] See *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972 at [49] (Ward LJ); *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634 at [6].

[119] *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634 at [41].

[120] This is not reflected in the *Defamation Act 2013* (UK).

[121] Claimants will only be able to claim reportage under the *Defamation Act 2013* (UK), s 4(3) where they are party to the dispute.

[122] *Defamation Act 2013*(UK), s 2 (no longer called "justification").

[123] Busuttil, n 57 at 47.

[124] Lord Lester of Herne Hill's *Defamation Bill 2010* (UK) (given its second reading in the House of Lords on 9 July 2010) was withdrawn as a result of the introduction of the government Bill in 2011: Afia J and Hartley P, "Lord Lester's Defamation Bill 2010: A Practical Analysis" (2010) 2 *Journal of Media Law* 183.

[125] Ministry of Justice, *Defamation Act Reforms Libel Law*, Press Release (25 April 2013), http://www.gov.uk/government/news/defamation-act-reforms-libel-law.

[126] The word "substantial" had been used in the draft Bill (published in March 2011). The difference between the two is not apparent: see Ministry of Justice, *Government Response: Report of the Joint Committee on the Draft Defamation Bill* (29 February 2012), https://www.gov.uk/government/publications/government-response-report-of-the-joint-committee-on-the-draft-defamation-bill; Explanatory Notes, *Defamation Act 2013* (UK), http://www.legislation.gov.uk/ukpga/2013/26/notes; Horne A, *Defamation Bill [Bill No 5 2012-2013]*, Research Paper 12/30 (28 May 2012), http://www.parliament.uk/briefing-papers/RP12-30; Stephenson A, *Opinion: Defamation Bill, Progress Report*, The International Forum for Responsible Media Blog (24 March 2012), http://inforrm.wordpress.com/2012/03/24/opinion-defamation-bill-progress-report, see also Cooke v MGN [2014] EWHC 2831 **at [37]; [2014] WLR (D) 379**

has been raised. This is intended to build upon cases such as *Thornton v Telegraph Media Group Ltd*[128] which established a threshold of seriousness. It should prevent frivolous claims rather than publications causing minimal damage. Indeed in *Dow Jones v Jameel*,[129] the Court of Appeal suggested that cases could be struck out as an abuse of process where minimal or no actual damage had been sustained, although that is likely to be rare.[130] Proving seriousness might however be costly as witnesses will have to testify, although it would be unusual for a claim to be brought where damage to reputation is minimal.

The Act rewrites the law in s 4 by abolishing references to Lord Nicholls' criteria in *Reynolds* that had appeared in earlier versions of the Bill, by creating a new defence entitled "publication on a matter of public interest" covering both the former *Reynolds* qualified privilege and reportage, thereby confirming their close relationship. This change is intended to free judges from the stricture of Lord Nicholls' criteria allowing them to apply the judgments in *Jameel* and *Flood*. However, judges might be tempted to fall back on some or even all of the criteria as s 4(2) allows the court to look at "all the circumstances of the case".

Courts are likely to refer, amongst other things, to the size and resources of the defendant publication. Does this mean that there will be a sliding scale with large media organisations being judged by one standard and bloggers being judged by a lesser standard? This cannot be what Lord Nicholls envisaged for his responsible journalism test and runs contrary to the analogy with breach of duty in negligence drawn above. A sliding scale of objectivity would surely be a very difficult one to apply. Arguably bloggers and others with limited resources should not publish potentially defamatory material if they do not have the resources to defend a claim. Will it be easier for bloggers to satisfy this requirement? As the common law was designed around *Reynolds* and investigative journalism, judges will have to make considerable adjustments.

The Act deliberately does not attempt to define what is meant by "the public interest" and nor do the Explanatory Notes. Its meaning is imprecise leaving judges with a wide-ranging discretion over how to define it. A tighter definition would have been preferable. Section 4(1) does, however, enable judges to adapt the guidance given by case law to the facts before them. Although it is a question of law, the role of precedent is likely to be limited as the term "public interest" is likely to continue be pretty fact-specific.

The Act adds in a further complication by providing that not only does the statement have to be in the public interest but that the defendant "reasonably believed that publishing the statement complained of was in the public interest". The second hurdle requires a subjective evaluation which is new and will surely involve a consideration of whether or not malice was involved. There is also the potential for the claimant to dig into the defendant's motives making litigation more complex.[131]

The House of Lords and House of Commons Joint Committee on Human Rights took the view that this section[132] was ECHR-compliant because courts would still look at the *Reynolds* criteria when assessing whether a journalist held a reasonable belief but without following the criteria rigidly. Courts will need to look at what steps were taken to verify the truth of the statement and whether adequate investigation had been carried out. The appropriate balance between Arts 8 and 10 of the ECHR will have to be struck and lack of verification and consultation of reliable sources, particularly

[127] See *Sim v Stretch* [1936] 2 All ER 1237.

[128] *Thornton v Telegraph Media Group Ltd* [2010] EMLR 25; [2010] EWHC 1414 (at first instance), although the Court of Appeal had taken the opposite view in *Dow Jones & Co Inc v Jameel* [2005] EWCA Civ 75 at [37] (Lord Phillips MR).

[129] *Dow Jones v Jameel* [2005] EWCA Civ 75.

[130] The Court of Appeal was not persuaded that the presumption of damage in libel cases was a breach of *European Convention on Human Rights and Fundamental Freedoms* (1950) ETS 5; 213 UNTS 221, Art 10. See *Dow Jones v Jameel* [2005] EWCA Civ 75 at [41].

[131] United Kingdom, *Hansard*, House of Lords, 5 February 2013, vol 743 at col 194 (Baroness Bakewell), www.parliament.uk/business/publications/hansard/.

[132] Joint Committee, n 56. The wording was proposed by Lord Lester.

where the allegations are serious, would be likely to breach Art 8.[133] Questions remain as to whether the legislation strikes the right balance or tilts too far towards Art 10.[134]

Section 4(3) relates to reportage, by specifically drawing a distinction between the two types of qualified privilege on the key issue of verification; confirming that whilst failure to verify is not crucial to reportage, it might be important in establishing the former *Reynolds* defence.[135] Section 4(5) makes it clear that the defence of reportage could apply to statements of fact or opinion.[136] Expressing opinions can be a tricky issue for reportage because there is a risk of lack of neutrality.

The big problem with s 4(3) is that it does not reflect the case law analysed in this article. As mentioned earlier, the Act does not pick up one of the key features of reportage which is: "It is not the content of a reported allegation that is of public interest but the fact that the allegation has been made."[137]

This restriction limited the defence. There is every reason to suspect that the defence will be much broader as the courts might find that the defence applies on the basis of the public interest in the allegations themselves and not the fact that they had been made. This author was in favour of a more limited form of reportage and feels that the wider form is much harder to defend. Has the pendulum swung too much in favour of Art 10 of the ECHR, although human rights' concerns and case law might persuade courts to stick to the existing case law? However, the reportage defence in the Act is more limited because the claimant must be a party to the dispute. This limitation is apparently intended to ensure that he or she can put forward his or her side of the story and explain why the other party to the dispute was wrong. This explanation is entirely unconvincing.[138]

Section 4(4) provides that the court "must make allowance for editorial judgement as it considers appropriate". This is in keeping with cases from the Strasbourg Court, such as *Jersild*,[139] where the court held that it is not for national courts: "To substitute their own views for those of the press as to what technique of reporting should be adopted by journalists." This seems designed to deal with one of the criticisms of *Reynolds*, namely that the judge was effectively put into the editor's chair.[140]

Lord Dyson in *Flood* states that: "Weight should be given to a newspaper's editorial judgement as to what details are necessary to convey the essential message.The court should be slow to interfere with an exercise of editorial judgement."[141] His Lordship also suggests that a story could still be in the public interest even if the journalist had a "personal vendetta" against the subject of the story.

Journalists are not therefore restricted by a set of guidelines limiting what can and cannot be published. Lord Nicholls' criteria should no longer be seen as hurdles but as a guide to reaching appropriate editorial decisions.

The Explanatory Notes suggest that reference to "editorial judgement" goes beyond "editors in the media context".[142] This would involve a radical change to most of the common law which covered investigative journalism. *Reynolds* was designed with that in mind and this radical rethink would

[133] *Axel Springer AG v Germany* (2012) 55 EHRR 6; [2012] ECHR 227 at [82]-[83].

[134] See summary of Professor Phillipson's views before the Joint Committee, n 56 at [23]-[26].

[135] See the judgments Lords Mance and Phillips in *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11.

[136] Mullis A and Scott A, "Tilting at Windmills: The Defamation Act 2013" (2014) 77 *Modern Law Review* 87.

[137] *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11 at [77] (Lord Phillips).

[138] United Kingdom, *Hansard*, House of Lords, 5 February 2013, vol 743 at col 196 (Lord Phillips), said: "I do not quite see why this clause should apply to a dispute to which a claimant was a party. Why would it not apply to a matter in which the claimant had an interest?"

[139] *Jersild v Denmark* (1995) EHRR 1; [1994] ECHR 33 at [31].

[140] Hooper D, Waite K and Murphy O, "Legislative Comment Defamation Act 2013 – What Difference Will it Really Make?" (2013) 24 *Entertainment Law Review* 199.

[141] *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11 at [199].

[142] Explanatory Notes, *Defamation Act 2013* (UK) at [33]; United Kingdom, *Hansard*, House of Commons, 19 June 2012, vol 546 at col 79 (Jonathan Djanogly) where it was made clear that the new law is intended to apply "beyond mainstream journalism".

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controversially judge a large media organisation and a small journal or a blogger by the same standards.

The Act should therefore be seen as a significant development for several reasons. First, because it would seem to reaffirm that reportage is indeed a sub-species of the *Reynolds* form of qualified privilege. Secondly, it confirms that failure to verify the accuracy of the story will not destroy the reportage defence. Thirdly, s 4 of the Act seems to assume that public interest is given the same meaning for both the *Reynolds* defence and for reportage. Fourthly, the flexibility given to journalists by the concept of "editorial judgment" is codified. Finally, journalists are freed from the strictures of Lord Nicholls' criteria.

<DIV>CONCLUSION

Reportage is clearly part of the landscape now that it has found its way into the Act, although it is regrettable that the wording of the statute does not reflect the common law. At common law it was not the content of the story but the fact that the allegations had been made which was in the public interest, but it is hoped that judges continue to take a narrow view of reportage nevertheless. It remains to be seen whether the fact that the claimant must be party to the dispute proves to be a major limiting factor. A wider defence might risk tilting the balance too far in favour of Art 10 of the ECHR and allowing for the potentially widespread reporting of unverified defamatory statements.

Judges will probably continue to refer to Lord Nicholls' guidelines despite their absence from the Act. The codification of *Flood* is meant to encourage judges not to "second guess" editors and surely gives even greater prominence to freedom of expression. How important the subjective view of the public interest in s 4(1)(b) of the Act will be and what influence arguments over malice will have is an open question. Malice has always been hard to prove and there is no reason to suspect that will change.

Whilst *Reynolds* was designed to deal with investigative journalism, the new public interest defence seemingly applies more broadly. Quite how smaller publications or bloggers will fund the running of their defence is unclear. One wonders also how courts will judge a large media organisation, a small journal, blogger or tweeter by the same exacting standard. Finding objectivity across the board is surely impossible.

Postscript: in *Cooke v MGN* [2014] EWHC 2831 (QB) it was held that "serious" for the purposes of s. 1 of the Act should have its every day meaning. Bean J said in some cases there might be no need to produce evidence of serious harm although he declined to say how seriousness might be proved. More recently it was held in *Ames v The Spamhaus Project Limited* [2015] EWHC 127 (QB) at [53] that "likely" in s. 1 meant "more probable than not". Warby J also drew an analogy between "serious harm" and the concept of "a real and substantial tort" for jurisdictional purposes. He suggested that judges should look at: "the nature of the statement…, the gravity of its meaning, and the nature and extent of its publication.." at [45]. He also warned against attempts to rely on an inference of seriousness. It is therefore clear that s. 1 will need further interpretation by the courts as the cases have not been as clear or consistent as we might have hoped especially on the key point of what evidence needs to be adduced to prove seriousness.