

## GD MEDIA LAW BULLETIN 14

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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.

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### LEGAL

#### Naomi Campbell v Mirror Group Newspapers

We reported in our Spring 2002 issue that there had been a number of important recent Court decisions affecting how an individual's right to privacy is protected in this country. Among them was Naomi Campbell's somewhat pyrrhic victory earlier this year: the supermodel was awarded £3,500 damages after The Mirror published photographs of her leaving a Narcotics Anonymous meeting and details of her treatment. The judge ruled that although The Mirror was entitled to publish the fact that Miss Campbell was a drug addict, revealing details of her treatment was in breach of confidence and of the Data Protection Act 1998.

Naomi Campbell suffered a serious blow earlier this month when The Mirror succeeded in its appeal against the court's ruling, leaving her with an estimated £750,000 bill in costs.

In overturning the case, the Court of Appeal said the report about Miss Campbell's drug addiction had been justified in the public interest. Lord Justice Phillips stated "We consider the detail given, and indeed the photographs, were a legitimate, if not essential, part of the journalistic package designed to demonstrate that Miss Campbell had been deceiving the public when she said she did not take drugs."

The court also overturned a finding that The Mirror had been in breach of the Data Protection Act in using sensitive personal information about Miss Campbell without her consent. The judges decided that The Mirror were protected by a public interest exemption under the Act.

This decision has been hailed as an important victory for press freedom, with Piers Morgan, editor of The Mirror claiming the decision serves as "a wake-up call to all celebrities queuing up to take the media on".

However Lord Justice Phillips did go out of his way to emphasise that public figures had a right to privacy, saying "We do not see why it should necessarily be in the public interest that an individual who has been adopted as a role model, without seeking this distinction, should be demonstrated to have feet of clay".

The Mirror's victory should be viewed with caution and is not a green light for journalists to print juicy details of celebrities' private lives. The judgment may not deter other celebrities from suing because Miss Campbell's case was undoubtedly weak. The Mirror ultimately won on the particular facts of the case: the court considered the revelation of her treatment to be relatively insignificant and Miss Campbell had lied about using drugs; consequently the press were entitled to set the record straight.

## MacIntyre v Chief Constable of Kent and Others

GD's Nicholas Armstrong looks at client Donal MacIntyre's recent libel success.

Donal MacIntyre's libel win against Kent Constabulary appears to be the first time that the Police have successfully been sued for libel. It delivers an important message about the approach of the Police and their increasingly complex relationship with the media.

It concerned a BBC "MacIntyre Undercover" programme which exposed failings in the care of adults with learning difficulties in a care home in Kent: unnecessary use of a potentially dangerous restraining technique called "pin down", cruel and threatening behaviour by certain staff towards residents, plus a general culture of neglect.

After broadcast, the local authority closed down the home and reported the matter to the Police. In parallel, an independent specialist consultancy prepared a study into conditions at the home, which confirmed Donal's findings. The Police themselves prepared a report. Two care workers were cautioned for a total of five offences of criminal assault.

But the Police report went beyond possible criminal offences by staff. It suggested that sections of Donal's programme were distorted and false. This was the start of the process described by a Court of Appeal Judge during Donal's case as "the Police acting like the Broadcasting Standards Commission".

The Police then gave a journalist on the Sunday Telegraph access to their report - his article in June 2000 (approved by the Police) concentrated on the allegations of distortion and falsity, as did briefings to other media organisations by Kent Constabulary's "media services manager". One article (which claimed to rely on what the Police had said) alleged that "nothing in the BBC programme was borne out". Many articles stated that the Police wanted back from the BBC the £50,000 their investigation had cost.

But the footage shot by Donal and a colleague during just fifteen shifts at the home had led to cautions in respect of five offences - i.e. an average of one criminal assault every three days.

Looking at all the untransmitted footage (as the Police did, and as I did during the case), it was obvious that the programme did give a true picture of the home, which it was important to bring to public attention.

We saw no reason why policemen who make allegations outside the arena of the investigation of crime should not be held to account if what they say is wrong. On the contrary, it is important that they should be held to account. Statements from the Police carry a badge of authority for most people - if incorrect, the damage is greater.

This general presumption that the Police can be believed is the presumption of the law as well - eg if a newspaper prints something based on information from the Police, the paper may well have an extra defence (of qualified privilege) to any libel claim - irrespective of whether the statements turn out to be true or false. The law regards it as responsible for a journalist to trust what the Police say. So if the information turns out to be incorrect, anyone damaged by what is published may not have an effective remedy against the media. The only redress will come from action against the source - the Police themselves.

I hope Donal's success will serve as a cautionary reminder to those in positions of authority that they have additional responsibility when it comes to making public statements via the media.

A fuller version of this article will be appearing in The Independent.

## **Fair comment steps forward**

Fair comment has frequently been the Cinderella of libel defences. Attractive but difficult to successfully pursue in practice. The situation has now begun to change with Lord Nicholls in *Cheng v Paul* stressing that personal animosity, intent to injure or other motivation does not of itself defeat the defence.

Lord Nicholls said "critics need no longer be mealy-mouthed in denouncing what they disagree with", provided the "objective limits" of the fair comment defence were established - that is, that the issue was one of public interest, the comment was readily recognisable as such and based on facts which were probably true or protected by privilege, that it explicitly indicated what were the relevant facts, and was a comment which could have been made by an honest person, no matter how prejudiced or obstinate.

This development needs to be seen in the light of the courts having broadened the limits of what could be held to constitute comment as opposed to a factual allegation.

Whether words sued over are actually comment or allegations of fact is a matter for the jury. However, judges can be asked to rule whether words are capable of being held to be comment. Previously, the courts had used this power to prevent what they considered to be essentially allegations of fact being defended as fair comment.

Last year, in a libel action brought by Richard Branson against his biographer Tom Bower, Mr Bower sought to defend the allegation that "Sceptics will inevitably whisper that Branson's motive [for his bid for the national lottery] is self-glorification" on the basis that it was fair comment. Mr Branson claimed that this was a factual allegation (that he had a questionable intention in bidding for the national lottery) and that this was untrue.

Although the long established rule was that "the state of a man's mind is as much a fact as the state of his digestion", the Court of Appeal held that Mr Bower's statement could be comment since it was "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark or observation".

[Top ^^](#)

## **MISCELLANEOUS UP-DATES**

### **Wards of Court**

For many years it was standard advice that in the absence of a Court Order there was no ban on identifying a child as a ward of court although the wardship proceedings themselves could not be reported. As Justice Munby recently made clear this is no longer the position, identification of wards of court is now prohibited by statute. There is, however, nothing to prevent the media interviewing or writing about a child who is a ward provided that fact is not reported.

### **Reporting Restrictions**

Two new reporting restrictions belatedly came into effect during the summer. S47 Youth and Criminal Evidence Act 1999 makes it a criminal offence to report that a court has directed "special

measures" be taken to reduce stress on vulnerable witnesses. S25 enables courts to eject the media, one representative being allowed to remain, so that evidence can be given in private in cases involving vulnerable witnesses. There is, however, no indication, as yet, from the Home Office as to when the sweeping s44 restrictions which ban the identification of young people suspected of offences will be introduced.

## **Contempt**

Prior to the recent case of *Jockey Club v BBC*, the view had prevailed that, under the "Spycatcher principle", any party having notice of an injunction, whether named in the injunction or not, could be guilty of contempt if it acted to undermine the purpose of the injunction. In its recent Panorama documentary on corruption in horse racing the BBC wanted to use certain confidential information which was the subject of an injunction and which had been disclosed to the BBC by Roger Buffham, who had acquired the information in the course of his employment as head of security at the Jockey Club.

When Mr Buffham left the Jockey Club, he had remained contractually obliged not to disclose any confidential information. But the Jockey Club became aware that he had passed onto journalists, including the BBC, documents which he had kept and the Club obtained an injunction requiring him not to disclose any confidential information. The injunction was served on the BBC, which then successfully applied to vary it. Mr Justice Gray decided that the BBC should not be subject to restraint in the terms of the order against Mr Buffham, holding that:

"The 'Spycatcher principle' applied to interlocutory but not final injunctions. Here the injunction was final, and only those against whom it was made would be bound by it."

"The BBC was not bound or affected by the order, nor would it be at risk of committing contempt if it broadcast the information received from Mr Buffham, which was confidential."

"The public interest in disclosure by the BBC outweighed the right of confidence of the Jockey Club"

## **Harassment**

Astonishing as it may appear it has been reliably reported that Bob Crow, leader of the train drivers' union, is invoking the Protection from Harassment Act 1997 in an attempt to restrain the Evening Standard from acting in a way he claims amounts to unlawful harassment.

## **Damages Awards**

£7,500 to Alex Ferguson from the Evening Standard for suggesting he was greedy and mercenary.

£90,000 to three directors of a betting firm for reports in the Racing Post which impugned their integrity.

"Substantial damages" to UTV reporter Jeanie Johnston and her husband for the suggestion in a number television listings magazines that her husband abused her. In fact she was the presenter of a programme about marital abuse.

£55,000 to Bonnie Woods from the Church of Scientology for accusing her of waging a "hate campaign".

£50,000 to Heather Mills (McCartney) from the Sunday Mirror for allegations of fiddling charity money.

£200,000 each to Dawn Reed and Christopher Lillie from Newcastle City Council for maliciously publishing a report containing allegations of child abuse.

£350,000 award to Alan Campbell which was then cut to £30,000 by the Court of Appeal. A News of the World article claimed the businessman was a paedophile. The Court indicated that an award not in excess of £100,000 would have been reasonable. However it reduced the award significantly because Campbell had engaged during the litigation in an elaborate and long lasting attempt to pervert the course of justice.

## Regulatory Interventions

The ITC Reports for the months of July, August and September record that there were no programmes in respect of which significant interventions or the imposition of a sanction occurred. In fact two penalties of £10,000 each were imposed on the channels B4U and Kanal 5. B4U had transmitted one '18' and two '15' rated films at 4pm and Kanal 5 had broadcast a still image which "graphically showed a couple having sex" throughout the day from as early as 8am.

During this period the ITC received 1,187 complaints; considered and reported on 29 programmes in respect of which complaints were received and up held complaints concerning 19 of these. Issues relating to bad language and taste and decency formed some 50% of the upheld complaints.

[Top ^^](#)

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### 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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