PSEUDO-CODIFICATION OF THE PUBLIC-INTEREST DEFENCE IN DEFAMATION

SERAFIN v Malkiewicz began as an everyday action for libel. A Polish-language magazine edited and published by the defendants had alleged disreputable conduct on the claimant's part, towards London's Polish community. Jay J.'s decision dismissing Mr. Serafin's libel claim ([2017] EWHC 2992 (Q.B.)) triggered a remarkable sequence of appellate consequences.

The Court of Appeal held the judge had been wrong to uphold the defence of publication on a matter of public interest (Defamation Act 2013, s. 4). There may be nothing especially unusual in that. But it further held that the conduct of the trial had been unfair to the claimant, who had represented himself. The learned judge had "descended to the arena, cast off the mantle of impartiality and taken up the cudgels of cross-examination": [2019] EWCA Civ 852, at [114]. The Supreme Court upheld this extraordinary finding. Their Lordships concluded, "with profound regret", that Jay J.'s "barrage of hostility towards [the claimant], fired by the judge in immoderate, ill-tempered and at times offensive language … did not allow the claim to be properly presented": [2020] UKSC 23, [2020] 1 W.L.R. 2455, at [48]. The logical result had to be a retrial before a different judge. Yet the Court of Appeal "did not in its judgment proceed to address the consequences that should flow from its conclusion that the trial had been unfair": ibid., at [33]. It had ordered only an assessment of damages. The Supreme Court could not understand what precisely this required (was the damages inquiry to assume that *all* the alleged libels were actionable? Or only the ones held actionable by Jay J.?). The Court of Appeal's "unexplained order" could not stand and a new trial was required: [2020] UKSC 23, at [49]. To round things off, that court's detailed consideration of the public-interest defence had been so flawed that "the new judge should determine [its] availability … without reference to the reasoning which led the Court of Appeal to conclude that the defendants had [failed to meet its requirements]": [2020] UKSC 23, at [78]. Lord Wilson, giving judgment for a unanimous Supreme Court, evidently found the case embarrassing. No wonder.

Serafin v Malkiewicz will be a leading case on unfair trials – since they are fortunately rare. But our concern here is the public-interest defence in defamation. This is no less constitutionally important. *Serafin* saw the first consideration of the statutory defence at the highest level. While the Supreme Court's reasoning was technically obiter, it naturally has great authority.

The House of Lords first derived a public-interest defence out of qualified privilege in *Reynolds v Times Newspapers Ltd.* [2001] 2 A.C. 127.

The Defamation Act 2013 states: "The common law defence known as the *Reynolds* defence is abolished" (s. 4(6)). Section 4 enacts its replacement. The key requirements are "a statement on a matter of public interest" (s. 4 (1)(a)) and that "the defendant reasonably believed that publishing [it] was in the public interest" (s. 4(1)(b)). About these the statute gives little guidance save that "the court must make such allowance for editorial judgement as it considers appropriate" (s. 4(4)) and "must have regard to all the circumstances of the case" (s. 4(2)). Unsurprisingly section 4's meaning has been contentious.

Low Kee Yang (2014) 130 L.Q.R. 24 thought "*Reynolds* privilege transformed". Section 4 was "far more favourable to the defendant" than the common law defence. Specifically compared with the inquiry, founded upon Lord Nicholls' speech in *Reynolds*, into whether the defendant's behaviour met standards of "responsible journalism" (see [2001] 2 A.C. 127, 202). Yang argued that Lord Nicholls' celebrated checklist had become irrelevant: "Nowhere in s.4 is there any express indication that the defendant must have acted responsibly and it would be an unbearable stretch of interpretation to argue that responsible conduct is embedded within the concept of reasonable belief". Yang supported this view by noting that whereas the Defamation Bill, as introduced, had originally contained a list of eight behavioural factors derived from Lord Nicholls' *Reynolds* speech, this subclause was removed during parliamentary consideration and is absent from section 4 as enacted. That amendment, Yang contended, indicated a decisive break with the *Reynolds* approach – an "astonishing" recalibration of defamation law towards freedom of speech.

This argument has not been accepted in the courts. *Economou v De Freitas* [2018] EWCA Civ 2591, [2019] E.M.L.R. 7 confirms the continuing relevance of the *Reynolds* factors. At [101] Sharp L.J. approvingly paraphrased Warby J.'s reasoning below: "it would be hard to describe a belief as reasonable if it has been arrived at without care, without any examination of the relevant factors or without engaging in appropriate enquiries." Despite the focus in *Reynolds* on the defendant's *behaviour*, contrasted with section 4(1)(b)'s requirement of "reasonable *belief*" Sharp L.J. said "it could not sensibly be suggested that the rationale for the *Reynolds* defence and for the public interest defence are materially different": [2018] EWCA Civ 2591, at [86]. Accepting that the 2013 Act could have expressly incorporated the *Reynolds* behavioural factors but did not, those factors might still be relevant when taking "all the circumstances" into account, and potentially decisive: ibid., at [110]. After all (as noted at [77]) according to the Act's Explanatory Notes, section 4 is "intended to reflect the principles in *Reynolds*" (Explanatory Notes at [29]); indeed "intended essentially to codify the common law defence" (Explanatory Notes at [37]).

The Court of Appeal's decision in *Serafin v Malkiewicz* marks the high tide of "*Reynolds* continuity". Enthusiastically approving *Economou* the

court thought the *Reynolds* factors relevant to establishing the "public interest", not just the defendant's reasonable belief about it: [2019] EWCA Civ 852, at [48]. Overruling Jay J., it held the defendants' "standards of journalism plainly left much to be desired" (at [82]). In particular they had not put their allegations to the claimant prior to publication. The "tenacious" requirement that claimants should be given the opportunity to respond was "the core *Reynolds* factor" (at [66]). There were other journalistic failings too. Having analysed these, the court finally thought it "useful to consider the *Reynolds* factors *seriatim*" and did so (see [83]).

With this Lord Wilson was unimpressed. The kernel of His Lordship's rebuke ([2020] UKSC 23, at [72]) was that the Court of Appeal had misunderstood Sharp L.J.'s reasoning in *Economou*. Her Ladyship had correctly observed there that the *rationale* of the statutory defence was not materially different (see above) – however, continued Lord Wilson: "It is wrong to consider that the elements of the statutory defence can be equiparated with those of the *Reynolds* defence". It followed that the Court of Appeal had been wrong in *Serafin* to apply Lord Nicholls' *Reynolds* factors as a "checklist". In particular, section 4 must not be "glossed" by elevating the solicitation of prior comment from the claimant into a strict "requirement". Lord Wilson also discouraged future courts from investigating ECHR jurisprudence insofar as the very purpose of the defence is to balance claimants' (art. 8) rights to reputation against defendants' (art. 10) rights to freedom of speech. For good measure he noted that the Court of Appeal had misattributed both of the Strasbourg authorities it cited to the European (Union) *Court of Justice*.

Lord Wilson did not formulate any elaborate positive account of the defence. His judgment focused on counsel's criticisms of the two Court of Appeal authorities (on behalf of the defendants and the Media Lawyers Association, interveners). As seen, His Lordship accepted criticisms of the decision below in *Serafin v Malkiewicz* yet his view of *Economou v De Freitas* was broadly positive. He did however identify an understatement in Sharp L.J.'s remark (above) that Parliament could have incorporated the *Reynolds* list but did not. As L.K. Yang previously emphasised (also above), such a list had actually appeared in the original Bill. It was deleted from section 4's final form. Lord Wilson traced the parliamentary history (quoting extensively from *Hansard*). Given the list's removal Lord Wilson lamented that the Act's Explanatory Notes describe the "codification" of *Reynolds* ("a strong word"). He traced this mischaracterisation to the "unfortunate" failure to update a passage which had referred to the *original* Bill, with its *Reynolds*-inspired list of factors.

The resulting law sits between two extremes. The public-interest defence cannot be analysed as if *Reynolds* still held sway – the Court of Appeal's apparent error in *Serafin*. But nor has the Supreme Court approved the converse suggestion that the behavioural factors identified in *Reynolds* are

irrelevant. The middle course is surely the correct interpretation of the statutory text. Since a defendant's belief in public-interest publication must be *reasonable*, her conduct (e.g. in verifying the information) has to be relevant. It is manifestly part of "all the circumstances" (s. 4(2)). But all depends on the facts of each case. How the test is framed, in the abstract, is important. Ultimately however, its application to particular fact situations is even more so. Everyone can agree that "responsible journalism" is essential and "fake news" deplorable (see *Economou* [2018] EWCA Civ 2591, at [109]); but free speech is equally vital. Section 4, like *Reynolds* before it, merely restates the intractable conflict. Its resolution requires sound judgement, and judgments.

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MOHAMUD EXPLAINED AND RE-UNDERSTANDING "CLOSE CONNECTION" IN VICARIOUS LIABILITY

WM MORRISON Supermarkets Plc. v Various Claimants [2020] UKSC 12, [2020] 2 W.L.R. 941 has somewhat narrowed the scope of vicarious liability. It was handed down alongside *Barclays Bank v Various Claimants* [2020] UKSC 13 (on which, see Richard Buxton, "Vicarious Liability in the Twenty-first Century" [2020] 97(2) C.L.J. 217). While *Barclays* concerned the first stage of the vicarious liability enquiry, whether or not the relationship between tortfeasor and defendant is one that will trigger the doctrine, the present case addresses the second: whether or not a sufficient connection exists between the wrongdoing and the relationship. Lord Reed, delivering the court's judgment, said the appeal "provide[d]. . .an opportunity to address the misunderstandings which have arisen since . . . *Mohamud v WM Morrison Supermarkets* [[2016] A.C. 677]" (at [1]). There is also an important point about the *Data Protection Act* 1998 ('*DPA*').

Morrisons was sued by several thousand employees/former employees when personal information was maliciously published on the Internet by another employee, Mr. Skelton. Skelton had been entrusted with payroll data to enable transmission to external auditors but had copied and published it in order to harm his employer. The claimants argued that Morrisons was liable for breach of a statutory duty under the *DPA*, misuse of private information and breach of confidence. Morrisons was also said to be vicariously liable.

The trial judge, Langstaff J., rejected the claims of primary liability but held Morrisons vicariously liable for all wrongs. Morrisons' appeal was dismissed. Both the trial judge and Court of Appeal treated as important that