

UK MEDIA LAW UPDATE
DEFAMATION AND OTHER RECENT ISSUES
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Qualified Privilege

Loutchansky v Times Newspapers

[75] This notable case made headlines again when *The Times* appealed² against the decision of Gray J. The Court of Appeal held that the judge had imposed too stringent a standard in applying the so-called 'duty-interest' test in relation to the defence of qualified privilege. Although the judge had correctly identified the proper test as being the *Reynolds* duty-interest test, he had applied the wrong standard. The interest was that of the public in a modern democracy in free expression and the need to promote a vigorous press to keep the public informed. The corresponding duty on the newspaper was to play a proper and responsible role in discharging that function. The Court held that if qualified privilege does arise, it is a complete defence which would pre-empt a finding of malice.

However, *The Times* failed to overturn the judgment on the question of online publication. The Court upheld the ruling of Gray J that an article held in an online archive is effectively republished every time it is accessed online. Further the Court held, on the issue of damages, as s 8 of the *Defamation Act 1996* enabled a judge to deal with small claims summarily, there was no reason why that procedure should not be available in a suitable case for determining quantum alone, once liability had been established.

One consequence of this decision seems to be that the burden of proof on the issue of malice in the context of qualified privilege has effectively been reversed. Since the defendant has the burden of proving that his conduct was responsible, he could be obliged to take on the burden of disproving malice. Although the Court of Appeal refused *The Times* leave to appeal, the newspaper has expressed its intention to apply to the House of Lords for permission to appeal.

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Al-Fagih v HH Saudi Research and Marketing (UK)

In this important decision,³ the Court of Appeal clarified the scope of the qualified privilege defence when reporting on political controversies. Mr Al-Fagih brought libel [76] proceedings against the defendant newspaper, which is part owned by the Saudi Arabian royal family and which is generally supportive of the Saudi Arabian government. The newspaper had published an article alleging that a political colleague of Al-Fagih's had told it that Al-Fagih had spread malicious rumours about him and had accused his mother of procuring women for sexual intercourse.

The newspaper, among other defences, claimed qualified privilege, arguing that these were serious allegations and it was a matter of public importance that the dispute be reported, provided that this was done fairly and accurately giving both parties an opportunity to explain. At first instance, the judge rejected the defence of qualified privilege, relying on a lack of verification and the fact that the potential harm to the claimant outweighed the public interest in publication.

Before the Court of Appeal, the newspaper argued that the disinterested reporting of a political dispute should more readily attract qualified privilege than an article in which the newspaper made allegations of its own. A majority of the Court, allowing the appeal, noted that although verification of a third party's allegations would usually be necessary if a defence of qualified privilege is to succeed, circumstances can arise where the public is entitled to be informed of a political dispute which is being fairly reported even though verification had not been sought. In this case, the failure to verify did not outweigh the public interest in publication. This case is to be welcomed by the media as it shows the Court of Appeal applying the defence of qualified privilege flexibly according to the circumstances of the case.

Fair comment defence

Branson v Bowyer

Sir Richard Branson brought a defamation claim over an article carried in *The Evening Standard* in December 1999.⁴ He claimed that the article implied, amongst

² [2001] EWCA Civ 1805.

³ [2001] EWCA Civ 1634.

⁴ [2001] EMLR 33.

other things, that his bid to run the National Lottery was motivated by financial self-interest and that he was acting hypocritically by seeking to use the lottery to promote his company's Virgin brand. The defendant pleaded the defence of fair comment and sought summary judgment on the basis that Branson was unable to establish that he (the defendant) had acted with malice. The critical issue before the court was the meaning of fair comment. Branson argued that, in order for opinion to be fair comment, those views must satisfy a test of fairness — in other words, could a 'fair-minded man' honestly hold those views?

The Court decided that a test of fairness had no role in the fair comment defence, which exists to protect expressions of genuine opinion on matters of public interest. The defence is open to a prejudiced, obstinate commentator, so long as their views are honestly held. Any requirement that the views be reasonable or fair would create great uncertainty. More importantly, it would unacceptably inhibit the freedom to comment on public events. In this case, the court found that the opinions were clearly capable of being honestly held. Sir Richard could still succeed, but he would need to establish that Mr Bowyer did not in fact honestly hold the views which he had expressed.

Freezing orders

Hamilton v Milroy-Sloan

Mr and Mrs Hamilton sought an asset freezing order against the defendant to a libel claim they were pursuing.⁵ The defendant had claimed the couple had sexually assaulted her and was of very limited means. She and her parents had entered into an agreement with the *News of the World* to give an interview. The defendant was paid £5000 immediately and a further sum £45,000 was to be paid to her parents, of which the defendant was to receive half. The defendant spent the £5000 paid to her within [77] 10 days. On an application made to the court without notice, an asset freezing order was made. When the order came before the court for renewal, the defendant argued that it should be set aside as no real risk of unjustifiable dissipation had been shown.

⁵ Unreported 30 August 2001, QDD.

The Court ruled that the order should continue. First, there was a good arguable case against the defendant. Whilst the fact that the defendant had spent the first payment of £5,000 in ten days did not in itself establish a real risk of unjustifiable dissipation, in all the circumstances, it was just and convenient for the order to continue. However, the ruling may be of limited benefit to the Hamiltons. The defendant asserted that her half share of the £45,000 would be held on trust for the education of her children. Provided that that share of the outstanding sum is indeed held on trust to this end, the asset freezing order will not affect that money.

Public interest defence to copyright

Ashdown v Telegraph Group

The Telegraph Group Ltd appealed against an injunction to prevent further publication of substantial quotations from a confidential minute belonging to Paddy Ashdown of a meeting between himself, Tony Blair and other political figures at which a possible cabinet coalition was discussed.⁶ One of its arguments was that its right to freedom of expression under art 10 of the *European Convention on Human Rights* was infringed by the injunction. The Court of Appeal was not persuaded and said that freedom of expression should not normally carry with it the right to make free use of another's work. Accordingly there might have been justification for the publication of the content of the minute, but there was no justification for the extent of the reproduction of Ashdown's own words. However, the Court of Appeal did note that the public interest in information being published could, in very rare circumstances, be a defence to a claim for copyright infringement, as recognised by s 171 (3) of the *Copyright, Designs and Patents Act 1998*.

Privacy and Harassment

Thomas v News Group Newspapers

The Court of Appeal has held that people who suffer alarm or distress through articles published by the media may in some circumstances be able to sue for harassment. In July last year, *The Sun* published an article criticising Esther Thomas, a police clerk, for having brought complaints against police officers about their treatment of an asylum seeker. The article, which described Thomas as a 'black clerk', blamed her for

⁶ [2001] EWCA Civ 1142.

the demotion of two officers and for the fine imposed on a third. Readers' letters were published attacking Thomas' actions and readers were invited to contribute to a fund to pay the fine. Thomas claimed she received racist hate mail as a result and brought proceedings against *The Sun*,⁷ relying on s 1 of the *Protection from Harassment Act 1997*. The Act was primarily intended to combat stalkers, but it is generally accepted that it can also be used against the media where, for example, a journalist repeatedly doorsteps someone. Thomas' claim was groundbreaking because she did not complain of direct, physical harassment but of articles published in a newspaper. *The Sun* applied to strike out the claim but failed, the judge ruling that Thomas had made out an arguable case. *The Sun* appealed to [78] the Court of Appeal.

The Sun conceded that the *Protection from Harassment Act* went further than just addressing stalking and that it was in theory possible for a newspaper to be liable for harassment through publishing articles. However, it contended that the wide interpretation given at first instance was incompatible with the right to freedom of expression. The appeal was rejected. Although the rights of the media should not be interfered with lightly, harassment in the *Protection from Harassment Act* should not be given a restrictive meaning. The Court of Appeal stressed that it was the effect on the victim which defined harassment, not the form of the conduct and therefore ruled that Ms Thomas did have an arguable case as the tone of the articles, particularly the reference to her colour, was unreasonable and it was foreseeable that readers would send racist hate mail as a result.

Enforcing the Editors' Code through court action

The Press Complaints Commission Code of Practice (the PCC Code) imposes a variety of standards which newspapers and their journalists are expected to meet. A claim recently issued by actress Amanda Holden illustrates a novel approach towards its enforcement.⁸ Photographs of Amanda Holden appeared in the *Daily Star*, together with a promise that further, similar photographs would be published the following day. Holden declined the traditional step of a complaint to the PCC. Instead she went immediately to court, arguing that her right to privacy had been and would be breached under the *Human Rights Act 1998*. As the case involved the balancing of an

⁷ [2001] EWCA Civ 1233.

individual's right to privacy against freedom of expression, s 12 of the Act required the court to take account of 'any relevant privacy code' such as the PCC Code. The court awarded an interim injunction preventing further publication pending a full hearing.

Several points emerge from this, although it is important to remember that this is an innovative case in its early stages. First, it is clear that the Code now enjoys a special status, although it is not afforded the force of law. A court will not treat compliance with, or breach of, the Code as determinative of whether an individual's legal right of privacy has been infringed. However, it must take the Code into account and it will be harder for a newspaper to justify conduct which is not in compliance.

This highlights many of the perceived deficiencies of complaints to the PCC, including the lack of remedies and may make legal proceedings attractive. Nevertheless, complaints to the PCC will remain the appropriate route in the majority of cases, being far cheaper and speedier than litigation.

J K Rowling

The PCC has upheld a complaint by J K Rowling, author of the Harry Potter books, that photographs published by *OK!* magazine taken by long lens of herself, her partner and her daughter, in swimwear on a beach in Mauritius breached cls 3 and 6 of the Code. Clause 3 enshrines the right to respect for one's private and family life and prohibits long lens photography to take pictures of people when they have a 'reasonable expectation of privacy'. Clause 6 precludes journalists from photographing children under the age of 16 on subjects involving the welfare of the child without the parent's consent. Furthermore, if material about a child's private life is published, there must be justification for publication other than his (or his parents') fame or position. The PCC accepted that Ms Rowling had gone to considerable lengths to protect her daughter's privacy, illustrated by her choice of a holiday during the low season on a beach which was not overlooked by other properties. It is

⁸ *Holden v Express Newspapers* (unreported, Eady J, QBD, 7 June 2001).

interesting to compare this decision with that involving newscaster, Anna Ford where the PCC rejected a complaint where Mrs Ford was photographed on a public beach.⁹

[79] **Confidentiality**

In a significant ruling on the law of confidentiality,¹⁰ the High Court ruled that details of sexual activities between two persons can be subject to a duty of confidence, even in the absence of any express agreement. A newspaper intended to publish articles about a married professional footballer which contained details of his alleged infidelities. Jack J, granting an injunction preventing publication of the articles, was satisfied that the information had the necessary quality of confidence about it and was imparted in circumstances importing an obligation of confidence. Further, he held that the law of confidentiality should protect facts concerning sexual relations both within and outside marriage, although the extent of its protection would depend on the circumstances of each case.

The judge did not believe that there was any public interest in publishing the confidential information. The case has been condemned by the media as a 'love rat's' charter. The wider effects of this decision are yet to be seen. There is concern that newspapers will now be prevented from exposing, for example, the extra-marital affairs of politicians. However, if they advocate in public the importance of family values, the public interest defence should still allow publication, overriding any obligation of confidentiality.

Contempt

Attorney General v Greater Manchester Newspapers

The Manchester Evening News has been found guilty of contempt of court for publishing information concerning the whereabouts of Robert Thompson and Jon Venables, the killers of James Bulger, and has been fined £30,000.¹¹ Dame Elizabeth Butler-Sloss, held that the article had breached her earlier injunction prohibiting the disclosure of 'any information likely to lead to the identification of the past, present or future whereabouts' of Thompson or Venables. In its defence, the company argued

⁹ See UK Media Law Update (2001) 3 *Media & Arts Law Review* 238.

¹⁰ *A v B Plc and Anor*, *The Times*, 2 November 2001.

¹¹ *The Times*, 4 December 2001.

that it was not likely that the disclosure would lead to the identification of either Thompson or Venables and that the information disclosed had been contained in a government publication, including a website, before the injunction was granted and therefore the information was in the public domain.

Dame Elizabeth said that the meaning of the word 'likely' in the injunction depended on the context in which it was used. In the context of protecting lives and personal safety, the word was to be equated with the real risk, danger or chance that it might lead to that dangerous situation. The article in question did create such a possibility. Further, although the government publication was available in public libraries and, therefore, was accessible to the public, it was of a detailed, statistical nature and very few people would have been aware of it. Accordingly, it could not be said to be in the public domain. Similarly, access to the information on the website was only theoretical and could not be said to be accessible to the public. Thus, the company was in breach of the injunction and in doing so had committed a significant contempt of court. The company is reported to be considering an appeal and would seem to have an arguable case, particularly in relation to the issue of public domain.

Other notable cases

ITC and BSC rule on Channel 4's Brass Eye programme

On 6 September 2001, both the Independent Television Commission (ITC) and the Broadcasting Standards Commission (BSC) published their findings on [80] complaints about Channel 4's *Brass Eye* programme. The programme, which included the use of child actors to satirise media coverage of paedophilia, attracted over 1000 complaints in total (but also 750 letters of praise).

The ITC acknowledged that Channel 4 had a special role in public broadcasting, which entitled it to produce challenging and sometimes disturbing material. However, the ITC found that the programme breached s 1.1 of the Program Code, (the Code) which deals with offence to public feeling and s 1.3 of the Code, which requires 'clear and specific warnings ... where there is the likelihood that some viewers may find the programme disturbing or offensive'. The pre-screening warning had said:

Now on 4, a *Brass Eye* Special which takes an uncompromising look at the subject of paedophilia. This programme contains scenes which some viewers might find disturbing.

The combination of the scheduling, warning and opening scenes had, in the ITC's view, caused an unnecessary degree of offence to many people. The ITC directed Channel 4 to broadcast an apology for the offence caused, but accepted that the broadcaster had carefully considered programme and had neither negligently nor wilfully disregarded the Code. Channel 4 broadcast an apology at 10pm on 20 September 2001.

The BSC said that the *Brass Eye* programme had provoked the most extensive discussions it had ever undertaken. However, it found that the cumulative effect of the scenes involving children in a sexual context had generated a level of offence and distress to the viewing audience, which outweighed the public interest purpose of the programme. The BSC therefore, upheld the complaints.

Both Commissions dismissed complaints that the children in the programme had suffered or been put at risk in its making.