

LONGMAN LAW SERIES

Media Law: Text, Cases and Materials

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Media Law

Questions for discussion

1. Ofcom emphasised that the test for impartiality was based on transmission, not other efforts. It also noted that Bloomberg was a niche channel with a specialised audience (the business community) and the programme was unlikely to have been seen outside this audience. Is this a sensible response? Would it be feasible in relation to niche channels, for example, to make clear the efforts re invitations and then broadcast?
2. In a multichannel environment is it appropriate that the public should actually be denied access to information and opinion as Ofcom is suggesting in circumstances such as these?

Rules 6.2 and 6.3 emphasise that due weight must be given to the coverage of the major parties during an election period and to designated organisations during a referendum period. However, ‘broadcasters must also consider giving appropriate coverage to other parties and independent candidates with significant views and perspectives’ (rule 6.2). A similar obligation applies for referendums (rule 6.3). Broadcasters are also restricted in the broadcasting of other (non-political) programmes in which a candidate may appear. Unless the programme was planned or scheduled prior to the election or referendum period, no such programmes can be broadcast (rule 6.7). The BBC also covers obligations of impartiality during elections and referendums in the Editorial Guidelines (sections 4.4.24–4.4.28 and 10) and separate guidelines are issued for each election campaign. Both the Broadcasting Code and the Editorial Guidelines permit impartiality to be achieved over a range of programmes, although obviously the time frame may be tighter.

Extract 4.4.6

BBC, Editorial Guidelines, section 10.4.18

The way in which due impartiality is achieved between parties will vary, depending upon the format, output and platform. It may be done in a single item, a single programme, a series of programmes or items, or over the course of the campaign as a whole. But programme makers and content producers must take responsibility for achieving due impartiality in their own output and not rely on other BBC content or services to redress any imbalance for them.

However, on some occasions, the programme itself may be regarded of such significance that impartiality cannot be achieved. In 1995, during a Scottish local election period, the BBC planned to broadcast an interview with the then Prime Minister, John Major, on *Panorama*. The broadcast would have occurred three days before the election. The interdict (injunction), which prevented the broadcast in Scotland until the close of the polls, was obtained only a few hours before the programme was due to be broadcast.⁴⁹

Source: © 2010 BBC.

The following discussion by Munro provides a good overview of the issues.

⁴⁹ An appeal was dismissed only half an hour before the programme was due to be broadcast. The following day, leave to appeal to the House of Lords was refused: *Houston v British Broadcasting Corporation* 1995 SLT 1305.

Extract 4.4.7

C. Munro, 'The Banned Broadcasting Corporation' [1995] *New Law Journal* 518, 519–20 [footnotes omitted]

The circumstances

... For the pursuers, it was argued that an extended interview with the party leader on the BBC's flagship current affairs programme would give the Conservatives an advantage, when corresponding opportunities had not been made available to Messrs Blair and Ashdown. For the defenders, counsel tried to deny that a searching interview need be viewed as advantageous, and tried to deny that the subject matter would be very relevant to local elections, whereas the pursuers had argued that it was naïve to suggest that British political issues and local political issues were separable.

More generally, it was argued for the BBC that it was the *totality* of political coverage which fell to be considered, and that over time or over a series of programmes they would treat the political parties with due impartiality, as was always their aim.

However, the issue was crucially sharpened by the proximity of the local elections being held in Scotland on April 6, a few weeks ahead of elections in England . . .

Significantly, the BBC also appeared to have failed to make arrangements to afford equal or reasonable prominence to other party leaders in the run-up to the election . . .

Comment

Some caution is advisable, in case too much weight is given to the *Panorama* decision, which was, after all, only argued on an interim interdict basis, and hurriedly at that. That said, it needs to be remembered that applications for interim interdicts or injunctions are very important in practice, because matters often need not or do not proceed beyond that stage.

So far as the media are concerned, restraints on publications are erosions of their freedom, even when the ban is temporary rather than permanent . . .

... One wonders if the Court of Session did not act rather precipitately in banning a single television programme of uncertain influence when, apart from other considerations, there was still a period of two clear days in which perceived imbalances or partiality might have been redressed. In the result, the courts have cast themselves in the role of censors, and their actions have formed an unattractive precedent. It is understandable that Mr Tony Hall (the BBC's Managing Director of News and Current Affairs) should regard the decision as an 'objector's charter', and that Mr Michael Grade (the chief executive of Channel 4) should fear that 'we are all going to be in the courts forever'.

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The suggestion that some margin of discretion may be applicable is arguably reflected in a matter that arose in the context of the 1997 General Election. During that campaign there was discussion about the possibility of a televised debate between the main party leaders. There were difficulties in reaching agreement about what would be fair between the parties, so the debate did not proceed.⁵⁰ However, before this became clear, the Scottish National Party, fearing that their party leader would not be included, commenced proceedings for an interdict to prevent the debate on the ground that it would infringe the impartiality rules. The application was dismissed by the Court of Session on the ground that the matter was hypothetical since no arrangements for the debate had been concluded. However, the Court did consider the responsibilities of impartiality.

⁵⁰ C. Munro, 'The 1997 General Election and Media Law' (1997) 2(5) *Communications Law* 166, 167.

Extract 4.4.8***Scottish National Party v Scottish Television plc and another*, 15 April 1997, LEXIS (Court of Session, Outer House)**

LORD EASSIE:

It might also be said indeed that an interview with one political spokesman must by definition involve partiality and that where several viewpoints obtain, a programme which gives scope to only some of them, will, in isolation, also be partial. For that very practical reason also it is in my view plain that in judging whether a licensee is observing due impartiality, particularly in the context of political broadcasting in an election campaign, it is the generality or entirety of the broadcasting output in the relevant field to which one must look, rather than to a single programme in isolation.

While the approach of the Court appears to be a practical one, it may limit the scope for parties to challenge decisions taken by broadcasters. As Munro has commented:

Once it is accepted that the obligation to preserve 'due impartiality' can only properly be judged across a range of programmes and over time, then there will in any event be difficulties in abstracting any particular programme or programmes, because there may always be others to put in the equation or additional or balancing programmes to be taken into account.⁵¹

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Questions for discussion

1. Do you agree with Munro that the Court acted precipitately?
2. Should it be a relevant consideration for the Court as Munro seems to suggest that the influence of the programme might be uncertain?
3. If the circumstances of the *Panorama* interview arose today, would such a ban be effective? How would a Court today be likely to decide?
4. Comparing the *Scottish National Party* and the *Panorama* cases, do they suggest that it may be easier to establish a case the nearer one comes to the election date?

Another factor broadcasters may have to consider in trying to preserve impartiality during election and referendum periods over a range of programmes is the position of the devolved nations. During the 2010 General Election campaign the Plaid Cymru party complained to Ofcom about its exclusion from the 'First Election Debate' broadcast on the ITV network across the United Kingdom.⁵² The debate had included the three major parties of the United Kingdom, the Conservative Party, the Labour Party, and the Liberal Democrats. Plaid Cymru argued that its exclusion meant that due impartiality had failed to be preserved and that for Welsh viewers the debate presented the election as a 'three horse race' whereas in Wales there were four major parties contesting the election.⁵³ Ofcom determined that the rules of impartiality did not require every party to be represented, rather only those parties which could properly be considered 'major parties across the UK as a whole'. The debate provided the public across the UK with an opportunity to hear from leaders who had a realistic prospect of forming the next UK government.⁵⁴ Further, Ofcom considered it relevant that the broadcaster notified

⁵¹ Ibid., 168.

⁵² Ofcom, *Decision of the Election Committee on a Due Impartiality Complaint Brought by the Plaid Cymru in relation to the 'First Election Debate'*, ITV1, 15 April 2010 (28 April 2010).

⁵³ Ibid., 2.

⁵⁴ Ibid., 6.

the audience in the devolved nations that there would be televised debates of the major parties in those nations, debating issues relevant to the devolved nations. The First Election Debate and the devolved debates were in Ofcom's view editorially linked within an appropriate time frame.⁵⁵

The requirements of due impartiality are also emphasised in relation to coverage of a constituency (or 'electoral area' for local government elections) during elections (rules 6.8–6.10). Once nominations have closed, a report or discussion on a constituency must include the names of all the candidates (rule 6.11). Although the broadcaster must extend an invitation to all candidates, their refusal to appear will not prevent the broadcast proceeding. This is a change to the previous rules whereby the refusal of one candidate to appear effectively prevented the broadcast being aired.⁵⁶ The practical effect of the rule was that broadcasters rarely interviewed any of the candidates.⁵⁷ This former rule often had unintended consequences. For example, in one general election a broadcaster had to abandon plans to follow the progress of black candidates across the country because of a concern that other candidates could veto their appearance.⁵⁸ The former rule provides a good example of how rules designed to ensure balance could perversely have a chilling effect on debate. Although broadcasters are no longer hamstrung by this virtual veto, they will still have to keep in mind their impartiality obligations. The *Guidance Notes, Section 6: Elections and Referendums*, illustrate the type of considerations a broadcaster will have to take into account, for example when profiling candidates or constituencies.

(d) Referendum broadcasts and impartiality

Section 333 of the Communications Act 2003 requires broadcasters to include coverage of referendum campaigns. Prior to the 2003 Act, there were no specific obligations regarding referendum coverage, although in practice the broadcasters allocated time. However, this invoked their impartiality obligations and potentially created some difficulty if the political parties were likely all to favour a particular position. In the 1979 referendum on Scottish devolution, the approach to allocation of broadcast time was challenged. The then equivalent of Channel 3 (and the BBC, although they were not a party to the proceedings) had allocated one political broadcast to each of the four main Scottish political parties using an approach similar to that used for election broadcasts. However, this was likely to result in three broadcasts advocating a 'yes' vote and only one 'no' vote broadcast. The petitioners successfully argued that the broadcaster had failed in its statutory duty to maintain a proper balance.⁵⁹

Legislative provisions and Ofcom's rules should now minimise the difficulties that arose in *Wilson*. Pursuant to section 127(1) of the Political Parties, Elections and Referendums Act 2000 referendum broadcasts can only be allocated to organisations designated under section 108 of the 2000 Act. Designated organisations are organisations which are permitted participants (section 105). Permitted participants are individuals or bodies who are recognised as referendum campaigners. A participant designated by the Electoral Commission will be recognised as the lead campaigner for one of the outcomes of the referendum, for example for the 'yes' outcome or for the 'no' outcome. The Electoral

⁵⁵ *Ibid.*, 7–8.

⁵⁶ This rule was required because of section 93 of the Representation of the People Act 1983, which has now been repealed.

⁵⁷ Ofcom, *Guidance Notes, Section 6: Elections and Referendums* (16 December 2009), 1.

⁵⁸ *Press Gazette*, 30 August 1996, 14.

⁵⁹ *Wilson v Independent Broadcasting Authority* 1979 SLT 279.

Commission must designate an organisation for each outcome or not at all (section 108(2)). These provisions should make it easier for broadcasters allocating broadcast time since the ‘designated organisation’ model severs the direct link between political parties and referendum positions, and the Ofcom rules make clear that the allocation of broadcasts will be equal for each designated organisation (rule 19). However, it is theoretically possible that there may be no designated organisation. Unless the Electoral Commission can designate an organisation for each of the possible referendum outcomes, it is not permitted to make any designation. This would mean that no one would be entitled to a referendum campaign broadcast and it may mean that broadcasters providing coverage of the referendum might face an even more sensitive role in meeting impartiality obligations. Whether or not there are designated organisations, rule 6.3 makes clear that broadcasters will have to exercise their judgement in coverage of referendums, and where there are designated organisations may not be able to rely simply on coverage of them.

Extract 4.4.9

Ofcom, Broadcasting Code (28 February 2011), rule 6.3

Due weight must be given to designated organisations in coverage during the referendum period. Broadcasters must also consider giving appropriate coverage to other permitted participants with significant views and perspectives.

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Questions for discussion

1. Do the new arrangements mean that broadcasters will no longer have to concern themselves with the issues raised in *Wilson*?
2. If a referendum is held at the same time as an election, what difficulties might arise for broadcasters in relation to their obligations to preserve ‘due impartiality’?

(e) Content of party political and election broadcasts

While broadcasters are under obligations to ensure impartiality, the political parties and designated organisations are naturally free to promote their own views during political broadcasts. However, these broadcasts must comply with other programme standards as well as the general law. This can present difficulties for the broadcaster who will be responsible for the broadcast as transmitted. During the 2001 General Election, a registered party, opposed to abortion, the ProLife Alliance, was allocated a party election broadcast. The video it submitted for broadcast was refused transmission by the BBC (and other broadcasters) on the grounds that the video, because of its graphic imagery of aborted fetuses, would infringe taste and decency programme requirements. (This would now come under the harm and offence provisions of the Broadcasting Code.) ProLife had applied for a judicial review of the decision which was refused but allowed on appeal. However, the BBC successfully appealed to the House of Lords.⁶⁰ The House of Lords held, by a majority, that the BBC’s decision had been lawful because it was applying programme rules which it was required to apply to political broadcasts as well as to its own programmes, and the BBC had not acted in a discriminatory, unreasonable or arbitrary manner.

⁶⁰ *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185.

However, the decision has been criticised for its failure to give due weight to the party's freedom of expression rights.⁶¹ Barendt has suggested that the Law Lords '... should have decided that the HRA establishes a right to freedom of political expression, the exercise of which can rarely be limited on the grounds of offensiveness'.⁶²

Questions for discussion

1. Leaving aside the approach taken by the House of Lords, is it appropriate for rules such as those in the 'harm and offence' category to be applicable to party political broadcasts? Should 'context' have a greater role to play?
2. If the ProLife Alliance party political broadcast had been transmitted via the Internet, would there have been any regulatory consequences?

Political broadcasting is another area where regulatory strain can be seen. At a meeting of the BLG in 2010, it was noted that parties were publishing their party political broadcasts on their own website, sometimes prior to the broadcast: '... even if parties put up their PEBs on their websites before they have been broadcast, the broadcasters still have a right to not broadcast them if they are problematic and do not meet the rules/law on compliance'.⁶³

4.5 REGULATION OF VIDEO ON-DEMAND PROGRAMME SERVICES

The Audiovisual Media Services Directive means that on-demand services will also have to comply with content standards, and, under the co-regulatory arrangements discussed earlier (see Chapter 3, Section 3.11), ATVOD has regulatory responsibility for developing and determining compliance with the content standards. Standards relating to advertising are the responsibility of the Advertising Standards Authority, although ATVOD is responsible for sponsorship and product placement rules (see Chapter 6, Section 6.6). The content standards under the jurisdiction of the ATVOD are set out in section 368E of the Communications Act 2003. ATVOD has developed a code, Rules & Guidance (Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services (ODPS)) (ODPS Code).⁶⁴ The ODPS Code rules essentially replicate the language of section 368E: rule 10 deals with material which may be likely to incite hatred and rule 11 with the protection of under-18s from harmful material. In relation to rule 11, the guidance given by ATVOD is quite extensive and is of interest in the way that it picks up on government intended policy concerning sexually explicit material, even though it is not part of the regulatory framework. It has been argued that the precautionary approach '... risked driving legitimate ODPS providers of "adult" content offshore, depriving UK citizens of the protection of UK regulation'.⁶⁵

⁶¹ E. Barendt, 'Free Speech and Abortion' [2003] *PL* 580–91.

⁶² *Ibid.*, 591. See also Hare, note 6 above, who suggests that the courts have distanced themselves from the deference shown to broadcasters in the *ProLife* decision: at 32.

⁶³ Broadcasters' Liaison Group (BLG) Meeting, *Notes of conclusions and action points* (2 September 2010), http://www.broadcastersliaisongroup.org.uk/docs/Meeting_2_Sep_2010.pdf (accessed 19 October 2012), 2.

⁶⁴ Edition 2.0, 3 May 2012.

⁶⁵ Ofcom, *Review of the Ofcom Designation of the Authority for Television on Demand* (15 August 2012), <http://stakeholders.ofcom.org.uk/binaries/consultations/on-demand/statement/statement.pdf> (accessed 22 October 2012), para 5.15. The argument was made by an ODPS provider of adult content.