

GD MEDIA LAW BULLETIN 4

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

"Reynolds" qualified privilege

In our last bulletin, we discussed the House of Lords ruling (*Reynolds -v- Times Newspapers Limited*) that the media may be protected by a qualified privilege defence where the information broadcast or published is such that the public is entitled to know it and the journalist has a social or moral duty to communicate it.

The ruling has been applied in favour of Leeds Weekly News in a recent High Court decision in a libel action brought by GKR Karate UK. The article concerned cold-calling sales techniques. The Judge ruled that on the facts before him, the public interest was of sufficient importance to outweigh the need to protect reputation and was hence privileged. Additional requirements are that the journalist has checked the authenticity of sources and has an honest belief in the truth of the information, both of which were satisfied in this case.

In a separate Court of Appeal judgment in the same action, it was ruled that issues such as qualified privilege can properly be determined separately and in advance of the trial on the basis that time would be saved at the trial itself.

Low Marks for Style

A recent Court of Appeal decision (*Norowzian -v- Arks Limited & Another*) has ruled that (i) under the Copyright Act 1988 a cinematic film can be a "dramatic work" in which copyright exists, but (ii) no such rights exist in relation to the style or technique used in making a film. Hence, a filmmaker cannot succeed in a copyright infringement action against the maker of another film which has different subject matter but employs strikingly similar filming styles and techniques.

It is perhaps surprising that we have had to wait until 1999, when the art of cinema is over a century old, for it to be established that a film can be protected by the Copyright Act as a "dramatic work", on the basis that, as one of the judges said, it is "a work of action, with or without words or music, which is capable of being performed before an audience".

The categories of dramatic work in the Copyright Act are not narrowly defined: hence the court felt able to include a "film" within this species of work.

Sticking to the Point

The trend towards simplifying libel actions continues.

In a Court of Appeal decision in December 1999 (*Tancic -v- Times Newspapers Limited*), the defendants were refused permission to make certain amendments to their defence. The rationale was that a libel defence "should be strictly confined to those matters... essential to the proper disposal of the issues" which "might mean cutting out peripheral matters". It was confirmed that the courts are "anxious to bring the length and expense of libel actions under some sort of control".

Consistent with this, in the wake of *Hamilton -v- Al Fayed*, new Law Society proposals for rules governing the conduct of parties prior to libel proceedings ("pre-action protocol") provide judges with the power to impose costs penalties against a party bringing a defamation action which is "expensive and unnecessary".

Summary Judgment in Defamation

A similar concern to provide a more streamlined resolution of defamation complaints is detectable in new draft rules of procedure intended to pave the way for the remaining sections of the Defamation Act 1996 to come into force shortly. In particular, these include the summary judgment provisions (ss. 8-11). The procedure will mean that a judge can be asked to make an appropriate order at an early stage if the claimant's or the defendant's case has "no realistic prospect of success". If a claimant succeeds in obtaining an order against the defendant on this basis, the "summary relief" which the judge can award includes damages up to £10,000 and an order that the defendant publish an appropriate correction and apology.

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Cross-border enforceability of Scottish Search Warrants Confirmed

In an earlier bulletin we reported the decision of the High Court in *R v Manchester Magistrates and Granada* in which our clients, Granada, successfully challenged a search and seizure warrant issued against them by the Strathclyde Constabulary. The warrant required delivery up of footage and journalists' notes of a *World in Action* programme broadcast in 1997. The High Court had held that the warrant was not enforceable in England because it circumvented the protections for the issue of warrants enshrined in PACE. Regrettably the House of Lords has now upheld an appeal by the Scottish Prosecuting Authorities that the provisions of PACE do not apply to search and seizure warrants issued in Scotland for enforcement in England.

Bloody Sunday

Important issues relating to the media have arisen from Lord Saville's enquiry into the deaths of 14 people in the Bloody Sunday incident in Northern Ireland.

Towards the end of last year, the enquiry deferred a decision on ordering media organisations to disclose the identities of sources used in programmes and articles about the shootings on the basis that such an order should be a last resort if the enquiry was unable to identify individuals by other means.

However, the enquiry has now referred a *Daily Telegraph* journalist to the Director of Public Prosecutions for destroying notes and audio tapes of interviews with a number of his sources.

The enquiry also withheld the identities of all military witnesses at public hearings due to take place this year. The latter decision implemented a Court of Appeal ruling in the summer overturning an earlier decision to identify soldiers who fired their weapons on Bloody Sunday.

Regulatory

Not Fair

The BSC upheld a complaint against Channel 4 concerning *Beneath the Sheets* (broadcast on 22.8.98). The programme was critical of the gay press in London and New York. It included an interview with the complainant, Mr Sollis, whose company published *The Pink Paper and Boyz*. The tone of the interview with Mr Sollis was different from the overall tone of the programme: he complained that the style and content of the programme, and the fact that it was presented by a critic of his publications, had not been made clear to him. The BSC agreed and found that he had, as a result, not been given a genuine opportunity to respond. Furthermore, the programme had failed to make clear to viewers that some of the criticisms aimed at his publications were up to 10 years old.

Photographs and Consent

The BSC partly upheld a complaint of infringement of privacy against Carlton in an episode of *Neighbours from Hell* (ITV 5.2.99). A photograph appeared in the programme taken by a newspaper photographer and showing the complainant at the funeral of a boy who had died of a drug overdose. The complainant had not consented to use of the photograph.

The programme makers argued that they had believed the photograph had previously been published but were unable to provide evidence of this (although a different photograph of the complainant at the funeral had been published). The BSC ruled that the complainant's consent should have been obtained and thus that its broadcast without consent was an unwarranted infringement of his privacy.

Tasteless and Indecent

The perils of live broadcasting have been highlighted in three recent BSC decisions.

- A BBC Radio 1 programme, *Ibiza '99*, included a live OB of a concert in which one of the entertainers unexpectedly grabbed the microphone and began to perform over the music using offensive language and references to illegal drug use. The BSC found against the BBC, which apologised.
 - Another BBC Radio 1 programme was also found to have exceeded acceptable standards: Simon Mayo's morning programme in September 1999 included a telephone conversation with U2's lead singer, Bono, who made use of "a derivative of the f-word". The BBC argued that the language was evidence of his sincere and deeply-felt commitment to the worthwhile cause he was discussing, but the BSC found against the BBC given the time of the broadcast.
 - Sky broadcast a live Robbie Williams concert in August 1999 in which he used bad language. Robbie Williams' management had previously been made aware that foul language in a live show would be unacceptable, but the BSC upheld a viewer's complaint given the likely young audience and the seriousness of the language used.
- Dealing with Children

The BSC has found against the BBC's Panorama programme investigating local authorities' duties in relation to the care of children. A viewer had complained that an interview with a young boy had been relentless, in poor taste and sensational.

The BBC's argument was that the distress of the boy arose from his experiences (he had been placed in 17 homes during his life and faced continuing uncertainty).

The BSC found that the interview seemed intended to explore the boy's feelings rather than to examine the facts, in order to add emotional intensity. It was found to have been unnecessarily intrusive. It hence contravened the responsibility of broadcasters to pay particular attention where children are involved to preserving the dignity of individuals and not to exploit them needlessly or cause unnecessary distress.

Should Crime Pay?

The BBC also fell foul of the BSC's Standards Panel in relation to Money, Money, Money broadcast in July 1999. The programme featured the story of one John Hole, who had received a three and a half year prison sentence for dishonesty and who admitted having stolen and sold his employer's Bentley. Other interviewees claimed he had stolen pictures and money. Mr Hole had been paid for his involvement in the programme; the payment had been approved (after the event) at an appropriate managerial level in the BBC. The broadcaster argued that the negative consequences of Mr Hole's crimes had been referred to. However, the BSC panel considered that the portrayal of Mr Hole as a loveable rogue was inconsistent with the effects of his crimes, in which Mr Hole appeared to revel rather than expressing any regret. Furthermore, the payment by the BBC was not in keeping with the BSC's code. The viewer's complaint was upheld.

BSC and ITC: Sexy Secrets

In an earlier bulletin, we commented on the surprising difference of approach between the BSC and the ITC over complaints about the homosexual sex scenes in *Queer as Folk*.

A similar contrast in approach arose out of the 27.9.99 Jerry Springer programme broadcast by Anglia on ITV at 8.00pm.

The programme was called *Sexy Secrets* and involved revelations made by guests dressed in PVC outfits (referred to as "kinky rubber-loving hussies") and naked lap dancers. 53 viewers complained to the ITC and 7 viewers to the BSC. The complaint was about inappropriate scheduling of the programme in family viewing time, directly after *Coronation Street*.

The ITC upheld the 53 complaints, finding that the time of transmission breached section 1.2(i) of their Programme Code on family viewing policy.

However, the BSC rejected its 7 complaints, finding that the style of the programme was well-known and that the subject matter was not inappropriate for the time of transmission. The sexual content had been "inexplicit" and did not exceed acceptable boundaries, according to the BSC.

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And finally a Competition

The following is an actual paragraph from a recent Press Complaints Commission adjudication.

You are invited to write and submit your version of the article to which the adjudication could have related. Prizes (probably liquid) will be awarded to the Most Humorous, Most Tasteless and Most Credible entries received.

..."The complainant said that the article contained many inaccuracies. He denied the accuracy of descriptions such as 'naked', 'ravers', and 'orgy' and said that these were misleading. The person described as a 'toff' had a broad Mancunian accent. Another man did not, as stated, pretend to be a table since his fetish is to be sat or stood on. Others were not dressed in German uniforms but American ones. Nobody was dressed as a light-switch, though there was one man in attendance who is a 'nationally recognised expert in electrical play'. Neither was anybody dressed as 'Wee Willy Winkie'. He denied that any couples were having sex on the floor"...

Entries awaited with interest (preferably by e-mail to: narmstrong@goodmanderrick.co.uk).

Those who actually read the original article to which the above relates (or who were present during the events described) are not eligible...

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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.

Goodman Derrick
90 Fetter Lane
London EC4A 1PT

tel +44 (0)20 7404 0606
fax +44 (0)20 7831 6407

e-mail law@gdlaw.co.uk