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## Continuing online publication and the public interest defence (*Lachaux v Independent Print Ltd* and another)

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**TMT analysis: Bruno Lachaux’s libel claim against Independent Print Ltd and Evening Standard Ltd is likely to always be synonymous with the interpretation of the ‘serious harm’ test in the Defamation Act 2013 (DA 2013). However, it is also an important decision in relation to the defence of publication on a matter of public interest and an interesting aspect of the judgment relates to the continuing online publication of the articles during the course of the proceedings, which this analysis focuses on. The Reynolds defence was abolished by DA 2013, s 4(6), but Mr Justice Nicklin found that the same principles apply to continuing online publication in the context of the defence of publication on a matter of public interest under DA 2013, s 4 (with the necessary modifications to reflect the statutory provision). Written by Nick Grant, senior associate at Payne Hicks Beach.**

*Lachaux v Independent Print Ltd and another* [\[2021\] EWHC 1797 \(QB\)](#)

### What are the practical implications of this case?

In proving a defence of publication on a matter of public interest, a defendant needs to show not only that it believed that it published in the public interest, but also that this was a reasonable belief. In doing so, contemporaneous documents are far more persuasive than witness evidence.

Where there is a significant change in circumstances relating to the factual basis of an article during proceedings, a defendant should carefully analyse the continuing justification for reliance on the defence.

While a defendant may believe that their articles remain in the public interest they should scrutinise, at every significant stage, how reasonable that belief may be. In this context, the defendant should also carefully consider amendments to the articles, bearing in mind the dangers highlighted by the judgment of maintaining the original structure and content with single clarificatory paragraphs at the top or bottom of the article.

### What was the background?

The claim related to articles published in *The Independent* on 25 January 2014 and the *Evening Standard* on 10 February 2014 which contained allegations including that Mr

Lachaux had been violent to his ex-wife and had snatched their son from her without justification.

Both articles were also published online and remained online until judgment, albeit they were amended several times during the course of the proceedings.

By the time of the trial, the defendants were not seeking to prove the truth of the allegations and the only defence maintained was publication on a matter of public interest.

Nicklin J considered the application of the defence at three points during the course of the proceedings:

- at the time of publication
- as at September 2014 after Mr Lachaux's solicitors wrote letters of complaint to both defendants and
- as at March 2017, after Mr Justice Mostyn handed down a judgment in the Family Division of the High Court

### **At the time of publication**

Both defendants failed in their defence at this point. A variety of reasons were given (and this is not the focus of this analysis) but Nicklin J was highly critical of the failure of both defendants to approach the claimant and ask him for his response to the allegations in advance of publication, not least because of their gravity.

### **The September 2014 letters of complaint**

The principle was established in *Loutchansky v Times Newspapers Ltd* [2002] QB 783 and followed in *Flood v Times Newspapers Ltd* [2012] 2 AC 273 that if a defendant sought to rely on the Reynolds defence (**essentially a 'responsible journalism' test**) in relation to continued online publication, then it would have to prove the constituent elements of that defence taking account of any significant changes in circumstances after the original publication. In practice, this meant a defendant would need to show that it had behaved responsibly—for example by making appropriate amendments to an article, if the factual position changed significantly after publication.

Letters of September 2014 set out Mr Lachaux's **complaint, in particular a detailed explanation of the** factual basis for his position that the articles contained inaccuracies. As neither defendant had contacted Mr Lachaux in advance of publication, this was the first time they were on notice as to his **side of the story. The letters also asked that the articles be removed from the defendants' websites.** The defendants chose not to engage with the factual position set out by Mr Lachaux and refused to take down the online versions of the articles. Single paragraph footnotes were however added to each of the online articles stating, among other things, that Mr Lachaux denied certain allegations in the articles.

Nicklin J **found that the defendants' evidence showed a belief that** continuing publication of the online articles in their amended form was in the public interest. He also found, however, that the defence failed because the belief was not reasonable taking account of all the circumstance of the case. Put simply, the amendments to the articles were inadequate and insufficient in reflecting Mr Lachaux's **detailed factual rebuttal.**

### **The March 2017 judgment in the Family Division**

The proceedings in the Family Division related to Mr Lachaux's **ex-wife** seeking an order for contact with their son. On 2 March 2017, Mostyn J handed down a fact-finding judgment in those proceedings which rejected (on the basis of the fullest access to all relevant documents) a number of the allegations made about Mr Lachaux in the **defendants' articles, including that Mr Lachaux had been violent to his ex-wife.**

**Following Mostyn J's judgement, both articles were briefly taken down from the defendants' websites** before being reinstated with amendments on or around 4 March 2017.

Paragraphs were added at the top of each article referring to the judgment of Mostyn J, the fact that he had rejected allegations made in the article and providing a link to a report of the decision (but not the underlying judgment of Mostyn J itself).

Again, Nicklin J **found that the defendants' defence failed** for the reason that their belief that continued publication was in the public interest was not reasonable. The amendments to the articles were found to be insufficient in circumstances in which there was no dispute by the **defendants to Mostyn J's factual findings. By maintaining the original structure of the article with the** brief additional paragraph at the top and without a link to underlying judgment, Nicklin J found that an ordinary reasonable reader could be genuinely confused as to whether the articles were suggesting that the court was wrong or not.

### What did the court decide?

Among other things, the defendants' conduct in relation to continuing online publication was a significant part of Nicklin's J assessment of remedies. The failure of the defendants to take adequate steps, in particular after the judgment of Mostyn J, meant that the element of vindication that might have been provided by a timely retraction or an apology could only now be provided by the award of damages and the court's judgment.

Damages were awarded against the defendants in the total sum of £120,000 (an unparticularised part of which related to the continuing online publication of the articles). It also meant that the claimant successfully established that an injunction prohibiting the defendants from publishing words bearing the meanings found by the court (or those substantially similar) was necessary and justified the making of an order under [DA 2013, s 12](#) that the defendants publish a summary of the judgment. No doubt these points will also have significance if it is necessary for the court to resolve the costs of the claim.

### Case details

- Court: Queen's Bench Division, High Court of Justice
- Judge: Justice Nicklin
- Date of judgment: 1 July 2021

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