

Defamation in the political arena

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Dispute Resolution analysis: What special treatment is afforded to political speeches in the context of defamation? Following the political mudslinging of the recent election campaign, three Labour MPs brought a libel claim against a UKIP MEP relating to the contents of a party conference speech. Gerald Shamash of Steel & Shamash Solicitors, who acted in the case, comments on the preliminary ruling.

Original news

Barron MP and others v Collins MEP [2015] EWHC 1125 (QB), [2015] All ER (D) 237 (Apr)

An application in this case was heard on 20 April 2015 with a reserved judgement handed down on 29 April 2015. In this application the judge had to rule on a UKIP party conference speech delivered by the defendant. In that speech, Ms Collins referred to a recently published report into historic sex abuse claims in the Rotherham area. Ms Collins sought to cast the blame not only onto council officials but also onto three MPs whose constituencies covered in whole or part the Rotherham area. Ms Champion was only elected MP in November 2012 to replace Denis McShane. The judge had to decide on the meaning of the words delivered at the 2014 UKIP party conference speech and whether it was fact or comment.

The judge ruled in favour of the three claimant Labour MPs who were all re-elected at the May 2015 general election.

What is at the heart of this dispute?

In October 2013 the Metropolitan Borough of Rotherham commissioned Professor Alexis Jay OBE to investigate historic allegations of child sex abuse in its area. The report was published in August 2014 entitled: *Independent Inquiry into Child Sexual Exploitation in Rotherham 1997-2013*. In his executive summary, are these findings:

'No one knows the true scale of child sexual exploitation (CSE) in Rotherham over the years. Our conservative estimate is that approximately 1400 children were sexually exploited over the full Inquiry period, from 1997 to 2013. In just over a third of cases, children affected by sexual exploitation were previously known to services because of child protection and neglect. It is hard to describe the appalling nature of the abuse that child victims suffered. They were raped by multiple perpetrators, trafficked to other towns and cities in the north of England, abducted, beaten, and intimidated...This abuse is not confined to the past but continues to this day.'

[...]

'Further stark evidence came in 2002, 2003 and 2006 with three reports known to the Police and the Council, which could not have been clearer in their description of the situation in Rotherham. The first of these reports was effectively suppressed because some senior officers disbelieved the data it contained. This had led to suggestions of cover-up. The other two reports set out the links between child sexual exploitation and drugs, guns and criminality in the Borough. These reports were ignored and no action was taken to deal with the issues that were identified in them.'

[...]

'Seminars for elected members and senior officers in 2004-05 presented the abuse in the most explicit terms. After these events, nobody could say "we didn't know". In 2005, the present Council Leader chaired a group to take forward the issues, but there is no record of its meetings or conclusions, apart from one minute. By far the majority of perpetrators were described as "Asian" by victims, yet throughout the entire period, councillors did not engage directly with the Pakistani-heritage community to discuss how best they could jointly address the issue. Some councillors seemed to think it was a one-off problem, which they hoped would go away.'

At the UKIP party conference on 26 September 2014 the MEP for Yorkshire, and candidate for UKIP in the Rotherham constituency, Jane Collins, gave a speech to her party's conference. The full text of that speech is in the judgment. As well as referring to the Jay report, she sought to put the blame for what had happened at the door of Labour-controlled Rotherham Council. However, in the speech she appeared to go further by seeking to taint the three claimant MPs whose constituencies covered Rotherham with what had happened.

The judge highlights key parts of Ms Collins' speech:

'My speech today will deal with an issue that highlights just how social engineering and political correctness has failed the most vulnerable people in our society today.'

'The report reiterated throughout warning after warning went unheeded in the town. And much of this was due, ladies and gentlemen, to political cowardness [sic] and worrying about keeping their vote.'

'From the outset of this scandal I called, and the party called, for resignations of all those directly involved. And we managed to bag a few...However there are many others that still have questions to answer, and possibly charges to face. This includes the three Labour MPs for the Rotherham area. I am convinced that they knew many of the details of what was happening.'

'I am now calling for criminal charges to be brought against those who it can be proved knew about the abuse, who failed to act-- because in failing to act they aided and they abetted the perpetrators and they are just as guilty. Take heed Mr Miliband, take heed. Together the Labour Party betrayed the children of Rotherham.'

'And as Mr Miliband put it, together they conspired to allow the abuse of children on an industrial scale; together, they failed to apologise, and they kept quiet to suit their political purposes.'

Sarah Champion was elected in a by-election for Labour in November 2012--she replaced Dennis McShane. One issue in this case was whether what Jane Collins said in her speech was intended to refer to the present or previous MP for Rotherham.

The three sitting MPs for Rother Valley, Wentworth & Dean and Rotherham were all contesting their seats at the May 2015 general election. They brought a defamation action against Ms Collins on the basis of her party conference speech. The judge decided three preliminary issues needed resolving before the trial:

- o the meaning of the words
- o whether the words are fact or comment, and
- o whether the words referred to the third claimant, Sarah Champion

These issues were resolved in the claimants' favour. All three claimants were successful at the May 2015 general election at holding on to their seats. Ms Collins, while unsuccessful, secured 11,414 votes and over 30% of the share coming second to Ms Champion.

How did the court approach determining the meaning of the words in the speech following *Jeynes v News Magazines*?

The judge was bound by the decision of the Court of Appeal in *Jeynes v News Magazines Ltd and another* [2008] EWCA Civ 130, [2008] All ER (D) 285 (Jan). In that case, Sir Anthony Clarke laid out the eight legal principles to be applied:

- o the governing principle is reasonableness
- o the hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available
- o over-elaborate analysis is best avoided
- o the intention of the publisher is irrelevant
- o the article must be read as a whole, and any 'bane and antidote' taken together
- o the hypothetical reader is taken to be representative of those who would read the publication in question
- o in delimiting the range of permissible defamatory meanings, the court should rule out any meaning which can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation
- o it is not enough to say that by some person or another the words might be understood in a defamatory sense

The judge said that freedom of political expression is one of our most important freedoms and this important in construing the third *Jeynes* criteria. The judge saw the application in the case and then viewed a recording of the speech to form his own impression of what it conveyed. He then read the skeleton arguments, heard the oral submissions before delivering his reserved judgment.

How does this case further our understanding of fact versus opinion (especially in the context of political speech)?

The Defamation Act 2013, s 3 (DA 2013) gives a defence to libel claims of 'honest opinion' which replaces the former defence of 'fair comment'. For this honest opinion defence to apply, the statement complained about has to:

- o be a statement of opinion
- o indicate in general or specific terms the basis of the opinion
- o be an opinion that an honest person could have held on the basis of any fact which existed at the time of publication

The defendant sought to rely on the defence on honest opinion on the basis of the Jay report. The judge had ruled in another case (*Yeo v Times Newspapers Ltd* [2014] EWHC 2853 (QB), [2015] 1 WLR 971) where the boundary lay between facts and opinion. He found these to be the dividing characteristics:

- o the statement must be recognisable as comment, as distinct from an imputation of fact
- o comment is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark or observation
- o the ultimate determinant is how the words would strike the ordinary reasonable reader
- o the subject matter and context of the words may be an important indicator of whether they are fact or comment

The judge examined DA 2013, the explanatory notes that accompanied the Bill that preceded it and the existing case law. On the whole, the judge decided DA 2013 has not changed the position very much. Even the claimants' counsel conceded that the boundaries of political criticism are very wide. The judge accepted this, saying 'the law relating to meaning and to the distinction between fact and comment, makes some allowance for the need to give free rein to political speech'.

However, crucially, the judge decided that the allegations of a conspiracy to allow abuse and keeping quiet 'together' were not presented as matters of opinion at all. The judge found this even though he ruled that the motives of the conference speech were presented as matters of opinion.

Does this case raise questions around the notion of verifiability?

The judge reminded himself of the jurisprudence of the Strasbourg Court in *Lingens v Austria (Application 9815/82)* (1986) 8 EHRR 407, [1986] ECHR 9815/82 that it would be wrong to require a defendant to prove the truth of a value judgment.

The defendant's counsel submitted that the criterion of 'verifiability' is not expressly reflected in DA 2013 or its explanatory notes and warned against using this as a yardstick.

What can we take from this case around the issue of reference to the third claimant?

The third claimant had been running a hospice for most of the time period covered by the Jay report. She was elected as MP for Rotherham at a by-election in November 2012, holding her seat at the May 2015 general election. The MP for Rotherham who was in office during the time of the complaints covered in the Jay report was Dennis McShane. In the UKIP conference speech, Ms Collins refers to Denis McShane by name but never refers to Ms Champion by name. This is a ruling on a preliminary issue by Warby J who had to decide if (even though Ms Champion was not mentioned by name) the impression left on her conference audience speech was such that Ms Champion was also attacked by Ms Collins. The judge rightly notes that this was a conference speech and it has to be judged as such on its overall impact and this would be different to how a written piece in a newspaper may be judged.

However, this is not how the judge saw it. He said the submissions that it was implicit in the UKIP conference speech that the allegations were levelled at the former and not the current MP for Rotherham were 'ill-founded'. He felt that this would require specialised knowledge by the audience as to whom Ms Collins was referring to and would not be in the general knowledge of her UKIP party audience. He labelled this 'reference innuendo' which could be affected by the knowledge of

the readership or audience. It had as its defamatory characteristic, some special knowledge possessed by some audience members, but he ruled that the same is true in reverse.

Does this case raise any further questions around the application of DA 2013?

DA 2013 received Royal Assent on 25 April 2013 and so far provisions of DA 2013 have been considered in 40 reported cases. This ruling on a preliminary issue clarifies how libel judges will treat the new 'honest opinion' defence. It seems that judges do not feel that DA 2013 has changed the requirements on this much from the 'fair comment' defence that used to apply before DA 2013.

DA 2013, s 1 requires 'serious harm' to be caused to the reputation of a claimant before any statement is defamatory. As this was a preliminary ruling, Warby J was not required to rule on where the UKIP conference speech caused all or any of the three Labour MPs 'serious harm'--this will be a matter for trial.

The justification defence in the Defamation Act 1952 was abolished by DA 2013 and a defence that 'the imputation conveyed by the statement complained of is substantially true' was put in its place. Again, as this was a preliminary ruling there is no guidance in this case on the scope of this defence.

Interviewed by David Bowden.

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