

Notes for Media Slot NineTo Noon Wednesday 12 December 2012

Professor Ursula Cheer, University of Canterbury

1. Today I can't avoid talking about how the law attempts to deal with hoaxes and pranks in the media that lead to harm, following the shocking outcome of the prank by Mel Greig and Michael Christian, hosts of 2Day FM Radio station in Sydney.
2. As everyone knows, these two impersonated the Queen and Prince Charles and called the private hospital where the Duchess of Cambridge was being treated for acute dehydration due to her early pregnancy, asking for details of Kate's condition. Although it is generally agreed the accents used by the two were abysmal, they were astonished to be put through to the Duchess' room by the nurse on reception, Jacintha Saldanha. The nurse who then answered did give out information about the duchess' condition, though none of it was particularly astonishing or intimate.
3. Greig and Christian recorded the call and were stunned and excited that the joke had been such a success, Greig referring to it as '...by far the best prank I've ever been involved ina career highlight'.
4. A decision was then made to broadcast the recording hours later, once it had been vetted by lawyers. As the broadcast went viral on the internet, the nurse was subjected to world-wide humiliation. The next day, her body was found in the nurses' accommodation near the hospital. The police are investigating but the death is not regarded as suspicious, which is usually code for a suicide.
5. This reminds you of but is far worse than "Sachsgate", which concerned a series of voice messages that comedian Russell Brand and TV presenter Jonathan Ross left on the answering machine of actor Andrew Sachs, which were labelled obscene by many media commentators and politicians. Eventually the show led to a record number of complaints and criticism of Brand, Ross and the editorial decisions of the BBC. Ross was suspended from his positions at the BBC while both the BBC and Ofcom launched investigations. Both Brand and Lesley Douglas, Controller of Radio 2, resigned from the BBC. Ross was suspended without pay for 12 weeks on 30 October, later describing the experience as "fun" The BBC was fined £150,000 by Ofcom because of the incident. I think the broadcasters' reputations were somewhat enhanced by that incident, overall.
6. In the Australian case, 2Day FM and Greig and Christian are paying a huge social and economic penalty for broadcasting the results of a childish prank, but should they also be subject to legal sanction? The hosts, now suspended,

have had to close down their Twitter accounts and go into hiding. The station has lost significant advertising revenue. Public reaction has been mixed, ranging from rampant hate-filled death threats to calls for understanding from the head of the national depression counselling service in Australia. Is that enough, or should the law intervene further?

7. The station has insisted it has done nothing wrong. Australian law appears to allow secret recordings of this kind to be made and used. Australia has Codes of practice which have been developed in accordance with the requirements of section 123 of the *Broadcasting Services Act 1992* and have been registered by the Australian Communications and Media Authority (**ACMA**) after endorsement by commercial radio broadcasters and consultation with the listening public.
8. If a person has heard something on the radio in Australia that they think breaches a code, as in NZ, they first have to make a complaint in writing directly to the station they heard it on. If they do not get a response within 60 days, or are not satisfied with the response, then they can make a complaint to the ACMA.
9. The Australian Commercial Radio Code of Practice provides in Part 6:
The purpose of this Code is to prevent the unauthorised broadcast of statements by identifiable persons.
6.1 A licensee must not broadcast the words of an identifiable person unless:
(a) that person has been informed in advance or a reasonable person would be aware that the words may be broadcast; or

(b) in the case of words which have been recorded without the knowledge of the person, that person has subsequently, but prior to the broadcast, expressed consent to the broadcast of the words.

This appears quite tough on media, but there is an out: Part 7 of the Code provides:

a failure to comply will not be a breach of the Codes if that failure is due to:

- (a) material being broadcast which the licensee believed on reasonable grounds did not breach the Codes; or
- (b) a reasonable mistake; or
- (c) reasonable reliance on information supplied by another person; or
- (d) an act or default of another person, or to an accident or some other cause beyond the licensee's control

and the licensee took reasonable precautions and exercised due diligence to avoid the failure.

10. So, not only does someone have to complain to 2Day FM to get the process going, then there is a period of delay while the matter is dealt with. Then any outcome will depend on whether there was reasonable belief of any kind by the pranksters.

11. In the meantime, ACMA chief Chris Chapman has issued a statement that:

These events are a tragedy for all involved and I pass on my heartfelt condolences to the family of the deceased nurse in London.

The ACMA does not propose to make any comments at this stage, but will be engaging with the licensee, Today FM Sydney, around the facts and issues surrounding the prank call.

12. A natural question to ask is what laws might apply if media behaved so callously in this country. I notice Jane Bowron in a recent column said that these sorts of broadcasters are not media and if they had been, they would have identified themselves as media as required by both legal and ethical codes. But suggesting this sort of thing is the action of mavericks does nothing for victims. Even idiot broadcasters and women's magazines are mainstream media and the codes are meant to apply to them and should be applied to them.

13. In New Zealand, it is not wrong merely to telephone a person to attempt to obtain information from that person, although if the calls were persistent this conduct could possibly, in a most exceptional case, be classified as a nuisance for which damages or an injunction would lie in a civil action. In addition it is, by the Telecommunications Act 2001, an offence to use a telephone for the purpose of 'disturbing, annoying or irritating' any person.

14. As we know from the teapot tape saga, it is an offence under the Crimes Act punishable by imprisonment for up to two years intentionally to intercept any private communication by means of an interception device. Most importantly, the prohibition does not apply where the person intercepting the private communication is a party to it, so there is nothing wrong with a person's tape-recording a telephone conversation to which that person is a party. The Law Commission has made recommendations about changing this provision. It has suggested that the definition of 'private communication' be changed to a single 'reasonable expectation of privacy' test, and that participant monitoring of private communication be allowed where it is reasonably necessary to protect the lawful interests of the parties, there are reasonable grounds to believe that monitoring is in the public interest, or such monitoring is carried out by a law enforcement officer in the course

of duty. I doubt the Greig and Christian prank would meet those new requirements!

15. The Privacy Act also appears not to cover such circumstances: see *Harder v. Proceedings Commissioner* [2000] 3 NZLR 80 .
16. So it is most likely any complaint would be dealt with under the broadcasting codes as an unfair practice. Under the codes which are administered by the Broadcasting Standards Authority, broadcasters should deal fairly with any person or organisation taking part or referred to.
17. Because prank calls are quite common, radio stations have tended to be the subject of complaints of this kind. An example is where a radio station broadcast a dedication which contained a malicious lie about two high school students. This was held to be manifestly unfair even though the programme was said to be a fun, entertainment-based programme and the announcer had accepted the dedication in good faith. The BSA also questioned the judgment of the announcer in accepting and repeating the dedication. Radio prank telephone calls will now be covered by guideline 6f of the Radio Code, which states that no telephone conversation should be recorded or broadcast unless the recipient has been advised that it is being recorded for possible broadcast, or is aware (or ought reasonably to have been aware) that the conversation is being broadcast. Exceptions may apply depending upon the context of the broadcast, including the legitimate use of humour. I suspect most ordinary people would query whether the broadcast as a joke was legitimate, but that is in hindsight, after Jacintha Saldanha has died. The question is whether the broadcast, which subject her to humiliation, was a legitimate use of humour. I think these days, the possibility of a broadcast going viral on the internet is foreseeable. This might make the decision to broadcast illegitimate.
18. Alternatively, the privacy principles of the BSA could apply. These forbid the public disclosure of private facts, where the disclosure is highly offensive to an objective reasonable person. I think people would find the disclosure of Nurse Saldanha's identity together with her comments highly offensive, but the issue really is what are the private facts in question? It is not really what she said but the fact that she was identified and believed in the prank. Possibly this could be seen as private facts as no-one other than those at the radio station knew about them.
19. The NZ privacy principles specifically include the protection against the disclosure by the broadcaster, without consent, of the name and/or address and/or telephone number of an identifiable individual, in circumstances where the disclosure is highly offensive to an objective reasonable person. That principle might be more appropriate. I am unclear as to who identified the nurse first - the station, or someone publishing on

the internet. Obviously if it happened on the internet, then the BSA codes could not apply. If it was the radio station in NZ, that principle could apply.

20. Of course, there is a defence to the privacy principles of disclosing the matter in the 'public interest', defined as of legitimate concern or interest to the public. I think any radio station would have difficulty making that stick, even though there was a connection in the joke to the royal pregnancy.
21. On the same basis, the tort of privacy could apply. It looks very like the BSA privacy principles in protecting against public disclosure of private facts, where the disclosure is highly offensive to an objective reasonable person, with a similar public interest defence. So the issue once again would be what facts are relevant and whether they could be seen as private. Usually your identity is seen as a public matter, but combined with these circumstances, I would argue the facts are the combination of Nurse Saldanha's identity together with the disclosure that she had been made a fool of.
22. There are other ways in which persons, including the media, can be liable for making deliberately false statements. There is an old English tort, beloved of academic lawyers, which may apply where someone tells a falsehood with the intention of frightening another. The liar can be liable if that other person suffers nervous shock, illness, or bodily harm. This is the effect of an old English decision, *Wilkinson v. Downton*, in which a man was held liable in damages for telling a woman, as a practical joke, that her husband had been seriously injured; the woman became ill as a result. Likewise, a person who spread a false rumour that a certain man had hanged himself was held liable when the man's mother suffered severe physical and emotional shock. In New Zealand the case of *Wilkinson v. Downton* was used as a precedent for the granting of an interim injunction against the media in one of our earliest privacy cases. Although often argued as having great potential for development of the law, *Wilkinson v. Downton* has seldom been pleaded. It seems unlikely it could apply to the joke played by the Sydney radio station - the hosts had no intention to frighten or cause harm when they called the hospital - they did not expect to get through and were not even focussing on the person who initially took the call in relation to any possible harm. Arguably, there was a recklessness about harm when the decision was made to broadcast the recording itself. But that does not fit *Wilkinson v Downton* requirements because no lie was being told at that stage.
23. There is one other possibility suggested by recent Australian case law. In a case I think I have mentioned previously, *TCN Channel Nine Pty Ltd v Ilvairy Pty*

Ltd, Channel Nine had broadcast a segment on its television programme, 'A Current Affair,' intended to expose the allegedly incompetent building practices of a company. Employees of the programme pretending to be interested in building a home had gained access to the business premises with a hidden camera, and after admitting a camera crew to the premises, confronted a managing director and franchisee of the company. The footage obtained was broadcast together with the testimony of dissatisfied customers. A claim by the company for false and misleading conduct under the Trade Practices Act 1974 was successful. The New South Wales Court of Appeal held that the false and misleading conduct did occur in the course of trade and commerce because even if it was not in the trade of the media making the representations, it was in the trade of the persons to whom the statements were made - the builders - since the communications were intended to acquire the services of the builders. Here it could be argued the pretence of being the Queen and Prince Charles was by statements made in the course of the trade of being a commercial radio station, as these do commonly carry out hoax calls.

24. So, all sorts of possibilities, none of them easy or simple to apply. Has 2Day FM done enough? I suspect not. Time will tell.

Ursula Cheer