

A walk through the media maze of 2011

January 2012

Last year saw a tidal wave of stories and developments in the media law world, which few could have predicted 12 months before. The proposed new Defamation Act, which many would have expected to be the big media story of 2011, has barely raised a whimper, drowned out beneath the noise of the twin hurricanes, phone hacking and privacy injunctions.

Defamation up to date

In the Spring of 2011, the clamour to reform the laws of privacy and libel had reached fever pitch. The draft Defamation Bill consultation proposed a series of changes to protect media defendants such as the abolition of the recovery of success fees, the inclusion of a 'substantial harm' test for defamation and making it even more difficult for companies to sue for libel. Withers and other interested parties offered their responses to Parliament and the draft bill appeared in Autumn in substantively the same form.

Super injunctions take centre stage

The media-driven frenzy over 'super-injunctions' then became a full-frontal assault on the integrity of the English courts and their ability to make interim orders securing anonymity for claimants. Amidst misreporting and suggestions of a fresh 'chilling effect' on freedom of expression, a number of claimants, whom the High Court had judged to have an Article 8 right to a private life, were outed either in criminal defiance of the Contempt of Court Act on Twitter, or in reliance upon the rules of Parliamentary Privilege on the floor of the House of Commons.

Business as usual

The controversy, stoked by the tabloid media, highlighted a number of issues faced by media lawyers, such as protecting the integrity of court orders in a world where the flow of information is incessant, international and frequently anonymous. However subsequent events have come to show the media storm of last May in a different light. Most importantly, the courts have continued, perhaps unnoticed, quite rightly to apply the law of privacy. It is a little-reported, if little-known fact that the CTB v News Group injunction remains in place, preventing The Sun newspaper from disclosing private information about the claimant which is not already in the public domain. Many other injunctions, both super and anonymous, also remain in force. In December 2011, the High Court granted two further interim non-

disclosure orders to prevent the release of private information into the public domain. One of the orders, secured by the Withers Reputation Management Team, remains in place and highlights that after the media pack has moved on, the integrity of the law remains.

Media Misreporting

The misreporting which went on during the Spring was certainly painful reading for a media lawyer. All injunctions were described as super-injunctions, which are actually a very rare beast. Similarly the public was bombarded with the irrefutable conclusion that courts were bringing a privacy law in by the back door, ignoring the fact that the Human Rights Act 1998 was passed by Parliament and that it was readily acknowledged at the time that a right to privacy under the European Convention of Human Rights would now have to be considered in the courts.

Phone hacking

On a grander scale, the phone hacking affair exploded in July with the revelation that a private investigator working for the News of the World hacked the phone of murdered schoolgirl Millie Dowler. A tumultuous week ended with the closure of the newspaper after 168 years, high profile departures from News International and a continuing series of arrests in criminal proceedings. The affair exploded the myth that the media should be taken at its word in its ongoing campaigns against our current laws of libel and privacy, and the Leveson enquiry, whilst oddly-timed given the continuing police investigations, continues to unearth further unsavoury stories about the behaviour of the tabloid end of Fleet Street.

Media regulation

As Leveson continues the focus has turned to media regulation and the models which could work in the future. In November Withers hosted a seminar with Justice to debate the various proposed models of regulation and the firm is keen to take a constructive role in the ongoing debate to find the best compromise between the two extremes of statutory regulation and the wild west model of self regulation which has been so comprehensively discredited.

The future – is it bright?

As 2012 gears up, we forecast that changes will be afoot, but perhaps changes more predicted and predictable than they were in 2011. While the Justice Minister has indicated he is not persuaded by suggestions to bring in a Privacy Act, there will be a new Defamation Act, at the end of this year or beginning of the next. The Leveson Inquiry will make findings, but their extent and impact remain to be seen.

Meanwhile, the Withers Media and Reputation Management Team will continue to monitor all events in this field and will quietly yet effectively continue to protect the privacy, reputations and brands of our clients.

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