

UK MEDIA LAW UPDATE
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DEFAMATION

Godfrey v Demon Internet

[59] In March 2000, the battle between Demon Internet and Dr Laurence Godfrey settled just before trial. In 1999, Morland J had ruled that an internet service provider ‘publishes’ comments posted by third parties on its news group and could therefore be liable in defamation.² Furthermore, Demon could not rely on the ‘innocent distribution’ defence in *Defamation Act 1996* s 1 (which exculpates a publisher which took ‘reasonable care’ when publishing the statement and ‘did not know’ that it was contributing to a defamatory publication) since Demon had been warned that the statement might be libellous, but had done nothing to remove it for a month. Demon apologised and agreed to pay £15,000 in damages, as well Dr Godfrey’s costs.

Edwina Currie

In March 2000,³ Edwina Currie was awarded £30,000 damages, costs and a public apology, over an article in the *Daily Express*. The newspaper’s political columnist, Peter Osborne, wrote that Westminster was awash with rumours that the former Tory Minister was about to join the Labour party, in order to reinvigorate her ‘clapped out’ political career. Describing Ms Currie as ‘the vilest lady in Britain’, he remarked that she would be no more acceptable to Tony Blair’s administration than ‘a mass murderer’, a ‘serial rapist’ or ‘an active officer in a Serb death squad’.

LM v ITN

LM, formerly *Living Marxism*, accused two ITN reporters of transmitting misleading images of an emaciated man and other Muslim prisoners, to suggest that the Serbs were running Nazi-style concentration camps. The article, headlined ‘The picture that fooled the world’, suggested that the image had been obtained by selective use of camera angles and videotapes. Far from being a concentration camp, LM claimed, it was a

¹ Lovells, Solicitors, London; © Lovells 15 January 2001.

² *Godfrey v Demon Internet Ltd* [2000] 3 WLR 1020.

³ *The Times* (London) 10 March 2000.

collection centre for refugees seeking safety, who were free to leave. The jury unanimously found *LM* guilty of libel and awarded £150,000 to each reporter, and £75,000 to ITN.⁴ *LM* subsequently closed down.

[60] **Branson v Bower**

In March, Richard Branson sued journalist Tom Bower for libel over an article in the *Evening Standard*.⁵ Mr Bower accused him of wanting to run the National Lottery for his own self-glorification and revenge, having failed to win the first lottery licence. Mr Branson did not sue the *Evening Standard*, which published letters from him in reply, although the newspaper is supporting the journalist in the legal action. Trial is due in May 2001.

McPhilemy v Times Newspapers Ltd

After a nine week trial, documentary producer Sean McPhilemy won a libel action against *The Sunday Times*. Mr McPhilemy had produced a documentary for Channel 4 about a secret committee of Protestant dignitaries, loyalist terrorists and the RUC in Northern Ireland, which regularly conspired to kill Catholics. *The Sunday Times* denounced this as 'little more than a collage of unsubstantiated rumours and fabrications'. The jury held that *The Sunday Times* had failed to prove on 'the balance of probabilities' that the committee had never existed.⁶ The newspaper was ordered to pay £145,000 damages, and an estimated £1 million in costs.

Marco Pierre White libel win

In April, Marco Pierre White, won his libel action against two US newspapers.⁷ The *New York Times* and *International Herald Tribune* had carried articles describing the celebrity chef's 'well publicised bout with drugs and alcohol'. The newspapers contended that, even if the claims were not true, the chef's reputation had not been damaged, since he was famously flamboyant, and reasonable people would think no worse of him for having been involved with drink and drugs. Mr White claimed that he objected to drugs and disliked drinking. The newspapers instructed private investigators to ascertain whether their allegation was true. On the basis of these

⁴ *The Times* (London) 15 March 2000.

⁵ *Sunday Business* (London) 26 March 2000.

⁶ *McPhilemy v Times Newspapers Ltd* [2000] 1 WLR 1732.

⁷ *The Times* (London) 6 April 2000.

findings, they dropped their defence of justification just before trial. Mr White was awarded £75,000 damages and punitive costs of about £450,000.

Berezovsky v Forbes Inc

In May 2000, the House of Lords ruled that two Russian nationals could sue for libel in England over an article published in *Forbes* magazine.⁸ *Forbes* is a US magazine, published in several countries, including England and Russia, which is also accessible on the internet. The defendants applied to have the writs set aside and the actions dismissed or stayed, arguing that England was not the most appropriate forum in which to bring the action. In the High Court, the judge ruled that the claimants' connections with England were tenuous, and Russia would be the more appropriate forum.⁹ The claimants appealed and the Court of Appeal allowed the appeals.¹⁰ The defendants appealed to the House of Lords, which dismissed the appeal. All the constituent elements of the torts had occurred in England; the publication of the defamatory material in England had been significant; and the claimants had reputations in England to protect.

Caroline Coon

Caroline Coon, co-founder of Release (a charity which gives advice on drugs) and a leading member of the 1960s 'alternative culture', accepted £40,000 in libel damages and £33,000 in costs. Ms Coon sued over a book, which claimed that an unnamed woman, whom she and others took to be her, performed sexual acts [61] on rock stars in order to raise funds for the charity. The book falsely alleged that 'one young woman' had offered oral sex to rock stars, George Harrison and Mick Jagger, in return for a £1,000 donation.

In 1999, Mr Harrison had received an apology and substantial damages from the author and publisher, when the High Court heard that all parties accepted that there was no truth whatsoever in any of the allegations.

⁸ *Berezovsky v Forbes Inc* [2000] 1 WLR 1004.

⁹ Unreported, 7 April 1997.

¹⁰ [1999] EMLR 278.

Pre-action protocol for defamation actions

In August 2000, the Lord Chancellor's Department issued a pre-action protocol for defamation actions, which came into force on 2 October 2000.¹¹ Its aim is to enable parties to resolve their dispute as early as possible, by having at an early stage all the facts available to enable them to reach an informed judgement of the merits of their case.

Peter Oates

In May, the Court of Appeal struck out a second libel claim by Peter Oates, a former Broadmoor patient.¹² Mr Oates had won a libel action against the *Sunday Mirror* over an article alleging that pornographic videos had been found in his room at the top security hospital.¹³ However, the jury had only awarded him 1p in damages, on the basis that he had no reputation to damage. He lost a subsequent appeal, but then sued the *Mail on Sunday*, which had carried a similar article. This action was struck out in the High Court¹⁴ and Mr Oates appealed. The Court of Appeal held that there was no difference between the two articles sufficient to lead the jury to a different verdict. The action was therefore an abuse of process.

Email Libel

In October, Allott J ordered a man who sent a series of malicious emails to his ex-employer to pay £126,000 in libel damages and costs.¹⁵ David Frankl sent emails to the deputy managing director of Takenaka (UK) Ltd, Brian Corfe, accusing him of having fathered an illegitimate child. Frankl took pains to disguise his identity, by calling himself 'Christine Realtor'. In order to trace the sender, Mr Corfe obtained orders for disclosure against Microsoft and Comuserve, which revealed that the messages came from a laptop being used by Mr Frankl in Turkey.

¹¹ See <www.open.gov.uk/lcd>.

¹² Unreported, 19 May 2000.

¹³ Unreported, 21 May 1999.

¹⁴ Unreported, 18 October 1999.

¹⁵ Unreported, 11 October 2000.

‘Mafia’ man can sue for libel

In October 2000, Gray J upheld the right of an alleged gangster to protect his reputation.¹⁶ Mr Loutchansky had sued *The Times* for libel over articles linking him to the Russian Mafia, money laundering and nuclear weapon smuggling. *The Times* applied to strike out the claim on the ground that the claimant was of bad character, as borne out by the fact that the Home Secretary had earlier made an exclusion order against him.

Gray J refused the application. Unlike a criminal conviction, an exclusion order would not usually be good evidence of bad character, being merely an executive decision, based on ‘unspecified information from an unspecified source’. He also [62] dismissed the argument that, even if the claimant won at trial, he would only recover minimal damages and his reputation would not therefore be vindicated. The claimant had a legitimate objective in protecting his reputation and should not be deprived of his right to do so.

Qualified privilege in press release

In October 2000, the House of Lords held that a newspaper report based on comments made at a press conference could attract qualified privilege.¹⁷ Their Lordships held that the press conference, which had been convened to elicit support for a convicted prisoner, had been a ‘public meeting’. The press performed a crucial role in bringing to the public’s attention matters which might require their support and of which they might otherwise have been unaware. A press conference was a valuable way of achieving this.

Their Lordships also held that qualified privilege attached to the contents of the press release. It was now general practice for people to read press releases rather than have them read out, and press releases were now as much part of the proceedings of the press conference as if they had been read aloud during it.

¹⁶ *The Independent* (London) 4 December 2000.

¹⁷ *Turkington v Times Newspapers Ltd* [2000] 3 WLR 1670.

Lord Archer

In November, Lord Archer pleaded 'not guilty' to perjury and perverting the course of justice at a preliminary hearing at the Old Bailey.¹⁸ The ex-deputy Chairman of the Conservative party has been charged with five counts over claims that he asked a friend to lie for him before his 1987 libel trial against Express Newspapers, and also perjured himself at the libel trial. The trial is set to commence in mid-May 2001.

Hamilton v al Fayed

In December 2000, the six year battle between Neil Hamilton and Mohamed al Fayed ended. The former Conservative minister had sued for libel over allegations made on television by the Harrods owner that he had corruptly accepted cash payments in return for asking Parliamentary questions on behalf of Harrods. The jury found that these allegations were justified and the claim was dismissed.

Hamilton then sought to adduce fresh evidence to support an application for permission to appeal. He claimed that al Fayed had used to unfair advantage counsel's privileged working papers, which had been stolen from dustbins outside chambers by a third party.

The Court of Appeal accepted that the documents had been stolen and paid for on al Fayed's behalf, but held he had not used them to obtain a tactical advantage in the litigation.¹⁹ Moreover, the trial judge had warned the jury in the strongest possible terms against giving credence to the defendant's uncorroborated evidence. The Court of Appeal went on to say that this action would not have harmed al Fayed's credit, as he had none. It therefore allowed the application to adduce fresh evidence, but refused the application for permission to appeal.

The Court ordered Hamilton to pass to al Fayed's lawyers details of those who had contributed to the £400,000 Hamilton fighting fund. Hamilton claims to be unable to pay his £2 million costs bill, and al Fayed may well now pursue some or all of his backers instead.

¹⁸ *The Guardian* (London) 12 November 2000.

¹⁹ *Hamilton Al Fayed (No1)* [2000] 2 WLR 609.

[63] **DISCLOSURE OF JOURNALISTS' SOURCES**

John v Express Newspapers

In April 2000, the Court of Appeal held that, before the court would require a journalist to break what he regarded as a most important professional obligation to protect a source, it was crucial that other ways of tracing the source had been explored.²⁰

A journalist had obtained counsel's draft advice to the claimant (Elton John), which counsel had thrown into his bin in chambers. The claimants obtained an order,²¹ requiring the journalist and her editor to reveal how they obtained the document. They appealed. The Court of Appeal allowed the appeal,²² holding that the judge had attached too little significance to chambers' failure to conduct an internal inquiry to ascertain how the document had been removed. If the judge's order were allowed to stand, the public might conclude that the law over-protected lawyers by attributing too much significance to their professional privilege, at the expense of the interests of journalists and the public.

Ian Brady

In December 2000, the Court of Appeal held that MGN Ltd must identify its source of information for an article about Ian Brady. *The Daily Mirror* had published an article about the 'moors murderer', an inmate of Ashworth Security Hospital, who was on hunger strike. This included verbatim extracts from a diary kept by Ashworth tracking the protest, kept on its database.

A *Mirror* journalist had received the information from a regular source, who had obtained the information from a member of staff at Ashworth, whose identity the journalist did not know. All Ashworth staff were fully aware of the confidentiality of the patients' medical records held there.

²⁰ *John v Express Newspapers* [2000] 1 WLR 1931.

²¹ *The Independent* (London) 7 March 2000.

²² *John v Express Newspapers* [2000] 1 WLR 1931.

Rougier J ordered MGN to reveal the intermediary's identity,²³ and MGN appealed. The Court of Appeal held that a court could order disclosure of the identity of a wrongdoer, wherever the person against whom disclosure was sought had become 'mixed up' in wrongful conduct which had infringed a claimant's legal rights.²⁴ This principle applied even more forcefully where the individual had been a wrongdoer himself, as was the case here.

Furthermore, such an order was 'necessary' in the 'interests of justice' under s 10 of the *Contempt of Court Act 1981* and did not infringe Art 10 of the *European Convention on Human Rights*.

[64] **PRIVACY AND CONFIDENTIAL INFORMATION**

A company has a right to privacy

In April 2000, the Court of Appeal held that a company had a right of privacy under the *Broadcasting Act 1996*.²⁵ The BBC had secretly filmed transactions in *Dixons* stores for a program designed to show that the shop, which had previously been convicted for selling second-hand goods as new, was still doing so. In fact, the filming revealed no evidence of mis-selling, and the BBC did not use it in the finished program.

The Broadcasting Standards Commission upheld *Dixons*' complaint about an unwarranted infringement of privacy.²⁶ The BBC successfully applied for judicial review and the Commission's decision was quashed.²⁷ The Commission appealed.

The Court of Appeal upheld the appeal and held that *Dixons*' right of privacy under the *Broadcasting Act 1996* had been infringed. A company could protect private activities from unwarranted intrusion and could object to secret filming at its premises. Where the filming took place at a location to which the public were free to go, the fact that members of the public might also appear in the film might exacerbate the infringement. In addition, a company could reasonably object on its own behalf to its employees

²³ Unreported, 30 June 2000.

²⁴ *The Times* (London) 10 January 2001.

²⁵ *The Times* (London) 12 April 2000.

²⁶ See <www.bsc.org.uk>.

²⁷ *The Times* (London) 14 September 1999.

being secretly filmed without cause. The court left open, however, whether companies, as opposed to human individuals, have privacy rights under the European Convention.

Regulation of Investigatory Powers Bill Becomes Law

On 28 July 2000, the Regulation of Investigatory Powers Bill received Royal Assent. The Act²⁸ creates offences of unlawful interception on a public or a private telecoms system and a tort of unlawful interception on a private system by the operator of that system. It also sets out grounds upon which businesses may monitor or record communications transmitted over their systems without consent.

Court opens way to breach of privacy actions

In November 2000, the Court of Appeal, in a landmark decision, held that individuals could sue for breach of privacy.²⁹ The British magazine *OK!* had entered into an agreement with Michael Douglas and Catherine Zeta-Jones, which gave the magazine the exclusive right to publish photographs of the actors' wedding. Shortly before *OK!* was due to publish them, *Hello!* sought to publish its own photographs of the wedding. The High Court granted an injunction to prevent publication, and *Hello!* appealed.

In the event, the Court of Appeal discharged the injunction, but in doing so made clear that, given the *Human Rights Act 1998*, individuals can have privacy rights under English law. Sedley LJ held that the couple had 'a powerfully arguable case to advance at trial' that they had a 'right of privacy, which English law would recognise and, where appropriate, protect'. The other two judges were more circumspect, holding that the couple in question had hardly intended to have a private wedding. However, in principle, privacy rights would not necessarily be overridden by the right to freedom of expression also enshrined by the Act.

[65] *Royal Assent for Freedom of Information Act*

The controversial *Freedom of Information Act 2000* received Royal Assent on 30 November 2000. However, it will be five years before the Act, which is designed to 'give citizens access to information held by public authorities' will be fully in force.

²⁸ See <www.hmso.gov.uk>.

²⁹ *The Times* (London) 22 December 2000.

The Act will probably cover all central government departments by mid-2002, with other authorities in subsequent phases.

COMPLAINTS TO THE PRESS COMPLAINTS COMMISSION

The Guardian

The Press Complaints Commission held, following a complaint by Graham Baldwin, that a newspaper was not obliged under Clause 1(v) of the Press Code of Conduct to publish a daily account of a libel trial.³⁰ This merely required a newspaper which has been a party in a libel action to publish a fair and accurate report of the outcome of the action.

Time Out

In relation to a similar complaint by Alexander McQueen and Givenchy against *Time Out*, the Commission advised parties in defamation actions to ensure that the issue of reporting of the outcome of an action be clearly dealt with at the time of settlement.³¹

Front

The Commission upheld a complaint under Clause 16 of the Code, which precludes the press from making payments 'directly or through agents to convicted ... criminals or their associates', unless in the public interest.³² An unidentified man complained that *Front* had paid £500 to Reginald Kray for an article about the well-known gangster. The magazine denied paying him personally, but confirmed that it had contributed £500 to the 'Free Reg' campaign. The Commission pointed out that clause 16 covered payments to associates and the intended beneficiary was Kray, albeit indirectly. The crucial question was whether there had been any public interest element in the article or whether it simply glorified crime.

The Sunday Times

In contrast, the Commission rejected a complaint about a payment by *The Sunday Times* to Jonathan Aitken for the right to serialise his memoirs.³³ There was, it held, a

³⁰ See <www.pcc.org.uk/reports>.

³¹ Ibid.

³² Ibid.

³³ Ibid.

clear public interest in publishing the articles in question. Aitken had held high ministerial office and was explaining for the first time why he had committed perjury. *The Sunday Times* was not glorifying the crime, and while Aitken might benefit indirectly by being able to discharge his bankruptcy earlier, this would not constitute a profit nor breach the Code.

[66] *Carol Smillie*

The Commission ruled that the *Sunday Mail* had breached Clause 5 of the Code in its reporting of the funeral of Carol Smillie's mother.³⁴ The newspaper had carried an article about the funeral with photographs taken by a long lens. Smillie had requested that it should remain a private affair.

The Commission held that the editor knew that the occasion was private and rejected the contention that, since the funeral involved a celebrity and had been announced in a newspaper, it constituted a public event. It had not been the funeral of a celebrity but of her relative. The occasion should have been handled with sensitivity, whereas in fact Smillie's grief had been compounded by the prominence of the article and pictures. The Commission disagreed that, because the photographer had (without being noticed) taken the pictures from outside the crematorium, there had been no intrusion.

The Daily Mirror

In May 2000, the Commission criticised the editor of the *Daily Mirror*, Piers Morgan, for failing to monitor two of the *Mirror's* journalists.³⁵ The two journalists had bought shares which they then tipped in the *Mirror's* 'City Slickers' column. This breached Clause 14 of the Code, which forbids journalists to profit from financial information received in advance of general publication; write about shares in which they have a significant financial interest or buy shares about which they have recently written or intend to write. Both were dismissed for gross misconduct. Morgan had also bought some of the tipped shares, but denied that he had known at the time that they were about to be tipped. The DTI is currently investigating the matter.

³⁴ *Ibid.*

³⁵ *The Times* (London) 11 May 2000.

The Mail on Sunday

The Commission rejected a complaint against *The Mail on Sunday* by Sara Helm, the partner of the Prime Minister's Chief of Staff, Jonathan Powell.³⁶

The newspaper had stated that, when dining out, the couple had left their eight week old daughter with a cloakroom attendant. Helm complained that this breached Clause 6(v), which provides that, where material about the private life of a child is published, there must be justification for publication other than the fame, notoriety or position of its parents.

The Commission made clear that the Code extended to all children, including infants. However, it held that the subject matter of the item concerned not the child's private life but rather her parents' behaviour.

The Mail on Sunday

The Commission dismissed a complaint by an unidentified, 'well known entertainer' against *The Mail on Sunday*.³⁷ The item explained that she was determined to protect her child's privacy. It was accompanied by two photographs (one aerial) of her country home and referred to her flat in London.

The complainant contended that the article breached Clause 3 of the Code, which provides that 'everyone is entitled to respect for his or her private and family life, home, health and correspondence', and that the 'use of long lens photography to take pictures of people in private places without their consent is unacceptable'. She also claimed that *The Mail on Sunday* had breached Clause 6.

The Commission accepted that the newspaper had complied with earlier guidance that, when publishing details of a celebrity's home without consent, newspapers must not publish details by which the property could be located. As a general rule, pictures of houses alone would not breach the owner's privacy, particularly where — as in this case — no people were included in the photograph.

³⁶ See <www.pcc.org.uk/reports>.

³⁷ Ibid.

[67] On the subject of the child's privacy, the Commission reiterated its determination to protect the privacy of vulnerable people, including young children. However, it did not consider that the material published inherently concerned the child's private life. Furthermore, the mere comment that the complainant had a child could not breach the mother's privacy, since this was a matter of record.

OK!

In December 2000, the Commission ruled that *OK!* was guilty of harassment and breach of privacy when it published telephoto pictures of Prince William in a South American jungle during his gap year.³⁸ The complaint was brought by Prince Charles.

The Commission dismissed the argument that the pictures had been taken in a public place. It ruled that the photographs had clearly been obtained in a situation where Prince William could reasonably have expected privacy. Furthermore, the photographers had been guilty of harassment or persistent pursuit — indeed the pictures could *only* have been taken by people who had pursued the prince in South America.

This was the first time that the Commission has considered the guidance issued in June by the Commission, on how the press should treat the young prince in the years to come.

BROADCASTING

BBC permitted to name Omagh bombing suspects

On 6 October 2000, the High Court in Northern Ireland refused to injunct the BBC from naming on *Panorama* three suspected participants in the Omagh bombing.³⁹ The husband of one of the victims had sought an injunction to prevent the broadcast, arguing that it would hinder police investigations and prejudice any future trial of the suspects. He also argued that the *victims* of crimes were protected by Art 6 of the *European Convention on Human Rights* (which protects the right to a fair trial). Kerr J rejected these pleas and held that, under the Convention, now incorporated into

³⁸ See <www.pcc.org.uk>.

³⁹ The *Guardian* (London) 10 October 2000.

domestic law by the *Human Rights Act 1998*, the balance fell firmly in favour of the BBC as broadcaster.

ITC Code on television sponsorship

The ITC has published a new Code on television sponsorship.⁴⁰ For the first time, television sponsors will be able to include their contact details in program credits, provided they do not do so in such a way as to encourage viewers to purchase a product or to contact the sponsor. Sponsors may only sponsor programs in which they have had no creative input.

Under the revised Code, it will still not be permissible to sponsor news, current affairs programs or consumer advice programs, although the sponsorship of business and finance programs will no longer automatically be precluded.

BSC rejects complaint

The Broadcasting Standards Commission rejected two complaints about graphic descriptions of infanticide, sadism, rape and other violent acts in a BBC Radio 4 program.⁴¹ Before transmission (during the afternoon) of *Ovid Metamorphosed: [68] Antiquity's Lust*, the presenter warned that the program dealt with one of the most brutal and disturbing of the classical myths. The Commission held that, whilst these events might not be to everyone's taste, the subject matter had been dealt with responsibly and within the acceptable boundaries for an adult, cultural program.

White Paper on Communications

In November 2000, the Government produced for consultation a White Paper on Communications.⁴² This sets out proposals to regulate the various sectors of the communications industry in the light of their gradual convergence.

The Government wishes to keep regulation as light and up to date as possible, whilst ensuring that any regulatory body has sufficient 'teeth' to protect the interests of consumers and newcomers to the market. It proposes to establish a new industry

⁴⁰ See <www.itc.org.uk>.

⁴¹ See <www.bsc.org.uk>.

⁴² See <www.communicationswhitepaper.gov.uk>.

'super-regulator', OFCOM, to regulate competition and content of television, radio and telecommunications. It will replace the existing regulators (the Radio Authority, Broadcasting Standards Commission, Radiocommunications Agency, Independent Television Commission and OFTEL). For the first time, the BBC will come under scrutiny by an outside regulator.

OFCEM will be in charge of licensing and enforcement and will have concurrent powers with the Office of Fair Trading to exercise *Competition Act* powers for the communications sector. The government also intends to relax the current cross-media ownership rules.