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UK MEDIA LAW UPDATE

RECENT DEVELOPMENTS

JENNIFER MCDERMOTT[1]

Defamation

MacIntyre v Chief Constable of Kent

[51] The claimant in this case[2] was an investigative reporter for the BBC. He presented a program on a care home which criticised the treatment of its residents. After the program had been broadcast, the defendant police force carried out an investigation into conditions at the care home, during which they viewed film footage which the BBC had secretly recorded at the home. A report about the conditions was then published by the defendant police force, which criticised the portrayal of conditions in the home in the program. Parts of the report were also published in the *Sunday Telegraph*.

The claimant alleged that these publications all implied that the BBC program had deliberately misled the public. The defendants claimed qualified privilege and argued that a rule of practice existed whereby issues of qualified privilege should be heard in advance of the main trial. Mr Justice Gray rejected the defendants' application for a ruling to this effect and the defendants appealed.

The Court of Appeal held that there was no rule of practice whereby issues of qualified privilege should be heard in advance of the main trial in a defamation action. Nothing in the authorities should be interpreted as removing the discretion of a trial judge to give the directions he considered appropriate at a case management conference. In this case, it could not be said that the judge had been wrong to refuse the suggested preliminary trial on qualified privilege.

In recent years, there have been a number of occasions where issues have been tried in libel actions in advance of the main trial, particularly where determining the issue may dispose of the whole action without the need for a lengthy trial. However, whilst attractive at first sight, such preliminary issues can prove to be 'treacherous shortcuts

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[1] And assistant solicitors, Lovells, London.

[2] [2002] EWCA Civ 1087 (24 July 2002).

… [resulting in] delay, anxiety, and expense' in the words of Lord Scarman in *Tilling* [52] *v Whiteman*.[3] This decision demonstrates that the court will consider each case on its merits and will actively consider whether ordering an issue to be tried at a preliminary stage will in fact assist in disposing of the proceedings fairly.

Bonnick v Morris

In this decision[4] the Privy Council considered the common law defence of qualified privilege and the application of the *Reynolds* test in relation to the standard of responsible journalism.[5]

The appellant was the former managing director of JCTC, a government-owned company which had a monopoly over the import of basic foods into Jamaica. In 1990 JCTC entered into two contracts for the supply of milk powder from a Belgian company. The appellant left JCTC shortly before the second contract was concluded. In August 1991, JCTC sued the Belgian company for breach of contract and on 19 April 1992 an article appeared in the *Sunday Gleaner* entitled 'JCTC sues Belgian milk company'. The appellant commenced proceedings for defamation against the journalist who wrote the article, the publisher of the newspaper and its editor. The article, according to the appellant, suggested that he had been dismissed following a contractual dispute with the Belgian supplier and owing to certain irregularities with the contracts.

The appellant won at first instance, but lost in the Court of Appeal of Jamaica, which held that the article was not defamatory of the appellant and that, in any event, the defendant had a defence of qualified privilege. He then appealed to the Privy Council on the questions of meaning and qualified privilege. The Privy Council dismissed the appeal.

On the issue of qualified privilege, the Privy Council held that the article was a piece of responsible journalism to which the defence of qualified privilege applied. First, the activities and management of JCTC were a matter of public concern, as was the

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[3] [1980] AC 1, 25.
[4] [2002] UKPC 31 (17 June 2002).
[5] See *Reynolds v Times Newspapers* [2001] 2 AC 127.

appellant's departure from the company. The defamatory imputation arose by implication and was not high on a scale of gravity. The defamatory meaning of the words used 'was not so glaringly obvious that any reasonable journalist would be bound to realise that the ordinary reader would understand the article in that way' and it would be inappropriate to judge the conduct of the journalist or newspaper against a 'single meaning' of the words when different interpretations were available.

Their Lordships did, however, give a warning that 'this should not be pressed too far'. Where questions of defamation may arise, ambiguity is best avoided as much as possible. Ambiguity should not be a screen behind which a journalist is to be 'willing to wound and yet afraid to strike'.

The ruling suggests that, when judging whether a journalist has acted responsibly, it establishes that the court may consider several possible meanings attributed to an allegedly defamatory article. However, the other side of the coin is that a journalist has a duty to consider how the ordinary, reasonable reader will perceive the article in question. If it is obvious that the words will be interpreted in a certain way, a journalist may not be afforded the protection of the *Reynolds* privilege, which was designed to safeguard 'responsible journalism in matters of public concern'.

Kearns v General Council of the Bar

The claimants, a firm of solicitors, issued libel proceedings over a letter sent by the Bar Council to heads of chambers, senior clerks and practice managers which contained guidance on the acceptance of instructions from the claimants. The recipients of the latter were advised that the claimants were not entitled directly to instruct counsel. It later emerged that this was incorrect and the Bar Council amended the letter, which it distributed, together with an apology, to the recipients of the original letter. The [53] claimants alleged that the first letter was defamatory and commenced proceedings for libel. The Bar Council applied for summary judgment on the grounds that the letter was subject to qualified privilege.

The court granted summary judgment.[6] It held that there existed a long established policy regarding qualified privilege to protect communications between persons in certain positions. Where both publisher and recipient of the information shared a common and corresponding interest, that communication attracted qualified privilege, unless the publication was malicious.

Lillie v Newcastle City Council

The claimants were Dawn Reed, 31, and Christopher Lillie, 37, former nursery nurses. They were accused of sexually assaulting children in their care but were acquitted at trial. Newcastle City Council (their employer) conducted its own investigation into events at the nursery and appointed a review team to investigate the events. The review team published a report to the local authority, containing serious allegations against the claimants: that they had abused a very great number of children at the nursery and elsewhere; that they were members of a paedophile ring and had used their position to procure children for rape and abuse and for use in the making of pornographic films; that they had injected children with drugs to be able more easily to assault them sexually; that they had terrorised children in their care into submission and silence; and that they were suspected of physical and sexual abuse of elderly people whose care had been entrusted to them.

The local authority published the report widely. As a result, the claimants were forced to flee their homes amid media appeals 'to help us find these fiends'. The claimants issued proceedings in libel against both the local authority and the review team. The defendants claimed that the publication was protected by qualified privilege. The review team further pleaded that the allegations contained in the report were true.

Sitting without a jury, Mr Justice Eady ruled that the allegations of child abuse were untrue.[7] He inferred from the number and pattern of false claims that the review team had known the allegations to be untrue and had acted maliciously in publishing the report. Whilst prima facie the review team's publication was protected by qualified privilege on the basis that the team was contractually obliged to report its findings to

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[6] [2002] EWHC 1681 (QB) (26 July 2002).
[7] [2002] EWHC Civ 1600 (30 July 2002).

the local authority, it was settled law that this defence was not available where the defendants had acted maliciously.

In the case of the local authority, Mr Justice Eady ruled they had had an obligation to inform the public. As no malice was established on its part, publication of the report by the local authority was protected by qualified privilege.

The allegations made were sufficiently serious for the claimants to merit the highest permitted level of award: each was to receive £200,000 by way of general damages. The review team also had to pay costs estimated at £2 million.

The Association of Directors of Social Services has stated that it fears that the decision may lead to councils limiting the publication of reports about serious complaints, leading to less open and accountable local government.

Campbell v Newsgroup Newspapers

In July 2002, the Court of Appeal reduced the amount of damages awarded to Mr Campbell in an action for libel and slander. The claimant, who represented himself at trial, sued a newspaper publisher and editor over an article which alleged [54] that he was a paedophile. The claim was successful and the jury ordered the defendants to pay damages of £350,000. The defendants appealed against the level of damages awarded, arguing that the judge did not properly direct the jury as to the complexity of the case or put the defence case to them with adequate care.

The appeal was allowed.[8] The judge at first instance, whilst trying to deal with time constraints and strike a balance between the claimant litigant in person and the defendants' legal team, had taken a broad brush approach to presenting to the jury the claimant's frequently changing case. The Court of Appeal held that, as a result, the defence case had not been fairly presented. Although the usual course following such a ruling would be to remit the case to the trial judge, the parties asked instead for the court to substitute the award with a more appropriate figure.

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[8] [2002] EWCA Civ 1143 (31 July 2002).

This decision contrasts with an earlier Court of Appeal decision in *Kiam v MGN*.[9] In *Kiam*, the court refused to reduce an award of £105,000 damages on the grounds that a jury's award should only be interfered with if it was more than that which any reasonable jury would have thought necessary to compensate the claimant and to re-establish his reputation. The fact that the award exceeded the upper limit given by the judge in his guidance to the jury was irrelevant. Further, the Court of Appeal said in *Kiam* that, where a jury's award is set aside, the court should substitute it with an award that was at the upper end of what is reasonable in order, insofar as possible, to give effect to the intentions of the jury.

The decision in *Campbell v Newsgroup Newspapers* may offer some comfort to the media, demonstrating that where a jury has given a high award seemingly as a result of how the trial judge presented the defence case, the Court of Appeal will reduce the award to a figure which it considers to be more appropriate.

McManus v Beckham

The Court of Appeal has held that Victoria Beckham will face trial for slander for alleging that a memorabilia shop, *GT's Recollections*, had been selling fake autographs of her husband, David Beckham.[10]

The shop's owners claim that Mrs Beckham made the alleged accusations in a 'loud and rude' manner in front of other customers. Mrs Beckham's comments later appeared in the press, which the shop's owners claim damaged their business. They seek damages of £500,000 from Mrs Beckham for slander and malicious falsehood.

The High Court had earlier struck out parts of the claim after His Honour John Previte QC held that it was not reasonably foreseeable to Mrs Beckham that her comments would be repeated or reported in the press. However, Lord Justice Waller in the Court of Appeal ruled that if a celebrity is aware 'that what she says or does is likely to be reported, and that a slander is likely to be repeated, there is no injustice in her being held responsible for the damage the slander causes'.

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[9] [2002] EWCA Civ 43 (28 January 2002).
[10] [2002] EWCA Civ 939 (4 July 2002).

This case establishes that celebrities can be liable for repetition by the media whether or not they actually intended their comments to be reported. The decision effectively impinges on a celebrity's freedom of expression as, unlike ordinary members of the public, even a throwaway comment might be picked up by the press, giving rise to substantial liabilities. An interesting question is whether the position would have been different if the defendant had been someone who, whilst a public figure, was not someone who courted publicity.

McVicar v United Kingdom

The applicant in the European Court of Human Rights wrote an article alleging that Linford Christie used performance enhancing drugs. Christie sued for libel. The applicant represented himself in the [55] subsequent court proceedings as legal aid was not available for defamation actions. At trial, the applicant's defence of justification was unsuccessful and he was enjoined from making further allegations.

The applicant complained to the European Court of Human Rights contending that the unavailability of legal aid in defamation proceedings violated his right of access under art 6 of the *European Convention on Human Rights*. He also argued that the unavailability of legal aid and burden of proof which he faced in proving justification violated his right to freedom of expression under art 10 of the Convention.

The European Court of Human Rights held that whether art 6 required the provision of legal representation would depend on the specific circumstances of the case, particularly whether an individual could present his case satisfactorily without the help of a lawyer. In the circumstances, the lack of legal aid and the burden of proof on the defendant in defamation proceedings did not deprive the applicant of a fair trial. The law of defamation was not sufficiently complex to require the applicant to have legal assistance as the outcome of the action would turn on the simple question of whether or not the applicant could show that the allegations were true. The applicant was a well-educated and experienced journalist who was perfectly capable of forming a cogent argument. The applicant was not prevented from presenting his defence to

the defamation action effectively in the High Court and there was therefore no interference with his right to freedom of expression under art 10.[11]

Broadcasting — Major Report on the Public Interest and Media Privacy

Researchers at the University of Leeds have published a major report on the public's attitude to privacy, the public interest and media intrusion.[12] More than a thousand individuals, eight focus groups and various media professionals were asked for their views. The majority stated that they favoured clear limits to media intrusion into people's private lives. In addition, an overwhelming majority (91 per cent) of those consulted felt that children had a 'virtually inviolable' right to privacy and that the media should not impinge on a child's life, whoever that child was and whatever he or she had done.

Other findings include the following:

(a) 54 per cent accept that the media must sometimes ignore people's privacy in order to report on important issues;
(b) expectations of privacy depend on the context, that is they would vary according, for example, to whether the subject was at home or in a shopping precinct;
(c) people have a duty to behave in a manner appropriate to the place they are in;
(d) 90 per cent believed that CCTV was helpful in protecting against crime in public spaces but many were uncomfortable at the prospect of being under constant surveillance;
(e) 'the public interest' is a well recognised concept, if difficult to define, although it is clear that an issue usually has to impact on large numbers of people for it to be in the public interest;
(f) the higher the degree of public interest, the greater the degree of intrusion that the public would accept — as a general rule, surreptitious gathering of [56] information is not acceptable;
(g) certain information, for example about crime or health or publicly funded institutions, is deemed to be publicly owned;
(h) there should be clear parameters around what the media can do in the name of serving the public interest;

[11] (European Court of Human Rights, application number 46311/99, 7 May 2002).
[12] David E Morrison and Michael Svennevig, *The Public Interest, the Media and Privacy* (March 2002). The report was prepared for the following organizations: British Broadcasting Corporation, Broadcasting Standards Commission, Independent Committee for the Supervision of Standards of Telephone Information Services, Independent Television Commission, Institute for Public Policy Research, and the Radio Authority. It is available as a pdf from their websites.

(i) whilst the public rely heavily on the media for information, and feel that it does a good job in informing them, most distrust the motives of the media (particularly the tabloid press), believing that it is driven by circulation figures;
(j) the media often deliberately sensationalise stories, and
(k) there is considerable distaste for invasive media conduct, particularly where it affects children or other family members or where it involves surveillance or illicit attempts to access private information.

Double Jeopardy and Contempt

The Leeds footballer, Lee Bowyer, is reportedly considering a claim against the *Sunday Mirror* to recover legal costs which he claims were wasted when a prejudicial report in the newspaper caused the collapse of a criminal trial in which he was a defendant.

The newspaper has already been fined £75,000 for contempt, plus the costs of the contempt proceedings. However, the amount of the fine did not include any compensatory element. Despite a general trend in the criminal justice system towards making offenders accountable for the consequences of their acts, the English courts have to date held that it is not appropriate to punish contemnors by ordering them to pay the costs thrown away as a result of aborted proceedings.

One reason may be that (as in the case of the *Sunday Mirror*) a media organisation may be found guilty of contempt under the 'strict liability rule', regardless of its intention. Some may think it unfair for a newspaper publisher or broadcaster to be ordered to pay what may amount to a very substantial sum as compensation for a contempt which it did not intend to commit.

The Criminal Injuries Compensation Authority in the UK administers a Government-funded tariff-based scheme of compensation for the victims of crime, but it covers only physical and/or mental injury directly resulting from a crime of violence.

It seems in the circumstances that, if Mr Bowyer is to obtain the reparation which he seeks, his only avenue of recourse is by way of a privately-funded civil claim for damages against the newspaper. Although such a claim would be unprecedented in

this country, there is some judicial pronouncement both here and elsewhere in the Commonwealth which suggests that he may have a chance of success.

In 1983 Mr Justice (now Lord) Mustill held that it was at least arguable that there exists a civil cause of action to recover damages for an act constituting a contempt of court. More recently, the New South Wales Court of Appeal has held that it was open to argue that, by analogy with the existing tort of abuse of the process, the law recognises an action to recover damages for loss occasioned to a defendant by a criminal contempt of court occasioning the need for a pending trial to be aborted.

While there will inevitably be difficulties with such a claim, not least in establishing a sufficiently culpable state of mind on the part of the contemnor, media organisations would be well-advised to take seriously the proposition that a contemptuous publication places them at risk of successful proceedings not only at the instigation of the Attorney-General but additionally (and probably more expensively) at the hands of the innocent ‘victims’ of their criminal act.

Complaints to the Press Complaints Commission

Daily Mirror

Steve Bing, alleged by Elizabeth Hurley to be the father of her child, complained to the Press Complaints Commission (PCC) about an article in the *Daily Mirror*. Mr Bing denied paternity, but the newspaper openly disputed his version of events and criticised his ‘cruel’ conduct and the way that he [57] had ‘turned his back’ on the actress. The *Daily Mirror* invited any readers who thought Mr Bing ‘a bigger cad than James Hewitt’ to telephone his office to tell him so, including in this invitation what it believed to be the main switchboard number of Mr Bing’s Los Angeles film company.

Mr Bing argued that publication of this number was an intrusion into his privacy, which had encouraged others to invade his privacy, with the result that he had received numerous crank and threatening phone calls.

The Commission dismissed the complaint. On the narrow issue of whether publication of Mr Bing’s office telephone number — and the encouraging of the newspaper’s readers to telephone it — was an intrusion into the complainant’s personal privacy,

the Commission noted that the number was available in various telephone directories. In addition, whilst the publication of a telephone number could breach cl 3 of the Commission's Code of Practice,[13] in this case, the number was not the complainant's personal number but that of his company's general switchboard. Indeed there was no evidence that Mr Bing had spoken to any of the callers himself. The fact that telephone operators may have been inconvenienced was not relevant to Mr Bing's privacy. In any event, the actions of individual *Mirror* readers were not a matter for consideration under the Code.

The Code had not been breached. The decision had been one within the editor's discretion, with which the Commission could not interfere.

By way of postscript, DNA tests have subsequently confirmed that Mr Bing is the father of Ms Hurley's child.

The Dorking Advertiser

A relatively trivial complaint has provoked useful PCC guidance on what constitutes a 'private place' under the Code. An individual, Hugh Tunbridge, complained about a photograph of him and his dining companion, which accompanied a review of a restaurant in the *Dorking Advertiser*, which had been taken without his consent. He argued that this amounted to harassment, in breach of cl 4 of the Code.

The PCC said that an important matter of principle was at stake. Clause 4 precluded the taking of photographs of individuals 'in private places without their consent'. Clause 3 defined private places as 'public or private property where there is a reasonable expectation of privacy'. Previous PCC rulings had made clear that there might be occasions where an individual could expect privacy, even in a place like a hotel which was accessible to the public. Mr Tunbridge had had a reasonable expectation that, when sitting in a quiet café, not easily visible from the street, he should not have to worry that surreptitious photographs would be taken of him and published in a newspaper. The complaint was therefore upheld.

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[13] It is available online at the Press Complaints Commission: <http://www.pcc.org.uk>.

The decision suggests that there are places such as hotels and restaurants which, although open to members of the public, are places where individuals may still have a reasonable expectation of privacy. Whilst individuals may have good reasons for preserving their privacy in such places, this decision presents practical difficulties for the press. Newspapers should ensure that they obtain the subject's express consent to publication, ideally before taking the photograph.

The Eastbourne Argus

This complaint provided the PCC with its first opportunity to apply cl 10 of the Code insofar as it relates to the treatment of children who witness or are victims of [58] crime, since it was revised in 1999.

Mr Andrew Hall complained that an article published by the Eastbourne Argus identified his daughter, who had witnessed the attempted kidnap of her friend by a man who warned them that if they involved the police he would come and 'get them'. The article included the child's name and part of her address. A reporter from the newspaper had spoken to Mr Hall's wife who was aware that an article was to be written but did not know that she was being interviewed or that details of the family address would be published. She stated that she would not have consented to the publication of these details which she had provided in the course of her discussion with the reporter.

The PCC upheld Mr Hall's complaint. Although the newspaper acted properly in speaking to the complainant's wife before publication, it did not appear that she had been told that the child's name and address would be printed. Clause 10 required particular regard to be paid to the vulnerable position of children who are witnesses to or victims of crime and in this instance the publication of the child's name and partial address had potentially put her in danger. Consequently, the newspaper had paid insufficient regard to her position.

The decision suggests that the PCC takes the view that a newspaper should obtain the explicit consent of a parent before publishing such details relating to children in circumstances where publication could put them in danger. The PCC emphasised that the protection of children is an essential part of the Code.

Broadcasting and Advertising Standards

TV political censorship not justified

Pro-Life, the political party opposed to legalised abortion, had prepared a party political broadcast for the 2001 general election. This included graphic footage of the abortion process and was rejected for transmission by the BBC on the grounds that it offended taste and decency. Pro-Life unsuccessfully applied to the Divisional Court for permission judicially to review the BBC's decision.

In the Court of Appeal, Pro-Life succeeded.[14] The Court was of the view that political expression, particularly at the time of a general election, was such an important form of expression that the courts should take steps to protect it. It would only be in the rarest of circumstances that a party political broadcast could be rejected on grounds of taste and decency. This was not such a case.

Advertising Standards Authority criticises 'blasphemous' sex show ads

Adverts showing a naked man lying on a bed with his arms outstretched above the words 'Lead me into temptation' appeared on poster sites and in *The Guardian* and *Metro* newspapers. The adverts were designed to promote the adult exhibition *Erotica 2001*.

The Advertising Standards Authority received letters of complaint from around fifty people who argued that the campaign was offensive to Christians. The organisers of *Erotica 2001* said that the advert was designed to appeal to open-minded women who had attended the show before and was designed to be stylish and fun. However, the ASA said that the advert was a parody of the crucifixion of Christ and that the image was unsuitable. The watchdog told the advertiser not to use the image again.

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[14] *Profile Alliance v British Broadcasting Corporation* [2002] EWCA Civ 297 (unreported, Simon Brown, Laws and Parker LJJ, 14 March 2002).