

## GD MEDIA LAW BULLETIN 15

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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

#### Risk of Defamation Action Threatens Freedom of Information Online

A landmark judgment in Australia has threatened the flow of information on the Internet. The case clarifies that Internet publication potentially takes place in any country in which the material is downloaded, irrespective of where the server is based, giving the right to sue for libel in the country where the reputation is damaged and not necessarily the country where the material originated.

The case was brought by Australian business man Joseph Gutnick against US publishing group Dow Jones & Company. Gutnick claimed that the online version of Barrons Magazine, published by Dow Jones, defamed him and he should be allowed to sue Dow Jones in Victoria, where his business is based. He argued that the case should be heard in Australia because he was only interested to re-establish his allegedly damaged reputation there. Dow Jones argued that Australian courts did not have jurisdiction in the case. The publisher claimed that the allegedly defamatory article was published in the US, where the company's web servers are located, and therefore the case should be heard there. They also claimed that the establishment of jurisdiction where internet material is downloaded would unreasonably expose internet publishers to defamation suits all over the world and therefore restrict freedom of speech.

The High Court of Australia ruled unanimously that Gutnick could sue Dow Jones in Victoria, where the rules of litigation are more favourable to claimants than in the US. The decision is not that surprising and is consistent with another recent case. In *Berezovsky v Michaels* a Russian businessman, Boris Berezovsky, successfully contended that he was entitled to sue Forbes Magazine in England for defamation despite the fact that Forbes is a US based publication, that sold only some 2,000 out of approximately 790,000 copies of its publication in England. These cases illustrate that an action can be brought in a country where the person bringing the case has a reputation to defend.

There is a concern that the ruling in Gutnick will initiate the censoring of potentially libellous material from websites for fear of potential liability anywhere the web reaches. However the Judge did state that "In all except the most unusual of cases, identifying the person about whom material is to be published will readily identify the defamation law to which that person resorts". The ruling has only direct application in Australia but English courts may be persuaded by the reasoning when considering similar cases.

The liability of Internet Service Providers (ISPs) for defamatory material was established in *Godfrey v Demon Internet*, in which Godfrey sued Demon over defamatory material about him in chat rooms. Demon sought to rely on section 1 of the Defamation Act 1996 which gives a limited defence to secondary publishers (publishers other than the original authors) provided that

reasonable care was taken in relation to the publication and a lack of knowledge and/or reason to believe that what was published was defamatory. Godfrey had warned Demon about the publication and it had failed to take it off the site. The defence therefore was not available.

The Popbitch website was recently in trouble for publishing a rumour concerning footballer David Beckham. Beckham's lawyer wrote to Popbitch to warn the site that the material was defamatory, resulting in the particular piece of gossip being taken out.

Until this developing area is tested further in the courts, it is likely that an overtly cautious approach will be adopted by ISPs, restricting the right of free speech that the internet was intended to foster.

### **Confidence and Privacy Update**

We reported in our October 2002 issue that the Court of Appeal overturned Naomi Campbell's victory against the Daily Mirror in a claim for breach of confidentiality and infringement of data protection rights. Ms Campbell's run of bad luck continued when her summary judgment against formal personal assistant Vanessa Frisbee was overturned by the same Court of Appeal judges.

Summary judgment is allowed in circumstances where a defendant has no real prospect of successfully defending the claim and there is no other reason why the case should be disposed of at trial. Ms Frisbee had worked for Ms Campbell as an independent contractor, and signed a confidentiality agreement but fell out with her. She claimed a repudiatory breach of contract and sold her story to the News of the World.

The court held that Ms Frisbee could not be said to have no reasonable prospect of success so Ms Campbell was not entitled to summary judgment. A balancing exercise had to be carried out on the effect of the repudiation and confidential duties.

In a rare move, Prince Charles obtained a court ban on newspaper revelations which he claims invade his privacy and are not in the public interest. The Prince's legal team were granted the gagging order in the Court of Session in Edinburgh to stop the Sunday Mail revealing details from a book written by his former house-keeper, Wendy Berry. English and Welsh newspapers were banned some time ago from using Berry's book, published in the US, but the High Court order did not extend to Scotland.

### **Qualified Privilege**

We reported in our Winter 2002 on the welcome clarification of the Reynolds qualified privilege test in the Court of Appeal judgment in *Loutchansky v The Times*. On 26 November 2002, Mr Justice Gray delivered his second judgment on The Times's defence of Reynolds qualified privilege. This followed the Court of Appeal's ruling that, in his first judgment, the judge had applied too stringent a test and he should reassess the defence, applying the standards of responsible journalism. However, The Times again failed to establish this defence as they had not complied with the standards of responsible journalism. The reporter was unable to contact the claimant, his company or their lawyers and the judge regarded his efforts to do so as "far less diligent than was required". Furthermore, the sole source of the article was highly unlikely to be reliable and what she said was published without any verification or corroboration.

The Times would not let the matter rest and also applied to amend its defence to include a plea of justification. The application was refused as the material put before the court fell well short of proving their case.

## Offer of Amends

There have been relatively few cases on the offer of amends defence under the Defamation Act 1996. The defence is designed to promote settlement and bring proceedings to an early conclusion in cases where a defamatory statement has been published innocently by the defendant. *Milne v Express Newspapers* arose from an article in the Sunday Express which suggested that a solicitor, Mr Milne, may have lied to a parliamentary committee. Express Newspapers responded to Mr Milne's written complaint by making an unqualified offer of amends under section 2 of the Defamation Act 1996. The offer of amends also acts as a defence to defamation proceedings should the claimant reject it. However under section 4 of the Act, a person who makes an offer of amends will not be able to rely on it if he or she "knew or had reason to believe" that the statement complained of was false and defamatory.

Mr Milne rejected the offer of amends considering that he was able to prove that the journalist responsible for the article and/or the Express Newspapers had "reason to believe" that the words complained of were false at the time of publication. However the court held that Mr Milne had no prospect of establishing this. In his judgment Mr Justice Eady provided useful guidance for journalists by stating that the main purpose of the offer of amends regime was to provide an exit route for journalists who had made a mistake and who were prepared to admit as much and to make amends. A journalist who was prepared to do so had a statutory defence save in exceptional circumstances. That defence was not to be subverted merely by proof that the journalist had been negligent. What was required was proof of actual bad faith.

## Damages

The smallest award in a recent case was made by the House of Lords in *Grobbelaar v News Group Newspapers*, in which a jury award of £85,000 was substituted with an award for just £1. The initial jury verdict, which found for Grobbelaar over a series of articles in the Sun newspaper that he had been guilty of taking money to fix matches, was set aside by the Court of Appeal on the ground that it was perverse. The House of Lords held that the jury could conceivably have reached the conclusion that it did without being perverse, but that, even on the most favourable view possible of the evidence, the jury would have to accept that Grobbelaar had made a corrupt agreement to fix matches, even if he had not actually carried out the match fixing itself. This meant he had no reputation to lose and certainly not one worth £85,000.

## Changes to Copyright Law

In April 2002 the European Union adopted a new Directive aimed at harmonising copyright law throughout the EU. The Directive was due to be implemented in member states by 22 December 2002 but the Government has set itself a new deadline of 31 March 2003.

The Directive seeks to provide copyright owners and other rights holders with stronger, more expansive rights by harmonising the most important rights, the reproduction right, the communication to the public right and the distribution right. The harmonisation of these rights will not require substantial changes to be made to UK copyright law. However, some changes relating to the application of these rights to digital media are required. In addition, the Directive harmonises the exceptions that are available to these rights.

Summary of Changes to UK Copyright Law:

- More expansive rights for reproduction and communication to the public;
- On-demand right to control dissemination of material on the Internet;

- Mandatory exception for browsing and caching;
- Copying for commercial purposes no longer exempted;
- Remedies against persons knowingly circumventing technological measures;
- Criminal sanctions for individuals manufacturing or marketing illicit circumvention devices;
- Rights management information protected against removal or alteration.

Top ^^

## REGULATORY

### Cigarette advertising banned

The Tobacco Advertising and Promotion Act 2002 comes into force on 14 February 2003. The Act will:

- Prohibit press, billboard and internet advertising of tobacco products;
- Prohibit the promotion of smoking through free distribution of tobacco products, coupons and mailshots;
- Restrict the display and promotion of tobacco products in shops;
- Bring an end to the sponsorship of sporting and other events by tobacco companies.

### Programme Complaints

The ITC has upheld a complaint about material offensive to homosexuals. Geography Junction featured a popular homophobic Jamaican song, and in Set Free, a US produced Christian evangelical series, a participant was described as being "cured" of homosexuality. Both programmes were in breach of the ITC Code which deals with the treatment of minorities and representation of minority communities.

Death Defying Thrills featuring footage of a death sequence was held to be in breach of the ITC Code for failure to establish the exceptional justification required for the inclusion of images of people being killed or about to die.

Euro Change, a current affairs programme, received partial funding from the European Union. Those funding programmes are also, according to the ITC Code, by definition sponsors. Given the close association between the funder of the series and its topic, the ITC regarded this as a serious breach of the Code on Programme Sponsorship.

Tonight with Trevor McDonald investigated a popular dietary regime known as The Atkins Diet, amid concerns that it promoted unhealthy eating. Nine viewers complained that the programme lacked objectivity and was biased against the Atkins Diet but the ITC felt that overall the programme handled the evidence fairly and was not in breach of the Code.

The ITC has not upheld complaints about Channel 4's taboo breaking live autopsy which some viewers considered offensive to taste and decency. The ITC held that although the subject matter and the content of Autopsy approached the limits of what is allowed by the Programme Code, those limits were not exceeded.

116 viewers complained about the documentary Palestine is Still the Issue: a special report by John Pilger, alleging partiality of the presenter and the selectivity, and inaccuracy of the facts laid before the viewer. The ITC acknowledged that 'due impartiality' must be observed by programmes treating matters of political controversy but it does not require absolute neutrality on every issue or

detachment from fundamental democratic principles. The ITC was satisfied that the programme was not wholly uncritical of the Palestinians and adequate opportunity was given to the expression of a pro-Israeli perspective. The programme was therefore not in breach of the Code.

The ITC have imposed a financial penalty of £10,000 on Auctionworld, a teleshopping auction channel, for breaches of the ITC Code of Advertising Standards and Practice. A substantial financial penalty was merited as this was the second time the ITC had intervened in respect of Auctionworld's poor delivery performance, and because the Commission felt that Auctionworld had been less than open in their provision of information to the ITC.

[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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