ENGLAND AND WALES' DEFAMATION ACT 2013 AND THE PUBLIC INTEREST DEFENSE: AN EMPHASIS TOWARD "IS IT TRUE" OVER "WILL THEY SUE?"

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I. INTRODUCTION

After the suicide of his daughter, a distraught father, David de Freitas, was interviewed by media outlets in 2014 in England.[1] His daughter Eleanor de Freitas had accused a man, Alexander Economou, of sexual assault. After he was arrested, but not charged, Economou sued her for "perverting the course of justice."[2] Eleanor took her own life only four days before the trial.[3] Because of this, her father publicly requested an investigation from the Crown Prosecution Service and the decision it had made to pursue the case despite evidence that Eleanor's claims were not false.[4] The media covered the case and it became a matter of public interest because of the nature of the accusations, both the sexual assault and the potential overstep by the Crown Prosecution Services.[5] Though he was not named in the publications, Economou sued David for defamation and argued that his reputation was damaged because the public could identify him due to the high profile nature of the case.[6] He argued that the publications accused him of falsely bringing the "perverting the course of justice" case.[7]

The English court decided that David's speech was protected because it was reasonable for him to believe that speaking about this issue was in the public interest.[8] In the United States, it is unlikely that this defamation case would survive a motion for summary judgment and go to trial. In England, the debate was not over because Economou appealed.[9] On November 21, 2018, the Civil Division of the Court of Appeal dismissed for cause and upheld the lower court's decision.[10] This case is a good example of the differences between the United States' and England's defamation laws, because the United States emphasizes the importance of free speech, making it more difficult for plaintiffs to win defamation cases. Economou ultimately did not win the defamation claim in England, which illustrates a potential shift in English defamation law towards protecting defendants in defamation cases.

The focus of this Note is to provide an update of defamation laws in England and Wales regarding the public interest defense, codified in Section 4 of

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[1] Economou v. de Freitas, [2016] EWHC 1853 (QB) 139 ¶¶ 2-4.
[2] *Id.* ¶ 2.
[3] *Id.*
[4] *Id.* ¶ 3.
[5] *Id.* ¶¶ 143-50.
[6] Economou v. de Freitas, [2016] EWHC 1853 (QB) 139 ¶ 4.
[7] *Id.* ¶ 2.
[8] *Id.* ¶ 259.
[9] Economou v. de Freitas, [2018] EWCA Civ 2591.
[10] *Id.*

the Defamation Act 2013. This Note will explore recent case law to determine how the courts have interpreted the public interest defense—whether judges have interpreted the defense in a way that provides the intended protection to defendants, or whether Section 4 is only a statutory enactment of the previously existing defense set forth in *Reynolds v. Times Newspapers Ltd. & Others*.[11] This Note will argue that case law decided since the passage of the Defamation Act 2013 suggests that the codifying of the defense has not changed how defamation law is interpreted in England, and has only impacted how the *Reynolds* factors are applied. It will then compare the new defense to libel law in the United States. Finally, it will briefly discuss the Scottish Law Commission's recent recommendation to amend defamation law in Scotland based on the Section 4 defense in England.

A. Background

Defamation in the United Kingdom prioritizes protecting one's reputation over another's free speech. In the United States, defamation law emphasizes the opposite and protects free speech, making defamation cases difficult for plaintiffs to win. In fact, defamation law in the two countries is so different that the United States passed legislation to prevent recognition of English defamation decisions.[12] However, England and Wales may be shifting slightly closer to the United States by providing more protection to defendants accused of defamatory remarks. The plaintiff-friendly defamation laws in the United Kingdom sparked political campaigns for better protections for defendants, which led to legislation to codify defenses for publishers of allegedly defamatory claims.[13]

The Defamation Act 2013 ("the Act") replaced the common law *Reynolds* defense in England and Wales.[14] The Act created many changes in defamation law in England, but this Note will focus on the Section 4 public interest defense. Notably, however, the Act states that defamation cases should be tried without a jury "unless the court orders otherwise."[15] This creates another significant

[11] Reynolds v. Times Newspapers Ltd. & Others, [1999] 7 BHRC 289.

[12] The Securing the Protection of our Enduring and Established Constitutional Heritage Act, or SPEECH Act, declares that foreign defamation judgments "shall not recognize[d] or enforce[d]" in the United states unless "the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press . . . as would be provided by the first amendment" or "the party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court applying the first amendment."; *see also* 28 U.S.C.A. § 4102(a)(1)(A-B).

[13] Alastair Mullis & Andrew Scott, *Tilting at Windmills: The Defamation Act 2013*, 77 THE MODERN L. REV. 84, 87 (2014) [hereinafter "Mullis"].

[14] The Defamation Act 2013 applies to England and Wales. For the purposes of this Note and in the interest of avoiding repetition, I will refer to England, though it will also apply to Wales. Scotland is not covered by the Act and will be discussed later in this Note.

[15] Defamation Act 2013, c.26, § 11.

difference in defamation law between England and the United States, where defamation cases are tried in front of a jury.[16] American juries decide issues of fact, such as whether "actual malice" was present.[17] Because England has replaced juries with judges in these cases, much deference is given to those judges to determine whether defamation occurred. Though not discussed specifically in the context of the cases, this difference in how cases are decided is significant and may be an underlying contributor to the differences in outcomes of defamation cases between the United States and England and Wales.

Section 4 of the Act provides a defense for publishers when publishing a potentially defamatory statement is in the "public interest."[18] The fact that David de Freitas prevailed on the Section 4 public interest defense suggests that English defamation law may offer more protection after the Act, though it is clear from the parliamentary debates that England does not want to "Americanise" their defamation law.[19] Though the intention of the Act was to create more protections for defendants, continued use of a subjective "reasonable belief" standard in the Section 4 defense may prevent a change from plaintiff-friendly outcomes in defamation cases.[20]

II. DEFAMATION: DEFINED

The United States Constitution protects freedom of speech in its First Amendment.[21] In the United States, defamation is a statement that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[22] Protections in England are found in the European Convention on Human Rights, which provides a right to freedom of expression.[23] In England, defamation is a statement that "has caused or is likely to cause serious harm to the reputation of the claimant." [24] The foundation of defamation law in each country is discussed below.

A. *Times v. Sullivan* Malice

[16] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[17] *See, e.g.*, Sullivan, 376 U.S. 254.
[18] Defamation Act 2013, c.26, § 4.
[19] 12 June 2012, Parl Deb HC (2012) col. 178 (UK).
[20] Defamation Act 2013, c.26, § 4(1)(b).
[21] U.S. CONST. amend. I.
[22] Restatement (Second) of Torts § 559 (Am. Law Inst. 1965).
[23] European Convention on Human Rights, art. 10, Nov. 30, 2005.
[24] Defamation Act 2013, c. 26 § 1(1).

Defamation law involves a balance between encouraging expression and ensuring that published information is accurate and not injurious to someone's reputation.[25] The United States emphasizes the former, and prioritizes free speech in defamation claims, making these claims difficult for plaintiffs to win.[26] This difficulty is especially reflected in cases involving defendants who are public figures, who have the greatest protection from defamation suits in the United States.[27] In the United States, to prevail on a defamation claim involving a public issue or figure, the defendant must meet the standard, established in *New York Times v. Sullivan*, of proving "actual malice" with clear and convincing evidence of "knowledge that [the statement] was false or [made] with reckless disregard" for the truth.[28]

Times v. Sullivan involved a newspaper article that discussed police breaking up a peaceful children's protest in support of the civil rights movement.[29] The police commissioner sued for defamation, arguing that discussing the police in the article harmed his reputation.[30] The U.S. Supreme Court reversed a lower court's decision and concluded that there was no defamation because the article involved a public figure and encouraged public debate.[31] The court decided that constitutional protections required that "actual malice" be present to find in favor of a plaintiff bringing a defamation suit.[32] "Actual malice" is defined as material that is published "with knowledge that it was false or with reckless disregard of whether it was false or not."[33] Whether "actual malice" is present is a question for the jury to decide.[34]

The *Times v. Sullivan* malice standard sought to protect free speech and encourage publication and discussion of public figures.[35] Offering no protection to publishers who discussed public figures would "give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."[36] Before the

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[25] David J. Acheson & Dr. Ansgar Wohlschlegel, *The Economics of Weaponized Defamation Lawsuits*, in *Fake News and Weaponized Defamation: Global Perspectives Symposium*, 47 SW. L. REV. 335, 354 (2018) [hereinafter Acheson].

[26] Vincent R. Johnson, *Comparative Defamation Law: England and the United States*, 24 U. MIAMI INT'L & COMP. L. 1, 6 (2016).

[27] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[28] *Id.* at 279 ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

[29] *Id.* at 258.

[30] *Id.*

[31] *Id.* at 300.

[32] *See Sullivan*, 376 U.S. at 279–80.

[33] *Id.* at 280.

[34] *See, e.g.*, *id.*

[35] *Id.* at 282–83.

[36] *Id.*

New York Times case in 1964, the United Kingdom and the United States had similar plaintiff-friendly defamation laws.[37] *New York Times* marked a significant change in defamation law in the United States, and created a noticeable difference between its defamation law and that of the United Kingdom.[38]

1. Future of *Times v. Sullivan*?

The *Times v. Sullivan* standard has been in effect for over 50 years. Recently, however, its constitutionality has been questioned by a current Supreme Court Justice. On February 19, 2019, the Supreme Court denied certiorari to hear *McKee v. Cosby*.[39] In his concurring opinion, Justice Thomas argued that courts should revisit *Times v. Sullivan*.[40] He argued that the public figure standard is not supported by the First and Fourteenth Amendments, and that defamation law should be for the states to decide.[41] No other justices joined in Justice Thomas' concurrence, so this opinion does not have clear support from other members of the Supreme Court. However, it allows the possibility that the precedent of *Times v. Sullivan* will be reconsidered and potentially overruled. Surprisingly, this would provide an opportunity for the United States' defamation laws to shift closer towards those of the United Kingdom.

B. The *Reynolds* Defense

In contrast to the United States, English defamation law protects reputations over free speech by emphasizing the accuracy of potentially defamatory material.[42] In the United Kingdom, free speech is protected by the European Convention on Human Rights, Article 10, which states:

> 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 . . . .
> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions,

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[37] Acheson, *supra* note 25, at 339.

[38] *See* Julie A. Davies & Paul T. Hayden, GLOBAL ISSUES IN TORT LAW 237 (2007) ("The importance of this divergence between English common law and defamation law as applied in the United States cannot be overstated").

[39] *See* McKee v. Cosby, 139 S. Ct. 675, 675 (2019) (Thomas, J., concurring).

[40] *Id.* at 2.

[41] *Id.* at 2, 14.

[42] Acheson, *supra* note 25, at 354.

> restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . .[43]

Article 10 continues by listing exceptions—interests that may limit the protections given free speech—including "the protection of the reputation or rights of others."[44]

England did not create a specific protection for speech and defendants until establishing the *Reynolds* defense in 1991, which focused on responsible journalism.[45] The common law *Reynolds* defense set out ten factors to be considered when a defamation case involved matters of public concern,[46] including steps the author took to verify the published information, the source of information, and the seriousness of the allegation.[47] However, the *Reynolds* defense rarely succeeded, and England defamation law remained plaintiff-friendly.[48] The reason was that the ten *Reynolds* factors were used in the courts as "ten hurdles at any of which the defence may fail."[49] This all-inclusive interpretation of *Reynolds* led to inconsistent enforcement of the defamation laws, which may have had a chilling effect on speech because publishers were unable to predict whether a statement

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[43] European Convention on Human Rights, art. 10(1), Nov. 30, 2005.

[44] *Id*. art. 10(2).

[45] Reynolds v. Times Newspapers Ltd. & Others, 7 BHRC 289 [1999].

[46] The ten factors established by *Reynolds* are: (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (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 for their stories. (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. He may have information others do not possess or have not disclosed. 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. *Id*.

[47] *See* Reynolds, 7 BHRC 289 [1999].

[48] Guy Vassall-Adams, *A Resounding Victory for Newspapers,* TIMES ONLINE (October 2006) *in* JULIE A. DAVIES & PAUL T. HAYDEN, GLOBAL ISSUES IN TORT LAW, at 240. ("Lord Nicholls' ten relevant factors were elevated into a judicial obstacle course, where every single defamatory allegation was treated in isolation and tested against the ten-point checklist, with any adverse finding potentially fatal to the defense.").

[49] Jameel v. Wall St. Journal Eur., [2006] UKHL 44, ¶ 56; *See also* Defamation Bill, Second Reading, 12 Jun. 2012, Parl Deb HC (2012) col. 231 (UK) ("The list of 10 principles, first enunciated by Lord Nicholls in 1999, were not supposed to be exhaustive, but in practice they have been used by judges in lower courts as 10 hurdles over which journalists and newspapers must jump to use the defence. It turns out to be a very expensive defence, and it affects how non-governmental organisations compile their reports and decide what they are prepared to write").

would be defamatory.[50] As a result, a movement began to reform defamation law,[51] which led to a bill being introduced to the House of Commons on May 10, 2012.[52]

III. CHANGES TO ENGLISH DEFAMATION LAW

A. 2012 Defamation Bill - Goals and Debates of Updating Defamation Law

The debates of the members of the House of Commons after the second reading of the bill illustrate three main goals of updating defamation law in England and Wales: (1) to decrease the number of frivolous lawsuits,[53] (2) to properly balance the interests of free speech and reputation,[54] and (3) to modernize defamation law, especially with the growing popularity and use of the internet.[55]

Members of the House of Commons discussed concerns about the "chilling effect" that the *Reynolds* privilege had on speech and publication, believing that the balance favored the protection of reputation over the publication of public interest articles.[56] Stories were told during debates about journalists who were afraid to publish due to an inability to predict how to be "responsible journalists" and their fear of lawsuits.[57] Members also wanted the new law to provide access to justice for "ordinary citizen[s]" to bring a lawsuit to defend their

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[50] *See* Acheson, *supra* note 25, at 348, for a discussion on the "economics of the chilling effect."

[51] A leader in the defamation reform movement is Libel Reform, a Scottish organization that campaigned for protection of free speech in defamation law in the UK. Libel Reform continues to campaign in Scotland and Northern Ireland. *The Campaign Will Continue in Scotland and Northern Ireland,* THE LIBEL REFORM CAMPAIGN, www.libelreform.org. Sense About Science worked closely with Libel Reform and focused on the impact of libel laws on open scientific discussion. *Libel Reform Campaign*, SENSE ABOUT SCIENCE (Apr. 18, 2017), http://senseaboutscience.org/activities/libel-reform/.

[52] Defamation Bill Presented, House of Commons, 10 May 2012.

[53] Defamation Bill, Second Reading, House of Commons, 12 June 2012, Column 179. The serious harm requirement in Section 1 was created to decrease frivolous suits, as Kenneth Clarke, The Lord Chancellor and Secretary of State for Justice, explains, "Our first priority has been to reform the law so that trivial and unfounded actions for defamation do not succeed. Clause 1 therefore raises the bar, by a modest extent, for a statement to be defamatory by proposing that it must have caused or be 'likely to cause serious harm to the reputation of the claimant.'"

[54] *Id.* at col. 177.

[55] *Id.*

[56] *Id.* at col. 190.

[57] *Id.* at col. 237–239. Dr. Julian Huppert discussed a study by Sense about Science which found that "38% of editors of scientific journals have chosen not to publish certain articles because of a perceived risk of libel, and 44% have asked for changes to the way articles are written to protect themselves . . . Journals . . . are not libel experts and should not be expected to be libel experts."

reputations.[58] Stories were also told of ordinary citizens and even a politician who, in response to a tarnishing of their reputation, took their own lives.[59] Despite creating the public interest defense, the debate at the House of Commons indicates that England and Wales did not want to "Americanis[e]" libel laws and favor freedom of speech too strongly.[60]

B. Defamation Act 2013 Enacted[61]

The Defamation Act 2013 abolished the *Reynolds* privilege and replaced it with a public interest defense.[62] Codified in Section 4, the public interest defense focuses upon the question of whether the belief of the author is reasonable, instead of the *Reynolds* focus on the responsibility of journalists.[63] It remains to be seen whether this new focus will change defamation case outcomes. Section 4 specifies:

> It is a defence to an action for defamation for the defendant to show that –
>
> (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
>
> (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.[64]

The defense applies for both statements of fact and opinion.[65] To decide if a statement was a matter of public interest, the court "must make such allowance for editorial judgment as it considers appropriate."[66] Presumably, a goal of codifying the *Reynolds* defense in the Act is to create a structure that allows for more consistent defamation case outcomes and minimizes the effect of inconsistent defamation rulings, because "restrictions on trivial claims, a stronger defence of fair comment, and a new public interest defence will help writers everywhere to decide what to publish based on 'is it true?' rather than 'will they sue?'"[67]

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[58] Defamation Bill, Second Reading, House of Commons, 12 Jun 2012, col. 197.

[59] *Id.* at col. 198–199.

[60] *Id.* at col. 178.

[61] Civil libel laws were established in the Libel Act of 1843. Until 2013, there were only two amendments to this statute: the Defamation Act 1952 and the Defamation Act 1996.

[62] Defamation Act 2013, ch. 26 § 4(1), (6) (UK). The Act applies to England and Wales (some provisions apply to Scotland, but those provisions are not discussed in this Note).

[63] Mullis, *supra* note 13, at 90.

[64] Defamation Act 2013, c.26 § 4(1).

[65] *Id.* § 4(5).

[66] *Id.* § 4(4).

[67] Sense About Science, *The Defamation Act (2013)*, (Apr. 18, 2017), http://senseaboutscience.org/activities/libel-reform/.

It is important to note that defamation analysis in the United States since the *Times v. Sullivan* case places the burden on the plaintiff(s) to prove the falsity of a statement instead of on the defendant(s) to prove its truthfulness.[68] In the United Kingdom, the burden of proof is on the plaintiff to show a cause of action.[69] If the plaintiff succeeds in doing so, the burden of proof then shifts to the defendant to establish a defense of public interest.[70] Even with the statutory recognition of a defense for publishers, defendants must provide proof to support the defense and avoid liability, which, absent evidence, could make defamation cases more difficult to defend.

1. Goals of Section 4

The question remains how courts should determine what is reasonably within the public interest according to Section 4. The Ministry of Justice wrote Explanatory Notes to accompany the Act and "assist the reader in understanding the Act."[71] The Explanatory Notes define a statement made in the public interest as "a concept which is well-established in the English common law,"[72] and this standard may be satisfied either when the words are "on a matter of public interest" or by considering the statement with "the wider context of the document" (a "holistic view").[73] Despite the changes brought by the statute, the Explanatory Notes suggest that the *Reynolds* defense not be completely abandoned, stating that Section 4 is "based on the existing common law defence established in *Reynolds v. Times Newspapers* and is intended to reflect the principles established in that case and in subsequent case law."[74] Additionally, some argue that the Act does not accomplish its goal of access to justice because it does not address the costs of litigation, a factor that deters many from filing suits and seeking remedies for harm to their reputations.[75]

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[68] New York Times Co. v. Sullivan, 376 U.S. 254, 280-81 (1964); Bruce E.H. Johnson, *Is the New York Times Rule Relevant in a Breitbarted World?* 19 COMM. L. & POL'Y 211, 214 n.22 (2014).

[69] Economou v. de Freitas, [2016] EWHC (QB) 1853 [Eng.].

[70] *Id.*

[71] Defamation Act 2013, c.26, Explanatory Notes intro. ¶ 1 (Eng.). The notes are not "part of the Act and have not been endorsed by Parliament."

[72] Defamation Act 2013, c.26, Explanatory Notes sect. 4 ¶ 30 (defining "public interest" as a statement that "was, or formed part of, a statement on a matter of public interest.").

[73] *Id.*

[74] *Id.* at ¶ 29.

[75] Iain Wilson & Max Campbell, *Defamation Act 2013: A Summary and Overview*, INFORRM'S BLOG (Nov. 5, 2018, 3:57 PM), https://inforrm.org /2014/01/21/defamation-act-2013-a-summary-of-the-act-iain-wilson-and-max-campbell/ ("The Act does not go as far as some free speech campaigners would have hoped

2. Criticisms of the Act

Because the Act replaced jury trials with bench trials for defamation cases, deference is granted to judges to decide what is in the public interest.[76] Some legal commentators have speculated that the "reasonable" prong of Section 4 could be too forgiving to publishers, because one could argue that it is always reasonably within the public interest to publish something about a public figure, which may discourage fact-checking.[77] Another predicted concern is that the public interest defense will be interpreted narrowly (like the *Reynolds* privilege), affording little new protection to publishers.[78] Mullis and Scott, professors at the University of Leeds School of Law and the Department of Law at the London School of Economics and Political Science, respectively, argue that using *Reynolds* to analyze new defamation cases reflects the goals of the Act.[79] They cite the committee stage debate—where it was discussed that previous *Reynolds* considerations should be applied by courts after the Act—as well as the Explanatory Notes.[80] Additionally, some commentators have expressed concern that applying the public interest defense to both fact and opinion has inappropriately broadened the defense, because it provides the opportunity for an author's opinion that is based on inaccurate facts to be protected by a defense.[81]

3. "Subsequent Case Law" Referenced in Section 4

Some case law decided after *Reynolds,* but before the Act in 2013, is still relevant to a public interest defense analysis.[82] The Explanatory Notes state that

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. . . The Act does not address the issue of costs – which remains a real practical obstacle for prospective litigants.").

[76] Defamation Act 2013, c. 26, § 11; Johnson, *supra* note 26, at 26; Mullis, *supra* note 13, at 106.

[77] Mullis, *supra* note 13, at 90**;** *see also* Scottish Law Commission, *Discussion Paper on Defamation*, Discussion Paper No. 161 (March 2016) ¶ 6.10 ("The result of this would be that the defence would fail only in the unusual circumstances that the belief was proven to be false, capricious, or irrational. This could legitimately be seen, it is argued, as overly generous to the publisher, given that it would mean the concept of 'reasonableness' differed little from good faith or honesty.").

[78] Mullis, *supra* note 13, at 90–91.

[79] *Id.*

[80] *Id*. at 90–91; *see also* Defamation Act 2013 Explanatory Notes.

[81] The Scottish Law Commission, *Discussion Paper on Defamation*, Discussion Paper No. 161 (March 2016).

[82] The *Economou* appeal upheld the use of such cases in the Section 4 analysis: "the judge and the parties [in the lower court in *Economou*] proceeded in the footing that the common law principles identified in *Reynolds* as interpreted or applied in subsequent cases. . . were of relevance to the interpretation of section 4. Though the point was

the intention of Section 4 is "to reflect the principles established in [*Reynolds*] and in subsequent case law."[83] Though there were multiple cases decided before the Act that are still cited in recent case law,[84] for the purposes of this Note, *Flood v. Times Newspapers Ltd.* will be discussed because of its clear mention in the Explanatory Notes.[85] In fact, some argue that the Defamation Act 2013 is substantially the same as the *Reynolds* privilege post-*Flood*.[86] *Flood* was decided in 2012 and involved the publication in a *Times* newspaper that a police Sergeant was investigated for corruption.[87] After the publication, the investigation revealed no evidence of corruption, and Flood sued Times Newspapers for defamation.[88] Times Newspapers invoked the *Reynolds* privilege.[89] The Explanatory Notes cite to the reasoning of Lord Brown in *Flood* about the continuing relevance of *Reynolds*, explaining:

> In deciding whether *Reynolds* privilege attaches (whether the *Reynolds* public interest defence lies) the judge, on true analysis, is deciding but a single question: *could whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done)* to guard so far as possible against the publication of untrue defamatory material,

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uncontroversial before us, in my view, this is the correct approach." Economou v. de Freitas [2018] EWCA (Civ) 2591 [76] (Eng.).

[83] Defamation Act 2013, c.26, Explanatory Notes sect. 4 ¶ 29; Flood v. Times Newspapers Ltd., [2012] UKSC 11 (Eng.).

[84] For further analysis of relevant subsequent case law, *see, e.g.*, Jameel v. Wall St. Journal, *supra* note 49 ("[the *Reynolds* factors] can become ten hurdles at any of which the defence may fail . . . but that, in my opinion, is not what Lord Nicholls meant [in *Reynolds*] . . . the standard of conduct required of the newspaper must be applied in a practical and flexible manner."); Bonnick v. Morris,[2002] UKPC 31 (Eng.) (deciding that the court can consider the intended meaning of a publisher's statement when determining whether reasonable steps were taken when publishing).

[85] "The intention in this provision is to reflect the existing common law as most recently set out in Flood v. Times Newspapers." Defamation Act 2013, c.26, Explanatory Notes sect. 4 ¶ 29 (Eng.).

[86] *See* Eric Descheemaeker, *'A Man Must Take Care Not to Defame His Neighbour': The Origins and Significance of the Defence of Responsible Publication,* 34 U. QUEENSLAND L.J. 239, 250 (2015) ("the Supreme Court of the United Kingdom indicated no intention whatsoever in [*Flood*] to alter the substance of the defence outside of reportage cases. The change of terminology, confusing as it might be, was not effectuated in order to alter the substance of the common-law defence where it did previously apply, but to allow it to widen its reach to a second (and analytically very different) class of cases.").

[87] Flood v. Times Newspapers Ltd. [2012] UKSC 11 [2] (Eng.).

[88] *Id.*

[89] *Id.*

> *properly have considered the publication in question to be in the public interest*?[90]

Lord Brown identified the main issue of the case as whether it is ever in the public interest to publish information about an investigation before the investigation occurs and before a suspect is charged.[91] Ultimately, Lord Brown decided that an appeal would be allowed, due to the possibility of the *Reynolds* privilege applying because the publication involves "the denunciation. . . of a public officer, [which] relates to a matter of obvious public importance and interest, and may justifiably appear to the journalists to be supported by a strong circumstantial case."[92] The paragraph of *Flood* cited in the Explanatory Notes suggests the continuing viability of the *Reynolds* factors, but expands the analysis to further consider whether publishers could believe that a publication was in the public interest.[93]

C. Post Defamation Act 2013 Case Law

A case heard in the High Court of Justice, Queen's Bench Division, published after the Defamation Act 2013, suggests that the Act did not change the defamation analysis for a public interest defense.[94] *Yeo v. Times Newspapers Limited* involved some statements that were published before the Act, and some statements published after.[95] As Justice Warby explained: "although I shall refer to some aspects of the new defences . . . . Neither side suggests, and I do not consider, that the 2013 Act altered the relevant law in any way that is material to the outcome of the case."[96] Mr. Yeo was a Member of Parliament who was Chair of the Environmental Audit Committee.[97] Investigative journalists conducted an "undercover investigation" concerning exploitation in Parliament.[98] The journalists created a cover story, pretending to be an energy company asking Yeo to be its paid expert consultant, and Yeo agreed to meet and discuss the consultant position.[99] After the meeting, multiple articles were published regarding the improper lobbying and advocacy in Parliament, and the articles accused Yeo of such inappropriate behavior, using quotes from the meeting with Yeo to support their claims.[100]

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[90] Defamation Act 2013 Explanatory Notes (citing Flood v. Times Newspapers Ltd. [2012] UKSC 11 [113] (Eng.)) (emphasis added).

[91] Flood v. Times Newspapers Ltd., [2012] UKSC 11 [114] (Eng.)

[92] *Id.* at [119].

[93] Defamation Act 2013 Explanatory Notes, 29; Flood v. Times Newspapers Ltd. [2012] UKSC 11 [113] (Eng.).

[94] Yeo v. Times Newspapers Ltd., [2015] EWHC (QB) 3375 [29] (Eng.).

[95] *Id.*

[96] *Id.*

[97] *Id.* at [45].

[98] *Id.* at [58].

[99] Yeo v. Times Newspapers Ltd. [2015] EWHC 3375 [62]-[63], [65] (QB).

[100] *Id.*at [112], [120].

In his description of the public interest defense, Justice Warby cites *Flood*'s two-step inquiry to determine if the public interest defense applies:[101] first, determine if information published was in the public interest, and second, determine whether there was responsible journalism.[102] The adherence to precedent cited in this case reflects the Act's goal of codifying the existing case law. However, the interpretation in *Yeo* differed from previous case law because the ten *Reynolds* factors were not required for the defense to succeed.[103]

After determining that both the publishing was a matter of public interest and that the publisher acted responsibly,[104] Justice Warby set out seven principles, citing defamation case law, to determine whether responsible journalism was adhered to.[105] The court in *Yeo* found that the journalism was responsible because "[t]he journalists believed what they said; their belief was based on a reasonable and responsible investigation; and it was a reasonable belief to hold."[106] The defense's argument that the journalists misinterpreted Yeo's behavior did not succeed, because "[i]n short, a publication can be wrong but "fair" for these purposes . . . it will be "fair" to present readers with factual conclusions honestly and reasonably drawn by journalists . . . fairness does not require the publisher to present the reader with all the factual material that could support a competing assessment."[107]

Even in a case where statements were published before and after the Act, a judge explicitly stated that the new statutory defense will not change whether the defense applies.[108] This interpretation supports the theories that the Act does not provide more protections for publishers.

1. Factors to Determine Public Interest

In contrast to *Yeo*, other case law decided after the Act suggest that the Act may in fact have changed defamation analysis. Seven "key points [that] are not in dispute" about Section 4 were identified by Justice Warby in the High Court of

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[101] *Id.* at [25].

[102] *Id.* at [26].

[103] Eric Barendt, *Reynolds Revived and Replaced*, J. OF MEDIA L., Apr. 21, 2017, at 6.

[104] *Yeo*, [2015] EWHC 3375 [129], 131-32.

[105] *Id.* at [133].

[106] *Id.* at [149]. (Note that the undercover aspect of the process was not considered in examining responsible journalism, *Yeo* at [135].).

[107] *Id.* at [175].

[108] "[C]ommon law defences were abolished and replaced by statutory defences under ss 2 to 4 of the Defamation Act 2013. Those defences are accordingly pleaded but, although I shall refer to some aspects of the new defences, this will not be determinative. Neither side suggests, and I do not consider, that the 2013 Act altered the relevant law in any way that is material to the outcome of this case." Yeo v. Times Newspapers Ltd. [2015] EWHC 3375 (QB) ¶ 29.

Justice, Queen's Bench Division in 2015, which he used to determine whether the public interest defense applied.[109] These factors are:

> (1) It is not enough for the statement complained of to be, or to be part of, a publication on a matter of public interest. It must also be shown that the defendant reasonably believed that publication of the particular statement was in the public interest.
> (2) To satisfy this second requirement, which I shall call "the Reasonable Belief requirement," the defendant must (a) prove as a fact that he believed that publishing the statement complained of was in the public interest, and (b) persuade the court that this was a reasonable belief.
> (3) The reasonable belief must be held at the time of publication.
> (4) The "circumstances" to be considered pursuant to [section] 4(2) are those that go to whether or not the belief was held, and whether or not it was reasonable.
> (5) The focus must therefore be on things the defendant said or knew or did, or failed to do, up to the time of publication. Events that happened later, or which were unknown to the defendant at the time he played his role in the publication, are unlikely to have any or any significant bearing on the key questions.
> (6) The truth or falsity of the allegation complained of is not one of the relevant circumstances.
> (7) It is not only those who edit media publications who are entitled to the benefit of the allowance for "editorial judgment."[110]

As is already known from the Act, truth or falsity of the statement is not considered, and editorial judgment is relevant instead.[111] Many of these factors are not new and applied in defamation cases pre-Defamation Act 2013. For example, it was previously understood that the "defendant's state of mind is to be determined at the time of publication."[112]

This brings us to the initial case in *Economou v. de Freitas*, when Eleanor de Freitas accused Economou of rape, and he responded by bringing a lawsuit against her for false accusation.[113] Eleanor, tragically, committed suicide shortly before the false accusation trial, after the Crown Prosecution Service (CPS) had

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[109] *See* Economou v. de Freitas, [2016] EWHC 1853 (QB).
[110] *Id.* ¶ 139.
[111] *Id.*
[112] *See* GKR Karate (UK) Ltd. v. Yorkshire Post Newspapers Ltd. [2000] 1 WLR 2571, 2578-79.
[113] Economou [2016] EWHC 1853 (QB) ¶ 2.

begun prosecuting her at the request of the plaintiff.[114] After her death, de Freitas' father, David, discussed in various ways—including press conferences and interviews—his desire for the investigation of Eleanor's death to include the Crown Prosecution Service for wrongfully prosecuting his daughter.[115] Economou's name was not mentioned anywhere in the articles or interviews, but Economou sued for libel claiming that he was the subject of the claims, which he says accused him of "falsely prosecuting" Eleanor.[116]

To determine whether the statements made by de Freitas were defamatory, the judge considered the public interest factors combined with factors from the *Reynolds* privilege.[117] The court determined that public discussion of the defendant in *Economou* was in the public interest because of: the nature of the crime and the circumstances surrounding the trial, the public authority status of CPS, the interest in encouraging victims of sexual violence to report rape, and the publication of the charge.[118] Again using the two-step analysis from *Flood*, it was established that the publication was in the public interest, thereby satisfying Section 4(1)(a) of the Defamation Act 2013.[119] The next inquiry to the defense is whether David de Freitas had a reasonable belief that publication was in the public interest to satisfy Section 4(1)(b).[120]

2. Responsible Journalism and Reasonable Belief

The Explanatory Notes state that the allowance made for editorial judgment "expressly recognizes the discretion given to editors in judgments such as that of *Flood*, but explain that it does not limit the discretion to media editors."[121] In *Economou*, we do not have a media editor or publisher; instead, the defendant, David de Freitas, is a layperson who made comments to media outlets.[122] Nonetheless, analysis was conducted to determine whether de Freitas had a reasonable belief that publication was in the public interest, considering the words themselves and not their potentially and sometimes secondary defamatory meaning.[123]

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[114] *Id.*

[115] *Id.* ¶ 3.

[116] *Id.* ¶ 4.

[117] "[T]here are some features of the Reynolds defence which it seems to me must on any view carry through into the new law." *Id.* ¶ 239.

[118] Economou, [2016] EWHC 1853 (QB) at ¶¶ 143-44, 239.

[119] *Id.* ¶ 142.

[120] *Id.*; Barendt, *supra* note 103, at 9.

[121] Defamation Act 2013 Explanatory Notes, 33; Flood v. Times Newspapers, [2012] UKSC 11 ¶ 199 ("the court should be slow to interfere with an exercise of editorial judgment").

[122] *See* Barendt, *supra* note 103, at 8.

[123] Economou [2016] EWHC 1853 (QB) ¶ 153.

The *Economou* case discusses reasonable belief at length.[124] The plaintiff argued that the ten-factor "responsible journalist" standard from *Reynolds* should apply to de Freitas, because he did not satisfy those steps before publishing the statement.[125] However, de Freitas was not the publisher of the statement, because he gave his statement to a reporter who then published. The court explains: "[i]t seems to me wrong in principle to require an individual who contributes material for inclusion or use in an article or broadcast in the media to undertake all the enquiries which would be expected of the journalist, if they are to rely on a defence of public interest."[126] Although de Freitas did not consider the impact of his statements on Economou's reputation, it was still reasonable for him to believe that making the statements to the journalist was in the public interest.[127] Thus satisfying the public interest defense because the defamatory meaning "is secondary to the principal messages . . . which are squarely aimed at the CPS."[128]

The analysis of "publisher" in *Economou* suggests that the former *Reynolds* privilege still has some influence despite Section 4. Though the judge determined that applying the ten *Reynolds* factors was inappropriate given the defendant in the case,[129] he lists components from *Reynolds* that he believes should be considered during a Section 4 analysis, including flexibility, specifics of the case, and editorial judgment.[130] The fact that the court did not apply the *Reynolds* factors to de Freitas[131] because he is not a journalist[132] does not deny the possibility of using the *Reynolds* responsible journalism factor in a defamation case involving journalists post-Defamation Act 2013. If the *Reynolds* factors are still applicable to journalists, and are still interpreted as hurdles, this could mean that the Act did not provide more actual protection to traditional publishers.

3. *Economou* Applied

One year after the 2016 *Economou* case, Justice Warby again applied the *Economou* factors in a case where, unlike in *Economou*, the Section 4 privilege did not apply and the plaintiff prevailed.[133] The court in *Hourani v. Thompson* held that statements made at a protest accusing the plaintiff of murder were a matter of public interest, but that defendants failed to meet the reasonable belief standard.[134] The fact that the plaintiff was accused of murder was taken into account: "[t]he

[124] *Id.* ¶ 159.
[125] *Id.* ¶ 160.
[126] *Id.* ¶ 246.
[127] *Id.* ¶ 247.
[128] Economou [2016] EWHC 1853 (QB) ¶ 247.
[129] *Id.* ¶ 246.
[130] *Id.* ¶ 239.
[131] *Id.* ¶ 160.
[132] *Id.* ¶ 242.
[133] Hourani v. Thomson [2017] EWHC 432 (QB) ¶ 167.
[134] *Id.* ¶ 166.

nature of the allegation required a heightened level of care and attention to detail in the checks and enquiries carried out by those involved."[135] The Court considered documentary and e-mail evidence to determine what the defendant "knew or did or failed to do,"[136] and what research was done before the event regarding the role of the plaintiff in the murder.[137] Because the defendant did not complete the necessary research, there was no belief (without even considering reasonableness) that the publication was in the public interest.[138] There, the specifics of the case are considered to determine an *Economou* factor: "[a] belief will be reasonable for this purpose only if it is one arrived at after conducting such enquiries and checks as it is reasonable to expect of the particular defendant in all the circumstances of the case."[139] This case suggests that editorial judgment is still considered in defamation analysis post-Section 4.

In the same year, the *Economou* factors were applied to a case where the public interest defense did apply when a publication questioned the plaintiff's fitness to serve in a charity agency.[140] In *Serafin v. Malkiewicz*, the sources that the defendants used when publishing their story were considered: "[i]n my judgment, a publisher has to act reasonably. He cannot be expected to act as judge and jury, deploying all the forensic tools available to this court. However, he must exercise common sense and sound judgment; he cannot be overly sedulous in pursuit of a good story."[141] The judge shared a "cautionary warning" that defamation suits "should not be initiated out of almost unbounded self-confidence and lack of judgment, coupled with a misplaced belief that the court will surely succumb to the same charm and eloquence that has worked so effectively in the world outside."[142] This warning suggests that defamation law is shifting at least slightly from its former plaintiff-friendly tendencies, but continues to balance this change with responsible publication.

The reasonableness factor of Section 4 appears to depend on the editorial judgment factor. A publisher that conducts proper research supports the defense that the published material was in the public interest. On the other hand, if the author did not conduct research, proving a reasonable belief at the time of publishing becomes more difficult.[143]

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[135] *Id.* ¶ 174.
[136] Economou [2016] EWHC 1853 (QB) ¶ 139.
[137] Hourani [2017] EWHC 432 (QB) ¶ 171.
[138] *Id.* ¶¶ 168-69.
[139] Hourani [2017] EWHC 432 (QB) ¶ 173 (quoting Economou, [2016] EWCH 1853 (QB) ¶ 241).
[140] Serafin v. Malkiewicz, [2017] EWHC 2992 (QB) ¶ 332.
[141] *Id.* ¶ 336.
[142] *Id.* ¶ 354.
[143] *See* NT1 & NT2 v. Google [2018] EWHC 799 (QB).

4. *Economou* Appeal[144]

In November of 2018, the Court of Appeal (Civil Division) dismissed the appeal brought by Economou and explained why it believed that the lower court properly applied the public interest defense.[145] Ultimately, the Court of Appeal agreed that not applying the public interest defense would infringe on de Freitas' right to free speech.[146] Lady Justice Sharp explained:

> The statutory formulation in Section 4(1) obviously directs attention to the publisher's belief that publishing the statement complained of is in the public interest, whereas the Reynolds defence focused on the responsibility of the publisher's conduct. Nonetheless, it seems to me it could not sensibly be suggested that the rationale for the Reynolds defence and for the public interest defence are materially different, or that the principles that underpinned the Reynolds defence, which sought to hold a fair balance between freedom of expression on matters of public interest and the reputation of individuals, are not also relevant when interpreting the public interest defence.[147]

Lady Justice Sharp reiterated three questions that should be answered—whether the statement was on a matter of public interest, whether the defendant believed that publishing the statement was in the public interest, and whether the publisher's belief was reasonable—and that this third and final question was the primary focus in *Economou*.[148] Thus, it appears that the two-step analysis in *Flood* has evolved to a three-step analysis. Lady Justice Sharp cites *Flood* in her analysis.[149] The *Flood* consideration of the defendant's belief that publishing was in the public interest was not named in the *Reynolds* factors,[150] but is now clearly set forth in the Section 4

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[144] Serafin v. Malkiewicz, [2017] EWHC 2992 (QB) ¶ 310 ("The issue on appeal will not be Warby J's formulation of the test but its manner of application.").

[145] Economou v. de Freitas, [2018] EWCA Civ. 2591.

[146] *Id.* ¶ 250 ("…my conclusions are that Mr. de Freitas could and did properly consider the publication to be in the public interest; and that a judgment in favour of Mr. Economou would represent an interference with Mr. de Freitas' free speech rights out of any reasonable proportion to the need to protect and vindicate Mr. Economou's reputation.").

[147] *Id.* ¶ 86.

[148] *Id.* ¶ 87.

[149] *Id.* ¶ 100 (quoting Flood v. Times Newspapers Ltd., [2012] UKSC 11 ¶ 113) ("… could whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?").

[150] Economou v. de Freitas, [2016] EWHC 1853 (QB) ¶ 139.

defense.[151] It is therefore possible that the case law recognized a gap in the *Reynolds* defense, which was then incorporated and codified in the Defamation Act 2013.

Besides reasonableness of belief, the appeal does not address the seven factors that Justice Warby described in the lower court *Economou* decision, in paragraph 139. This could be due to the appellate judges' decision that the other factors were not relevant to the issue upon appeal. The lack of discussion does not mean that the list is irrelevant; to the extent that Justice Warby has continued applying the factors in subsequent cases,[152] it may become concretized in the law. But the lack of discussion of the factors by the appellate court does deny an opportunity to further confirm the importance of the factors, which elaborate the statute and synthesize case law, for a public interest analysis. Because of the Court of Appeal's focus in *Economou* on only the reasonableness factor, the lower court opinion appears to be more instructive and thorough in the legal analysis of the public interest defense. To really understand the public interest defense, it appears best to consult the 2016 opinion of the lower court.

5. Citizen Journalist?

The *Economou* factors address the "citizen journalist" in factor seven: "It is not only those who edit media publications who are entitled to the benefit of the allowance for 'editorial judgment.'"[153] The "editorial judgment" benefit is provided in Section 4(4), "[i]n determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate."[154] So, considered together, it appears that whether someone is a "citizen journalist" can impact whether their public interest belief was reasonable if the court determines that their "editorial judgment" differs from that of a professional publisher.

This appears to be a slight change from the previous *Reynolds* factors, which included "whether comment was sought from the plaintiff" and "whether the article contained the gist of the plaintiff's side of the story."[155] The new Section 4 defense may provide more protection for publishers than the *Reynolds* factors did, because it could be determined that omitting the plaintiff's comment or side of the story was within the publisher's "editorial judgment" and therefore would not weigh against the defendant in a defamation suit. However, the Court of Appeal decision

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[151] Defamation Act 2013, Ch. 26 § 4.

[152] *See* Hourani v. Thomson, [2017] EWHC 432 (QB); Serafin v. Malkiewicz, [2017] EWHC 2992 (QB); NT1 & NT2 v. Google, LLC., [2018] EWHC 799 (QB).

[153] Economou v. de Freitas, [2016] EWHC 1853 (QB) ¶ 139.

[154] Defamation Act 2013, Ch. 26 § 4(4) ("In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.").

[155] Reynolds v. Times Newspapers Ltd. and Others, 7 BHRC 289 [1999].

to affirm the lower court has led to concerns that this could create a "contributor immunity."[156] The reasoning is that David de Freitas was excused from not including Economou's "side of the story" because he was not a professional publisher, essentially allowing "citizen journalists"[157] to provide information and expect the media completing the publishing to take all responsibility to ensure that it is responsibly conveyed in the publication.[158] In the 2016 *Economou* decision, Justice Warby explained:

> I see no reason why the defence should not avail an individual source or contributor who passes to a journalist for publication information the truth or falsity of which is not within the knowledge of the contributor. *The contributor may well be entitled to rely on the journalist to carry out at least some of the necessary investigation and to incorporate such additional material as is required*, in order to ensure appropriate protection for the reputation of others.[159]

On appeal, Lady Justice Sharpe clarified that the lower court did not determine that David de Freitas had *no* responsibility (shifting the responsibility to the media) because he was a contributor. Instead, she explained that "the defendant had some inherently reliable information and had made what, for a person in his position were reasonable and responsible investigations into the merits of the case against his daughter."[160] Lady Justice Sharp found that the lower court's analysis created an appropriate balance for determining how much responsibility should rest on the non-media publisher.[161] She agreed with the use of some *Reynolds* factors and not others, and emphasized the importance of varying the weight of *Reynolds* factors based on the facts of each case.[162] The *Economou* appeal therefore confirms that, after the Act, the *Reynolds* factors are not meant to be applied as "hurdles" in a defamation analysis.

A case decided by Justice Warby, who wrote the opinion for *Economou*, held that a citizen journalist could not claim the public interest defense, which suggests that there is not complete immunity for citizen journalists.[163] Smith, a blog author, published an article accusing Doyle of fraud regarding a project to move a rugby club to a new location.[164] Justice Warby decided that, though the topic could be in the public interest,[165] the Section 4 defense did not apply to Smith as a citizen

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[156] Economou v. de Freitas, [2018] EWCA Civ 2591 ¶ 75.
[157] *Id.* ¶ 107.
[158] *Id.* ¶ 108.
[159] Economou v. de Freitas, [2016] EWHC 1853 (QB) ¶ 246 (emphasis added).
[160] Economou v. de Freitas, [2018] EWCA Civ 2591 ¶ 112.
[161] *See Id.* ¶ 111.
[162] *Id.* ¶ 110.
[163] Doyle v. Smith, [2018] EWCH 2935 (QB).
[164] *Id.* ¶¶ 2-4.
[165] *Id.* ¶ 72.

journalist because he could not have believed that publishing was in the public interest.[166] Justice Warby reached this decision because there was evidence that Smith knew what he was publishing was false;[167] for example, he admitted that his statement was false and he should have presented it to his readers as an assumption and not as fact.[168]

The court considered the *Reynolds* factors in that case, despite Smith's citizen journalist status and the subsequent Section 4 defense.[169] Justice Warby considered the reliability of the sources, steps taken by the author to verify the truth of the published statements, whether the plaintiff was given the opportunity to comment, and whether the publication included the plaintiff's "side of the story."[170] Justice Warby explained, "[w]here the target of a publication has given an explanation, but the publisher fails to report it, it will be difficult if not impossible to claim the protection of the privilege."[171]

Smith could not succeed on the public interest defense because he "did not merely suppress the claimant's innocent account, he invented a false confession of guilt and published that as an accurate version of events, thereby positively deceiving readers."[172] Justice Warby explained that Smith should have conducted more "checks or enquiries" to ensure that his blog post was accurately interpreting the events, and that the threatening e-mails he had received were not an excuse for failing to conduct proper research.[173] Finally, he justified his analysis by stating that "these points do not in my judgment involve setting an unduly high bar for a 'citizen journalist.'"[174]

Smith's lack of preparation is not as egregious as the murder accusations in *Hourani v. Thompson*, so this case further explains the expectations of citizen journalists when publishing material. *Smith*, using *Reynolds* factors, also suggests the continuity of those factors and their applicability to citizen journalists. The case suggests that there is not a citizen journalist defense; or if there is, it is defeated when citizen journalists do not reasonably research their publication to ensure that it is in the public interest – because there is "[n]o public interest [] served by publishing or communicating misinformation."[175]

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[166] *Id.* ¶¶ 76, 88.
[167] *Id.* ¶ 79.
[168] Doyle v. Smith, [2018] EWCH 2935 (QB) ¶ 80.
[169] *Id.* ¶ 82.
[170] *Id.*
[171] *Id.*
[172] *Id.* ¶ 84.
[173] Doyle v. Smith, [2018] EWCH 2935 (QB) ¶ 91-94.
[174] *Id.* ¶ 101.
[175] *Id.* ¶ 80 (citing Reynolds v. Times Newspapers Ltd., [2001] 2 AC 127) (Lord Hobhouse, concurring).

D. Would the Public Interest Defense Succeed if *Economou* was Decided Under *Reynolds*?

Importantly, Lady Justice Sharp clarified that despite the lack of a "material difference"[176] between *Reynolds* and Section 4, she agreed with the lower court's decision to not depend on the *Reynolds* factors: "[w]hat the judge did not accept however, rightly in my view, was the core of the claimant's case as advanced at trial, namely that the *Reynolds* factors were key to the determination of reasonableness in this case."[177] The appellate court confirmed that, because David de Freitas was not a journalist, the public interest defense could still be met even though de Freitas had not met all of the *Reynolds* factors.[178] Presumably, the decision in this case is different than it would have been under *Reynolds*, especially if the *Reynolds* factors were treated as hurdles, because de Freitas did not meet all of the factors. The analysis of all the circumstances allows for his "citizen" status to be factored into whether his belief that publication was in the public interest was "reasonable." However, because *Reynolds* was intended to be a flexible standard, and the Act kept the factors but shifted away from applying them as "hurdles," there is a chance that de Freitas had acted responsibly because he was not an official publisher. In either case, the appellate court upheld the lower court's decision that the public interest defense applied in his case.

It is not clear how the *Economou* decision will extend to cases that involve professional publishers who work with the media. Eric Barendt, professor Emeritus at University College London, argues that this unanswered question is especially important because of the accessibility of media in the modern world, allowing lay persons to easily publish to public platforms by using the internet.[179] If a lay publisher does not meet certain *Reynolds* factors, this could lead to the conclusion that the belief that publication was in the public interest was not reasonable.

Hourani v. Thompson offers some insight into how future cases might be interpreted.[180] The defendants in *Hourani* were not individuals who "edit media publications," in the traditional sense; they participated in demonstrations and made posts on social media.[181] The *Hourani* accusations involved murder, which could objectively be considered a matter of public interest because of the seriousness of

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[176] Economou v. de Freitas, [2016] EWHC 1853 (QB) ¶ 24.

[177] Economou v. de Freitas, [2018] EWCA Civ 2591 ¶ 102.

[178] "[Justice Warby] acknowledged that the case that the defendant's conduct had fallen far short of what the Reynolds approach required, would have had obvious force if the defendant had acted as a journalist, composing and publishing what purported to be investigative journalism. The critical point made by the judge however, was that it would not be appropriate to hold the defendant to the standard that might be required of a journalist because he was not one: his role was closer to that of a source or contributor." *Id.* ¶ 104.

[179] Barendt, *supra* note 103, at 11-12.

[180] Hourani v Thompson, [2017] EWHC 432 (QB).

[181] *Id.* ¶ 1.

the offense, such as the rape accusations in *Economou*.[182] But in *Hourani*, the seriousness of the accusations led the judge to conclude that the public interest defense should not apply, because the defendants did not complete enough investigation considering the nature of the accusations and the harm it could cause the plaintiff's reputation.[183] The *Hourani* court emphasized the reasoning in *Economou* that a belief is reasonable if it is founded on "conducting such enquiries and checks as it is reasonable to expect of the *particular defendant* in all the circumstances of the case."[184]

Hourani supports the conclusion that the Section 4 analysis, post-*Economou*, has allowed for a greater focus on the expectations of a defendant based on the particular defendant's circumstances than the previous "responsible journalism" standard. The *Hourani* decision suggests that *Economou* did not create a "contributor immunity," and shows that individuals who are not typical publishers will not always succeed on the public interest defense.[185] So while the question raised by Barendt about the impact of *Economou* for lay publishers remains unanswered by an appellate court, there is confirmation that publishers may be held to different standards based on the role that they had in the publication.[186] There might have been some expectation that the appellate court decision would clarify the reach of *Economou* in terms of non-media publishers, and the lack of discussion on that specific topic may have been disappointing. The appellate justices may have decided that the implications of adjusting the standard for "contributors" were not relevant to the issue on appeal and did not warrant discussion. The lack of clarification, however, leaves the extent of contributor liability to be decided by future cases.

E. Public Interest and Name Publication

Another matter of defamation law involves whether it is in the public interest to publish the name of someone accused of a crime, though the publication may be defamatory or cause harm to the person accused. The privacy interest of the accused must be balanced with the public interest to know about the crime and the suspect. Courts generally allow publishing if "the public interest served by

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[182] Economou v. de Freitas, [2016] EWHC 1853 (QB) ¶ 167.

[183] The judge also considered that the defendants were paid for their actions and that they held signs with the plaintiff's face and the word "murderer," which the judge did not consider serving any public interest. Hourani v Thompson, [2017] EWHC 432 (QB) ¶ 169.

[184] *Id.* ¶ 173 (citing *Economou*, [2016] EWHC 1853 (QB) ¶ 241) (emphasis added).

[185] Note the difference between the Economou and Hourani facts; while Hourani involved a picket sign that read "murderer" with a picture, Economou did not name the plaintiff in his comments to the media. So, it may have been easier to apply the defense to Economou than Hourani based on the methods of publication.

[186] Barendt, *supra* note 103, at 1-13.

publishing the facts extend[s] to publishing the name."[187] The policy argument for allowing publication of the name when it is in the public interest is that "anonymised reporting of issues of legitimate public concern are less likely to interest the public and therefore to provoke discussion."[188]

The nature of the subject matter of the case was considered in *PNM v. Times Newspapers Limited*, which involved child sexual abuse and is considered to have the "highest public interest."[189] The court considered whether full publication would encourage witnesses to come forward.[190] *PNM* involved an individual who was arrested in connection with a child sexual abuse case due to confusion about his first name, and was released and never charged.[191] Two newspapers wanted to vacate an injunction that prevented them from identifying PNM by name until he was charged with an offense.[192]

The court balanced the European Convention on Human Rights right in article 8 to respect private and family life with the Article 10 right to freedom of expression.[193] The issue is whether it was in the public interest to publish the identity of PNM, or whether the interest could be accomplished without revealing his name.[194] The appellate court denied appeal and agreed with the lower court that the order should be lifted and the name be used in publication.[195] However, as the dissent explains, public interest does not extend to the identity of the individual if revealing the identity does not substantially improve the story or outweigh the privacy interest.[196]

IV. IMPACT OF THE ACT

The Defamation Act 2013 may have an impact on more than just interpretation in the courts by affecting whether plaintiffs feel confident enough to bring a suit. If the Act leads to more failed defamation suits because of the public interest defense (or other changes implemented in the act), plaintiffs may be deterred from bringing suits. As discussed in *Serafin v. Malkiewicz*, "[t]he Claimant observed somewhat wistfully towards the conclusion of the trial that had he anticipated what was entailed, he would not have brought this claim in the first

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[187] PNM v. Times Newspapers Ltd., [2017] UKSC 49 ¶ 17.
[188] *Id.* ¶ 18.
[189] *Id.* ¶ 32.
[190] *Id.*
[191] *Id.* ¶ 3.
[192] PNM v. Times Newspapers Ltd., [2017] UKSC 49 ¶ 6.
[193] *Id.* ¶ 15; *see also* European Convention on Human Rights, arts. 8, 10, Nov. 4, 1950, E.T.S. No. 5.
[194] PNM v. Times Newspapers Ltd., [2017] UKSC 49 ¶ 30.
[195] *Id.* ¶ 36.
[196] *Id.* ¶¶ 40-43 (arguing in dissent that readers may not presume defendant is innocent, which outweighs the public interest in publishing identity, though admitting that identity does greatly increase public interest).

place. . . this litigation has proved to be enormously costly for him as well as for the Defendants."[197] This outcome would be unwanted because one of the goals of the Act was to allow persons to defend their reputations; however, the Act does strive to prevent meritless defamation suits.[198] The public interest defense under Section 4 allowed a case to avoid summary judgment because of the "real prospect of success" of the defense.[199] Instead of deterring cases, this suggests the possibility that that the Act could allow more defamation cases to avoid summary judgment and proceed to trial. Ironically, this may be disadvantageous to defendants if the trial occurs, but the defense is difficult to obtain, and the trials may not resolve in the defendants' favor.

A. Comparison to the United States

The recent case law decided after the Defamation Act 2013 suggests that England and Wales may be moving slightly towards the United States by placing more weight on free speech. Though the parliamentary debates made it clear that England and Wales do not want to emphasize free speech over protecting one's reputation, *Economou* illustrates that the courts are providing more protections to publishers by considering what is reasonable on a case-by-case basis.[200] The *Reynolds* factors may have restricted this type of analysis, because it set a standard to be met for "responsible journalism" through factors that, if not met, were more like "hurdles" to a successful public interest defense. The case law after the Act suggests an attempt to apply the *Reynolds* factors more flexibly to protect defendants.

A United States court would be likely to agree with the *Economou* court and find no liability for defamation, especially considering the fact that the publications arguably involved a public figure, or at least a limited purpose public figure.[201] There is no evidence of malice because de Freitas did not mention Economou by name.[202] This suggests there may have been a slight shift in English defamation law towards United States defamation law.

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[197] Serafin v. Malkiewicz, [2017] EWHC 2992 (QB) ¶ 354.

[198] 12 Jun. 2012, Parl Deb HC (2012) col. 178 (UK).

[199] Suresh v. Samad, [2016] EWHC 2704 (QB) ¶ 80 ("I shall not grant summary judgment on liability, but nor shall I dismiss that application. I shall adjourn the remainder of the claimant's application. . . . [I]n order to give the defendants the chance to try once again to state in writing a tenable case of public interest or truth or both, and to put in further evidence to show that one or both have some real prospect of success.").

[200] Economou v. De Freitas, [2016] EWHC 1853 (QB) 139 ¶ 246 ("The enquiries and checks that can reasonably be expected must be bespoke, depending on the precise role that the individual plays.").

[201] *Id.* ¶ 90.

[202] *Id.* ¶ 4. This is supported by the court's conclusion that, though his name was not mentioned, the case was so well known to the public that he could easily be identified by readers.

Because *Economou* would have been decided the same way, a better indicator of whether England and Wales are shifting closer to the United States in protecting freedom of expression is to consider whether a U.S. court would have found liability in *Hourani*. Assuming that the plaintiff in *Hourani* was a limited purpose public figure, because of the recent assault and murder case that was referenced in the demonstrations,[203] the plaintiff would have to prove clear and convincing evidence of falsity or reckless disregard for the truth.[204] This shifts the discussion from whether a defendant's belief that publishing was reasonable to whether they were irresponsibly and maliciously publicizing the murder accusation with "reckless disregard" for the truth, similar to an "editorial judgment" analysis. The *Hourani* court discussed the fact that the defendants did not investigate the murder accusations on their own, aside from some potential internet research by one of the defendants.[205] Instead, they took as true the information that they were receiving from the man who was paying them to organize the demonstrations.[206] A U.S. jury could potentially find that this was malicious, and that the defendants showed a reckless disregard for the truth in publicizing through demonstrations without determining their accuracy, but it is also possible that this was only careless and would not meet the "actual malice" standard.

This suggests that the Section 4 analysis in *Hourani* reflects similar defamation analysis to the United States. However, the defendants' lack of investigation into the claims makes it possible that a defamation claim would have succeeded under *Reynolds* as well. This would mean that, either there is not much of a shift since the Defamation Act 2013, or that there is not yet a case that illustrates a clear difference between the two defenses.

VI. CONCLUSION

Case law that has been decided since the Defamation Act 2013 suggests that the Act will not have a significant impact on defamation analysis and whether the public interest defense applies.[207] However, the Act has been interpreted by judges to allow for a more flexible application of the *Reynolds* factors depending on the facts of the case.[208] This seems to be providing more protection to publishers because courts are encouraged to no longer treat the *Reynolds* factors as hurdles,

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[203] Hourani v. Thompson, [2017] EWHC 432 (QB) ¶ 1.

[204] New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

[205] Hourani v. Thompson, [2017] EWHC 432 (QB) ¶¶ 170, 174.

[206] *Id.* ¶ 174.

[207] *See, e.g.*, Yeo v. Times Newspapers Ltd., [2015] EWHC 3375 (QB) ¶ 29 ("[A]lthough I shall refer to some aspects of the new defences . . . [n]either side suggests, and I do not consider, that the 2013 Act altered the relevant law in any way that is material to the outcome of the case."); Economou v. de Freitas, [2018] EWCA Civ 2591 ¶ 86 ("it seems to me it could not sensibly be suggested that the rationale for the Reynolds defence and for the public interest defence are materially different.").

[208] *See, e.g.*, Economou v. de Freitas, [2018] EWCA Civ 2591.

and a defendant may succeed on a Section 4 defense even if some of the *Reynolds* factors are not met.[209] So, the Act appears to have better embodied the goals of the original *Reynolds* privilege by broadening the application of the public interest defense to protect publishers. It remains to be seen how far this defense will apply for "citizen journalists" and non-professional publishers, but case law already suggests that there is not a "contributor immunity" and that individuals who are not typical publishers can fail on the public interest defense.[210] However, the change from jury trials to bench trials gives deference to judges to interpret the factors, so it is still possible that the Act and the *Reynolds* privilege will be interpreted inconsistently.

The changes in defamation law in England reflect changes that are occurring in other countries as well. The Scottish Law Commission recommended in 2017 that Scotland adopt a statutory public interest defense, based on England's Section 4(2), "in the interests of clarity, certainty and accessibility of the law."[211] The goals of enacting a statute in Scotland are similar to those of the Act: "to reproduce in statutory form the essence of *Reynolds* defence," but not to "attempt to define 'public interest.'"[212]

In December of 2019, a Bill was introduced to the Scottish Parliament to "amend the law of defamation."[213] Section 6 of the Bill, "Defence of publication on a matter of public interest," includes the same subsections as the Act's Section 4 with only minor changes in language.[214] Only the Act's Section 4(6), which abolished the Reynold's defense, is missing from Scotland's Bill.[215] The Explanatory Notes explain that "Section 6 is intended to reflect the principles developed in [*Reynolds*] and subsequent case law . . . . The test to be applied is now reasonableness of the belief that publication of the statement complained of was in the public interest, rather than the responsibility of the journalism behind the statement."[216] Scotland's attempt to adopt the same statutory defense as England and Wales suggests that the Act may impact defamation law beyond the countries it applies to.

Finally, and somewhat surprisingly given the 50-year history following *Times v. Sullivan*, Justice Thomas' concurring opinion suggests the possibility of

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[209] *Id.*

[210] Hourani v. Thompson, [2017] EWHC 432 (QB) ¶ 99.

[211] SCOTTISH LAW COMMISSION, *Report on Defamation*, ¶ 3.72 (2017).

[212] *Id.* ¶¶ 3.72-.73. For a discussion of concerns about enacting a statutory defense addressed by the Commission, see *Id.* ¶¶ 3.69-3.71.

[213] Defamation and Malicious Publication Bill 2019-5, SP Bill [61] (Scot.).

[214] *Compare* Defamation and Malicious Publication Bill 2019-5, SP Bill [61] § 6 (Scot.), *with* Defamation Act 2013 c. 26 § 4 (UK).

[215] *Compare* Defamation and Malicious Publication Bill 2019-5, SP Bill [61] § 6 (Scot.), *with* Defamation Act 2013 c. 26 § 4 (UK).

[216] *Defamation and Malicious Publication (Scotland) Bill: Explanatory notes* ¶ 41 (2019), https://www.parliament.scot/S5_Bills/Defamation%20and%20Malicious%20Publication%20(Scotland)%20Bill/SPBill61ENS052019(1).pdf.

changes to defamation law in the United States.[217] If defamation law were revisited in the way Thomas suggests, it would shift the United States' defamation law closer to England by providing more protection for reputation.[218] Time will tell if these changes occur or if the *Times v. Sullivan* standard will remain, continuing to favor protection of free speech over reputation.

This analysis of case law after the Defamation Act suggests that publishers may have more protection with the public interest defense, shifting defamation law slightly towards the United States. However, because the *Reynolds* privilege and case law decided before 2013 are still part of the analysis, it is more likely that the Act better adopted the original goals of *Reynolds* without changing the aims of defamation law in England.

[217] McKee v. Cosby, 139 S. Ct. 675 (2019) (Thomas, J. Concurring).
[218] *Id*.