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Defamation Law and Free Speech: *Reynolds v. Times Newspapers* and the English Media

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ABSTRACT

The common law of defamation cut the balance between speech and reputation decisively in favor of reputation and allowed for the imposition of significant damages against media outlets that defamed. For the last four decades, U.S. media outlets have been insulated against the common law rules by the United States Supreme Court's landmark decision in New York Times Co. v. Sullivan. *Following* Sullivan, *Commonwealth countries clung steadfastly to common law rules and are only now beginning to modify the common law rules to provide speech and media protections. Rather than following* Sullivan *by adopting constitutional protections, however, Commonwealth*

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courts have opted to provide that protection by expanding common-law qualified privilege protections.

The Authors examine the Reynolds' *standard with particular emphasis on how that decision has affected media practices and reporting. They do so through empirical evidence rather than doctrinal analysis. The Authors engaged in extensive interviews with the British media during 2003 and 2004, four to five years after* Reynolds *was decided. Since some of the authors also conducted extensive interviews with the British media in the early 1990s, years before* Reynolds *was decided, the authors were able to compare and contrast their pre-*Reynolds *interviews with their post-*Reynolds *interviews, and thereby gain a better understanding of* Reynolds' *impact.*

The Authors conclude that, although Reynolds *has had some impact on British defamation law as well as on the practices of the British media, the impact has not been as dramatic as the* Sullivan *decision's impact on U.S. press and media practices.*

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I. INTRODUCTION

The law of defamation presents an inevitable conflict between reputation—or more precisely, the need to compensate those whose reputations have been injured by defamatory statements—and the societal need for free expression.[1] Until the second half of the twentieth century, most countries resolved this conflict in favor of reputation. Some countries valued individual reputation as a quasi-personal property right that deserved compensation if damaged,

1. *See* Gertz v. Welch, Inc., 418 U.S. 323 (1974).

while others recognized reputation as an aspect of the burgeoning concept of privacy (or more generally, human dignity) and therefore needing protection by enjoining speech altogether.[2]

In the landmark 1964 decision *New York Times Co. v. Sullivan*,[3] the United States Supreme Court established constitutional protections for expression and limited the ability of defamation plaintiffs to recover. Despite the *N.Y. Times* decision, most Commonwealth countries steadfastly clung to the notion that defamation is a necessary protection lest good people fall to foul rumor.[4] But, even in Commonwealth countries, the balance is beginning to shift in favor of free expression. The trend began in the Pacific Rim. In *Lange v. Australian Broadcasting Corporation*,[5] Australia's High Court extended the common law doctrine of "qualified privilege" to protect publications related to the conduct of governmental affairs.[6] In *Lange v. Atkinson*,[7] New Zealand's Court of Appeal held that qualified privilege included speech about politicians and candidates.[8] Finally, in 1999, Britain's House of Lords decided *Reynolds v. Times Newspapers*[9] and expanded common law qualified privilege to provide special protection to the English media for reporting on matters of "public interest." The net effect is that four distinct approaches have been taken. One country (the United States) has taken a constitutional approach while three others (England, Australia, and New Zealand) have taken varying common law qualified privilege approaches, albeit using different standards.[10]

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2. *See* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986).

3. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

4. *See* NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL (1986) (tracing the colonial roots of this notion, and noting that President Richard Nixon in 1974 was concerned that libel laws following *Sullivan* would discourage "good people" from running for "public office").

5. *See* Lange v. Australian Broad. Corp., [1997] 189 C.L.R. 520, 521 (Austl.).

6. *See* Russell L. Weaver & David F. Partlett, *Defamation, the Media and Free Speech: Australia's Experiment with Expanded Qualified Privilege*, 36 GEO. WASH. INT'L L. REV. 377 (2004) [hereinafter Weaver & Partlett] (providing a fuller examination of the *Lange v. Australian Broadcasting Corp.* decision, and its effect on Australian law).

7. *See* Lange v. Atkinson, [1997] 2 N.Z.L.R. 22, 27 (N.Z.).

8. *Id.* ("Generally-published statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to be members, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.").

9. *See* Reynolds v. Times Newspapers, [2001] 2 A.C. 127 (H.L. 1999); GATLEY ON LIBEL AND SLANDER ch. 14 (Patrick Milmo & W.V.H. Rogers eds., 10th ed. 2004).

10. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 254 (1964); Lange v. Australian Broad. Corp., [1997] 189 C.L.R. 520, 520 (Austl.); Lange v. Atkinson, [1997] 2 N.Z.L.R. 22, 27 (N.Z.).

Given the plethora of standards, legitimate questions arise about whether one standard strikes a preferable balance between speech and reputation. The essence of the *N.Y. Times* decision was a rule that prevented public officials from recovering for defamation unless they could show that the defendant had acted with "actual malice."[11] The actual malice standard, which was later extended to "public figure" plaintiffs,[12] required public officials to show that those who defamed them knew that what they printed was untrue, or that the defamer acted with reckless disregard for the truth.

Commonwealth countries have not tended to follow the *N.Y. Times* decision. In part, this may be due to the fact that some Commonwealth jurisdictions have never been entirely comfortable with the *N.Y. Times* decision and its focus on the plaintiff's status.[13] This difference in approach may also have been dictated by differences in constitutional structure. Britain, for example, has no written constitution. Although Britain is a signatory to the European Convention and has adopted a statutory bill of rights (in the form of the Human Rights Act of 1998),[14] the relevant statement on free speech (in Schedule 1, Article 10)[15] is in qualified form and is therefore quite distinct from the United States Constitution's First Amendment. Australia has a written constitution, inspired by the United States Constitution, but the document does not contain a bill

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11. *See Sullivan*, 356 U.S. at 280.

12. Curtis Pub. Co. v. Butts, 388 U.S. 130, 163 (1967).

13. *See, e.g.*, Theophanous v. Herald & Weekly Times, [1994] 182 C.L.R. 104 (Austl.).

14. *See* Clive Walker & Russell L. Weaver, *The United Kingdom Bill of Rights 1998: The Modernisation of Right in the Old World*, 33 U. MICH. J.L. REFORM 497 (2000).

15. Article 10 provides as follows:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Human Rights Act, 1998, c. 42, sched. 1, art. 10 (Eng.); *see* GATLEY ON LIBEL AND SLANDER, *supra* note 9, at 719-51 (providing the interpretations of Article 10 in relation to libel by the European Court of Human Rights).

of rights.[16] Although the Australian High Court has interpreted the Constitution as containing an implied right of free speech for government and political matters,[17] and has even flirted with providing constitutional protections for defamation,[18] the High Court ultimately chose the common law qualified privilege route.

The question is whether the new common law qualified privilege approaches provide adequate "breathing space" for speech. In the *N.Y. Times* decision, the United States Supreme Court focused on the presumed "chilling effect" of defamation laws on speech and the need to protect the media against it.[19] Before the recent decisions, the evidence strongly suggested that both English and Australian defamation law failed to provide much "breathing space" for speech and that English and Australian media outlets were deeply concerned about the potential for defamation liability.[20] Post-decision research suggests that the Australian *Lange* decision has had only a marginal effect on Australian media law and has not revolutionized Australian defamation law in the same way that the *N.Y. Times* decision revolutionized U.S. law.[21] But there is reason to think that Britain's *Reynolds* decision may be having more effect. *Reynolds* provided somewhat broader protections than the Australian *Lange* decision, and

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16. *See* Russell L. Weaver & Kathe Boehringer, *Implied Rights and the Australian Constitution: A Modified New York Times, Inc. v. Sullivan Goes Down Under*, 8 SETON HALL CONST. L. J. 459 (1998).

17. *See* Stephens v. West Australian Newspapers, Ltd., [1994] 182 C.L.R. 211 (Austl.).

18. *See* Theophanous v. Herald & Weekly Times, [1994] 182 C.L.R. 104 (Austl.).

19. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278 (1964). The U.S. Supreme Court provided that:

> The state rule of law is not saved by its allowance of the defense of truth... a rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone' . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

Id.

20. *See* Russell L. Weaver & Geoffrey J.G. Bennett, *Is the New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153 (1993).

21. *See* Weaver & Partlett, *supra* note 6, at 422-30.

it focused on matters of "public interest" rather than on simply matters relating to the conduct of government.[22]

This Article principally examines *Reynolds'* effect on English media practices through empirical evidence rather than doctrinal analysis. The results are based on interviews with members of the English media conducted during 2003 and 2004, four to five years after *Reynolds* was decided. Because some of the Authors also conducted extensive interviews with members of the English media in the early 1990s, years before *Reynolds* was decided, they were able to compare and contrast their pre-*Reynolds* interviews with their post-*Reynolds* interviews, thereby gaining a better understanding of *Reynolds'* effect.

As will be developed more fully below, *Reynolds* has had some effect on English defamation law as well as on the practices of the English media, and it has certainly had more than the marginal effect of the Australian *Lange* decision. The extent of that effect, however, is difficult to assess because the English media are struggling to ascertain what *Reynolds* means. Some English media outlets have reacted to *Reynolds* very cautiously. Others have assumed that the decision provides significant media protection and have responded and acted accordingly. In addition, it is difficult to divine its precise effect distinct from other substantive and procedural changes that occurred around the same time.

II. *REYNOLDS'* EFFECT ON ENGLISH LAW

The *Reynolds* decision represented a significant change in English defamation law. In order to understand the decision's significance, it is important to canvass pre-*Reynolds* English defamation law.

A. *Pre*-Reynolds *English Law*

It is not easy to explain or understand the English common law of defamation. As a leading U.K. commentator stated, "[t]he law of defamation is notoriously complex."[23] Its complexity comes from numerous detailed and technical rules, which stem from the common law as well as from recent developments.[24] In addition, the English

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22. *See* Reynolds v. Times Newspapers, [2001] 2 A.C. 127.

23. ERIC BARENDT ET AL., LIBEL AND THE MEDIA: THE CHILLING EFFECT 1 (1997).

24. *See generally* DAVID PRICE & KORIEH DUODU, DEFAMATION LAW, PROCEDURE AND PRACTICE (3rd ed. 2004) (detailing matters of litigation practice); GATLEY ON LIBEL AND SLANDER, *supra* note 9 (covering this English law in detail).

common law of defamation was altered by the 1952 Defamation Act and the 1996 Defamation Act, as well as by the European Convention on Human Rights and Fundamental Freedoms, which has been incorporated into U.K. law through the 1998 Human Rights Act.[25]

1. Libel, Slander, and Procedure

The common law distinguished between causes of action in libel and slander. Libel applied to publications in permanent form, while slander applied to transient publications such as spoken words.[26] The difference could be significant because financial damage must be shown in many slander cases,[27] but need not be shown in libel cases. Broadcast media publications, however, were treated as being permanent in form under § 1 of the 1952 Defamation Act.[28] The 1990 Broadcasting Act also deemed some Internet communications, such as websites run by media companies, as permanent in form.[29] These provisions mean media publications raise issues of libel and not slander. In this Article, the terms libel and defamation are used interchangeably.

Three general points should be made about English civil procedure. First, English civil procedure has undergone substantial changes since the introduction of the Civil Procedure Rules in 1999 following the Woolf Report on civil justice.[30] There is a specific Practice Direction for defamation under the Civil Procedure Rules and a Pre-Action Protocol for Defamation[31] that sets out expected practice before commencing litigation and during pre-trial and trial stages. The objective of the Rules is to deal justly with disputes, taking into account the parties' relative positions and in proportion to the number, importance, and complexity of the issues. The Rules also

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25. *See generally* Eric Barendt, *Human Rights Act 1998 and Libel Law: Brave New World?*, 6 MEDIA & ARTS L. REV. 1 (2001) (reviewing European cases and defamation law).

26. GATLEY ON LIBEL AND SLANDER, *supra* note 9, at 79.

27. Certain slanders are excepted from the requirement to show damage, such as imputations disparaging the claimant in a profession or trade. *See* Defamation Act, 1952, 15 & 16 Geo., 6 & 1 Eliz. 2, c. 66, § 2 (U.K..

28. Defamation Act, 1952, c. 66, § 1.

29. Broadcasting Act, 1990, § 166(1) (U.K.); *see* MATTHEW COLLINS, THE LAW OF DEFAMATION AND THE INTERNET 43-47 (2001).

30. Lord Woolf, Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England (1996), *available at* http://www.dca.gov.uk/civil/final/contents.htm; *see* GATLEY ON LIBEL AND SLANDER, *supra* note 9, at Part IV.

31. Lord Chancellor's Department, Civil Procedure Rules, Rules & Practice Directions, Part 53 (Feb. 28 2000), *available at* http://www.dca.gov.uk/civil/procrules_fin/current.htm; Lord Chancellor's Department, Civil Procedure Rules, Pre-action Protocol for Defamation (Oct. 2 2000), *available at* http://www.dca.gov.uk/civil/procrules_fin/contents/protocols/prot_def.htm.

affect terminology—for example, plaintiffs are now called claimants, writs have become claim forms, and pleadings have been renamed statements of case.[32] But since many older English cases described defamation claimants as "plaintiffs," that terminology is sometimes used in this Article. This prior terminology remains current in the U.S. and Australia, so it also is used when comparing issues across jurisdictions.

The second procedural point concerns litigation costs. Under English law, it is usual for the side that loses a case to pay its own legal fees and a significant amount of the other side's fees.[33] This means anyone contemplating a civil action, such as defamation, faces an unpredictable and potentially very large liability for costs. The scale of costs in defamation is very high, with media reports commonly suggesting that costs outstrip any damages awarded.[34] The situation is exacerbated for defamation claims because claimants cannot obtain public funding through the legal aid system.[35] Under changes made in the late 1990s, it is possible for potential litigants to enter conditional fee agreements to make their own legal fees payable only if they win the case.[36] Litigants also can seek insurance to cover the risk of having to pay the other side's legal costs if they lose the case. Lawyers who enter conditional fee agreements cannot take a percentage of damages that may be awarded, unlike in the United States. But lawyers can claim a success fee—that is, an additional amount of up to 100 percent of their ordinary fees to be awarded if their client prevails.[37] The combination of fees being made conditional on victory and the possibility of insurance is a dramatic change in the permissible methods of civil litigation in England. But the difficulty in predicting outcomes in defamation cases means insurance premiums are reportedly quite high,[38] and the changes may not have significantly reduced the risks facing potential defamation litigants.

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32. Lord Chancellor's Department, Civil Procedure Rules, Rules & Practice Directions, Part 53 (Feb. 28 2000), *available at* http://www.dca.gov.uk/civil/procrules_fin/current.htm; Lord Chancellor's Department, Civil Procedure Rules, Pre-action Protocol for Defamation (Oct. 2 2000), *available at* http://www.dca.gov.uk/civil/procrules_fin/contents/protocols/prot_def.htm.

33. The court determines the amount payable, after closely reviewing the work undertaken, if the parties cannot agree to the amount between themselves.

34. Interview with Anonymous BBC Legal Staffer (Apr. 13, 2003) [hereinafter Interview with Anonymous BBC Legal Staffer].

35. *See* MICHAEL ZANDER, THE STATE OF JUSTICE (2000) (commenting on the legal aid system). The absence of legal aid has been upheld as consistent with Article 6 of the European Convention on Human Rights. Steel and Morris v. U.K., App. No. 21325/93, 18 E.H.R.R. C.D. 172 (1993); McVicar v. United Kingdom, Reporter 2002-III, 35 Eur. Ct. H.R. 22 (2002).

36. *See* Courts and Legal Service Act, 1990, c. 41, § 58 (Eng.).

37. Courts and Legal Service Act, 1990, c. 41, § 58(2)(b).

38. *See, e.g.*, PRICE & DUODO, *supra* note 24, ¶ 34-21.

Third, civil actions in England generally are tried without juries, in marked contrast to the United States. But there is a right—traced to Fox's Libel Act of 1792[39]—for either party to choose a jury trial in defamation cases. The court has discretion to refuse a jury trial only if the case "requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury."[40] Thus, the usual mode of defamation trial in England is before a judge and jury in the Queen's Bench Division of the High Court of Justice. The judge and jury have distinct roles: the judge determines questions of law, while the jury deals with questions of fact. But the judge can withdraw issues from the jury. For example, if there is insufficient evidence to establish a defense or if the publication is incapable of conveying a defamatory meaning, the judge may remove those factual questions from the jury's consideration. Matters can be appealled to the Court of Appeal and to the House of Lords.[41] England does not have a separate court list for managing defamation disputes, but interlocutory matters all go to the judge heading the jury list. Because English civil actions generally do not involve a jury trial, the list operates in practice as a defamation list, and specialist defamation judges deal with most matters (which is most unlike the situation in the United States, where judges hearing defamation matters very rarely have substantial experience in the area). In addition, a far more active style of case management by judges appears to have developed for civil litigation under the Civil Procedure Rules.[42]

2. The Claimant's Case

English common law has historically asked little of defamation claimants. They need only establish that published material that identified them conveyed a defamatory meaning.[43] The normal civil standard of proof applies—namely, the balance of probabilities. The U.S. standard of "clear and compelling" evidence is not applied.[44]

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39. Libel Act, 1792, 32 Geo. 3, c. 60, § 3 (Eng.).

40. Supreme Court Act, 1981, c. 54, § 69(1).

41. The other relevant appellate body is the Privy Council, which acts as a final court of appeal for some commonwealth countries, e.g. New Zealand. Because it comprises members of the House of Lords, Privy Council decisions carry great weight within the U.K. court hierarchy.

42. Lord Chancellor's Department, Civil Procedure Rules, Rules & Practice Directions, Part 3 (Feb. 28, 2000), *available at* http://www.dca.gov.uk/civil/procrules_fin/current.htm.

43. *See* W.V.H. ROGERS, WINFIELD AND JOLOWICZ ON TORT 410-13 (16th ed. 2002).

44. New York Times v. Sullivan, 376 U.S. 254, 280 (1964).

First, a defamation claimant must prove publication. Proving that material was published has been relatively easy in relation to the media. "Publication" means the communication of material to a person other than the claimant, in a form capable of being understood by recipients.[45] And "material" includes words and images in fixed or transient form.[46] Each entity that takes part in the process of publication can be responsible, including printers, distributors, and vendors. But those with only limited involvement can rely on the defense of secondary responsibility.[47] In practice, claimants sue the media companies that publish material and often sue journalists and editors as well.[48] Other potential defendants, such as distributors and retailers, are sued when the primary publisher has limited assets.[49]

Second, claimants are required to prove that the material identified them—that is, the material was "of and concerning" them.[50] This requirement is easily satisfied when publications name claimants. But liability can extend to publications using fictional names or even those omitting all names. The test is whether ordinary recipients think that the claimant had been identified.[51] This means publishers who had no intention of referring to, or knowledge of, claimants could be liable.

The law allows corporations, but not local authorities, to sue for defamation. In *Derbyshire County Council v. Times Newspapers*,[52] Britain's House of Lords held that local authorities may not bring defamation actions because of the importance of robust discussion about their activities, especially given that their members are elected. *Derbyshire* can be seen as an important precursor to *Reynolds v. Times Newspapers*.[53] But it also is important to recognize *Derbyshire*'s limited scope. Although local authorities are prohibited from suing, council officers may sue personally when publications identify them.[54]

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45. GATLEY ON LIBEL AND SLANDER, *supra* note 9, at 141-42; New York Times v. Sullivan, 376 U.S. at 280 (1964).

46. *See id.* at 76-78.

47. Defamation Act, 1996, c. 31, § 1 (U.K..).

48. Action also may be available against people whose words are republished by the media.

49. The potential liability of secondary publishers, distributors, and retailers provides a mechanism for defendants to prevent the continued distribution of the material.

50. GATLEY ON LIBEL AND SLANDER, *supra* note 9, at 966.

51. *Id.* at 966-67.

52. Derbyshire County Council v. Times Newspapers, [1993] A.C. 534. The same has been applied to political parties. Goldsmith & Another v. Bhoyrul, [1997] 4 All E.R. 268.

53. Reynolds v. Times Newspapers, [2001] 2 A.C. 127.

54. If a publication criticizes a group of which the claimant is a member, the question is whether it would be understood to refer to the claimant individually.

Third, the claimant is required to show that the publication conveys a defamatory meaning.[55] In most instances, this is the only contentious element of the claimant's case. Indeed, the meaning conveyed by a publication, and how the parties differ as to that meaning, is the central issue in the vast majority of cases. A publication's meanings are called imputations, and they must be set out pre-trial by the claimant in its particulars.[56] Imputations are characterized in two ways: (1) natural and ordinary meanings and (2) innuendo meanings.[57] Natural and ordinary meanings are those conveyed directly by the publication. They can also be conveyed by inference, where the inference depends only on general community knowledge—for example, common slang expressions.[58] Innuendoes are the second type of imputation and are often called "legal" or "true" innuendoes.[59] Innuendoes can arise when an unusual meaning is given to words: for example, by uncommon slang. An innuendo can also arise where facts not included in the publication result in the particular meaning being conveyed to recipients knowing those facts.

The test for determining meaning focuses on what an ordinary, reasonable publishee would understand from the whole material, in light of its manner of publication.[60] In other words, the test does not focus solely on the recipients' actual understanding[61] or on the publisher's intention relevant to the question of meaning.[62] There have been many case law descriptions of the ordinary or reasonable publishee.[63] He or she is often described as one who reads between the lines, interprets publications in light of his or her general knowledge and experience, is neither too suspicious nor naïve, and is not avid for scandal. Courts accept some loose thinking from ordinary people who are said to have a greater capacity for implication than lawyers. But strained or forced meanings are not accepted, nor will the ordinary recipient interpret publications as conveying only the mildest imputations. So publications that report rumors can easily convey a substantial meaning; it is difficult to talk of "smoke" without publishees thinking there must be a "fire."

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55. *See* ROGERS, *supra* note 43, at 410-13.

56. *See* GATLEY ON LIBEL AND SLANDER, *supra* note 9, at 28.

57. ROGERS, *supra* note 43, at 416.

58. *See* GATLEY ON LIBEL AND SLANDER, *supra* note 9, at 92-93.

59. *See id.* at 96-97. In contrast, natural and ordinary meanings can be called 'popular' or 'false' innuendoes, which is an older terminology.

60. ROGERS, *supra* note 43, at 412.

61. No evidence of recipients' understandings is admissible on the natural and ordinary meaning. Neither dictionary definitions nor readership surveys are admissible. But evidence is admissible, although it is not determinative, where an innuendo meaning is pleaded.

62. The publisher's intention is relevant to issues of malice and damages.

63. *See generally* PRICE & DUODO, *supra* note 24, at 8-10.

Publications are considered in their entirety. For example, in *Charleston v. News Group Newspapers*,[64] an article's headline and main photograph may have suggested that television actors were involved in making a pornographic computer game, but the article's text stated that this was untrue. What was the legal effect of the undoubted fact that some readers saw only the headline? The House of Lords said no defamatory meaning could arise because defamation law says meanings are those conveyed to the reasonable recipient, who is taken to have read the whole publication.[65]

Although the literature on what meanings can be defamatory is extensive, research into defamation litigation strongly suggests that questions about whether meanings are defamatory generally are insignificant in practice.[66] The common law provided no comprehensive definition of what is defamatory. There are three commonly stated tests, and satisfying any one of them is sufficient. Material is defamatory if it (1) exposes the claimant to hatred, ridicule, or contempt;[67] (2) "tend[s] to lower the plaintiff in estimation of right-thinking members of society generally";[68] or (3) leads people to shun or avoid the claimant.[69] This third category—having a tendency to exclude the claimant from society without implying any moral fault on the claimant's part—is rarely used. It traditionally has been applied to situations involving allegations of insanity, having a serious contagious disease, or a woman having been raped.[70] As these old examples suggest, the standard of what is defamatory can change over time as social norms evolve.

In litigation practice, a publication's meaning is an important issue of dispute. It is understandable that a criticized claimant often interprets a publication as more seriously defamatory than its journalist author. Tactical considerations also drive claimants to allege that precise and damning meanings are conveyed, while defendants argue for wider, less serious meanings. These lesser meanings may be more plausible to defend or more useful in mitigating any damages eventually awarded. For example, parties frequently dispute whether a publication alleges that some misbehavior actually occurred or merely was suspected to have occurred. This sort of difference between the parties underlies judicial

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64. Charleston v. News Group Newspapers, [1995] 2 A.C. 65, 71-72 (Lords Bridge, Goff, Jauncey and Mustill), 73-74 (Lord Nicholls).

65. *Id.* at 65.

66. Andrew T. Kenyon, Word Games: Meaning in Defamation Law and Practice in England, New South Wales and Victoria (2002) (unpublished Ph.D. dissertation, University of Melbourne) (on file with the University of Melbourne Library).

67. Parmiter v. Coupland, [1840] 6 M &W 105; 151 E.R. 340.

68. Sim v. Stretch, [1936] 2 All E.R. 1237, 1240.

69. Youssoupoff v. MGM Pictures, [1934] 50 T.L.R. 581, 587.

70. GATLEY ON LIBEL AND SLANDER, *supra* note 9, at 34-36.

criticism of the long and complex analysis to which publications are subjected in English defamation litigation.

The judicial analysis can be extensive even before trial is reached. Preliminary determinations can be sought about whether pleaded meanings are capable of being conveyed or capable of being defamatory. Pre-trial, a judge may be in a position to decide these questions of capacity in a short hearing that involves no evidence. These pre-trial battles are quite common, although they are unlikely to result in dismissal. If a particular meaning cannot arise, a lesser meaning usually will be open, and leave to amend will be given. The pre-trial determinations, however, are important in shaping the scope of any eventual trial and the relative strength of the parties' positions. In particular, where the feasible defenses are truth or fair comment, determining the range of possible meanings is very important.

3. The Defendant's Case

Defenses excuse publications that otherwise would create liability. The main defenses are justification, fair comment, and absolute or qualified privilege.[71] A showing of malice by the claimant, however, will defeat both fair comment and qualified privilege.[72]

B. *Justification*

A publication's meaning is especially important for justification. At common law, defamatory publications are justified if shown to be true. If a publication is true, the claimant's reputation merely has been brought down to its "proper level."[73] The imputations found to be conveyed have to be proved true; it is not enough to prove that the publication's literal meaning is accurate.[74] Every detail need not be proved true, but the imputations need to be true in substance. Thus, justification would fail if the publication omits material facts altering the imputation's substance. And if a defamatory meaning is conveyed by repeating a rumor, the publisher must prove that the substance of

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71. Other defenses include (1) secondary responsibility under Defamation Act, 1996, c. 31, § 1 and (2) offer of amends after unintentional defamation (the rarely used provisions in Defamation Act, 1952, c. 66, § 4 have been replaced by Defamation Act, 1996, c. 31, §§ 2-4 since February 2000).

72. Justification is not defeated by malice, but the Rehabilitation of Offenders Act 1974 applies to "spent convictions" incurred a substantial time before the publication. Justification fails if that type of old conviction is referred to maliciously. Rehabilitation of Offenders Act, 1974, c. 53, § 8 (Eng.).

73. *E.g.*, Rofe v. Smith's Newspapers, [1924] 25 N.S.W.S. Ct. R. 4 (Austl.).

74. *Id.*

the rumor is true (or rely on some other defense).[75] The fact that the rumor is in circulation is not a sufficient defense.

For example, publishing that a person has been arrested and charged with a crime may impute suspicion that he or she is guilty of the crime. If so, the defendant is required to prove three matters: (1) the arrest and charge occurred, (2) the police had a suspicion of guilt with reasonable cause, (3) and the claimant's conduct giving rise to the suspicion occurred. The focus is on the claimant's conduct that gives rise to the suspicion, and the defendant need not prove actual guilt. But a publication might do more and suggest the claimant is guilty of a crime, rather than merely being suspected of being guilty. If so, the imputation of guilt must be defended.[76] In addition, other imputations might arise by referring to a prior criminal offense. It might be imputed that the claimant remains untrustworthy, which cannot be justified simply by proving a prior conviction. That is the basic position for justification: the publication's imputations must be defended.

C. *Fair Comment*

The common law defense of fair comment also applies in England. In theory, it is an attractive defense because the jury can find for the defendant without condemning the claimant. That is, the jury may think the publication is defamatory but decide it was merely the defendant's honest opinion. In this way, the defendant can draw on free speech arguments while the claimant is portrayed as a would-be censor. But the legal rules for this defense are quite technical, and in practice it appears that juries focus on the general question of whether the defendant has proved the truth of the publication's factual allegations.

The elements of common law fair comment can be categorized in various ways. The publication must be comment rather than fact and must be on a matter of public interest.[77] It must have a factual basis, with the facts being true or privileged.[78] And the comment must be "fair"—that is, possible for a commentator to make—but even a fair comment will be defeated by a showing of malice.[79]

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75. *Id.*

76. Evidence of an earlier criminal conviction for the offense can be used to defend such a publication, because legislation has changed the common law rule that prevented convictions from being used as evidence of crimes. *See* Defamation Act, 1996, c. 31, § 12.

77. GATLEY ON LIBEL AND SLANDER, *supra* note 9, at 289.

78. *Id.*

79. *Id.* at 289-90.

The publication must first be determined to be comment. Case law distinguishes comment from statements of fact, even if the division is problematic. Beginning with "in my opinion" is not decisive, but comment can include deductions or inferences drawn from facts. The question is how recipients can be expected to regard the publication—as fact or as comment. There are two common references in the case law. First, did the publication indicate both facts and comment?[80] If facts are indicated and a statement is inferred from them, the statement is more likely to be understood as comment. If facts are not indicated, an imputation is more likely to be understood as itself being factual. The second common reference is that facts and comment need to be indicated separately, not all mixed together.[81] If they are separate, the comment can be evaluated by a recipient in light of the facts. These two aspects of *indicating* facts *separately from* comment form a primary approach used by courts in distinguishing fact from comment.

Traditionally, publications attacking the claimant's motives will be interpreted as conveying factual allegations, which precludes the defense of fair comment. This is a very different approach from that taken in the United States, where matters of opinion can only be actionable if they convey false facts (and the plaintiff meets whatever fault standard applies to him or her).[82] But in *Branson v. Bower*,[83] a publication that alleged the claimant's motive was to seek revenge was held incapable of being factual. Rather, it was comment because it clearly was an inference drawn from facts in the publication. This decision has been seen as a departure from older case law and a significant endorsement of the defense of fair comment. It should allow greater media criticism of people's motives.

Second, fair comment must be on a matter of public interest—that is, matter inviting comment or of concern to the public. Courts have been reluctant to define public interest narrowly. A classic reference is to Lord Denning in *London Artists v. Littler*:

> I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment.[84]

Public interest, however, does not include everything that would interest the public. For example, while the private life of a politician

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80. *Id.* at 292-99.
81. *Id.*
82. Milkovich v. Lorain Journal, 497 U.S. 1 (1990).
83. Branson v. Bower (No. 1), [2001] E.W.C.A. Civ. 791.
84. London Artists v. Littler, [1969] 2 Q.B. 375, 391 (Eng. C.A.).

may be of public interest, it might not be regarded as relevant to the person's suitability for office.

Third, fair comment must be based on facts. The facts must be stated in the publication, and the subject matter must be indicated in the publication or be notorious.[85] The facts must be true or privileged.[86] At common law, all facts stated in the publication must be proved true.[87] Even relatively insignificant factual errors could defeat the defense. But the English defense has been extended by statute and will not fail if the comment is fair in regard to facts that have been proved true.[88] Comment can also be based on facts stated on a privileged occasion, such as during judicial or parliamentary proceedings. In such cases, the comment needs to be linked to a fair and accurate report of the privileged occasion.

Fourth, fair comment does not mean reasonable comment. The test is whether a reasonable person could express the opinion, even if it was exaggerated, prejudiced, or obstinate.[89] Once comment was shown to be fair objectively, it was presumed to be the publisher's honest opinion. But malice defeats fair comment. Recent English case law has stressed that malice is constituted by proof that the opinion was not honestly held. Ill will of the publisher is not determinative of malice. Honesty of belief is the decisive issue.[90]

D. *Privileges*

A publication's factual basis must have been proved true to succeed in defenses of justification or fair comment. Absolute and qualified privilege—defenses in which truth need not be shown—traditionally have been narrow and have mainly allowed the media to reproduce official documentation rather than to encourage investigative reporting in the interests of free speech. The development in qualified privilege in the late 1990s may be one of the most significant legal changes. *Absolute* privilege classically applied to comments made in Parliament[91] and to statements by participants in court proceedings and in tribunals exercising equivalent functions to those of courts. It also applied to communications outside court that were part of the process of investigating malfeasance before a

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85. *See* ROGERS, *supra* note 43, at 438-40.
86. GATLEY ON LIBEL AND SLANDER, *supra* note 9, at 299-300.
87. *Id.* at 300.
88. Defamation Act, 1952, c. 66, § 6.
89. Merivale v. Carson, [1887] 20 Q.B.D. 275, 281 (Lord Esher MR), 283-84 (Bowen LJ) (Eng. C.A.).
90. *E.g.*, Branson v. Bower (No. 2), [2001] E.M.L.R. 33 (Q.B.D.) (applying Tse Wai Chun Paul v. Albert Cheng, [2000] 3 H.K.L.R.D. 418 (Hong Kong Final C.A.)).
91. English Bill of Rights, 1689, art. 9.

possible prosecution or regulatory hearing.[92] Section 14 of the 1996 Defamation Act extended absolute privilege to contemporaneous fair and accurate reports of judicial proceedings in U.K. courts as well as in some European and international bodies.[93] Absolute privilege was not defeated by malice, rendering it a very strong defense when it applied.

The common law also recognized various categories of *qualified* privilege, which were said to exist for the "common convenience and welfare of society."[94] Qualified privilege was available when publishers acted to protect an interest or were under a recognized legal, social, or moral duty *and* the recipients had a corresponding duty or interest in receiving the publication.[95] This shared duty or interest could exist when material was published to a small audience, but if publication was widespread, the defense would likely fail. For example, while qualified privilege has long existed for fair reports of proceedings in Parliament, the defense generally has not protected media publications about matters of public interest.[96] Although the occasions of privilege were not definitively set by nineteenth century case law, the defense remained narrow during almost all of the twentieth century. Courts were reluctant to recognize new occasions on which society's "common convenience and welfare" required privilege to exist. The law required allegations of malfeasance to be reported to relevant authorities rather than to be published generally. The defense did not allow suspicions of corruption, for example, to be publicized. And there was no defense for publishers who reasonably believed defamatory allegations to be true, or for those who published something in the public interest after making reasonable inquiries.

Successive statutes extended qualified privilege to various fair and accurate reports of public proceedings in court and Parliament, including pubic inquiries, as well as some public meetings, notices, and official reports.[97] Schedule 1 of the 1996 Defamation Act sets out the categories of reports protected in this way.[98] For some reports, such as those of public meetings, the protection is lost if the defendant refuses a claimant's request for it to publish a reasonable

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92. Mahon v. Rahn (No 2), [2000] 4 All E.R. 41 (Eng. C.A.).

93. Defamation Act, 1996, c. 31, § 14.

94. Toogood v. Spyring, [1834] 1 C.M. & R 181, 193.

95. Blackshaw v. Lord, [1984] Q.B. 1.

96. *Id.* But the media might be able to rely on an ancillary or derivative protection, for example, if it published one person's reply to an attack made against the person by another.

97. Defamation Act, 1996, c. 31, sched. 1. Some such reports also receive protection at common law. *See* GATLEY ON LIBEL AND SLANDER, *supra* note 9, at 483-88.

98. Defamation Act, 1996, c. 31, sched. 1.

explanation in response to the report.[99] For all the reports protected under statute, the privilege is lost if publication is not of public concern or for the public benefit.[100] In the significant 2000 decision of *McCartan Turkington Breen v. Times Newspapers*,[101] the House of Lords made clear that media conferences are within the concept of public meetings so that media reports of the conferences receive this statutory protection. In the leading speech, Lord Bingham noted "[t]he functioning of a modern participatory democracy requires that the media be free, active, professional and enquiring."[102] The case meant that the public meeting provisions of the 1996 Defamation Act offered a significant avenue for protecting media reporting, especially because a "public meeting" does not require any opportunity for participation[103] or even that the issue giving rise to the claim be orally discussed—a handout will suffice. The defense, however, does not protect what was said at media conferences; it only protects subsequent media reports of what was said.

E. *The* Reynolds' *Decision*

The 1999 House of Lords decision in *Reynolds v. Times Newspapers*[104] altered the approach to qualified privilege. *Reynolds* established that common law qualified privilege could apply to publications in the media and that the traditional duty and interest requirements could be satisfied by media publications because the public had a right to know in all the circumstances. This was widely seen as a major development since the accepted elements of the defense gave publishers no defense even if they were not careless or published the material to serve a general public interest. The House of Lords did not create a generic qualified privilege for all *political* material because it thought this would offer too strong a protection for this type of speech. With a generic approach, all such media publications would be protected unless claimants proved malice. Under the influence of the European Convention on Human Rights,[105] journalists' confidential sources are accorded very strong protection in England,[106] which makes it extremely difficult to prove malice. In addition, a generic approach was rejected because its

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99. Defamation Act, 1996, c. 31, § 15(2).
100. Defamation Act, 1996, c. 31, § 15(4).
101. McCartan Turkington Breen v. Times Newspapers, [2000] 4 All E.R. 913.
102. *See id.*
103. *See id.*
104. *See* Reynolds v. Times Newspapers, [2001] 2 A.C. 127.
105. *See* Goodwin v. United Kingdom, App. No. 17488/90, Reporter 1996-II, 22 Eur. H.R. Rep. 123, ¶ 9 ("Protection of journalist sources is one of the basic conditions for press freedom.").
106. *See* Contempt of Court Act, 1981, c. 49, § 10 (Eng.).

scope—limited to politics—would be too narrow.[107] Instead, the House of Lords concluded that common law qualified privilege should focus on the publication's public interest qualities. In the leading judgment, Lord Nicholls listed ten illustrative factors relevant to whether publication occurred on an occasion of qualified privilege.

> (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed. . . . (2) The nature of the information, and the extent to which the subject matter is a matter of public concern. (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid. . . . (4) The steps taken to verify the information. (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff. . . . An approach to the plaintiff will not always be necessary. (8) Whether the article contained the gist of the plaintiff's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication, including the timing.[108]

Thus, courts must consider matters about the publication, as well as the source of the information, such as the steps taken to verify it. But a source's identity need not necessarily be revealed in order to claim the privilege.[109]

Although qualified privilege failed on the facts in *Reynolds*—largely—because the publisher had failed to tell *Reynolds'* side of the story when making serious allegations of misconduct by a political leader—the comments of Lord Nicholls suggest that the defense should be useful to the media.

> Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.[110]

Courts have subsequently used the ten *Reynolds* factors as a checklist and focused on the idea of "responsible" journalism. Cases suggest the defense may fail when publications are repeated and sensational, sources are unreliable, claimants are not contacted before publication (at least when there is no urgency to publish), or matters of suspicion

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107. *See* Reynolds v. Times Newspapers Ltd., [2001] 2 A.C. 127.
108. *See* Reynolds, [2001] 2 A.C. 127, 205.
109. *E.g.*, Gaddafi v. Telegraph Group, [2000] E.M.L.R. 431 (Eng. C.A.).
110. *See Reynolds*, [2001] 2 A.C. 127, 205.

are presented as fact.[111] For example, in *Bonnick v. Morris*,[112] the Privy Council emphasized the need to apply standards of responsible journalism in a practical manner and for courts to consider journalists' conduct more than whether journalists foresaw the actual meaning conveyed by a publication: "To be meaningful this standard of conduct must be applied in a practical and flexible manner. . . . [A] journalist should not be penalised for making a wrong decision on a question of meaning on which people might reasonably take different views."[113]

In another notable decision, *Al-Fagih v. H.H. Saudi Research & Marketing*,[114] the Court of Appeal held that qualified privilege applied to a newspaper that reported a political dispute among members of the Saudi Arabian community in London. The newspaper published allegations made during the dispute without attempting to verify them. The defense applied because "both sides to [the] political dispute [were] being fully, fairly and disinterestedly reported in their respective allegations and responses" and the public was "entitled to be informed of such a dispute."[115]

But the *Reynolds'* approach, with each publication being closely analyzed on its facts, may raise difficulties in litigation practice, especially in the division of judge's and jury's roles. The law attempts to provide a simple rule under which the occasion of the privilege's existence is a matter for the judge and malice is a matter for the jury. But there could be many disputed facts relevant to whether the privilege exists, and the jury has to rule on these before the judge's decision. This means jury questionnaires can be very complex. In *Loutchansky v. Times Newspapers*, for example, the jury was sent an "examination paper."[116] In any event, commentators and the courts expect judicial decisions to clarify the circumstances in which publications will be protected. Lord Nicholls commented about the *Reynolds* factors' flexibility and said:

> This uncertainty, coupled with the expense of court proceedings, may "chill" the publication of true statements of fact as well as those which are untrue. . . . However, the extent of this uncertainty should not be exaggerated. With the enunciation of some guidelines by the court, any

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111. *See* Grobbelaar v. News International, Ltd., [2002] 1 W.L.R. 3024; James Gilbert v. MGN, [2000] E.M.L.R. 680; *c.f.* GKR Karate v. Yorkshire Post Newspapers, [2000] E.M.L.R. 410.

112. Bonnick v. Morris, [2002] U.K.P.C. 31.

113. *Id.* ¶ 24.

114. Al-Fagih v. H.H. Saudi Research & Marketing, [2002] E.M.L.R. 13 (Eng. C.A.).

115. *Id.* at 13, 52 (Simon Brown, LJ).

116. Loutchansky v. Times Newspapers, [2001] E.M.L.R. 898, 912 (Gray, J), [2001 E.W.C.A. Civ 92 (C.A.), (no. 2), [2001] E.W.C.A. Civ 1805 (C.A.), [2002] E.W.H.C. 2490 (Q.B.), [2002] E.W.H.C. 2726 (Q.B.).

> practical problems should be manageable. The common law does not seek to set a higher standard than that of responsible journalism. . . .[117]

III. PRE-*REYNOLDS* INTERVIEWS

Before *Reynolds*, the English media gave the appearance of being very aggressive and robust.[118] Indeed, Britain's tabloid newspapers seemed particularly aggressive and hard-hitting. But the pre-*Reynolds* interviews, conducted in the early 1990s, suggested that this appearance was, at best, misleading. English defamation law took a significant toll on the willingness of the English media to report on matters of public interest.

A. *Threats of Suit*

At the time of the initial interviews, English newspapers and broadcasters received fairly large numbers of defamation complaints. For example, News International received three to four letters a week, or 150 to 200 letters a year.[119] Even quality newspapers, which were less inclined to sensationalize, regularly received letters from solicitors regarding their coverage. These letters could average two or more a week.[120] For example, *The Guardian* received somewhere between 100 and 120 letters from solicitors a year.[121] Thames Television received about 100 letters from solicitors a year.[122] *The Times* received letters from solicitors at the rate of two or three every two weeks, or between fifty and 100 letters a year.[123]

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117. Reynolds v. Times Newspapers, [2001] 2 A.C. 127 (Nicholls, J.).

118. *See* Weaver & Bennett, *supra* note 20, at 1156, 1165-69.

119. Interview with Anonymous News International Lawyer, London, Eng. (June 4, 1992) [hereinafter Interview with Anonymous News International Lawyer].

120. Interview with Anonymous Guardian Editor, London, Eng. (May 28, 1992) [hereinafter Interview with Anonymous Guardian Editor]; Interview with Anonymous News International Lawyer, *supra* note 119; Interview with Anonymous Thames Television Legal Officer, London, Eng. (June 4, 1992) [hereinafter Interview with Anonymous Thames Television Legal Officer]; Interview with Anonymous Times Legal Officer, London, Eng. (June 3, 1992) [hereinafter Interview with Anonymous Times Lawyer].

121. Interview with Anonymous Guardian Editor, *supra* note 120.

122. Interview with Anonymous Thames Television Legal Officer, *supra* note 120.

123. Interview with Anonymous Times Lawyer, *supra* note 120.

B. *The Rate of Defamation Litigation*

Although few letters from solicitors resulted in litigation, plaintiffs served the English media with a significant number of writs. For example, at News International, of the 150 to 200 letters received a year, about ten percent evolved into writs (in other words, fifteen to twenty writs a year).[124] For every 100 or so demand letters received by Thames Television, about five percent resulted in writs (five writs a year).[125] *The Times* received a writ about once a month (twelve writs a year).[126]

C. *Responses to Post-Publication Suits and Threats of Suits*

The English media aggressively attempted to deal with threatening letters on a pre-writ basis. If a paper or broadcaster thought that a statement was inaccurate, it would usually offer to retract the statement,[127] and it might offer to pay a small amount of damages.[128] Some papers made such retractions in response to about a third of the letters they received.[129] Of course, some matters could not be settled and resulted in litigation, something which occurred about ten percent of the time.[130] Of the 100 to 120 letters *The Guardian* received from solicitors a year, it paid a small settlement sum in about forty cases.[131] Thames Television found that it had an adequate defense, and was able to persuade opposing solicitors of this fact, in nearly ninety-nine percent of all cases.[132]

The rate of suits may have been affected by tighter rules in regard to the size of damages awards that took effect after the pre-*Reynolds* interviews. One would assume that the rewards on offer would affect the willingness to go to court. Two cases dampened the expectation of large damages awards. First, the European Court of Human Rights concluded that the award of large cash sums could be disproportionate to the need to protect reputations under Article

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124. Interview with Anonymous News International lawyer, *supra* note 119.

125. Interview with Anonymous Thames Television Legal Officer, *supra* note 120.

126. Interview with Anonymous Times Lawyer, *supra* note 120.

127. *Id.*

128. *Id.*

129. Interview with Anonymous Guardian Editor, *supra* note 120; Interview with Anonymous Thames Television Legal Officer, *supra* note 120.

130. Interview with Anonymous News International Lawyer, *supra* note 119; Interview with Anonymous Thames Television Legal Officer, *supra* note 120.

131. Interview with Anonymous Guardian Editor, *supra* note 120.

132. Interview with Anonymous Thames Television Legal Officer, *supra* note 120.

10.[133] This requirement proved to be the stumbling block in *Tolstoy Miloslavsky v. U.K.*[134] The size of the award (£1.5 million) in favor of Lord Aldington (for the libels accusing him of involvement in war crimes against Cossak and Yugoslav prisoners-of-war and refugees at the end of World War II) could not be viewed as proportionate to the legitimate aim of the protection of an individual's reputation and therefore not necessary in a democratic society. The European Court was heavily influenced by the fact that it was three times higher than any previous award and that at the time when the award was made the prevailing view was that the Court of Appeal could only interfere if an award was irrational, not just because it viewed the award as excessive. Second, at the domestic level and even before the decision in *Tolstoy,* the Court of Appeal concluded in *Rantzen v. M.G.N.*[135] that the courts should be readier to reduce awards under the 1990 Courts and Legal Services Act because of the requirement of proportionality under Article 10. Accordingly, the £250,000 award to the plaintiff made against the defendant, *The People*, was reduced to £110,000.

D. *Insurance*

Although it was possible before *Reynolds* for newspapers and broadcasters to insure themselves against possible defamation losses, few found it feasible to do so.[136] Insurance was often expensive[137] and usually came with very high deductibles.[138] So, virtually all publishers found that the best way to protect themselves was, rather, through careful reporting.

E. *The Motivations of Defamation Plaintiffs*

Unfortunately, the 1990s interviews did not focus on the motivations of defamation plaintiffs and therefore uncovered little relating to that issue.

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133. Miloslavsky v. United Kingdom, App. No.18139/91, [1995] Eur. Ct. H.R. 25, ¶¶ 48-50 (Jul. 13).

134. Miloslavsky v. United Kingdom, App. No.18139/91, [1995] Eur. Ct. H.R. 25, ¶¶ 48-50 (Jul. 13).

135. Rantzen v. MGN, [1994] Q.B. 670; *see also* John v MGN, [1997] QB 586; Kiam v MGN, [2002] E.W.C.A. Civ. 43.

136. Interview with Anonymous Guardian Editor, *supra* note 120.

137. *Id.*

138. Interview with Anonymous Thames Television Legal Officer, *supra* note 120. The Guild of English Newspaper Editors survey found that there had been an increase in the percentage of papers which carried insurance from fifty-eight percent in 1990 to seventy percent in 1991. Insurance premiums had increased for thirteen percent of those insured.

F. *Participation of Lawyers in the Editorial Process*

Unlike U.S. newspapers and broadcasters, which tended (and tend) not to involve lawyers in the editorial process,[139] most English newspapers routinely involved lawyers in the pre-*Reynolds* era. Indeed, they had teams of lawyers (usually junior barristers from local law offices who act as "night lawyers") who reviewed each day's paper for material that might be defamatory. *The Guardian*, for example, had several lawyers review each day's paper before it was published.[140] *The Times* had an in-house staff of three solicitors who performed this task, and it also employed a "night barrister" who came in during the evening to make spot checks.[141] Thames Television had two lawyers who spent up to seventy percent of their time on defamation issues.[142] While these two lawyers could not review all programs, they tried to review as many as they could, and they made a special point of reviewing high-risk investigative programs.[143]

G. *The Role of Lawyers in the Editorial Process: Privileges and "Legally Admissible Evidence"*

The presence of lawyers had a significant effect on the publication process. At most English newspapers, if a lawyer flagged an article or program as potentially defamatory, a secondary review process was then triggered. Editors (and sometimes lawyers) would then meet with the reporters who wrote the story in an effort to determine the basis for allegations.[144] Throughout the process, the focus was on legal sufficiency.[145] Most meetings focused on whether, if the organization was forced to defend a story in court, it would have legally admissible evidence with which to defend itself.[146] At Thames

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139. *See* Weaver & Bennett, *supra* note 20, at 1189-90.

140. *Id.* at 1171-72.

141. *Id.* at 1172.

142. Interview with Anonymous Thames Television Legal Officer, *supra* note 120.

143. *Id.*

144. Interview with Anonymous Guardian Editor, *supra* note 120; Interview with Anonymous News International Lawyer, *supra* note 120; Interview with Anonymous Thames Television Legal Officer, *supra* note 120; Interview with Anonymous Times Lawyer, *supra* note 120.

145. Interview with Anonymous Guardian Editor, *supra* note 120; Interview with Anonymous News International Lawyer, *supra* note 120; Interview with Anonymous Thames Television Legal Officer, *supra* note 120; Interview with Anonymous Times Lawyer, *supra* note 120.

146 Interview with Anonymous Guardian Editor, *supra* note 120; Interview with Anonymous News International Lawyer, *supra* note 120; Interview with

Television, one of the solicitors would meet with the editor and reporter in an attempt to determine the basis for any allegations that were made.[147] This was a cooperative process under which the solicitor would try to understand and accommodate the needs of program makers.[148]

But the process was also pragmatic. Editors considered whether, even if evidence was admissible, the sources were willing to go "into the box" and testify.[149] Editors were reluctant to rely on evidence learned from a source that they could not expose[150] or who was likely to go "wobbly."[151] Editors would also consider whether information was learned under the "lobby system" and was therefore deemed to be off the record and unavailable in court.[152] Editors might also consider whether the subject of the article was someone who was likely to sue.[153] Counsel for News International stated that he focused on three basic issues: (1) Is the statement true?; (2) Can we prove it?; and (3) Is the person mentioned likely to file suit?[154] Other organizations used similar criteria.[155]

H. *The Effect of the "Legally Admissible Evidence" Standard on Reporting*

All media organizations indicated in their pre-*Reynolds* interviews that, as a matter of journalistic ethics, they did not want to print or broadcast anything that was untrue.[156] But all also stated

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Anonymous Thames Television Legal Officer, *supra* note 120; Interview with Anonymous Times Lawyer, *supra* note 120.

147. Interview with Anonymous Guardian Editor, *supra* note 120; Interview with Anonymous News International Lawyer, *supra* note 120; Interview with Anonymous Thames Television Legal Officer, *supra* note 120; Interview with Anonymous Times Lawyer, *supra* note 120.

148. Interview with Anonymous Guardian Editor, *supra* note 120; Interview with Anonymous News International Lawyer, *supra* note 120; Interview with Anonymous Thames Television Legal Officer, *supra* note 120; Interview with Anonymous Times Lawyer, *supra* note 120.

149. Interview with Anonymous News International Lawyer, *supra* note 119; Interview with Anonymous Times Lawyer, *supra* note 120.

150. Interview with Anonymous News International Lawyer, *supra* note 119; Interview with Anonymous Times Lawyer, *supra* note 120.

151. Interview with Anonymous Times Lawyer, *supra* note 120.

152. The Prime Minister's private secretary may brief the political editors of Britain's national newspapers. These briefings, which were once rendered in the lobby and therefore referred to as the "lobby system," are usually "off the record." Nevertheless, editors obtain much salient, and sometimes juicy, information. *Id.*

153. Interview with Anonymous News International Lawyer, *supra* note 119.

154. *Id.*

155. Interview with Anonymous Thames Television Legal Officer, *supra* note 120.

156. Interview with Anonymous Guardian Editor, *supra* note 120; Interview with Anonymous News International Lawyer, *supra* note 120; Interview with

that they were not able to publish everything that they believed was true.[157]

After considering the mixture of factors set forth above, editors decided whether to publish. This decision was often a "team" decision involving the editor and the reporter and perhaps the head of the department.[158] This process could produce a variety of results. Although editors sometimes decided to scrap an article,[159] this option was rarely chosen.[160] More common, editors tried to save a piece by rewriting or altering it in a way that would limit their exposure.[161] In rewriting a piece, editors might delete segments that were not legally supportable,[162] present the subject in a more balanced fashion,[163] or change a statement of fact to an opinion in order to make the statement a "comment" potentially protected by the privilege of fair comment.[164]

Of course, it is possible that some newspapers and broadcasters regarded the threat of defamation liability as simply a cost of doing business, and therefore were willing to engage in more robust reporting despite the threat of liability in order to gain a competitive advantage.[165] In other words, it is possible that some hoped that they could net enough additional revenue to pay defamation claims and still make a profit.[166] But English newspapers and broadcasters denied that this was the case.[167] Even the tabloids suggested that such a course of action was too dangerous. A legal staffer at News International, which owns *The Sun*, claimed that the risk of

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Anonymous Thames Television Legal Officer, *supra* note 120; Interview with Anonymous Times Lawyer, *supra* note 120.

157. Interview with Anonymous Guardian Editor, *supra* note 120; Interview with Anonymous News International Lawyer, *supra* note 120; Interview with Anonymous Thames Television Legal Officer, *supra* note 120; Interview with Anonymous Times Lawyer, *supra* note 120.

158. Interview with Anonymous Times Lawyer, *supra* note 120.

159. Interview with Anonymous Guardian Editor, *supra* note 120.

160. Interview with Anonymous Guardian Editor, *supra* note 120; Interview with Anonymous Thames Television Legal Officer, *supra* note 120 (noting only one instance in which Thames Television was forced to "kill" a program in its entirety); Interview with Anonymous Times Lawyer, *supra* note 120.

161. Interview with Anonymous Guardian Editor, *supra* note 120; Interview with Anonymous Times Lawyer, *supra* note 120.

162. Interview with Anonymous Times Lawyer, *supra* note 120.

163. Interview with Anonymous Thames Television Legal Officer, *supra* note 120.

164. Interview with Anonymous Times Lawyer, *supra* note 120.

165. *Id.*

166. *Id.*

167. Interview with Anonymous Guardian Editor, *supra* note 120; Interview with Anonymous News International Lawyer, *supra* note 120; Interview with Anonymous Thames Television Legal Officer, *supra* note 120; Interview with Anonymous Times Lawyer, *supra* note 120.

defamation liability was simply too great[168] and that it was difficult to predict which stories would produce major circulation increases.[169] In his view, there were fantastic stories that produced no significant increase in sales.[170]

I. *The Media and Particularly Litigious Individuals*

The English media considered a subject's willingness to sue as one of the three most important factors in risk assessment. As a result, as to those who were deemed to be particularly litigious, editors were less inclined to take risks.[171] In other words, the litigiousness was a factor that was explicitly considered in the publication decision-making process.[172]

By contrast, the English media tended to report more freely on those who tended not to sue for defamation. Included were the English Royal Family and publishing magnate Rupert Murdoch. It is interesting that the Australian media adopted a similar approach with regard to the Royal Family and Rupert Murdoch.[173] But one company lawyer indicated that, regardless of whether someone like Murdoch was likely to sue, he would always be careful about someone so rich and powerful. The English media also reported fairly freely on Cabinet ministers who, by custom, could not sue for defamation without first gaining clearance.[174] Of course, this custom provided publishers with only a limited reprieve. Once ministers relinquished their cabinet posts, they were free to sue regarding defamatory statements made while they were in office provided that the statute of limitations had not expired.[175]

Among litigious individuals, the late Robert Maxwell, the English publishing magnate who died mysteriously off the coast of the Canary Islands in 1992, was easily regarded as the most litigious. English editors and lawyers flatly stated that they were well aware of Maxwell's litigious nature.[176] An in-house lawyer for *The Times* stated that Maxwell was quick to serve defamation writs and that he would do so if the newspaper got so much as a word wrong.[177] One

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168. Interview with Anonymous News International Lawyer, *supra* note 119.
169. *Id.*
170. *Id.*
171. Interview with Anonymous Thames Television Legal Officer, *supra* note 120.
172. *Id.*
173. *Id.*
174. Interview with Anonymous Thames Television Legal Officer, *supra* note 120; Interview with Anonymous Times Lawyer, *supra* note 120.
175. Interview with Anonymous Times Lawyer, *supra* note 120.
176. *Id.*
177. *Id.*

defamation lawyer stated that Maxwell used libel law "savagely" and that the media were therefore afraid of him.[178]

Because Maxwell was so litigious, English newspapers and broadcasters were quite careful about how they reported on him.[179] The English media repeatedly indicated that Maxwell's threats had a chilling effect that influenced them not to publish allegations that could not be easily and thoroughly proved in court.[180] One defamation lawyer indicated that he routinely demanded proof that "one hundred percent" of all allegations made against Maxwell were accurate.[181] Publishers would make allegations against Maxwell when they had strong evidence to support their allegations, but the media would withhold publication when it lacked compelling proof. Thus, the media withheld items that would have been aired against someone who was less litigious.[182]

The net effect of Maxwell's litigiousness was that many things that were known about Maxwell, including his financial reverses, came to light only after his death.[183] By that time, it was too late to prevent financial losses to English pensioners who had invested in Maxwell's companies. Some interviewees suggested that Maxwell's financial problems would have come to light earlier if not for Maxwell's litigious nature, which made the English press reluctant to make allegations against him.[184] As a result, Maxwell's problems were revealed too late to allow the public to protect itself.[185]

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178. Interview with Anonymous Thames Television Legal Officer, *supra* note 120; *see also* Interview with Anonymous News International Lawyer, *supra* note 119 (explaining that the media was "afraid" of Maxwell).

179. Interview with Anonymous Thames Television Legal Officer, *supra* note 120.

180. *Id.*

181. Interview with Anonymous News International lawyer, *supra* note 119.

182. *Id.*

183. *Id.*

184. Columnist Anthony Lewis summarized the situation as follows:

> How could he get away with it for so long? That is the question posed by the collapse of Robert Maxwell's empire so quickly after his death. For years he ran what amounted to an international confidence game, borrowing more and more, covering up his accounts. An official English inquiry in 1971 found him unfit to be in charge of a public company. Yet politicians honored him; and newspapers printed his boasts, hollow though most of them turned out to be. The Financial Times of London said last week that Maxwell was not some unimportant figure; his operations affected large interest and many people. "How was it," the paper asked, "that he was able to play such a role, for so many years, with such apparently cavalier disregard for the normal standards of probity? How could some of the world's leading banks lend so much money to him?" It was English corporate regulatory law that failed, the Financial Times said. Yes, it did. But there was another reason why Maxwell escaped proper scrutiny for so long: Britain's stringent libel law, which makes it dangerous to write critically about a scoundrel like Maxwell. Whenever anyone suggested wrongdoing by

J. *A Resourceful Media: Exploiting Privileges*

Because of their fear of defamation suits, English newspapers and broadcasters were resourceful about finding alternative ways to get material into print. For example, the English media took advantage of various privileges, including the absolute privileges for accurate reporting of parliamentary debates[186] and judicial proceedings.[187] Indeed, many hard-hitting pieces were carefully sculpted based on statements rendered in privileged contexts.[188]

The English media's tendency to base allegations on testimony heard in courts or in Parliament was somewhat disturbing. It is obviously desirable for the media to report what transpires in those two contexts. But in a democratic society, one would prefer to have media outlets that do their own investigations and report freely about them. Although the United Kingdom did have investigative journalists, the firm impression was conveyed through interviews that its press reported less freely and tended to publish fewer investigative pieces than its counterpart in the United States.

When newspapers gained information about a scandal, but thought that they did not have enough legally admissible evidence to support their allegations, they sometimes asked a member of

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> Maxwell, he sued. He brought 21 libel actions against the authors and others connected with two biographies of him. He sued the BBC, Rupert Murdoch, the editors of half a dozen English newspapers. The threat of a libel suit is so potent in silencing critics in Britain because the law is so favorable to libel plaintiffs. Nearly everyone who sues the press gets a cash settlement or wins a jury verdict at trial - and keeps it on appeal.

Anthony Lewis, *Britain's Plaintiff-Friendly Libel Laws Shielded Maxwell's Scams From Scrutiny*, L.A. DAILY J., Dec. 16, 1991, at 2 (December 16, 1991); *see* Mirror Group Newspapers plc, Investigations under Sections 432(2) and 442 of the Companies Act 1985, Report by The Honourable Sir Roger John Laugharne Thomas & Raymond Thomas Turner FCA (2001), *available at* http://www.dti.gov.uk/cld/mirrorgroup/summary.htm.

185. Mirror Group Newspapers plc, Investigations under Sections 432(2) and 442 of the Companies Act 1985, Report by The Honourable Sir Roger John Laugharne Thomas & Raymond Thomas Turner FCA (2001), *available at* http://www.dti.gov.uk/cld/mirrorgroup/summary.htm.

186. ROGERS, *supra* note 43, at 443.

187. *Id.* at 444.

188. Illustrative is the following piece:

> Two Kray twin copycats hatched an amazing plot to kidnap soccer hero Paul Gascoigne, a court heard yesterday. Would-be gangsters Lindsay and Leighton Frayne allegedly recruited Gazza's bodyguard and driver—ex-SAS man Paul Edwards—to snatch the star. The plot was revealed at Newport Crown Court where the brothers are accused of robbery and conspiracy.

DAILY MIRROR, June 4, 1992, at 1.

Parliament (MP) to raise the matter during "question time."[189] The press was then free to report on the question and the response, if any. If the paper thought strongly enough about a matter, it might ask a MP to schedule a matter for an "early day motion"—a motion suggesting that a matter has troubling implications and should be investigated.[190]

K. *Ability to Report the Public Interest*

Although few stories were completely scrapped for lack of evidence, Britain's defamation laws took an inevitable toll on political reporting. Editors would print allegations against public officials, but they rarely did so except when there was strong supporting evidence.[191] One editor referred to the Wilbur Mills' tidal basin incident that occurred in the United States.[192] He suggested that the facts in that case were so strong that, had a similar incident occurred in Britain, it would have been widely reported and been the subject of much derisive comment.[193]

But the English media frankly admitted that defamation laws had a significant effect on their coverage. Every English editor and defamation lawyer interviewed expressed serious concerns about the state of English law. A company solicitor thought that English law gave plaintiffs an "easy run" by making papers "guilty [of defamation] until proven innocent."[194] One editor complained that even quite small errors could lead to adverse judgments.[195] Thames Television's counsel suggested that defamation cases entail high risk because juries almost always find against media defendants,[196] even though only the strongest cases are ever litigated.[197] Thames' counsel also complained that defamation cases often yielded relatively large judgments. This resulted in the anomaly that, even though a plaintiff who suffered personal injury might recover, say, £50,000 for a serious

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189. Interview with Anonymous Thames Television Legal Officer, *supra* note 120; Interview with Anonymous Times Lawyer, *supra* note 120.

190. Interview with Anonymous Thames Television Legal Officer, *supra* note 120; Interview with Anonymous Times Lawyer, *supra* note 120.

191. Interview with Anonymous Guardian Editor, *supra* note 120.

192. Wilbur was a member of Congress who was found swimming naked with a stripper in the tidal basin next to the Jefferson Memorial in Washington, D.C.

193. Interview with Anonymous Guardian Editor, *supra* note 120.

194. Interview with Anonymous Times Lawyer, *supra* note 120.

195. Interview with Anonymous Guardian Editor, *supra* note 120.

196. Interview with Anonymous Thames Television Legal Officer, *supra* note 120.

197. *Id.* (suggesting that this occurs because the tabloids tend to cause both the public and judiciary to hold the press and broadcast media in disrespect). Others agreed. Interview with Anonymous News International Lawyer, *supra* note 119 (noting that, at the trial court, newspapers are "likely to lose").

injury, the same person might have received as much as £500,000 if he or she was defamed.[198] This situation partly reflected the fact that England handled the two types of cases differently from a procedural perspective. Personal injury cases were dealt with by a judge sitting alone who relied on his own experience as well as on amounts awarded in prior cases.[199] By contrast, defamation was one of the few areas of the law where juries were still the norm. As related earlier, damages claims were reined in to some extent during the mid-1990s.[200]

Britain's defamation laws did, however, have one positive effect: they encouraged newspapers and broadcasters to make sure that their reporting was even-handed. Because they feared the possibility of defamation liability, English editors tended to check and recheck their stories. In addition, they tended to rewrite articles to make sure that their coverage was balanced.[201] For example, *The Guardian* was particularly careful about balance.[202] If there was contrary information, it often placed that information closer to the beginning of the piece rather than at or near the end.

Virtually no English publisher expressed flippancy about the legally admissible evidence standard and the need for fact checking. One of the few who did, *Private Eye* Editor Ian Hislop,[203] was dramatically affected when the magazine suffered a £600,000 judgment in the Sonia Sutcliffe case.[204] Following the judgment, Hislop expressed concern about the ruinous nature of the judgment in an interview with "Morning Edition":

> Edwards: *Private Eye* has a circulation of about 200,000.
>
> Hislop: That's right.
>
> Edwards: Can you begin to afford this kind of settlement?

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198. Interview with Anonymous Thames Television Legal Officer, *supra* note 120.

199. *See* Ward v. James, [1965] 1 All E.R. 563 (Eng. C.A.) (Denning, L.J.) (reviewing and confirming abandonment of jury system in damages actions for personal injury).

200. The approach to damages did change during the second-half of the 1990s, when reasonably successful attempts were made to rein in defamation damages and make them more comparable to damages for pain and suffering in personal injury cases. *See* Andrew T. Kenyon, *Problems with Defamation Damages?* 24 MONASH U.L. REV 70 (1998).

201. Interview with Anonymous Thames Television Legal Officer, *supra* note 120.

202. Interview with Anonymous Guardian Editor, *supra* note 120.

203. Interview by Bob Edwards with Ian Hislop, Editor, Private Eye Magazine (National Public Radio's Morning Edition, Mar. 3, 1992).

204. Sutcliffe v Pressdram Ltd., [1991] 1 QB 153. Sutcliffe was the wife of the mass murderer, Peter Sutcliffe, also known as "the Yorkshire Ripper."

> Hislop: No, obviously not.[205]

Nevertheless, Hislop expressed optimism that his readers would help bail him out:

> Edwards: You're trying to raise the money to cover this, aren't you, right now?
>
> Hislop: Yes, and we are desperately trying to get our readers to cough up.
>
> Edwards: And how's that going?
>
> Hislop: Well, there's a lot of money coming in, which is very good news. I am hopeful we're going to raise it and I am hoping that we will win our appeal on the grounds that this is a perverse award. But I'm not sold on the fact that the law will bail us out. I have very little confidence in the law. I have a feeling that our readers might be more reliable than the workings of the legal system.[206]

Private Eye continued (and continues) to publish, and the damages were later reduced to £60,000 on appeal.[207]

The net effect, according to a pre-*Reynolds* interview of a British Broadcasting Corporation (BBC) official, was that investigative journalism had fallen into what he referred to as "disuse" in the United Kingdom.[208] Most investigative programs deal with consumer matters (e.g., cheats, car salesmen, and car mechanics).[209] This BBC solicitor spent half of his time on such programs for thirty weeks a year.[210] But investigative journalism is expensive in terms of money and effort— not only because of the research and legal input that goes into a program, but because it can result in wasted effort if a story "falls down" (or, to put it another way, is scrapped) because publishers like the BBC cannot prove it in court.[211]

L. *A Hypothetical English "Watergate"*

When English publishers and broadcasters were asked about a case like Watergate, most thought that the story would not have been published in Britain.[212] The story was slow developing and was initially based on inside sources who were unwilling to be named. In some instances, sources were unknown even to the reporters themselves and were unwilling to be publicly revealed. Thus, it would

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205. Interview by Bob Edwards with Ian Hislop, *supra* note 203.
206. *Id.*
207. Sonia Sutcliffe won nine libel cases against various publications.
208. Interview with Anonymous BBC Legal Staffer, *supra* note 34.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*

have been difficult for editors and publishers to produce legally admissible evidence substantiating their allegations of misconduct. English editors and defamation lawyers uniformly stated that, without legally admissible evidence, they would have been unable to print such allegations.[213] Even *The Sun* newspaper, a tabloid, suggested that it would have been "reluctant to run" such a story.[214] If a libel suit had been brought, news sources might have "dried up." The sources, who in the case of Watergate were governmental insiders, might have feared retaliation and refused to provide further information. As a result, the investigation might not have continued to conclusion and the full extent of the scandal might never have been revealed.

M. *Britain's Cost Rules*

Unfortunately, the 1990s interviews did not focus on England's "cost rules" (the rules that allow a court to impose "costs" on the losing party, including attorney's fees).[215] More recent interviews suggest that Britain's cost rules probably had a major effect on English defamation litigation at the time and continue to exert a similar effect.[216]

Interview results from Australia, a system with similar cost rules, shows that such rules can have a significant effect on defamation litigation.[217] In an Australian defamation case, attorneys' fees can be quite high. For example, in 1994, a solicitor for *The Sydney Morning Herald* estimated that it cost approximately $8,000 a day ($40,000 a week) to litigate a case, and that it usually cost somewhere between $100,000 and $200,000 to litigate a case through a two week trial.[218] A solicitor who sometimes took plaintiff's cases put the figure much higher.[219] In theory, if the media defendant lost, it could be ordered to pay both sides' costs. If it won, it was entitled to an award of fees. But one solicitor indicated that the media defendant usually received an award of only $40,000 (or so) if it spent $200,000, and it might not always be able to collect that sum.[220] Another solicitor put the recovery figure quite a bit higher ($150,000 of $200,000) but agreed that such awards can be difficult to collect.[221]

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213. *Id.*
214. Interview with Anonymous News International Lawyer, *supra* note 119.
215. *See id.*; *see also* Interview with Anonymous BBC Legal Staffer, *supra* note 34.
216. *See* Weaver & Partlett, *supra* note 6.
217. *Id.* at 416.
218. *Id.*
219. *Id.* at 417.
220. *Id.*
221. *Id.*

One media outlet budgeted $1 million a year for outside solicitors and barristers.[222] The Australian Broadcasting Corporation's Senior Legal Advisor referred to the cost of running a trial as "enormous."[223] But some believed that the cost rules, though inconsistently applied, still functioned as a deterrent to the media.[224]

In Australia, the cost rules functioned as a double-edged sword. In some defamation cases, the media defendant was less concerned about the potential damages than it was worried about the costs. Moreover, the media defendant was required to prove that everything it reported was correct or it faced the prospect of being ordered to pay costs.[225] The question of costs undoubtedly affected the media's willingness to report.

Conversely, the cost rules also allowed the media to run roughshod over defendants of moderate or minimal means. In deciding what to publish, the media considered the likelihood that the defendant would sue and whether the defendant had the resources to fund a legal action.[226] Impecunious defendants often lacked the resources to maintain a legal action. Even people of moderate means were concerned about the financial effect of having to pay costs and simply did not have the means to fight back.[227] As a result, the media could use lawyers to delay and intimidate a small person aggrieved by an article. As John Slee, a journalist for *The Sydney Morning Herald* said, "small people, who feel aggrieved, think of suing and then realize that it will cost a lot of money."[228] Slee said that this is "one of great shames of our society and our profession. We, too, are bullies with regard to small people."[229] Chris Masters, a senior reporter for the Australian Broadcasting Corporation, agreed, noting that the cost rules turned the media into both "cowards and bullies" because the legal system was beyond the means of most people.[230] While not agreeing that the media runs roughshod over impecunious defendants, an in-house counsel agreed that some defamation plaintiffs settle for fear of having to pay costs.[231]

Clive Evatt, a barrister who represented defamation plaintiffs, dissented on this issue. He said that impecunious plaintiffs were often his best clients. In many instances, the media had treated them savagely. Moreover, even if a poor plaintiff lost a case, the poor

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222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.* at 418.
226. *Id.* at 417.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.* at 417-18.
231. *Id.*

plaintiff had little to lose because many plaintiff's lawyers would take these cases on a contingency fee basis.[232]

By contrast, the rich and powerful could use the costs rule to intimidate the media. Some interviewees recognized that "[f]ew journalists do tough, risk taking, stories."[233] The rich know that the media often make commercial decisions about what to publish and whether to settle suits, and they bullied the media into submission. If a case involved an important political story, and the media believed that they "got it right" and had the evidence to support the story, then the media would (as a general rule) push ahead.[234] There were exceptions. John Slee concluded that the media "cannot exercise the freedom to inform the public in cases where it really matters. Those people tend to be powerful, resourceful fiends who can use legal system to protect [themselves]."[235]

In any event, the costs rule forced the media to make sophisticated business judgments about which cases to fight and which to settle.[236] If the media outlet "got it wrong" on a particular story, it would quickly issue a retraction and perhaps offer a small amount of compensation.[237] But the media were reluctant to issue corrections, especially if they thought that they "got it right," because they thought that it reflected on their credibility.[238] As a result, the media were sometimes willing to litigate.[239] This was especially true when the allegedly defamatory piece involved investigatory allegations against a politician.[240] Indeed, the media thought that if they always settled or too frequently made corrections or clarifications, then their credibility might be impaired.[241] On the other hand, if a case was regarded as having only an insignificant news effect (i.e., a gossip column), the media might have paid a small amount simply to avoid the potential for having to pay costs.[242] Of course, whether the media would fight or settle ultimately depended on whether "legally admissible evidence" was available to support their allegations.

Once defamation litigation commenced, the cost rule could create a quagmire that made it difficult for either party to extricate itself from litigation. In "small" cases (one editor defined the term "small"

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232. *Id.*
233. *Id.*
234. *Id.*
235 *Id.*
236. *Id.*
237. *Id.*
238. *Id.* at 418-19.
239. *Id.* at 419.
240. *Id.*
241. *Id.*
242. *Id.*

as $50,000),[243] both parties might be desperate to get out of the case. But once costs had been incurred, both parties would be reluctant to admit error, as well as to offer a small sum to get out of the case, for fear of having to pay the other side's legal fees.[244] As a result, a few cases ended up at trial even though the plaintiffs had little evidence to support their claims.[245] Nevertheless, at the Australian Broadcasting Corporation, only twenty percent of cases went to trial (thirty percent were settled and the remaining fifty percent fell dormant).[246] Of those that actually went to trial, ABC won half and lost half.[247]

IV. *REYNOLDS'* EFFECT: POST-DECISION INTERVIEW RESULTS

Did *Reynolds* affect the way the English media report on matters of public interest? The answer appears mixed. Among the English media, there is great uncertainty about what *Reynolds* means and how it will be applied. Some in the English media believe that *Reynolds* had a fairly significant effect on English law and have adjusted their reporting accordingly.[248] Others are less convinced and remain more careful about their reporting.[249]

A. *Threats of Suit*

Post-*Reynolds*, while English broadcasters continue to receive pre-publication threats relating to their coverage, the threat rate appears to have declined at some organizations. For example, although *The Times* was receiving two to three pre-publication threats every two weeks in the early 1990s, it now receives only about one every two weeks.[250] *News International*, which was receiving three to four letters a week, saw its rate remain about the same,[251] as did *Independent Television News* (ITN).[252]

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243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. Interview with Second Anonymous Guardian Editor, London, Eng. (Apr. 16, 2003) [hereinafter Interview with Second Anonymous Guardian Editor].
249. Telephone Interview with Anonymous ITN Staff Lawyer (Apr. 26, 2004) [hereinafter Interview with Anonymous ITN Staff Lawyer].
250. Second Interview with Anonymous Times Lawyer, London, Eng. (Apr. 16, 2003) [hereinafter Second Interview with Anonymous Times Lawyer].
251. Second Interview with Anonymous News International Lawyer, London, Eng. (Apr. 16, 2003) [hereinafter Second Interview with Anonymous News International Lawyer].
252. Interview with Anonymous ITN Staff Lawyer, *supra* note 249.

Although *The Guardian* perceives that its threat rate declined since the early 1990s, the statistics suggest no net decline. In the early 1990s, it received two to three threatening letters a week. Post-*Reynolds*, *The Guardian* was receiving the same number of threatening letters.[253] In the post-*Reynolds* era, nearly fifty percent of *The Guardian's* contentious stories were generating threatening letters.[254] But *The Guardian* perceived that the threat rate is declining, in part, because it has gotten better at using the *Reynolds* defense.[255]

The BBC did not have exact figures regarding threat rates but indicated that it receives far more threatening letters than writs.[256] A majority of the threats are pre-publication, and at least one BBC official indicated that he thought that these threats were designed to intimidate the BBC and affect its coverage.[257] Indeed, in the view of this official, some of the threats appear to have no basis at all.[258]

Even though the English media continue to receive a substantial number of pre-publication threats, pre-publication injunctions are fairly rare. In part, this is due to Section 12 of the *Human Rights Act*, which makes it difficult to obtain prior restraints.[259] In the view of a BBC solicitor, attempts to obtain pre-publication injunctions are doomed to failure[260] in part because there is a presumption against prior restraints on speech.[261] Nevertheless, some solicitors are able to obtain pre-publication injunctions on other grounds (e.g., breach of contract, breach of confidence, or privacy).[262]

B. *The Rate of Defamation Litigation*

Since the original interviews were conducted in the early 1990s, the rate of English defamation litigation appears to have slowed considerably at some institutions. At *The Times*, which was served with writs at a rate of about twelve a year in the early 1990s, the rate has dropped to two to three writs a year.[263] As of April 2003, no cases had been filed against *The Times* recently, and none of the pending

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253. Interview with Second Anonymous Guardian Editor, *supra* note 248.
254. *Id.*
255. Interview with Third Anonymous Guardian Editor, London, Eng. (Apr. 16, 2003) [hereinafter Interview with Third Anonymous Guardian Editor].
256. Interview with Anonymous BBC Legal Staffer, *supra* note 34.
257. *Id.*
258. *Id.*
259. Second Interview with Anonymous Times Lawyer, *supra* note 250.
260. Interview with Anonymous BBC Legal Staffer, *supra* note 34.
261. *Id.*
262. *Id.*
263. Second Interview with Anonymous Times Lawyer, *supra* note 250.

cases were even close to going to court.[264] Although the BBC was served with sixty to seventy writs during the prior five years, the rate of litigation has declined to single digits.[265]

Other media organizations have experienced similar defamation litigation declines. At News International, which was being served with fifteen to twenty writs a year in the early 1990s, the rate has dropped by half.[266] *The Guardian* still has as many as fifty cases pending against it, many of which were filed over the prior three to four years,[267] but some of these cases are no longer active and have "gone to sleep."[268] At ITN, the rate appears to be unchanged.[269]

The *Reynolds* decision has probably played some role in the defamation litigation decline. For example, an editor at *The Guardian* indicated that, when *Reynolds* was decided, *The Guardian* assumed that the decision would have a significant effect on English defamation law and would provide the media with significant protection.[270] As a result, *The Guardian* changed its editorial practices to take advantage of the *Reynolds* defense.[271] In effect, *The Guardian* attempted to "*Reynoldize*" pieces. *The Guardian* has not been sued lately for libel in a case involving a *Reynolds* defense and has no pending cases involving that defense.[272] An editor at *The Guardian* stated that, when the plaintiffs' lawyers see that the media have structured an article to take advantage of the *Reynolds'* defense, the lawyers back off because they cannot guarantee victory to their clients (and do not want to be forced to pay *The Guardian*'s legal costs if they lose).[273]

Although *Reynolds* may have been a factor in the litigation decline, it was not the sole or primary reason for the decline.[274] Interviewees gave plenty of non-*Reynolds* reasons for the decline in defamation litigation.[275] As noted, English law now limits the quantum of damages that can be recovered in defamation actions, and English judges now have the authority to reduce damages to much lower limits.[276] Some believe that these limitations discourage

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264. *Id.*
265. Interview with Anonymous BBC Legal Staffer, *supra* note 34.
266. Second Interview with Anonymous News International Lawyer, *supra* note 251.
267. Interview with Third Anonymous Guardian Editor, *supra* note 255.
268. *Id.*
269. Interview with Anonymous ITN Staff Lawyer, *supra* note 249.
270. Interview with Second Anonymous Guardian Editor, *supra* note 255.
271. *Id.*
272. *Id.*
273. *Id.*
274. Interview with Anonymous BBC Legal Staffer, *supra* note 34.
275. *Id.*
276. Second Interview with Anonymous Times Lawyer, *supra* note 250.

defamation litigation.[277] In addition, some attribute the decline to the mounting cost of defamation litigation.[278] In recent years, hourly rates for solicitors have climbed to £400–450 a hour,[279] although this trend is subject now to the introduction of contingent fee arrangements, which are discussed later. Finally, and not insignificantly, the general "revolution" in civil litigation under the Civil Procedure Rules, which came into operation in 1999, appears to have dramatically reduced the amount of all civil litigation by pressuring parties into early settlements.[280]

Another important factor in any litigation decline is Britain's "offer of amends" statute adopted in 2000.[281] The English media routinely make offers of amends, both formal and informal, in an effort to avoid litigation.[282] For example, when *The Times* receives a threatening letter, it makes an initial decision about whether to fight or to make an offer of amends.[283] Two or three times a year, *The Times* makes an offer of amends and pays a sizeable amount of money and costs.[284] Even when such payouts are made, the total cost is far less than the cost of litigating a defamation case in court.

Another significant feature that may discourage litigation has been the rise of the Press Complaints Commission. This non-statutory body provides a relatively rapid and, to the claimant, cost-free (and virtually risk-free) way of challenging press coverage. Paragraph 1 of the Code of Practice, to which virtually all national and other major newspapers adhere, states:[285]

> 1. Accuracy:
>
> i) The Press must take care not to publish inaccurate, misleading or distorted information, including pictures.
>
> ii) A significant inaccuracy, mis-leading statement or distortion once recognised must be corrected, promptly and with due prominence, and—where appropriate—an apology published.
>
> iii) The Press, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact.

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277. Interview with Anonymous BBC Legal Staffer, *supra* note 34.

278. *Id.*

279. *Id.*

280. *See supra* notes 30-32 and accompanying text; *see also* PRICE & DUODU, *supra* note 24, at ch. 25.

281. Defamation Act, 1996, c. 31, §§ 2-4.

282. Interview with Anonymous ITN Staff Lawyer, *supra* note 249; Second Interview with Anonymous Times Lawyer, *supra* note 250.

283. Second Interview with Anonymous Times Lawyer, *supra* note 250.

284. *Id.* In one case, *The Times* paid out £10,000 in damages and an additional £18,000 in costs under a CFA (contingent fee agreement). *Id.*

285. Press Complaints Commission, Code of Practice (June 1, 2004), *available at* http://www.pcc.org.uk/cop/cop.asp.

iv) A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.

In summary, although *Reynolds* may be partially responsible for the drop in defamation litigation, other factors appear to be at work as well.[286]

C. *Responses to Threats of Suit: Pre-Publication*

In some respects, the English media continue to handle pre-publication litigation threats in the same way that they handled them before *Reynolds*. In other words, the English media tend to be cautious, reviewing the evidence on which the challenged story might be based, and deciding whether legally admissible evidence is available to support the story. At ITN, pre- and post-*Reynolds* practices changed little.[287]

Reynolds does seem to have altered the pre-publication practice at some media outlets (e.g., *The Guardian*), which indicated that they are going to great lengths to "*Reynoldize*" pieces. In other words, they were trying to make sure that the *Reynolds* factors were satisfied in a case where the *Reynolds* defense might apply. This practice has tended to deter pre-publication threats.[288] When potential plaintiffs become aware that *The Guardian* is trying to set up a *Reynolds* defense, they proceed more cautiously.

D. *Responses to Post-Publication Suits and Threats of Suits*

Post-publication, the actions of some English media outlets have changed fairly considerably. But the change is not due entirely, or even primarily, to *Reynolds*. *The Times* tends to rely heavily on offers of amends.[289] At *The Guardian* as well, if the paper finds that it has made a mistake, it tries to move quickly (within twenty-four hours) to apologize and correct the error.[290] The same is true at ITN.[291]

Indeed, most media outlets are so eager to avoid suit that they are unwilling to pass up the chance to make amends. When the BBC is faced with a case in which the damages are expected to be low but the costs of defense high and the chances of success low, the BBC will

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286. Interview with Anonymous BBC Legal Staffer, *supra* note 34.

287. Interview with Anonymous ITN Staff Lawyer, *supra* note 249.

288. Interview with Second Anonymous Guardian Editor, *supra* note 248.

289. Second Interview with Anonymous Times Lawyer, *supra* note 250.

290. *See* Interview with Second Anonymous Guardian Editor, *supra* note 248 (noting that court procedures in libel cases have been streamlined so that they are not enormously drawn out).

291. Interview with Anonymous ITN Staff Lawyer, *supra* note 249.

do whatever it takes to get rid of the action.[292] If all else fails, the BBC will make a payment into court (after assessing what a jury would likely award to the plaintiff even though not all cases are tried by juries) in an effort to avoid a payment of costs.[293]

E. *Insurance*

As with the prior interviews, information about insurance was difficult to ascertain. For example, although the BBC carries defamation insurance, it refused to divulge the details.[294] A BBC official did state that the BBC went without insurance for years because the premiums were so high as to render the insurance uneconomical.[295] In addition, the media were reluctant to carry insurance for fear that insurers would try to limit losses by meddling in the editorial process[296] and would settle cases that the media preferred to fight.[297]

Despite these fears, few interviewees complained that defamation insurers unduly meddled in pre-publication editorial decisions.[298] Indeed, a BBC interviewee stated that he found insurer intrusions into the editorial process to be generally unobjectionable.[299] In general, insurers asked for nothing more than assurances that the BBC was conducting journalist training sessions and requested information about risk avoidance procedures.[300] The BBC responded by providing training and education talks for journalists, including pre-publication advice about how a program should be checked.[301] This training effort was a major task for the BBC given its five to six thousand employees worldwide.[302]

F. *The Motivations of Defamation Plaintiffs*

What are the motivations of English defamation plaintiff's post-*Reynolds*? Some believe that a fair proportion of post-publication defamation plaintiffs are motivated by greed.[303] By contrast, many

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292. Interview with Anonymous BBC Legal Staffer, *supra* note 34.
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.*
298. *See id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.* (indicating that a "fair proportion" of defamation plaintiffs are motivated by greed).

believe that a majority of the pre-publication threats are designed to intimidate the BBC and affect its coverage.[304] Some interviewees felt that many threats had no basis at all.[305] Again, since all of the interviews were conducted with the media, and no defamation plaintiffs were interviewed, the data are insufficient to draw significant conclusions.

G. *Participation of Lawyers in the Editorial Process*

The *Reynolds* decision has not diminished the role of lawyers in the editorial process. On the contrary, the lawyer's role has actually increased. Before *Reynolds*, in the early 1990s, most English newspapers had so-called night lawyers or barristers who went through the entire paper at the end of the day searching for potentially defamatory material.[306] Today, all newspapers interviewed have continued this practice—including *The Times*,[307] *The Guardian*,[308] and other News International publications, such as *The Sun*.[309]

In an effort to take advantage of the *Reynolds* decision, most newspapers now involve lawyers (or lawyer surrogates) much more heavily and much earlier in the publication process.[310] For example, at *The Sun*, in-house lawyers are involved in the *Reynolds* review process.[311] At *The Guardian*, there is a non-lawyer editor who specializes in *Reynolds* issues who regularly advises journalists about how to bring their articles within the scope of the *Reynolds* privilege.[312] This editor works closely with *The Guardian's* five or six in-house lawyers, especially on pieces that are likely to result in litigation.[313] Well before the eve of publication, lawyers look at the article, examine the subject's response, and help journalists and

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304. *Id.*

305. *Id.*

306. *See* Weaver & Bennett, *supra* note 20, at 1171 (discussing how various newspapers use lawyers to "screen" newspapers before publication).

307. *See* Second Interview with Anonymous Times Lawyer, *supra* note 250 (explaining that teams of lawyers still come in at the end of the day).

308. Interview with Second Anonymous Guardian Editor, *supra* note 248; *see also* Interview with Third Anonymous Guardian Editor, *supra* note 255 (noting that night barrister still comes in to review the paper).

309. *See* Second E-mail from Anonymous News International Lawyer (May 10, 2003) [hereinafter Second E-mail from Anonymous News International Lawyer] (indicating that *The Sun* still has "night lawyers coming in").

310. Interview with Second Anonymous Guardian Editor, *supra* note 248; Interview with Third Anonymous Guardian Editor, *supra* note 255.

311. Second E-mail from Anonymous News International Lawyer, *supra* note 309.

312. *Id.*

313. Interview with Second Anonymous Guardian Editor, *supra* note 248.

editors decide how to bring the piece within the ambit of *Reynolds*.[314] At *The Guardian*, although defamation litigation expenses have declined, total lawyer bills have actually increased because of extra *Reynold*-related pre-publication expenses.[315] At *The Times*, in-house lawyers are also involved in the *Reynolds* proofing process.[316]

At broadcast outlets, little has changed. The BBC's post-*Reynolds* pre-publication review processes are similar to its pre-*Reynolds* processes.[317] At ITN, post-*Reynolds* editorial practices remain essentially unchanged, and lawyers do pre-publication review for a variety of purposes; in addition to defamation, they review programs for contempt, privacy, and copyright infringement issues.[318]

H. Reynolds *and the "Legally Admissible Evidence" Standard*

In the early 1990s, English newspapers and broadcasters usually tried to bring existing articles within the scope of existing privileges, or they tried to make sure that "legally admissible" evidence was available to support the allegations that they were making.[319] Following *Reynolds*, newspapers and broadcasters continue to rely primarily on privileges and legally admissible evidence, but they show some willingness to rely on the *Reynolds* defense when privileges and legally admissible evidence are unavailable.[320] But there is great variance among English media organizations in how the *Reynolds* defense is evaluated and the extent to which it is relied on.[321]

At *The Sun*, a tabloid, *Reynolds* has had little effect on the publication process.[322] Post-*Reynolds*, *The Sun* continues to rely on the legally admissible evidence standard.[323] In part, this is because, as a tabloid, *The Sun* is more likely to use a sensational presentation format with huge headlines that make it difficult to take advantage of *Reynolds'* privilege.[324] By and large tabloids tend to rely on the defense of justification (i.e., proving that the story is true).[325]

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314. *Id.*
315. Interview with Third Anonymous Guardian Editor, *supra* note 255.
316. Second Interview with Anonymous Times Lawyer, *supra* note 250.
317. Interview with Anonymous BBC Legal Staffer, *supra* note 34.
318. *Id.*
319. *See* Weaver & Bennett, *supra* note 20, at 1177 (discussing privileges and manipulation thereof by the press).
320. Second Interview with Anonymous Times Lawyer, *supra* note 250.
321. *Id.*
322. Second Interview with Anonymous News International Lawyer, *supra* note 251.
323. *Id.*
324. *Id.*
325. E-mail from Anonymous News International Lawyer, *supra* note 309.

At *The Guardian*, although editors are willing to rely on the *Reynolds* defense, they focus primarily on justification and use *Reynolds* as only a second-line defense[326] only if other defenses are unavailable.[327] But they will sometimes publish based solely on *Reynolds*.[328] In this respect, *Reynolds* has brought about a major change in the paper's practices.

A solicitor for *The Times* believes that *Reynolds* "altered the media landscape in some respects" and gave journalists the opportunity to publish even though they cannot prove the truth of what they are alleging.[329] He offered the example of a reliable source in the Home Office who tells *The Times* that it has good grounds for believing that an individual is deeply involved in terrorist activities.[330] *The Times* solicitor stated that, if *The Times* reports neutrally, and the report sets forth both sides (something that he referred to as "reportage"), and it does not simply adopt what the Home Office source said, there is a good chance of success using the *Reynolds* defense.[331] In such a situation *The Times* will craft the story to invoke as many of the *Reynolds* criteria as possible.[332]

Likewise, if sexual allegations were made against a politician, pre-*Reynolds*, *The Times* might have been reluctant to run the story.[333] Why? Sex allegations often pit one person's word against another's, and it is frequently difficult for the media to prove the truth of allegations. After *Reynolds*, *The Times* would be much more likely to run the story even if it cannot prove truth. But *The Times* would first consider whether the story is in the "public interest,"[334] and *The Times* would seek a response from the politician.[335] If the politician offered an alibi, *The Times* would try to find out whether the alibi was iron clad.[336] If the politician said that the allegation was not true, but that he was not prepared to tell the paper why, *The Times* would publish anyway.[337] It would only desist if the politician could prove that *The Times* had its facts wrong.[338] While *The Times* solicitor stated that he believes that the paper should be able to

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326. Interview with Third Anonymous Guardian Editor, *supra* note 255.
327. *Id.*
328. *Id.*
329. Second Interview with Anonymous Times Lawyer, *supra* note 250.
330. *Id.*
331. *Id.*; *see, e.g.*, Al-Fagih v. H H Saudi Research & Marketing, [2002] E.M.L.R. 13 (Eng. C.A.).
332. Second Interview with Anonymous Times Lawyer, *supra* note 250.
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.*

publish based simply on the fact that it is reporting what someone else said, the paper is realistic enough to realize that it must make every effort to limit liability and to take advantage of *Reynolds'* qualified privilege defense.[339]

Among the broadcast media, there were similar variations in approach. An official at ITN indicated that *Reynolds* had little effect on how ITN decides what to broadcast. In his view, *Reynolds* has not come up to expectations.[340] An official at the BBC indicated that the BBC had adopted a slightly different position. Although the BBC will sometimes publish based solely on the *Reynolds* defense,[341] it considers that defense to be a last resort.[342] The BBC continues to focus primarily on privileges and legally admissible evidence.[343] In addition, when the BBC does rely on *Reynolds*, it imposes a high level of diligence on the author.[344] At the very least, the BBC demands that editors and reporters thoroughly evaluate an article under all ten parts of the *Reynolds* test.[345] Even then, the BBC is wary about relying on the *Reynolds* defense because it fears that it might not be able to meet that decision's requirements[346] and because it believes that *Reynolds* imposes a very high level of diligence on authors and publishers that can be very difficult to meet.[347] For example, if the media's only source is an individual who has ill will toward the subject of an article, it may be dangerous to rely only on that source.[348] As a result, the BBC's primary focus is still on whether it has legally admissible evidence to support a story.[349]

Post-*Reynolds*, the BBC kills more than one story a week, and three or four stories worldwide.[350] This is not a staggering number given that the BBC has two television channels, digital channels, radio channels, more than forty radio stations, websites, and regional television and radio stations.[351] But the BBC makes changes in the majority of its stories (the remaining stories do not present a legal

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339. *Id.*
340. Interview with Anonymous ITN Staff Lawyer, *supra* note 249.
341. Interview with Anonymous BBC Legal Staffer, *supra* note 34.
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*
348. *See id.* Sources are individuals with a vested interest in "doing down" the subject of the article. The difficulty is that, if the media cannot rely on someone who is maliciously inclined, it may have no other source. In *Reynolds'* terms, the witness is not a "reliable source." *Id.*
349. *Id.*
350. *Id.*
351. *Id.*

risk from a defamation standpoint).[352] But some of these changes, however, may be nothing more than small "tidying suggestions" designed to provide balance.[353] BBC lawyers might also ask a journalist whether he or she has sought reaction from the subject of the article, as well as whether he or she had made further checks (e.g., in official records, local council records, court transcripts, etc.).[354]

I. *Ability to Report the Public Interest*

Reynolds' effect on the English media's ability to report the public interest varies. Some, such as ITN and *The Sun*, thought that *Reynolds* had not affected their ability to report the public interest because *Reynolds* did not improve their chances of success.[355] Some newspapers, in particular, *The Guardian*, believe that *Reynolds* provides them with a significant defense against defamation liability and have affirmatively relied on that defense. *The Guardian's* editors flatly stated that they viewed the pre-*Reynolds* English law as "terrible" in terms of preventing the media from getting articles into print and frankly admitted that they were hoping that the House of Lords would adopt a *Sullivan*-type defense.[356] Although they were initially suspicious about whether and to what extent *Reynolds* would help the English media report the public interest,[357] *The Guardian's* editors have been pleasantly surprised by the way that *Reynolds* has worked out.[358] They believe that *Reynolds* provides them with a significant defense against defamation liability and have affirmatively relied on that defense.[359] The net effect is that *The Guardian* is now able to publish stories that it would previously have been unable to publish,[360] is less likely to "kill" stories, and is more likely to find ways to get them into print.[361] As a result, *The Guardian's* editors are now bolder and more hopeful about *Reynolds'* effect.[362] In general, *The Guardian* works on the basis that *Reynolds*

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352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.*; Second Interview with Anonymous News International Lawyer, *supra* note 251.
356. Interview with Second Anonymous Guardian Editor, *supra* note 248.
357. Interview with Third Anonymous Guardian Editor, *supra* note 255.
358. *Id.*
359. Interview with Second Anonymous Guardian Editor, *supra* note 248; Interview with Third Anonymous Guardian Editor, *supra* note 255.
360. Interview with Second Anonymous Guardian Editor, *supra* note 248.
361. *Id.*
362. *Id.*

operates in the way that they think it does, and so far (at least) *The Guardian* has not been sued in a *Reynolds*-type case.[363]

In order to take advantage of *Reynolds*, however, *The Guardian* has been forced to change its practices.[364] For example, compared to the way it published before, *The Guardian* might change the tone of a piece, posit information as a question rather than as a statement, and make sure that the headline is "right."[365] *The Guardian's* editors conclude that the change demanded by *Reynolds* is "not a bad thing journalistically" because English media culture is highly aggressive.[366] Journalists are able to say the same things but in a slightly different way.[367] In the final analysis, *The Guardian's* editors think that *Reynolds* allows them to report more aggressively in the public interest.[368]

A BBC solicitor views *Reynolds* similarly, although, perhaps a little less optimistically.[369] He believes that the BBC is able to run at least one story a week that it would not have been able to run before *Reynolds*.[370]

J. *Concerns About* Reynolds

Although most interviewees viewed *Reynolds* as a positive contribution to English defamation law, concerns were expressed. Those who viewed *Reynolds* as providing limited or incomplete protection had greater concerns, but all editors had concerns about the decision. Even at *The Guardian*, which seems to have had the best experience post-*Reynolds*, the Editor in Chief flatly stated that he still viewed English defamation law as too restrictive.[371] A variety of overall concerns were raised.

First, many expressed concern regarding *Reynolds'* vagueness and uncertainty about how it would be applied.[372] The decision articulates ten factors that courts must evaluate when deciding whether the media acted properly in a particular case.[373] Because of

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363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.*
369. Interview with Anonymous BBC Legal Staffer, *supra* note 34.
370. *Id.*
371. Interview with Third Anonymous Guardian Editor, *supra* note 255.
372. Interview with Anonymous ITN Staff Lawyer, *supra* note 249.
373. The *Reynolds* decision provides:

> (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed ... (2) The nature of the information, and the extent to which the subject matter is a matter of public

the plethora of factors, a solicitor for *The Times* indicated that it is difficult to know which of the *Reynolds* criteria are so "absolutely fundamental" that the media will lose if they breach those criteria.[374] As a result, the media never know where they might "fall down" in terms of the ten *Reynolds* criteria.[375] In one case, *The Times' Reynolds* defense failed because it did not contact the subject of the article—even though the *The Times* did not know how to contact the person and it would have been difficult to find him.[376] In another case, *The Times* failed to contact the subject of an article, but its *Reynolds* defense stood up.[377]

Second, the media have had varied results under the *Reynolds'* test. For example, *The Times* was sued for defamation by someone described as a Russian mafia boss.[378] This individual had been denied entrance into the United Kingdom on security grounds.[379] *The Times* had great difficulty defending the case because, even though the evidence it needed to defend itself was available in the Home Office file relating to the denial of entrance, *The Times* was unable to obtain that information.[380] As a result, *The Times* was unable to plead justification and was forced to plead qualified privilege.[381] Even though the jury ruled in *The Times'* favor on almost all of the *Reynolds* factors, the judge ruled against the newspaper because it failed to seek a response from the subject of the article.[382] It is interesting that *The Times* later obtained copies of Interpol reports that confirmed and substantiated the substance of its allegations.[383]

> concern. (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid ... (4) The steps taken to verify the information. (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff ... An approach to the plaintiff will not always be necessary. (8) Whether the article contained the gist of the plaintiff's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication, including the timing.

Reynolds v. Times Newspapers, [2001] 2 A.C. 127.

374. Second Interview with Anonymous Times Lawyer, *supra* note 250.

375. *Id.*

376. *Id.*

377. *Id.*

378. See Loutchansky v. Times Newspapers, [2001] E.M.L.R. 898, [2001] EWCA Civ 92 (C.A.), (no. 2), [2001] E.W.C.A. Civ 1805 (C.A.), [2002] E.W.H.C. 2490 (Q.B.), [2002] E.W.H.C. 2726 (Q.B.).

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

But the Court of Appeals rejected the information, noting that the *Reynolds* test allows the courts to consider only the evidence that the newspaper had available to it at the time it published its allegations.[384]

Third, some interviewees expressed concern that *Reynolds* is inconsistent with traditional journalistic practices and essentially forces the media to "think about stories in a different way" and to report them differently.[385] Under the *Reynolds* regime, judges rather than journalists decide what constitutes permissible journalistic practices. In *Reynolds* itself, judges established criteria for acceptable journalistic practices. Then, as cases arise, judges decide whether those criteria have been satisfied. An editor for *The Guardian* flatly stated that journalists are not accustomed to writing articles in the "*Reynolds* way" in which they are forced to stand back, balance, and present all perspectives of the subject.[386]

Fourth, and related, is a concern about the fact that *Reynolds* limits the "tone" of what journalists can say.[387] In an effort to bring themselves within the *Reynolds* privilege, journalists feel obligated to bend over backward to make sure that a piece appears to be "balanced" and fairly representative of the position of those against whom they are making allegations. For example, after *Reynolds*, most newspapers would be reluctant to refer to something as "outrageous" and would instead say only that a major investigation is in order.[388] Likewise, newspapers generally avoid using big headlines to report allegations.[389]

Reynolds' control of tone is somewhat disturbing. While there is value to balance, there are times when hard-hitting allegations are both necessary and appropriate. Nevertheless, after *Reynolds*, interviewees suggested that they were so fearful about the possibility of losing their *Reynolds* defense that they would generally refrain from making hard-hitting allegation even when such allegations were especially warranted.[390] Of course, the real problem is that articles will be evaluated after-the-fact by unelected judges. As a result, newspapers must be extremely careful to make sure that those judges

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384. *Id.*

385. Interview with Second Anonymous Guardian Editor, *supra* note 248.

386. *Id.* This situation has some similarities to the role of judges under the "actual malice" standard in the United States—namely, courts have to determine certain matters about the appropriate standards of journalistic behavior. *See, e.g.*, Brian C. Murchison et al., *Sullivan's Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7 (1994).

387. Second Interview with Anonymous Times Lawyer, *supra* note 250.

388. *Id.*

389. *Id.*

390. *Id.*; Second Interview with Anonymous News International Lawyer, *supra* note 251.

agree that the tone of a piece is fair and permissible. The net effect is that the *Reynolds* defense has had an exaggerated influence on the tone of news reporting. Of course, *Reynolds* still produces a benefit because it allows the publisher to make the allegation. In the past, the publisher might not have published the allegation at all.

Fifth, and of lesser concern, is the fact that tabloids like *The Sun* have found that they have a more difficult time taking advantage of the *Reynolds* defense. A solicitor for *The Sun* stated that, although he regards *Reynolds* as a "good pro-freedom of speech development," he saw it as "being of much less use to my newspapers [*The Sun* and *News of the World*] than to broadsheets like *The Times*."[391] He explained that papers that engage in "red top tabloid sensationalism" find it difficult to take advantage of *Reynolds*.[392] As a solicitor for *The Times* stated, *The Sun* never does anything by halves.[393] By contrast, since the BBC strives for objective reporting, it feels that it is more able to take advantage of the *Reynolds* defense.[394]

Sixth, interviewees expressed concern about the fact that *Reynolds* stories require the media to inform the subjects of stories about allegations in advance of publication and to give the subject of those stories a chance to respond.[395] The media typically give the subject a deadline for responding (which can vary depending on the circumstances).[396] The subject is told that, if he or she does not respond, the media will assume that he or she does not dispute the allegations.[397] Of course, if the subject provides a sensible response, the media will incorporate it.[398]

These requests for comment have advantages and disadvantages. In terms of disadvantages, some editors complain that such requests for comment are inconsistent with traditional journalistic practices.[399] In addition, there are concerns that, by alerting the subject of a piece to the possibility that a critical article is about to be published, the newspaper might give the subject an opportunity to seek an injunction prohibiting publication.[400] Conversely, in terms of advantages, a BBC solicitor stated that, although many journalists would not have asked the subject of a story

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391. First E-mail from Anonymous News International Lawyer (May 3, 2003) [hereinafter First Email from Anonymous News International Lawyer].
392. *Id.*
393. Second Interview with Anonymous Times Lawyer, *supra* note 250.
394. *Id.*
395. Interview with Second Anonymous Guardian Editor, *supra* note 248.
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*
400. Interview with Third Anonymous Guardian Editor, *supra* note 255.

for comment before *Reynolds*,[401] the procedure sometimes produces admissions that help the BBC support its case.[402] In addition, the requests for comment sometimes put potential claimants' defamation lawyers on the defensive.[403] Before *Reynolds*, had the media made a request for comment, defamation lawyers would simply have responded with a request to "prove it."[404] Now they see the newspaper is setting up a *Reynolds* defense and struggle to find a suitable response.[405] As a BBC solicitor stated, we are now "hot on getting a response" from the subject of an article.[406]

Seventh, interviewees expressed concerns about *Reynolds'* financial effect.[407] In order to take advantage of the *Reynolds* defense, the media must now spend a lot of money on legal fees in an attempt to "*Reynoldize*" articles.[408] At *The Guardian*, editors go through a special *Reynolds* checklist.[409] Not only does this process involve lawyers earlier in the editorial process, *The Guardian* has an editor who specializes in *Reynolds* issues. An editor for *The Guardian* suggested that many smaller newspapers could not afford these additional "*Reynoldizing*" expenses.[410]

Eighth, *The Guardian* expressed concerns about being saddled with the burden of proof of falsity.[411] It thought that the burden of proof of falsity should rest on the plaintiff, as it does in the United States.

Ninth, a BBC official expressed concern that courts will apply "20/20 hindsight" in applying *Reynolds*.[412] Because the BBC is dealing with limited time for fact checking, BBC lawyers try to create a twenty percent margin of safety.[413] In creating this margin, BBC lawyers recognize that witnesses sometimes change their minds and at other times are forced to change their minds by opposing counsel.[414]

Finally, *Reynolds* is of value to the English media only when it publishes in the U.K.[415] For example, a BBC solicitor indicated that

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401. Interview with Anonymous BBC Legal Staffer, *supra* note 34.
402. *Id.*
403. Interview with Second Anonymous Guardian Editor, *supra* note 248.
404. *Id.*
405. *Id.*
406. Interview with Anonymous BBC Legal Staffer, *supra* note 34.
407. Interview with Third Anonymous Guardian Editor, *supra* note 255.
408. *Id.*; *see also* Interview with Second Anonymous Guardian Editor, *supra* note 248.
409. Interview with Second Anonymous Guardian Editor, *supra* note 248.
410. Interview with Third Anonymous Guardian Editor, *supra* note 255.
411. *Id.*
412. Interview with Anonymous BBC Legal Staffer, *supra* note 34.
413. *Id.*
414. *Id.*
415. *Id.*

he regarded Ireland as a claimant's paradise because the Irish hate the English.[416] When the English media are sued in Dublin courts, where the *Reynolds* defense does not apply, they almost always lose.[417] Likewise, the BBC World Service reports all over the world and is subject to the law of various jurisdictions.[418] When the BBC reports in Africa, it does so without the benefit of a *Reynolds* defense.[419] By contrast, when it publishes in India, it fares somewhat better because India has adopted a strong version of *Derbyshier*-type rule.[420] In some instances, the BBC will try to restrict the scope of its transmission (something that it cannot do over the Internet) in order to limit its liability potential.[421]

K. Reynolds *and Particularly Litigious Individuals*

Although Robert Maxwell is now dead, the English media continue to be sensitive about covering particularly litigious individuals. For example, both the BBC and *The Times* expressed concern about certain Russian citizens who are particularly litigious and who often sue to protect their reputations.[422] It is also concerned about Richard Branson but not Rupert Murdoch (who still does not tend to sue).[423] *The Times* is careful about high profile individuals who do not think twice "about reaching for a lawyer."[424] An editor at *The Guardian* stated that he was concerned about the Barclay brothers and "anyone who is rich enough to employ aggressive

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416. *Id. But see* Department of Justice, Equality, and Law Reform, Report of the Legal Advisory Group on Defamation (March 2003), *available at* http://www.justice.ie (current Irish reform proposals for defamation law); Hunter v. Gerry Duckworth & Co., [2000] 1 I.R. 510 (Ir. H. Ct. 1999) (noting that a Reynolds-style development appears to be encouraged for Ireland); *see also* Andrew T. Kenyon, *Developments in Qualified Privilege: England, Australia and Ireland?* in EOIN O'DELL (ED.), FREEDOM OF EXPRESSION (Ashgate: Aldershot, 2005).

417. Interview with Anonymous BBC Legal Staffer, *supra* note 34.

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.* The hazards of publication across borders are well exemplified by the decision of the High Court of Australia in *Gutnick*. *See* Gutnick v. Dow Jones & Co., [2002] 210 C.L.R. 575 (Austl.). For suggestions on resolution of the problem, see Shawn Bone, *Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by* Gutnick v. Dow Jones & Co., 61 WASH. & LEE L. REV. (forthcoming 2004).

422. Interview with Anonymous BBC Legal Staffer, *supra* note 34; Second Interview with Anonymous Times Lawyer, *supra* note 250 (asserting that *The Times* is always more careful about high profile individuals who do "not think twice about reaching for a lawyer").

423. Second Interview with Anonymous Times Lawyer, *supra* note 250.

424. *Id.*

lawyers."[425] As he stated, most "millionaires get good lawyers and try to intimidate."[426]

But a lawyer for the BBC stated that there is nobody who is even close to Maxwell in terms of litigiousness.[427] Maxwell served three writs in the year before his death and was regarded as "vicious."[428] He would spend £200,000 fighting a case with damages of only £5,000.[429] The closest equivalent today, and it would be a distant one, would be the Barclay twins.[430] They are among the twenty richest people in the United Kingdom with an empire worth more than £1 billion.[431] As a result, the BBC is "cautious" about how it reports on the Barclay brothers because they are likely to serve it with a writ.[432]

L. *Suits by Governmental Officials*

The interviews produced quite divergent responses regarding the extent to which English police, politicians, and other governmental officials tend to bring defamation actions post-*Reynolds*. Prominent national politicians, even those in office, are not so thick-skinned as to ignore all attacks, and headline-making actions for libel during the past decade have included:

> -Jeffrey Archer, a Conservative MP who became Deputy Chairman of the governing party, was awarded £500,000 by the *Daily Star* over allegations that he consorted with a prostitute, Monica Coughlan. Lord Archer (as he became in 1992) was jailed for four years in July 2001 after being found guilty of perjury and perverting the course of justice through the fabrication of an alibi. He has agreed to pay more than £1.8 million in damages, costs, and interest.
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> -Following a successful attempt to block the use of Parliamentary materials as evidence against him,[433] former Minister Neil Hamilton lost his libel action against Al Fayed (the owner of Harrods and the Ritz Hotel in Paris) arising out of the "cash for questions" scandal. It was sustained before the High Court in 1999 that Hamilton was corrupt in his capacity as a MP by accepting money in return for favors such as making representations and asking questions in the House of Commons on behalf of his funders.

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425. Interview with Second Anonymous Guardian Editor, *supra* note 248.

426. Second Interview with Anonymous News International Lawyer, *supra* note 251.

427. Interview with Anonymous BBC Legal Staffer, *supra* note 34 ("At present, there is no equivalent of Maxwell. There is nobody who is in the same league as Maxwell or even two leagues below.").

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. Hamilton v. Al Fayed, [2001] 1 AC 395; *see also* Hamilton v. Al Fayed (No 2), [2003] Q.B. 1175 (Eng. C.A.).

> -*Jonathan Aitken v. The Guardian*. Aitken sued for libel. At the start of his case, he announced, "if it falls to me to start a fight to cut out the cancer of bent and twisted journalism in our country with the simple sword of truth and the trusty shield of English fair play, so be it." The action arose out of allegations of corruption as a government minister in dealing with Saudi arms traders. The libel action collapsed in 1997 when it was shown he had lied about a stay in the Ritz hotel in Paris. His testimony in this case was later determined to involve perjury by Aitken, for which he was imprisoned in 1999.[434]

The Times is sued or threatened with suit by politicians from time-to-time, including MPs.[435] Indeed, *The Times* was recently threatened by an MP, but the matter went to arbitration, where the MP won and recovered damages.[436] But *The Times* is rarely sued by lower-level governmental officials.[437] Officials in central government departments must still obtain the Cabinet Secretary's permission to sue, and this is felt to be a major deterrent.[438] Sometimes, if central government employees leave the agency before the limitation period has expired, they feel free to initiate the action.[439]

Do the police tend to sue for defamation after *Reynolds*? The evidence appears to be mixed. *The Times* indicated that it is hardly ever sued by the police either before or after *Reynolds* (perhaps once in the last twenty-five years), and it is hardly ever threatened with suit by the police.[440] By contrast, the BBC has had significant defamation litigation with police officers and police unions financing the litigation.[441] The latter seems to be more representative of the position elsewhere. The Police Federation, acting on behalf of its members through its solicitors, Russell, Jones & Walker, are frequent and successful libel claimants.[442]

M. *Data Protection Laws*

Many English journalists are fearful that Britain's data protection laws, which few seem to understand,[443] would be used to

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434. Other cases include: Hamilton & Howarth v. B.B.C. (1987); Norman Tebbit v. The Guardian (1988); Michael Meacher v. The Observer (1988); Edwina Currie v. The Observer (1991); John Major v. The New Statesman (1993, commented upon in (1994) Solicitors Journal 391); John Major v. Scallywag Magazine (1993); Peter Bottomley v. Express Newspapers (1995); David Ashby v. The Sunday Times (1995); Neil Hamilton v. The Guardian (1996).

435. Second Interview with Anonymous Times Lawyer, *supra* note 250.

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.*

441. Interview with Anonymous BBC Legal Staffer, *supra* note 34.

442. *Id.*

443. Interview with Third Anonymous Guardian Editor, *supra* note 255.

circumvent *Reynolds*.[444] Under *Reynolds*, the media feel compelled to make the subjects of articles aware of allegations against them and to seek a response. The media fear that this process may encourage the subjects of articles to seek pre- or post-publication relief. In 2003, twenty-three data protection cases were pending against *The Guardian* and *Observer* newspapers.[445]

The purposes of these suits can be manifold. One goal might be to prevent publication. This tactic is likely to be unsuccessful if a plaintiff seeks nothing more than a pre-publication injunction against defamation.[446] English law seems to prevent such injunctions, especially for defamation, but injunctions are more readily issued when the plaintiff claims a violation of confidentiality or a violation of data protection laws.[447] But the subjects of articles may use data protection laws to gain information about the media's sources and attempt to intimidate or sanction informants.[448] This type of suit is particularly likely if it is based on a plaintiff organization's internal documents.[449] Because of Britain's data protection laws and the *Interbrew* decision,[450] journalists are not certain that they can treat sources as confidential.[451] In an effort to respond to the possibility of data protection litigation, the media sometimes purge information about sources from their systems.[452] Finally, data protection suits may help potential plaintiffs determine whether the media have adequate support for any their allegations and whether the media in fact can support a *Reynolds* claim. As a result, the data protection suit may encourage and allow the plaintiff to bring a defamation action.[453]

It may be that some of these fears are exaggerated. Section 32 of the 1998 Data Protection Act provides for special protection for journalism.[454] In *Campbell v. MGN*,[455] the famous fashion model

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444. Interview with Second Anonymous Guardian Editor, *supra* note 248; Interview with Third Anonymous Guardian Editor, *supra* note 255; Second Interview with Anonymous Times Lawyer, *supra* note 250.

445. Interview with Third Anonymous Guardian Editor, *supra* note 255.

446. Interview with Second Anonymous Guardian Editor, *supra* note 248.

447. *Id.*

448. Interview with Third Anonymous Guardian Editor, *supra* note 255.

449. *Id.*

450. Interbrew SA v. Financial Times Ltd., [2002] E.W.C.A. Civ. 274 (Eng. C.A.).

451. Interview with Third Anonymous Guardian Editor, *supra* note 255.

452. Interview with Second Anonymous Guardian Editor, *supra* note 248.

453. *Id.*

454. Section 32 provides:

> 32. - (1) Personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if-
>
> (a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,

Naomi Campbell lied about her abstinence from drug use. The *Daily Mirror* revealed the truth about her drug habit and also published details about the therapy clinic she was attending and carried photographs of her outside the location.[456] The information about the treatment should not have been revealed and amounted to a breach of confidence. The claimant also sued under the Data Protection Act. That part of the claim, however, was not decided in the House of Lords, but in the Court of Appeal it was held that § 32 provided exemption from the duty of a data controller (the newspaper) to comply with the statutory obligations, "subject only to the conditions that he reasonably believed that the publication would be in the public interest and that compliance with each of the provisions was incompatible with the special demands of journalism."[457] It was further accepted that § 32 applied to data collected or generated before and after publication. The newspaper was able to rely on § 32 and thus had not violated the Act.

N. *A Hypothetical English "Watergate"*

Are the English media more likely to report a story like Watergate in the post-*Reynolds* era? A BBC solicitor argued that the media company would be no more likely to run the story today than it was before *Reynolds*.[458] Since that story was based on an anonymous source, someone who was unwilling to come to court, the BBC would still kick the story out.[459] The BBC has found that anonymous sources are virtually useless, and the BBC would not be inclined to rely on *Reynolds* in a situation like this because the BBC would be penalized for relying on an anonymous source.[460] In addition, the BBC has found that it has been set up by anonymous sources at times.[461] The BBC might send a journalist to meet the anonymous source wearing a wire.[462] Part of the problem is that the U.K.

(b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and

(c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.

Data Protection Act, 1998, c. 29, ¶ 32 (U.K.).

455. Campbell v. MGN, [2004] 2 All E.R. 995 (H.L.).
456. *Id.*
457. Campbell v. MGN, [2003] Q.B. 633 (Eng. C.A.).
458. Interview with Anonymous BBC Legal Staffer, *supra* note 34.
459. *Id.*
460. *Id.*
461. *Id.*
462. *Id.*

provides little protection to journalistic sources,[463] and sometimes plaintiffs will bring a writ simply to learn the name of a source.[464] A number of BBC journalists have been threatened with jail and fines for protecting their sources.[465]

Because of these limitations, a BBC solicitor suggested that hard-hitting investigative journalism did not occur on a day-to-day basis in the U.K.[466] He stated that it does not really happen at the BBC or at other U.K. media outlets either.[467] Instead, there are "bits of investigations."[468]

It remains the case that *Reynolds* does not align English law with a First Amendment stance. It does not afford any automatic privilege for matters of public interest or for statements about public figures. The assertion of the defendant that a defamatory statement of fact made in the course of political discussion is privileged if published in good faith[469] was rejected.

O. *Britain's Cost Rules*

Virtually all interviewees indicated that Britain's cost rules have a significant effect on the media. At the very least, the rules encourage the media to settle and to make amends when faced with the threat of defamation litigation.[470] As a BBC official states, Britain's cost rules are a "great problem" that can have a huge effect on pre-publication decisions.[471] An editor at *The Guardian* admits that its coverage could be affected by the threat of litigation from a fabulously rich person who could afford a blistering array of legal attacks.[472] As a result, the newspaper might not publish everything that it could publish about such an individual.[473] *The Guardian*'s editors clearly indicated that costs are a significant factor when it decides to publish or withhold a story from publication.[474] In one case, when a rich man was offended by an article, the newspaper incurred

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463. *Id. But see* Contempt of Court Act, 1981, s. 10; notes 105-6 above and accompanying text.
464. *Id.*
465. *Id.*
466. *Id.*
467. *Id.*
468. *Id.*
469. Reynolds v. Times Newspapers, [2001] 2 A.C. 127, 191.
470. Second Interview with Anonymous Times Lawyer, *supra* note 250.
471. Interview with Anonymous BBC Legal Staffer, *supra* note 34.
472. Interview with Third Anonymous Guardian Editor, *supra* note 255.
473. *Id.*
474. Interview with Second Anonymous Guardian Editor, *supra* note 248.

$50,000 in external lawyers' fees.[475] Because of threats, *The Guardian* does not publish all that it can in some cases.[476]

By contrast, if the potential plaintiff is a person of moderate or limited means, that factor is relevant too.[477] As a BBC solicitor stated, if the potential plaintiff is poor, he must tell his client that the plaintiff is unlikely to sue.[478] This solicitor indicated that such an approach was disgraceful, especially for a national broadcasting body.[479] He hastened to add that the BBC would never air allegations simply because it believed that the potential plaintiff was too poor to sue.[480] They would only air if they thought that it was correct.[481]

The situation has changed somewhat with the advent of conditional (contingency) fees in defamation.[482] Because of contingency fees, it is now possible for someone of moderate means to bring suit.[483] The plaintiff may take out insurance to cover the possibility of an adverse judgment and costs.[484] As another lawyer stated, some attorneys are seeking a 100 percent success fee so that it is very costly to the media defendant if it litigates a defamation case and loses.[485] Some correction to this danger has been provided recently by the Court of Appeal in *King v. Telegraph Group Ltd.*[486] The latter complained that the success fee provided for in the claimant's CFA was 100 percent. Given that the claimant appeared to be of limited means and was not the beneficiary of an After-The-Event (ATE) insurance policy, the defendant's efforts were pointless—it was unlikely to recover any costs if it won, yet would have to pay the claimant's costs if it lost.[487] The court broadly accepted this point in the interest of avoiding a chill on free speech and indicated that a costs capping order would be appropriate.[488] It also tartly commented that the claimant solicitors' "vituperative tone appeared calculated to raise the temperature and to inflate the parties' legal costs in a manner that entirely conflicts with the philosophy underlying the civil justice reforms."[489]

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475. *Id.*
476. Interview with Third Anonymous Guardian Editor, *supra* note 255.
477. Interview with Anonymous BBC Legal Staffer, *supra* note 34.
478. *Id.*
479. *Id.*
480. *Id.*
481. *Id.*
482. *Id.*; *see also* Access to Justice Act, 1999, c. 22, § 27 (U.K.); *supra* notes 33-38 and accompanying text.
483. Interview with Anonymous BBC Legal Staffer, *supra* note 34.
484. *Id.*
485. Second Interview with Anonymous Times Lawyer, *supra* note 250.
486. King v. Telegraph Group Ltd., [2004] E.W.C.A. Civ. 613 (Eng. C.A.).
487. *Id.* ¶ 37.
488. *Id.* ¶¶ 37-61.
489. *Id.* ¶ 59.

Some newspaper editors believe that *Reynolds* may have shifted the effect of the cost rules in favor of defamation defendants.[490] For lawyers who accept cases on a contingent fee basis, if they do not prevail, they do not obtain a fee. As a result, these lawyers are disinclined to bring a writ unless they have a "sure-fire win."[491] Some editors believe that *Reynolds* cases involve a complicated defense that reduces the plaintiff's chances of success and thereby deters lawyers from offering this type of fee arrangement to their clients.[492] In addition, when defamation lawyers see that the media are trying to structure a *Reynolds* defense (e.g., by putting allegations to the subject of an article for a response), they now respond differently.[493] Before *Reynolds*, they would have demanded that the media prove their allegations.[494] Now the lawyers are somewhat bewildered about how to respond and tend to back off when they see that the media are setting up a *Reynolds* defense.[495] The net effect is that *The Guardian* has not been sued lately in a *Reynolds*-type case.[496] It is unfortunate that for media defendants, large corporations are less likely to be deterred by the costs rules.[497]

V. CONCLUSION

It is worth noting, however, that in the context of the repressive restrictions that English libel law has historically placed on publishers, *Reynolds*' consideration of tone may allow for more allegations to be published by the media. That is, before *Reynolds* it would have been difficult or impossible to make certain allegations in England.[498] But after *Reynolds*, it is possible to make allegations even if they need to be put in a restrained tone.[499] Although the *Reynolds* decision has not produced the extraordinary level of protection accorded by the United States Supreme Court's decision in *New York Times, Inc. v. Sullivan*, it does seem to have had a significant positive effect on English defamation law. Before *Reynolds*, English defamation law tracked the common law and was very protective of reputation. In order to publish, the media needed to be able to prove

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490. Interview with Second Anonymous Guardian Editor, *supra* note 248.
491. *Id.*
492. *Id.*
493. *Id.*
494. *Id.*
495. *Id.*
496. *Id.*
497. *Id.*
498. *See*, e.g., Andrew T. Kenyon, Lange *and* Reynolds *Qualified Privilege: Australian and English Defamation Law and Practice*, 28 MELB. U. L. REV. 406 (2004).
499. *See*, e.g., *id.*

the truth of the matter asserted or to bring the article within the scope of a recognized privilege. In many instances, the media opted not to publish for fear of liability. Under *Reynolds*, most media organizations are able to publish articles that they would not previously have been able to publish. So, in this respect, *Reynolds* represents a more successful extension of qualified privilege than the Australian decision in *Lange v. Australian Broadcasting Corporation*. The latter decision seems to have had little positive effect on the Australian media.

Despite its positive effect, the English media have concerns regarding the *Reynolds* version of qualified privilege. Among the major concerns, the media remain uncertain about how *Reynolds*' multi-factor analysis will be applied. Because there are so many factors, and because there have been so few judicial decisions interpreting and applying *Reynolds*, the media do not know how to weigh and evaluate the factors. Must the media always seek a response from the subject of an article? If not, when is it permissible not to seek a reply? If the media satisfy some of the *Reynolds* factors but not others, will it be enough? Perhaps this concern will be resolved over time as the courts render additional decisions.

Other concerns are less likely to be resolved. For example, the media are concerned that *Reynolds* controls the tone of what they publish. Even when the English view a particular situation as outrageous and believe that the public interest requires them to declare the outrageousness, few English media outlets will be prepared to do so for fear that they will lose their *Reynolds* defense. For the same reason, the media must also be very careful about the content and size of their headlines. The English media are also concerned about the costs of complying with *Reynolds*. Although the English media spent significantly more on lawyers than the U.S. media before *Reynolds* (e.g., using night lawyers and barristers to go through newspapers looking for potentially defamatory material), the English media have significantly increased their expenditures on lawyers in the post-*Reynolds* era. Not only did all newspapers retain the night lawyers and barristers, they also use lawyers to "*Reynoldize*" pieces.

In the final analysis, *Reynolds* appears to be a positive and hopeful development in English defamation law. Before *Reynolds*, English defamation law was particularly draconian and tended to inhibit the publication of important information. In the post-*Reynolds* era, the English media are able to report more freely. While *Reynolds* may not have found the perfect balance between speech and reputation (assuming that such a perfect balance exists), it constitutes a positive and worthwhile addition to English jurisprudence. The analysis here shows that the legal developments, even when noted by the media, are slow to take root in journalistic

practice. A greater scope for public speech will take more than one encouraging decision—it will depend upon a culture of robust inquiry and publication that will turn upon the courts' consistent message prompting cultural change.