

Media Law Bulletin

FRAUDULENT JOURNALISTS?

The Fraud Act 2006 came into force in January 2007. Its purpose is to codify and simplify the various sources of criminal law relating to the offence of fraud. What is its relevance here? Well, our concern is that it could be used to stymie the efforts of journalists who go undercover in order to record illegal or disreputable practices and then broadcast or otherwise publish their observations.

S2 of the Act creates the offence of fraud by "*false representation*": a person commits this offence if he or she dishonestly makes a false representation and intends by making that representation, either to make a gain (for himself or another), or to cause or create a risk of loss to another. Let us imagine an investigative journalist who has obtained evidence of systematic failures of hygiene in the meat department of a well known supermarket: he successfully applies for a job in the meat department of said supermarket; he spends three months working on the meat counter, during which time he secretly records copious quantities of video footage showing bad hygiene and poor practices, together with audio of exchanges with other employees and supervisors containing numerous damaging admissions of the supermarket's knowledge of the state of affairs and its failure to do anything about them. The footage then forms the basis of an acclaimed documentary programme (or newspaper article or book) which severely tarnishes the reputation of the supermarket. Has the journalist created an offence of fraud by false representation under the new Act? Let us analyse the criteria:-

Has he dishonestly made a false representation in applying for the position? Well clearly a false representation has presumably been made since the applicant has not mentioned the fact that he is currently employed as a journalist. There may well be numerous other such representations committed during the recruitment process. However, has that (mis)representation been made dishonestly? "Dishonesty" is not defined in the Act, presumably on the grounds that this is regarded as a matter that is rightly to be left to a jury to decide. However, the explanatory notes to the Act refer to a two-stage test: whether the behaviour would be regarded as dishonest by the ordinary standards of reasonable and honest people; and if so, whether the defendant was aware that his conduct was such. This is probably the most helpful provision from the point of view of our journalist. He would be highly likely to opt for a jury trial and would no doubt place great emphasis on the public interest value of his investigation which necessitated him applying for the position at the supermarket. Only by doing so has the journalist been able to reveal the shoddy and potentially dangerous practices and thus this is a clear case of the ends justifying the means. In a straightforward case, it is not difficult to imagine a jury refusing to convict on the grounds that the journalist's behaviour was not dishonest by the ordinary standards of reasonable and honest people. However, in reality, the position may be far less clear cut or convenient.

In relation to the second limb of the offence, has the journalist intended to make a gain or cause a loss?

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It is quite easy in practice to avoid any suggestion of personal gain by ensuring in our example that the salary received from the supermarket is not banked or spent by the journalist, but is instead put into a separate account and is promptly returned to the employer at the end of the journalist's employment. However, the problem which the new Act creates is the possibility that an offence is committed if the intention is not of personal gain but to cause loss or expose another to a risk of loss. There is as yet no authority on how this will be interpreted, but it is at the very least arguable that the damage to the supermarket's reputation or goodwill could well constitute a loss for these purposes. Indeed, in s5(2) of the Act "loss" is defined to include money "or other property" and includes temporary losses as well as permanent losses. S5(4) even defines loss to include "not getting what one might get". In other words, this is quite capable of applying to a loss of future contracts or goodwill.

Suffice to say that the penalties for an offence under the Act are strict. On indictment (i.e. by jury trial), a defendant could face an unlimited fine or imprisonment for up to 10 years.

An organisation which has been the subject of an undercover sting often leaves no stone unturned in seeking potential remedies against the journalist and those who commissioned him. It would appear on the face of it that the Fraud Act 2006 provides another potential remedy in this regard, albeit that the decision to prosecute will rest with the police

and the CPS. One hopes that they will be slow to prosecute where issues of "public interest" or "the greater good" are concerned.

CUCKOLDED HUSBAND'S FREEDOM OF EXPRESSION -V- ADULTERY'S PRIVACY??

This refers to the bizarre and seemingly unique case of CC -v- AB which came before the High Court last December. CC - the Claimant - is an apparently well known sports star. He had been having an affair with the wife of the Defendant - AB. CC was also married. AB found out about the affair and decided to sell the story to a tabloid newspaper. CC applied for an injunction to prevent AB divulging the information on the grounds ... yes you've guessed ... that it would breach CC's rights of privacy. He also relied on a claim for harassment as AB had threatened CC on several occasions with his intention to publish the material. Not surprisingly, the Judge described as "striking and unprecedented" the suggestion by CC that a cuckolded husband owes a duty of confidence to his wife's adulterer to keep quiet about their affair. However, Mr Justice Eady, who has been a zealous proponent of the emerging law of privacy, felt able to rule that the existence of the adulterous affair was now a matter to which a reasonable expectation of privacy attached and, moreover, that the unfortunate AB was under no lesser obligation in respect of that private information than any other person.

But what about AB's right to

freedom of expression? This turned out to be his achilles heel. There was no discernible public interest in the proposed publication. Further, the Judge was clearly influenced by the fact that AB's desire to publicise the affair was apparently motivated by the unworthy motives of revenge and financial gain and he felt that these were relevant considerations to take into account when undertaking the balancing act between the competing rights of freedom of expression and rights of privacy. The Judge was also influenced by the position of CC's wife. She was naturally devastated at the news of CC's affair and her health had deteriorated as a result. CC said that he was in the process of trying to effect a reconciliation with her which would be severely hampered by any publicity concerning this earlier affair. In this regard, it is perhaps worth mentioning that CC and AB's wife had gone to considerable lengths to ensure that their affair was kept secret. CC also claimed to be unaware that AB's wife was married and naturally AB's wife was similarly opposed to any publication concerning their affair.

Interestingly, by the time the matter got to court, AB had already published some material about the affair on the internet. This might have dealt a serious blow to CC's prospects of obtaining an injunction, but the Judge ruled that these earlier internet postings were not significant and they would not render any subsequent injunction futile. However, in ordering the injunction, the Judge did limit

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it to AB's communication with the media or over the internet. AB was not excluded from revealing the existence of the affair to his family and those close to him.

A bizarre case with an extraordinary and unexpected outcome. It is interesting to observe that on the one hand the Judge appeared to take a very modern and progressive view of adultery in recognising that it was no longer appropriate that an adulterous relationship should be denied rights of privacy; on the other hand, this enlightened and liberal approach not extend to the Judge's view of the conduct of AB in seeking to divulge the story to the media and for financial gain, of which he took a dim view. Obviously the injunction was a temporary measure to preserve the position pending a full trial of the matter. It will be interesting to learn the outcome of the case if it proceeds to a full trial.

REPORTING SEXUAL OFFENCES

The reporting of sexual offences is rightly a very tightly prescribed area. The Sexual Offences (Amendment) Act 1992 imposes far reaching prohibitions on the publishing of any material which might lead to the identification of the victim of a sexual offence. The range of sexual offences covered is very broad and the prohibitions apply irrespective of whether the victim is male or female: They bite from the point at which an allegation of a sexual offence is made (whether by the victim or some other person) and irrespective of whether or not any subsequent

charges or proceedings are brought and they continue for the lifetime of the victim. By necessity, the print and audiovisual media are very familiar with these restrictions. Nevertheless, occasional infringements do occur and we recently saw some interesting examples of this. These arose in relation to the reporting of the conviction of teacher Steven Edwards on several counts of abusing a position of trust. The offences of abuse of trust were created by the Sexual Offences Act 2003. The charges related to four children, each of whom were his pupils, ranging from 14-16 years old. In at least two cases the relations involved full sexual intercourse, in one case when the pupil was under 16. Importantly, these abuse of trust offences have been added to the list of sexual offences to which the 1992 Act reporting restrictions apply. These are two-fold in their effect. Once an allegation of an offence has been made, no matter may be published about the victim which might lead to his/her identification; once an arrest has been made, no matter of any description may be published which might lead to the identification of the victim. The 1992 Act gives specific examples of information which is likely to lead to the identification of the victim and these include their name, address, school or other educational establishment and so on.

Nevertheless, it was interesting to note that several newspapers, in their reports of Mr Edward's conviction, named the school at which he taught. This was of

course clearly prohibited information since, as the same reports made clear, the victims were all his pupils. A lively discussion ensued when the writer was telephoned by a television reporter querying why his broadcasts could not include a reference to the name of the school when this had been reported by the local media and at least one national newspaper. Such widespread transgressions may demonstrate a degree of ignorance about the fact that the abuse of trust offences are subject to the same reporting restrictions as "conventional" sexual offences.

REGULATORY

Dispatches - Channel 4: July 2005

This complaint concerned an edition of "Dispatches" which examined failing standards in British Secondary Schools. The main reporter was a qualified teacher who worked undercover as a supply teacher at various schools and, equipped with a hidden camera, secretly recorded her classes. The programme attracted much publicity because of the clear and compelling evidence it presented of poor standards of discipline and high levels of disruption at secondary schools - key contributory factors in the poor academic performance of a number of schools. A complaint was made by V on behalf of her daughter who was secretly filmed throwing a pencil during class and responding "no" to a question from the teacher. Although her daughter's face was pixelated, V nevertheless felt that she had been subjected to unfair

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Further information

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treatment and that her privacy had been invaded both in the making and broadcast of the programme.

V was concerned that she had been filmed and the film broadcast without V's consent and without V having been given an opportunity to respond to the material. She also claimed that despite the pixelisation, her daughter had still been recognised by friends and family. She criticised the programme makers for not paying sufficient regard to her daughter's age and vulnerabilities.

Channel 4 emphasised the overriding public interest of a programme of this nature in exposing the failures in the education system at secondary schools: a significant contributing factor to this is persistent low level misbehaviour which is endemic in a number of classrooms, of which V's daughter's behaviour was one of many examples. In view of the important public interest served by the programme and because of the steps taken by the programme makers to obscure the daughter's identity, it argued that Ofcom should not find any unfairness or any unwarranted invasion of her privacy.

Interestingly, immediately before the programme was broadcast, several parents had joined forces in an effort to obtain an injunction to prevent the broadcast. The Judge held that although the programme appeared to breach the children's rights of privacy under Article 8 ECHR, this was outweighed by the public interest in showing the footage.

One of V's arguments was that her daughter was in a vulnerable position (the report does not disclose the nature of these vulnerabilities) and that therefore

it was irresponsible of Channel 4 to broadcast the footage of her. In its response, Channel 4 pointed out that prior to broadcast it had specifically alerted the relevant local authorities to the fact that the filming had taken place to enable any particular problems of this nature to be resolved. For instance, it might be that certain children should not be included if there was a risk that they might face the risk of physical harm from their parents or others as a result. However, Leeds City Council, in whose area the school was located, declined to discuss the matter with the programme makers or to co-operate in any way. Therefore, this opportunity was denied in the case of V. However, Channel 4 were able to point to the fact that neither the undercover reporter nor subsequently the programme makers were given any indication by the school of any special considerations.

Ofcom held that although V's daughter's privacy had been infringed in both the making of the programme and its broadcast, there was a very strong overriding public interest which warranted this. It also rejected the complaints of unfair treatment.

This is a welcome endorsement of the practice of deception and secret filming in programme making when appropriate and justified in the circumstances. Although the decision was based on the old ITC Programme Code (which was still current at the time the programme was broadcast), there is no reason to believe that the outcome would have been any different if the Ofcom Broadcast Code had been applied.