Reputation as a Convention Right

Introduction

1 Convention Rights - Hierarchy, Equality and Conflict

1.1 (1) For many years, the European Court of Human Rights (ECHR) have made robust statements in favour of freedom of expression, in the context of prior restraint, excessive libel damages (2), the burden of proof in libel and rights to a fair trial (3), defamatory allegations that are in the public interest (4), or are comment (5).

In Observer v UK [1992] the ECHR said: "[It] is . . . incumbent on [the press] to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Where it otherwise, the press would be unable to play its vital role of "public watchdog."

1.2 Following the implementation of the Human Rights Act 1998 ("HRA"), the domestic Courts have attempted to deal with and resolve the conflict between Article 10 and Article 8 but this was mainly in the context of claims for privacy and/or breach of confidence. Even at that early stage, the domestic Courts took into account decisions of the ECHR. However, it took some time for the Courts to work out a methodology to resolve the conflict between Articles 8 and 10, especially in the light of the terms of section 12 of the Human Rights Act 1998 which appeared at first glance to give some priority to freedom of expression over privacy claims (6). e.g. Douglas v Hello! Ltd [2001] QB 967, Theakston v MGN (2003) QB and A v B plc (2003) QB 195.

1.3 While the domestic Courts grappled with the conflict between privacy rights and freedom of expression, they have, until recently explicitly or implicitly, assumed that Article 10 was of a higher order than the (non-convention right) to reputation.

Lord Justice Brown was explicit in the Court of Appeal decision in Cream Holdings Limited & Others –v- Banerjee & Others [2004] UKHL 44

"It is one thing to say, as indeed I myself said in Al-Fagih -v- HH Saudi Research & Marketing (UK) Ltd [2001] 2 EMLR 215, in a passage repeated with approval by this court in Loutchansky -v- Times Newspapers Ltd (Nos 2-5) [2002] QB 783, 803, that the media's right to freedom of expression, particularly in the field of political discussion "is of a higher order" than "the right of an individual to his good reputation"; it is, however, another thing to rank it higher than competing basic rights. (emphasis added)

It will be recalled that this decision concerned the construction of S.12(3) HRA (7) in the context of interim injunctions for breach of confidence/ privacy. The House of Lords in its decision in Cream Holdings set out a flexible test (8).

1.4 *The Court of Appeal's decision in: Re S [2003] EWCA Civ 963*

This case concerned reporting restrictions during the trial for murder of the mother of child S, who had already lost his brother then aged 9. The Court of Appeal decision in July 2003 was one of the critical turning points for the Courts in resolving any conflict of Convention Rights. The "Parallel Analysis" test set out in the decision of LJ Hale was accepted as correct in the subsequent House of Lords decision in Campbell v MGN Ltd (which by then included Baroness Hale).

1.5 A few months after the House of Lords decision in Campbell v MGN Ltd, in October 2004 the House of Lords finally and authoritatively laid down a procedure for resolving a conflict of Convention Rights in Re S [2003] EWCA Civ 963, by Lord Steyn as follows:

"The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in Campbell v MGN Ltd. For present purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test".
This applies to all convention rights and provides a methodology which is similar to the reasoning

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in decisions of the ECHR. This methodology was applied in recent domestic privacy decisions such as Mckennitt v Ash, Lord Browne v Associated [2007] EWHC 202, and Mosley v NGN [2008]. Explicit in the domestic privacy decisions is a comparative assessment of the quality of the speech rights and privacy rights involved and whether the interference with each right can be justified.

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Although the domestic Courts and ECHR previously assumed that the right to reputation was not a convention right, it is now clear from recent jurisprudence from the ECHR that reputation is protected as an aspect of Article 8. Some decisions have suggested reservations about excessive protection of article 10 rights.

2.1 *Radio France v France [2004] (9)*

The French weekly magazine Le Point alleged that Mr Junot, when Deputy Prefect at Pithiviers from September 1942 to August 1943, had supervised the deportation of a thousand French and foreign Jews. The allegations were repeated over 60 times in broadcasts on Radio France. Criminal proceedings for libel were instituted and the Court fined the Defendants and ordered Radio France to broadcast a summary of the Judgment, each 30 minutes over a 24 hour period. The Defendants then applied to the ECHR.

The ECHR held that the allegations were significantly exaggerated in particular in relation to the suggestion that Mr Junot had admitted that he had organised the transport of the Jewish deportees. In the context of the serious allegations made and the fact that they were repeatedly broadcast on Radio France , this exaggeration was not permissible in the exercise of journalistic freedom. Accordingly there was no violation of Article 10. Critically the Court held:

“The Court would observe that the right to protection of one's reputation is of course one of the rights guaranteed by Article 8 of the Convention, as one element of the right to respect for private life."(para 31)

2.2 *Cumpana v Romania [2004]*

The applicants was convicted and sentenced to prison for seven months for publication of an article making allegations of corruption against a deputy mayor DM and serving Judge RM. The applicants were also prohibited from working as journalists for a year. The ECHR held that although the right to reputation was protected by Article 8 the penalties were “manifestly disproportionate” and a violation of article 10.

2.3 *Lindon v France [2007]*

This case concerned a novel entitled “Jean-Marie le Pen on Trial” and contained a number of allegations that le Pen was “the chief of a gang of killers” and “that he advocated murder”. Criminal proceedings for libel were instituted. The French Courts convicted the author and publisher of the novel and fined them each 15,000 Francs as well as compensation to Le Pen. The ECHR rejected the complaint that this decision was a violation of Article 10.

Significantly, Judge Loucaides in his concurring opinion, made a number of significant statements concerning the recent adjustment in position of the ECHR.

“When there is a conflict between two rights under the Convention, neither of them can neutralise the other through the adoption of any absolute approach. Both must be implemented and survive in harmony through the necessary compromises, depending on the facts of each particular case.

The principle established by the jurisprudence, that there is more latitude in the exercise of freedom of expression in the area of political speech or debate, or in matters of public interest, or in cases of criticism of politicians, as in the present case, should not be interpreted as allowing the publication of any unverified defamatory statements. To my mind this principle means simply that in those areas mentioned above, and in respect of politicians, certain exaggeration in allegations of fact or even some offending effect should be tolerated and should not be sanctioned. But the principle does not mean that the reputation of politicians is at the mercy of the mass media or other persons dealing with politics, or that such reputation is not entitled to the same

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legal protection as that of any other individual. Reputation is a sacred value for every person including politicians and is safeguarded as a human right under the Convention for the benefit of every individual without exception. And that is how I approached the facts of the present case.

The right to reputation, having the same legal status as freedom of speech, as explained above, is entitled to effective protection so that under any circumstances, any false defamatory statement, whether or not it is malicious and whether or not it may be inevitable for an uninhibited debate on public issues or for the essential function of the press, should not be allowed to remain unchecked.

One should not lose sight of the fact that the mass media are nowadays commercial enterprises with uncontrolled and virtually unlimited strength, interested more in profitable, flashy news than in disseminating proper information to the public, in controlling government abuse or in fulfilling other idealistic objectives. And although they may be achieving such objectives incidentally, accidentally or occasionally, even deliberately, they should be subject to certain restraint out of respect for the truth and for the dignity of individuals. Such restraint should include the duty to investigate defamatory allegations before rushing into print and the obligation to give an opportunity to the persons affected by their defamatory stories to react and give their own version. Furthermore they should remain legally accountable to the persons concerned for any false defamatory allegations. Like any power, the mass media cannot be accountable only to themselves. A contrary position would lead to arbitrariness and impunity, which undermine democracy itself.

2.4 *White v Sweden 2007*

The Applicant brought libel proceedings against newspapers who had alleged that he had murdered the Prime Minister of Sweden. The press were acquitted on the grounds that they had a reasonable basis for publishing the information and the public interest outweighed the Applicant's Article 10 rights. The Applicant complained that his Article 8 rights had been breached but the ECHR held that the public interest in publishing outweighed the applicant's article 8 rights.

3 The English Courts have now recognised Reputation as a Convention Right

3.1 The Courts have now also recognised reputation as a convention rights in a number of decisions eg. in Greene v Associated the Court of Appeal assumed this to be correct and this was expressly accepted by the Court of Appeal in George Galloway MP –v-The Telegraph Group Ltd [2006] EWCA Civ 17, in Roberts v Gable [2007] in Charman v Orion [2007].

3.2 In another recent qualified privilege Prince Radu of Hohenzollern –v- Marco Houston & Sena Julia Publicatus Ltd [2007] EWHC 2735 (QB),:- the Court heard the preliminary issue in respect of privilege and rejected the defences. In this case, the Court not only accepted the reputation was a convention right but also the new methodology as set out by Lord Steyn.

4 There is a positive obligation on member states to ensure protection of Article 8 Rights as between private parties.

Although it was thought that the positive obligation to ensure protection of Article 8 as between private parties was a recent ECHR development from Von Hannover v Germany [2004] , in fact this had been the position for some years Buxton LJ held in McKennitt v Ash [2006] that Article 8 as extended by ECHR jurisprudence, (for example, Markx v Belgium [1979] and Y v Netherlands [1985]) imposes not merely negative but also positive obligations on the state: to respect, and therefore to promote, the interests of private and family life.

In the context of privacy, it is by means of the express absorption of articles 8 and 10 into the cause of action of breach of confidence that the state has complied with these positive obligations. (10)

In the libel context, the impact of the new methodology of resolving conflicts of rights and the fact that reputation is now a convention right appears at this stage to be limited despite the general terms of the guidance given by Lord Steyn in Re S. It may however be necessary to apply this new methodology where the conflict of convention rights is most acute, such as interim injunctions, fair comment and qualified privilege. Indeed in the recent ECHR defamation decisions the Court adopts as similar balancing process.

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5 Injunctions Can Be Granted Restraining publication of false allegations

5.1 Shortly before the Appeal in the privacy case of McKennitt v Ash the media sought to intervene since they were concerned about a number if statements in the first instance of Eady in particular in relation to the effect of Von Hannover, the issue of trivial private matters and the application of privacy to false private information. The Court of Appeal decision McKennitt v Ash extended the reasoning of Eady J and went much further. Buxton LJ held that the accuracy of the information concerned does not matter what matters is whether the information is confidential. However he cautioned that it may be an abuse of process to use a claim for an interim injunction for misuse of private information where the nub of the complaint was falsity of the allegations.

Longmore LJ (11) went further in his Judgment: "The question in a case of misuse of private information is whether the information is private, not whether it is true or false. The truth or falsity of the information is an irrelevant inquiry in deciding whether the information is entitled to be protected and judges should be wary of becoming side-tracked into that irrelevant inquiry."

5.2 Although there may still be some debate whether privacy claims can now apply to totally false information and/or whether the statement of Longmore is correct since it was not approved by the other judges, it appears clear that privacy does apply to purely false information (12). Accordingly it would apply to threatened publication of say, false medical or sexual information (13).

A recent example of a pure false privacy case emerged a few days ago. P, Q & R v Mark Quigley [2008] EWHC 1051 (QB); the Court granted a pure false privacy injunction, even though it was recognised that the material sought to be restrained in the form of a novella was "scurrilous" and "scandalous".

Eady J held that the ultimate balancing act in accordance with Re S needed to be carried out and that this:
"comes clearly down in favour of restricting publication. That is because there is no conceivable public interest in making such scurrilous allegations against P and Q, whether directly or under the transparent disguise mentioned. The only effect of carrying out the threats contained in the 22 November letter would be to cause embarrassment and distress to the two individuals concerned. Very little value can be attached to the Defendant's freedom to do that. There is no suggestion, for example, that this is a libel claim in disguise and that P and Q are seeking to suppress defamatory allegations which he would wish to allege are true. What they are seeking to restrain is the publication of clearly scandalous matter which serves no legitimate purpose. There would appear to be no reason why the Defendant should be permitted to publish such allegations to the world at large, whether via the internet or by any other means".

This decision is highly significant since it is a pure false privacy claim. It seems clear that the terms of this injunction would be no different from an injunction based in libel. Although this was an application for summary judgment, it is difficult work out the precise nature of the abuse that Buxton referred to if the same facts applied on the application for an interim injunction.

5.3 In libel any application for prior restraint is still however governed by the rule in Bonnard v Perryman. Therefore, if P and Q formulated their claim in libel, they would be faced with a different threshold test according to the Court of Appeal decision in Greene v Associated Newspapers [2005] EMLR 10 (14). Although reference was made in the decision to the House of Lords decision in Re S (handed down after argument in Greene), the Court of Appeal in Greene did not follow Re S in attempting to resolve the conflict of convention rights and no "parallel analysis" was conducted. In addition, the Court asserted that when allegations are first published, the Claimant's convention right of reputation is in suspension until trial. This cannot be right either as a matter of logic or ECHR jurisprudence. More significantly, if the balancing of convention rights is carried out in respect of the convention rights engaged, it surely cannot produce a different result depending on the nature of the claim where the remedy is the same (15).

5.4 Sunderland Housing Company Ltd & Another –v- Baines, Finn, Smith & Pallion Housing Ltd & Others [2006] EWHC 2359 QB) Eady J stated:
In November 2006, there was an unreported decision of Eady J which appears obiter to indicate that the parallel analysis should be applied to

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libel injunctions, and therefore doubted whether the strict application of Bonnard v Perryman was always appropriate. The case concerned defamatory allegations that had been posted on a website in a campaign re allegations and sexual misconduct. In addition to libel, the Claimants also made claims in harassment and data protection.

Eady J granted an injunction in libel since the Defendant had produced no evidence in support of the stated intention that he intended to justify but allowed him the opportunity to discharge the injunction if he filed such cogent evidence. He held:

"Mr Price is arguing effectively that the Article 10 free speech rights of his client trump the claimant's Article 8 rights to the protection of reputation and privacy and the integrity of the personality. It is necessary to remember that clear denials of all the defamatory allegations have been made by Mr Walls in his two witness statements. There is nothing at this stage to suggest that I should treat his evidence as false or dishonest as to its content. Is it right in those circumstances to refuse an injunction merely when there has been an expression of an intention to justify and then to permit a defendant to go on publishing widespread allegations which are as various and grave as these?

There is no doubt that Bonnard v Perryman is powerful authority which has been endorsed not only in modern times but also subsequent to the coming into effect of the Human Rights Act. Some weight, of course, must now be given to Article 8 interests where they are engaged, especially in the light of the proposition advanced by their Lordships in Re S to the effect that when such rights are engaged no one Article 10 will always weigh very powerfully, but Article 8 cannot simply be put out of account altogether" (16)

5.5 In terms of the convention rights, there is a substantial difference between the political speech allegations of, say, corruption about politicians in their official capacity and detailed and defamatory personal allegations about non-politicians. In the latter case, the Article 8 rights will be engaged on 2 levels; firstly since it affects reputation and, secondly, because of the private subject matter concerned. However, a blanket application of Bonnard v Perryman makes no allowance for the different levels of speech rights that may be involved.

5.6 Whether the Sunderland approach is followed, remains to be seen, but the issue may not arise if the Claimant relies upon false privacy and as long as such action does not amount to an abuse in the terms indicated by Lord Justice Buxton in the McKennitt decision. As to this alleged abuse it is not in any event clear the precise elements of such an abuse, since the overlap between the two causes of action is now so substantial.

6 Fair Comment

6.1 *Tse Wai Chun Paul v Albert Cheng [2001] EMLR 777, at paras [16]-[21]*

Lord Nicholls in the Court of Appeal of Hong Kong set out the classic modern statement of the law of fair comment.

First, the comment must be on a matter of public interest. Public interest is not to be confined within narrow limits today.

Second, the comment must be recognisable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege. This mirrors ECHR jurisprudence.

Third, the comment must be based on facts which are true or protected by privilege.

Fourthly, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.

Fifthly, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views:
The third and fourth points are significant and provide the main area of dispute in comment cases. They also provide parties with a relatively straight forward and objective means of assessing the viability of any claim and any fair comment defence.

6.2 *In Oliver v Chief Constable of Northumbria [2003] EWHC 2417, QBD*

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In this action the claim was in respect of allegations that a report by the Claimant had been shown to be "unfounded" and "discredited" as a result of an investigation by his superiors. No detail of the investigation was given. In rejecting the defence of fair comment, Gray J said at [30]:

"[Counsel for the Defendant] may be right in saying that the trend of modern authority is to adopt a more liberal approach to the availability of the defence of fair comment, but I do not think that the cases entitle the Court effectively to dispense with the requirement that the publishee must be provided with sufficient information to judge for himself how far the opinion of the current commentator is well-founded."

6.3 *Rupert Lowe v Associated Newspapers Ltd [2006] EWHC 320 (QB)*

In this decision, Eady J indicated that it was not necessary to have the true facts stated in the article and that it was sufficient that they be pleaded in the defence, indicating, in effect, that it is no longer necessary for the publishee to be able to assess whether or not he agrees with the comment. Eady J also set out the requirements where a defendant does not rely on facts set out in the article.

"At this point, I need to state my conclusions on the legal requirements as to the commentator's state of knowledge at the time of publication. There is no authority directly in point, but I owe it to the parties to make clear the principles I have sought to apply on the strike-out application. I have taken into account the authorities I have cited and the need also to interpret English law compatibility with the requirements of the European Convention:

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

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

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

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

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

6. The purpose of the defence of fair comment is to protect honest expression of opinion upon, or inferences honestly drawn from, specific facts.

7. The ultimate test is the objective one of whether someone could have expressed the commentator's defamatory opinion (or drawn the inference) upon the facts known to the commentator, at least in general terms, and upon which he was purporting to comment.

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

9. It is not permitted to plead fair comment if the commentator was doing no more than regurgitating the opinions of others without any knowledge of the underlying facts – still less if he was simply echoing rumors.

In the context of the present case, it may be critical to the defence of fair comment that the pleaded particulars can be shown to have been within Mr Mellors knowledge, to the required extent, in August 2004."

The decision in Lowe appears to be inconsistent with Cheng and with Oliver. The Court of Appeal may at some stage need to resolve this issue in the light of the fact that reputation is protected by Article 8 and the new methodology in Re: S and possibly the very recent jurisprudence from the ECHR.

6.4 *Pfeifer v Austria [2007]: ECHR (Application No 12556/03)*

At the beginning of 1995, a Professor P wrote

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an article in the Yearbook for the Academy of the Austrian Freedom Party, alleging that the Jews had declared war on Germany in 1933. The article also trivialised the crimes of the Nazi Regime. Pfeifer, who was a freelance journalist and editor of the official magazine, the Vienna Jewish Community. In February 1995, Pfeifer published article in his magazine criticizing Professor P in harsh terms for using Nazi terminology and disseminating ideas which were typical of the "Third Reich".

Subsequently, Professor P brought defamation proceedings in Austria against Pfeifer and the Vienna Court of Appeal found that Pfeifer's criticisms constituted a value judgment which had sufficient factual basis. Two years later, in April 2000, the Public Prosecutor's Office in Vienna brought charges against Professor P on the grounds that P's article constituted Nazi activity. Shortly before the trial, Professor P committed suicide.

In June 2000 the "Zur Zeit", a right-wing magazine, published an article that Pfeifer had unleashed a manhunt, which eventually resulted in the death of the victim, Professor P. Pfeifer brought defamation proceedings and these were successful before the Vienna Regional Court. However, in October 2001, the Court of Appeal set aside the judgment, finding that the article was a valued judgment, which was not excessive.

During this litigation, in February 2001, the Editor of the magazine wrote a 3 page letter to subscribers of Zur Zeit, asking them for financial support.

"The Jewish journalist Karl Pfeifer had condemned the statements for their Nazi tone and as a result had unleashed the judicial avalanche against P. When Zur Zeit dared to show that this was the cause of the suicide, Pfeifer lodged a complaint". Pfeifer brought a further set of defamation proceedings, which were stayed pending the Court of Appeal's decision, which was handed down in October 2001. As a result, the regional Court acquitted the Defendants and the Court of Appeal dismissed the Appeal.

Pfeifer complained to the ECHR for violation of his right to reputation under Article 8 and for the first time the European Court upheld his complaint and awarded compensation of 5,000 Euros.

The main issue before the ECHR was whether the text of the letter was a statement of fact or a valued judgment.

"It is true that statements that shock of offend the public or a particular person are also protected by the right to freedom of expression under Article 10. However the statement here at issue went beyond that, claiming that the applicant had caused Professor P's death by ultimately driving him to commit suicide. By writing this, Mr M's letter to the subscribers to Zur Zeit overstepped acceptable limits, because in fact accused the applicant of acts tantamount to criminal behaviour.

49. In those circumstances the Court is not convinced that the reasons advanced by the domestic courts for protecting freedom of expression outweighed the right of the applicant to have his reputation safeguarded. The Court therefore considers that the domestic courts failed to strike a fair balance between the competing interests involved." (17)

6.5 *Alithia Publishing v Cyprus (2008)*

A Cypriot newspaper wrote a series of 12 defamatory articles about the minister for defence alleging, in effect, that he had corruptly accepted gifts and bribes from arms dealers The minister sued for libel and the defendants accepted that the allegations were defamatory but relied upon justification and fair comment.. The Court found for the Minister and awarded damages. The newspaper complained to the ECHR who dismissed the claim saying it was not a violation of Article 10. In relation to the defence of fair comment, the Court stated:
"While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which a value judgment may be excessive (see, inter alia, Lindon and Others v France [GC], cited above, S55). The applicants relied on the defence of fair comment, which required them to prove the alleged factual basis on which their statements had been based. The court considers that it is not, in principle, incompatible with Article 10 to place the onus of proving, to the civil standard, the truth of the factual basis on which a value judgment was based"

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7 Qualified Privilege

7.1 Since the House of Lords decision in Jameel v Wall Street Journal (2007) 1 AC 359 there have been a number of significant decisions concerning the new scope of the Reynolds "responsible journalism" defence and the neutral reportage variant of Reynolds based on the Court of Appeal decision in Al Fagih v HH Saudi Research and Marketing (2002) EMLR 13 (which appeared to assume that Article 10 had higher priority than a right to a reputation).

7.2 *Roberts v Gable (2007) EMLR 457*

In this action the Defendants succeeded in establishing before Eady J that their reports of disputes between various factions of the BNP were neutral reportage. The Defendant's appeal was dismissed but the Court of appeal set out its reformulation of the classic Reynolds defence and neutral reportage.

The Court of Appeal stated the reportage defence would be available if it reported neutrally the allegations of both sides in a political dispute, provided that it did not adopt, embellish or subscribe to any belief in the truth of the allegations.

7.3 *Michael Charman v Orion Publishing Group Ltd & Others [2007] EWCA Civ 972*

In this action concerning a book entitled "Bent Coppers" the Defendants sought to defend on the basis of neutral reportage and perhaps inconsistently in the alternative classic Reynolds privilege.

Prior to the decision in Jameel, Gray J, dismissed both defences of privilege. He rejected the reportage defence on the ground that the author had adopted the serious allegations against the claimant and had failed to report the facts fully fairly and disinterestedly. In relation to classic Reynolds the author had failed to act responsibly in communicating information to the public; he failed to critically analyse the material, gave prominence to marginal material and put a spin on the material.

The Court of Appeal dismissed the Appeal on reportage but upheld the appeal on Reynolds responsible journalism. In paragraph 66, LJ Ward's provides an analysis of the recent developments in law, including Jameel:

"Gray J did not have the advantage of their Lordships' opinions in Jameel v Wall Street Journal Europe SPRL (No 3) . . .

Had Gray J had the benefit of it, he would, I do not doubt, have approached his task differently. The salient features of Jameel, some of which are of significance in this appeal, are these.

(1) Whether or not the matter was properly in the public interest and whether or not the standard of responsible journalism has been met has to be considered in the context of the article as whole. . .

(2) Taking steps to verify the information is given added emphasis…

(3) If the public interest is engaged, the report is privileged if it satisfies the test of responsible journalism…

(4) As for Lord Nicholl's ten factors to be taken into account, Lord Bingham said: . . . . pointers which might be more or less indicative, depending on the circumstances of a particular case, and not, I feel sure, as a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege.

(5) In assessing the responsibility of the article, weight must be given to the professional judgment of the journalist. This is a very important point to emphasise in our appeal. . .

(6) The test is not intended to present an onerous obstacle to the media in the discharge of their function. . .

(7) Reynolds must be seen as the House's attempt "to redress the balance [between Article 8 and Article 10 of the ECHR] in favour of greater freedom for the Press to publish stories of genuine public interest", per Lord Hoffmann . . . I sense at once which way the wind from the House of Lords is blowing and I must trim my sails accordingly . . .

I have looked again at the Strasbourg jurisprudence. The consistent trend is very supportive of the right of free expression. It is necessary only to cast an eye over the Strasbourg

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decision since Jameel was argued. White v Swede [2007] EMLR.(emphasis added)

In the light of Charman, it appears to be the case that the defendant must now choose between classic Reynolds and the reportage defence.

7.4 *Prince Radu of Hohenzollern -v- Marco Houston & others [2007] EWHC 2735 (QB)*

In this case, the Defendants alleged in Royalty Monthly that there was a "very strong case against the Claimant which to the present time he has failed convincingly to refute, that he was not granted a title or rank by the Fürst and that his claims to the contrary are false; and that he is relying upon a document, namely the Urkunde, in support of his claims, and although it is not genuine and indeed contains a forged signature purporting to be that of the Fürst. The Defendants sought to rely upon common interest privilege, responsible journalism privilege and reportage. The Court rejected these defences and made explicit reference to the fact that reputation is a convention right and the Re S methodology must be considered.

"Lord Nicolls also explained the concept of "responsible journalism" in terms of trying to achieve an acceptable balance or reconciliation: see Reynolds at pp. 200-201. On the one side, obviously, is freedom of speech and the corresponding right of the public to be told; on the other hand, the reputation of the individual concerned.(para 43)

"Now, perhaps, this tension would be expressed more overtly as being between competing Convention rights under Article 10 and Article 8, since it has subsequently been acknowledged in Strasbourg that the protection of reputation is one of the functions of Article 8: see e.g. Radio France v France [2005] 40 EHRR 29; Lindon v France [2007] ECHR 836. Be that as it may, Lord Nicolls went into some detail about the considerations to be put in the scales alongside freedom of speech, albeit without express reference to Article 8….. (para 44)

"It is now recognised that when Convention rights come into conflict the courts must apply an "intense focus" to the facts of the case without according automatic priority to any one Convention right over another: see e.g. Re S (A Child) [2005] 1 AC 593 at [17], per Lord Steyn. It is against that background that the Judges must grapple with the notion of "responsible journalism".(para 45)

In relation to "responsible journalism":

"Standing back from these individual factors, I need finally to consider the matter "in the round": see eg Galloway v Telegraph Group Ltd at [76]. Is it right to uphold the defence of privilege (as happened eg, in Roberts v Gable) notwithstanding the fact that some of Lord Nicholls' questions have been answered negatively? That turns upon the broader question to which I referred earlier; namely, whether it was in the public interest to publish this article in the magazine regardless of its truth or falsity. That in turn depends on whether it was an example of "responsible journalism". Were the steps taken to gather and publish the information responsible and fair, as contemplated by Ward LJ in Charman at [66]? This is a judgment for the court to make, but having regard to the range of reasonable decisions open to an editor in Mr Houston's position. It is not a question of what I would have done: I am not a journalist.

In the end, I have come to the conclusion that the publication of this article did not meet the criteria recently expounded in Charman. I take into account all the matters I have mentioned in the body of this judgment. It is especially significant, in my assessment, that such serious allegations were put into circulation without giving any opportunity for the Claimant's side of the story to be stated on the alleged forgery of the Urkunde, its use for personal gain, his false claim that the Hohenzollerns adopted him, or his alleged service in the secret police. (I need hardly add that this conclusion is not to be equated with saying that privilege is lost because Mr Houston tripped over one or two of Lord Nicholls' ten "matters". That would be absurd. As always, the assessment has to be "in the round"). Accordingly, the plea based on Reynolds also fails. The preliminary issue is thus resolved in favour of the Claimant…

The Defendant sought permission to appeal and Smith LJ (who tried the Al Fagih case some years before) refused permission on paper but May LJ gave permission to appeal the Reynolds privilege claim at an oral hearing.

7.5 *Alithia v Cyprus [2008]*

As mentioned above, the ECHR dismissed the newspapers' complaint. In addition to the other defences, the Court also considered the defence of qualified privilege which was similar in form to the Reynolds defence. The Court emphasised that the significant factors which required consideration were the authority of the source; whether the newspaper had conducted a reasonable amount of research, whether the story was reasonably balanced and whether the newspaper gave the persons defamed the opportunity too defend themselves. It said:

"the Court considers that the applicants should have realized that by publishing a whole series of articles making seriously defamatory statements of fact, which were based on dubious sources, without affording the person defamed a reasonable opportunity to comment on them or, at least, to attempt to put his side of the story, they might well be considered to have failed to comply with the standards of "responsible journalism" and that, as a result, they would not be able to benefit from the defence of qualified privilege.

Article 10 of the Convention does not, however, guarantee a wholly unrestricted freedom of expression even in respect of coverage by the press of matters of serious public concern. Where, as in the present case, there is question of attacking the reputation of individuals and thus undermining their rights as guaranteed in Article 8 of the Convention (see, inter alia, Pfeifer v Austria, no. 12556/03 S.35, cited above), regard must be had to the fair balance which has to be struck between the competing interest at stake. Also of relevance for the balancing which the Court must carry out in the present case is that, under Article 6 S2 of the Convention, everyone has the right to be presumed innocent of any criminal offence until proven guilty.".

8 Conclusions

8.1 It appears that over the last few years the English Courts have made a number of assumptions concerning freedom of expression and the right to reputation: namely:
a. That Article 10 has priority over the right to reputation.
b. That the right to reputation was not a convention right.
c. That Strasbourg jurisprudence was almost universally in favour of Article 10.

8.2 In fact, it is now clear that these assumptions are no longer correct. Furthermore, the proper approach when dealing with a clash of convention rights is to conduct an ultimate balancing test as indicated in Lord Steyn in Re: S. This is not just limited to privacy claims but to all conflicts of convention rights.

8.3 The other consideration is that there is a positive obligation on the domestic states to ensure adequate protection between individuals.

The effect of this new methodology and this positive obligation on the law of libel has not yet been fully tested but it may mean that certain aspects of the law of defamation will need to be reformulated, for example, where the law has been developed under the impetus of free speech/Article 10 considerations or where the English Courts have assumed that Strasbourg jurisprudence implies that article 10 is dominant. At the very least this new methodology may need to be applied to considerations of interim and final injunctions, Reynolds and/or reportage qualified privilege, fair comment, and possibly damages. Some recent decisions such as Radu appear to indicate that the domestic Courts are aware that some adjustment to the law of libel is necessary in the light of these considerations.(18)

Mark Thomson
5 June 2008

Reputation as a Convention Right

1. This is a revised version of the paper handed out at the Management Forum Seminar on 30 May 2008; entitled “Media Law” (back)
2. Tolstoy v United Kingdom [1996] EMLR 152 (back)
3. Steel & Morris v UK [2005] EMLR 15 (back)
4. Bladet Tromso & Stensaas v Norway [21980/93] (2000) 29 ECHR (back)
5. Lingens v Austria [1986] 8 EHRR (back)
6. See also “Judicial Reasoning under the UK Human Rights Act” by Helen Fenwick, Gavin Phillipson and Roger Masterson – Cambridge University Press 2007 (back)
7. S.12(3): “No such relief may be granted unless the Court is satisfied that the applicant is likely to establish at trial that publication should not be allowed.”(back)
8. See Cream Holdings v Banerjee [2004] UKHC44(back)
9. See also Rotaru v Romania [2000](back)
10. See the House of Lords decision in Campbell v MGN [2004] and the Court of Appeal decision in McKennitt v Ash [2006](back)
11. Also see Lord Browne v Associated [2007](back)
12. The French privacy laws have for many years applied to false information. Bridget Bardot successfully sued in privacy based on a story that she had attempted suicide(back)
13. See also the recent talk by Desmond Browne QC entitled “Kiss & Tell and Snatched Photographs” (available on the 5RB website)(back)
14. See also the similar decision of Tugendhat in Coys Ltd v Autocheris [2004] EMLR 25(back)
15. Indeed the Rule in Bonnard v Perryman does not apply rigidly in the context of harassment injunctions e.g Howlett v Holdings [2006] EWHC 41 (QB) nor in the context of trademark injunctions. Boehringer v Vetplus [2007] EWCA 583(back)
16. See also the decision of Eady J in the related action Gentoo Group Ltd & Others –v- Stephen Hanratty [2008] EWHC 627 (QB) (back)
17. See also the dissenting Judgment of Judge Loucaides(back)
18. See “Privacy, Reputation and Expression, the Strasbourg Article 8 Revolution” – by Hugh Tomlinson & Heather Rogers(back)