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Republication of Defamation under the Doctrine of Reportage – The Evolution of Common Law Qualified Privilege in England and Wales

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1 Introduction

The House of Lords' decision in *Reynolds v Times Newspaper Ltd* ('*Reynolds*')[1] made a fundamental change to the law of defamation in the United Kingdom. In response to the well recognised 'chilling effect' of libel actions on media speech,[2] it broadened the defence of duty-interest qualified privilege[3] – traditionally of limited application to the media[4] – to include certain widespread publications made in the public interest.[5] Specifically, the House of Lords held that, in modern times, a media

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[1] [2001] 2 AC 127 (HL).

[2] Ibid 192. The development was also seen as necessary to bring libel law into line with freedom of expression jurisprudence (see, eg, *Lingens v Austria* (App no 9815/82) (1986) 8 EHRR 407) under the Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 June 1952)).

[3] 'Duty-interest' qualified privilege arises where a publisher has a legal, moral or social obligation to public the defamatory material and the recipient has a corresponding interest in receiving it, and will usually arise by reference to the relationship between the person making the publication and its recipient: see *Toogood v Spyring* (1834) 1 C M & R 181, 149 ER 1044; *Adam v Ward* [1917] AC 309 (HL). For a detailed analyses of the law on duty-interest qualified privilege, see P Milmo and WVH Rogers, *Gatley on Libel and Slander* (11th edn Sweet & Maxwell, London 2008) Chapter 14.

[4] Duty-interest qualified in the United Kingdom has traditionally been of very little use in defending defamatory media publications made to the world at large: see, eg, AT Kenyon, *Defamation: Comparative Law and Practice* (UCL Press, London 2006) 258; E Barendt, *Freedom of Speech* (2nd edn Oxford University Press, Oxford 2005) 204, 219; Milmo and Rogers (n 3) 437 and 517-518. Media publishers, generally speaking, were not seen as having a duty to publish nor the public an interest in receiving widespread publications, even in circumstances where such a publication concerned a legitimate matter of public interest: see *Braddock v Bevins* [1948] 1 KB 580 (CA); *Blackshaw v Lord* [1984] QB 1 (CA).

[5] It should be noted, however, that the precise conceptual basis of the development is a matter of controversy among both judges and commentators. The House of Lords in *Reynolds* was clear in characterising the development as an expansion of duty-interest qualified privilege (ie *Reynolds* (n 1) 194-195, 197, 204 (Lord Nicholls), 213 (Lord Steyn), 217, 224, 227 (Lord Cooke), 229, 235 (Lord Craighead), 237, 239 (Lord Hobhouse)), while more recent judicial opinion has challenged that view. Thus, in *Jameel v Wall Street Journal Europe Sprl (No.2)* [2006] UKHL 44, [2007] 1 AC 359 (HL),

publication will be protected by qualified privilege where the information is 'of sufficient value to the public that, in the public interest, it should be protected...'[6] In order to guide this analysis, Lord Nicholls set out a list of ten non-exhaustive factors ('*Reynolds* factors') of particular relevance to cases involving media defendants.[7] The factors are intended to invoke the standard of 'responsible journalism'[8] by which to judge whether a publisher took sufficient steps in relation to the accuracy of the material published, with the core factors being the reliability of the source, the steps taken to verify the information and whether comment was sought from the claimant.

It was to the disappointment of the press, however, that the lower courts in England and Wales initially thwarted the intention behind '*Reynolds* privilege' by applying it restrictively, with the consequence that it succeeded in very few cases. The approach adopted by the courts was to treat the *Reynolds* factors as a series of hurdles to be overcome before a defendant could be deemed to have acted responsibly.[9] Much has been written on this jurisprudential trend,[10] especially since the House of Lords' more recent rejection of the 'checklist' approach in *Jameel v Wall Street Journal Europe Sprl (No.2)* ('*Jameel*').[11] This article, however, takes a different focus. Against the backdrop of these broader developments, it explores in detail a particular line of cases

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Lord Hoffmann and Baroness Hale (following earlier comments by the Court of Appeal in *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805, [2002] QB 783 (CA) [35]) viewed *Reynolds* qualified privilege as being of a 'different jurisprudential creature' from the traditional duty-interest privilege from which it emerged ([50] (Lord Hoffmann), [146] (Baroness Hale); cf. Lord Bingham ([30]) and Lord Hope ([105])). For a discussion of the conceptual basis of *Reynolds* privilege, see Milmo and Rogers (n 3) 524-526; S Deakin, A Johnson and B Markesinis, *Markesinis and Deakin's Tort Law* (6th edn, Oxford University Press, Oxford 2007) 805.

[6] *Reynolds* (n 1) 195.

[7] Ibid 205.

[8] Ibid 202.

[9] Publishers were found, for example, to have relied on sources that were unreliable (*James Gilbert v MGN* [2000] EMLR 680) or to have not taken reasonable steps to verify the allegations (*Armstrong v Times Newspapers* [2004] EWHC 2928; *Galloway v Telegraphic Group* [2004] EWHC 2786 (QB), [2005] EMLR 7 (QB)), or they were not considered to have given a claimant a meaningful opportunity to comment on the allegations prior to publication (*Jameel v Wall Street Journal Europe (No 2)* [2004] EWHC 37, [2004] EMLR 11 (QB); *Jameel v Wall Street Journal Europe Sprl (No 3)* [2005] EWCA Civ 74, [2005] QB 904 (CA).

[10] See K Beattie, 'New Life for the Reynolds 'Public Interest Defence'? *Jameel v Wall Street Journal Europe*' (2007) 1 EHRLR 81-89; A Scott, 'The Same River Twice? *Jameel v Wall Street Journal Europe*' (2007) 12 Comms Law 52-59; J Rowbottom, 'Libel and the Public Interest' [2007] CLJ 8-11; D Hooper, 'The Importance of the Jameel Case' (2007) 18(2) Ent LR 62-64; G Robertson and A Nicol, Media Law (revised 5th edn Penguin Books, London 2008), 159-171.

[11] *Jameel* (n 5).

where *Reynolds* privilege *has* proven to be successful, even prior to *Jameel*: the so-called 'reportage' cases.[12]

The 'doctrine of reportage'[13] – the term by which this particular application of *Reynolds* privilege has since become known[14] – essentially provides a defence for the republication of allegations originally made by a participant to a dispute or controversy of public interest. Repeating a defamatory allegation, subject to any other defence, would usually give rise to liability on the part of the republisher.[15] Under the reportage defence, however, liability will be avoided where the republisher does not adopt or present the repeated defamatory allegation as fact, but instead simply republishes the allegation as part of a story that has the effect of reporting, in the public interest, the fact that the allegation has been made. Even though the precise boundaries of the defence remain uncertain, a number of recent decisions have confirmed both the existence of the doctrine and its position as a particular application, or 'species', of *Reynolds* qualified privilege.[16]

However, notwithstanding what has been said in the reportage cases, most notably by the English Court of Appeal in the leading case of *Roberts v Gable*[17] ('*Roberts*'), it is argued in this article that the doctrine should not be seen as a mere application of 'classic'[18] *Reynolds* privilege. This is because each of these defences – classic *Reynolds* privilege and reportage – involves a very different analysis. Perhaps more importantly, it is argued that these defences also appear to be doctrinally distinct. *Reynolds* privilege focuses on the conduct of the journalist in relation to the truth of the allegations published; reportage, on the other hand, is not concerned with the truth

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[12] *Al-Fagih v H.H. Saudi Research & Marketing (U.K.) Ltd* [2001] EWCA Civ 1634, [2002] EMLR 13 (CA); *Roberts v Gable* [2006] EWHC 1025, [2006] EMLR 23 (QB); *Roberts v Gable* [2007] EWCA Civ 721, [2008] QB 502 (CA).

[13] The phrase 'doctrine of reportage' is used interchangeably with 'reportage' and the 'reportage defence'.

[14] This term was first used by Eady J in *Roberts v Gable* [2006] EWHC 1025, [2006] EMLR 23 (QB), *Roberts v Gable* [2006] EMLR 23 [6]. The doctrine of reportage has since been recognised by the Supreme Court of Canada in *Grant v Torstar Corp*., 2009 SCC 61, but rejected in New Zealand in *Peters v Television New Zealand* unreported, HC Auckland, 1 October 2009, Andrews J.

[15] See, eg, *Stern v Piper* [1997] QB 123 (CA); *Lewis v Daily Telegraph* [1964] AC 234 (HL).

[16] *Roberts v Gable* [2007] EWCA Civ 721, [2008] QB 502 (CA) [60]; *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972, [2008] 1 All ER 750 (CA) [49].

[17] *Roberts* (n 16).

[18] As it was referred to by Eady J in *Prince Radu of Hohenzollern v Houston* [2007] EWHC 2735 [26].

or falsity of the allegations but with the public interest in reporting the fact that they *have been made.* The problem, however, is that the development of reportage under the guise of *Reynolds* has muddied this distinction. This, in turn, has led to confusion as to the scope of the defence and, at least in the current author's opinion, a tendency to overestimate its reach. As such, this paper suggests that the courts need to reconsider the doctrinal basis of the defence and explicitly interrogate its public interest justifications so that its scope can be clearly and properly defined. After exploring such justifications, it is argued that a broad interpretation of the defence should be rejected.

2 *Reynolds* and the 'Doctrine of Reportage'

A The Broader Context of Republication in Defamation Law: Liability and Defences

In considering the development of the doctrine of reportage under the *Reynolds'* jurisprudence, it is important to reemphasise that at common law a publisher will usually be responsible where it republishes someone else's defamatory comments, with such republication giving rise to a separate cause of action.[19] Moreover, under the so-called 'repetition rule' a republisher cannot defend a publication by arguing that the defamatory statement originated with someone else.[20] This is the case even if the words are attributed to a respectable and informed source.[21] The repetition rule works to limit the scope of the justification defence by preventing the defendant from simply proving the truth that the allegations *were made* rather than the *substance* of the allegations themselves – a semantic distinction familiar to the law of hearsay evidence.[22] The rationale for the rule, as pointed out by Lord Denning in *Truth (NZ) Limited v Holloway*, is that '[i]f the words had not been repeated by the newspaper,

[19] See *Duke of Brunswick v Harmer* (1849) 14 QB 185 (QB); *Truth (NZ) Limited v Holloway* [1960] 1 WLR 997 (PC); *Lewis v Daily Telegraph* [1964] AC 234 (HL).
[20] *Watkin v Hall* (1868) LR 3 QB 396 (QB) 401; *Stern* (n 15) 128-30; *Shah v Standard Chartered Bank* [1999] QB 241 (CA).
[21] See, eg, *John Fairfax & Sons v Cojuangco* (1988) 165 CLR 346, 358.
[22] *Lewis* (n 15) 260; see also Milmo and Rogers (n 3) 312-314.

the damage done…would be nothing compared to the damage done by this newspaper when it…broadcast the statement to the people at large…'[23]

The existence of the repetition rule, however, does not limit the application of defences *other* than justification. For example, the fair report privilege, which is now largely augmented by statute,[24] has long afforded the protection of qualified privilege to the republication of defamatory statements originally made in the course of judicial and parliamentary proceedings.[25] Nor is the concept of a broader neutral reportage defence to republication entirely unfamiliar to defamation law. A quasi-neutral reportage 'defence', for example, was recognised in England between the seventeenth and nineteenth centuries.[26] This defence emerged from the fact that, before the mid-nineteenth century, in order for a defamation action to arise, the defendant had to have acted with malice – that is, acted with a subjective intention to injure the plaintiff (as malice was then understood).[27] Malice, however, was presumed and it was incumbent upon the defendant to rebut this *prima facie* presumption by showing that the actual motive for making the statement was not malicious.[28] Thus, it was held that repeating an allegation made by someone else, provided the defendant did not intend to injure the plaintiff, would be enough to rebut the presumption.[29] The leading decision, *The Earl of Northampton's Case*, qualified this with the additional requirement that the defendant identify the source of the allegations.[30] Later, the Court of the King's Bench in *Maitland v Goldney* held that, for the defence to be valid, the defendant must have repeated the precise allegation made by the source, not 'words to the effect'.[31] It appeared that the defence would also fail where the defendant repeated an allegation it knew to be false.[32] The defence, however, was made redundant once the

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[23] [1960] WLR 997 (PC) 1003. See also, *Mark v Associated Newspapers Ltd* [2002] EWCA Civ 772.
[24] See Defamation Act 1996 ss 14 and 15, and Sch 1.
[25] See, eg, *Webb v Times Publishing* [1960] 2 QB 535 (QB).
[26] *The Earl of Northampton's Case* (1612) 12 Co Rep 132, 77 ER 1407; *Davis v Lewis* (1796) 7 TR 17; *Maitland v Goldney* (1802) 2 East 426, 102 ER 431; *Woolnoth v Meadows* (1804) 5 East 463, 102 ER 1148. For a detailed account of these cases, see P Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing, Oxford 2005) 121-144.
[27] See P Mitchell, 'Malice in Defamation' (1998) 114 LQR 639, 639.
[28] *Crawford v Middleton* (1662) 1 Lev 82, 83 ER 307.
[29] *Maitland* (n 26).
[30] (n 26).
[31] (n 26) 437; 435.
[32] Ibid.

question of malice became irrelevant to the defamation cause of action[33] – in other words, when liability for defamation became, in effect, strict.[34]

A defence similar to the recently developed English reportage – the focus of this paper – is also recognised in the US, where the neutral reporting of allegations made against public figures has been held by some courts as protected speech under the First Amendment to the US Constitution.[35] It is useful to say a little more about the US privilege, initially recognised by the Court of Appeal for the Second Circuit in *Edwards v National Audubon Society, Inc*, ('*Edwards*').[36] For the defence to apply, the allegation must be made (1) in the context of a 'raging controversy', (2) about a public figure, (3) by a responsible, prominent organisation, and (4) reported in an accurate and disinterested manner.[37] It is the newsworthiness that the accusations *have been made* which attracts the protection and, consequently, the defence is not defeated if the publisher has serious doubts regarding the truth of the allegations (or

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[33] See *De Crespigny v Wellesley* (1829) 5 Bing 392, 130 ER 1112; *McPherson v Daniels* (1829) 10 B & C 263.

[34] *Bromage v Prosser* (1825) 4 B & C 247, 107 ER 1051; Mitchell (n 27).

[35] For a recent treatment of the defence, see MJ Donnelly, 'A Newsworthiness Privilege for Republished Defamation of Public Figures' (2009) 94 Iowa LRev 1023-1049. The existence of the defence, however, remains uncertain following a series of unfavourable state court decisions questioning its constitutional validity: see, especially, *Norton v Glenn*, 860 A2d 48 (Pa, 2004), cert denied sub nom., *Troy Pub. Co., v Norton*, 544 U.S. 956 (2005). See Note, 'Recent Case: Constitutional Law – Freedom of the Press – Pennsylvania Supreme Court Declines to Adopt Neutral Reportage Privilege – Norton v Glenn, 860 A2d 48 (Pa, 2004)' (2005) 118 Harv LRev 2029-2036; DA Elder, 'Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwock's Attempts to Circumvent *New York Times v. Sullivan*' (2007) 9 Vanderbilt Journal of Entertainment and Technology Law 551-830. Note, also, that the defence was rejected by some federal circuit and state courts much earlier than this: *Dickey v CBS, Inc.*, 583 F2d 1221 (3d Cir, 1978); *McCall v Courier-Journal*, 623 SW2d 882 (Ky, 1981), cert denied, 456 US 975 (1982); *Hogan v Herald Co*, 444 NE2d 1002 (NY, 1982). For commentary on the neutral reportage doctrine, see RW Campbell, 'The Developing Law of Neutral Reportage' (1983) 69 Virg LRev 853-874; SE Saef, 'Neutral Reportage: The Case for a Statutory Privilege' (1992) 86 NULR 417-452; K Keyes, 'Freedom Without Responsibility: Do Massachusetts Media Defendants Need the Neutral Reportage Privilege?' (2001) 34 Suffolk ULRev 373-393; D Kohler, 'Forty Years After *New York Times v Sullivan*: the Good, the Bad and the Ugly' (2004) 83 Or LR 1203-1238.

[36] 556 F 2d 113 (2d Cir, 1977).

[37] Ibid 119. Note that these elements are not necessarily definite, with a number of states modifying them in an ad hoc way: see Saef (n 35) 436-443. At least one state court of appeal has said that the newsworthiness of the allegation is an additional element of the privilege: see *Celebrezze v Netzley*, Nos 53864, 53865, 1988 WL 87566 (Ohio Ct App, Aug 4 1988); and at least one other court in the same state has held that it will apply to the reporting of comments made against a private figure: see *April v Reflector Herald*, 46 Ohio App 3d 95, 546 NE2d 466 (1988).

indeed, even if there is actual knowledge of their falsity).[38] But, despite providing a seemingly strong defence, the US courts have been far from unanimous in accepting the doctrine, with one commentator suggesting that it has been overwhelmingly rejected by the Federal Courts of Appeals.[39] Furthermore, even in the jurisdictions that accept the doctrine, it has only been successfully argued in a handful of cases.[40] This was explained by Eady J in *Prince Radu of Hohenzollern v Houston* on the basis that the courts in the US have approached the defence 'in a "restrictive" way'.[41] But the dearth of successful case law, however, also appears to be due to the US Supreme Court's rejection in *New York Times v Sullivan*[42] of the strict liability standard in common law defamation.[43] Following this landmark decision, a defendant will only be liable for defamatory comments made against a public figure where they were made with 'actual malice', with the burden of proof resting on the claimant.[44] This means, of course, that there will be no need to rely on a defence of neutral reportage where a defendant has not acted with actual malice in publishing the allegations – that is, where he or she did not know or did not have reckless disregard as to whether or not the allegations were false.[45]

While the position of the neutral reportage defence in the US is uncertain, and even though it has limited authority in the English context due to its very different constitutional basis,[46] it nevertheless provides a reference by which, at certain points in this article, to critically evaluate the contours of the doctrine of reportage as it has

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[38] Ibid. On this aspect of the defence, see RJ Pautler, '*Edwards v National Audubon Society, Inc*: The Right to Print Known Falsehoods' (1979) 4 U Ill LF 943-968.
[39] Elder (n 35) 685.
[40] See comments in *Roberts* (n 16) [46]. These cases include, for example, *Krauss v Champaign News Gazette*, 59 Ill App 3d 745, NE2d 1362 (1978); *Barry v Time, Inc*, 584 F Supp 1110 (1984); *Price v Viking Penguin, Inc*, 881 F2d 1426, (8th Cir 1989), cert denied, 110 SCt 757 (1990). For a more detailed, recent examination of the case law, see Elder (n 35).
[41] Above (n 18).
[42] 376 US 254 (1964).
[43] Campbell (n 35) 863; Milmo and Rogers (n 3) 543; H Melkonian, 'Reportage and Neutral Reportage – Are They Something New or Just Fair Report on Steroids?' (2009) 3 MLRCB 41-70, 47 <http://www.medialaw.org/Content/NavigationMenu/Publications1/MLRC_Bulletin/Bulletin_Archive/2009-3_Intl.pdf> last accessed 6 January 2010.
[44] *New York Times* (n 42) 279-280.
[45] Ibid 280.
[46] See *Roberts* (n 16) [47], [75].

emerged in England.[47] It is the development of the English doctrine to which I now turn.

B Developing a 'Doctrine of Reportage': *Al-Fagih v H.H. Saudi Research & Marketing (UK) Ltd*

It was the Court of Appeal in *Al-Fagih v HH Saudi Research Marketing (UK)* ('*Al-Fagih*')[48] that first upheld a plea of *Reynolds* qualified privilege on the basis of reportage. In that case, the defendants' newspaper published a series of articles in the context of an ongoing political dispute between two members of the Saudi Arabian community, Al-Fagih and Al-Mas'aari. One article, written by Al-Khamees, repeated defamatory allegations that were made by Al-Mas'aari against Al-Fagih – essentially, that Al-Fagih, the claimant, was a liar and 'purveyor of malicious sexual gossip'.[49]

At trial, Smith J rejected a defence based on *Reynolds* qualified privilege. Despite finding that the allegations were made in the context of a political dispute, she found that Al-Mas'aari was an unreliable and partisan source and that 'a responsible journalist would have waited and sought to verify the truth of the allegations and Al-Fagih's response.'[50]

The decision was overturned on appeal. Even though the allegations were not from a reliable source and the journalist did not take steps to verify their accuracy, the majority of the Court of Appeal held that the publication was nevertheless protected by *Reynolds* qualified privilege. It held that the publication did not adopt or endorse the allegations and, importantly, because the allegations were attributed to Al-Mas'aari and were made in the context of an ongoing political dispute, it did not matter that the defendants' newspaper did not delay publication in order to get a response from the claimant.[51] Importantly, Latham LJ said, '[i]t is the fact that the

[47] Indeed, Sedley LJ in *Charman* (n 16) noted that the English doctrine reflects the 'now classic limb of First Amendment jurisprudence' established in *Edwards*: (n 16) [91].
[48] Above (n 12).
[49] Ibid [24].
[50] Ibid.
[51] Ibid [53].

allegation of a particular nature *has been made* which is in this context important, and not necessarily its truth or falsity.'[52] Simon Brown LJ further said:

> where, in short, both sides to a political dispute are being fully, fairly and disinterestedly reported in their respective allegations and responses…[t]he public is entitled to be informed of such a dispute without having to wait for the publisher, following an attempt at verification, to commit himself to one side or the other.[53]

His Honour even went so far as to say that taking steps to verify the truth of the allegations would have been 'inconsistent with objective reporting' and may have resulted in a loss of privilege.[54]

Despite various pronouncements following *Al-Fagih* denying the existence of a general doctrine of 'neutral reportage' under English law,[55] the *Al-Fagih* decision clearly recognises such as defence in the context of the media reporting of certain political and public interest disputes. One claimed implication of this development is its impact on the repetition rule.[56] Arguments have been made that adoption or non-adoption is a crude criterion upon which to limit the application of the repetition rule and that 'reportage and the policy underlying [the] repetition rule appear to be fundamentally incompatible.'[57] But, while the decision in *Al-Fagih* may work to 'substantially weaken the *impact* of the repetition rule when public interest stories are in issue',[58] the Court of Appeal correctly noted, as I mentioned above,[59] that the repetition rule is not concerned with the law of qualified privilege.[60] In fact the defence of privilege *presupposes* the existence of the repetition rule because without it there would be no need for the privilege in the first place.[61] On this view, the courts

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[52] Ibid [65] (emphasis added).
[53] Ibid [52].
[54] Ibid [50]; see also comments in *Robert* by Latham LJ on appeal at [68] (n 16) and Eady J at trial at [28] (n 14).
[55] See, eg, *English v Hastie* [2002] All ER (D) 11. Lord Hutton, a few years later, also rejected the existence of a common law reportage defence: B Hutton, Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly C.M.G. (2004).
[56] I Loveland, 'The Ongoing Evolution of Reynolds Privilege in Domestic Libel Law' (2003) 14(7) Ent LR 178-183, 180; Kenyon (2006) (n 4) 273; Robertson and Nicol (n 10) 169.
[57] G Busuttil, 'Reportage: A Not Entirely Neutral Report' (2009) 20(2) Ent LR 44-50, 48.
[58] Loveland (n 56) 179 (emphasis added).
[59] See n 22 and accompanying text.
[60] Above (n 12) [35]-[36]; c.f. Sedley LJ in *Roberts* (n 16) who said without explanation (at [74]) that because the reportage defence 'modifies the repetition rule' it must be interpreted 'restrictively'. See also *Mark* (n 23) [35].
[61] Milmo and Rogers (n 3) 314, citing *Stern* (n 15) 137. See, also, *Al-Fagih* (n 12) [35]-[36].

have been well within established principles to find no doctrinal conflict between the repetition rule and the protection of neutral reporting under qualified privilege.[62]

But, while the interaction between the repetition rule and reportage is easily reconciled on a doctrinal level, I argue in the next section that a more important and much more fraught question concerns the relationship between reportage and classic *Reynolds* privilege. This question was explicitly considered a few years after *Al-Fagih* in the case of *Roberts*.[63]

C Reconciling *Reynolds* and Reportage: *Roberts v Gable*

Roberts involved *Searchlight*, a monthly anti-fascist magazine, which had been following the factional infighting between members of the British National Party ('BNP'). The October 2003 edition of *Searchlight* featured an article which reported that allegations of theft and violence had been made against two BNP members, Christopher Robert and his brother, Barry, in a five page bulletin and published letter written by opposing factions of the BNP.

At trial, Eady J agreed with the defendants' submission that the *Searchlight* article was protected under the 'recently emerging' reportage doctrine recognised in *Al-Fagih* because it reported both sides of the political dispute in 'a disinterested way'.[64] It did not matter that the journalist responsible for the publication, Mr Gable, did not take steps to verify the information,[65] nor seek comment from either claimant.[66] The reliability of the source was also an irrelevant consideration in this context, 'since it is not the reliability of either side which matters so much as the nature of the quarrel'.[67] What was important was the way in which the dispute was reported.[68]

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[62] cf *Galloway v The Telegraph Group Ltd* [2006] EWCA Civ 17, [2006] EMLR 11 (CA), where Sir Anthony Clarke MR said [at 26] '[t]here is an exception to the repetition rule which is sometimes called reportage'; *Roberts* (n 16) [74].
[63] Above (n 16).
[64] Ibid [16], [34].
[65] Ibid [28].
[66] Ibid [32]. Eady J accepted that it was reasonable for Mr Gable to not have sought a comment based on Mr Gable's belief that the claimants would not want to speak to him. But even if the claimants had wanted to speak with Mr Gable, Eady J indicated that it would not have altered the outcome.
[67] Ibid [29].
[68] Ibid [16].

The Court of Appeal unanimously upheld Eady J's decision and commented at length on the nature and requirements of the defence. On the nature of the defence, Ward LJ (who wrote the lead judgment) said that reportage is 'a form of, or a special example of, *Reynolds'* [sic] qualified privilege, a special kind of responsible journalism but with distinctive features of its own.'[69] In relation to its requirements, Ward LJ said that the information published must be in the public interest and the article, 'judging the thrust of it as a whole, must have the effect of reporting, not the truth of the statements, but the fact that *they were made*'.[70] In this sense, like the repetition rule, the defence relies on the distinction made in the law of hearsay evidence between the fact *that* something was said and the fact of *what* was said.[71] Moreover, the journalist must report the attributed allegations 'without adoption or embellishment or subscribing to any belief in [their] truth'[72] and must do so in a 'fair, disinterested and neutral way.'[73]

In addition to the effect of the publication, it must also meet the standard of responsible journalism as developed in *Reynolds*, where '[a]ll the circumstances surrounding the gathering in of the information, the manner of its reporting and the purpose to be served will be material', including the *Reynolds* factors, adjusted for the special nature of reportage.[74] Specifically, due to the harm caused to reputation if the reported allegation is untrue, its seriousness will be important. The urgency of the publication will also be a relevant factor.[75] In the reportage context, however, a publisher is not required to take reasonable steps to verify the 'truth and accuracy of what is published'[76], nor seek comment from the claimant.[77] This is because the publisher, in a true case of reportage, will not attest to the truth of what is being

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[69] *Roberts* (n 16) [60].
[70] *Roberts* (n 16) [61] (emphasis added). More recently, the Court of Appeal in *Charman* (n 16) said (at [50]) that '[i]t will depend on the context whether the material is published to report the fact that it was said or to report what was said as fact'.
[71] Ibid.
[72] *Roberts* (n 16) [53]. He also cites (at [41]) comments made by Simon Brown LJ (at [35]) in *Mark* (n 23) that the reportage defence may extend to the neutral reporting of allegations other than in the context of a political dispute. Note that the reportage defence was not argued in that case, but principles surrounding it were relevant to legal argument.
[73] *Roberts* (n 16) [61].
[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Ibid [70].

reported and should, therefore, not be required to take steps to confirm or deny its veracity.[78]

It should be noted here, also, that the more recent Court of Appeal decision in *Charman v Orion* largely repeated what was said in *Roberts*, but with Sedley LJ adding that 'the reportage doctrine…cannot be logically confined to the reporting of reciprocal allegations. A unilateral libel, reported disinterestedly, will be equally protected'.[79]

There are, however, two fundamental problems with insisting, as the Court of Appeal did, that the doctrine of reportage is a 'special example' of *Reynolds* responsible journalism. First, it runs contrary to the process of analysis actually adopted by the courts; and, second, it fails to recognise the doctrinal distinction between, on the one hand, the law's apparent understanding of responsible journalism and its goals in classic *Reynolds*, and what, on the other hand, the courts have so far said about what lies at the core of the doctrine of reportage.[80] I deal with each of these observations in turn.

3 The Reportage Analysis

The Court of Appeal's insistence on the relevance of the 'gathering in of the information'[81] and of the *Reynolds* factors is at odds with the actual analysis undertaken by courts when considering a reportage case. It is clear that the factors going towards deciding whether a journalist took reasonable steps towards establishing the truth of the claims – the 'core' *Reynolds* factors – have no application in the reportage context. The conduct of the journalist, and the circumstances *leading up to* publication would appear to be, effectively, irrelevant.[82] But, most of the other *Reynolds* factors are also irrelevant. The seriousness of the allegations, for example, does not appear to have an impact on the availability of the defence: it does not matter

[78] Ibid [61].

[79] *Charman* (n 16) [91]. In this case, the protection of reportage was lost because the book in question, 'Bent Coppers', was not reporting the fact that allegations of police corruption were made but was intended to tell the 'inside story of Scotland Yard's battle against police corruption', making it more like traditional investigative journalism.

[80] c.f. Melkonian (n 43) 59 (where it is argued that the reportage defence is 'relatively straightforward to justify as being a variant of responsible journalism').

[81] Above (n 16) [61].

[82] Provided, of course, that the journalist is not motivated by malice.

'whether what was said is of high political importance, or merely scurrilous gossip or person accusations.'[83] Even quite serious allegations did not preclude a finding of reportage in *Al-Fagih* ('a very serious allegation indeed')[84] nor in *Roberts* (allegations of theft and threats of serious violence).[85] Furthermore, in the reportage context, the 'urgency' factor will only appear to preclude a finding of reportage where the publication has become stale.[86] In such circumstances, the public interest in being informed of the statement will have waned, which would see the defence fail in any case.[87] It seems, therefore, that at least as long as the publication is neutrally reported as events unfold and it continues to remain of public interest, urgency will not be an important factor. Certainly, a positive finding that the publication was not urgent did not defeat the application of the defence in *Roberts*.[88]

Reportage, instead, would appear to involve a very different analysis from that suggested by Ward LJ in *Roberts*, with the only relevant *Reynolds* factors being the tone of the article, along with the extent to which the publication is of a matter of public concern – *matters which inhere in the article itself*. Thus, it appears that the privilege will arise where the following elements are satisfied:

1. the information published (ie the story that the allegations have been made) is in the public interest;
2. the allegations are made by one party to a dispute or controversy, A, about another party to the same dispute or controversy, B, although the published allegations need not be bilateral;
3. the publication, judged as a whole, has the effect of disinterestedly and fairly reporting the fact that the allegations have been made, including their substance;
4. the allegations are attributed to their source; and
5. the publication does not adopt or embellish the allegations.

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[83] *Al-Fagih* (n 12) [65] (per Latham LJ); cited with approval in *Roberts* (n 16) [39] (Ward LJ), but rejected by Sedley LJ at [76].
[84] *Al-Fagih* (n 12) [57].
[85] Above (n 14) [4].
[86] *Roberts* (n 16) [70].
[87] Ibid [61].
[88] *Roberts* (n 14) [31].

Under this formulation – distilled from *Al-Fagih*, *Roberts* and *Charman* – the protection afforded by reportage can be described as arising not from the occasion or circumstances *leading up to* publication but from the publication *per se*.[89]

But, not only are the factors or requirements necessary to establish the reportage defence different from those in classic *Reynolds*, they are also treated as distinct defences as a matter of process, with each involving a separate and distinct analysis. Thus, Ward LJ suggests the following approach in *Roberts*:

> [t]he protection [of reportage] will be lost if the journalist adopts the report and makes it his own or if he fails to report the story in a fair, disinterested and neutral way. Once that protection is lost, he must then show, if he can, that it was a piece of responsible journalism even though he did not check [the] accuracy of his report.[90]

This 'two-step' process has been adopted in subsequent cases where reportage and classic *Reynolds* have been argued in the alternative.[91] Upon rejecting the reportage defence, judged by reference to the publication itself and *not the conduct of the journalist*, the courts have proceeded to consider separately whether the journalist acted responsibly regarding the gathering of the material published according to the more fine-grained responsible journalism standard in *Reynolds*. And, in the language of Ward LJ in the subsequent case of *Charman*, where reportage was found not to apply, '[w]hether or not a [publication] could give rise to *Reynolds* privilege is, of course, *a very different question altogether*…'[92]

4 Doctrinal Distinction Between 'Classic' *Reynolds* and Reportage

But, there is a further reason why it is hard to reconcile reportage as a particular application of *Reynolds* privilege. In fact, it explains *why* the core factors are irrelevant. It is because reportage and *Reynolds* attract qualified privilege for distinct reasons – or, perhaps more precisely, the public interest as it relates to the published allegations is given a very different focus in each defence.

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[89] This was originally said, erroneously in this author's opinion, in relation to classic Reynolds privilege in *Loutchansky* (n 5) [33].
[90] Above (n 16) [61].
[91] *Charman* (n 16); *Prince Radu* (n 18).
[92] *Charman* (n 16) [50] (emphasis added).

The *Reynolds* 'responsible journalism' standard is focused on ensuring that journalists take reasonable steps in relation to the *truth of any allegations that they report*. As explained by Lord Bingham in *Jameel*:

> The rationale of [the responsible journalism] test is, as I understand, that there is no duty to publish and the public have no interest to read material which the publisher *has not taken reasonable steps to verify*…[T]he publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication.[93]

The goal of classic *Reynolds*, therefore, appears to be to ensure that as much true information is published as possible, even if some of that information later turns out to be false or cannot be proved to be true to the satisfaction of the law. At the same time, it aims to discourage the publication of information that it likely to be false. Thus, the steps taken by the journalist to verify the allegations, judged by reference to the publication's public importance and guided by the applicable *Reynolds* factors, determine the scope and availability of the defence.

Contrast this with the apparent goals of the reportage defence. Reportage is not directly concerned with the truth of what the allegations say about the claimant but is instead focused on the much narrower public interest in knowing that the *allegations have been made*.[94] In light of this very different focus, it seems entirely contradictory that a defence which is unconcerned with truth could be seen as a species or 'offshoot' of one that is *entirely* concerned with the steps taken by a journalist regarding the truth of the allegations that he or she reports. And, while reportage may be seen as an instance of responsible journalism in a very broad sense – in that the journalist acted responsibly by not adopting the allegations[95] – such an understanding of 'responsible journalism' certainly appears to prompt a significant departure from Lord Bingham's clear focus on the process of verification under *Reynolds* privilege.[96]

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[93] Above (n 11) 377 (emphasis added).

[94] *Al-Fagih* (n 12) [49] and [67]; *Roberts* (n 16) [61]; *Prince Radu* (n 18), where Eady J said (at [17]) that 'it is the accuracy (and balance) of the reporting which is important, rather than the accuracy of the underlying allegations.' See, also, comments made by Lord Hoffmann in *Jameel* (n 5) where he said (at [62]) that '...there are cases ("reportage") in which the public interest lies simply in the fact that the statement was made...'

[95] Indeed, this was suggested by Baroness Hale in *Jameel* (n 5) [149], where she said that, in the reportage context, 'the tone in which the information is conveyed will be relevant to whether or not the publisher has behaved responsibly in passing it on.'

[96] A similar argument has recently been made by another commentator, see Busuttil (n 57) 49.

For this very reason, the doctrine of reportage might be best viewed as much more akin to the common law fair and accurate report privilege than as an offshoot of *Reynolds*. Indeed, the US neutral reportage defence is widely considered to be based in part on an expansion of the fair report privilege[97] and, in the English context, it would certainly appear to provide a much more doctrinally coherent characterisation of the defence, at least in relation to its formal requirements. Thus, both are based on the accurate reporting of what has been said by someone else (republication) and neither is directly concerned with the potential truth of the substance of the allegations reported; rather, as we have seen, the availability of both is judged simply according to the nature of the published report itself and not the conduct of the journalist *vis-à-vis* the truth. In fact, apart from the absence of the 'fairness and accuracy' requirement, the only substantive difference between the requirements of the fair report privilege and reportage is that the public interest under the former arises from the nature of the proceedings in question – in this respect the public interest is said to be 'in-built'[98] (although it is an additional requirement under statute);[99] reportage, rather, is granted irrespective of the forum in which the comments are made but the public interest in the report must be satisfied as an explicit and separate requirement. This means that reportage is at the same time narrower *and* broader than the common law fair report privilege.[100] One further common feature that should be noted, and one that might not be immediately apparent, is that because neither is directly concerned with the potential truth or falsity of the republished allegations, both seek to mitigate

[97] CJ Crass, '"The Privilege of Neutral Reportage" – Edwards v National Audubon Society, Inc' [1978] Utah LRev 347-359, 354; Pautler (n 38) 961; JE Boasberg, 'With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage' (1990/1991) 13 Hastings Comm & Ent LJ 455-488, 465; MW Page, 'Price v Viking, Inc: The Neutral Reportage Privilege and Robust, Wide Open Debate' (1990) 75 Minn LRev 157-199, 175; Saef (n 35) 422. See, also, comments by Mr Justice Castille in *Norton v Glenn*., 860 A2d 48, 59 (Pa 2004) and also in *DiSalle v P.G. Pub. Co.*, 544 A2d 1345, 1355 (Pa Supper 1988).

[98] See Milmo and Rogers (n 3) 567.

[99] For example, s 15(3) of the Defamation Act 1996 provides that the protection of qualified privilege for fair and accurate reports of certain proceedings listed in Schedule 1 of the Act does not apply to 'the publication to the public, or a section of the public, of matter which is not of public concern and the publication of which is not for the public benefit.'

[100] See RD Sack, *Sack on Defamation: Libel, Slander, and Related Problems* (3rd edn Practising Law Institute, New York 1999), § 7.3.2.4.6.1.

any harm suffered by the claimant by relying *exclusively* on the 'marketplace of ideas' to correct the publication of false statements.[101]

Having not had the opportunity to directly consider the doctrine of reportage, however, it is unclear whether or not the UK Supreme Court (the successor to the recently abolished judicial arm of the House of Lords) would be willing to reconsider the jurisprudential basis of the defence, whatever that basis might be – an extended species of the fair report privilege, a different application of traditional duty-interest privilege or a new *sui generis* defence. Reportage as a *sui generis* qualified privilege defence was explicitly rejected in *Roberts*, with Ward LJ simply stating that '[i]f the case for a generic qualified privilege for political speech had to be rejected [in *Reynolds*], so too the case for a generic qualified privilege for reportage must be dismissed.'[102]

This, however, is not a principled objection to the creation of a new category of qualified privilege. The objection in *Reynolds* was based on the fact that the test that was proposed was confined to the strong protection of a particular category of subject-matter (political communication) that was to apply in all circumstances.[103] This was contrary to Strasbourg jurisprudence which does not per se distinguish political expression from other forms of expression. Nor, according to the court, did the proposed defence provide adequate protection to reputation.[104] The reportage defence, in comparison, does not necessarily meet either of these objections. Thus, it is not confined to a particular subject-matter of expression and the acceptance of the doctrine under a *Reynolds* analysis indicates, at least on the court's current analysis, that it strikes an acceptable balance between the protection of reputation and freedom of expression by requiring that the publication as a whole be in the public interest along with the requirement of neutrality and attribution. Furthermore, the possibility that new sui generis categories of qualified privilege might be recognised is not entirely out of the question given the willingness of Lord Hoffmann and Baroness Hale in *Jameel* to recognise, in no uncertain terms, *Reynolds* privilege as being of a

[101] Pautler (n 38) 962.
[102] Ibid. See also comments made by Simon Brown LJ in *Al-Fagih* (n 12) [27].
[103] *Reynolds* (n 1) 204.
[104] Ibid; *Jameel* (n 5) [44].

'different jurisprudential creature' from the traditional duty-interest privilege from which it evolved.[105]

But, the precise characterisation of the reportage defence is much more significant than simply in name. The ad hoc development of the defence under *Reynolds* privilege has meant that the courts have not fully explored its scope and have fudged discussion about the underlying public interest justifications that support it. In particular, the current approach of framing reportage within a *Reynolds*' analysis has obfuscated that it is the public interest in the fact that the allegations *have been made* which must be established rather than the fact that they relate more broadly to a matter of public concern. This, in turn, has created uncertainty and confusion as to its availability and an overestimation as to its potential breadth.

In *obiter dicta* statements made in *Galloway v The Daily Telegraph Group*, for example, the Court of Appeal (constituted differently from that in *Al-Fagih* and *Roberts*) suggested that reportage would have applied to the facts at issue in that case had the story been published without further comment or additional factual allegations.[106] However, in making its assessment the court completely ignored the question as to whether there was any public interest in the fact that the allegations *had been made*, focusing instead on the requirements of neutrality and attribution and emphasising the fact that the allegations *themselves* related to a matter of public interest. Thus, the court said:

> It is not in dispute that the Baghdad documents were of great interest to the public and *The Daily Telegraph* was naturally very keen to publish them. If the documents had been published without comment or further allegations of fact Mr Galloway could have no complaint since, in so far as they contained statements or allegations of fact it was in the public interest for *The Daily Telegraph* to publish them...Such publication would be *reportage*.[107]

Considering that the courts themselves have not properly grasped the limits of the defence, it is perhaps not surprising that commentators have also been guilty of overlooking its defining ingredient. Thus, the latest edition of the leading treatise on English defamation law, *Gatley on Libel and Slander*, gives some recognition to the fact that the defence caters to the public interest in the fact that the allegations *have*

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[105] *Jameel* (n 5) Lord Hoffmann at [50] and Baroness Hale at [146] quoting the Court of Appeal in *Loutchansky* (n 5) [35].
[106] *Galloway* (n 62) [48].
[107] Ibid.

been made,[108] but fails to acknowledge this as an explicit requirement of the defence.[109] Rather, by ignoring this central requirement *Gatley* suggests that the defence, if the courts construe the 'dispute' requirement broadly, could amount to a 'general privilege to report "*matters of public concern*"'.[110]

In order to avoid such misunderstanding, I suggest that the courts, instead of developing the reportage defence under *Reynolds* privilege and the responsible journalism standard, need to engage with the one 'critical question'[111] that is said to underpin the defence, and which should, in my opinion, directly dictate the terms of its availability: when and why the public will have an interest in the fact that allegations *have been made*? The following section explores this critical question and suggests how it should inform the proper approach to, and scope of, the reportage defence.

5 The Public Interest and the Proper Scope of the Reportage Defence

While the English courts have not properly articulated the public interest goals of the reportage defence, the cases do provide, very subtly, a number of judicial pointers. The US cases and associated literature also provide valuable insights. Drawing upon these sources there appears to be two separate but related 'scenarios' where the public can be said to have an interest in the fact that particular allegations *have been made* and not necessarily their truth or falsity – that is, where the public interest arises due to (1) the *fact* of the dispute, or (2) the status of the defaming party. In many cases there will be overlap between these public interest scenarios and it must also be acknowledged, as a brief side note, that the mere fact that a publication caters to either of these public interest scenarios does not necessarily mean that, as a matter of policy, it should automatically receive the protection of a reportage-style defence. Rather, in

[108] Milmo and Rogers (n 3) 540.
[109] Criticism of the defence by Busuttil (n 57) also ignores this as an explicit requirement of the defence.
[110] Milmo and Rogers (n 3) 542 (emphasis added).
[111] *Roberts* (n 16) [61].

determining the scope of the reportage doctrine, the public interest in allowing publication needs to be weighed against the risk of harm to a victim's reputation.[112]

It is only in the first scenario – where the public interest resides in the very *fact of the dispute* – that the public interest can strictly be said to be in the fact that the allegations have been made and not their truth or falsity. The most obvious example given in the literature is where a political leader accuses his or her deputy of being corrupt and incompetent. The public interest in the fact that such allegations have been made is not whether or not they are true or false but that they indicate, for example, a 'dysfunctional administration or at least a lack of harmonious or cordial relations among elected leaders.'[113] The important point under this scenario is that the public interest is completely independent of the truth or falsity of the allegations themselves and operates regardless of whether or not the journalist knew or suspected that the allegations were false at the time of publication. The publications at issue in both *Roberts* and *Al-Fagih* fell squarely within this public interest scenario, with each reporting the fact that quarrelling existed between political and community leaders.

The second possible public interest scenario is based on the argument that some speakers are so important that the public has an interest in receiving reports of anything they have to say.[114] In some ways, by focusing on the public interest in the conduct of 'public figures', however defined, this scenario parallels both the 'supervisory theory' that has been traditionally used to justify the fair reporting of judicial and parliamentary proceedings and the expansion of that privilege under the so-called 'information theory' to include non-official and foreign proceedings.[115] To

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[112] The issue of when it is appropriate to take the 'risk' of damage to reputation in developing common law qualified privilege was explicitly referred to in *Webb* (n 25) 561-562.

[113] Melkonian (n 43) 56; see also LC Levin, 'Constitutional Privilege to Republish Defamation' (1977) 77 Colum LRev 1266-1284, 1274.

[114] See C Smyser 'Protecting the Public Debate: A Proposed Constitutional Privilege of Accurate Republication' (1979-1980) 58 Tex LR 623-646, 626, 630; Pautler (n 38) 961; Campbell (n 35) 867; Boasberg (n 97) 467.

[115] The 'supervisory theory' justifies publication on the basis that it provides the public with the information necessary for it to supervise the conduct of public proceedings and the conduct of public officials: see, eg, *Webb* (n 25) 560-561. The 'information theory', on the other hand, relies on a broader notion that the public is entitled to information relating to matters of legitimate public concern and is effectively the basis upon which the fair report has been expanded by statute (see n 24) and the common law (*Webb* (n 25)) to include the fair and accurate reports of proceedings where the supervisory theory might not otherwise apply (ie, foreign judicial and parliamentary proceedings and public meetings).

illustrate this public interest scenario, imagine a situation where the leader of the opposition, in the context of speaking to a journalist, accuses the Minister of State for the Home Department of taking bribes in exchange for favourable immigration decisions. The public has a clear interest in knowing that such allegations *have been made*, not necessarily because of what they say about the claimant but because they have been made by the attributed speaker. Thus, in *DiSalle v P.G. Publishing Co*,[116] the most extensive treatment of the US doctrine to date, the Superior Court of Pennsylvania held that the justification for the doctrine was the value of the reported allegations 'in the nature of the defamer and his relationship to the controversy, not the status of the defamed person.'[117] The newsworthiness of the allegation is said to stem 'from the importance of the speaker to the controversy at issue and the fact that anything he says has value within the context of that controversy.'[118] The Court of Appeal has refused to specifically limit the reportage doctrine to allegations made by or about public figures.[119] However, this justification was alluded to in *Al-Fagih*, where Simon Brown LJ was of the opinion that the mutual allegations being cast back and forth in that case served the public interest by revealing that 'one or the other if not both' of the speakers were disreputable and that this, in itself, is something that the public should be informed about.[120] Moreover, by revealing the source of the allegations, the reliability of the defaming party is 'more easily assessed'[121] – and, precisely because it is the character of the defamer which is the object of assessment, his or her reliability has been held to be an irrelevant consideration as to the availability of the US defence.[122] It is important to note also that the public interest in this scenario need not be limited to statements made by political figures; it may extend to statements made by and on behalf of a whole host of government and non-government individuals and organisations. Thus, 'when a private advocacy group seeks a role in shaping public policy..., the reporting of false charges by that group

[116] Above (n 97).
[117] Ibid 1361.
[118] Ibid 1362.
[119] *Roberts* (n 16) [61].
[120] *Al-Fagih* (n 12) [49].
[121] Ibid [39].
[122] *DiSalle* (n 97) 1362.

will allow the public to define for itself the credibility, or even desirability of that group's proposals for reform.'[123]

In this context, at least from a public interest perspective, the publication of both true and false allegations has the potential to serve the public interest. Thus, as explained by the California Supreme Court in *Khawar v Globe International, Inc*:

> If the allegations are true, their reporting provides valuable information about the target of the information; if the allegations are false, their reporting reflects in a significant way on the character of the accuser.[124]

Indeed, in some circumstances, the repeating of false allegations, including known or suspected falsehoods, may be more important than the repeating of true, or potentially true, allegations. Compared to the first public interest scenario, however, the public interest cannot be accurately said to arise *regardless* of their truth or falsity. Rather, the public interest is in the fact that the public figure has made either true *or* false allegations. This was suggested by Mantell LJ in *Al-Fagih*, where he said: '…if the allegations were known to be untrue *and could be so stated* the public would be entitled to know that fact as telling them something about its disseminator.'[125] Consequently, in relation to the reporting of *false* allegations, the public can only be said to benefit where the fact that the allegations are false is reported upfront or, if the report acts as a 'stepping stone' to uncovering the truth of their falsity, where the truth is reported at a later date. This means that, in deciding whether reportage should protect the republication of allegations in this context, the public interest in knowing that the defamer has made false allegations must be balanced against the risk that the falsity of the allegations will *not* be disclosed. In this regard, it should be noted that *obiter dicta* statements by Baroness Hale in *Jameel* suggest that the reportage defence should apply even though a publisher positively knows that the attributed allegations are false, but warned that he or she 'would be well advised to make this clear.'[126]

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[123] Ibid.

[124] 965 P2d 696, 704-705 (Cal 1998).

[125] *Al-Fagih* (n 12) [61]. See, also, Boasberg (n 97) 467; Smyser (n 114) (where he suggests (at 623) that '[e]ven if the statement is false, substantively incomplete, or misleading, the citizenry learns something about the veracity of its leaders.')

[126] *Jameel* (n 5) [149]. There appears to be a particular conceptual difficulty with this 'requirement', the discussion of which is beyond the scope of this paper: that is, it is difficult to see how declaring a belief that allegations are false or suspected to be false could amount to disinterested or objective

In order to assist in marking out the limits of the reportage doctrine, there is a third possible public interest scenario that must also be considered but ultimately rejected: where reporting that allegations have been made is of public importance due to the nature of the allegations themselves. The public interest might arise, for example, because the allegations are made about a figure or organisation of public importance or because they relate to a legitimate matter of public concern. Importantly, it is not the truth or falsity of the allegations at the time of publication that is significant here. Rather, it is the possibility that reporting the fact that the allegations have been made will facilitate the attainment of their truth or falsity at some point *after* publication. Including this third public interest scenario within the ambit of reportage would create a defence that, in effect, mirrors the interpretation given to it by the Court of Appeal in *Galloway*[127] (where the public interest appeared to have arisen due to the significance of the allegations themselves and their value if they turned out to be true) and also by the authors of *Gatley* – namely, a general right to republish statements relating to matters of public concern.[128] In the US context, this expanded understanding of the defence has been advocated by a number of commentators[129] along with a very small number of the courts that have adopted the defence.[130]

This understanding, however, must be rejected for the simple reason that the public interest in this scenario does not arise from the fact that the allegations *have been made*. Rather, it stems from the possibility that the allegations might be true and, based on what I have already said in this paper, doctrinal consistency dictates that where this is the case classic *Reynolds* privilege is the appropriate defence. As such, any publication which seeks to cater solely to this public interest scenario must be subjected to the usual rigours of the responsible journalism standard as set out in

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reporting as required by the doctrine. On the contrary, it can only be characterised as a clear exercise of editorial judgment.

[127] *Galloway* (n 62) [48].

[128] See (n 110) and accompanying text.

[129] Saef (n 35) 448-449 ; Boasberg (n 97) 479; Page (n 97) 195-198.

[130] See, eg, the following cases where the scope of the defence was held to include the repetition of all newsworthy statements made against public figures regardless of who made them: *Barry v Time, Inc*., 584 F Supp 1110 (ND Cal 1984); *In re UPI*, 106 Bankr 323 (DDC 1989); *Price* (n 40) 1444-1445. See, also, *Krauss v Champaign News Gazette*, 59 Ill App 3d 74, 375 NE2d 1362 (1978), where the court went even further and suggested a broader defence, focusing exclusively on the newsworthiness of the statement without also requiring an existing controversy or a public figure source or target.

Reynolds, including taking steps towards verification and seeking comment from the claimant.

Apart from any doctrinal inconsistency, however, including the third public interest scenario within the ambit of the defence would also endow it with an extremely broad scope. In fact, it is fair to say that a general right to republish defamatory allegations that relate to a matter of public concern would amount to the broadest defence to defamation ever recognised by the common law. Not only would reportage, broadly interpreted, be easier to obtain than *Reynolds* privilege, it would appear to be especially difficult – much like *Reynolds* itself – to defeat by showing evidence of malice.[131]

One serious and well-founded concern with such a broad and strong defence, as highlighted by Busuttil, is that it would simply provide a 'mandate for "churnalism"'[132] (the 'repackaging of largely unchecked second-hand material')[133] and, at the same time, discourage investigative inquiry and valuable fact-checking encouraged under the responsible journalism standard. Journalists would, in other words, choose to hide behind the reportage defence by remaining neutral as to the truth of their stories instead of relying on the *Reynolds* defence where greater resources are required to verify allegations and where liability, as we have seen, is perhaps much less certain. This, in turn, provokes even more questions – which I flag here but leave for fuller discussion at a later date – about the compatibility of the broad interpretation of the defence with the ECHR. This is especially the case following the recent acknowledgement by the ECtHR that reputation is protected as a

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[131] See Busuttil, n (57) 49. In *Al-Fagih*, for example, the court held that finding malice on the basis that the defendant had reckless disregard as to the truth by failing to take steps to verify the allegations would be 'inconsistent with the very basis' of which the privilege was granted in the first place: *Al-Fagih* (n 12) [55]. Considering that the defence is likely to include known or suspected falsehoods (see n 126 above and accompanying text), a similar conclusion is likely to be reached even where there is evidence of a defendant's positive belief or suspicion that the allegations were false. Such a defendant would not be taken to have acted outside the scope of the privilege, as is required to establish malice under the reasoning in *Horrocks v Lowe* [1975] AC 135 (HL) 149. Rather, the claimant would be required to show that the defendant was acting outside the scope of the privilege by using the privileged occasion for an improper purpose or had a dominant motive to injure the claimant. This is particularly difficult where media defendants are concerned: see, eg, *Stevens v Sampson* (1879) 5 Ex D 53 CA. It is for this reason that Eady J has labelled this variety of malice an 'endangered species': *Lillie & Reed v Newcastle City Council* [2002] EWHC 1600, [1093].

[132] Ibid 50.

[133] N Davies, *Flat Earth News* (Chatto & Windus, London 2008), 59-60, cited in Busuttil (n 57) 50.

stand-alone interest under Article 8[134] rather than as a narrowly construed exception to Article 10, and what appears to be a concurrent movement within the Strasbourg jurisprudence towards greater emphasis on the verification of factual allegations and the insistence on higher standards of journalistic conduct.[135] Indeed, this change of direction in the Strasbourg jurisprudence is already starting to be felt domestically, with recent comments by the Queen's Bench[136] as well as academics[137] predicting that such recognition may require a contraction of the various defences available to defamation defendants.

6 Conclusion

Despite what some commentators have claimed, the reportage defence is a welcomed addition to the suite of defamation defences available to the media. However, its emergence as a species of *Reynolds* qualified privilege is unfortunate. Not only is it doctrinally different from *Reynolds* privilege, but its development under the mantle of *Reynolds* has resulted in a misunderstanding as to the breadth of its availability – both by the courts and by commentators. For this reason, it has been argued in this paper that the courts need to re-examine its jurisprudential basis and engage in a thorough analysis of the public interest considerations that support a reportage-style defence. Only then can the proper scope of the defence be properly defined. This paper has contributed to this quest. It has argued, in light of existing UK and US case law and academic commentary, that the defence should be given a particularly narrow interpretation – one that is closely focused on scenarios where the public has an interest it the fact that the allegations *have been made* and not simply, as the defence has been otherwise interpreted, where the allegations themselves relate more broadly to a matter of public concern. Any other approach is likely to lead to a defence that is

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[134] See, eg, *Radio France v France* (2005) 40 EHRR 29; *Chauvy & others v France* (2005) 41 EHRR 29; *Cumpana v Romania* (2005) 41 EHRR 200; *Lindon, Otchakovsky-Laurens and July v France* (2008) 46 EHRR 35; *White v Sweden* (2008) 46 EHRR 3; *Pfeifer v Austria* (2009) 48 EHRR 8; *Petrina v Romania* (Unreported, App No 780601/01, 14 October 2008).

[135] See, eg, M. McGonagle, 'Defamation Law in Europe: A Rapproachment Between Reynolds and the ECHR' (2009) 14(2) MALR 166-194, 179.

[136] *Terry v Persons Unknown* [2010] EWHC 119 [79]-[80]. See also the UK Supreme Court's discussion of Article 8 protection of reputation in *In re Guardian News and Media Ltd* [2010] UKSC 1 [37]-[42].

[137] See, eg, R Clayton and H Tomlinson, *The Law of Human Rights* (2nd edn, Oxford University Press, Oxford 2009) § 12.19.

unsurpassed in terms of strength and scope and goes beyond, at least in this author's opinion, what is necessary to achieve the apparent aims of a properly considered reportage defence.