

GD MEDIA LAW BULLETIN 5

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

Blow to the Media on Fair Dealing

In an earlier Bulletin, we reported on the decision of the High Court in *Hyde Park Residence -v- Yelland and Others* (March 1999). This case involved the publication by *The Sun* of the now notorious stills from security cameras at Mohammed Al Fayed's villa in Paris ("Villa Windsor") showing the arrival and departure of Princess Diana and Dodi Fayed on 30 August 1997, the day before their deaths. Even though stills were published over a year later in September 1998, the High Court held that *The Sun* was entitled to rely on the defence of fair dealing for the purposes of reporting current events in view of the very recent publicity which had been generated by Mr Al Fayed about the events on 30 August 1997. The High Court further held that publication could be justified as being in the public interest. In February 2000, the Court of Appeal allowed an appeal by Mr Al Fayed and reversed the High Court's decision, rejecting the fair dealing and public interest defences.

Although the Court of Appeal was prepared to accept that the events of 30 August 1997 could qualify as current events for the purposes of publication in September 1998, it did not accept that the publication of the stills was for the purpose of reporting the events of August 1997. Rather they were directed to the recent media coverage of Mr Al Fayed's claims about the couple's plans to marry and live at Villa Windsor, matters which the Court held could be described as current events. However, the Court did not accept that *The Sun's* dealings with the stills were fair.

The Court's reasoning is a matter of concern for media organisations attempting to rely on the defence of fair dealing for the purposes of reporting current events. The Court held that such dealing could not be fair, having regard to the fact that the stills had been stolen by Mr Al Fayed's former security chief. This is in contrast to earlier decisions where the Courts had attached less weight to the provenance of the copyright work in deciding whether the dealing was fair. Indeed it is almost axiomatic that a media organisation is forced to rely on the defence of fair dealing in reporting current events specifically because it does not have the permission of the copyright owner. The Court clearly felt that having unauthorised possession of copyright material is one thing, but where that material has also been stolen, this takes it beyond the realms of fair dealing.

The second reason relied upon by the Court was the fact that the stills had not previously been published. Again, this is a restrictive, and from the Media's point of view, an unhelpful interpretation of the fair dealing provisions. The current affairs exemption in the fair dealing provisions is, it is reasonable to assume, in recognition of the need for the rights of copyright owners to be overridden for the purposes of informing the public about current events. Surely the question of

whether or not the material has previously been published is irrelevant to that overriding aim?

The third reason relied upon by the Court of Appeal was that it did not consider it necessary to publish the stills in order to convey the information as to the precise timings of the couple's arrival and departure at Villa Windsor. The Sun could have merely referred to the fact that it was in possession of stills which showed the exact timings and it could also have referred to a previous statement by Mr Al Fayed's Press Secretary which also referred to these timings. Again, this is a very restrictive interpretation of these fair dealing provisions as it appears to set a very high standard of necessity in order to justify publication. Surely, it can always be argued that publication of a still or clip was not absolutely necessary in order to convey the requisite information when a narrative or other description could be given. The Court was clearly persuaded by the argument put forward on behalf of Mr Al Fayed that the primary purpose for publishing the stills was to expose him as a liar. However, the question of Mr Al Fayed's veracity was of course part of the essence of the current events being reported because of his recent public pronouncements about Dodi and Diana's visit to the villa and their plans to make it their marital home.

The Court dismissed the fair dealing defence in the following terms:-

"I have come to the conclusion that the defence of fair dealing cannot succeed. I do not believe that a fair minded and honest person would pay for the dishonestly taken driveway stills and publish them in a newspaper knowing that they had not been published or circulated when their only relevance was the fact that the Princess and Mr Dodi Fayed only stayed the 28 minutes at the Villa Windsor - a fact that was known and did not establish that the Princess and Mr Dodi Fayed were not to be married. To describe what The Sun did as fair dealing is to give honour to dishonour."

On the other defence raised by The Sun, the Court of Appeal held that the concept of public interest cannot be used to override rights of ownership in a copyright work. Rather, the concept of public interest was limited in its application to the nature or content of a work. In other words, a Court could refuse to enforce copyright if the work was gravely immoral, scandalous or inflammatory, but it could not be used as a defence to what would otherwise be a breach of copyright in a recognised work. Although the stills may have been of interest to the public, they contained nothing which could require the Court to refuse to enforce the copyright attaching to them. Again the Court has erred on the side of the owners of property rights as against the publishers of such information. The Court refused to accept that public interest was available as a defence unless it could be shown that the nature of the copyright work itself was so odious as not to be worthy of copyright protection.

Contempt: Shipman Case Near Miss

Two presenters on a local radio station in Preston came within a hair's breadth of being prosecuted for contempt following a blatant and naive broadcast commenting on the Harold Shipman murder trial. A DJ and traffic announcer from Rock FM were hauled before the Trial Judge on the 38th day of the trial and severely reprimanded for their comments in the following exchange:

"The Harold Shipman trial we have got to be delicate because it is on-going ... I am supposed to be delicate, but I really don't care ... Harold Shipman's trial is going into its umpteenth month (at which point the traffic announcer was heard saying in the background "guilty") ... innocent until proven guilty of course because that's the way it works in this land. It's innocent until proven guilty as sin ... put us tax payers out of our misery because we are paying for this - admit to it - it's a fair cop - you're caught red-handed, be done with it."

Not surprisingly, the Trial Judge took an extremely dim view of these comments and told them that

it was "about as irresponsible a piece of broadcasting as I have ever heard... By saying the words 'I have to be delicate' you made it perfectly clear that you knew you shouldn't mention any kind of words like that". Although there was no evidence that any of the jurors had heard the broadcast, the Judge said he had been on the verge of referring the two announcers to the Attorney General for contempt of court proceedings but had been sufficiently impressed by the contrition and response of their employers as to take the matter no further. Rock FM had promptly suspended the announcers and immediately introduced a training programme for all presenters to avoid any recurrence of such incidents. The need for this was no doubt driven home by the comments of the DJ in Court, that he had "not been entirely aware" of the law of contempt.

Defamation: Sorry Currie

Former Tory MP Edwina Currie was awarded £30,000 damages plus costs and a public apology over an article in The Daily Express published in September 1997 which branded her as "the vilest lady in Britain". The article suggested that there were rumours afoot in Westminster that she was about to join the Labour Party to reinvigorate her flagging political career. The Express wrote that Ms Currie would be no more acceptable to Mr Blair's administration than "a mass murderer", "a serial rapist", or "an active officer in Radovan Karadzic's death squad". These comments, said her Counsel, put her in the same category as Myra Hindley and Rosemary West. The Express apologised for the article and expressed its "sincere regret".

This case serves as an object lesson and a timely reminder as to the often fine line which exists between the cut and thrust of parliamentary and political banter or "slagging off" and comments which are plainly offensive and defamatory. Most politicians are rightly broad-shouldered about public criticism, even when it relates to personal qualities or attributes. However, in this case, the Express clearly went too far, no doubt in the understandable belief that "she'll never sue" ...

Contempt: Protection of Sources

In a welcome decision for the media, the Court of Appeal has upheld the right of a journalist to refuse to identify her sources. The journalist in question worked for The Daily Express and had come into possession of a draft Counsel's Opinion advising on the merits of a potential claim by Sir Elton John against accountants PriceWaterhouseCoopers. The journalist was in the process of verifying the information when she was served with an injunction requiring delivery-up of the document and disclosure of its source. The draft Opinion had apparently been produced in the offices of Sir Elton John's solicitors but after the draft had been superseded by the final version it was torn in half and put in the bin. It was not clear how the document had then come into the hands of the journalist. Sir Elton and his solicitors sought an Order compelling the journalist to disclose her source under Section 10 of the Contempt of Court Act 1981, which protects journalists against disclosure, unless it is found by the Court to be necessary in the interests of justice or national security or for the prevention of disorder or crime.

Initially, the High Court, whilst sympathetic to the journalist's principled stand, was concerned about the effects on the administration of justice if people who search for and select confidential and privileged legal information, and then hawk it around to the media. It therefore ordered disclosure. However, in recognition of the difficulties of the case, the High Court also gave leave to appeal. On appeal, the Court was impressed by the newspaper's arguments that no investigations appeared to have been carried out as to how the breach of security had occurred. Accordingly, whilst the Court of Appeal recognised the need for clients to be able to consult their lawyers secure in the knowledge that their confidential information was not at risk of being betrayed, before the journalist should be required to breach her professional obligation of confidentiality to her sources, at the very least other avenues of identifying the source should be explored, rather than simply assuming

that the culprit could not be found. Because this appeared to be a one-off case of infringement of confidentiality, it did not justify making inroads into the rights of journalists to protect their sources.

There is a clear object lesson for Claimants here, which is that they should not assume in these cases that once the horse has bolted, no further action is required and they can simply rely on the Courts to invoke Section 10. On the contrary, they need to demonstrate that they have taken all reasonable and appropriate steps themselves to trace the leak and identify the culprit before resorting to S.10.

[Top ^^](#)

REGULATORY

Consent Irrelevant where Taste and Decency is concerned

The ITC has upheld a complaint against the Bravo Channel concerning an item showing footage from an American programme in which a 13 year old boy was killed in a parachute accident. A complaint was received that this contravened the ITC's Code on Taste and Decency. The broadcaster pointed out that the parents of the boy had given their consent for the footage to be used in an attempt to help others to avoid a similar tragedy. However, the ITC considered the issue of consent to be irrelevant. They stressed that the critical factor was for the broadcaster to consider the impact of this kind of footage on the audience. The inclusion of footage of a fatal accident of this kind and the reaction of on-lookers would have required exceptional justification which was not present in this case.

Lesbian Chefs

The ITC rejected complaints from viewers of an edition of Channel 4's "Dishes" - a dating game show series with a cookery theme - where all the contestants were lesbian women. The show was broadcast at 6.00 pm on a weekday evening. The complaints concerned the early scheduling of the programme and the suggestion that it was promoting lesbianism. Although the ITC accepted that some viewers might feel uncomfortable with the inclusion of homosexuals in a programme, particularly at a time when children might be watching, the key question was whether or not the content was unsuitable for viewing at this time. The ITC did not feel that there was anything unsuitable in the programme, indeed the only change to the show's usual format and content was that all the contestants were homosexual. There was no bad language or explicit sexual content and therefore there were no grounds for objecting to it on the grounds of taste and decency or scheduling.

Right of Privacy of Companies Upheld

Earlier Bulletins have featured the various proceedings relating to Dixons' complaints to the BSC over the BBC's Watchdog Programme. In 1997, the BSC upheld complaints by Dixons that secret filming in their stores by the BBC was an unwarranted infringement of Dixons' privacy, even though no individual employees had complained. The BBC sought judicial review of the BSC's decision on the grounds that it had no jurisdiction to entertain privacy complaints from a company. In 1999, the High Court upheld the BBC's application and quashed the decision of the BSC. The BSC appealed against this decision.

In April 2000, the Court of Appeal upheld the BSC's appeal. The Court held that there was no basis for saying that companies are excluded from making privacy complaints, just as there can be no dispute that a company can make a complaint about unfair treatment. A company undertakes activities of a private nature which need protection from unwarranted intrusion. To hold that a company was not entitled to protection against invasions of privacy would leave it at a disadvantage under legislation designed to encourage and achieve proper standards of conduct. This was despite the fact that no individuals had complained and that the secret filming was carried out in an area where members of the public are freely admitted. The Court also refused to interfere with the BSC's finding that the invasion of privacy was unwarranted as it had been undertaken without adequate prior enquiries which would have established whether there was any justification for the secret filming.

In practice, this decision will have little impact upon broadcasters because of the existing hurdles which the ITC and BSC Codes require them to negotiate when dealing with privacy issues. However, it will no doubt encourage more companies to launch privacy complaints. All in all, it is a timely reminder of the need to be able to justify the secret filming by proper preliminary research rather than simply using it as a fishing expedition in the hope that it can be justified after the event.

Speaking of privacy ...

The BSC has upheld up a complaint of unwarranted infringement of privacy from a motorist featured in an episode of Granada's "Motorway Life" programme broadcast at the end of April 1999. This programme looked at life on the M6 Motorway and the individuals who work on it. It also included footage of the aftermath of a car crash which included shots of the complainant receiving medical attention for her injuries. Understandably the complainant was in a distressed state and made it clear that she did not wish any footage to be included in the programme. Naturally the broadcaster took steps to obscure the complainant's identity, but the BSC found that these were inadequate and that she was still identifiable. Whilst recognising the right of broadcasters to film at the scene of accidents for news and documentary purposes, the BSC stressed that this should not be at the expense of rights of privacy of any victims of such accidents. Therefore her complaint of unwarranted invasion of privacy was upheld. The broadcaster's arguments were clearly hampered in this case by the fact that it had taken steps to obscure the complainant's identity and therefore recognised her rights of privacy, but unfortunately the steps were inadequate.

[Top ^^](#)

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

Goodman Derrick

[Disclaimer & Privacy policy](#)