

GD MEDIA LAW BULLETIN 20

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

We begin this issue by reviewing some of Ofcom's programme related adjudications, three months into its inception.

REGULATORY

Complaints about bad language

Ofcom has made some important decisions in relation to offensive language in live broadcasts. Four of these decisions help to give broadcasters guidance on how to avoid falling foul of the relevant Code provisions:

Channel 4: Little Friends

First to come under Ofcom's scrutiny was the series Little Friends. This was aired between October 2003 and January 2004 on Channel 4 and E4, and depicted professional child actors aged between 13 and 16 setting up adult celebrities and members of the public alike by enticing them into swearing and talking explicitly about sexual matters.

Although the programmes were screened after the watershed, and indeed often after midnight, it nevertheless received 27 complaints from viewers who were concerned about the strong language and sexual content given the very young age of the presenters. The broadcaster, in defending the programme, put forward the argument that the use of child actors in this case was similar to using child actors in films such as the Exorcist which also had an adult theme. Furthermore they stated that the children involved were 'chosen for their maturity' and that the scripts for the show had been approved by the actors' parents.

Ofcom, however, was far from impressed, although it did accept that there was no evidence that the children's welfare had been put at risk. Moreover, the fact that the children's parents had approved the scripts was evidence that the broadcaster had at least attempted to protect the children's welfare. Notwithstanding this concession, Ofcom considered that the context of the programme did not justify the use of children to elicit the most offensive language ("fxxx"; "mother-fxxker"; "cxxxsucker") from adults in their presence, or entrapping adults into talking about sexual matters, especially as the script appeared to 'celebrate the use of inappropriate references'. The use of a young person who looked younger than his age for these purposes was additionally offensive. As a result Ofcom ruled that Little Friends was in breach of section 1.1 of the Programme Code (General Offence).

Sky News: Littlejohn

The next show to have its knuckles rapped was Sky News: Littlejohn Leader. This is a topical discussion programme that is aired before the watershed at 7pm. On Thursday 4 December 2003 the presenter Richard Littlejohn suddenly broke off from what he was saying and said 'f**k it! I am so sorry', at which point the transmission was briefly interrupted before resuming with the presenter apologising by saying 'OK well, we seem to have got an earlier recording there. We do apologise for that. Let's move on to our first story'.

Although the broadcaster stated that this was a highly regrettable mistake, Ofcom did not consider the apology given by the presenter to be sufficient and further noted that there was no additional apology given by the broadcaster after the show had ended. In their opinion this was below acceptable standards, particularly since the programme had gone out before the watershed at 7pm. Accordingly Sky News were found to be in breach of section 1.5 of the Programme Code (Bad Language), which prohibits the most offensive language from being transmitted before the watershed.

Sky Sports: Greyhound Racing

In contrast however, Sky Sports One's NCR Greyhound Racing was not found to be in breach of the Programme Codes following a complaint made about a contributor who sang 'f**k the Pope and the IRA' during a live interview, despite being similarly aired before the watershed. In this case, Sky stated that the presenter and the production crew had not anticipated such comments and were very much taken aback, as were they themselves and the Greyhound Association. As a result Sky had put in place measures to try and prevent such an unwelcome event from recurring and placed a ban on the contributor being interviewed again. Consequently, Ofcom were fully satisfied that all reasonable steps had been taken, in the light of the fact that one would not normally expect to hear such comments in this type of show.

ITV: I'm a C*** ...Get me out of here!

Finally, ITV's 'I'm a Celebrity...Get Me Out of Here!' was another source of profanity when the controversial contestant Johnny Lydon, the former Sex Pistols frontman, was heard to refer to the viewers of the programme who had not voted him out as 'f**king c**ts'. Despite the show being shown after the watershed at 10pm, 96 viewers complained. In this instance the responsible broadcaster (Granada) was, in Ofcom's view, suitably contrite. They acknowledged that the language used by Johnny Lydon was unacceptable and were supported by their presenters Ant and Dec who had apologised straight after the outburst as well as at the end of the programme. Nor were these the only measures taken; they had also issued clear warnings prior to the programme that this was a live show and that there might be strong language, as well as having the production teams and contributors briefed on compliance. Following the event Granada took the additional precaution of creating a 7 second time delay to prevent any future occurrences.

The response from Ofcom was that these measures meant that the complaint had effectively been resolved by the broadcaster. Indeed, it would appear that the fact that the offensive comments came from a man who is well known for such language actually aided the broadcasters' cause, as Ofcom were at pains to point out that 'viewers are aware that this was a live programme, featuring Johnny Lydon in the Australian bush'.

Live television programmes are always going to be problematic in terms of potential breaches of the Programme Codes due to the inability to exercise effective control or to edit out remarks. However, Ofcom has shown that if broadcasters make appropriate apologies as soon as

practicable and put in place suitable measures, they may not necessarily face sanction under the Codes.

LEGAL

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Defamation

Internet jurisdiction

The courts have ruled on jurisdiction in libel cases where the internet was the sole means of publication. The relevant case was that of *Don King v Lennox Lewis* (1) *Lion Promotions L.L.C.* (2) and *Judd Burstein* (3) (2004), the background to which was that the defendant Mr Burstein, the lawyer representing Lennox Lewis and Lion Promotions in US litigation, was alleged to have made defamatory statements about Mr King to the effect that he was anti-semitic and had called Mr Burstein a 'shyster lawyer' in an article that was published on two US websites, www.boxingtalk.com and www.fightnews.com respectively. Consequently Mr King, a well known personality in the boxing world and particularly in England, made an application for the English courts to hear his case for defamation. This was contested by the defendant.

Mr Justice Eady in his judgment reviewed the relevant issues: both that the damage had occurred in the English jurisdiction and that the claimant had a reputation to protect in this jurisdiction. Under English law the publication of statements made on the internet is regarded as taking place where it is downloaded. In this case the relevant material had been downloaded by internet users in England and the fact that this had not been authorised by the defendants was deemed irrelevant for these purposes. The publication therefore had occurred in England and evidence suggested that the sites were popular and regularly accessed and the contents readily discussed by members of the boxing fraternity.

The next necessary step was to ascertain that Mr King had a reputation to protect in England, such that it would make this country an appropriate forum for a defamation claim. The evidence presented suggested that Mr King did in fact have a substantial reputation in England, supported by numerous appearances on television and radio.

As a result Mr Justice Eady ruled that the English court had jurisdiction in this case. If the reputation element is satisfied, all that is required is the accessibility of a website in this country, regardless of where the website originated. Not for the first time, arguments by the defendants that publication should be regarded as taking place in the territory where the defamatory material was uploaded were defeated.

Qualified Privilege

In the post Hutton era, it seems that the courts may take a more restrictive view of the Reynolds defence, previously heralded by the media as providing a helpful extension of the defence of qualified privilege.

In assessing whether or not the qualified privilege defence applies, it is necessary to show a legal, moral or social duty to publish the material together with a corresponding interest to receive it. The Reynolds defence adapted the strict duty and interest doctrine, in recognition of the specific role of the media's duty to publish material which is in the public interest.

As readers will recall, Lord Nicholls in *Reynolds v Times Newspapers Limited* [2001] defined 10 criteria to be taken into account when deciding whether or not the duty and interest test were met

and hence whether qualified privilege could apply to journalists, even if the material published subsequently proved to be untrue and defamatory.

It is worth setting out in full again Lord Nicholls' 10 factors:

1. Seriousness of the allegation.
2. Nature of the information and the extent to which the subject matter is of public concern.
3. Source of the information: how good or how biased is the source?
4. Steps to verify the information.
5. Status of the information: has it already been separately investigated?
6. Urgency of the matter.
7. Whether comment was sought from the claimant.
8. Whether the article contained the gist of the claimant's side of the story.
9. Tone of the article.
10. Circumstances of publication including timing.

The Hutton Report, however, took a more restrictive line, in what would seem to be a backward step. Lord Hutton (arguably misinterpreting one aspect of the Reynolds decision) stated that the right of the media to publish material in the public interest was qualified in that 'false accusations of fact impugning the integrity of others, including politicians, should not be made by the media'. This approach appears to have been echoed in the recent case of Jameel and others v Wall Street Journal Europe Sprl where the Jameel Group had been identified as having their bank accounts monitored, in an article in the Wall Street Journal entitled 'Saudi officials monitor certain bank accounts: focus is on those with potential terrorist ties'.

Mr Justice Eady in this case stated that the Nicholls test for the Reynolds defence had to be applied objectively in order to establish whether the defendant had a moral or social duty to publish the material, regardless of whether or not it was true. That duty to publish is the primary question to be considered in establishing the defence of qualified privilege; the Nicholls factors are guidelines to be taken into account. To this extent he considered that the law did not 'afford journalists with a special privilege or a degree of protection which is not available to other citizens'. In Jameel, the incorrect allegation was "at the higher end of the scale of gravity" and the Journal had to pay £40,000 damages.

Despite this apparent erosion of the Reynolds defence, the 10 "Nicholls factors" remain a key guide to what must be borne in mind in deciding whether a particular piece of journalism is fair and responsible, underpinning relevant provisions in the broadcasting code.

PROGRAMME FORMATS

Frapa, in conjunction with Munich based copyright advisers Max Planck Institute, have published a helpful guide to the relevant law affecting programme formats in Germany, France and the UK. A copy of the Study can be downloaded from www.frapa.org.

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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.

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