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**Update June 2020 – Defamation Section 4 Defence**

*Lord Nicholls’ 10 points ‘not a requirement for public interest defence’*

The defence of publication on a matter of public interest in the Defamation Act 2013 does not include a “requirement” that allegations must be put to the subject of an article before publication, the Supreme Court has declared.

In addition, a court considering the section 4 defence should not use as a “check-list” the 10 points which, in *Reynolds v Times Newspapers Ltd* [(2001] 2 AC 127), Lord Nicholls listed as factors which could be taken into account when considering whether an article was the result of responsible journalism, said Lord Wilson, giving a judgment with which Lord Reed, President, Lord Briggs, Lady Arden and Lord Kitchin agreed.

Lord Wilson’s declaration came in a judgment in which the Supreme Court ordered a new trial in a long-running libel battle between Polish-born businessman Jan Serafin and the Editor and publishers of the London-based Polish-language magazine *Nowy Czas* (New Time).

A new trial was necessary because Mr Justice Jay, who tried the case in the High Court, had not given Mr Serafin – who was a litigant in person – a fair trial, directing a “barrage of hostility” towards his case and using “immoderate, ill-tempered and at times offensive language” at many points during the four days of hearing, the court said.

Mr Serafin had sued *Nowy Czas*over an article headlined “Bankruptcy need not be painful” which was published in October 2015.

At the trial in the High Court Mr Justice Jay dismissed the claim, having held that most of the allegations highlighted by Mr Serafin were either protected by the truth defence, or failed to meet the serious harm requirement.

He also held that the article was protected by the section 4 defence, even though the magazine had not put the allegations to Mr Serafin before publication.

While Mr Serafin had won his claim on a number of points, he received no damages – the judge said that even if the magazine’s public interest defence had failed he would not have awarded more than nominal damages as his reputation was already shot to pieces by the imputations which the publishers had proved to be true.

The case went to the Court of Appeal, which held that Mr Serafin had not received a fair trial, and overturned Mr Justice Jay’s finding on the section 4 defence, but failed to order a new trial, instead ordering a hearing before another judge on the issue of damages for Mr Serafin.

The case then went to the Supreme Court, which upheld the Court of Appeal’s finding that the original trial was unfair, and ordered a new trial.

Lord Wilson said the section 4 defence would have to be considered at the new trial.

The Court of Appeal’s statements of principle about the effect of the defence had been subject to “energetic criticisms”, and the court had to deal with them, he said.

This did not form part of the decision but was intended to be helpful, because otherwise the Court of Appeal’s approach would remain authoritative not only for the judge at the new trial, but also generally.

Lord Wilson highlighted a series of criticisms of the Court of Appeal’s analysis of the section 4 defence which were levelled by the defendants as well as by the Media Lawyers Association, representing lawyers with national and regional news organisations, and broadcasters, which intervened because of its concerns over the potential effect of the lower court’s approach.

Under section 4 publishers have a defence if they can show that the statement complained of was, or formed part of, a statement on a matter of public interest, that they believed that publishing it was in the public interest, and that that belief was reasonable.

A court considering the defence “must have regard to all the circumstances of the case” and, when determining whether a defendant’s belief that publication was in the public interest, “make such allowance for editorial judgement as it considers appropriate”.

In the Supreme Court judgment, Lord Wilson referred to the first element of the defence, the question of whether an article was, or formed part of, a statement on a matter of public interest.

The Court of Appeal had referred to an article being “in the public interest”, and to Lord Nicholls’ 10 points as being relevant to the issue of whether there was a public interest in it, he said, adding: “But, with respect, the question is not whether the article is ‘in the public interest’ but whether it is ‘on a matter of public interest’.”

Lord Wilson said that during the Act’s legislative development Parliament had made clear its intention that the list detailed by Lord Nicholls in *Reynolds* was not to be used as a check-list for the section 4 defence – although, as Lady Justice Sharp had pointed out in *Economou v De Freitas* ([2018] EWCA Civ 2591, [2019] EMLR 7) that was not to deny that one or more of those factors might be relevant when deciding whether a defendant was reasonable in believing that publishing was in the public interest.

The Court of Appeal had described Lord Nicholls’ points as “a well-known check-list for use when determining whether the defendant reasonably believed that publishing the statement was in the public interest”.

The Court of Appeal was referring to the issue in section 4(1)(b) of the statutory defence – whether the defendant reasonably believed that publishing the statement complained of was in the public interest – but Lord Nicholls had been referring to the different question of whether an article was the product of responsible journalism, said Lord Wilson.

The Court of Appeal had also said that while the section 4 defence had replaced the *Reynolds* defence, the recent case of *Economou v De Freitas*([2018] EWCA Civ 2591, [2019] EMLR 7) had confirmed that the tests in each were “not materially different”.

Lord Wilson said: “But what the Court of Appeal said in the *Economou* case was that the *rationale*for each of the tests was not materially different … It is wrong to consider that the elements of the statutory defence can be equiparated with those of the*Reynolds* defence.”

The Court of Appeal had also described the section 4 defence as a form of qualified privilege, said Lord Wilson, adding: “The origins of the statutory defence lie in the *Reynolds*defence which, at birth, arose out of the concept of qualified privilege.

“But even in 2006, long before the enactment of section 4, Lord Hoffmann in the *Jameel*case explained that it was unhelpful to regard the defence as a form of privilege… Indeed in the *Flood*case Lord Phillips said likewise... The concept of qualified privilege is laden with baggage which, on any view, does not burden the statutory defence.”

The Court of Appeal also went too far when suggesting that the section 4 defence should be confined to circumstances in which it was necessary to protect rights under Article 10 of the European Convention on Human Rights, said Lord Wilson.

The statutory defence was developed under the influence of Convention principles and was intended to ensure that it did not generate any breach of rights under Article 10 or Article 8.

Referring to a “check-list” was now inappropriate, and it was also best to avoid references to acting “responsibly”, he went on.

The Court of Appeal had also held that it was “a basic requirement of fairness and responsible journalism” that someone who was going to publish something without having to show that it was true should give the subject the opportunity to put his side of the story.

Lord Wilson said a failure to invite pre-publication comment from the claimant would doubtless always at least be the subject of consideration under section 4(1)(b) and might contribute to or form the basis of a conclusion that the defendant had not established the reasonableness of his or her belief that publication was in the public interest. He added: “But it is, with respect, too strong to describe the prior invitation to comment as a ‘requirement’.”

Such an invitation had never been a “requirement” of the common law defence, so describing it as being so for section 4 “would be to put a gloss” on subsections 4(1)(b) and 4(2).

Finally, in its judgment the Court of Appeal had listed and considered as a check-list the 10 factors Lord Nicholls had detailed in *Reynolds*, said Lord Wilson, adding: “The Court of Appeal’s exercise in then proceeding to set out Lord Nicholls’ 10 factors and to apply them to the present case is not what Parliament intended it to do.”

*Serafin v Malkiewicz and others*

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*Supreme Court; Lord Reed, President, Lord Wilson, Lord Briggs,*

*Lady Arden, Lord Kitchin*

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