

GD MEDIA LAW BULLETIN 3

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.

Introduction

This quarter the Bulletin has a strong legal flavour. Particularly important is the House of Lords decision in *Reynolds -v- Times Newspapers* reviewed below. Our final page is given over to the use by journalists of copyright material and the defence of fair dealing. Broadcast journalists are frequently too timid in their approach to this area and this resume provides some broad guidance.

LEGAL

Reynolds Reversed

The House of Lords in *Reynolds -v- Times Newspapers* has reversed the decision of the Court of Appeal on the applicability of the defence of qualified privilege to media coverage of public issues. Some commentators consider this a retrograde step, but in a number of ways, the Lords' decision is a liberal one which stresses the need for public information and the vital importance of responsible journalism in a democratic society.

Background

The former Taoiseach sued the Sunday Times in respect of an article relating to the political crisis in Ireland in 1994, which culminated in the resignation of Reynolds and the collapse of the coalition government.

At the initial hearing the jury decided that the article was defamatory of Mr. Reynolds but he was awarded only 1p damages. At the trial the Sunday Times argued that the article was protected by the defence of qualified privilege which it argued should in effect apply automatically to reporting of political discussion. The judge rejected this. Both Reynolds and the Sunday Times appealed.

The decision of the Court of Appeal extended and redefined the defence of qualified privilege. At the heart of the defence of qualified privilege has always been the test that material is only protected if there was a legal, moral or social duty to publish and the material was published to those who had corresponding interest in receiving it. The Court extended the practical ambit of the defence by recognising that this test could be satisfied when the media inform the public on a matter of general concern, as long as the circumstances of the publication in question satisfy an additional set of requirements ("the circumstantial test").

House of Lords

The Law Lords unanimously rejected both this approach and the Sunday Times' argument that the Court should go even further and develop a new category of qualified privilege applying automatically to political discussion.

They concluded that where all relevant factors make it appropriate, qualified privilege in its existing form can protect a media story about a matter of public concern:

"the established common law approach to misstatements of fact remains essentially sound. The common law should not develop political information as a new "subject-matter category" of qualified privilege, whereby the publication of all such information would attract qualified privilege, whatever the circumstances. ... The elasticity of the common law principle ... enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern" (Lord Nicholls)

The nature and importance of the subject-matter, the conduct of the investigation and the tone and balance of the coverage are all factors to be weighed by the judge in deciding if privilege applies.

Analysis

The case is likely to mark a positive change in judicial attitudes to the press. The House of Lords went out of its way to endorse the vital role of the media and the paramount importance of freedom of speech. For the first time, the highest court in the land recognised the status of investigative journalism, not just reportage, as being integral to the media's central role in a democratic society:

"Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and that therefore the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication." (Lord Nicholls)

The Lords set out a 10-point list of factors for judges at first instance to bear in mind when considering whether a media story about a matter of public concern should be privileged: many relate to the quality of journalism behind the story, e.g., whether steps were taken to verify the story, and whether the plaintiff's point of view was sought and represented (it was the Sunday Times' failure on this point that let them down on the particular facts of Reynolds).

In evaluating these factors, judges must adopt the media's own standards (*"The common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse."* Lord Nicholls), thus reflecting the way the new Human Rights Act will specifically make the media's own codes of practice relevant factors in legal decisions.

It is likely that TV journalists will reap the benefits of the high standards that have come from the strict regulatory culture under which they operate. In many libel trials, the spotlight will be on the conduct of the investigation. BSC/ITC-compliant broadcast coverage is far more likely to win the protection of Reynolds-style qualified privilege than most typical press stories. The Reynolds decision therefore may well lead to a culture-shift in print journalism.

Journalist's Notes

Ed Moloney, northern editor of the Dublin Sunday Tribune has won his battle against a court order to surrender to police his notes of an interview with a loyalist charged with murder in Northern Ireland. The material had been sought by detectives investigating the murder by loyalists of Catholic

solicitor Pat Finucane.

Mr. Moloney interviewed William Stobie, an Ulster Defence Association activist and following his arrest in connection with the Finucane murder Mr. Moloney ran a story detailing his interview. The police then obtained a court order requiring him to hand over his notes. On appeal the Northern Ireland Lord Chief Justice, Sir Robert Carswell, ruled that Ed Moloney was not required to hand over his notes. Sir Robert said "*Police have to show something more than a possibility that the material will be of some use. They must establish that there are reasonable grounds for believing the material is likely to be of substantial value to the investigation. Police evidence does not, in our judgment, start to meet that criterion*".

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REGULATORY

Regulation - who needs it?

Apparently you do. An 80-strong audience at a debate on the topic at the recent Sheffield International Documentary Festival voted overwhelmingly in favour of continued regulation of broadcasters. The debate pitted Ian McBride, Managing Editor Factual Programmes at Granada in favour of regulation against Lion TV Director Nick Catliff, against. The audience signally failed to be persuaded by Catliff that the regulators should be made redundant. The concerns expressed by McBride about keeping the industry honest clearly resonated with the audience, particularly in the context of "*The Connection*" debacle. You won't be surprised to learn that Goodman Derrick, who sponsored the event, supported the status quo!

The status of the ITC in this regard has been enhanced by its handling of, not only, *The Connection* where it fined Carlton £2 million but also its careful investigation into allegations of faked scenes in two Channel 4 programmes, "*Chickens*" and "*Guns on the Street*". Although Channel 4 was fined £150,000 last February in respect of "*Chickens*" it and the producer, Ray Fitzwalter Associates, have been largely exonerated in relation to "*Guns on the Street*". The ITC concluded that the main elements of that programme were truthful and that there was insufficient evidence to conclude that viewers were misled or the Code had been breached.

Take care with children

Both the ITC and BSC have upheld complaints against Channel 4 concerning TFI Friday.

On 18th June a new competition was introduced in the programme in which two seven year old boys had a "*last one to blink*" contest, with a new car awarded to the parents of the winner. The boy who lost the contest was seen fighting back tears. The following week, the competition was repeated, this time with two young girls, and a prize of a £15,000 speedboat. On this occasion, the loser burst into tears. Following this, the competition was restricted to adults.

Channel 4 stressed to the regulators that the parents of the children were entirely happy for their children to participate and that they were well aware of the nature of the contest and would not be upset or harmed by it. The children themselves had been selected on the basis of their confidence and outgoing natures.

The Commission concluded that the inclusion of this competition was a serious lapse of judgment, and was especially concerned that Channel 4 had included it a second time despite the evidence of distress on the first occasion.

Financial Penalty on MTV

The ITC has imposed a fine of £40,000 on MTV for a series of breaches of the ITC's Programme Code. The Commission was concerned that there may have been commercial influence on programming and that two programmes had contained unjustifiable references to branded products or services.

The video request programme "*Select*" transmitted on 30 May 1999 had included several scripted references to Alton Towers, the donor of a competition prize. The "*Scarily Big Hits*" weekend which ran on 5 and 6 June 1999 included an unjustifiable number of references to Alton Towers as well as showing footage of rides and an animated logo.

The purpose of this item is to identify the circumstances in which copyright material can be used without the consent of the copyright owner. The available defence is called "*fair dealing*" and permits publishers to use, to a limited extent, copyright material for the purpose of criticism, review or in connection with reporting current events. Where material is used for criticism or review a sufficient acknowledgement to the copyright owner must be given and, in all cases, the use must be 'fair', e.g. not extensive.

Simple examples of fair dealing are the use of limited material from sporting events (e.g. the goals) in news programmes to report the outcome of matches and the use of material from a film for review or criticism. An example of the former was the use by BSB of BBC material from the 1990 World Cup for a nightly round-up of highlights. A graphic example of the latter was the use of sections from "*A Clockwork Orange*" by Channel 4. In this case a programme was dedicated to a review of the film and some 12 1/2 minutes was given over to use of sections from the film. Notwithstanding this, the Court held that the use amounted to fair dealing.

Two recent cases have examined the impact of this defence. *Pro Sieben Media AG v Carlton TV* involved a documentary produced by Carlton TV entitled "*Selling Babies*" which attacked chequebook journalism. Pro-Sieben had arranged an exclusive contract for an interview with Mandy Allwood who was pregnant with octuplets. The documentary used a 30 second sample of the Pro-Sieben interview with a clip showing Ms Allwood and her boyfriend purchasing eight teddy bears. The Pro-Sieben logo was displayed on the clip although there was no acknowledgement of their ownership of the copyright. Carlton's defence to the copyright infringement action relied on fair dealing for the purpose of criticism or review and for reporting current events. Carlton TV succeeded in the Court of Appeal which held that the documentary was indeed a programme about current events - a term which it was held is to be 'liberally' construed and subject to wide interpretation.

This use of this liberal construction by the courts is shown by *Hyde Park Residents v Yelland and others* (March 1999) which centered around the publication of stills of Dodi Fayed and Princess Diana taken from a security camera outside Villa Windsor, Mohammed Fayed's Paris residence. A ex-employee of Mr Fayed passed the stills to the Sun. Applying Pro-Sieben the Court held that the publication of the stills was protected. The use was fair and in the public interest and even though it was a historical event it had become current due to comments of Mr Mohammed Fayed.

So where do these cases leave us? It is clear that in the right circumstances the courts will use their wide discretion to allow copying provided that in their view the publication was fair and

reasonable and for the limited purposes identified above. Journalists, working in current affairs, should generally keep at the forefront of their minds the need to justify the use of any material in connection with reporting current events. The use of the material should not be by way of illustration or background but directly connected to the current events being reported.

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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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