



**A GUIDE TO MEDIA LAW FOR  
INVESTIGATIVE JOURNALISM**

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# A GUIDE TO **MEDIA LAW** FOR **INVESTIGATIVE JOURNALISM**

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## FOREWORD

Journalists and media houses around the world, but especially in Africa, often face vicious legal attacks and are hauled to courts by those whose pockets are deeper than the ocean and whose sins can make the devil look like an angel.

Numerous newspapers are forced to close shop or back down; journalists retrenched and forced to join the unemployment lines because of lawsuits and litigations. Publishers and investors are looking for a profit and are not willing to spend their hard earned money paying legal bills. But more often than not, these battles could have been easily avoided should the journalist(s) and the editor(s) take the right precautionary measures before publishing a story.

In 1999 and early 2000, my former boss, Jocelyn Maker, then head of the investigations unit, along with myself, created what we called an accuracy check for the Sunday Times. If your story can pass this test, then it likely would not have any come-backs like apologies or threats of lawsuits.

This accuracy check – still used by all journalists working for the Sunday Times today, gave one a guide to perfect and improve your story:

- What's the background of your story?
- Do you trust your source?
- Are all names spelled correctly – as well as figures, percentages, dates and ages? Are all your facts correct?
- Can you verify your quotations against your notebook?
- Are you satisfied that the story is accurate, angled correctly and that you are fair to all parties involved?
- What legal problems do you foresee?
- Were you threatened with a legal action and would like the story to be checked by a lawyer?
- Most of all do you have all your evidence to back all allegations made in the story and can you stand up in court, in front of a judge and be able to defend it?

In November 2011, President Jacob Zuma spokesperson and political heavyweight, Mac Maharaj, laid criminal charges against two renowned national papers: the Mail & Guardian and City Press, as well as some of their reporters. They even prevented the two publications from writing stories alleging that they had contravened the provisions of section 41(6) of the National Prosecuting Act of 1998 if they publish the details of his interview with the former elite investigating unit, the Scorpions.

But the Sunday Times wrote a similar: in fact our story was more damaging as we could prove that Maharaj lied under oath; and that he and his wife, Zarina, were paid millions in bribes.

The story under the headline Mac's dodgy millions – published on the front page on the Sunday Times in November 2011 – revealed that: "President Jacob Zuma's spokesman Mac Maharaj stands accused of receiving millions in bribes from French weapons maker Thales, the company that will be at the centre of the government's arms deal inquiry next year.

A two-month Sunday Times investigation has uncovered a paper trail that leads from the arms company to Maharaj and his wife Zarina.

Schabir Shaik, Zuma's former financial adviser who was convicted of corruption in the arms deal trial, was the conduit used by Thales to channel the money to Zarina Maharaj.

The "missing link" obtained by the Sunday Times is a consultancy agreement, never before disclosed, between Thales predecessor Thompson CSF and Shaik's company Minderley Investments, registered in the British Virgin Islands.

The agreement shows that secret payments totalling 1.2 million French francs (R2.3-million) went from the arms dealer's French bank to offshore bank accounts belonging to Maharaj's wife Zarina just two months before her husband's department awarded the French company a controversial credit card licence tender worth R265-million.

Documents from the Swiss district attorney's office which had obtained court orders for statements of Zarina and Shaik's Swiss bank accounts, revealed that Shaik's company was used as a conduit to channel the Thales money to Zarina's accounts.

It is believed the Scorpions were unable to obtain this agreement, and that this ultimately torpedoed their corruption investigation into Maharaj in 2007.

Investigators believed at the time there was a "reasonable suspicion" the money was destined for Mac Maharaj, according to documents seen by the Sunday Times."

Maharaj didn't dare take the Sunday Times to court or stop us from publish the story, as he had done with the two newspapers. The accuracy check helped us angle the story better, precisely; and most of all, we had all the documents and bank statements to support our allegations.

To avoid lawsuits and litigations, as an investigative reporter, make sure you have your ammunition in order including documents as well as sworn affidavits to support your stories.

Without them you would be a piece of pie in court and your newspaper would end up paying millions in damages. Worse, your reputation as a journalist began to be questioned and doubted.

The story won our investigations unit the Taco Kuiper Award for Investigative Journalism for 2011.

### **Mzilikazi wa Afrika**

Investigative Reporter

FAIR Board Chairperson 2013



Good investigative journalists are often the source of enormous conflict, whether in repressive regimes or so-called democracies, and this in turn is the basis for two processes which civil society and academics both celebrate, respectively: the chance to make social change, and the production of knowledge. Social change requires awareness, and were it not for investigative journalists reporting about social, economic, political and environmental crimes, many more of our societies would be stagnating under dictatorship. The fact that so many still are, reflects how much more attention our citizenries need to give to investigative reports about state and corporate malfeasance, and it is here, often, where civil society campaigning to open up lines of inquiry in turn supports journalists who seek more knowledge.

Likewise, we academics must acknowledge how much production of information comes from those investigative journalists who push through the boundaries of secrecy. Personally, I am continually reliant upon the finest teams of global, continental, national and local reporters, and if I don't spend at least an hour each morning poring over the internet to find their latest output, I feel intellectually disempowered. There are, of course, bad academics whose work lags because of failure to keep abreast of current news. There are many academics who look skeptically at the output of those brave journalists at the cutting edge of critical public-interest work. The bad academics do not have the courage to recognize how much knowledge is produced in the conflicts generated by the tough investigative reporters working under such adverse conditions across Africa. One reason they suffer the 'failure of analytical nerve', is their failure to give respect to journalists who are challenging power.

And so it is up (or perhaps down) to the legal terrain that we all must climb, in order to assess whether information being generated by these brave journos can be 'trusted,' officially that is. The real mark of trust is reputational, and entails a span of output often lasting years. The case of the New York Times' Judith Miller is instructive, because her biases contributed to a war (mainly by Washington and London) based on misinformation about Weapons of Mass Destruction that she published.

Biases can be found in the writing of nearly all journalists – who are too often of middle-class upbringing, too often male, and depending upon the setting, too often carrying racial, ethnic and other privileges, or politically-influenced to serve power – and these are evident to careful readers or viewers. Such biases may well be amplified by media bosses, who are usually the ones first phoned by fellow members of elite clubs, when their journalists uncover corruption by state or corporate leaders. The pursuit of justice is too often foiled well before the investigative journalist's work is brought to the courts for its test.

And worse, the courts to which they are dragged are often absolutely useless appendages of ruling party tyranny in Africa, as well as the other English-speaking sites of current conflict. The secret sealed indictment filed in US courts against WikiLeaks journalist Julian Assange is just one example, as is the 35-year jail sentence (following torture during detention) given to one of his sources, Chelsea Manning. In another current case, the courage of a very brave US journalist, Glenn Greenwald, who is based in Brazil because of homophobic laws in his own country, was revealed when he reported Stasi-like internet vacuuming by the National Security Agency (including these very words I'm now typing), following leads from Edward Snowden.

Likewise, we must all appreciate the contribution of various British government leaders – going as high as Prime Minister Cameron – who approved the August 2013 detention of David Miranda, Greenwald's Brazilian partner and journalistic assistant, within the transit lounge at Heathrow Airport. Miranda had his passwords and computer equipment wrenched from him by a proto-fascistic British state, fearful of a handful of journalists repeatedly unveiling Washington's attacks on the world citizenry's civil liberties.

This appalling context means that the 99% of us not in on the action must fight all the harder to regain integrity within our states and economies. That in turn means we need to name names and to show trails of evidence, and then insist upon accountability. It also means we have to be that much more careful about the accuracy of what we allege. And for these reasons, to encourage more courageous journalism – as well as civil society and academic investigations – we should all become much more familiar with the legal framework for publishing controversial information.

We are therefore extremely indebted to FAIR Reporters, whose guide to media litigation in the pages below will prove so useful in so many settings where English common law influences the courts. The rules of defamation,

confidentiality, privacy, data protection, contempt of court, copyright and related matters are highly complex. The corporate media – especially the notorious right-wing Murdoch empire – tested many of these laws in their own salacious ways, but it is in contestation of information in the public interest that we now seek Duodo's advice.

We must not just be content, though, to learn the ropes through his experience and great wisdom; we have to expand the boundaries of what is permissible in all these respects, through increasingly serious work for social, economic and environmental justice. It is only through critical investigations that we can see how systems of malevolent power operate – by testing them in repeated enquiry and well-researched allegations. The courts are all too often used by malevolent forces to exercise power, and all too often that power is amplified by bad journalists and academics, as well as by status-quo, civilized-society institutions. So let us move our critical work forward, without making elementary defamatory mistakes that play into the hands of those who would retain undeserved protection from the law; this guide will help us guard against such mistakes, and allow us all – reporters and readers alike – to have confidence in what is published in the public interest.

### **Patrick Bond**

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## **INTRODUCTION**

This is general common law guidance based on English law which most English speaking (commonwealth) countries correspond to.

The advice given in this document is not intended to be definitive. It is important that legal advice is taken on specific proposed articles.

What this document seeks to achieve is to be able to put you in a position where you can identify “red flags” – those allegations and circumstances which require legal advice, since they may give rise to a successful claim in the event of publication.

There are a number of risk areas when preparing investigatory pieces. These are as follows:

- Defamatory content
- Content which is in breach of confidentiality, privacy or data protection laws
- Content which may constitute a contempt of court (for example because it breaches reporting restrictions or it creates a risk of prejudice to an ongoing or future trial)
- Copyright infringement (not covered below: see slides)
- Content which may breach any reporting restrictions

# A DEFAMATORY CONTENT

## What is defamatory?

In English law, “defamation” is a generic term for libel, slander, and malicious falsehood. Libel is defamation in permanent form, such as publication of defamatory statements in a newspaper, and slander is publication in impermanent form, e.g. orally. Technically, malicious falsehood does not concern the publication of defamatory material at all. A malicious falsehood is committed when a false allegation is published maliciously, in circumstances where it causes or is likely to cause financial loss or damage to a person in their professional standing, office, or trade. In English law, malice is a ‘term of art’ denoting either that the maker of the statement knew the statement was false, had a dominant improper motive for making the statement, or was reckless in connection with the making of the statement.

A defamatory statement is one that tends to make reasonable people think the worse of the claimant. Such a definition implies some element of discredit or moral blame. However, an alternative (and equally applicable) definition is a statement which would make people shun or avoid the claimant. For example, an allegation that a financial institution is facing insolvency would not necessarily impute any element of discredit or moral blame, but would tend to lead to the institution being avoided for investment purposes.

The question whether words are defamatory is to be judged according to the standards of “reasonable” or “right-thinking” members of society. The court seeks to establish the “natural and ordinary meaning” of the words. However, the claimant is not limited to complaining about the literal meaning of the words on the page. A defamatory meaning might be understood by reading between the lines, so as to extract a defamatory “innuendo” from the statement. A further type of innuendo might also be imputed where readers with knowledge of special facts understand the words in a different way to those without such knowledge. For example, the allegation that the claimant was seen coming out of “45 Old Compton Avenue” is not on its face defamatory. Only readers with special knowledge, for example that number 45 is a brothel and that the claimant is married, would understand the words to carry a defamatory imputation.

Examples of defamatory allegations:

- **A company is guilty of trading in “conflict minerals” from region A in country X, and obtained certain ores between January and March 2005.**

There is the obvious defamatory allegation that the company traded in conflict minerals. But there are a number of other serious potential allegations ‘between the lines’.

There is an allegation that the CEO or senior management allowed this to happen, so that they could bring a claim if they knew nothing about it;

There is a potential innuendo allegation that the company has breached certain international laws preventing trade in such minerals;

There may be a further innuendo allegation that the company is profiting from genocide, if it is known to certain readers that between January and March 2005 minerals were obtained from certain villages in region A which had been pillaged and all inhabitants killed by a rogue military unit which then sold the minerals on the black market.

- **A minister is guilty of ‘cronyism’**

There are two defamatory meanings here, but they are open to debate. Some readers will understand cronyism to not be defamatory – equivalent to nepotism and merely allowing friends and hangers on to join his entourage and receive associated benefits. Others will understand cronyism to be a charge of corruption: allowing such hangers on to corruptly benefit from his senior office by receiving contracts or other benefits that they ought to have competed fairly to obtain.

- **A government official said that he would not allow the contract to go through unless he received a substantial facilitation payment as part of the deal**

Again, this is open to debate as to whether or not it is defamatory. By English standards, receiving such a payment would be tantamount to a kickback, or bribe, to allow the contract through. Those readers familiar with the UK Bribery Act would also understand a further innuendo meaning to the words, since the Act outlaws facilitation payments. However, in other countries, it might be viewed as normal and acceptable for an official to receive a ‘thank you’ benefit for allowing a contract to go through.

- **The company is guilty of cutting down large numbers of endangered trees as part of its road building and construction**

This is potentially defamatory, since the company is acting in an anti-environmental way and harming endangered species. However, sometimes further facts which are not stated in the publication give rise to significant further problems. Let us suppose that in this case, the company had in fact obtained a permit to cut down those particular trees, which was approved by the government department on the basis that the road and construction (of a hospital, say) were seen as essential and the tree cutting was not seriously damaging to the species since there are many in that particular area.

- **A minister is selling off large portions of land, and making personal profit from doing so**

Is this defamatory? On its own, it begs a number of questions: is the land government or privately owned? Where does he make his profits from in the deal? Is he a minister for that land region, or is he dealing in land which is completely independent? Let us assume that the context is one of two scenarios:

a. The minister is in charge of that region, and he is selling government owned land under a ministerial decree that allows him to do so cheaply. He is selling to his own company, and then that company re-sells the land at massive profit, to mining companies.

Or

b. The minister happens to be independently wealthy, and he comes from a tribe that owns very large portions of unused land, which is in his name. He has decided to sell of that land, which he is entitled to do, for a profit. As it happens, he has pledged to use the profits to develop sewage facilities in his region, and to build six schools and three hospitals, much to the joy of the tribe.

Scenario (a) is very obviously defamatory. Scenario (b) may well not be defamatory at all. But context is everything.

## Intention of the author is irrelevant

What is key when writing serious allegations is to be aware that the intentions of the writer are irrelevant. What matters is the meaning conveyed – objectively – to the ordinary and reasonable reader. That reader is not avid for scandal or overly suspicious, seeking out defamatory meanings where they do not exist, but he is quite capable of reading between the lines and understanding the defamatory meaning even if it is not stated explicitly.



# Determining meaning

It is necessary to consciously identify the meaning of the allegation that one seeks to publish, since the meaning will dictate what defences may be available if there is a subsequent claim.

## Defences to a defamation claim – how to reduce risk

### 1. The Public Interest Defence under English law

In the landmark case of *Reynolds v. Times Newspapers Ltd.*, the House of Lords developed a new species of the qualified privilege defence to cover occasions where the media (and now anyone else) publishes false allegations in circumstances where the allegations are in the public interest and the publisher can be shown to have acted responsibly in preparing the story for publication. The House of Lords set out a test for responsible journalism which must be considered when seeking to rely on the defence.

There are a number of criteria that have been used from the *Reynolds* case to determine whether the defence of responsible journalism applies. These are ten points in the judgment of Lord Nicholls in *Reynolds*. Below each criterion is identified, and then discussed.

- i. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.***

This is critical, and comes back to a determination of the meaning of the allegation. If, for example, you intend to suggest that there should be an investigation of a suspected fraudster in a certain government department, but you end up alleging that the official is guilty of fraud, you will be required to take extensive steps to investigate your story. This also impacts on seeking comment from the subject. See (vii) below.

- ii. The nature of the information, and the extent to which the subject matter is a matter of public concern.***

This is the basic public interest test. The public interest is defined usefully in the Press Complaints Commission Code as follows:

*Detecting or exposing crime or serious impropriety.*

*Protecting public health and safety.*

*Preventing the public from being misled by an action or statement of an individual or organisation.*

This definition is not exhaustive, but has met with approval by the English courts. It is important to note the element of seriousness required for a matter to be in the public interest. Serious impropriety is required, rather than a minor misdemeanour.

- iii. The source of the information. Some informants have no direct knowledge of the events. Some have axes to grind or are being paid for their stories.***

The Courts generally regard sources with suspicion; particularly since most democratic countries do not require journalists to disclose their sources (see e.g. s. 10 of the English Contempt of Court Act 1981). Accordingly, a journalist seeking to defend a claim on public interest responsible journalism grounds, will be required to show that their source was reliable, and had a position of authority from which they can provide accurate information on the allegations. If a source is paid, or a disgruntled ex-employee, the courts are more likely to criticise a journalist for having relied on them. Other sources are well meaning whistleblowers wishing to expose certain behaviour out of moral compulsion. Those are more likely to be the type of sources that will impress the courts.

**iv. Steps taken [by the journalist] to verify the story.**

The defence of responsible journalism requires the journalist to 'show their working'. The journalist needs to demonstrate that they carried out an appropriate level of investigation, which will be expected to be more exhaustive, for more serious allegations. Obtaining copies of key source documents, speaking to direct witnesses, recording or filming instances of the allegations, etc. This is where a defence of a libel claim often stands or falls: some journalists rely merely on hearsay or material that has been published before. Others go to the root of the story

**v. The status of the information. The allegation may have already been the subject of an investigation which commands respect.**

If you rely on allegations that have been subject to a recent respected investigation (for example, a public inquiry), you are in safer territory. If the allegations are from an old and discredited investigation, such as an investigation that led to an acquittal, then the risk is clearly much higher.

**vi. The urgency of the matter. News is often a perishable commodity.**

This cuts both ways. If the allegation is very serious and urgent, you may be excused in publishing it in a daily newspaper without seeking extensive verification. If it is not urgent, or you are writing for a book, you will be required to investigate more deeply. There is of course a crossover (and tension) between saying the allegations are serious, on the one hand, which appears to be a justification for investigating them thoroughly before publishing them, and saying they are urgent, and therefore justifying potentially serious allegations being published without a full investigation. This was the issue in the *Jameel v Wall Street Journal* case which went to the House of Lords.

**vii. Whether comments were sought from the claimant. He may have information others do not possess or do not disclose. However, an approach to the claimant will not always be necessary.**

This is critical. Cases subsequent to *Reynolds* have also established that it is important to consider what allegation to put to the subject for comment. If you merely put to him that he is suspected of fraudulent behaviour, and he denies it, you will not be entitled to the defence if your article in fact accused him of guilt.

**viii. Whether the article contained the gist of the plaintiff's side of the story.**

This is an obvious and essential aspect of the defence of responsible journalism. It is not necessary to publish precisely what the complainant says. However, any omissions must be carefully judged, and it is essential that nothing is removed that detracts from any explanation or denial that is given. That may also be evidence of malice.

**ix. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statement of fact.**

See above. This is again an aspect of meaning. It is irresponsible to accidentally accuse someone of guilt, when all your evidence points only to grounds for suspicion. The media plays a key role as watchdog of society, but must not overstep its bounds into playing judge and jury, unless there is incontrovertible evidence entitling such a judgment. And in any event, it is generally advisable to phrase any allegation of guilt in terms of opinion, to reduce the risk of defamation.

**x. The circumstances of publication, including the timing.**

Lord Nicholls commented that this list was meant for illustrative purposes only. He considered that depending on the circumstances, these were the factors to be taken into account. The list, he said, was "not

exhaustive.” Lord Nicholls also commented that the weight to be given to the various factors would vary from case to case. He expected that over time, a valuable corpus of case law would be developed, by which the defence would be refined and clarified.

Courts in England have been encouraged to approach the issue by first addressing whether the publication as a whole is in the public interest. If it is, and provided the defamatory allegations complained of are not irrelevant to the public interest issue, the public interest requirement will be made out.

The courts will also apply a less rigorous approach to the test for responsible journalism if the allegations are very strongly a matter of public interest, and/or if there is a pressing urgency to publish. In the Jameel case itself, the Wall Street Journal had come across a list known as the “golden chain list,” said to contain a list of individuals and organizations that were funding terrorism. In the wake of the September 11 attacks, this was considered to be an issue of the utmost public interest, and the House of Lords rejected the view of the courts below that the defence should fail because the publishers did not give the claimant sufficient time to respond to the allegations.

## Equivalent protection in other jurisdictions

The Reynolds or public interest defence exists in a number of African jurisdictions. It is available in South Africa and Kenya, for example. The precise bounds of the defence have however not been clearly made out across the continent, and it is essential that case law develops so as to ensure a wide and flexible defence, which can only assist in building a strong framework for investigative journalism.

### 2. Fair or honest comment – general requirements

The defence of honest comment (as it is now called in England following *Joseph v Spiller* in the Supreme Court) protects the expression of opinions or value judgments on matters of public interest. The old name of ‘fair comment’ has recently been made obsolete since the word “fair” was considered misleading, given that the concept of fairness plays little part in this defence. The defence applies to statements notwithstanding their being exaggerated, wrong-headed, prejudiced, or extreme. The fact that the court might disagree with the opinion would not be a basis for the defence failing. Furthermore, there is no sense in which an opinion or comment has to be “reasonable” or “fair minded” for the defence to apply. The defence is intended to be liberally applied taking particular account of freedom of expression, and in particular the jurisprudence of the European Court of Human Rights, which has emphasised in its decisions the need to prevent stifling of opinions or other statements not capable of proof.

Honest comment is a powerful defence and is increasingly being applied to statements which would previously have been considered statements of fact. In recent years there has been a growing willingness of the English and European courts to apply the defence where statements amount to value judgments or inferences from facts. This has blurred the lines between the defence of honest comment and the defence of justification (below).

There are four essential requirements for the defence to apply:

- i. *The statement must constitute a comment or value judgment rather than a statement of fact.*
- ii. *The comment must have a sufficient factual basis. This means that the comment must be based on facts which are true or privileged. The comment must also explicitly or implicitly indicate, at least in general terms, the facts on which it is based.*
- iii. *The opinion must be held honestly by the person who expresses it. Although this is an objective test, it does not impose a requirement of either fairness or reasonableness.*
- iv. *The subject of the comment must be of public interest.*

If these four hurdles are surmounted, the defence will succeed. The third hurdle – honesty – concerns whether or not the comment has been made maliciously. In this sense, malice requires the claimant to prove that the commentator did not honestly believe in the opinion he was expressing. Malice in this context is different from malice as applied

in the context of privilege. In honest comment cases, malice cannot be shown by merely demonstrating that the defendant had an improper motive for making the statement. Provided the defendant honestly believes in the opinion he is expressing, he will not be held to be malicious.

## Sufficient factual basis

For the defence of fair comment to succeed, it must be based on facts which are true, or sufficiently true. For example, to accuse a doctor of being an appalling surgeon, and for the defence to succeed, it would be necessary to demonstrate, for example, that the surgeon had botched a number of operations which might be regarded as relatively straightforward. The burden of proof is generally on the author or defendant to prove the facts underlying the comment.

There are a number of further requirements in seeking to establish a sufficient factual basis for the comment as follows:

- i. *The facts must be either stated in the publication or referred to explicitly or implicitly, at least in general terms, with sufficient clarity to enable readers to understand (or find out) the facts on which the comment is based. The exception to this rule is where the subject matter is so well known, such as a subject of public debate, that readers will have no difficulty identifying the factual basis. In these circumstances, it is not necessary to set out or refer to the facts on which the comment is based.*
- ii. *Under English law, not all the underlying facts are required to be proved true. A defence will succeed if the expression of opinion "is a [fair] comment having regard to such of the facts alleged or referred to in the words complained of as are proved." In other words, the question of comment is to be judged by reference to those of the underlying facts that are proved to be true.*
- iii. *Where the supporting facts are protected by privilege, the defence will succeed even where they are untrue. This is because a publisher is free to comment on matters which he fairly and accurately reports from court of parliamentary proceedings.*

The defendant cannot rely on facts or matters taking place after the date of publication on which to base the comment.

### 3. Justification or truth

It is a total defence to a defamation claim for the defendant to prove that the statement is either true or substantially true. The state of mind of the defendant is irrelevant. Even where, at the time of making the statement, the defendant believes the allegation to be false and makes it with the intention of harming the claimant, the defendant will still have a complete defence to the action if the allegation is in fact true.

Under English law, and in most common law jurisdictions, the burden of proof is on the defendant to prove that the allegations are true. This is an onerous burden in many cases, and the author of an investigative piece should not take lightly the task of proving truth. A number of significant hurdles and complexities lie in wait for those choosing to defend defamatory publications on this basis.

## Justification and Meaning

As discussed above, in English law, the concept of meaning plays an important part in a defamation case. It can also have a major bearing on the success or failure of a defence of justification. The basic rule is that the defendant will not succeed on a defence of justification if the allegation he seeks to prove true is materially less serious than that which the court finds the words bear. Accordingly, it is essential for the investigative journalist to establish what meaning (or range of meanings) the allegations are capable of bearing, before considering what evidence they have to prove the truth of them.

For example, an article might be capable of meaning either that the claimant is guilty of fraud, or that he is suspected of having committed fraud. The defendant might succeed on a defence of justification if, ultimately, the meaning that the article is found to bear is that there are merely grounds to suspect the claimant of fraud, rather than that he had committed full-blown fraud. That might be a considerably lower hurdle. For example, evidence that the claimant had arranged his finances using a complex web of offshore accounts, had travelled under several different passports or identities, or had withdrawn large sums of money from bank accounts and gone to live in a tax haven might all give rise to suspicion of fraud, but may well not be capable of proving actual fraud.

## Effect on Damages of a Defence of Justification

Where allegations are proved to be true or partially true, but the defence of justification nevertheless fails, this could have a reductive effect on damages. The court can take into account those allegations which have been proved true and limit the damages accordingly (since those true allegations have an impact on the claimant's reputation). The converse is also true: where a defendant seeks to rely on a defence of justification which ultimately fails, and where the material is not found to be partially true, this could lead to a claim for aggravated damages (since the failed defence of justification causes more damage to the claimant's reputation and causes them additional hurt and injury to feelings).

## Qualified privilege – fair and accurate reporting of official government documents, legislatures, court proceedings or documents

If untrue defamatory allegations are published on an occasion of privilege, the publisher will be protected from a claim for defamation.

- i. *Absolute privilege. Where absolute privilege applies, no action for libel or slander can succeed irrespective of the dishonesty or motive of the speaker or writer. It denies any remedy at all to the victim. Absolute privilege is available for fair, accurate and contemporaneous reports of parliament, the courts, and various other statutory bodies. It also applies under English law to statements made during parliamentary, judicial or quasi-judicial proceedings.*
- ii. *Qualified privilege. Qualified privilege is a lesser protection which is defeated if the claimant establishes that the maker of the relevant statement was motivated by malice.*

Qualified Privilege will be available in a range of situations and arises “where the person who makes a communication has an interest or a duty, legal, social or moral to make it to the person to whom it is made. It will also be available for fair and accurate (but not contemporaneous) reports of court proceedings, of tribunals and public meetings, and of legislatures or courts in other countries in the world.

The categories of report based qualified privilege will vary from country to country.

## B. BREACH OF CONFIDENTIALITY

### Difference between defamation and privacy/confidentiality

In a confidentiality claim, the allegation need not be defamatory. Truth is not a defence, whereas the fact that the information is already in the public domain is a defence. It is also much easier to obtain a pre-publication injunction.



For a Claimant to succeed in a breach of confidentiality claim, he must show:

- a. That the information is confidential in nature
- b. That it was imparted in circumstances in which an obligation of confidence arises
- c. That there has been an unauthorised use of that confidential information (actual or threatened) to the detriment of the claimant

Put simply, where the information concerned would reasonably be understood to be confidential, an action in breach of confidence may be available.

## The public interest/public domain defences

The public interest includes, but is not confined to:

- i. *Detecting or exposing crime or serious impropriety.*
- ii. *Protecting public health and safety.*
- iii. *Preventing the public from being misled by an action or statement of an individual or organisation.*

It is arguable in Europe that there is a public interest in freedom of expression itself.

Whenever the public interest is invoked, the UK Press Complaints Commission will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest.

## Public domain

If the allegedly confidential information enters the public domain it loses its quality of confidentiality. Public domain generally means that the information is so “generally accessible” that no additional harm is done by publication. Accordingly, it does not apply to every instance in which the information is disclosed.

# C. REPORTING RESTRICTIONS AND CONTEMPT OF COURT

Under section 1 of the English Contempt of Court Act 1981, it is a contempt of court to publish material that creates a “substantial risk of serious prejudice” or impediment to active legal proceedings. This rule applies to criminal cases to be heard by a jury. It requires that there be “active” proceedings. For proceedings to be active, a person must either be the subject of an arrest warrant, arrested, subject to a summons, or charged. They can also become active again when an appeal is lodged.

Once proceedings are active, the following material should be avoided in any reports on the subject of the criminal proceedings, arrest or charge:

- Reference to the subject’s previous convictions
- Information that suggests they are guilty or of bad character
- Evidence linking them to the crime of which they are suspected
- Any other suggestion that they are guilty.

Breach of this rule can lead to a fine or imprisonment of the journalist or editor of the publication.

## Other forms of contempt of court

It is a contempt in most common law jurisdictions to carry out any of the following:

- Publish material which scandalises the court or judges
- Photograph, record or sketch the court proceedings while in court
- Record the court proceedings or transmit them without the permission of the court

Where a court order is in place restricting the identity of any party or witness to the proceedings, or the publication of any information from a trial (for example because there are co-accused being tried separately), it will be a contempt of court to breach a court order. It is also a contempt of court to breach an injunction (for example ordering the prevention of disclosure of confidential information).

## D. IDENTIFYING RED FLAGS

### Defamation

- Identify the subject matter of the investigation and whether the conclusion is likely to be defamatory of anyone.
- What is the defamatory meaning of the story?
  - If defamatory, what defences are you going to be relying on?
  - How can you best summarise or encapsulate the public interest angle in the story?
  - Are you willing to comply with the Reynolds 10 steps of responsible journalism?

### Responsible journalism in the public interest – setting up the defence

- Prepare pre-publication letter(s) to subject seeking comment on main defamatory allegations (and if necessary check them with the lawyer)
- Pitch the meaning as high as it is capable of being
- Allow as much time for their response (ideally 14 days)
- Incorporate responses from subjects attacked in article or film
- If subjects do not respond, include that they failed to answer enquiries, and (ideally) include any other public statement they have made in response to the allegations
- Obtaining legal and editorial signoff

### Confidentiality and privacy

- Does it potentially breach confidentiality or privacy?
- Does the work make use of other copyright work?
- If so, what is the justification for publishing them? Is there a public interest or public domain defence in relation to those specific disclosures?
- Do you need to go into the detail of private allegations or acts? It may be necessary to blur faces, or bank details, or specific names or features of information, to protect third parties, or to ensure that the extent of any infringement is only what is necessary to tell the public interest story.
- Are there any ethical or compliance issues, such as risks of third party fixers paying bribes or otherwise breaching the law?
- Will you be showing any criminal acts taking place?
- Could the police get involved and obtain disclosure of your documents?
- In any of the above circumstances, you must contact the editor before going any further
- Where there is a risk of publishing defamatory confidential or other infringing information, obtaining a legal view is recommended.

## Korieh Duodu

FAIR lawyer

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