

GD MEDIA LAW BULLETIN 2

GD Media Law Bulletin is a news review compiled quarterly by Goodman Derrick's Media Group. The aim of the Bulletin is to provide a brief summary of interesting developments in media law and regulation. The Bulletin is directed at journalists, producers and compliance officers. Detailed guidance on how those developments may impact upon programme makers and broadcasters is available from any member of the Media Group.

Legal

" The Invisible Spanking Dad":

Much publicity was given to the recent case of the father who was convicted of assault after smacking his 8 year old daughter in their dentist's waiting room. An Order was made by the Sheriff at Hamilton Sheriff Court forbidding the publication of any material which might lead to the identification of the daughter. This Order was made under Scottish legislation which is very similar to the law regulating identification of children involved in proceedings in the English Courts. One of our television clients obtained an exclusive interview with the father for broadcast and, naturally, took steps to conceal his identity by filming him from behind.

The exercise served to highlight the different approaches taken by the English and Scottish Courts to issues of identification and Contempt of Court. If the programme had been broadcast in England and Wales only, then barring exceptional circumstances, these precautionary measures should have been sufficient to avoid prosecution for contempt. However, because the Scottish Courts are renowned for a much stricter enforcement of such issues than their English counterparts, other footage of the man shown on local news programmes in Scotland introduced the additional precaution of masking the father's voice. The rationale was that as the father was a teacher, his voice, being an essential part of his stock in trade, could lead to his identification.

A further twist was added by the newspaper coverage of the case. The London edition of at least two broadsheet newspapers named the father. However, because the Order was limited in territorial effect to Scotland then provided these editions were not published there, the publishers would have no fear of prosecution. The Northern and Scottish editions did not name the father for obvious reasons. However, at least one broadsheet identified the father in the electronic version of the newspaper published on its Website. This is a good example of the limited value of territorially based restrictions in the context of electronic media as this publication was made after the Court Order.

Fair Dealing and Photographs

A number of recent cases have dealt with the media's right to publish a third party's copyright material under the protection of the "fair dealing" defence when the images are used to report current events. In our last bulletin, we reported on Carlton Television's successful defence of a copyright action by a German broadcaster over the use of a clip to illustrate a report on current media coverage of Mandy Allwood's multiple pregnancy. This liberal interpretation of "reporting current events" was followed in March 1999 when the Sun successfully defended its use of stills from a security camera film when the copyright was owned by an Al Fayed company. The film showed the Princess of Wales and Dodi Al Fayed arriving at a Paris villa on the eve of their deaths. The currency of events and the fact that Mr Al Fayed had raised certain issues in the public forum

meant that use of the clips was fair dealing and was in the public interest. The decision is subject to appeal.

The decision also serves as a reminder that stills of film footage, unlike photographs, can attract the "current events" defence.

Landmark Riot Footage Ruling

July saw a historic decision upholding press freedom in the face of a police application under the Police and Criminal Evidence Act 1984 for journalistic material obtained during the anti-capitalism riots in the City earlier this summer. The City of London Police applied to Court for possession of notes and tapes produced by nine newspapers and broadcasting organisations in the course of the demonstration. The Old Bailey Judge ruled that the police were not entitled to the material. He said that the need for police to investigate serious crime must be balanced against the need for the media to be free to report and film in safety. He said that the police must not make PACE applications as a matter of routine, or too fast: in this instance, they had not sufficiently examined the adequacy of the film and photographs that they themselves had taken during the riots.

The ruling is one of few to apply a wider interpretation of the PACE provisions, thereby protecting the media's right to cover events without appearing to be gathering information for the police and hence risking hostility from the participants.

Young People and the Courts

Reporting court cases involving young people is a regular source of problems for journalists. A series of recent decisions under Section 39 of the Children and Young Persons Act 1933 (which allows an adult court to order that no reports of proceedings shall identify any young person concerned in the case) has been criticised, often because the names of the children concerned were already legitimately in the public domain, or because the children were not strictly speaking "concerned" in the cases.

Furthermore, a recent ruling means that the media must not identify children following open court hearings in the Court of Appeal, even though no specific direction is made to that effect. A recent judgment (in re R(a minor)) has made it clear that all Court of Appeal Orders relating to children contain a ban on the identification of the child, whether or not a specific direction is given in court.

It is open to the media or the public to apply to lift or restrict the effect of this automatic ban in particular cases.

By way of contrast, in the case of Jade & Hannah Bennet and the Bramleys, the Judge took a more pragmatic and liberal approach. When judgment was given in the adoption proceedings, she published a statement for distribution to the press explaining her judgment and the order restricting reporting. Those restrictions were limited to protecting the children for the future (e.g. no identification of home address or school) but permitted the re-publication of material already in the public domain and a report of the outcome of the hearing, a sensible and balanced approach.

Libel

Glad to be Gay

It is not entirely certain in English law whether current attitudes on the part of "right thinking members of society" today mean that an allegation that someone is homosexual could on its own be regarded as defamatory. Guidance on the issue is perhaps provided by a recent Scottish case

in which the view was expressed that an allegation of homosexuality is not to be regarded in itself as defamatory. (*Quilty v Windsor*).

The earlier Jason Donovan case was run on the basis that the defamatory allegation was that he had lied about his sexuality, not that it was defamatory to suggest he was homosexual.

Libel and the Internet

Earlier this year, the English High Court ruled for the first time on the potential liability of internet service providers (ISPs) for defamatory material posted by third parties on sites hosted by the ISP. In *Godfrey v Demon Internet*, Demon sought to rely on Section 1 of the Defamation Act 1996 providing a defence of "innocent dissemination". Unfortunately for Demon, they had been warned by Mr Godfrey that the material was defamatory. Their failure to remove the item immediately was held to deprive them of the innocent dissemination defence.

The decision has caused serious concern to ISPs because of the practical difficulties of monitoring and reacting to complaints, especially given the many millions of items of information disseminated by this medium. ISPs argue, with some justification, that it is akin to holding a telephone company liable for defamatory remarks made in a single telephone conversation.

The decision is being appealed.

Libel and Live Broadcasts

The operation of Section 1 of the Defamation Act 1996 came under scrutiny in another recent case, *Mori v BBC*. The action concerned defamatory allegations made by the late Sir James Goldsmith in a live radio interview. Although the action itself was settled after the jury had difficulty reaching a verdict, the Judge had ruled during the trial on an important issue. He ordered that the use of a "profanity delay unit" (the device that puts a 7 second transmission delay on live broadcast) could be relevant as to whether the broadcaster had taken reasonable care (a requirement of the innocent dissemination defence). However, he ruled against the argument that use of this device means that the broadcast is no longer live such that the defence cannot be applicable when the unit is used.

The Judge gave leave for appeal on this important decision.

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Regulatory

Watching the Watchdog

In 1998, the BSC upheld a complaint by Dixons that the makers of the BBC's Watchdog Programme had infringed Dixons privacy by secretly filming in its shops.

The BBC applied to the High Court to review the BSC's decision. The Judge found against Dixons and quashed the BSC's decision.

The Judge's decision was based on two important principles:

- A company cannot enjoy a right to privacy; and
- There can be no infringement of privacy in a place to which the public has access and where the events filmed are not inherently private.

This a very significant judgment and will affect not only the BSC but should also influence the thinking of the ITC particularly in relation to, for example, secret filming in public places. Leave to appeal has been granted.

EastEnd Violence

One of the major plot lines in EastEnders this year breached BSC Guidelines on pre-watershed portrayal of violence. The killing of manic former girlfriend Saskia by Steve Owen, and the macabre scenes in which Steve and Matthew disposed of and buried her body, were criticised by the BSC, as was a scene in BBC1's Holby City where a nurse was attacked and no clear pre-watershed warning had been given.

It's Not Fair

Three recent BSC decisions upholding complaints of unfairness are instructive.

A trailer for Channel 5's Crime Report series made clear that the series would deal with serious crime issues, and would "expose the mechanics of the criminal mind". However, this was juxtaposed with a clip of film of an animal rights demonstration in which a woman who had committed no crime was identifiable. The BSC ruled that the effect was to suggest unfairly that she was involved in serious crime.

The BSC ruled against HTV who filmed at a company's premises during a farmers' protesters' about beef imports. HTV had failed to put the protester's allegations to the company's proprietor or to broadcast adequately the company's position on the issue.

Lastly, a BBC Private Investigations documentary about a pig farm had been unfairly presented by a former employee who had left in acrimonious circumstances and who unfairly delivered criticism which was not backed up by evidence.

Double Standards...How Queer!

That the ITC seem to take a more liberal approach to sexual content in broadcasting than the BSC is confirmed by recent decisions on Channel 4's "Queer as Folk" series.

This recent drama series, about the lives of three homosexuals in Manchester, was the subject of 138 complaints to the BSC, and 163 complaints to the ITC.

The vast majority of complaints to both concerned episode 1, where a 15 year old's sexual initiation at the hands of a 29 year old man was portrayed, notably in three graphic sex scenes.

The two Regulators reached opposite conclusions.

The BSC upheld the complaints relating to explicit and graphic depiction of sexual activity involving an underage boy.

However, the ITC ruled that the programme and the series in general was not in breach of its Code. It considered that the series fell within Channel 4's statutory remit and that most viewers would have no difficulty with the scenes which were broadcast after 10.30 pm. The ITC did express some concerns about the "celebratory tone" of the underage sexual encounters, and about Channel 4's failure to provide or offer support or advice, such as fact sheets or website material. They recommended that any repeat or further series should be enhanced by such messages.

This guide is for general information and interest only and should not be relied upon as providing specific legal advice. In relation to any particular matter, readers are advised to seek advice.

further information:

If you would like more information about any of Goodman Derrick's Media Law services please telephone and ask to speak to a member of the Media Group.

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