

GD MEDIA LAW BULLETIN 16

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

Contempt: Jury is trusted to ignore TV

The Court of Appeal was recently asked to consider the influence of a TV programme on the deliberations of the jury in the trial of Angela Cannings who was convicted of murdering her two infant sons. A TV drama called "The Cry" was broadcast during the trial. It involved a woman who was harming her own baby. Her QC argued that the drama "mirrored" the case of Ms Cannings and therefore could have a material effect on the jury's verdict. He submitted that the jury should therefore be vetted according to whether they had watched the programme. The Court rejected the application and pointed to the fact that the trial judge had specifically warned the jury to put the TV drama out of their minds during their deliberations. In the Court's view, if the jury could not be trusted to follow such a direction then the integrity of the whole criminal justice system would be undermined.

This case, although not of great legal significance, is a helpful endorsement of the robustness and independence of criminal juries - one of the factors which is often taken into account by compliance staff when assessing the risk of contempt.

Section 39 Orders

Orders made under section 39 of the Children and Young Persons Act 1933 are designed to protect children by preventing the media from revealing the identity of those who are "concerned in" proceedings 'either as being the person by or against or in respect of whom the proceedings are taken, or as being witness therein'. However, a couple of recent cases summarised below indicate that there is no let up in the Courts' over-zealous and inappropriate reliance on these orders.

In the first case a s.39 Order was imposed preventing identification of a defendant who had been found guilty of wounding his partner, because the magistrates felt that the couple's 8 month old baby would be harmed by the publicity. The press challenged the order, pointing out that such orders can only apply to children who are 'concerned in' proceedings in adult courts. The magistrates were persuaded to revoke the order. They reasoned that the child was very young and lifting the order would not affect her future, thereby suggesting that they believed (incorrectly) that this was a proper basis for making the order in the first place!

Truancy cases are a prime area in which the courts are keen to impose s.39 Orders and where the press are equally keen to challenge them. It is not clear to us on what basis such instances qualify for the protection of a s.39 Order: the truanting child is unlikely to be involved in the case as a witness, victim or accused, so unless he/she is the person "in respect of whom the proceedings are taken..." it is difficult to see how s.39 could have any application in such cases. This point does not

appear to have been argued in the next two examples.

In the first case the media were banned from naming a 15-year truant but allowed to name his mother. However the order was revoked when it was challenged by the press as putting the media in an impossible situation since the press could not name the mother without identifying her son.

In the second case, magistrates convicted a mother of failing to send her 15-year old daughter to school and made a s.39 Order in respect of the girl. The order was challenged on the basis that not only had the mother and girl been previously identified in an earlier hearing but that the order would have also ensured the anonymity of the mother when the local Education Authority wanted to publicise the case as a deterrent. The order was revoked.

Libel: Restrictions on the defence of Justification

Journalists and reporters have long relied on the "reasonable grounds to suspect" principle when reporting criminal arrests or charges. This is the principle that says that if you report the arrest or charge of an individual who is subsequently released or whose charges are dropped, you will have a defence in libel if there were reasonable grounds to suspect the individual in the first place.

An important Court of Appeal case (*Chase v Newsgroup Newspapers Limited*) has considered whether this principle should be changed in light of the Human Rights Act 1998. The case arose from a children's nurse, Elaine Chase, who claimed that articles in the Sun Newspaper implied that she had serially murdered at least 18 terminally ill children entrusted to her care. The Sun's front page had carried the headline "Nurse is probed over 18 deaths: World Exclusive". The Sun had also run a feature with a photograph of the nurse on the front page, with the face obscured. A caption described her as the "woman at the centre of 18 death probe".

The Sun appealed from a High Court decision to strike out part of their defence which claimed there were reasonable grounds for suspecting Miss Chase. The High Court had applied the three components of the principle namely:

- a defence based upon "reasonable grounds for suspicion" must focus upon some conduct of the individual claimant that in itself gives rise to the suspicion ("the conduct rule");
- in such a case it was not permitted to rely upon hearsay ("the repetition rule"); and
- a defendant may not plead as supposed "grounds" matters or conduct post-dating publication;

and had decided that the particulars relied upon by the Sun did not refer to the conduct of Miss Chase but instead involved "complaints" or "allegations" that were hearsay and in some cases post-dated publication.

In considering whether these three principles had been affected by the Human Rights Act 1998 the Court of Appeal held that the conduct rule did not upset the relationship between the right of the media to publish information and the right of an individual to protect his reputation; the repetition rule was not objectionable under the Human Rights Act; and the prohibition on reliance on events that post-dated publication was not a disproportionate restriction on press freedom. In dismissing the appeal the Court also remarked that to allow the Sun to claim that there were reasonable grounds for suspicion would transfer the burden on to Miss Chase for her to disprove these grounds. This would not be permitted.

The case shows that the Court of Appeal considers this aspect of English defamation law to be in line with the Human Rights Act and that the three components of the "reasonable grounds to

suspect" defence are still valid.

Libel: Offers of Amends

This little known and rarely used device introduced by the Defamation Act 1996 is rapidly becoming more common and certainly more popular with media defendants. The recent case of Kareem Abu v MGN Ltd has given helpful guidelines for the defence and will enable litigants to use the procedure with greater certainty in the future.

The defence enables contrite media defendants to offer a correction and apology and pay compensation to the aggrieved party. The parties need not agree on the content of the offer but if the compensation is disputed it can be determined by the court. If the offer is not accepted it nevertheless provides a defence to defamation. However the defence cannot be used where the defendant knew or had reason to believe that the statement referred to the aggrieved party and was both false and defamatory of that party.

The case arose out of the Sunday People's headline "Lennox Lewis minder beats up girl". The People admitted that the allegations were untrue and made an offer of amends. The offer was accepted but compensation could not be agreed. The case came before the High Court for directions. The People wanted to refer to evidence relating to the Claimant's character which it said was relevant to damages. The Court said that evidence could be submitted in line with that which can be relied upon in full defamation proceedings and set out helpful guidelines. In short, these guidelines provide that the defendant can raise allegations that the claimant has a bad reputation and demonstrate that damage to the claimant had been caused by factors other than the libel complained of. However they prohibit the defendant bringing justification 'through the back door' by alleging that the words complained of are true.

We predict that a significant number of defamation cases involving the media will resort to this procedure and we are already experiencing the beginning of this trend, having dealt with two such cases in the last three months.

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REGULATORY

Taste, Decency and Violence in News Reports

Two recent reminders that news programmes are not exempt from the requirements of the watershed.

The BSC has upheld a complaint about violent content in a lunchtime news item broadcast by the BBC. The news item contained CCTV footage of a street attack by way of illustrating a reported rise in violent crimes. The BSC took the view that the use of the CCTV footage was prolonged and graphic and went beyond acceptable boundaries for broadcast for the time of transmission.

The second report concerned a complaint about the disturbing details of a gruesome "vampire style" murder broadcast by the BBC during its teatime bulletin. In this case the BSC acknowledged that whilst the report was emotive, it had been responsible and had not gone beyond the acceptable boundaries for a pre-watershed news programme.

ITC v BSC: The double jeopardy continues...

...but thankfully not for much longer. Summarised below are two recent instances of the two regulators reaching opposite conclusions in relation to the same programme and subject matter.

The first concerned "Beijing Swings" broadcast by Channel 4 after 11pm in January. A large number of viewers complained to both regulators about the inclusion of images of deceased children used in contemporary Chinese art. The BSC concluded that the images shown were justified as part of an examination of extreme art. The programme was late at night, unambiguous warnings had been provided and it was the Channel's remit to explore unfamiliar, non-mainstream subjects. The complaints were therefore not upheld.

In contrast, whilst the ITC acknowledged that the programme had been scheduled at an appropriate late hour with clear and unambiguous warnings, nonetheless the ITC considered that Channel 4 had exceeded the boundaries of acceptability and that the offending images were contrary to good taste or decency and showed a lack of respect for human dignity. Interestingly the ITC felt that the context of the programme provided little justification for such extreme images and concluded that the programme was in breach of the Programme Code.

One-nil to the BSC then (our readership does not include regulators!). However the ITC scored a late equaliser with "The Ultimate Chart", another Channel 4 offering broadcast at 9pm last November. This featured the 100 all time UK best selling singles. A substantial number of viewers complained on the grounds of taste and decency, particularly in relation to bad language. The BSC was particularly concerned about the repeated use of "Mother F****r", and upheld the complaint on this ground. The ITC on the other hand felt that Channel 4 had done enough to avoid having the complaint upheld by including a clear warning at the beginning, scheduling the programme relatively late and ensuring a gradual progression towards the bad language. In a further twist the BSC rejected an identical complaint relating to the broadcast on S4C who had chosen to schedule it two hours later than Channel 4.

So there we have the latest, and hopefully the last, examples of the two regulators reaching opposite conclusions in relation to the same complaints. The overlapping responsibilities of the two will of course be subsumed into Ofcom which is due to become operational by the end of this year.

Fairness/Privacy

The BSC has upheld a complaint of unfair treatment and unwarranted infringement of privacy in relation to "Sleepers: Undercover with the Racists" broadcast by Channel 4 in November 2001. The programme relied heavily on secret filming to expose racism in a Nottinghamshire town. The complainant's 9 year old son was secretly filmed shouting "I love Pakistan" in a mock asian accent outside an asian-run convenience store. The BSC held that bearing in mind the boy's tender age and the mild nature of his comment in the context of the programme's overall content, the failure to obscure his face amounted to unfair treatment. Identifying him also amounted to an unwarranted infringement of his privacy. The BSC directed Channel 4 to broadcast an approved summary of the findings and, curiously, that it be published in the Sun Newspaper.

In an unusual move, Channel 4 requested a review of the BSC's findings. They challenged the BSC's rejection of their explanation for obscuring the identities of other young people secretly filmed making racist remarks. The BSC's Review Panel, having viewed certain unedited footage, accepted that it was difficult to be certain who made the other remarks and accepted Channel 4's reasons for obscuring their identities. However this finding alone was not sufficient to persuade the Review Panel to interfere with the substantive findings of the original panel. They upheld the original panel's conclusion that failing to obscure the boy's face was unfair to him. On the issue of privacy the Review Panel stated that whilst there was an overriding public interest in including the

secretly filmed footage in the broadcast, there was no overriding public interest in identifying the boy in view of his age and the nature of his remark. This amounted to an unwarranted infringement of his privacy.

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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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