

# Media Law Bulletin

## MIND YOUR LANGUAGE

Last year we reported the decision by Ofcom not to uphold a large number of viewer complaints relating to the use of the "c" word during a heated confrontation between the housemates in Big Brother 5. Ofcom agreed with C4's argument that the un-bleeped use of the word was key to understanding the strength of feeling between the protagonists. C4 was also able to point to a clear warning at the beginning of the programme. Perhaps encouraged by this, Sky took the decision not to bleep the "c" word when it appeared in the 1st episode of acquired drama series **"Weeds"** - shown on Sky One last October at 10 pm. Sky argued that the use of the word was in context and that in view of the adult themes pursued in the series (the exploits of a recently widowed mother who has turned to drug dealing in an effort to make ends meet), such language would not have been contrary to audience expectations. In addition, this most offensive language had come at the end of the programme. Therefore it was not felt necessary to include a warning. Ofcom agreed that the programme was appropriately scheduled and that generally the likely audience for such a programme would not have been offended by the use of such language. The problem was that as this was a new series some viewers would have been unprepared for this language and the pre-publicity did not give any indication of it. Ofcom ruled that this was a case where a warning should have been given and the failure to do so meant that the programme was in breach of Rule 2.3 of the Broadcast Code.

The "c" word is rivalled for gravity only by "motherf\*\*r". The use of that expletive by Snoop Dogg in the BBC's coverage of **Live 8** last July attracted 55 complaints. They expressed surprise that no delay

system was used to screen out such language and, further, that there had been no apology following its utterance. The BBC explained that a time delay would not have been appropriate in view of the fact that this was a live global event being broadcast simultaneously by other media in the UK and around the world. As for an apology, the timing of Snoop Dogg's performance had unfortunately coincided with various operational problems at the Event with which the BBC's senior operational staff were embroiled. Hence, by the time they became aware of the use of this language they felt it was too late to issue a meaningful apology. Other bad language had occurred during this and other performances, but this expletive was the most serious and it all occurred well before the watershed during an event which large numbers of children could be expected to be watching. In view of this and the likelihood of bad language, Ofcom censored the BBC for failing to take sufficient precautions and upheld those aspects of the complaints.

Regrettably for the BBC, there was a reoccurrence of this expletive, albeit in a condensed form, in an episode of **"Celebrity Weakest Link"** in January 2006 at 18.45 pm. A viewer complained that one of the celebrity contestants was wearing a t-shirt with the logo "Freeze MOFO", which is of course an abbreviation of "motherf\*\*r". The BBC in its response questioned whether child viewers would have appreciated the meaning of this abbreviation, but apologised to the complainant and undertook to tighten up its procedures concerning the scrutiny of clothing worn by contributors. Such procedures should already exist to guard against undue prominence of branding and logos, so it is surprising that such checks did not pick up on the harm and offence angle.

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There was some comfort for the BBC concerning the outcome of complaints over the use of the "f" word on **News 24** at 9.45 am on 11 March 2005 when it relayed live coverage of Bob Geldof's press conference to launch Live 8. Ofcom did not uphold the complaints on the basis that dedicated News Channels tend to have an overwhelmingly adult audience and, further, the use of the language was not gratuitous. Nevertheless, it emphasised that this should not be taken as a green light for the use of bad language on News Channels. The clear implication is also that Ofcom will continue to adopt a strict line in relation to news bulletins on non-news channels. In fact, the issues raised by these complaints were regarded as sufficiently important as to result in Ofcom issuing specific guidance directed to News Channels on the issue of bad language. Where bad language does appear Ofcom will take into account the following factors: Editorial justification for the coverage - was it live or pre-recorded? Was it at a time when children were likely to be in the audience? Context? Was an apology issued?

Lastly, before we leave the subject of bad language entirely, here are two unfortunate incidents concerning the use of bad language in pre-watershed programming: BBC2's "**Sahara**" with Michael Palin and C4's "**Richard and Judy Show**". Both featured the use of the "f" word, but the broadcasters had ensured that this was bleeped in audio. Unfortunately, no such precautions were taken in respect of the programmes' sub-titles, both of which reproduced the word in full. Because "**Richard and Judy**" is a live show, the stenographer was able

to pick up on the error and issued an apology subsequently in the sub-titles. Notwithstanding the very limited audience for sub-titles and the bleeping of the bad language in the audio track, Ofcom upheld the complaint against the BBC, but did not take any action in relation to "**Richard and Judy**" in view of C4's prompt action.

### PAYMENTS TO WITNESSES

There was a good deal of coverage recently of the appeals of the two men who were convicted of the infamous "Essex Boys" murders. The victims were 3 drug dealers who were associated with the defendants and had incurred their wrath over a drugs deal. The 3 were murdered in a quiet country lane in Essex in 1995. Subsequently, a film entitled "Essex Boys" was released which was based on the case. The basis of the appeal was the subsequent discovery by the defendants that the chief prosecution witness, Darren Nichols, had, prior to giving evidence at the trial, entered into a contract with a publisher for a book to be published about the case after the trial had concluded. He was estimated to have received approximately £15,000 for this. The defendants contended that had this been known to them, it would have been disclosed to the Jury, who would have been bound to take it into account in assessing Mr Nichols' credibility. Importantly, the contract was entered into after Mr Nichols had given a full witness statement detailing his evidence which he did not deviate from at the subsequent trial. The PCC and Ofcom (and previously the ITC), have long taken a dim view of the practice and since 1998 broadcasters have been prohibited from entering into any

commitment with a witness before the trial has been concluded; this prohibition has recently been expanded in the Ofcom Broadcast Code.

The Court of Appeal rejected the appeal on the basis that it was unlikely that the disclosure of the contract to the Jury would have had any significant impact on their assessment of Mr Nichols' evidence, bearing in mind that it remained consistent throughout and that the defence had already gone to significant lengths to try and discredit him, apparently to no avail.

The question of the legality of this practice is worth considering: the Court of Appeal, whilst deploring it, saw no suggestion of any offence as long as nothing prejudicial was published before the end of the trial which might affect the Jury's deliberations. This contrasts with the case of *R -v- Shillibeer re HTV 2001* where the defendant was standing trial for murder. Broadcaster HTV was making a documentary about the police investigation of the case and indicated that it intended to interview one of the witnesses who had already given evidence at the trial. Obviously, HTV was not planning to broadcast the programme until the Jury had returned its verdict. When the prosecution and defence got wind of HTV's plans, they made a joint application to the Trial Judge for an injunction preventing HTV from contacting any witness who was likely to give evidence. An Order was duly made to this effect and HTV applied to have it discharged. Its application was rejected on the grounds that an injunction was necessary to prevent it committing a Contempt of Court. The Court was concerned that even though the witness in question had

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finished giving their evidence, it was conceivable that they might be recalled and any subsequent evidence they gave might be tainted by their contact with the broadcaster. Hence, the injunction was confirmed and it would remain in force until the prosecution had completed the presentation of its case. Code considerations aside, this case clearly suggests that the Courts will do all in their power to prevent contact between members of the media and witnesses prior to the conclusion of the criminal process in the belief that such contacts can give rise to a Contempt of Court.

### WHEN WILL THEY LEARN?

Three newspapers have recently been fined for identifying the victims of sexual offences, contrary to the Sexual Offences (Amendment) Act 1992. The first, **The Newquay Voice** inadvertently named the (male) victim of a sexual offence in a Court report. The opening paragraph of the story specifically rehearsed the fact that the victim could not be identified "for legal reasons" but the name was unfortunately included further down in the story. Naturally enough, the victim was devastated. Then subsequently, both the **Daily Express** and the **Daily Telegraph** were convicted for publishing photographs of a servicewoman who was at the centre of Court Martial concerning allegations of sexual assault. Both of the photographs were taken from behind, no doubt in the belief that they would not identify the woman. Unfortunately, it was still possible to identify her from these photographs and the information contained in the reports. Interestingly, the **Daily Mail** had also used a similar photograph of

the woman victim in its coverage, but it took the precaution of obscuring the colour of the woman's hair, a simple expedient which enabled it to avoid prosecution. Meanwhile the **Daily Express** was fined £2,700 and ordered to pay the woman £10,000 in compensation. The **Daily Telegraph** was fined £2,000 and ordered to pay compensation of £5,000.

The latest Ofcom Bulletin also contains an example of a similar occurrence, albeit with different consequences. The complaint concerned a regional news item broadcast by **Central News** in August 2005 about an attack on a woman (B) as she walked through a local park (there was no suggestion that the attack had any sexual element). B agreed to participate in an interview about her attack on two conditions: firstly, that her identity would be comprehensively obscured; and, secondly, that it would include her description of the attackers which would hopefully assist in their apprehension. The resulting item did not include her description of the attackers and B complained about this and also the fact that the broadcaster had not taken sufficient steps to obscure her identity. She complained that the programme had included full body walking shots of her at close range, which identified her height, posture, weight, physical form, hair colour and skin tone. Central News explained that the failure to include her description of the attackers was likely to have been due a misunderstanding in that she regarded the inclusion of this material as a condition of her taking part, whereas those responsible for editing the piece had merely viewed it as a request on her part. Interestingly, Ofcom assessed the first issue as to

whether the piece as broadcast created any unfairness to B. It concluded that the omission of her description of the attacker did not result in unfairness, as it was unlikely to have affected the viewer's understanding of B and the incident in a way that was unfair to her. As to the issue of identification, there was no dispute that B's appearance in the programme was conditional on her not being identified. The problem arose in that the broadcasters proceeded on the basis that she should not be identified in the piece, whereas B was assuming that she would not be identifiable. Clearly, there is a significant difference between the two positions. Ofcom decided that the programme did not sufficiently protect her identity in view of the range of shots used and the personal identifying information which they contained. In Ofcom's view these would have made her readily identifiable to those who knew her. The broadcaster had failed to provide her with sufficient information about the likely degree of her identifiability in the programme. This meant that her consent was not informed. For the same reasons, Ofcom also upheld B's complaint of invasion of privacy. As with the **News 24** decision summarised above, this adjudication resulted in a specific Guidance Note being issued by Ofcom. It emphasises the need to explain clearly to contributors who are concerned about being identified what steps the broadcaster is going to take to obscure that identity and ensuring that the contributor is satisfied with those steps. The broadcaster must also ensure that the contributor appreciates the difference between not being identified and not being identifiable.

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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.

### ACTIVE PROCEEDINGS?

It often comes as a surprise to programme makers that criminal proceedings are deemed to be active for Contempt purposes from the point that an individual is arrested. Many, perhaps understandably, believe erroneously that the proceedings only become active when the individual is charged. Schedule 1 of the Contempt of Court Act 1981 states that the proceedings become active at the point of arrest without warrant or, on the issue of a warrant. Cases where a warrant is issued before an arrest takes place are rare. They can arise where the individual wanted for questioning has fled abroad and a warrant is required to initiate the extradition process. This area has recently come under the spotlight in relation to the attempts to extradite Manindar Singh from India for questioning in connection with the murder in 2003 of teenager Hannah Foster in Southampton. Shortly after her murder, Mr Singh disappeared and it transpired that he had fled to India. The UK Court issued a warrant for his arrest and representatives of the Hampshire Police Force travelled over to India in an attempt to begin extradition proceedings. Mr Singh has been arrested by the Indian Police, but is contesting those proceedings. The case has attracted a great deal of attention, particularly amongst the local media in Hampshire. This culminated with the Attorney General issuing a Guidance Note in February 2006, reminding editors of the fact that the suspect's arrest means that the proceedings are active for the purposes of the Act. However, it is highly questionable whether his arrest in India renders the proceedings active for the purposes of the Act. It is not disputed that a warrant for his arrest has been issued, but while the warrant was issued in April 2003, the arrest did not occur until July 2004 and, therefore, under Schedule 1, the warrant ceases to be

relevant. Therefore it is unlikely in the writer's view that the proceedings are still active for the purposes of s2(2) of the Act. Nevertheless, one suspects that the fact that the Guidance Note has been issued is likely to make the media much more circumspect about contravening it, notwithstanding any reservations about its provenance. Experience in the recent Daily Star Case (where it was fined £60,000 for identifying the footballers involved in the infamous "roasting" incident) suggest that the media will tread very carefully. Firstly, the fear is that once a warning has been issued by the Attorney General, he is more likely to issue proceedings if the warning has been ignored; secondly, if the subsequent proceedings result in a conviction, the sentence is likely to be higher in view of the earlier warning.

### And finally ...

This concerns the fate of the producers of "Kan Dit" a Belgium candid camera-type show. The prank in question occurred at a funeral home in Ghent where an actor was lying in a coffin pretending to be dead. A hidden camera recorded three cleaning ladies going about their business at the funeral home. They were asked to remove a key from the deceased's coat and as they were doing so the corpse came to life and their horrified reactions were caught on camera. The women claimed to have suffered physiological problems as a result and the producers were prosecuted under Belgium criminal law for the offence of physiological abuse. The Court at first instance acquitted the producers, but on appeal the Court convicted them of the offence and imposed a suspended prison sentence. Whilst there is no direct analogy under the English criminal law, there is no doubt that the English civil law provides a potential remedy in a form of an action for damages for nervous shock as a form of personal injury.

### 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 or visit us at [www.gdlaw.co.uk](http://www.gdlaw.co.uk)

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