

GD MEDIA LAW BULLETIN 22

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 of Court by the Back Door

This week saw the implementation of The Costs in Criminal Cases Regulations 2004. These Regulations give our criminal courts the power to penalise any third party who has committed an act of serious misconduct which, for instance, causes the collapse of a trial. For these purposes the third party can include a witness, a juror, member of the public or, most worrying for our readers, the media. Everyone remembers the collapse of the Woodgate/Bowyer case caused by prejudicial reporting in the Sunday Mirror while the jury was considering its verdict. That was a profound error on the part of the newspaper which was rightly punished in proceedings for contempt. The newspaper was fined £75,000 and ordered to pay costs in excess of £50,000. However, the estimated cost to the taxpayer of the collapsed trial was a staggering £8m. "Something must be done about this" said some bright spark in the Home Office. The result is a set of regulations - approved by Parliament - which create a very blunt instrument capable of being used against the media in a very broad set of circumstances. There are a number of very worrying aspects: firstly, the application for such an Order can be instituted at the behest of the trial Judge who, it might be thought, is not necessarily the most appropriate person to exercise proper judgment in circumstances where the trial over which he or she has presided has collapsed. Secondly, there is no definition or guidance given as to what constitutes "serious misconduct" other than that the Regulations make it clear that this may or may not constitute a contempt of court. Where the serious misconduct does constitute a contempt of court, then it is perhaps understandable that Parliament felt it appropriate that the punishment should fit the crime and that the party guilty of contempt should pay the full price for its misdemeanours. However, surely it would have been far better to introduce guidelines or regulations setting out the tariff of fines to be applied in those cases where contempt of court has been proved? Of even greater concern is the fact that the Regulations specifically recognise that serious misconduct may not constitute a contempt of court. This might be because the behaviour, whilst prejudicial, did not create a substantial risk of serious prejudice as would be required in the case of a strict liability contempt; however, that would still be enough to establish liability under the Regulations for a penalty potentially much greater than ever awarded in a contempt of court case. Furthermore, there are no defences laid down in the Regulations. Again, contrast the position with contempt of court. The Contempt of Court Act 1981 provides various defences to a charge of contempt, e.g. where the risk of contempt was incidental to a discussion in good faith of matters of public interest, or where it arose out of the reporting of proceedings in Court. No such defences apply in the Regulations.

It will be interesting to see how the Regulations affect court reporting, particularly if an attempt is made to make the media liable for prejudicial reporting which does not constitute a contempt. Surely in those circumstances a challenge under Article 10 of the ECHR would be fruitful? Watch this space...

Jameel - v The Sunday Times: Three old chestnuts clarified in one Judgment!

The Court of Appeal's recent decision in this case has clarified: issues of meaning where allegations of criminal conduct are made; whether a company can sue in relation to comments made about its proprietor; and the extent to which a defamatory article can be neutralised by accompanying denials. The case serves as a timely reminder of the three levels of meaning in relation to reports of criminal conduct: imputation of guilt (the highest meaning); "grounds to suspect" (middle meaning); and "grounds to investigate" (the lowest).

In June 2003 the Sunday Times published an article under the headline "Car tycoon 'linked' to Bin Laden", accompanied by photographs of Mr Jameel and the Twin Towers in flames. It referred to Mr Jameel's alleged involvement in funding training for the 911 terrorists. It also referred to Hartwell Plc - a British Car dealership owned by the Jameel Family. Mr Jameel and Hartwell both sued, pleading that the words meant that there were grounds for suspecting that Mr Jameel was associated with Bin Laden and funding terrorism; and that Hartwell's funds had also been used in that way.

The newspaper applied to have the claims struck out, arguing that at most the article bore the lowest meaning and that this was justified by the facts included in the article; furthermore that the article was not defamatory of the company. Gray J allowed Mr Jameel's claim to proceed on the basis of the lowest meaning only and dismissed the claim by Hartwell. The Claimants appealed.

To justify the highest level meaning the defendant must prove guilt; for the middle meaning, evidence of the claimant's conduct bringing suspicion on himself BUT which is additional to the existence of the investigation itself and is not hearsay. The mere fact of the investigation will not be enough, but will usually be sufficient to satisfy the lowest level. The Court of Appeal held that the article was capable of conveying not merely that grounds existed for investigating into Mr Jameel but also for suspecting him of guilt.

The Court dismissed the claim by Hartwell holding that to defame the owner of a company and identify his company was not defamatory of the company unless it also suggested that the company was itself implicated in wrongdoing. The Court emphasised that a limited company is a distinct legal person and therefore not an extension of the proprietor(s). The Court of Appeal was also asked to consider whether, when the article was read as a whole, the denials published were enough to neutralise the defamatory imputation. It was recognised that the article did contain significant material capable of dispelling the suggestions made, however it was held that these words were not enough to cure the defamatory headline.

Clearly a number of these issues turned on the particular words of the article, but nevertheless the Court's general comments and guidance are helpful.

REGULATORY

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Perhaps most notable amongst the plethora of consultation papers issued by Ofcom since it started trading at the beginning of the year is the draft Broadcasting Code setting out its proposed new programme and sponsorship rules for TV and radio. The paper ran to nearly 150 pages and the deadline for submissions closed on 5 October 2004. The new Code will replace the six Legacy Regulator Codes which remain in force until the new Code becomes effective next Spring. In the meantime copies of responses to the consultation can be found at www.ofcom.org.uk/consultations/past/broadcasting_code/responses The responses of the various broadcasters in particular provide a comprehensive analysis and critique which we will not be attempting in this Bulletin! However some of the more notable developments in relation to

fairness and privacy issues are as follows:-

- recognition that in circumstances justified by the public interest payments to criminals or their associates will be permitted for their contribution to a programme, provided the payment is declared on air.
- incorporation of provisions forbidding the payment or promise of payment to actual or potential witnesses in criminal cases in terms which are much wider than contained in the Legacy Codes.
- fairness and privacy are now dealt with as discrete chapters, a considerable improvement on the ITC Code where the distinction between the two was often blurred. The fairness section contains a number of the specific rules lifted from the BSC Code, but one which was the source of much difficulty in contentious programming was the obligation, where dealing with "political or industrial controversy or current public policy" (an archaic expression which has been retained) to inform potential interviewees of the identity and intended role of other proposed participants in the programme, often at the risk of spiking a tasty "ambush" interview. Perhaps not surprisingly, this was not always observed in practice. The obligation has now disappeared.
- recognition that there will be circumstances where it is acceptable for programme makers to obtain material through misrepresentation or deception, but that this may be warranted if in the public interest (a concept which has largely been removed from elsewhere in the draft - see below).
- in relation to privacy the concept of "the public interest" as a justifying factor has been removed. Instead the draft simply distinguishes between invasions of privacy which are warranted and those which are unwarranted. If the broadcaster wishes to defend the infringement as warranted then it must be able to demonstrate why. The draft makes it clear that "warranted" is not necessarily synonymous with "the public interest" and therefore recognises that there may be other factors which would warrant the invasion of privacy.
- the privacy section does not adopt rules contained in the Legacy Codes concerning filming on police or other operations. This was often a source of headaches for programme makers, particularly where the subject of the raid or investigation objected to the presence of the cameras. Presumably such issues will under the new Code be adjudged purely on whether the producer's actions were warranted.
- the obligation contained in the ITC Code to provide tapes and transcripts on request from a complainant has been deleted as has the obligation in the BSC code to require a broadcaster to broadcast an apology.

Generally the draft has much to commend it. The draftsman has undertaken a root and branch review of the underlying legislation and ensured that the provisions of the Code do no more than reflect that. This was not a discipline that characterised the framing of the Legacy Codes. At the same time the draft is in many respects admirable in its clarity and sophistication. On the other hand much has already been written about the extent to which it has gone too far in the areas of harm and offence and the watershed. Protection of the interests of children and young persons has been accorded paramount importance.

Ofcom Programme Complaints

Interestingly The Times in its report of the publication of the draft code stated "Swearing including the "C" word may not attract censure if the context is appropriate. Viewers offended by late night programming with high sexual content will be encouraged to switch off". Unbeknownst to it, at the time the article was written Ofcom was considering a number of complaints concerning Big Brother 5, in relation to the infamous late night bust up provoked by Emma and Michelle's unexpected return to the house, and others concerning an outburst by Victor against Michelle which included

an unbleeped use of the "C" word. Victor was in fact using the word in response to Michelle's use of the very same word in their confrontation. Channel 4 argued that it was Michelle's prior use of this word that had provoked Victor's behaviour and it was therefore essential for viewers to know what was said in order to understand the strength of his reaction. On this basis they had decided it was editorially justified to show the use of the word by Michelle. Ofcom agreed with this reasoning on the basis that the use of the word was key to understanding Victor's reaction, notwithstanding that this is considered the most offensive swearword in the Lexicon. They also pointed to the fact that the programme was preceded by a clear warning. A case of two wrongs making a right? However Ofcom did uphold complaints in relation to E4's live coverage of the big bust up. Ofcom appear to have been swayed by the depth of feeling expressed by the large number of complainants, many of whom were genuinely concerned about the prolonged and physical nature of the confrontation, without any apparent action being taken by the programme makers, such that some viewers even alerted the police to intervene. Although the broadcaster had security staff standing by during the incident, this was not known to the audience and the situation was exacerbated by the appearance throughout the live coverage of text messages from viewers, some of which revelled in the physical nature of the confrontation. Ofcom felt that this gave viewers the impression that the broadcaster was continuing to treat this as entertainment whereas a number of viewers clearly felt otherwise. E4 was found to be in breach of the programme code.

On a lighter note Ofcom upheld a complaint against Channel 4 concerning the late night entertainment programme "Experimental". Two viewers complained about a sketch in which two 12 year old boys were encouraged to eat a large number of chocolate liqueurs to see how many it would take to bring them over the legal limit for driving. The Channel had taken the precaution of consulting a doctor who advised that the children were not liable to suffer any adverse effects but suggested that first aid be available as a precaution. In addition the children's parents had of course fully consented to their taking part in the sketch and understood that they could stop at any point they wished to. Furthermore this was transmitted way past the watershed at 23.40 when the likelihood of other children watching would be slim. All persuasive arguments. Nevertheless Ofcom felt that the attempt to mix children and alcohol for what it considered to be entertainment purposes was not acceptable and made a specific reference to the stricture in the ITC code that "Under no circumstances may children be put at physical or moral risk." Ofcom felt that the decision to have a first aid assistant on standby demonstrated an awareness of the potential physical risk. Furthermore, although the children could withdraw from the experiment at any time, as 12 year olds they were unlikely in those circumstances to make a considered judgment. Lastly Ofcom scorned any educative purpose of the piece pointing out that since 12 year old children are under the legal age for driving there was little point in using them to demonstrate the potential pitfalls of excess consumption of chocolate liqueurs. Therefore the programme was held to be in breach of the ITC Code.

Just the ticket...

A small reminder for broadcasters with niche channels. Ofcom has upheld a complaint against Southampton Leisure Holdings Plc, the parent company of Southampton Football Club and owner of "The Saint" Radio Station. A listener had complained that a news bulletin had included an interview with a member of SFC staff promoting their season tickets and considered that this was not impartial news. The item in the sports news ran: "It's the last chance to get a ticket bargain here at St Mary's today; 5.30 is the deadline for the earlybird discount..." Ofcom had little hesitation in upholding the complaint on the basis that the news bulletin had breached the requirement for accuracy and impartiality and also the prohibition on undue prominence. There does not appear to have been any argument or suggestion that the expectation of listeners to such a partisan and single interest station would have been otherwise.

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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