

Media Law Bulletin

INTRODUCTION

In view of the widespread publicity that has already been generated concerning the “manipulation” of programme material and premium rate “scandals” we do not propose to add to those debates in this issue. However a development which has not received much coverage and may be of use to programme makers is the guidance recently issued by the Gambling Commission on free draws and prize competitions, a short summary of which is included at the end of this bulletin.

LEGAL

Defamation

Reportage

“Reportage” is the term used to describe the neutral reporting of both sides of topical stories, as opposed to first hand investigation or reporting. It is a form of “Reynolds” qualified privilege with one very attractive element: there is no need to verify the relevant allegations. Attractive yes, but considerable care needs to be taken before reliance is placed upon it; the recently reported Court of Appeal case of *Roberts & Another -v- Gable* illustrates its use and also helpfully identifies its limitations.

The Claimants were active members of the BNP. An article in *Searchlight* magazine (which is openly critical of the BNP) reported on a row within the party, in the course of which, it was said, two members had been accused of stealing party funds but had then issued a letter accusing the First Claimant of the theft and making additional allegations about the other Claimants. The Defendants had not attempted to verify these allegations or put them to the Claimants, but contended that the article fell within the “reportage” doctrine.

The Court of Appeal confirmed this: the “goings-on” in the BNP were a matter of

public interest, the article did not adopt or endorse the allegations and it was, in all the circumstances, a piece of responsible journalism. True, there was an element of sarcasm in the article and some glee at the embarrassment of the Defendants’ political enemies, but this did not deprive the Defendants of their reportage defence.

Ward LJ described reportage as “The neutral reporting, without adoption or embellishment or subscribing to any belief in the truth of attributed allegations, of both sides of a political and possibly some other kinds of dispute”. A journalist has a good defence to a libel claim if what he publishes, even without attempting to verify its truth, amounts to reportage.

The most important factors to stress are that:-

- (1) The information must be in the public interest.
- (2) To qualify as reportage, the report must have the effect of reporting, not the truth of the statements, but the fact that they were made.
- (3) The protection of the reportage defence will be lost if the journalist adopts the report and makes it his own or if he fails to report the story in a fair, disinterested and neutral way.
- (4) The publication must always meet the standards of responsible journalism.

Dip in Defamation Cases

The number of defamation cases coming to court in England and Wales dropped by 13.5% last year, despite a surge in the proportion of claims resulting from allegations of terrorism. Only 64 defamation claims reached the courts last year, down from a mark of 74 for the previous 12-month period.

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Privacy

Vulnerable Adult Protected

In *T -v- British Broadcasting Corporation* in July 2007, the High Court granted an injunction to prevent a vulnerable adult (T) with an IQ of 63 from being identified in a BBC documentary which concerned the process by which T's two-year-old daughter was adopted by a foster family. The documentary included footage of a number of intimate matters including T and her last contact session with her daughter. The BBC had obtained T's consent prior to filming but subsequently she was deemed incapable of giving such consent and the Official Solicitor sought an injunction on her behalf to prevent her identification in the programme.

The judge ruled that T's rights under Article 8 of the European Convention of Human Rights should take priority over the BBC's right to freedom of expression under Article 10 of the Convention. The value of the BBC's Article 10 rights was not proportionate to the exposure of T's raw feelings and her relationship with her daughter, especially as the public interest in publication could have been satisfied without identifying her. The case neatly illustrates the nature of the balancing exercise which a court needs to carry out in deciding whether rights under Article 8 or 10 of the Convention should take priority.

JK Rowling's Son

The High Court has struck out a claim made on behalf of JK Rowling's infant son, David Murray, following the taking and subsequent publication in the Sunday Express of a photograph of David (and the family) in the street. The Court was required to grapple with the tensions between the

European Court of Human Rights case of Von Hannover and the House of Lords decision in the Campbell case. Patten J accepted that "The European Court of Human Rights clearly took a much wider view of what should be regarded as falling within the scope of an individual's private life" but nevertheless he considered himself bound to follow the Campbell case. Patten J therefore concluded that there remained a body of information about private individuals which was innocuous or anodyne and did not raise a reasonable expectation of privacy, and that the information contained in this photograph fell into this category (*David Murray -v- (1) Express Newspapers plc (2) Big Pictures (UK) Limited*).

Press Regulation Finally Catches Up

A newspaper has been criticised in a landmark Press Complaints Commission (PCC) ruling on the use of video material on its website. The Hamilton Advertiser reported in March 2007 that a 16-year-old student at a school in the town had filmed her unruly mathematics class on her mobile phone in order to explain poor exam results to her parents. The paper printed still images from the video, in which pupils and the teacher could be identified. It also published unedited moving images on its website.

The newspaper argued that there was a clear public interest in the lack of supervision in the class. It said the footage did not intrude into the education of the children, who were all over 16.

The PCC said it had been "entirely legitimate" for the paper to bring conditions in the classroom to public attention - and to use, at least in

part, the information contained in the video. At the same time, the newspaper had a responsibility to ensure that the material it published did not infringe the rights of the pupils appearing in the footage, some of whom were clearly identifiable.

While the newspaper had argued that obscuring the faces would have undermined the impact of the story, the PCC considered that any public interest in identifying the pupils was not so great as to override their rights under the code. Steps should have been taken to conceal their identity or to obtain proper consent.

It is interesting that in a regulated broadcast environment this ruling would be entirely unexceptional but is regarded as a landmark ruling for the printed press.

Trademarks

'Mr Miss World'

In *Miss World Limited -v- Channel 4 Television*, the High Court granted an interim injunction preventing Channel 4 from screening a late-night programme about a beauty pageant for transvestites and transsexuals that took place in Thailand in 2006, called "Miss International Queen". Channel 4 planned to call the programme 'Mr Miss World'.

The Claimant, who was the owner of the trade mark in "Miss World", learned about the proposed screening only a few days before transmission, and promptly sought an injunction based upon its trade marks. The judge rejected Channel 4's argument that an injunction would infringe its Article 10 rights; he considered that the use of a trade mark would not generally engage Article 10 rights of freedom of expression unless the mark was making some political point or identifying some matter of public

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importance.

The judge took the view that the principal objective in using the proposed programme name was to take unfair advantage of the distinctive character and repute of the Miss World mark and therefore granted the injunction.

The programme subsequently aired under the title "Mr Miss Pageant".

REGULATORY

Complaints and adjudications relating to Rules 9 and 10 of the Ofcom Broadcasting Code have occurred regularly over the last few months. In particular, rule 9.6 (which forbids promotional references to a sponsor in a sponsored programme) and rules 10.3 (products and services must not be promoted in a programme) and 10.4 (no undue prominence). Well understood though these rules may be, it is all too easy for material to slip through the compliance process and result in an unfavourable Ofcom adjudication.

The X Factor and The Xtra Factor

Nokia sponsored both ITV1's The X Factor and ITV2's The Xtra Factor. In an episode in the last series of The X Factor, Sharon Osbourne was shown using a Motorola phone, the branding of which had been obscured. The following day The Xtra Factor featured a sketch called 'The Text Factor', which showed Simon Cowell and Louis Walsh apparently insulting each other via text messages. Notably, the Nokia phones used in the sketch were not obscured. Rule 9.6 prohibits promotional references to a sponsor and allows non-promotional references "only where they are editorially justified and incidental".

ITV's compliance staff had noticed the Nokia branding but considered

that the Nokia name and handsets, both in silver, would blend in with each other and make the branding less noticeable. Ofcom did not share this view. They found that the branding was apparent and the references to Nokia were not editorially justified, since they could easily have been avoided and neither were the references to the sponsor incidental. Therefore there had been a breach of Rule 9.6.

Radio XL

Dr Gorania a homeopathic practitioner who is a regular contributor on Radio XL (an Asian music station in the West Midlands) provided information about how homeopathic medicine can help in certain circumstances and conditions. Conveniently, his practice and content details were provided during the item in the following terms:

"Callers will be pleased to hear that Dr Gorania is with us today - if you want to see him, he will be in Birmingham today. To make an appointment, please ring his mobile".

Helpfully, also his mobile and land line telephone numbers were given and later in the programme further mention was made of his practice:

"Some people turn up without an appointment resulting in long queues, which often causes chaos. It is therefore requested that people telephone before coming. The lines are open from 10 am to 10 pm".

Ofcom considered that the references to the Dr Gorania's practice were unduly prominent as they went beyond what was editorially justified. This was a clear breach of Rule 10.4.

Scotland Today

Scotland Today, STV's news daily local programme, included an item about the launch of "a new SMG website, Peopleschampion.com" in the following terms:

"When it comes to money choices, most of us would welcome the right advice. A new SMG website, Peopleschampion.com, has been set up to do just that. It's offering extensive consumer advice and Vicky Lee's been having a look".

Close-up shots of the website, including its address and logo, were then displayed with the following voiceover from the reporter:

"Peopleschampion.com is about finding you the best deal and helping you save money within four clicks of the mouse, so when it goes live in the next few weeks, you'll be able to compare more than 8500 mortgages, the best deals in pet and medical insurance and search for bargain flights ...".

Ofcom requested STV's comments, with particular reference to Rules 10.3 and 10.4. STV made the point that at the time of broadcast Peopleschampion.com was not an active service, nor had any date been set for its launch. The item was considered to be editorially justified on the basis of the widely acknowledged business interest in the new website in Scotland.

Ofcom accepted, in principle, that there may have been editorial justification to include an item in Scotland Today about the launch of a new consumer website providing price comparisons of various services. However, in this particular case they were concerned by the favourable manner in which the website was described.

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The item was about ninety seconds long and most of this was devoted to detailed and favourable information about the website. There were also close-up shots of the site's name and logo. Ofcom concluded there was a breach of rules 10.3 and 10.4.

The Gambling Commission's Guidance on Prize Competitions and Lotteries

The Gambling Commission has published guidance in relation to the Gambling Act 2005 (effective September 2007) on the distinction between prize competitions and free draws on the one hand and lotteries on the other.

The guidance covers the often blurred boundary between lotteries and a wide range of prize competitions, free draws and product promotions including TV quizzes and prize draws. Prize competitions and free draws are permitted under the Gambling Act. This contrasts with lotteries which are illegal unless they qualify under one of the Act's exempt categories or operate under a licence issued by the Gambling Commission.

The Act contains provisions designed to help clarify the distinction between lotteries and prize competitions and free draws. In prize competitions, success must depend to a substantial degree on the exercise of skill, judgment or knowledge. This distinguishes them from lotteries where success depends wholly or mainly on chance. However a lottery is only illegal if participants are required to pay to enter by money or monies worth. Therefore, free draws are exempt from the statutory prohibition on lotteries.

Premium rate TV quizzes usually attempt to take advantage of the free draw option by permitting contestants to participate through a web-based free entry route. The Commission

expresses concern that entry to TV quizzes through such a route may not be considered to satisfy the statutory test, i.e. that the free route must be no more expensive nor less convenient than the paid route. The Commission's concern is that web-based entry would not satisfy the "convenience" requirement, particularly where there is a need for immediate responses or if the quiz is only run for a short period.

The guidance also expresses the Commission's concern that competitions which pose simple questions, the answers to which are widely and commonly known or are obvious from the material accompanying the question, will fail to meet the skill requirements of the Act and will be classed as lotteries. The effect of the Act is that a genuine prize competition must be one which contains a requirement to exercise skill or judgement or to display knowledge and it can reasonably be expected that such requirements will either:

- (1) prevent a significant proportion of people who wish to participate from doing so; or
- (2) prevent a significant proportion of people who participate from receiving a prize.

Although the Commission has no licensing responsibilities in respect of prize competitions and free draws, it will be expected to monitor the boundary between them and lotteries. It does have powers to prosecute operators of illegal gambling and illegal lotteries.

You can download the guidance from:
<http://www.gamblingcommission.gov.uk/Client/detail.aspx?ContentId+194>

Further information

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