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Doping and Free Speech

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ABSTRACT

This article looks at the problems of doping in professional cycling and the difficulties of the media in accurately reporting the problem. It examines the arguments against doping in sport generally and the specific problem which is raised by professional cycling. The question of public

interest in fairly conducted professional sport is examined. This is set against English libel law and the problems which the media have in reporting and analysing drug taking by professional cyclists. The article concentrates on the libel action brought by the leading U.S. cyclist and multiple Tour de France winner Lance Armstrong against the Sunday Times. The structure of English libel law and historical emphasis on reputation outweighing free speech is examined, as are modern developments in English libel law prompted by the European Convention on Human Rights, particularly 'Reynolds privilege'. The question is raised as to whether this development gives more scope to report individual doping cases provided that they comply with the standards of 'responsible journalism.'

KEYWORDS

Libel, Privilege, Journalism, Cycling, Drugs

INTRODUCTION

The importance of sport in modern life is unquestionable professional form it provides entertainment to a large population, both live and in media coverage through television, radio, print media and increasingly on the internet.


A key aspect of professional sport is that it involves large sums of money are invested in professional sport

ownership, sponsorship or media payments. Companies return on their investment and the most obvious return success, which is then identified with the companies' profit. One effect of this is increased pressure on professional athletes to perform. They depend on contracts for a living and contracts depend on success. This pressure is increased by the knowledge that other athletes are resorting to performance enhancing drugs and outperforming them as a result. The pressure to improve through illegal methods is extremely strong.

The International Olympic Committee defines doping as, 'the use of an expedient (substance or method) which is potentially harmful to athletes' health and capable of enhancing their performance, or the presence in the athlete's body of a prohibited substance or evidence of the use thereof, or of the use of a prohibited method.' (IOC 1999). However, there is no universally accepted definition of performance – enhancement remains elusive. Drugs may be taken by athletes for reasons other than performance – enhancement. This may be for legitimate therapeutic reasons or recreational use.

Whether a drug is considered to be performance – enhancing also depends on the context in which it is used. A drug which is performance – enhancing in one sport, such as beta-blockers, may well have the opposite effect if used in another sport.

'Doping is generally felt to be the worst of sporting crimes' (Williams, 1998) but evidence of the prevalence of doping in elite athletes is, by its nature very difficult to obtain and academic studies have been carried out on athletes (Spence, 1990; Anskel, 1991; Laure, 1995; Spence, 1996; Franke and La Torre, 2001; Chester, 2003). Such studies as have been carried out have had widely differing aims and produced highly variable results. No clear evidence can be drawn from them. It has been stated that the available evidence supports the view that the use of performance enhancing drugs has substantially increased since doping controls were first introduced in the 1960s and that the prevalence of drugs in elite-level sport is now widespread. However, it appears to beg the question as to the unknown level of doping prior to the introduction of doping controls.

From the 1960s, the 'medicalisation of sport,' (Drugs in Sport, 2002, p.76) saw a new type of individual, the 'trained athlete'. Athletes were now prepared for competition with training regimes encompassing diets and medication. The preparation of an athlete for sport could encompass non-medical use of medicines such as steroids, stimulants and tranquillisers (Spence, 2003, p. 232). The new approach focused on performance enhancement but a major change came in the 1990s with the development of drugs which could actually improve performance. The background to these drugs was in the practice of blood doping, in the form of blood transfusions in athletics in the 1970s. The International Olympic Committee only banned this practice in 1986. Fitness can be measured by the volume of oxygen consumed while exercising at your maximum capacity. VO₂ max is the maximum amount of oxygen in millilitres, one can use per minute per kilogram of body weight. Those who are more fit have higher VO₂ max values and can exercise more intensely than those who are not as well conditioned.  The physical limitations that restrict the rate at which energy can be

aerobically are dependent upon: the chemical ability of muscular cellular tissue system to use oxygen in breaking down fuels; the combined ability of cardiovascular and pulmonary systems to transport the oxygen to the muscular tissue. Blood doping could increase an athlete's VO2 Max by up to 10 percent and their running time to exhaustion by up to 10 to 15 percent.

The spread of doping in sport was confirmed when the first received widespread prominence in the media when the Canadian sprinter Ben Johnson tested positive after winning the 100 metres at the Seoul Olympic Games in 1988. A report by the Australian Senate heard evidence that approximately 70% of Australian athletes who competed internationally had taken performance-enhancing drugs (Australia, 1989) and the Canadian Government established a Commission of Enquiry under Mr Justice Dubin to enquire into the problem and this exposed detailed evidence of the networks of relationships between doctors, athletes and coaches involved in doping. (Dubin, 1990) It is this report that has set the tone for subsequent anti-doping policies.

ARGUMENTS AGAINST DOPING

Three arguments are raised against allowing doping in sport, although there are some who take the position that doping should be allowed (Coomber, 1993, p. 169-173).

The first argument is that doping is a danger to health. It is accepted that there is a strong link between sport and health and that sport is health promoting, the logical corollary of a paternalistic one that possibly unhealthy substances should be banned in the interests of the athlete. However, this argument ignores the principle of autonomy and that adult athletes should be able to make an informed judgment about what they do (O'Leary, 1998, p. 161-197).

It is also arguable that high-performance sport is not conducive to good health because of the risks of injury and the effects of severe training regimes on the athlete's bodies. One former professional cyclist has stated that, 'a good Tour takes a toll on your life and when you finish in a bad state they reckon you're 10 years' (Globe and Mail, 1998).

It would also appear that several legal drugs which are used in treating sports-related conditions, such as anti-inflammatory drugs, have negative short and long-term effects on an athlete's health (Waddington, 2000). There would not appear to be a slight shift away from paternalism indicated by the difference between the International Olympic Committee's anti-doping code of 2000, which included the movement to protect the athlete's health, (IOC Olympic Movement: Anti-Doping Code 2000.

http://www.medcynasportowa.pl/download/doping_coc and the World Anti Doping Association (WADA) equivalent. The principle is to protect the athlete's fundamental right to participate in doping free sport (WADA World Anti-Doping Code (2003) http://www.wada-ama.org/rtecontent/document/code_v3.pdf1).

The WADA statement is part of the second argument, which is that there should be a level playing field for all competitors.

this basis doping is cheating. This argument is open to criticism as although elite-level sport is highly rule-governed, it is not to say that all competitors operate on a level playing field. This is because the resources available to each competitor would not be equalised. In professional cycling there is a huge disparity between the budgets of the different teams and thus the ability to sign the best riders and provide the best equipment and coaches. Why not therefore include the best performance-enhancing drugs?

The third and most recent argument is that doping is harming the image of sport (Ethics, 1997-8). If doping is an attempt to gain an unfair advantage over opponents why is it singled out with particular opprobrium over other forms of cheating in sport? Waddington (2000) has convincingly suggested that this is because of the moral panic associated with drugs in sport and public anxiety over drugs spilling over into the sporting world.

DOPING IN PROFESSIONAL CYCLING – A BRIEF HISTORY

Professional cycling has been described as having, 'an inextricable association with drugs' (Williams, 1998) and it is clear that drugs have always been prevalent in cycling. Initially stimulants and painkillers were taken, not to expand performance capabilities but to enable cyclists to use their existing capacities to the fullest. The systematic use of drugs in professional cycling in the 1970s, such as amphetamines, has been documented by a rider from the 1970s (Kimmage, 1998).

The speed at which oxygen can be conveyed to the muscle tissue system is crucial in elite-level cycling and in the 1970s a new form of doping arrived in the professional peloton. In 1985 the Food and Drug Administration approved the clinical use of EPO (Erythropoietin), a medicine which had originally been developed to cure anaemia in patients with kidney problems. EPO has the same effects on an athlete's performance as doping but poses far greater health risks, including thickening the blood which makes it more difficult for the heart to pump blood round the body. In the early 1990s upsets in major races became more frequent and there was a rash of deaths among professional cyclists (Independent on Sunday, 1991). In 1990 the deaths of two cyclists, one of whom had a blocked external iliac artery, one of the key arteries leading down from the heart was literally obliterated. This was put down to two factors, the dangers of thickened blood and an increase in wear and tear linked to riders' inability to train when using EPO. At this point there was no test for EPO. In 1996 the riders themselves asked the governing body, UCI, to impose a limit on haematocrit levels, the red blood cell count in the blood. The more red blood cells there are, the faster oxygen can be transmitted.

The level was set at fifty percent for no scientific reason. A rider recording a higher level would not be allowed to ride. The average haematocrit level for healthy persons in the 18-20 age range is forty-four and this should drop during training and competition by three to four points. However, this was at least an improvement, as some riders had been recording levels of up to sixty percent and were having to sleep with heart monitors and alarms in case their thick blood slowed the heartbeat, leading to death.

Matters reached a head in the 1998 Tour de France when soigneur (team helper) for the Festina team was arrested at the French-Belgian border with industrial quantities of EPO in the boot of his car. The team was thrown off the Tour, riders were subjected to police searches and arrests and the team manager and doctor imprisoned. The subsequent investigations revealed an organised and systematic doping culture in the team, even previously 'clean' riders being sucked in (Voet 2007). Professional cycling was thrown into crisis, as it was clear the doping culture was not restricted to just the one team. A rash of confessions from former team members from the 1990s was revealed that one of the best funded teams in the professional peloton, T-Mobile, had a similar organised doping culture within the team in the 1990s (<http://www.bikerace.com>, 21st September 2006). A urine test for EPO was developed in France in 2000 and introduced in 2001. This would appear to have loosened the grip of EPO on professional cycling but it has also led to other methods such as a resurgence of blood doping and other, as yet undetectable, drugs being used. Difficulties have been experienced in testing for human growth hormone and IGF1 (insulin-like growth factor) is as yet undetectable. The issue resurfaced when Spanish police raided a pharmacy in 2006 in what became known as Operation Puerto. As a result of information supplied to the organisers of the Tour de France by the team managers, an entire team and four of the five riders from the previous year's event were withdrawn from the 2006 Tour de France. The fifth rider was Lance Armstrong who won the 2005 event and then retired. The 'winner' of the 2007 Tour, the US rider Floyd Landis subsequently tested positive for testosterone and was suspended and subsequently stripped of his title. The 1996 Tour de France champion, Danish rider Bjarne Riis was also stripped of his title when he admitted to EPO use in 2007.

The 2007 race descended into complete farce when one of the race favourites, the Kazakh rider Alexander Vinoukov, was thrown out of the race for blood doping, another favourite, the Spanish rider, Iban Mayo tested positive for EPO and the race leader, the Danish rider Michael Rasmussen, was suspended from his Dutch team, Rabobank for lying about his whereabouts to avoid drug testers. The eventual winner, the Spanish rider Alberto Contador, has been linked with Operation Puerto and was prevented from participating in a German race after the Tour de France.

The evidence appears to show that doping has been almost universal in the professional peloton and that what came to be known as a 'clean' rider. It appears clear that everyone in the cycling business had knowledge of this and a blind eye was being turned by almost everybody involved in professional cycling. The response of riders, race organisers and team directors to the police raids on the 1998 Tour was one of hostility and the team avoided France in the following season, wherever possible, because of the stronger stance on doping (Waddington 2005, ch. 9; Masso, 2005, ch. 11).

Given the ambivalent attitude to doping by riders, spectators and organisers are there any convincing reasons why doping should be banned in adult professional cycling? It is clear that the integrity of professional cycling has been brought into serious doubt by doping scandals. This has led to firms withdrawing

sponsorship from the sport, including Floyd Landis' team Phonak Hearing Systems. Television companies withdrew coverage of the Tour de France, when two German TV channels withdrew coverage in protest at the ongoing drug scandal. A decline in spectators and viewers is also apparent and is part of the circle of sponsorship withdrawal. It would appear sports do not always take the ethical high road however. In 2006 Swiss firm Nestle was launching Aquarel, a new brand of water and was considering a contract with the Tour de France organisation. Concerned with the impact that doping scandals might have had on the image of professional cycling, the company carried out surveys in several different countries. These showed that the impact had been zero. The surveys were carried out in countries which were the heartland of cycling and had to turn a blind eye. As the appeal of professional cycling spreads to countries without a history of the sport, such as the USA, audiences tended to be more critical (Maso, 2005, p. 14).

At the time of writing it would appear that the future of the sport is in doubt unless it takes rapid steps to clean up its act. The strongest argument would appear to be the one concerning the athlete's health. Many of the doping products and methods used carry serious risks to the athlete's long-term health. It appears that their teams to dope in order to produce results have placed professional cyclists under pressure, directly or indirectly.

It is not the purpose of this article to analyse whether cycling should be allowed but to argue that for the reasons given it is a legitimate subject for media attention and therefore worthy of free speech protection as a subject of public interest. On the other hand, the subject to public scrutiny would appear to serve all the purposes of the law. The legal difficulty in England is the law of libel.

THE LAW

Any law of libel requires the balancing of the interests of reputation and freedom of speech. Too restrictive a law would stifle discussion of matters of public interest.

The relevant issues in media stories relating to doping are whether the claimant has to establish that the article was defamatory in the sense that it lowered his reputation in the eyes of reasonable thinking members of society. What is crucial here is the meaning that is attached to the words used and what the 'sting' of the libel is. If defamatory meaning is established, the defendant must either prove that factual matters are true, (justification) or that his comments (opinions) are fair. If he cannot do this then he must establish that privilege attaches to the statements. Privilege has the effect of allowing statements to be made in the public interest ('Reynolds privilege') even if they cannot be proved true at the time they are made. English law recognises two forms of privilege. The first is absolute privilege which applies to statements such as statements made in Parliament or in a court of law. The second is qualified privilege, which unlike absolute cannot be destroyed by malice on the part of the speaker. The relevant form of privilege here is qualified privilege.

How feasible is it for the media to investigate doping in the light of this legal background? In essence any statement which could be defamatory under the tests stated above could

actionable unless it can be proved to be true (justification). Reynolds privilege applies. The key factor in qualified privilege is that it permits the publication of certain statements which turn out not to be true. Because of the murky world that surrounds this issue, even if there were evidence of guilt it would be difficult to gather the evidence to establish a defence of justification and as was stated in *Bennett v News Group Newspapers Ltd* [2002] EMLR 860 at 877, the fact that a defendant in a libel case cannot plead as supposed grounds of defence post-dating publication also poses a problem. A defendant who is suspected of doping at the time of publication but who has not tested positive by the time of the libel action but technical facts cannot be used to establish justification.

The application and effect of the law in this regard is applied in the litigation involving the United States cyclist Lance Armstrong and the Sunday Times newspaper.

THE BACKGROUND TO THE LITIGATION

Armstrong became world cycling champion at the age of 25. He later developed testicular cancer and was given a fifty-fifty chance of surviving. He did survive and returned to professional cycling to win the 1999 Tour de France and went on to win the event a record seven times in succession before retiring in 2005. His win in the 1999 Tour was seen as particularly important for cycling, as he had not competed in the tainted 1998 version of the race and was seen as a breath of fresh air sweeping through cycling, who could win without resorting to illegal methods.

The background to the litigation was a book, "L.A. Confidential: Les secrets de Lance Armstrong", written by David Walsh and Pierre Ballester. The book was published in France on 11 November 2004 and has been published in the U.S.A. but was not published in the United Kingdom as a result of that country's libel laws.

Mr Walsh and Mr Armstrong were well known to each other professionally and when the Sunday Times proposed to publish an article drawn from the book, Mr Walsh attempted to contact Mr Armstrong prior to the publication of the Sunday Times article in order to obtain his answers to certain questions and to make any other comments he might wish to make. He sent Mr Armstrong questions on topics concerned with drugs and cycling. Mr Armstrong instructed by Mr Walsh sent a letter to Mr Walsh at the Sunday Times in relation to the article. They enclosed with the letter copies of the e-mailed questions, which they described as containing implicit allegations and insinuations which were defamatory, and highly damaging. They did not answer the questions, and complained that these false allegations would be being repeated verbally when there was absolutely no evidence to support them. They said it was difficult to ignore the allegations which were more harmful to an athlete's professional standing, honour or reputation, or a more damaging time to publish them, given the US Postal Team's imminent attempt to win the Tour de France for a sixth time. They asked for clarification of the nature of any allegations Mr Walsh intended to publish, complaining that the allegations arising from the emails were vague in the extreme and lacked particularity, so that they could not be expected to comment on them, even if so requested. They also sought details of the book they understood Mr Walsh was writing.

might also be writing (or co-writing) for publication. The their letter by asking for an undertaking from Mr Walsh Sunday Times to the effect that they would not publish articles alleging improper, unprofessional or illegal behaviour of their clients.

This letter received no reply, and on 13th June The Sun published an article which took up most of a page in its Section. The article was headed:

'LA Confidential

A book co-written by David Walsh of The Sunday Times will raise new questions about Lance Armstrong, five-time champion of the Tour de France and an icon of the sporting world. Alan English reports.'

This heading appeared alongside a large photograph of Armstrong, below which was the following caption:

Heart of the matter: Lance Armstrong after victory the Tour de France, a race he will attempt to win a sixth time next month. The new book investigates the aftermath of a drug test on Armstrong during 1999 Tour.

Armstrong claims David Walsh, left, is pursuing a vendetta against him. The publication of the book likely to lead to further recriminations.

It said that it was certain to raise serious new questions about drug taking in professional cycling, and to investigate the possibility that Mr Armstrong might have taken performance-enhancing substances in order to compete in 'a sport riddled with drugs'. Particular reference was made to 'the blood-boosting product erythropoietin (EPO)'. The article then referred to the sources used in the book and an article in a Dutch newspaper quoting Lance Armstrong attacking David Walsh's ethics standards. A claim for libel was served by Lance Armstrong five days later.

A story which simply discussed the problems of doping in cycling with reference only to cyclists who have been convicted of doping offences would be 'safe' in libel terms. The difficulty that journalists faced was that Lance Armstrong had not been convicted of any doping offences and no investigation was pending. Any article which suggested that he was pharmaceutically assisted ran the risk of a libel action.

It appears that the journalists were convinced that the questions that needed answering and that Lance Armstrong needed to answer them satisfactorily in order to satisfy the public that what they were watching in bike racing was genuine. In the words of one medical writer, 'this was a self-deception...to which hundreds of athletes are subjected. For the millions of fans, we need the athletes themselves to do this plague' (Noakes 2004). On one side of the fence was the reputation of an undoubtedly superb athlete with the best ever in the Tour de France, widely regarded as the world's most gruelling sporting event. On the other side was a public

issue as to whether it was possible to win what is probably the world's most watched annual sporting event without doing so. The job of the court in the libel proceedings was to see whether the defendants had overstepped the mark and unjustifiably tarnished the claimant's reputation.

DEFAMATORY MEANING

The question of defamatory meaning involves two inquiries. Firstly, what meaning are the words capable of bearing; secondly whether that meaning is defamatory or not. It was stated in *Keays v Murdoch Magazines* [1991] 1 WLR 1184 that the first question is one of law and for the judge and is appropriate to be decided as a preliminary issue. If the case goes to a jury, it was stated in *Broome v Agar* (1928) 44 TLR 339, 340 per Lord Justice Atkin that the judge may determine that a statement is not defamatory and withdraw the issue from the jury. The judge does not have the power to enter judgment for the claimant if he thinks that the words are only capable of a defamatory meaning. If there is a jury in the trial, the question of whether the statement was defamatory is one of fact for the jury.

At any time after the service of the particulars of claim a defendant party may apply to a judge sitting in private for an order determining whether or not the words complained of are capable of bearing a particular meaning or meanings. The court may determine a meaning that could only emerge as a result of strained or utterly unreasonable interpretation as the Defamation Act 1996, s. 7 provides that a court shall not be asked to rule on whether a statement is 'arguably capable' of bearing a particular meaning. Where the language of an alleged libel could possibly bear more than one meaning, the claimant should give particulars of the meanings that he alleges the words bear. This is to limit the particulars that the defendant will be permitted to advance in a plea of justification and to limit the issues for the jury.

Clearly a case can be shaped and defined by the particular meaning or meanings that a judge determines can be put to the jury. An example is where a person is accused of having committed some illegal act. In *Chase v News Group Newspapers* [2003] EMLR 11 at 45 Brooke LJ stated that there are three levels of defamatory meaning that can be attached. In descending levels of seriousness, these are that the claimant is guilty of the accusation; that there are reasonable grounds to suspect him; that there are grounds for investigating whether the claimant has been responsible for such an act. The nature of which a story will be written will depend on the nature of the evidence available to prove justification. If the media have conclusive evidence of guilt then an accusation of guilt can be made. Where they do not, a formula is frequently used referring to 'questions which need answering.' If the formula is successful the defendant can draw the 'sting' of the libel by justifying this meaning. If the judge excludes this meaning the defendant's task in justification is much more difficult. It is, however, a step to be taken lightly and in *Jameel v The Wall Street Journal Europe* [2003] EWCA Civ 1694 it was stated that a meaning should only be excluded if it is so far-fetched that a jury, properly directed, would be perverse to uphold it.

The first question was the meaning of the alleged libel; the second was whether that meaning was defamatory.

the 'sting' of the libel was. The thrust of the article was Lance Armstrong was associated with illicit performance enhancing drugs. There were three levels of seriousness attached to meaning. The most serious was that he was (level one), the second that there were reasonable grounds for suspecting him of having taken such drugs (level two), and third that there were grounds for investigating whether the claimant had been involved. (level three)

Libel cases frequently involve early skirmishing in order to determine which meaning can be put to the jury and it is obviously to the advantage of the claimant to establish the highest, three, or, in default, a level two meaning.

A preliminary application was made in order to determine whether a level three meaning could be put to the jury. (*Armstrong v Times Newspapers Ltd* [2004] EWHC 2928) At the stage of the proceedings it was still anticipated that the case would be tried by a jury. However, the parties later agreed to be tried by judge alone. Mr Justice Eady accepted that the effect of 'grounds for investigating' might significantly reduce the prospects for a plea of justification. The problem facing the defence was that there was no investigation under way and the defence argument was that a plea of justification should be allowed on the basis that an enquiry should be conducted. However, there had to be grounds which would lead a reasonable onlooker to believe that the person would not be trusted until the matter was cleared up. The sting of the libel might be, 'that there are grounds for investigating whether [the claimant] has been responsible for such an act.' The article in the Sunday Times had clearly been constructed with a view to fitting into this case as it referred frequently to 'questions which need answering'. However this was rejected by the court on the basis of the following passages in the article:

For a clean cyclist to beat a rider taking EPO is extremely difficult. The book will quote experts who believe that in a race as gruelling as the Tour de France, to do so is probably impossible.

Armstrong is no ordinary cyclist, but there are those who fear that a man who has won five Tours de France in a row must have succumbed to the pressure of taking drugs.

As the article referred explicitly to Lance Armstrong and made a call for an inquiry to be set up to investigate whether there was drug taking generally in the cycling world it was held that the material invited the reader to come to a conclusion where the probability lies or at least as to reasonable suspicion.

In a later hearing, *Armstrong v Times Newspapers* [2006] EWHC 1614, the issue was whether on the 'ordinary reader' test the words bore the meaning contended for by the claimant. The court held that the words bore the meaning that Armstrong was a fraud, cheat and liar who had enhanced his performance by using drugs (a first level meaning that he was guilty) or that the words bore the meaning that there were reasonable grounds to suspect that Armstrong had taken performance enhancing drugs (level two). The court held that the former was the case.

In my judgment the hypothetical ordinary reasonable reader would have understood The Sunday Times article as a whole, read once in conjunction with its headline, photographs and the captions, to mean that Mr Armstrong had taken drugs to enhance his performance in cycling competitions. If that is the meaning, then it appears to me inevitably to follow that Mr Armstrong's conduct in so doing was fraudulent and amounted to cheating and that his denials that he had done so were lies (Gray J. at para 32).

Is it preferable to have one of these types of cases tried by jury or by judge alone? The parties had agreed that the case as a whole should be tried by judge alone because of the need for the prolonged examination of documents and a scientific investigation which could not conveniently be made with a jury. However, the defendants requested a preliminary hearing on the question of meaning with a jury. In *Armstrong v Times Newspapers Ltd* [2005] EWHC 2816 (upheld by the Court of Appeal [2006] EWCA Civ 519) the court held that it did not have the power to hive off certain issues for determination by a jury. There was no countervailing advantage in jury trial in this case. The issue was to be assessed dispassionately from a management point of view without being distracted by emotional arguments that the jury was the constitutional tribunal for resolving certain issues. Mr Justice Gray (citing Lord Devlin) analysed the difference between a judge's view of meaning and that of a jury.

We were reminded of Lord Devlin's speech in *Lewin v Daily Telegraph Ltd* [1964] AC 234 at 277: 'My Lord, the natural and ordinary meaning of words ought to be the same for the lawyer as for the layman, because the lawyer's first rule of construction is that words are to be given their natural and ordinary meaning as popularly understood. The proposition that ordinary words have the same meaning for the lawyer as for the layman is as a matter of pure construction undoubtedly true. But it is very difficult to draw the line between pure construction and implication, and the layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory.'

JUSTIFICATION

For a plea of justification to succeed, there must be a finding on the merits by a court on admissible evidence that the defamatory 'sting' of the allegation complained of is objectively true as a matter of fact. The defendant does not have to establish that every word he published was true. He has to establish the essential or substantial truth of the 'sting' of the libel. The truth of some lesser defamatory meaning does not

complete defence.

As stated in *Lucas Box v News Group Ltd* [1986] All ER 1171, the defendant must set out in his statement of case the defamatory meaning he seeks to prove to be essentially or substantially true. This is known as the *Lucas-Box* meaning. The claimant will therefore know unequivocally what meaning the defence is seeking to justify. The defendant must then give proper particulars of the facts on which he relies to justify that meaning.

At the trial the jury must undertake a two-stage process: they must first decide whether on the admissible evidence called by the parties the defendant has proved to their satisfaction that the defamatory meaning, according to the appropriate standard of proof, all or at least some of the factual propositions asserted by the particular defendant are true. They must then decide whether the whole of the facts which they have found to be proved are such as to establish the essential or substantial truth of the sting of the defamatory libel.

A defence of justification based upon reasonable grounds of suspicion (a level two meaning) has three principles. As stated in *Shah v Standard Chartered Bank Ltd* [1999] QB 241, at 241 (Hirst LJ), 266 (May LJ) and 270 (Sir Brian Neill), it must first be shown that there was some conduct of the individual claimant that in itself gives rise to the suspicion. Secondly, as stated in *Shah* (at 241 and 242), it is not permissible to rely upon hearsay. Finally, as stated in *Bennett v News Group Newspapers Ltd* [2002] EMLR 860, a defendant cannot plead as supposed grounds matters relating to the timing of the publication. This poses a particular problem for the media who for a number of reasons, including commercial pressure to break a story, the threat of an injunction, or the anonymity of their sources, may wish to publish before they have conclusive evidence of justification. This issue is also relevant to the question of 'responsible journalism' in qualified privilege.

The ruling by the judge that the words carried a level one meaning left the defence with an impossible argument of justification as they would have to prove on the balance of probabilities that Lance Armstrong had taken illegal performance enhancing drugs and they did not have the evidence to do that.

On the classic English law of defamation the action would be lost but it is precisely this difficulty facing defendants in defamation actions which has led to the popularity of the Reynolds defence of qualified privilege based on public interest.

PUBLIC INTEREST PRIVILEGE

English law resisted the introduction of any form of 'public interest' privilege which would apply to the media until the *Reynolds* case. Privilege was confined to specific occasions such as reports of parliamentary proceedings and to duty-interest situations such as references to the police. The restricted ambit of the defence can be partly ascribed to its drastic effect. Once the privilege has been established the only way that the claimant can succeed is by proving malice on the part of the defendant. Attempts to introduce a duty-interest privilege attaching to the media were largely rejected on the basis that if the media uncovered wrongdoing, their duty was to report it to the relevant authorities rather than publishing it.

the public.

Partly as a result of the Human Rights Act 1998 and the of speech requirements in Article 10 of the European Convention on Human Rights, the House of Lords moved the goalposts in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. This case concerned with political information and although the House of Lords refused to find a generic qualified privilege for political information, they did extend the protection given to dissemination of public interest information by the media to individual stories, provided certain criteria were satisfied. This protection was arguably widened by subsequent decisions such as *GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd* ([2000] EMLR 410; *Al Fagih v HH Saudi Research & Marketing Ltd* [2002] EMLR 13 (CA); *Loutchansky v Times Newspapers Ltd* [2002] 1 All ER 652. It is, for example clear that the protection extends beyond political information in the narrow sense to other material which is of serious public concern and is not limited to applying to sporting issues as was stated in *Grobbelaar v Group Newspapers Ltd* [2001] 2 All ER 437.

The defence is based on responsible journalism and in establishing this Lord Nicholls laid down ten non-exhaustive factors. These were; the seriousness of the allegation; nature of the information and the extent to which the subject matter is of public concern; the source of the information; the steps taken to verify the information; the status of the information; the urgency of the matter; whether comment was sought from the claimant; whether the article contained a fair account of the claimant's story; the tone of the article; and the circumstances of the publication including the timing (*Reynolds* [2001] 2 AC 127, para 205). The spirit of *Reynolds* met with hostility from first instance judges and Lord Nicholls' ten factors to be taken into account became ten hurdles, at any one of which the defence might fail. The House of Lords decision in *Jameel v Wall Street Journal Europe* [2007] 1 AC 359 appears to have restated the principle of *Reynolds* which is much more favourable to the media. In deciding whether the newspaper could rely on the Reynolds defence, the question was whether the subject matter of the article was of public interest, and that was a question for the court. In answering that question, it was not helpful to apply a test for the existence of a privileged occasion and ask whether there was a duty to communicate the information and a corresponding duty in receiving it. The Reynolds defence was developed from a traditional form of privilege by a generalisation that in the public interest, there could be said to be a professional duty on the part of journalists to impart the information and an interest on the part of the public in receiving it. That generalisation having been established, it should be regarded as a proposition of law and not decided on a case-by-case basis as a question of fact. If the publication was in the public interest, the duty and interest were taken to exist. If they were not, as a whole concerned a matter of public interest, the next question was whether the inclusion of the defamatory statements was justifiable. On that question, allowance had to be made for editorial judgment. The inquiry then shifted to whether the steps taken to gather and publish the information were responsible and fair. In *Reynolds*, Lord Nicholls gave his well-known list of ten matters which should in suitable circumstances be taken into account in deciding the issue of responsible journalism. They were not tests which the publication had to pass.

pass. The standard of conduct required of the newspaper be applied in a practical and flexible manner. In this case was no basis for rejecting the newspaper's Reynolds defence.

It should be noted that the Armstrong libel case was settled before the House of Lords decision in *Jameel*. Any legal principle pertaining to qualified privilege in relation to the settlement would have been made on the basis of the Court of Appeal decision, which was hostile to the media.

Reynolds privilege marks a shift in power in the courtroom. Several of Lord Nicholl's factors raise matters which are associated with malice, an issue for the jury in a libel case. Reynolds has the effect of transferring these factual issues to the judge to decide and has also moved the burden of proof on certain issues from the claimant to the defendant. The effect of the Court of Appeal's decision in *Loutchansky v Times Newspapers Ltd (No 2)* [1997] 1 All ER 652 appeared to remove the defendant's involvement in the issue of qualified privilege and transfer the burden of proof on recklessness from the claimant to the defendant. It would appear that the burden will vary according to the nature of the story. At one end of the spectrum, if the claimant were concerned with political information, the defendant would only appear to have to meet the test of not having been reckless. At the other end of the spectrum, which would presumably include sporting matters, it appears that the defendant will have to discharge the heavier burden of proving that they were not negligent.

Other jurisdictions have adopted a different approach, starting from the different starting point that the integrity and competence of elected politicians is a matter of constitutional concern and the dominant concern is that of the electorate in receiving true information on politicians. Subsidiary to this is the balance between the right of politicians and freedom of the press (Loveland, 2000). In the United States the test stated in *Sullivan v New York Times* [1957] 354 US 254 US 376 is 'actual malice,' under which the plaintiff must prove that the defendant knew the story was false or was reckless as to its truth. In Australia, it was stated in *Lange v Australian Broadcasting Co* [1997] 71 ALJR 818 that the defendant must prove that there was no negligence in failing to establish the truth. In New Zealand, Reynolds was rejected as too uncertainly defined and restrictive and the New Zealand Court of Appeal in *Lange v Atkinson (No 2)* [2000] 3 NZLR 385 favoured the generic qualified privilege rejected by the House of Lords, where all that the claimant had to prove was the absence of malice and that a genuine public interest discussion was involved.

This question is complicated by the fact that the major part of the *Reynolds* decision (*Jameel*) was decided after the settlement of the Armstrong litigation. It is therefore proposed to analyse the material firstly from what actually happened and secondly what, hypothetically, might have happened, had the case been fully litigated on this issue.

The defendants raised Reynolds privilege as a defence. The claimant applied to have the defence struck out as having no realistic prospect of success. In *Armstrong v Times News* [2004] EWHC 2928 Mr Justice Eady tested the plea against ten non-exhaustive criteria laid down by Lord Nicholls. He

accepted that there was a legitimate public concern in the subject, the judge could not find that the defendants had a duty to publish the allegations without at least giving the claimant the opportunity of giving a measured response to the charges. Despite the contact between David Walsh and Armstrong's representatives, the judge felt that there were serious issues in the article which the claimant had not given the opportunity to respond to. This aspect of the decision was appealed and in *Armstrong v Times Newspapers Ltd* [2004] EWCA Civ 1007, the Court of Appeal was clearly influenced by the fact that the defence appeared to have been ambushed by the claimant making an attack at the first instance hearing on the bona fides or integrity of the defendants.

One of the key points in the first instance decision was that no steps had been taken to verify the information published in the article; however, steps had been taken in regard to the source on which the article was based. Did this amount to responsible journalism? A further problem lay in the source of the information which was described by the judge as 'rumour and speculation' rather than an official source. Finally, although this is not a Reynolds defence, whether sufficient attempts had been made to obtain the claimant's side and include it in the story.

The Court of Appeal stressed the difference between Reynolds privilege and standard qualified privilege. In the former, emphasis was on responsible journalism and without responsible journalism the privilege could not arise. The Court cited Phillips MR in *Loutchansky* (at 670):

Once Reynolds privilege is recognised, as it should be, as a different jurisprudential creature from the traditional form of privilege from which it sprang, its particular nature of the 'interest' and 'duty' which underlie it can more easily be understood.

The interest is that of the public in a modern democracy in the expression and, more particularly, in the promotion of a vigorous press to keep the public informed. The vital importance of this interest has been identified and emphasised time and again in recent cases and needs no restatement here. The corresponding duty on the journalist (and equally his employer) is to play his proper role in discharging that function. His task is to behave as a responsible journalist. He can have no duty to publish unless he is acting responsibly any more than the public has an interest in reading whatever may be published irresponsibly. That is why in this class of case the question whether the publisher has behaved responsibly is necessary and intimately bound up with the question whether the privilege of qualified privilege arises. Unless the publisher is acting responsibly privilege cannot arise. That is not the case with regard to the more conventional situations in which qualified privilege arises. A person giving a reference or reporting news need not act responsibly: his communication will be privileged subject only to relevance and malice' (approved in *Jameel*

Significantly, Brooke LJ also stated that there was a difference in meaning for the purposes of justification and qualified privilege and cited Lord Nicholls in *Bonnick v Morris* [2003] 1 AC 3

although the law of defamation ordinarily adopts artificial "single meaning" rule, it would be quite wrong to apply that rule when deciding whether a journalist or newspaper behaved responsibly. In other words, on the facts of this case, although a jury might find that the article meant for the purpose of the justification defence that Mr Armstrong was in fact guilty of taking performance-enhancing drugs the words were capable of meaning no more than that there were reasonable grounds for suspecting that he had, and the defendants would be entitled to rely at the trial on this possible meaning when putting forward their claim for qualified privilege as responsible journalists.

The Court of Appeal felt that the judge had erred in his approach to the source material, as this depended on the relationship between the various defendants which would only become clear later on. The first question was whether Mr Walsh had acted responsibly in relying on the people he interviewed. The second question was whether Mr English acted responsibly when he relied on the outcome of Mr Walsh's interviews. The defence also sought disclosure of the history of the article and the quality of the research material. This was a matter for witness statements and disclosure, not for disposal on a Part 24 application, where most of the claimants' complaints were sprung at the last moment.

The Court also accepted that the issues surrounding the defence which the defendants gave Lance Armstrong the opportunity to answer their charges were far from clear, especially given the long history between the parties and that a failure to put all the cards on the table to the claimant is not necessarily determinative as was held in *GKR Karate v Yorkshire Post (No 2)* [2000] EMLR 410.

The defence of qualified privilege was restored in order that the issue could be properly investigated at trial, although this issue was never tried.

The case was settled before the House of Lords decision in *Jameel* and it may be instructive to consider how the defence of qualified privilege might hypothetically have fared had the issue gone to trial.

Three conditions were laid for the defence. The first was that the subject matter of the article was a matter of public interest. This is a proposition of law for the judge and not one to be decided factually. This condition was said to be satisfied in *Armstrong v Times Newspapers Ltd* [2004] EWHC 2928.

The second question was whether the inclusion of the allegedly defamatory statement was justifiable. The more serious the allegation, the more important it is that it should make a significant contribution to the public interest element in the article. The defence also sought disclosure of the matter of how the story ought to have been presented. This was a matter of fact and allowance has to be made for editorial judgment. The fact that a judge, with the advantage of leisure and hindsight might have made a different decision should not destroy the defence if it is possible, if not probable that the Sunday Times would have passed this test.

The third question is whether the steps taken to gather and publish the information were responsible and fair. This is a question of responsible journalism. The standard of conduct had to be applied in a practical and flexible manner. The ten matters set down in Reynolds by Lord Nicholls were not to be regarded as 'hurdles' or 'tests', each of which had to be passed by the defendant. What appears to be key after *Jameel*, are the steps taken to verify the story, the opportunity given to the claimant to comment and the propriety of the publication at that particular time. It is at this stage that the Sunday Times would appear to have been vulnerable on the issue of verification. The story in *Jameel* was of a much higher level of public importance than that in Armstrong as it concerned the financing of terrorism and the defendants had good sources in the United States government. The Sunday Times would appear to have given the claimant the opportunity to comment on the story and none of the sources had axes to grind. However, none of the sources had direct evidence that Armstrong had taken performance-enhancing drugs. It is therefore possible but not definite that the claimant may have failed on this point. Unfortunately we shall never know and what is permissible to the media will have to be left to the next case.

CONCLUSIONS

This case arrived at a definitive moment in English libel law, marking the advent of Reynolds privilege and the slight easing of the burden in favour of public interest stories. The incidence of drug use in sport is a matter of public interest, on the grounds of an athlete's right to participate in a doping free sport and the image of the sport. The public perspective is that although they want to see their chosen team or individual, they would normally want to see them without resort to cheating. Resort to performance enhancing drugs is now widespread across sport and has tainted it from athletics to football. Where an athlete tests positive for an illegal drug there is normally an immediate fall from grace and a substantial ban from the sport. The approach of WADA is one of zero tolerance. The drastic effects of discovery lead to a secretive and shadowy world of chemists, doctors and nurses who purvey drugs to athletes. The public are then confused by what they see. Is the athlete genuinely exceptional or is he or she chemically assisted?

These factors demonstrate that there is a public interest in knowing the truth about professional sport and that drug use is a legitimate area of media interest. The problem is where to draw the line between this and individual reputations. As with cycling is very much a testing ground for drugs in sport and because of the prevalence of drugs in cycling, there is a suspicion that drug assisted performance exists on a wide scale in large professional sports and that this will be an issue in the future. Professional cycling had become notorious for its involvement in performance enhancing drugs and there was widespread public suspicion of its participants. The lid on this particular stew was lifted by the Festina affair in 1998 and the future of the sport was thrown into jeopardy.

Professional cycling desperately needed a knight in shining armour and he duly arrived in the form of Lance Armstrong. He became the most successful Tour de France rider in history.

winning seven times in succession. His story was complicated cancer and had an interest that went well beyond professional cycling. Had he not had cancer it is unlikely that he would have won the Tour at all as his body shape pre-cancer was unsuited to the demands of the Tour. So dominant was he in the professional peloton that there was inevitable suspicion surrounding his achievements and for the reputation of the sport he needed to be seen to be clean.

Was the Sunday Times justified in singling out Armstrong? The newspaper could have covered the issue of drugs in cycling without mentioning him but this would have appeared to be 'tilt windmills.' There is no show without Punch and Armstrong. The difficulty for Armstrong and the media coverage of the issue was that suspicion falls on any participant in professional cycling, particularly the outstanding ones. So many leading cyclists, including all of Armstrong's main rivals, had tested positive or were suspended pending the outcome of investigations that Armstrong was either regarded as a superman or tainted.

In any media story covering doping in sport the media must find the limbs of defence. The first is to write the story in such a way that there are 'grounds for investigation' or 'reasonable grounds for suspicion' meaning can be attached to it. The difficulty with the latter is the problem of 'no smoke without fire.' Given the well documented problem of doping in professional cycling and the hold it has on the sport, was it possible to construct a 'reasonable grounds for suspicion' story? Armstrong's vigorous denials were included in the story but Gray, J. felt that this was counter-productive as, 'the vehemence of Mr Armstrong's denial might make readers wonder whether he is as innocent as he claims.' In answer to accusations of doping, cyclists usually take refuge in the fact that they have never tested positive. However, there is universal suspicion that drug tests are a reliable indicator of drug usage. No cyclist tested positive on the infamous 1998 Tour despite the drugs found by police searches and the confessions of those attached to the Festina team. Armstrong's clean record was pointed out in the article but the judge said that this was negated by the inclusion of a statement on the unreliability of drug testing.

The conclusion to be drawn on the linked issues of media coverage and justification is that it is probably impossible to produce a story linking a named athlete to issues of drug use without having to prove guilt. The various courts in the action place emphasis on two paragraphs in the article but without those two paragraphs the article would have missed its mark.

This leaves the second defence of privilege on the basis of 'responsible journalism.' The crucial distinction between the two is that in the first the meaning must be shown to be true in the latter, provided it is responsible.

This defence survived initial scrutiny by the Court of Appeal but the 'single meaning' in justification did not apply in privilege. As the case had been litigated to completion, the defence must have turned on the witness statements and whether the newspaper was 'responsible' in relying on them in deciding whether they had a duty to publish. It was confirmed that the all

of taking illicit drugs was one of public concern and was of attracting the privilege. What is also clear is that in future will be very difficult to have a Reynolds defence struck out. A preliminary application before the evidence has been heard. The question technically remains unanswered as the issue has not been fully litigated and the reasons for the settlement are not clear. It is possible however, that following the ruling on near-absolute legal advisors may have concluded that as the meaning of 'guilty of...', that the Sunday Times was unlikely to have been held to have been exercising responsible journalism. All the Court of Appeal said that even if this meaning was found for the purposes of justification, it would be open to the defendant to use the possible 'reasonable grounds' meaning for the purposes of privilege. Alternatively, the wariness of the Court of Appeal on sources may have swayed the decision. It was not a brave media outlet to put this to the test.

It was hoped that this case would demonstrate to the public where the line was to be drawn but give them scope to investigate and inform. However, the settlement of the case leaves this area in limbo. The lesson that can be drawn from English law is not yet ready to sacrifice individual reputation for the public interest in the media publicising doping in sport.

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