

Libel and Privacy in the 21st Century

1. Dr Rachel Ehrenfeld is from Israel but now lives in the United States. She is the founder and director of a neo-conservative think tank called the American Centre for Democracy which is concerned with Islamic terrorism and supports the Israeli government. In 2003 she published a book called "*Funding Evil, How Terrorism is Financed and How to Stop It.*" It contained allegations that a well-known Saudi family named Bin Mahfouz had contributed millions of dollars to Al Qaeda and other terrorist organisations, including, among other things, depositing tens of millions in the London accounts of terrorists implicated in the attacks on the US embassies in Kenya and Tanzania and funding Hezbollah and Hamas. The book was not an international best seller but it appears that 23 copies were sold to persons in the UK by internet sellers like Amazon. The Mahfouz family had business interests in England and considered that they had a reputation in this country. They brought an action in London for libel. In 2004 they applied for summary judgment under sections 8 to 10 of the Defamation Act 1996, which allows a court to enter judgment without trial if the claimant is not asking for more than £10,000 in damages and the defendant does not appear to have a real prospect of successfully defending the claim. The application came before Eady J on 3 May 2005.

2. Dr Ehrenfeld had been given notice of the proceedings and made a statement in the United States in which she described them as an abuse of legal process. She said that the Mahfouz family -

“both hide the truth of their acts behind the screen of English libel law and seriously chill legitimate and good faith investigation into his behaviour and links to terrorism.”

3. As sometimes happens, the libel proceedings brought the book to the attention of people who would otherwise never have heard of it and she was able to publish a new edition and well as a paper back version saying on the

cover: "The book the Saudis don't want you to read." In the new preface she said -

"Despite the enormous cost involved, I have decided to take it upon myself to challenge Bin Mahfouz and provide the UK court with evidence that he...[has] in fact supported Al Qaeda and Hamas."

4. She seems, however, to have changed her mind because in the end she gave no evidence to contradict that of the Mahfouz family. They, as the judge was at pains to point out, were not content to rely upon the burden of proof. They dealt in considerable detail with all the grounds which had been advanced in the book for saying that they had funded terrorism. This was not the first time Dr Ehrenfeld had preferred not to attempt to substantiate her claims. In an earlier book, *Evil Money*, she had made a number of sensational claims about the funding of terrorism in South America which, as a reviewer in the New York Review of Books observed, had little evidence to back them up. Dr Ehrenfeld answered this criticism in a letter to the Review saying that her sources were classified or confidential.

5. Eady J made a declaration that the allegations were false and awarded her £10,000 damages and costs. The case received considerable publicity in the United States. Dr Ehrenfeld and her supporters conducted a campaign for legislation to protect Americans against the effect of foreign libel laws. In 2008 the state of New York passed the oddly named "Libel Terrorism Protection Act", which provided that judgments in foreign defamation proceedings should not be enforceable unless the foreign law provided "as least as much protection for freedom of speech and the press as would be provided by both the United States and New York constitutions." Similar legislation was passed in California, Illinois and Florida. A bill has been introduced into the United States Senate by Senators Specter and Lieberman which goes further and gives the defendant a cause of action in the United States to recover any damages he has paid and costs he has incurred in the foreign proceedings, as well as damages for "the harm caused to the United States person due to

decreased opportunities to publish, conduct research or generate funding.”
These would no doubt be fixed by a jury. In addition, if the jury -

“determines by a preponderance of evidence that the person bringing the foreign lawsuit engaged in a scheme to suppress rights under the first amendment by discouraging publishers or other media from publishing, or discouraging employers, contractors, donors, sponsors or similar financial supporters from employing, retaining, or supporting the research, writing or other speech of a journalist, academic, commentator, expert or other individual, the court may award treble damages.”

6. The response in the press in this country has been to applaud the American reaction. “Doesn’t it shame us”, said the Daily Mail in a leader “that one American state after another has found it necessary to pass laws protecting its citizens freedom of expression from the book-burning rules of the British courts.” These comments were accompanied by a good deal of personal abuse of Eady J. The *Guardian* carried an article last month by its columnist George Monbiot with the headline “How our senior libel judge stamps on free speech – all over the world” and “Mr Justice Eady’s rulings amplify the democratic world’s most illiberal laws.” It seems, however, that there are other countries in competition for that title. Dr Ehrenfeld had an article in IsraelForum.com last month in which she complained that an American who had written an exposé revealing “potential terrorist threats to the United States emanating from McMaster University in Canada was being sued for libel by the university in its own country, although she claimed that the book had been published only in the U.S. Canadian libel laws, she says, are notoriously plaintiff-friendly. Brazil is also cited as a country which threatens American freedom of speech.

7. Do our libel laws need revision? About 10 years ago I attended a lecture which Alan Rusbridger, the editor of the *Guardian*, gave in a series established in memory of James Cameron. He said that the trouble with

English press laws was that the laws against libel were too strict and the laws protecting privacy were too weak. The libel laws prevented newspapers from publishing stories of considerable public importance, however carefully researched, for fear that they would contain allegations which would not stand up in court. The attitude of the courts then was, in the bleak words of Lord Hobhouse, that there was no public interest in the publication of false information. On the other hand, newspapers were free to publish stories of no public interest about the most embarrassing details of people's private lives, as long as they were true. Of course, as the editor of a broadsheet, Rusbridger had more interest in relaxing the libel laws than in maintaining the right to invade private life and the editors of the tabloids accused him of being willing to sacrifice their right to publish kiss and tell stories in exchange for greater freedom for investigative journalism into matters which did not interest their readers. But there seemed to me much sense in what he said.

8. Until the start of the present century, it was generally assumed that the common law provided no remedy for disclosure of private and personal information, even for financial gain, as in the case of newspapers. For many years there had been discussion about whether such a right should be created by statute. In 1972 the Younger Committee, which included the young novelist Margaret Drabble, recommended against it. The Calcutt Committee in 1990 recommended that there should be one more try at self-regulation, by the creation of the Press Complaints Commission, but that a statutory right of privacy should be created if that was unsuccessful. You may remember Mr David Mellor, then Heritage Secretary said that the Press were drinking in the Last Chance Saloon. In 1993 Sir David Calcutt undertook another review, said that the Press had not put their house in order and recommended legislation. Nothing happened. That is hardly surprising. There is no political advantage in such legislation. The disadvantages of antagonising the press are obvious. The tabloids had their revenge on David Mellor two years after his famous *bon mot* when the lady with whom he was having an affair sold her story to *The Sun* for £30,000. The political advantages are nebulous. Public opinion polls always show that people attach great value to the right of privacy but

they value it for themselves and not for other people. The politicians and celebrities who are most vocal in their complaints about press intrusion belong to a different species, about which the public has an insatiable curiosity but with whom they do not readily empathise. On the contrary, I think most people positively enjoy reading about the more salacious details of the private lives of the rich and famous; a poor modern substitute for the wild beast shows and public executions of earlier times but one which provides the commercial motive for invasion of privacy by newspapers. The Government in the 90s therefore recognised that there was no support for a statutory right of privacy; first, because the predominant impression left with the public by the newspapers was that the demand for such a right came from people who did not deserve it; the recent case of Max Moseley was a typical example of such self-justification by the Press; and secondly, because most people don't imagine themselves being the accidental victims of press intrusion. Of course they sometimes are, when they are caught up in some disaster or become victims of crime, like the parents of Madeleine McCann. Equally, most people don't imagine themselves being falsely accused of crime and are therefore impatient with laws which provide safeguards for accused persons. The general view is that people charged with crime are criminals and people whose private lives are exposed in the press are crooks or hypocrites.

9. Since legislation was out of the question, it fell to the judges to construct a right to the privacy of personal information out of whatever materials were to hand. They consisted of, first, the equitable doctrine of confidence, which had been used in the 19th century to protect Prince Albert's right to the confidentiality of family sketches and drawings and secondly, the right to privacy in article 8 of the Human Rights Convention, which became part of United Kingdom law in 2000. On the face of it, both of these doctrines were flimsy foundations for a law of privacy. The equitable doctrine was not concerned with whether the information was of a personal and private character but with whether it had been communicated in circumstances which imposed an obligation of confidence. Prince Albert's sketches happened to be personal and private information but that was an accident. The main use of

the equitable doctrine in the 19th and 20th centuries was to protect commercial and trade secrets. As for article 8, it was concerned with rights against the State; the knock on the door and arbitrary search, rather than with publication in newspapers.

10. The bringing together of these two rights was a remarkable example of judicial creativity, for which a good deal of credit must go, if I may say so without being invidious, to Lord Goff for his judgment in *Spycatcher* and to Lord Justice Sedley for his judgment in the Court of Appeal in *Douglas v Hello*. It was Lord Goff, with his famous example of the man who finds an obviously confidential document which has been dropped in the street, who pointed out that an obligation of confidence need not be imposed separately from the communication of the information. The nature of the information itself may show that it is confidential. And it was Lord Justice Sedley who pointed out that although article 8 confers rights against the State, it demonstrates the value attached to the right to keep personal information private and therefore enables one to say that the nature of such information is such as to impose upon anyone who receives it, such as a newspaper buying a kiss and tell story, an obligation of confidence. It was this synthesis which was recognised by the House of Lords in Naomi Campbell's case, where although the House was divided on whether the facts justified a claim to privacy, they were unanimous in declaring that such a right existed in English law.

11. Was it right for the judiciary thus to step in where Parliament had feared to tread? I think it was; it is the classic role of the judiciary to protect the rights of the individual, even those whom the Press may wish to portray in an unsympathetic light. It does not make the judges popular with the Press, as was demonstrated by Max Moseley's case, where, although the newspaper did not appeal, Eady J was again subjected to a barrage of personal abuse for applying the principles which the House of Lords had declared in the Naomi Campbell case. Judges are not popular when they protect the rights of prisoners or immigrants either, although personal abuse from government

ministers over such matters is a relatively new phenomenon. The Press, however, can be expected to complain.

12. As the Naomi Campbell case showed, there are bound to be differences of opinion over what counts as an invasion of privacy and what the press are genuinely justified in publishing. No doubt in the course of time there will be decisions of the courts to give guidance. However, a wild card in the judicial pack is the European Court of Human Rights, which has its own ideas of the proper balance between privacy and press freedom. In Princess Caroline's case, it disagreed with the German Constitutional Court, no less, over whether she had a right not to be photographed in a public restaurant. The case raised no general point of principle and in my view the questions raised by these cases are difficult enough without the intrusion of the Strasbourg court.

13. Before I leave privacy and return to Dr Ehrenberg and defamation, I should say that the new right is in danger of being a fairly ineffective weapon. Unlike defamation, in which your reputation can be cleansed of mud by the verdict of the jury, there is no way in which privacy can be restored. The cat cannot be put back in the bag. To bring an action for damages is to give further exposure and public attention to the facts of your private life which you say should never have been revealed. Bringing such an action can often have only an exemplary purpose: to teach the newspaper that they should not behave in that way in the future. It must have taken courage as well as money and anger for Max Moseley to have brought proceedings at the end of which he was awarded damages of £60,000. Very few people would have done it. Damages of £60,000 must have seemed a relatively small sum for the News of the World to pay for such a story.

14. It may have to be recognised that, certainly in cases of breach of privacy and to some extent in cases of defamation, awards of damages have to serve an exemplary purpose, to act as a deterrent against similar behaviour in the future. Awards of damages in defamation have for some years been

linked to awards of general damages in personal injury actions, on the grounds that the loss of reputation should not be regarded as deserving of more compensation than a severe personal injury. But that seems to me a rather facile comparison. Personal injury damages are compensatory in principle, even if the calculation of general damages is somewhat arbitrary. Although the law and economics school of jurisprudence says that they have a deterrent function which improves safety standards, the link is a weak one. On the other hand, in defamation, the deterrent function is a very strong one. Lord Justice Sedley, with the support of Lord Devlin in *Rookes v Barnard*, says that the civil law should never be concerned with deterrence. That is the function of the criminal law. But using the criminal law to control the press seems to me out of the question and we are left with the choices of deterrence by large awards of damages to private litigants or no deterrence at all. For my part, I would prefer to accept the theoretical impurity of the civil system.

15. That brings me back to defamation and the question of whether, as the Daily Mail says, we have the world's most illiberal libel laws. In the United States the freedom of the press has constitutional protection. But article 10 of the Convention has virtually the same constitutional effect. The difference lies in the way they are interpreted. The United States Supreme Court, in the *Sullivan* case, decided that the only way to prevent the law of libel being used as a political weapon by racist politicians and juries in the Southern States was virtually to abolish it; to say that no statements about a broadly defined class of public figures was actionable unless made in bad faith. That was a decision highly specific to political conditions in the United States in the early 60s of the last century. The House of Lords, in the different social and political conditions of this country, took a less drastic approach. In the *Reynolds* case it recognised that the existing law was too strict, but refused to go as far as *Sullivan*. Instead, it created a new public interest defence for cases in which the newspaper could not justify but in which there had been a public interest in publication and the journalists had acted responsibly in their investigation and checking of the story. That principle was more recently applied by the

House of Lords in the *Jameel* case, which clarified and expanded the public interest defence which had been created in *Reynolds* and encouraged trial judges to apply it more liberally. It said, for example, that in deciding whether a publication was about a matter of public interest, one should consider the article as a whole and not concentrate upon the particular allegation which the claimant has singled out for his complaint. And then, if the subject-matter was of public interest, one should not be too censorious about whether it was necessary to include some particular item of information. You have to remember that editors and journalists work under pressure and to deadlines. It would inhibit good journalism if the newspaper were held liable because, in telling the story and making it readable (after all, they have to sell their newspapers) they included some detail which a judge afterwards, with the advantage of knowing more of the facts, thinks was unnecessary to communicate the public interest element in the story. The test of responsible journalism must also be applied with a proper appreciation of the realities of daily life for editors and journalists. There are limits on the time and resources they can devote to a story, the checks they can make. And these constraints are becoming tighter as the nature of the industry changes from publication once a day or once a week to 24 hour news on the paper's internet site, with the decline in newspaper advertising revenue and the vogue for reader-generated copy.

16. I mention these substantial changes brought about by *Reynolds* and *Jameel* because, on the whole and without being too complacent, I think that they have struck a reasonable balance between giving anyone, even foreign businessmen or the Prince of Wales, the right to a reputation – what Cassio called the immortal part of himself - and creating traps for journalists who have taken reasonable care and acted in good faith. (The Wall Street Journal's complaint to the European Court of Human Rights that English law as stated by the House of Lords in *Jameel* still infringed their right to freedom of speech in article 10 of the Convention was struck out as “manifestly ill-founded”: see the decision of the Court in *Application No 28577/05*). But that kind of balance does not appear to be enough to satisfy the press. They

would naturally prefer the American law under which there is in effect no restraint upon the publication of unsupported allegations of outrageous conduct by public figures, especially if they are foreigners. In fact there is an ugly smell of xenophobia in the assumption by the American campaigners that a Saudi businessman must be abusing the legal process if he seeks a forum in which he can establish that the allegations against him are untrue.

17. The *Jameel* case makes an interesting contrast with Dr Ehrenfeld's case. As it happens, it was also about an allegation that a Saudi businessman was suspected of a connection with terrorism. In *Jameel* the story was that the Saudi banking supervision authorities, at the request of the US Treasury, had been monitoring the accounts of Mr Jameel's business to see if funds were going to terrorist organisations. The newspaper, the Wall Street Journal, could not have justified this allegation because there was no way in which the Saudi banking authorities were going to disclose whose accounts they had been watching. But the newspaper was able to satisfy the House of Lords that the story was very much a matter of public interest and, without disclosing their sources, that they had acted responsibly, had reasonable grounds for their allegations and made whatever checks they reasonably could. Their defence was held to be made out. Dr Ehrenfeld, by contrast, made no attempt to claim a public interest or any other defence. No doubt her story would also have been held to be in the public interest, particularly since her positive allegations that the Mahfouz family were financing terrorism on a huge scale were much more positive than the Wall Street Journal's claim that Mr Jameel's company was under surveillance. But I suspect that Dr Ehrenfeld may have had some difficulty on the requirement of responsible journalism and that it was this which made her reluctant to keep her promise of putting her defence before the English court.

18. The Americans would say that they have no objection to the English having what they regard as restrictive press law, as long as they don't apply them to Americans. The protection of the various statutes which have been passed to nullify foreign judgments is confined to Americans. They say it is

wrong that English courts should take jurisdiction in cases which, in their view, have very little to do with England. I would accept that this is a difficult question. About 7 years ago a Russian oligarch named Boris Berezovsky brought proceedings against Forbes magazine for an article which alleged that he had been involved in some shady business dealings. Forbes is a financial journal which sells mainly in the United States, although a few hundred copies are sold in the UK and Europe. Mr Berezovsky was then living in Russia, although I think he is now an exile from Mr Putin in England. But he was known in some circles in England, as any rich man dealing with the City is bound to be, and part of his evidence of reputation was that he had been invited to Rupert Murdoch's wedding.

19. Now, why did he bring proceedings in England? It is easy to see why he did not sue in the United States. He knew that he would certainly have lost, given the *Sullivan* rule. Why did he not sue in Russia? Rather oddly, I think the reason was that he would certainly have won and that such a judgment would have been worthless currency to maintain his international reputation because it would have been assumed that he would have influenced the court. He did not sue for the money because he was immensely rich and any damages he recovered would have been small change in his pocket. What he wanted was a decision of what would everywhere be recognised as an impartial and competent court. The judge stayed the proceedings on the grounds of forum non conveniens, saying that the case had insufficient connection with England. However flattering it was to feel that foreigners came to avail themselves of English justice, we could not become the libel centre of the world. But the Court of Appeal and the House of Lords reversed his judgment and said that there had been publication in this country, a tort had been committed here and Mr Berezovsky therefore had a right to sue.

20. Since that case, anyone who can show the sale of even a few copies in this country, like the 23 books Dr Ehrenfeld sold on Amazon. Com, can sue for libel in this country. The current phrase for people from abroad who bring

such actions is that they are libel tourists. The pained reaction of the Americans is that they published in the United States, secure in their protection by the 1st Amendment and *Sullivan*, and do not see why they should be amenable to the jurisdictions of the United Kingdom just because a few copies found their way here. Some American publishers have recently said, in a memorandum to the Culture Media and Sport Committee of the House of Commons, which had been looking into the question of libel, that they were thinking of stopping the supply of their publications to this country because the profit from doing so did not justify the risk of being sued for libel. The Committee is due to report before Christmas, so watch this space. However, publication on the internet of information which can be read by people in England seems likely to count as publication here, so stopping the supply of hard copies may not help. Indeed, the whole idea of publication being in one particular place is beginning to look rather old fashioned. The internet has made all publication effectively world-wide.

21. That makes the question of jurisdiction, which traditionally depends on where the tort was committed, that being in the case of libel, where publication took place, rather a difficult one. It might be better to look at the place where the damage was caused, that is to say, where the claimant has a reputation. The Americans are hardly in a position to complain about countries which take jurisdiction on the grounds that the acts in question, although done abroad, have effects within the jurisdiction. That is the ground upon which American courts regularly assert extra-territorial jurisdiction in all kinds of cases like anti-trust actions and securities legislation. Nor does it seem to me unfair that McMaster University should have sued in Canada. It is a Canadian university. Mr Mahfouz also appears to have had a reputation in this country. No doubt he had more of a reputation in Saudi Arabia and very likely in other countries as well. But I cannot see why, if he did have a genuine reputation here, he was not entitled to choose this country as the place where he was going to bring proceedings to protect it. However, since the *Berezovsky* case, any restriction of jurisdiction is going to require legislation and may also run into difficulties with the Brussels Regulation, which not only

confers jurisdiction upon member states according to its rules but imposes upon them a duty to take jurisdiction in such cases. The doctrine of forum non conveniens, like all exercises of judicial discretion, is anathema to the Continental mind. It will therefore not be easy to construct a jurisdictional rule which, given the attractions of our courts, removes accusations of fostering libel tourism. However, I see no reason why we should change our substantive law and deprive our own citizens of the right to protect their reputations, just because some foreigners avail themselves of the same right.