Trinity Term
[2020] UKSC 23
On appeal from: [2019] EWCA Civ 852

JUDGMENT

Serafin (Respondent) *v* Malkiewicz and others (Appellants)

before

Lord Reed, President
Lord Wilson
Lord Briggs
Lady Arden
Lord Kitchin

JUDGMENT GIVEN ON

3 June 2020

Heard on 17 and 18 March 2020

Appellants
David Price QC
Anthony Metzer QC
Dr Anton van Dellen
(Instructed by David Price QC, Solicitor Advocate)

Respondent
Adrienne Page QC
Alexandra Marzec

(Instructed by Simon Burn Solicitors (Cheltenham))

Intervener
(Media Lawyers Association)
(written submissions only)
Heather Rogers QC
Romana Canneti
Jonathan Price
(Instructed by Pia Sarma, Solicitor, Editorial Legal Director, Times Newspapers Limited)

LORD WILSON: (with whom Lord Reed, Lord Briggs, Lady Arden and Lord Kitchin agree)

A. *Introduction*

1. This appeal is sensitive and important. I regret that I have failed to contain this judgment within fewer than 78 paragraphs, plus 25 paragraphs of a schedule to it. The Court of Appeal has made a rare finding that the judge's conduct of the trial was unfair towards one of the parties. When made in respect of the conduct of any judge, however senior or junior, such a finding carries profound sensitivity. Our duty is to appraise it with the utmost care; and, were we to uphold it, we would need to address the order made by the Court of Appeal in consequence of it. But there is a second dimension to the appeal to this court. For the Court of Appeal also based its decision upon its understanding of the effect of section 4 of the Defamation Act 2013 ("the Act"), entitled "Publication on matter of public interest"; and energetic criticisms are made to us in relation to its exposition of the effect of the section. For reasons which will become apparent, our own analysis of the section will not form part of our decision; but it is intended to be helpful nevertheless.

2. It will be convenient to describe the appellants as the defendants; and the respondent as the claimant. The first defendant, Mr Malkiewicz, is the editor-in-chief of a Polish newspaper, entitled Nowy Czas (which means New Time) and owned by the second defendant, Czas Publishers Ltd. The third defendant, Mrs Bazarnik-Malkiewicz, is an editor of the paper, a director of the second defendant and the wife of the first defendant. At the relevant time the paper was published eight times a year, both in hard copy and online, and it addresses issues of interest to the substantial Polish community in the UK, particularly in London. The claimant, Mr Serafin, now aged about 68, was born in Poland but has lived in England since 1984.

3. The claimant sued the defendants for libel in respect of an article which they published about him in the newspaper in October 2015. Over seven days in October and November 2017 Mr Justice Jay ("the judge"), sitting in the Queen's Bench Division of the High Court, heard the claim. The claimant appeared in person before him, supported by a *McKenzie* friend. Simon Burn Solicitors had been acting for him but came off the record shortly before the hearing. It appears, however, that, outside court, a degree of legal assistance was continuing to be provided to the claimant during the hearing, in particular in relation to the compilation of his closing submissions. But ranged against the claimant in court was Mr Metzer QC, by then

instructed directly by the defendants rather than by the solicitors who had acted for them until shortly before the hearing.

4. By a reserved judgment dated 24 November 2017, the judge explained why he had decided to dismiss the claim: [2017] EWHC 2992 (QB). On 8 December 2017 he made an order to that effect. The claimant appealed against it to the Court of Appeal. On 5 March 2019 Lewison, McCombe and Haddon-Cave LJJ heard the appeal. By a judgment of the whole court dated 17 May 2019, they explained why they had decided to allow the appeal: [2019] EWCA Civ 852. On 21 June 2019 they made an order to that effect. They remitted the task of quantifying the claimant's damages in respect of part or all of his claim to a judge of the Media and Communications List other than the judge. The defendants now appeal to this court against that order.

B. *The Background*

5. Following his arrival in England, the claimant set up business as a builder. In about 1989 he joined POSK, a substantial Polish social and cultural association, established as a charity, with premises in Hammersmith. For about 15 years until 2012 he sat on the General Council of POSK and between about 2003 and 2007 he was a senior member of its House Committee, which was responsible for all building work done at the premises. During his membership of it there was refurbishment both of the entrance hall and of the basement, where a bar and café, together called The Jazz Café, were created. Between 2007 and 2012 the claimant was joint manager of The Jazz Café and often served behind the bar.

6. In 2008 the claimant set up a company, Polfood (UK) Ltd, with a view to its importing Polish foodstuffs and selling them wholesale to Polish groceries in England. The company needed working capital and the claimant persuaded Polish friends and acquaintances to buy shares in it or to lend money either to it or to him for transmission to it. But Polfood soon became insolvent.

7. In 2011 the claimant was declared bankrupt. In 2012 he was discharged but only in consideration of his entry into a Bankruptcy Restrictions Undertaking, which was to endure for five years. He thereby apparently undertook not to be a director of a company without the court's permission, not to borrow more than £500 without disclosing the restriction and not to be a trustee of a charity.

8. Kolbe House is the name of a charity which runs a substantial care home in Ealing. It provides care for elderly Polish people. While it was trading, Polfood supplied bread and other foodstuffs to Kolbe House. In 2012 the claimant began

again to supply it with bread. In 2013 he became the maintenance man and general factotum at Kolbe House; and he invoiced it for works of renovation done by him there.

C. *The Meanings of the Article*

9. The article, written of course in the Polish language, is entitled "Bankruptcy need not be painful". At its foot is the name of the first defendant, whom the judge described as "a Polish intellectual in the old school". The judge described the article as "satirical, witty, allusive and intellectually sophisticated in style and tone".

10. The claimant alleged that the words of the article had in effect 13 defamatory meanings (or, to use the word in the Act, imputations). The defendants responded that the words bore a "common sting", which was that

> "the claimant was a bankrupt and a serially untrustworthy man who, in order to satisfy his ambition and financially benefit himself and his family in Poland, took improper advantage of a number of people, including women."

The judge disagreed that the words bore this "common sting" and held that he was therefore required to address whether the defendants were liable for each of the 13 meanings which, insofar as they admitted them, were as alleged by the claimant and which, insofar as they disputed those alleged by the claimant, were those which he found the article to have carried.

11. The first meaning ("M1") was that the claimant

> "abused his position as house manager of POSK in order to award himself or his company profitable contracts for maintenance work at POSK, avoiding the proper procedure for obtaining approval for tenders for such contracts."

The defendants appear to have contended that, if the article bore this meaning, it was not defamatory by reason of section 1(1) of the Act, which provides as follows:

> "A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant."

The judge rejected the defendants' contention. He proceeded, however, to consider an alternative contention of the defendants, namely that they had a defence under section 2(1) of the Act, which provides as follows:

> "It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true."

The judge found that M1 had been shown to be substantially true.

12. The second meaning ("M2") was that the claimant

> "purchased memberships of POSK for those whom he could rely upon to support his electoral aspirations."

The judge found that, even if, which he doubted, the publication of a statement to this effect crossed the threshold of serious harm to reputation set by section 1 of the Act, M2 had been shown to be substantially true.

13. The third meaning ("M3") was that the claimant

> "was not really single at all, or at the very least his personal circumstances in Poland were mysterious … and that he exploited his supposed availability as a means of bringing him closer to women, over whom he exercised his charm."

As in relation to the second meaning, the judge found that even if, which he doubted, the publication of a statement to this effect crossed the threshold of serious harm set by section 1 of the Act, M3 had been shown to be substantially true.

14. The fourth meaning ("M4") was that the claimant

> "in the course of supplying alcohol for retail sale in POSK's Jazz Café, dishonestly ensured that money taken from sales would by-pass the cash register, in order to obtain unlawful and fraudulent profit from those sales."

The judge found that the statement to this effect had been shown to be substantially true.

15. The fifth meaning ("M5") was that the claimant

> "conned a number of women into investing their life savings into his food business by leading each woman to believe she was the only one and with promises of a good life together with him."

The judge found that the statement to this effect had been shown to be substantially true.

16. The sixth meaning ("M6") was that the claimant

> "having dishonestly persuaded investors in his food business to part with their life savings, stole their money for himself and transferred it to Poland to support a family construction project in Poland and to support his family there."

The judge found that the statement to this effect had been shown to be substantially true.

17. The seventh meaning ("M7") was that the claimant

> "defrauded his creditors and dishonestly circumvented the normal consequences of bankruptcy in order to retain for himself personal wealth, in the form of a BMW X5 car and real property that he pretended to sell, that should have been made available to satisfy the claims of his creditors."

The judge found that the statement to this effect had been shown to be substantially true.

18. The eighth meaning ("M8") was that the claimant

> "had profited or attempted to profit by selling out-of-date food to Kolbe House, a residential care home for elderly and vulnerable people, including those suffering from dementia."

The judge found that the defendants had failed to show that the statement to this effect was substantially true.

19. The ninth meaning ("M9") was that the claimant

> "by means of exploiting his charm and sway over the female manager of Kolbe House, inveigled himself into the highest levels of management at the home to the extent that he treated it as if it were his own personal property, including accessing at will the highly confidential records of the vulnerable residents despite having no legitimate reason to do so."

The judge found that the defendants had failed to show that the statement to this effect was substantially true.

20. The tenth meaning ("M10") was that the claimant

> "abused his position of trust at Kolbe House and callously diverted to himself funds that were needed for the care of the home's elderly and sick residents by securing for himself a contract for the major renovation of the bathrooms at the home, even though these renovations were completely unnecessary."

The judge found that the defendants had failed to show that the statement to this effect was substantially true.

21. There is inconsistency in the judge's judgment about what he found to be the 11th meaning ("M11"). But it appears to have been that the claimant

> "supplied to Kolbe House frozen milk and bread which was close to its sell-by date from a source which he did not disclose."

The judge found that the statement to this effect failed to cross the threshold of serious harm to reputation set by section 1 of the Act.

22. The 12th meaning ("M12") was that the claimant

> "dishonestly concealed from the manager and trustees of Kolbe House his current status as an undischarged bankrupt in order to win their trust and also to obtain a building contract for the extension of the manager's home."

The judge rejected the assertion of the defendants that the statement to this effect failed to cross the threshold of serious harm to reputation set by section 1 of the Act and he proceeded to find that they had also failed to show that it was substantially true.

23. The 13th meaning ("M13") was that the claimant

> "concealed his bankrupt status from Ealing Council [in relation to a planning application] in circumstances where he was obliged to reveal it."

The judge found that the defendants had failed to show that the statement to this effect was substantially true.

24. It follows that, by this stage of the judge's judgment, the claimant's cause of action had been rejected in relation to all the meanings apart from M8, M9, M10, M12 and M13. These five meanings all related, directly or indirectly, to Kolbe House.

25. Then, however, the judge turned to address a further defence raised by the defendants in relation to all 13 meanings, thus relevantly including the five meanings which had until that stage of his judgment survived as actionable. This was the defence under section 4 of the Act.

D. *Public Interest*

26. Section 4, entitled "Publication on matter of public interest", is more conveniently set out in para 52 below.

27. Much of the argument before the judge in relation to section 4 surrounded subsection (1)(b), namely whether the defendants could show, particularly in circumstances in which they had not invited the claimant to comment prior to publication on their intended allegations against him, that it was reasonable for them to have believed that publishing the statements was in the public interest. In the event the judge found that the defendants had indeed established a defence under section 4 in relation to all the allegations and thus, relevantly, to the five meanings of them which had until that stage survived as actionable. The judge added, however, that, even if the defence under section 4 had not been established, he would not have awarded damages (other, presumably, than nominal damages) in respect of those five meanings. For, so he explained, the claimant's reputation had been sufficiently "shot to pieces" by the other statements in the article which had been shown to be substantially true.

28. So the judge dismissed the claim.

E. *The Appeal to the Court of Appeal*

29. For his appeal the claimant re-instructed Simon Burn Solicitors. The claimant's grounds of appeal were

(a) that the judge had been wrong to uphold the defence under section 4;

(b) that there was no evidence on which he could have found that M4 was substantially true and that, without reference to that finding, he could not have found that the claimant's reputation had been shot to pieces by reference only to the other imputations shown to have been substantially true; and

(c) that the judge's conduct of the hearing had been unfair to the claimant.

30. Before the Court of Appeal Ms Marzec appeared for the claimant and, as before, Mr Metzer appeared for the defendants. The court chose to address the grounds of appeal in the order set out by the claimant. It held, first, at para 84 that the judge had been wrong to uphold the defence under section 4. It held, second, at para 99 that on the evidence before him he had not been entitled to find that M4 was substantially true and so it set that finding aside. Then, suggesting that M4 had been the "most serious" imputation made against him, it proceeded at para 101 to uphold the claimant's contention that it would not have been open to the judge to find that his reputation had been shot to pieces by reference only to the other imputations shown to have been substantially true.

31. At that stage of the judgment and (as it said) "on this basis", the Court of Appeal explained at para 102 that the claimant was entitled to damages in respect not only of M8, M9, M10, M12 and M13 but therefore also of M4.

32. The Court of Appeal then addressed the claimant's third ground of appeal, namely that the judge's conduct of the hearing had been unfair to him. The court was furnished with substantial parts of the transcripts of the first four days of the hearing and with 16 short excerpts from them on which Ms Marzec particularly relied. The court concluded at para 114 that on numerous occasions the judge had appeared to descend into the arena, to cast off the mantle of impartiality, to take up the cudgels of cross-examination and to use language which was threatening and bullying; and that its impression was of a judge who, if not partisan, had developed an *animus* towards the claimant. It observed at para 117 that it found his conduct all the more surprising in light of the fact that the claimant was appearing in person and that, although he spoke it well, English was not his first language. It added at para 118 that it was highly troubled by the judge's criticisms of the claimant's disclosure of particular documents in circumstances in which the defendants had at no time sought an order for their disclosure. The court concluded as follows at para 119:

> "In our view, the judge not only seriously transgressed the core principle that a judge remains neutral during the evidence, but he also acted in a mannerwhich was, at times, manifestly unfair and hostile to the claimant … [W]e … are driven to the conclusion that the nature, tenor and frequency of the judge's interventions were such as to render this libel trial unfair. We, therefore, uphold [this] ground of appeal."

F. *The Court of Appeal's Order*

33. The problem is that 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. In particular it did not consider whether that conclusion should in any way displace its earlier conclusion, set out in para 31 above, about the relief to which the claimant was entitled. At the end of its judgment the court said only that the appeal should be allowed; and, apparently by email, it invited the parties to file written submissions in respect of the appropriate order to be made in the light of its judgment.

34. The transcript of the hearing before the Court of Appeal shows that both parties had then reluctantly accepted, as apparently had the court, that, were it to conclude that the trial had been unfair, it would have no option but to order a retrial of the claim. The written submissions of the parties to the court following

distribution of its judgment show only limited departure from that position. Thus the claimant's basic contention was that "the judgment no longer stands because the trial was unfair" and that the claim should be remitted for determination by another judge. But the claimant qualified his contention by reference to two points: he argued that, in the light of the court's judgment, the pleas in the Defence under section 4 of the Act and, in relation to M4, that it was substantially true should both be struck out of it. The defendants agreed with the claimant's basic contention that there should be a retrial; they argued that all issues that were alive on the statements of case at the trial should remain alive at the retrial save to the extent that the judgment of the Court of Appeal had finally determined them. In this latter regard they conceded, no doubt subject to their proposed appeal to our court, that the judgment had finally rejected their defence in relation to public interest and that it should be struck out of their Defence; but they disputed that the judgment had finally rejected their contention that M4 was substantially true.

35. In the event, however, the Court of Appeal, without giving reasons, issued the following order:

> "1. There be judgment for the appellant.
>
> 2. The orders of Mr Justice Jay ... be set aside.
>
> …
>
> 5. The matter shall be remitted for an assessment of the quantum of the claimant's damages only, by a Judge of the Media and Communications List [other than Jay J]."

36. It follows that the Court of Appeal did not order a retrial. It ordered a remittal limited to the assessment of damages. At the hearing before us we asked counsel on both sides what each understood the court's order to mean. Did it mean, particularly in the light of the order for judgment for the claimant, that the liability of the defendants was established in relation to all the meanings encompassed within his claim? If so, why should the defendants be deprived of a retrial in respect of liability for those meanings which neither the judge nor the Court of Appeal had held to be actionable? Or did the order mean that damages should be assessed only in respect of M8, M9, M10, M12, M13 and also of M4? If so, why should the claimant be deprived of a retrial in respect of liability for the other meanings held not to be actionable in the course of a trial which had been unfair to him? No counsel seemed able to answer our question with confidence but they seemed to be of the view that the order probably meant the latter.

G. *Unfair Trial: The Principles*

37. There was no express reference to "bias" in the judgment of the Court of Appeal. It did observe, at para 114:

> "One is left with the regrettable impression of a judge who, if not partisan, developed an *animus* toward the claimant."

Its observation may come close to a suggestion of apparent bias on the judge's part towards the claimant. But the clear focus of the court was on whether the trial had been unfair.

38. In *M & P Enterprises (London) Ltd v Norfolk Square (Northern Section) Ltd* [2018] EWHC 2665 (Ch) the ultimately unsuccessful appellant company alleged both that the trial had been unfair and that the judge had given the appearance of bias against it. In para 31 of his judgment Hildyard J quoted the definition of bias given by Leggatt LJ in *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468, para 17, as follows:

> "Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case …"

In paras 32 to 42 Hildyard J proceeded to analyse the interplay between the two allegations before him. He observed that, although they overlapped, they were distinct. He added that they required appraisal from different perspectives for, while the fairness of a trial required objective judicial assessment, the appearance of bias fell to be judged through the eyes of the fair-minded and informed observer; and, in the protracted analysis of the trial judge's questionable performance which Hildyard J proceeded to undertake, he studiously paused at every point to ask (and, at the end, he considered in the round) whether it either rendered the trial unfair or would generate an appearance of bias in the eyes of that observer.

39. I have no doubt that the Court of Appeal in the present case was correct to treat the claimant's allegation as being that the trial had been unfair. We have not been addressed on the meaning of bias so it would be wise here only to assume, rather than to decide, that the quite narrow definition of it offered by Leggatt LJ and quoted by Hildyard J is correct. On that assumption it is far from clear that the observer would consider that the judge had given an appearance of bias. A painstaking reading of the full transcripts of the evidence given over four and a half days strongly suggests that, insofar as the judge evinced prejudice against the claimant, it was the product of his almost immediate conclusion that the claim was

hopeless and that the hearing of it represented a disgraceful waste of judicial resources.

40. The leading authority on inquiry into the unfairness of a trial remains the judgment of the Court of Appeal, delivered on its behalf by Denning LJ, in *Jones v National Coal Board* [1957] 2 QB 55. There, unusually, both sides complained that the extent of the judge's interventions had prevented them from properly putting their cases. The court upheld their complaints. At p 65 it stressed in particular that "interventions should be as infrequent as possible when the witness is under cross-examination" because "the very gist of cross-examination lies in the unbroken sequence of question and answer" and because the cross-examiner is "at a grave disadvantage if he is prevented from following a preconceived line of inquiry".

41. In *London Borough of Southwark v Kofi-Adu* [2006] EWCA Civ 281, Jonathan Parker LJ, giving the judgment of the Court of Appeal, suggested at paras 145 and 146 that trial judges nowadays tended to be much more proactive and interventionist than when the *Jones* case was decided and that the observations of Denning LJ should be read in that context; but that their interventions during oral evidence (as opposed to during final submissions) continued to generate a risk of their descent into the arena, which should be assessed not by whether it gave rise to an appearance of bias in the eyes of the fair-minded observer but by whether it rendered the trial unfair.

42. In *Michel v The Queen* [2009] UKPC 41, [2010] 1 WLR 879, it was a criminal conviction which had to be set aside because, by his numerous interventions, a commissioner in Jersey had himself cross-examined the witnesses and made obvious his profound disbelief in the validity of the defence case. Lord Brown of Eaton-under-Heywood, delivering the judgment of the Privy Council, observed at para 31:

> "The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials."

43. The distinction, drawn expressly or impliedly in all three of the cases last cited, between interventions during the evidence and those during final submissions was stressed by Hildyard J in para 223 of his judgment in the *M & P Enterprises (London) Ltd* case, cited in para 38 above. He suggested at para 225 that, upon entry into final submissions, the trial had in effect entered the adjudication stage.

44. In *In re G (Child)* [2015] EWCA Civ 834 counsel for the father, who was responding to the mother's contention that the conduct of the trial had been unfair, sought to rely on the judge's reserved judgment, which he suggested was balanced and had in no way represented a wholesale acceptance of his case. So too, before us, the defendants commend the quality of the judge's reserved judgment. It is on any view a remarkable document. The judge distributed it to the parties only 16 days after the end of the hearing. It runs to 355 paragraphs spread over 70 pages. It is intricately constructed and beautifully written. In it, as will already be clear, the judge in no way accepted all the defendants' arguments although his acceptance of their defence of public interest ultimately swept the claim into overall dismissal. Following a reading of this judgment, but of nothing else, many might ask "how could that trial have been unfair?" As it happens, Miss Page QC on behalf of the claimant does question whether the judgment, even on its face, is fair. In particular she criticises the alleged poverty of the reasoning in support of the judge's conclusion, pursuant to section 4(1)(b) of the Act, that the defendants reasonably believed that publication of the article was in the public interest. But this part of the inquiry does not relate to the judge's judgment and it is not affected by its ostensible quality. For, as Black LJ said in the *G* case, at para 52:

> "the careful and cogently written judgment cannot redeem a hearing in which the judge had intervened to the extent … of prejudicing the exploration of the evidence."

45. In the *G* case Black LJ also observed, at para 53:

> "the one person from whom this court has not heard is the judge, who would no doubt have had much that she could valuably have contributed to the evaluation of the process."

The observation precipitated a discussion at the hearing before us about the merits or otherwise of an invitation by an appellate court to the trial judge to comment on an allegation such as the present. In relation to a hearing which has not been recorded and so cannot be made the subject of a transcript, such as a hearing before the Immigration and Asylum Chamber of the First-tier Tribunal, it may well be appropriate to invite the judge to comment in writing and perhaps to provide his or her own note of the hearing: *Sarabjeet Singh v Secretary of State for the Home Department* [2016] EWCA Civ 492, [2016] 4 WLR 183, para 53. But where, as in the present case, there is a full transcript of the relevant part of the proceedings, it is less likely to be appropriate to invite the judge to comment. On the one hand, as I know from personal experience, the anxiety of a trial judge may be profound if he considers that what he perceives to be the baselessness of criticisms of him in a forthcoming appeal is likely to go unexposed. On the other hand, unlike a disciplinary inquiry into his conduct, the focus of the appeal is not - directly - upon

him. It is upon the alleged breach of the ap pellant's right to a fair trial both at common law and under article 6 of the European Convention. Most appeals involve criticism of trial judges in one way or another and no doubt most judges would welcome an opportunity to respond to it. Where would the line be drawn and, if the appellant were to take issue with t he judge's responses, w ould resolution of the appeal be even more problematical? The obs ervation of Black LJ in the *G* case therefore raises a difficult issue. All that need here be said is that, where a transcript exists, it is not the present practice of appellate courts to invite the judge to comment; but that the absence of his ability to comment places upon them a re quirement to analyse the evidence punctiliously. In the pres ent case we should draw confidence from the fact that it was Mr Metzer, counsel for the defendants at the trial and therefore intimately acquainted wit h the cours e that it took, who was able to pl ace before us a detailed and energetic response to t he contention that the trial had been unfair.

46. No authority has been cited to us in which the conduct of the trial was alleged to have been unfair towards a litigant in person. The appearance of a litigant in person presents the court with well -known challenges. When, at an early stage of his judgment, the judge said that, for a numbe r of reasons, conduct of the trial had been difficult, his first reason was tha t the cl aimant had appeared in perso n. The appearance of the defendants by leading counsel will no doubt in one sense have assisted the judge but in another sense will have made his task even more difficult. For Mr Metzer's appearance made the imbalan ce of forensic resources all the more stark. Every judge will have experienced dif ficulty at trial in divining the line between helping the litigant in person to the extent necessary for the adequate articulation of his case, on the one hand, and becoming his advocate, on the other. The Judicial College, charged with providing training for the judges of England and Wales, has issued an Equal Treatment Bench Book. In chapter one of the edition issued in February 2018 and revised in March 2020, the college advises the judges as follows:

> "8. Litigants in perso n may be stressed and worr ied: they are operating in an alien environment in what is for them effectively a foreign language. They are t rying to grasp concepts of law and procedure about which th ey may have no knowledge. They may well be experiencing f eelings of fear, ignorance, frustration, anger, bewilderment an d disadvantage, especially if appearing against a represented party.
>
> …
>
> 59. The judge is a facilitator of justice and may need to assist the litigant in person in ways that would not be

> appropriate for a party who has employed skilled legal advisers and an experienced advocate. This may include:
>
> …
>
> - Not interrupting, engaging in dialogue, indicating a preliminary view or cutting short an argument in the same way that might be done with a qualified lawyer."

Training and experience will generally have equipped the professional advocate to withstand a degree of judicial pressure and, undaunted, to continue within reason to put the case. The judge must not forget that the litigant in person is likely to have no such equipment and that, if the trial is to be fair, he must temper his conduct accordingly.

H. *Unfair Trial: The Facts*

47. Any inclusion within the body of this judgment of the requisite factual analysis of the conduct of the trial would have unbalanced it. The analysis is better set out in the schedule to this judgment, to which the reader should now turn. This court, unlike the Court of Appeal, has been provided with full transcripts of the first four and half days of the hearing, during which almost all the oral evidence was given. I have read all of them and, also deriving some assistance from a schedule provided on behalf of the claimant, I have chosen to place 25 excerpts from them into the schedule.

48. In order to keep the schedule within manageable bounds it has been necessary for the 25 excerpts to be set out together. But it is important to remember that those passages were separated by long stretches of evidence in respect of which no criticism of the judge can be made. Ellipses within the excerpts also indicate the omission from them of words which add nothing either to the claimant's complaint about the trial or to the defendants' response to it. Some of the excerpts, if taken alone, would not merit significant criticism. Nor should we forget that the transcripts enable us to read but neither to hear nor to see. But, when one considers the barrage of hostility towards the claimant's case, and towards the claimant himself acting in person, fired by the judge in immoderate, ill-tempered and at times offensive language at many different points during the long hearing, one is driven, with profound regret, to uphold the Court of Appeal's conclusion that he did not allow the claim to be properly presented; that therefore he could not fairly appraise it; and, that, in short, the trial was unfair. Instead of making allowance for the claimant's

appearance in person, the judge harassed and intimidated him in ways which surely would never have occurred if the claimant had been represented. It was ridiculous for the defendants to submit to us that, when placed in context, the judge's interventions were "wholly justifiable".

49. What order should flow from a conclusion that a trial was unfair? In logic the order has to be for a complete retrial. As Denning LJ said in the *Jones* case, cited in para 40 above, at p 67,

> "No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it."

Lord Reed observed during the hearing that a judgment which results from an unfair trial is written in water. An appellate court cannot seize even on parts of it and erect legal conclusions upon them. That is why, whatever its precise meaning, it is so hard to understand the Court of Appeal's unexplained order that all issues of liability had, in one way or another, been concluded. Had the Court of Appeal first addressed the issue of whether the trial had been unfair, it would have been more likely to recognise that the only proper order was for a retrial. It is no doubt highly desirable that, prior to any retrial, the parties should seek to limit the issues. It is possible that, in the light of what has transpired in the litigation to date, the claimant will agree to narrow the ambit of his claim and/or that the defendants will agree to narrow the ambit of their defences. But that is a matter for them. Conscious of how the justice system has failed both sides, this court, with deep regret, must order a full retrial.

50. Subject to any agreed narrowing of the issues, the new judge will, among many other things, decide whether the defendants have shown the substantial truth of the (admitted) meaning of M4. This is not to show disrespect for the conclusion of the Court of Appeal that the defendants had failed to do so. Its conclusion was founded upon the evidence given to the original judge. But the new judge will reach a conclusion founded upon the evidence given to him or her. Of course it is rare for the Court of Appeal not just to set aside but even to reverse a finding of fact made by a trial judge who had all the well-known advantages. But the court may have been justified in doing so. There is no need for us to look into it.

51. Subject again to any agreed narrowing of the issues, the new judge will also, among other things, decide whether to uphold the defendants' overall defence under section 4 of the Act. The Court of Appeal's conclusion that the defence failed was based on fact-finding which is likely to differ, at least to some extent, from that to be conducted by the new judge. But the Court of Appeal's analysis of the defence of public interest under section 4 included abstract statements of principle which the defendants and the Media Lawyers Association, which intervenes in the appeal,

criticise and which even the claimant concedes to be in various places at least unfortunate. We must proceed to address these criticisms and, insofar as they are valid, so declare since otherwise the Court of Appeal's statements of principle would remain authoritative both for the new judge and generally.

I *The Public Interest Defence*

52. The Act provides as follows:

> "4. Publication on matter of public interest
>
> (1) It is a defence to an action for defamation for the defendant to show that -
>
> (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
>
> (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
>
> (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
>
> (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.
>
> (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

> (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.
>
> (6) The common law defence known as the Reynolds defence is abolished."

53. The origin of the defence lies in the common law. Any study of how in the common law one principle emerges, stage by stage, from another until it achieves independence of it, like a butterfly shedding a chrysalis and taking wing, would do well to address first the decision in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, then the decision in *Jameel (Mohammed) v Wall Street Journal Sprl* [2006] UKHL 44, [2007] 1 AC 359, and finally the decision in *Flood v Times Newspapers Ltd* [2012] UKSC 11, [2012] 2 AC 273.

54. In the *Reynolds* case the defendants published an article which included a statement taken to mean that, when he had been the Taoiseach, the claimant had deliberately misled the Irish parliament. At a trial the jury found that the statement was not substantially true but it in effect awarded him only nominal damages. Before the appellate committee of the House of Lords there was no challenge to the Court of Appeal's order that the claimant's action should be retried. The issue was whether it should be open to the defendants at the retrial to assert a defence of qualified privilege. By a majority the committee ruled that it should not be open to them to do so but, in its journey towards that ruling, the committee considered the nature of the suggested defence in the context of the statement at issue. Lord Nicholls of Birkenhead gave the leading speech, with which Lord Cooke of Thorndon and Lord Hobhouse of Woodborough agreed. Lord Nicholls noted at p 194 that privilege had been held to exist where a person making a statement had a duty to make it and where its recipient had an interest in receiving it; suggested at p 197 that it was preferable to describe the duty-interest test as a right-to-know test; explained at p 195 that the privilege had particular relevance to a statement on a matter of public interest; held at p 201 that, in relation to publication of a defamatory statement of fact on a matter of public interest, the claimant's traditional ability to defeat a claim to privilege by proof of malice was insufficient protection for him; concluded at p 202 that the solution of the common law was to have regard to all the circumstances in deciding whether, because of its value to the public, the publication was privileged and that the requisite standard was that of "responsible journalism"; identified at p 205 ten factors which might fall to be taken into account in that regard, including, at seven, whether (which was, so Lord Nicholls confirmed, not always necessary) comment had been sought from the claimant prior to publication; there observed that the list was not exhaustive and that the weight to be given to any relevant factor would vary from case to case; and there also stressed the need to remember that "journalists act without the benefit of the clear light of hindsight".

55. I interpolate a reference to *Bonnick v Morris* [2002] UKPC 31, [2003] 1 AC 300, because there, in delivering the advice of the Privy Council upon an appeal from Jamaica, Lord Nicholls offered a useful epitome of the decision in relation to which he had played the leading role three years earlier. On the board's behalf he said:

> "23. Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege. If they are to have the benefit of the privilege journalists must exercise due professional skill and care."

56. In the *Jameel* case, cited in para 53 above, the defendant published an article which asserted that bank accounts held by the claimants, namely Mr Jameel and his company, were among those which the Saudi central bank was monitoring in case they were being used, wittingly or unwittingly, for channelling funds to terrorists. Prior to publication the defendant had not given Mr Jameel an adequate opportunity to comment on the intended assertion. The appellate committee reversed the decision of the Court of Appeal, which had been to uphold the decision of the trial judge that the *Reynolds* defence was not available to the defendant. Lord Hoffmann gave a speech of seminal importance, with which Lord Scott of Foscote and Baroness Hale of Richmond agreed. Lord Hoffmann observed at paras 43 and 46 that, although the reference to "*Reynolds* privilege" was historically accurate, it might be misleading and that the better description was "*Reynolds* public interest defence"; also at para 46 that there was no need to consider the concept of malice because the propriety of the defendant's conduct was built into the conditions under which the material was privileged; at para 50 that it was unhelpful to inquire into the existence of "duty" and "interest" because, as a result of the decision in the *Reynolds* case, the "duty" and the "interest" were in law to be taken to exist in a publication in the public interest; at para 56 (echoing what Lord Bingham of Cornhill had said at para 33) that the ten factors identified by Lord Nicholls were not ten tests all of which the publication had to pass; at para 62 that the elements of the defence were the public interest of the material and the conduct of the journalist at the time and that, if the statement was not true, the defendant nevertheless had usually to establish that the journalist honestly and reasonably believed that it was true; and at paras 84 and 85 that in the circumstances the failure to afford to Mr Jameel an adequate opportunity to comment prior to publication did not preclude establishment of the defence.

57. On 15 March 2011 the government put proposals for reform of the law of defamation out for public consultation. In a foreword the Lord Chancellor referred to mounting recent concern that the law was failing to strike the right balance and was having a chilling effect on freedom of speech. The proposals took the form of a draft Bill and of a consultation paper. Clause 2 of the Bill was entitled "Responsible publication on matter of public interest". Subclause (1) was as follows:

> "It is a defence to an action for defamation for the defendant to show that -
>
> > (a) the statement complained of is, or forms part of, a statement on a matter of public interest; and
> >
> > (b) the defendant acted responsibly in publishing the statement complained of."

Subclause (2) listed eight matters to which, among others, the court might have regard in determining whether a defendant acted responsibly in publishing the statement. In substance the eight listed matterswere, in the words of the consultation paper, broadly based on the ten factors identified by Lord Nicholls in the *Reynolds* case. In the paper the government explained that concerns had been expressed about the complexity of the *Reynolds* defence and about its application outside the context of mainstream journalism; that on balance it considered that there should be a statutory defence aimed at meeting these concerns; and that the drafting of subclause (2) was intended to make clear that the listed matters "should not be interpreted as a checklist or set of hurdles for defendants to overcome".

58. On 10 May 2012 the Defamation Bill was introduced in the House of Commons. In relation to the public interest defence, there were only minor changes from the draft which had been put out for consultation in 2011. The defence had been moved from clause 2 to clause 4. There were now nine, rather than eight, matters listed in subclause (2) and there were changes in their phraseology. There were now further subclauses, including, at (6), that "The common law defence known as the Reynolds defence is abolished". Accompanying the Bill were Explanatory Notes, which included the following:

> "29. [Clause 4] creates a new defence to an action for defamation of responsible publication on a matter of public interest. It is based on the existing common law defence established in *Reynolds v Times Newspapers* and is intended to

> reflect the principles established in that case and in subsequent case law.
>
> …
>
> 37. Subsection (6) abolishes the common law defence known as the Reynolds defence. This is because the statutory defence is intended essentially to codify the common law defence. While abolishing the common law defence means that the courts would be required to apply the words used in the statute, the current case law would constitute a helpful (albeit not binding) guide to interpreting how the new statutory defence should be applied."

59. As the Bill progressed through its stages in both Houses, concerns were expressed about clause 4. One of them was that it failed to take into account the effect of the decision in the *Flood* case, which this court had decided on 21 March 2012, thus less than two months prior to introduction of the Bill in the House of Commons.

60. In the *Flood* case, cited in para 53 above, the defendant published an article taken to mean that there were reasonable grounds to suspect that the claimant, a police officer, had corruptly taken bribes. The allegation was false. This court held that the defendant nevertheless had a valid defence of public interest. Lord Phillips of Worth Matravers, the President of the court, said at para 26 that in that case analysis of the defence required particular reference to two questions, namely public interest and verification; at para 27 that it was misleading to describe the defence as privilege; at para 78, building on what Lord Hoffmann had said in the *Jameel* case at para 62, that the defence normally arose only if the publisher had taken reasonable steps to satisfy himself that the allegation was true; and at para 79 that verification involved both a subjective and an objective element in that the journalist had to believe in the truth of the allegation but it also had to be reasonable for him to have held the belief. Lord Brown at para 113 chose to encapsulate the defence in a single question. "Could", he asked, "whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?". Lord Mance at para 137, echoing what Lord Nicholls had said in the *Reynolds* case at p 205, stressed the importance of giving respect, within reason, to editorial judgement in relation not only to the steps to be taken by way of verification prior to publication but also to what it would be in the public interest to publish ; and at para 138 Lord Mance explained that the public interest defence had been developed

under the influence of the principles laid down in the European Court of Human Rights ("the ECtHR").

61. On 19 December 2012 the House of Lords in Grand Committee considered three substantial amendments to the Defamation Bill moved by the government. Although it arguably represented a less significant development than the decision in the *Jameel* case, the recent decision in the *Flood* case had clearly influenced the government's thinking. Before the committee, Lord McNally, Minister of State for Justice, moved the amendments. He prefaced his remarks by saying that clause 4 was, as he had been told, at the heart of the Bill.

62. The first proposed amendment was to subclause (1)(b), set out in para 57 above. Instead of providing that the defendant should have "acted responsibly in publishing the statement complained of", the form of words now proposed was that the defendant should have "reasonably believed that publishing the statement complained of was in the public interest". Lord McNally explained the proposed change in interesting terms, as follows (Hansard, (HL Debates) 19 December 2012, col GC 534):

> "Consideration of whether a publication was 'responsible' involved both subjective and objective elements. 'Reasonable belief' also does this, but we believe that it brings out more clearly the subjective element in the test - what the defendant believed at the time rather than what a judge believes some weeks or months later - while retaining the objective element of whether the belief was a reasonable one for the defendant to hold."

63. The second proposed amendment was to delete subclause (2) of the Bill, which had listed the nine matters to which, among others, the court might have regard in determining the question identified in subclause (1)(b). Lord McNally explained the proposed change in similarly interesting terms, as follows (col GC 534):

> "Although we do not believe that the courts would apply the list of factors, based on those in Reynolds, as a checklist, we have responded to strongly expressed concerns that the use of a list may be likely to lead in practice to litigants and practitioners adopting a risk-averse approach and gathering detailed evidence on all the factors listed, in case the court were ultimately to consider them relevant …on balance, we consider

> that it is preferable for there to be greater flexibility than a statutory list might provide."

64. The third proposed amendment was to add a subclause that "in determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate". In this respect Lord McNally referred (col GC 535/6) to the decision in the *Flood* case and no doubt he had in mind in particular para 137 of the judgment of Lord Mance.

65. The Grand Committee accepted all three of the proposed amendments and, as the reader will have realised, each was ultimately carried into the Act. Later, prior to enactment, the government moved a further amendment. It was to add into clause 4 a subclause to the effect that, in determining whether the defendant had shown the matters mentioned in subclause (1), the court should have regard to all the circumstances of the case. On 5 February 2013, at the Report stage in the House of Lords, Lord McNally (col 198) moved the amendment. He noted a concern that, following the removal of the list of nine matters potentially relevant to the question at subclause (1)(b), the courts would invent a new check list of potentially relevant matters. He suggested that the proposed subclause, albeit not strictly necessary, would "send a signal to the courts and practitioners to make clear the wish of Parliament that the new defence should be applied in as flexible a way as possible in light of the circumstances". He concluded by saying that he believed that, were this further amendment to be agreed, the final version of the Bill would in particular reflect the question posed by Lord Brown in the *Flood* case. This further amendment was agreed and ultimately found its way into subclause (2).

66. On 25 April 2013 the Bill received Royal Assent. The Explanatory Notes which accompanied the Act were necessarily changed from the Explanatory Notes which had accompanied the Bill. Thus while in para 29 the first two sentences of the later Notes were in effect identical to those of the earlier Notes set out in para 58 above, the rest of the paragraph was now changed so as to set out the new terms of subsection (1) and to explain that the intention behind it was to reflect the common law as recently set out in the *Flood* case and in particular the subjective and objective elements of the requirement now both contained in subsection (1)(b). But para 37 of the Notes to the Bill, also set out in para 58 above, was reproduced, word for word, in para 35 of the Notes to the Act. It therefore continued to say that the reason for the abolition in subsection (6) of the common law defence known as the Reynolds defence was that "the statutory defence is intended essentially to codify the common law defence". The failure to change this sentence was unfortunate. "Codify" is a strong word. One could scarcely say that the terms of the section ultimately enacted went so far as to "codify" the law even as set out in the *Jameel* and *Flood* cases, let alone as set out in the *Reynolds* case.

67. Since the enactment of section 4, the primary authority in relation to its interpretation has been, so we are told, the case of *Economou v De Freitas* decided by Warby J at [2016] EWHC 1853 (QB), [2017] EMLR 4, and by the Court of Appeal (in a judgment of Sharp LJ with which Lewison and Ryder LJJ agreed) at [2018] EWCA Civ 2591, [2019] EMLR 7. The claimant had a relationship with the defendant's daughter. Following its breakdown the daughter accused the claimant of rape. He was arrested but not charged. He launched a private prosecution against her, later continued by the Crown Prosecution Service, on the ground that she had falsely accused him of rape with intent to pervert the course of justice. Days before her trial she committed suicide. The defendant made statements in writing and in interviews which were published by the press and by the BBC. In summary their meaning was that there were reasonable grounds to suspect that the claimant had raped his daughter and thus that the basis of his prosecution of her had been false. A central issue in both courts was whether the defendant's defence under section 4 of the Act should be upheld. Warby J upheld it and dismissed the claim; and the Court of Appeal dismissed the claimant's appeal. Section 4(1)(b) requires that the defendant's belief that publication was in the public interest should have been reasonable; and a major part of the discussion in both courts addressed the effect of that requirement in relation to a defendant who, not being a professional journalist, had been a contributor, albeit the central one, to the publication. Warby J introduced his discussion with the following statement:

> "241. I would consider a belief to be reasonable for the purposes of section 4 only if it is one arrived at after conducting such enquiries and checks as it is reasonable to expect of the particular defendant in all the circumstances of the case."

Sharp LJ at para 101 quoted the judge's statement with approval. Before us, however, the defendants criticise it as incompatible with the section. I can discern no basis for that criticism. It is almost impossible to expand in the abstract on the meaning of the word "reasonable" but, so far as it goes, the judge's statement is no doubt helpful.

68. Two passages in the judgment of Sharp LJ in the *Economou* case have been the subject of particular focus. The first is as follows:

> "86. The statutory formulation in section 4(1) obviously directs attention to the publisher's belief that publishing the statement complained of is in the public interest, whereas the *Reynolds* defence focussed on the responsibility of the publisher's conduct. Nevertheless ... it could not sensibly be suggested that the rationale for the *Reynolds* defence and for the public interest defence are materially different, or that the

> principles that underpinned the *Reynolds* defence, which sought to hold a fair balance between freedom of expression on matters of public interest and the reputation of individuals, are not also relevant when interpreting the public interest defence."

It could be said that the contrast drawn in the first sentence of the passage is misconceived. For, in addressing the subsection, Sharp LJ has there omitted reference to its requirement that the publisher's belief should be reasonable; and it is that requirement which falls to be compared with the focus in the *Reynolds* defence on the responsibility of his conduct. But the second sentence, if carefully read, is clearly correct: the *rationale* for each of the defences is indeed not materially different and the *principles* which underpinned the *Reynolds* defence are indeed relevant to the interpretation of the statutory defence.

69. The second passage in the judgment of Sharp LJ in the *Economou* case is as follows:

> "110. … Section 4 requires the court to have regard to all the circumstances of the case when determining the all-important question arising under section 4(1)(b) … The statute could have made reference to the *Reynolds* factors in this connection, but it did not do so. That is not to say however, that the matters identified in the non-exhaustive checklist may not be relevant to the outcome of a public interest defence or that, on the facts of the individual case, the failure to comply with one or some of the factors, may not tell decisively against a defendant. However, even under the *Reynolds* regime … the weight to be given to those factors, and any other relevant factors, would vary from case to case."

In the light of the analysis of the passage of the Bill through Parliament in paras 58 to 65 above, it is possible to add to what Sharp LJ there said. For the Bill, as introduced, *did* in effect make reference to the *Reynolds* factors but later they were deliberately omitted. Subject to what some may regard as only a quibble, the observations of Sharp LJ are valid. The quibble, if such it be, relates to her use of the word "checklist". I suggest that a check list is a list of factors to which reference ought to be made, in particular in order to check whether a preliminary conclusion should be confirmed. Even in its pre-legislative consultation the government had expressed concern that the matters then proposed to be listed in the Bill "should not be interpreted as a checklist": see para 57 above. But, in removing the listed matters from the Bill and in proceeding to substitute a reference to all the circumstances, Parliament made clear its intention that the *Reynolds* factors, upon which the list had been based, were not to be used as a check list. Even if, at the time of the decision

in the *Reynolds* case, it was appropriate to describe the factors identified by Lord Nicholls as a check list, it is clearly inappropriate so to regard them in the context of the statutory defence. But, as Sharp LJ proceeded to explain, that is not to deny that one or more of them may well be relevant to whether the defendant's belief was reasonable within the meaning of subsection (1)(b).

J *The Court of Appeal's Analysis of the Defence*

70. Good manners require immediate acknowledgement both of the fuller submissions on the statutory defence made to us than were made to the Court of Appeal and, following the hearings, of the greater opportunity for reflection upon the defence available to us than was available to it.

71. In para 36 of its judgment the Court of Appeal said:

> "In *Reynolds*, Lord Nicholls set out a well-known check list for use when determining whether the defendant reasonably believed that publishing the statement complained of was in the public interest."

But the inquiry which the Court of Appeal there described is the inquiry mandated by section 4(1)(b) rather than that suggested in the *Reynolds* case.

72. In para 41 of its judgment the Court of Appeal said:

> "The *Reynolds* 'public interest' defence has been replaced by the section 4 'public interest' defence. The recent Court of Appeal decision in *Economou* has confirmed that the two tests are not materially different."

But what the Court of Appeal said in the *Economou* case was that the *rationale* for each of the tests was not materially different: see para 68 above. It is wrong to consider that the elements of the statutory defence can be equiparated with those of the *Reynolds* defence.

73. In para 44 of its judgment the Court of Appeal said:

> "The defence is a form of qualified privilege."

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: see para 56 above . Indeed in the *Flood* case Lord Phillips said likewise: see para 60 above. The concept of qualified privilege is laden with baggage which, on any view, does not burden the statutory defence.

74. In para 47 of its judgment the Court of Appeal said:

> "When determining the issue whether defamatory material is published in the 'public interest' under section 4, the public interest in publication is to be balanced with the fact that an individual's article 8 right to reputation will be breached by the publication of unproven allegations without a remedy. (The CJEU has long recognised that a person's reputation is encompassed by the article 8 right: see eg *Einarsson v Iceland*, App no 24703/15, at para 33.) The section 4 defence needs to be confined to the circumstances *necessary* to protect article 10 rights."

The first question is to ask whether the court was there addressing (a) or (b) of section 4(1). The answer, agreed by counsel, is that, had it been addressing (b), it would have referred to reasonable belief so that it must have been addressing (a). The requirement at (a) is, however, not whether the statement "is published in the public interest" but whether it is "on a matter of public interest"; and, with respect, it is important to adhere to the statutory wording. The court then proceeded to refer to human rights under the European Convention: its reference to the CJEU, like an earlier reference in para 34 of its judgment, is a slip of its pen and should be to the ECtHR. At present I cannot envisage how, as the Court of Appeal reiterated in para 57, the objective evaluation whether a statement is on a matter of public interest might be affected by consideration of rights under article 8. But there is a wider point: for just as the common law defence was developed under the influence of Convention principles (see para 60 above), so was the statutory defence. Its three requirements that the statement should have been on a matter of public interest, that the defendant should have believed that publication of it was in the public interest and that the belief should have been reasonable, all of which have to be established by the defendant, are intended, and may generally be assumed, to ensure that operation of the section generates no violation either of the claimant's right under article 8, or of the defendant's right under article 10. To the extent that a court is persuaded to consult Convention jurisprudence in the course of a determination under section 4, it is likely to find that the word "reasonably" in subsection (1)(b) is sufficiently elastic to enable the section to be given effect in a way which is compatible with Convention rights.

75. In para 48 of its judgment the Court of Appeal said:

> "When considering whether or not an article is in the public interest, the court needs to consider not merely the bare subject-matter, but also the context, timing, tone, seriousness and all other relevant factors. In this respect Lord Nicholls' check-list in the *Reynolds* case remains relevant not only to the issue of whether the journalist acted responsibly, but also the issue of the existence of public interest in the article."

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". I suggest that reference to a check list is now inappropriate for the reasons given in para 69 above and that reference to acting "responsibly" is now also best avoided. For, acting upon the reasons given by Lord McNally to the Grand Committee on 19 December 2012, Parliament deliberately removed the reference to acting "responsibly" from the Bill and substituted the words in section 4(1)(b): see para 62 above.

76. In para 66 of its judgment the Court of Appeal said:

> "It is a basic requirement of fairness and responsible journalism that a person who is going to publish a story without being required to show that it is true should give the person who is the subject of the story the opportunity to put his side of the story. Gatley [Gatley on Libel and Slander, 12th ed (2013)] refers to this as the 'core' *Reynolds* factor …"

A failure to invite comment from the claimant prior to publication will no doubt always at least be the subject of consideration under subsection (1)(b) and may contribute to, perhaps even form the basis of, a conclusion that the defendant has not established that element of the defence. But it is, with respect, too strong to describe the prior invitation to comment as a "requirement". It was never a "requirement" of the common law defence: see the *Jameel* case, cited at para 53 above; and so to describe it would be to put a gloss on subsections (1)(b) and (2) of the section.

77. In para 83 of its judgment the Court of Appeal said:

> "Finally, by way of a checklist, it is useful to consider the *Reynolds* factors *seriatim*: …"

The Court of Appeal's exercise in the n proce eding to set out Lord Nicholls' ten factors and to apply them to the present case is not what P arliament intended it to do: see para 69 above.

78. In th e light of the above I am driven, with a degree of embarrassment in relation to respected colleagues, to suggest that the new judge should determine the availability of the public interest defence without reference to the reasoning which led the Court of A ppeal to conclude tha t the d efendants had met the requirement s neither of section 4(1)(a) nor of section 4(1)(b) of the Act.

Schedule

Key

Judge:	"J"
Claimant:	"C"
First Defendant:	"D1"
Third Defendant:	"D3"
The Defendants:	"Ds"
Mr Metzer QC:	"M"

DAY ONE

A1. *M cross-examines C.*

M: Do you deny saying you were still married?
C: Starting with Mrs Paczesny, okay? I was friends with Mr Paczesny.
J: I do not want a speech.

Comment: J stifles C's explanation prematurely.

A2. *M cross-examines C about a civil claim against him.*

J: You said this was an internet claim?
C: Yes.
J: Well, it cannot be because (a) it does not look as if it is an internet claim -
C: Let me tell you how it was.
J: Do not keep on interrupting me.
C: I'm sorry.
J: You interrupt counsel and now you are interrupting me.

Comment: J takes over cross-examination, shows irritation.

A3. *M cross-examines C about a debt owed by Polfood.*

J: There is always a lack of clarity with your evidence which I am finding irritating.

Comment: J makes no secret of irritation.

A4. *M ends cross-examination for the day.*

J to C (about to rise):

It is not very ethical behaviour, this, but we will see where the weight of the evidence is leading. Because if I conclude that you are acting unethically as a businessman, I am not sure [that] the precise terms of the defamations are going to matter to you much. Do you understand that? You will lose, but there is a lot more evidence yet.

Comment: Strong indication, albeit subject to further evidence, that C will lose. See para 59 of Bench Book, set out in para 46 above.

DAY TWO

A5. *M cross-examines C about his alleged investment in Polfood.*

J: Where are the documents to show your investment of £385,000?
C: I'll try to find that in a second, but -
J: Well, it should not take you a second. It should take you a nanosecond, because it is obvious that this point would be raised.
…
J: I want to see them at one minute past two, the page. If you do not show them to me, I will draw inferences. Do you understand what that means?
C: Yes I do.

Comment: Severe treatment of perceived failure to disclose documents in anticipation of cross-examination.

A6. *M cross-examines C about repayment of a creditor of Polfood.*

J: The company did not pay. It came out of the proceeds of your house?
C: Yes.
J: Did you tell the Official Receiver this?
C: Yes.
J: Right, you can show me the page after lunch.

M: Just -
J: It looks like a fraudulent preference of sorts.
…
M: Yes … at the very least, highly questionable, My Lord, I would respectfully suggest.

Comment: Further demand for documents and a suggestion of fraudulent preference not made by M.

A7. *M cross-examines C about his assertion that Polfood's remittances to Poland went to suppliers to it of Polish food.*

J: And they are all for deliveries, are they?
C: Yes.
[After 13 further questions from J and others from M]
J: ... what is being suggested is … that you are funnelling money out of the company, probably to go to your family in Poland.
C: No, that's not true.
J: … I am not going to take your word for it, ok? I need you to prove it to me. A bunch of assertions is not going to cut any ice. I need proof. Strictly speaking, the burden of proof is on the defendant to prove that under the Defamation Act, but it is not going to work like that in the sense that I will draw inferences. So, you can get it over lunch. You can prove to me where these monies went.

Comment: Advance notice that, unless supported by documents, C's evidence will be rejected.

A8. *M cross-examines C about Polfood's accounts.*

C: The first year's accounts, they are there … I've got them in the file.
…
J: Is this going to be more work over lunch, finding these accounts?
C: Yes.
J: But why do you not have them at your fingertips?
C: [No audible reply]
J: Also I want proof that they were filed at Companies House, documented proof.
C: I'll try to find out. I'm not quite sure that there's anything about it in the documents that they were filed.

J: Well, it is up to you. If you fail to provide it, I can draw an inference again.

Comment: Further demand for documents, including to satisfy a new requirement introduced by J that the accounts had been filed at Companies House.

A9. *M cross-examines C about whether, as he had told Polfood investors, a loan was to him personally or whether, as he now claimed, it was to Polfood.*

J: This does not look great, frankly, because either you were lying to the investors or you are lying to me. If you are lying to me, the consequences can be really awful, because you understand, I do not like being lied to. Which is it? Who were you lying to? Were you telling the truth to the investors and therefore lying to me, or were you lying to the investors and telling the truth to me?

C: That's accurate, I was lying to the investors. Because the document that she lended the company, I don't - can't dispute that.

…

J: But do you understand what this is about, Mr Serafin? That you are bringing proceedings in the High Court ... taking ten days, and however long it takes for me to write the judgment. It will take some considerable time, seeking to uphold your reputation. But your reputation is already beginning to fall to pieces, because you are a liar, and you do treat women in a frankly disgraceful way, on your own admission.

Comment: J applies heavy pressure and uses intemperate language.

A10. *M cross-examines C about his completion of an application form.*

M: You're saying this is for a parking permit?

C: Yeah.

M: This is not - this is a vehicle registration certificate -

J: No, no, no, Mr Metzer. He is giving a false address in order to entitle himself to a parking permit -

M: Oh, I see, I'm sorry … Is His Lordship right? It's me being slow and I apologise for that.

J: That is right, is it not? That is what you were doing?

C: Yeah, yeah.

J: Thoroughly dishonest, but it is what you were doing.

Comment: J refocuses M's cross-examination and reiterates C's dishonesty.

A11. *M cross-examines C about his repayment of a debt out of alleged earnings.*

J: I am sure you declared all this to the Revenue, did you?
…
C: Yeah, I've done every year.
J: Honestly and fully, so that your statement in your taxreturn for the relevant year … will give a true picture?
C: Yes.
J: … why do you not do that by tomorrow morning? … Because if I do not think there is a true picture, I will take action to include sending your papers off to the Revenue for you to be investigated. So, I would like to see your personal tax returns for 2010 onwards, first thing tomorrow morning.

Comment: J introduces demand for production of six years' tax returns within 24 hours and threatens C with HMRC investigation.

A12. *M cross-examines C about his disclosure of a creditor's email to him and asks him to compare it with a different version of the email which, unchallenged by J, he, M, suddenly produces.*

M: This is the real email that came from [her] to you on 22 December, and you have manipulated the email -
C: No, I never manipulated anything.
…
M: Now, I'm going to suggest to you that you have manipulated that email to add in things that were simply never said by [her], and I'll show you how you've done that.
…
M: Please just read those last three lines -
J: You are still not in the right place: Sorry, Mr Metzer, can you just find it for him?
M: Of course. I wonder if his assistant can -
J: He is either being obtuse, or he is playing for time, and I cannot decide which.
C: I'm sorry, but I'm somehow confused.
J: Or he is getting flustered.
…
J: Well, I think this is so important that we should make available

the electronic copy, because you underst and what the consequences are. If I think that you are lying , I will send the papers to the Director of Public P rosecutions, and if you are found guilty by a jury, of perjury, you will go to prison. Do you understand?

C: Yes, I do.

…

J: Which paragraph are you referring towhich you say is omitted?

...

C: It's the paragraph, what is clear is you put a question mark after how -

J: You see what you are doing is you are not answering my question, and what you are doing is trying to obfuscate, and I am going to sit here until I pin you down on this. Which paragraph do you say is missing? Just read it out -

C: Ok.

J: - before I lose my temper.

Comment: An offensive and inappropriate aside to M about whether C is being obtuse or playing for time. Threat of imprisonment and statement that C is deliberately not giving a clear answer.

A13. *In re-examination of himself C seeks to adduce photographs of a cash register in The Jazz Café.*

C: If you allow me to present those pictures that are very clear, and they are dated now, then -

J: Well, I have refused you that because you should have produced those before …

Comment: In context, a harsh ruling.

DAY THREE

A14. *C cross-examines D1 about his research for the article, as set out in his witness statement.*

C: What for you is a prominent member? … You describe Mr [inaudible] as a prominent member of POSK.

…

J: A prominent member, it speaks for itself, … If you are

suggesting that he was not a prominent m ember, that the witness statement is untrue, put it to the witness. But otherwise you are wasting my time.

C: In article was mentioned that I overcharged a lot of people and in your witness statement, number 31, is that I behaved very badly towards [inaudible].

J: But again, you see, it does not matter because it is not in the article. You see , if I were a jury it would … be important, because it might poison my mind. But I am not a jury. I do not care about this.

Comment: In peremptory terms J prevents C from cross-examining D1 on allegations in D1's witness statement.

A15. *C cross-examines D1 about alleged confusion in Poland as to his (C's) marital status.*

J: You are not going to get very far asking this witness question. You should keep your questions far more f ocussed to the narrow question which is this: did he publish this recklessly without caring that it was true, or did he c arry out proper research and enquiries? Just keep to that point and you might, you might get somewhere or at least you mi ght learn some useful evidence. Otherwise you are complet ely wasting my time. I am not interested in what the wit ness says more generally as to the truth or otherwise of what iscontained in his piece.

Comment: A fair direction but cast in offensive terms.

DAY FOUR

A16. *C cross-examines D1 about letters in response to the article published in the following issue.*

C: Yeah, but that was rather criticisms for you and not congratulations, isn't it?

D1: Exactly.

J: That was not [a] brilliant question, was it? ...

Comment: J introduces a note of sarcasm.

A17. *C cross-examines D1 about his alleged failure to have established whether C had repaid his creditors.*

C: Did you contact [Mr Ligeza] for any reason asking if he was repaid or start to be repaid?
J: Well, that is not [inaudible] point because he has only been repaid small amounts. Move on … you were on better ground with … Mrs Howard.

Comment: J stops a relevant question.

A18. *C seeks to cross-examine D1 about a document.*

J: This is the report … the committee report.
C: Yes, it's my report to the annual board of POSK.
…
C: Would it be fair that the word "we" could have been used … as a universal term for [inaudible] Polish community?
J: Apart from the fact that you say twice here "I would like to thank …" That is yo u … I know you are tr ying to distance yourself from this document, but your fingerprints are all over it.
C: Yeah, I'm not questioning that I wrote this.
…
J: Yes. And you, therefore, were part of the process that selected Antec Builder, the dormant company. So this is a hopeless line of questioning. The more you try and distance yourself from this, the worse it gets from your perspective. Is there a question you want to ask?
C: No, I think, thank you very much.

Comment: J appears to misunderstand C's case and prevents cross-examination on the report.

A19. *After D1's evidence, M expresses the hope that C will now concede that some of the challenged parts of the article are substantially true.*

M: … quite a lot of the factual material … may have fallen by the wayside and I will be asking, and it may assis t My Lord also, which parts of the article the claimant still ma intains are false because, evidentially, one would hope that the issues have been narrowed.
J: I would not even bother, Mr Metzer. I think we have got to

assume every point is lies.

Comment: C wrongly submits that here J means that every point that he was making was a lie. But J almost certainly means only that "we" (he and Mr Metzer as a unit together) had to assume that C's case remained that every point made in the article was a lie. Nevertheless the tone of his comment is offensive.

A20. *J asks M about the terms of C's Bankruptcy Restrictions Undertaking.*

M: And we probably should have pushed for this. I don't think the Annex setting out the restrictions was disclosed.
J: Yes. Where is it, Mr Serafin? … Why have we not got the terms of the restriction?
C: I will try to find out by tomorrow morning, because I don't know where it is
…
J: You have not given proper disclosure in this case. You are under an obligation under the rules to give disclosure of all relevant documents … Your failure to disclose them will give rise to an adverse inference. Do you know what that means?
C: No.
J: I will hold things against you … It is only fair.

Comment: It was *unfair* because, as M conceded, D's lawyers were well aware of the undertaking and had never asked C to disclose it and because from C's perspective it was not foreseeably relevant.

A21. *In cross-examination of one of Ds' witnesses, C seeks to invite comment about potentially contrary evidence given by Ms Stenzel, a previous witness.*

C: Well, you don't know Maria Stenzel but I just want to … something what she say in her testimony yesterday ... She state that she never prepared payment cheques for A Serafin, which would be Anna Serafin or Anna Serafin Project Company. So that was -
J: That is not a proper question.
C: But, My Lord, I -
J: Do not waste everybody's time, particularly this witness' time
…
C: Because -
J: Do not use it as a [?] to make a speech.
C: Because he don't -

J: You were doing quite well until you insisted on ruining it by asking the wrong sort of questions.
C: I think I finished because he don't know her.
J: He does not know anything about Ms Stenzel so do not even go there.
C: There's no point.
J: Is there any re-examination, Mr Metzer?

Comment: C's proposed question was legitimate ye t rudely disallowed.

A22. *C cross-examines one of Ds' witnesses about occupation of her flat in Poland.*

C: Who's living in the flat?
M: I really do fail to understand the relevance of this, My Lord.
C: It's fairly relevant, I assure you.
…
J: Well, it had better be relevant, this, otherwise I shall get very annoyed with you.

Comment: Warning of increased irritation.

A23. *M objects to C's cross-examination of the same witness, with whom C had had a sexual relationship.*

M: I think this is, unfortunately, an unnecessary area of cross-examination … this is not an area of dispute. It's accepted that essentially he is a womaniser and sleeps with more than one woman at the same time.
C: That's not accepted, My Lord.
J: It is not accepted by you but it is true, is it not? …You certainly were running two women at the same time.
C: [inaudible] Why I'm asking -
J: It happened to you. It just sort of came upon you as some sort of passive alien (?)

Comment: Further sarcasm

A24. *C continues to cross-examine the same witness, who had lent him money.*

J: You have not made any proposals, by the way, to repay this

money, have you?

C: No.

J: You seem pretty craven about that. I think you need to get on with this because it is just making it worse, ok? … Just speed up and come to a conclusion. It is not the best part of your case.

C: I know.

J: You know? Well then why aggravate it even more? … You have acted completely in the wrong and you were with at least one other woman at the time, part of the time, when the money was lent to you?

C: Yes, I accept it.

J: It was deplorable behaviour and I am going to say so in my judgment.

C: Yes, I know.

J: Well, are you going to stop asking questions or not?

Comment: In hostile terms J reveals during the evidence what his finding will be.

DAY FIVE

A25. *C cross-examines an investor in Polfood who lost money and seeks to ask her about Polfood's accounts.*

J: It is all grossly unfair … because you have never provided the accounts.

…

C: Yeah, this is [file] number three …

J: Yes, well, you will not find proper accounts in this. You will find management accounts for nine months , and you will find abbreviated accounts.

…

I am going to ask you one last time, do you have, at least for the first year of trading, the full audited accounts of the company …?

C: No, we never had audited accounts.

…

J: Well, I am not going to allow you to ask any morequestions on this theme without the documents being made available. In any event, those are questions that lead nowhere.

C: Ok.

J: Can you ask questions on a more fruitful line please?

C: There will be questions regarding the second director.

…

M: My Lord, this has nothing to do with the point that Mr Serafin says he was moving to.
C: It has everything to do with it.
J: Well, you had better bring this to a head quickly, otherwise I am going to get even more irritated.

Comment: Unfair refusal to allow C (who rightly or wrongly denied that there were audited accounts) to cross-examine by reference to the unaudited accounts. Further expression of irritation.