Libel—‘reply-to-attack’ qualified privilege not defeated in ‘reply-to-retort’ context (Abdulrazaq and others v Hassan and others)

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TMT analysis: This was an application to strike out the claim and/or for summary judgment in relation to the defendant’s defence of qualified privilege, in circumstances where the claimant’s plea of malice was argued to be unsustainable. The proceedings were a straightforward claim for libel arising from a notice published on a noticeboard and online and in a similarly worded leaflet. The application was considered solely through the lens of summary judgment, the judge having stated that his assessment of the pleadings, particularly as regards the plea of malice, was not dispositive and therefore that he did not consider that the case was appropriate to be struck out. The judge considered that the defence of qualified privilege did apply, and that the plea of malice had not been made out, such that the defendants were entitled to summary judgment. The judgment contains interesting comments about ‘reply-to-attack’ privilege and its applicability in the context of an anticipated attack followed by a public reply. The judgment also summarises the principles applicable to a plea of malice, and confirms the inherent difficulties of such a plea based on the defendants’ wish for retaliation or revenge. Written by Mathilde Groppo, senior associate at Carter-Ruck Solicitors.

Abdulrazaq and others v Hassan and others [2021] EWHC 3252 (QB)

What are the practical implications of this case?

The judgment’s main point of interest is its consideration of the claimants’ submission that the words complained of were not, properly speaking, a reply published by the defendants in response to an attack published by the claimant. Instead, the claimants sought to suggest that the words complained of were simply a retort to an attack published by them in anticipation of a probable attack by the defendants themselves (in other words, a retort to a reply published by anticipation). The claimants argued that in those circumstances, the privilege should not attach to the defendants’ retort to the claimants’ attack/anticipated reply.

In the paradigm case, the reply-to-attack privilege does not attach to the first publication, the attack, but attaches to reply, regardless of whether the first publication was defamatory. The claimants’ contention was that a retort to an anticipated attack should not be protected by privilege. The claimants’ argument failed on the facts of the case, but the judge commented further on this point. He suggested that if he had to take a view on the legal argument, he would either have decided that the existing case of *Bhatt v Chelsea and Westminster NHS Trust* (not reported by LexisNexis®UK, 16 October 1997) (in which it was held that the ‘reply-to-attack’ principle did cover anticipated attacks) had been wrongly decided, or that it should not prevent the defence of qualified privilege from applying to the response to the first public attack.

The judgment also considers the issue of malice—in the form of a dominant and improper motive to injure the defamed person—and the circumstances in which this would characterise a misuse of the defence of privilege, which would consequently fail. Having summarised the main principles applicable in this context, the judgment confirms the difficulties associated with a plea of malice generally, and in particular with a plea based on a wish for retaliation or revenge, irrespective of the truth of the allegations. The judge adopted Mr Justice Eady’s characterisation of such a plea as an ‘endangered species’ in *Lillie & Reed v Newcastle City Council* [2002] EWHC 1600 (QB), and commented that, generally, ‘a case of malice put forward on this basis would be extremely difficult to sustain’.

The judge also reminded practitioners that the malice plea must be contained in the pleadings, and criticised the claimants’ decision ‘to serve what [was] in reality another pleading as an annex to a skeleton argument and not seek the court's permission for it’.

What was the background?

The three claimants were former members of a Mosque, and one of them was also a former trustee of the Mosque, who had been expelled and excluded from it by the defendants, the current trustees of the Mosque. The background to the exclusion was an historic dispute between the parties, which resulted in the trustees and executive committee of the Mosque meeting and taking the decision to exclude the claimants in accordance with the Mosque's constitution.

Following the meeting, identical letters were sent to the claimants notifying them of the expulsion decision and the grounds for this decision, and inviting them to attend a meeting to put their case. The letters were not made public, but the claimants reacted by handing out leaflets asserting that the first defendant (in particular) had no right to ban them. The claimants then sought to attend the meeting with non-Muslim friends, who were refused entry by the defendants. The police were called and asked the claimants to leave, to avoid a breach of the peace.

The meeting proceeded in the claimants' absence, and the claimants' exclusion was voted. It was agreed a statement would be drafted for distribution by way of 'a challenge to [the Claimants'] own leaflet'. The statement, which comprised the words complained of, was in fact published on a Notice affixed to the Mosque notice board and published online, and in a leaflet distributed at the Mosque.

The claimants issued proceedings. Following the filing and service of the pleadings in the case, the defendants issued an application to strike out the claim and/or for summary judgment on the grounds that the defence of qualified privilege must succeed and the plea of malice was unsustainable. This judgment followed the hearing of that application.

What did the court decide?

The court considered the application solely from the lens of summary judgment, considering it inappropriate for a strike out. For these purposes, it had to consider two main issues: whether the defendants could rely on the defence of qualified privilege, and whether the claimants' malice plea defeated that defence.

On the issue of qualified privilege, the court considered that this case was one where the 'duty/interest' privilege arose; not because of the existence of a legal duty to publish the reasons for the expulsion (the Mosque's constitution imposed no such duty), but because the defendants had a social or moral duty to do so given the draconian nature of the decision. The members of the Mosque had a reciprocal interest in receiving that information, which related to the proper running of the Mosque.

The court rejected the claimants' contention that the defendants could not rely on 'reply-to-attack' privilege because theirs was simply a retort to the claimants' reply to an anticipated attack. The court did not agree that, on the facts of the case, the defendants had genuinely anticipated an attack, and considered that in any event the rationale of the privilege is to protect reasonable and proportionate responses to public attacks, such that as a matter of principle either the privilege should not cover anticipated attacks, or it should not be prevented from applying to responses to the first public attack.

On the claimants' plea of malice, the court considered that: the claimants did not have a real prospect of proving at trial that the defendants knew that the allegations were untrue; their interpretation of *Ward v Associated Newspapers Ltd* [2021] EWHC 641 (QB) was incorrect and that their plea of improper dominant purpose could not survive on a free-standing basis; and, that on the facts of the case the claimants had no real prospect of establishing at trial that the defendants had acted with the dominant purpose of retaliation or revenge. On that basis, the judge granted the defendants summary judgment.

Case details

- Court: Media and Communications List, Queen's Bench Division, High Court of Justice
- Judge: Mr Justice Jay
- Date of judgment: 2 December 2021

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