

## GD MEDIA LAW BULLETIN 11

---

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 edition of the Bulletin reports two worrying developments for programme makers and broadcasters: the contempt risk arising from contact with witnesses in criminal trials; and a potentially significant decision which could substantially hinder broadcasters' news reporting activities. On the positive side there has been a welcome clarification of the Reynolds qualified privilege test.

### LEGAL

#### Qualified Privilege Clarified

Before Xmas the Court of Appeal gave judgment in *Loutchansky -v- The Times*. The Times had appealed against Mr Justice Gray's rejection of its claim of qualified privilege for defamatory articles about Grigori Loutchansky. Gray J ruled that The Times was not entitled to rely on the defence, applying the criteria laid down in *Reynolds*. The articles had alleged that Loutchansky was the boss of a major Russian criminal organisation and was involved in money laundering and the smuggling of nuclear weapons. Although Gray J held that the subject matter of the articles was in the public interest, he was not satisfied that The Times had a duty to report it in the terms required by *Reynolds*. He felt that the stories were "low grade" in importance and there was "no great urgency" about the need for publication.

The Court of Appeal held that this was too stringent a test. This species of qualified privilege requires a duty on the part of the publisher and a corresponding interest or duty to receive it on the part of the recipient i.e. in this case the public. The Court of Appeal stressed that the interest was that of the public in a modern democracy of free expression and more particularly in the promotion of a free and vigorous press to keep the public informed. The corresponding duty on the publisher was to play its proper role in discharging this function. The test had to be set at the right level. If set too low, this would give the press a licence to publish defamatory material with impunity, and it was important that journalists were rigorous in their approach. On the other hand, setting the standard too high could be equally damaging as it would deter publishers from discharging their proper function of keeping the public informed. The case was therefore remitted to Gray J to re-examine the matter in the light of this clarification.

Incidentally the Court of Appeal upheld two other important aspects of Gray J's judgment. First, the posting of back copies of a newspaper in the archive section of a website did not constitute one single publication. Instead a separate act of publication occurred each time the relevant part of the archive was accessed by visitors to the site. Second, qualified privilege could not attach to the archived version of the relevant articles since they had been posted and subsequently repeatedly published in the knowledge that their truth was being contested but without any qualification or

statement being added to the archive to that effect.

## Website Archives and Contempt

A recent decision of the High Court in Edinburgh draws an interesting parallel with the website archive issue referred to in Loutchansky. Last autumn, William Beggs was convicted and jailed for life for the gruesome murder and dismemberment of a teenager. During the trial his counsel drew the Judge's attention to certain archive material in the websites of The Guardian and The Sunday Times which was very prejudicial of the defendant and which could impede a fair trial. In a curious twist of fate, the prosecuting authorities argued in defence of the newspapers that merely by maintaining these archives they were not publishing prejudicial material and therefore were not contravening the Contempt of Court Act (the relevant parts of which are the same in Scotland, albeit more strictly applied). The Judge rejected the argument that the archive material was not published and likened it to a book that is continuously on sale and available for purchase by the public. However, he also held that the archive material did not create a serious risk of substantial prejudice in view of the limited likelihood of it coming to the attention of a juror. He was particularly influenced by the fact that the search engines operated by the newspapers would not have been able to search against Begg's name, therefore making it much more difficult for a visitor to discover the archive material, unless he already knew about it. Clearly it would have been an entirely different matter if the prejudicial material had been published in a more readily accessible manner during the trial.

## Contempt - Interviewing Witnesses

ITC licensees are prohibited from entering into any commitment to pay a witness in a criminal trial before a verdict has been reached. A further and worrying restriction in relation to journalists' dealings with such witnesses came to light last autumn, too late for inclusion in our last Bulletin. This is the decision in *R v Shillibier re: HTV*, relating to a murder trial at Cardiff Crown Court. HTV was following the trial and intended to produce a documentary about the case incorporating interviews with witnesses. Prosecuting counsel discovered this and asked the Trial Judge to make an order that would prevent HTV from contacting or interviewing any witness who had given or was likely to give evidence for the prosecution. Defence counsel also supported the application. The Judge duly made an order to this effect and HTV applied to have it discharged. The Court said that it was satisfied that the proposed interviews would amount to a contempt of court, in the sense that the course of justice in the trial would be seriously impeded or prejudiced.

In doing so, the Court appears to have automatically assumed that merely interviewing a witness will affect the course of justice. This appears to be a harsh judgment since the interview may have consisted of no more than a recitation by the witness of evidence which he or she had already given. True, a witness who has already given evidence could be recalled but unless there was any suggestion of the witness being improperly pressurised or influenced by the interviewers, it should not be taken as read that the mere fact of the interview would have such a damaging effect.

However, the Court did have regard to considerations of freedom of expression under the Human Rights Act and declared that any injunction would have to be proportionate. Hence the injunction would be to the minimum extent necessary to safeguard the course of justice which in this case would be until the start of the Crown's closing speech, after which it was safe to assume that witnesses would not be recalled to give evidence. Hence the programme makers would be free to approach and interview the witnesses after that date. Nevertheless this decision will ring alarm bells for programme makers who have previously assumed, not unreasonably, that provided they have not in any way coached, pressurised or influenced a witness and provided the witness is merely repeating what he or she had said or will say in court and, of course, provided such material

is not broadcast until after the trial, there was no substantial risk of serious prejudice.

Top ^^

## REGULATORY

### ITC Programme Code Revisions

On 16 November 2001 (again just after our last Bulletin) the ITC published a revision to section 2.11 dealing with the reporting of sexual and other offences involving children, following on from earlier consultation with broadcasters. This provision has a slightly torturous history. The previous version published in Spring 2001 parroted the relevant provisions of the Youth Justice and Criminal Evidence Act 1999 even though they were not in force and had been put on ice after strenuous objections from the media during the passage of the Bill! Once more television journalists found themselves at a considerable disadvantage to their print colleagues.

The revised provision now requires broadcasters *"...to pay particular regard to the potentially vulnerable position of any person under 18 involved as a witness or victim, before broadcasting their name, address, school or place of work...Particular justification is...required in the case of any such person who is involved as a defendant or potential defendant"*. Hence broadcasters must weigh up the potential impact of the broadcast on the young person and, in the light of this, be satisfied that they have cogent reasons for broadcast which outweigh any potential harm. It will obviously help if they also obtain the consent of the parent or guardian.

### Green Light for Hamilton's Defender

In a fairly extraordinary decision the High Court has given leave to a journalist, Jonathan Boyd Hunt to judicially review a decision by the ITC rejecting his complaint that Granada TV had failed to show due impartiality in its coverage of the Neil Hamilton cash for questions affair. Mr Boyd Hunt complained to the ITC in 2000 about Granada's coverage of the Hamilton saga and delivered a dossier particularising what he claimed was Granada's failure to cover the story with due impartiality. He claimed that Granada had deliberately ignored significant evidence which he and a colleague had uncovered which would have supported Mr Hamilton's claims of innocence. The ITC argued that Granada, like any other ITC Licensee, was only required to provide even-handed coverage of such stories and it was satisfied that Granada had met that requirement since it had included in its reports Mr Hamilton's denials of wrong doing. Burton J ruled that Mr Boyd Hunt had an arguable case in his claim that Granada had failed to show due impartiality and that the ITC's Programme Code required Granada to broadcast the fact that a third party's research into the Hamilton affair supported his denials: *"It seems to me you have an arguable case worthy of further development that the admitted failure by Granada Television to mention your significant views renders the decision in breach of the code of conduct and perverse."*

Admittedly Mr Boyd Hunt still has a long way to go but the fact that he has managed to get this far will have surprised anyone with a working knowledge of broadcasting regulation in the UK. If successful the implications for broadcasters could be cataclysmic. Not only would programme makers have to accord a right of reply to the subject of their programmes, but also to any other third party who happened to have carried out research which supported that party's position. Watch this space...

### Unfair Crash

The ITC has upheld a complaint against Channel 5 in respect of its programme entitled "Crash - Picking up the Pieces". This was a documentary series accompanying a police serious accident team in their work investigating traffic accidents. An episode broadcast in November 2000 featured a motorcycle crash in which the rider broke his neck and was hospitalised for 6½ months. He did not appear on screen and was not identified. The commentary stated that he "would never walk or ride again", based on what the investigating police officer had said. The rider in fact saw the programme while he was still in hospital and immediately recognised his crash when it was mentioned. He had not been told by his doctor or anyone else that he would never walk or ride again and was not unnaturally distressed to learn this for the first time whilst watching the programme. To compound matters a letter informing his family of the date of the programme's broadcast arrived two days after the transmission. Channel 5 explained that the rider's prognosis had come from the investigating police officer who would have obtained the information from the hospital. They also explained that the police had been the source of the family's address which had in fact proved to be wrong, thereby explaining the delay in his receipt of the letter.

Although the rider was not identified the ITC found it unacceptable that sensitive information about the rider's prognosis should have been broadcast without it first being ascertained that he himself was aware of it. They felt that this should have been done by direct reference to the rider, preferably in association with his family and senior medical staff. It was not sufficient to rely on the police officer.

To make matters worse the information broadcast was not only un-corroborated but wrong since the rider had made at least a partial recovery. The ITC ruled that the programme contravened the Code's requirements of accuracy and respecting an individual's right for privacy. Channel 5 was clearly unlucky: the rider was not identified and the source of his prognosis and contact details, emanating from the investigating officer, was assumed to be reliable.

Winter 2002

[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](mailto:law@gdlaw.co.uk)

