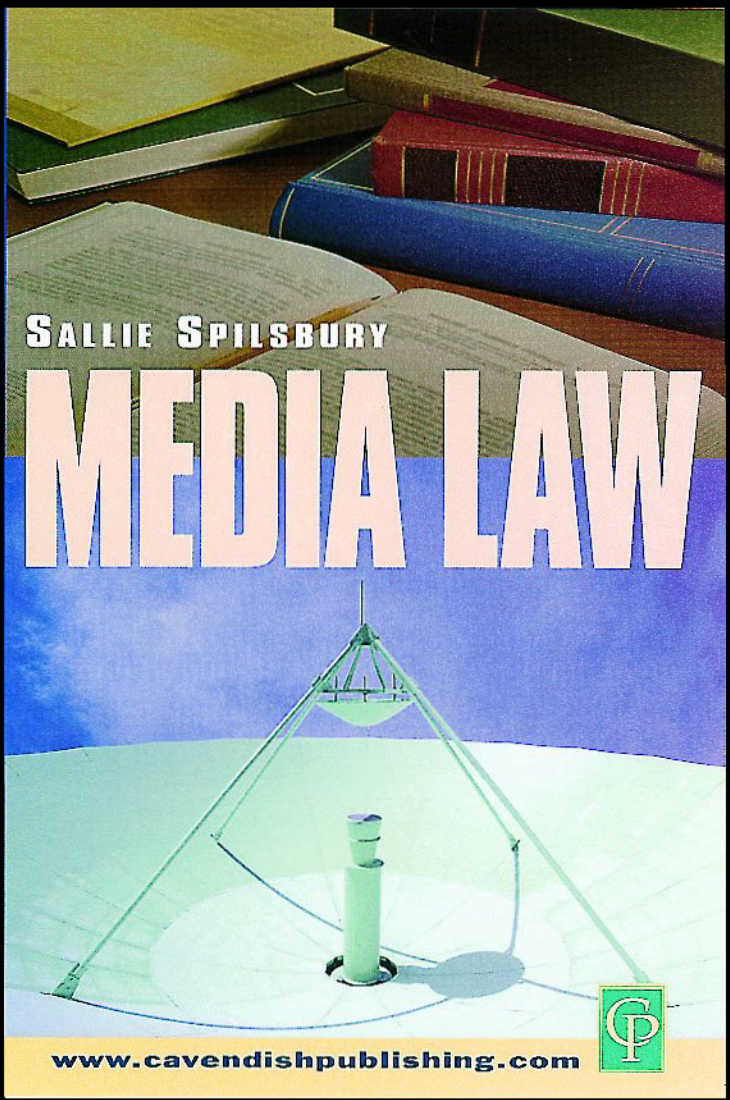
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THE MEDIA AND OPEN JUSTICE

REPORTING COURT PROCEEDINGS

This chapter sets out the law which regulates the reporting of legal proceedings. The first section explains the law of contempt of court. The second section sets out the more commonly encountered methods in which the court can order the postponement or restriction of media reports of legal proceedings.

CONTEMPT OF COURT – PREJUDICING A FAIR TRIAL

There is an obvious danger that reports of, or relating to, civil or criminal proceedings might affect the administration of justice and, in particular, that it might prejudice the right to a fair trial.

Consider the following example: a well known celebrity has been charged with possession of Class A drugs. His trial is due to take place in six months' time. Today, a national newspaper with a large circulation has published exclusive revelations about the celebrity's lifestyle, including detailed allegations about his regular drug abuse.

Could the article prejudice the trial of the celebrity? Might members of the public who are empanelled on the trial jury be swayed by what they have read rather than the evidence presented at trial? If so, the trial would normally be stayed, and the publishers of the article in question might be found to be in contempt of court, an offence punishable by fines and, potentially, by imprisonment.

The law which determines whether the article is a contempt of court is set out below. There are two forms of contempt – strict liability contempt and intentional contempt.

(a) Strict liability contempt – the Contempt of Court Act 1981

> Make no mistake, this is a liberalising bill and it is intended to be a liberalising Bill.[1]

The Contempt of Court Act 1981 ('the Act') establishes parameters to regulate how far the media can legitimately go in reporting or commenting on ongoing

1 Lord Hailsham, HL Deb, Vol 419, col 659.

or anticipated civil and criminal proceedings. The Act provides for a criminal offence of contempt of court for the publication of statements which carry a substantial risk of serious prejudice to the proceedings. Under the provisions of the Act, publication can take place in a wide variety of ways. 'Publication' is defined to include any speech, writing, programme included in a programme service[2] or other communication in whatever form.[3] This is a broad definition. The offence carries maximum penalties of an unlimited fine and/or two years' imprisonment.

The offence is committed whether or not the publisher had any intention of interfering with the administration of justice. This is known as 'the *strict liability rule*'.[4] There is a real possibility that a publisher may accidentally or negligently publish a statement in contempt of court even though he had no intention of prejudicing legal proceedings.[5] Any person responsible for publication may be prosecuted under the strict liability rule. Liability can therefore extend not only to publishers in the strict sense of the word, but also to editors or to distributors of the material in question.

As a safeguard against capricious private prosecutions, proceedings for contempt under the strict liability rule may only be brought by or with the consent of the Attorney General or on the motion of the court having jurisdiction to deal with the issue.[6] The burden of establishing contempt lies on the party who brings the proceedings (typically, the Attorney General) who must establish contempt to the criminal standard.[7]

Limitations to liability

There are three major limitations to the operation of the strict liability offence, which are set out in s 2 of the Act.

First, the offence only applies to publications which are addressed to the public at large or to any section of the public.[8] Private communications do not fall within the strict liability rule. Second, for the strict liability rule to apply, the proceedings about which comment is made must be 'active'. The meaning of 'active' is set out in Sched 1 of the Act. The question whether proceedings are active varies according to the type of proceedings in question as follows:

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2 Inserted by the Broadcasting Act 1990, s 203(1).

3 Contempt of Court Act 1981, s 2(1).

4 *Ibid*, s 1.

5 The Act provides for limited defences of innocent publication which are considered below.

6 Contempt of Court Act 1981, s 7.

7 *AG v Independent Television News Ltd* [1995] 2 All ER 370, p 375; *AG v English* [1982] 2 All ER 903.

8 Contempt of Court Act 1981, s 2(1).

Criminal proceedings become active with: (a) an arrest; or (b) the issue of a warrant for arrest or summons; or (c) the service of an indictment or other document specifying the charge; or (d) an oral charge.

It follows that comments made during a police investigation will not fall within the strict liability rule until a suspect has been apprehended in one of the ways set out in the Act. Where a suspect voluntarily attends the police station to help with inquiries, proceedings will not yet be active.

Civil proceedings become active when arrangements are made for the hearing of the action – typically, when the case is set down for trial or a trial date is fixed. In the case of emergency applications, such as injunctions, the case becomes active when the hearing commences.

Appellate proceedings (civil or criminal) become active when permission to appeal is applied for or when a notice of appeal is lodged.

Sched 1 of the Act also sets out when proceedings cease to be active.

In relation to *criminal proceedings*, the usual way in which proceedings cease to be active is where the defendant is acquitted or sentenced or where any other verdict, finding, order or decision is made which puts an end to the proceedings, for example, where a defendant is found unfit to plead. Where the arrested person is released without charge, the proceedings will cease to be active (unless the suspect is released on bail). If no arrest is made within 12 months of the issue of a warrant, the proceedings will cease to be active (although they become active again if an arrest is subsequently made).

Both civil and criminal proceedings cease to be active where the case is discontinued. Civil proceedings also cease to be active where the proceedings are otherwise disposed of without being formally discontinued.

Appellate proceedings cease to be active when the hearing of the appeal is over or when a new trial is ordered or the case is remitted to a lower court.

The third restriction on the strict liability rule under the Act is that the rule only applies:

> ... to a publication which creates a *substantial risk* that the course of justice in the proceedings in question will be *seriously impeded or prejudiced*.[9] This is a double limbed test and both limbs must be satisfied.

Substantial risk and serious prejudice – the law in practice

Substantial risk

The prosecution must prove that the publication gave rise to a substantial risk of prejudice. The assessment of the risk must be considered at the date of

9 Contempt of Court Act 1981, s 2(2).

publication,[10] not the date of trial. It is unnecessary to show actual impediment or prejudice. It is the potential effect of a publication that is relevant.

A substantial risk has been defined as a risk which is more than remote or minimal.[11]

Serious impediment or prejudice

There must be a substantial risk that the legal proceedings will be *seriously prejudiced or impeded* before the strict liability offence is made out. In *AG v Hat Trick,*[12] the court stressed that, before serious prejudice could be found, the course of justice must be put at risk, for example, something affecting the outcome of a trial or necessitating the discharge of a jury. In *AG v Unger*,[13] Simon Brown LJ observed that if serious prejudice is to be held to exist, the publication must:

- materially affect the course of a trial; or
- require directions from the court 'well beyond more ordinarily required and routinely given to juries'; or
- create at least a 'seriously arguable' ground for appeal on the basis of prejudice.

Substantial risk of serious prejudice – applying the test

Pre-trial publicity

In *AG v Mirror Group Newspapers and Others,*[14] the Court of Appeal gave guidance about the application of the two limbs of the strict liability rule. This decision has been categorised as a high point for the media – because it provided an interpretation of the rule which comes down strongly in favour of freedom of expression.

The facts

Between May 1989 and March 1995, the relationship between Geoff Knights and his girlfriend (the 'EastEnders' star Gillian Taylforth) was given

10 *AG v English* [1982] 2 All ER 903, p 918.
11 *Ibid*, p 919; *AG v News Group Newspapers* [1986] 2 All ER 833.
12 *AG v Hat Trick* [1997] EMLR 76.
13 *AG v Unger* [1998] Cr App R 308, p 318.
14 *AG v Mirror Group Newspapers and Others* [1997] 1 All ER 456.

saturation media coverage. During that time, disclosures had appeared in the media about Knights' violent behaviour and previous convictions.

In April 1995, Knights was arrested and charged with wounding with intent. Various newspapers published articles about the incident in the days following his arrest. Some of the contents of the articles were inaccurate, exaggerating the nature of the victim's injuries. References were also made in the articles to Knights' previous convictions, although this latter information had already been publicised by the media on separate occasions before the offence in question had been committed.

Knights was committed for trial and a provisional date for trial was set for October 1995. He successfully applied for the proceedings to be stayed on the ground that the pre-trial publicity made it impossible for him to have a fair trial. The Attorney General subsequently commenced proceedings for contempt against the newspapers involved. He claimed that the pre-trial publicity had created a substantial risk of serious prejudice. The court held that the newspapers were not in contempt.

The guidance

The court laid down the following guidelines for applying the strict liability rule:

(a) each case must be considered on its own facts. Schiemann LJ cited with approval the following comment from the earlier case of *AG v News Group Newspapers*:[15]

> The degree of risk of impact of a publication on a trial and the extent of that impact may both be affected, in differing degrees according to the circumstances, by the nature and form of the publication and how long it occurred before trial. Much depends on the combination of circumstances in the case in question and the court's own assessment of their likely effect at the time of publication. This is essentially a value judgment for the court, albeit that it must be sure of its judgment before it can find that there has been contempt. There is little value in making detailed comparisons with the facts of other cases;

(b) the court will look at each individual publication separately and apply the test at the time of each publication. This individual publication rule works in the media's favour. In *AG v Mirror Group Newspapers*, the effect of the press coverage taken together was quite devastating. However once the coverage of each newspaper had been isolated, the effect was less dramatic. The court held that the isolation of each paper's coverage was the appropriate approach. This position may change. In an address to University College, Dublin, the English Lord Chancellor observed that 'an

15 *AG v News Group Newspapers* [1986] 2 All ER 833, p 843.

outstanding question is whether the law should nevertheless become that cumulative prejudice counts as contempt for which all may be held liable'.[16] It is probable that any such change will be effected by statutory amendment;

(c) if several newspapers publish prejudicial material (as in the *Knights* case) they cannot necessarily escape from liability by contending that the damage has already been done.[17] The fact that, at the time of publication, there is already some risk of prejudice to proceedings as a result of earlier articles will not automatically prevent a finding that a publication has created a further risk of prejudice.

On the facts of the *Knights* case, the judges, having emphasised the above principle, then proceeded to make no further reference to it in reaching their decision. In particular, the court made no attempt to reconcile it with its finding that in the light of the previous publicity there was no contempt on the facts of the *Knights* case. It is not therefore clear whether and how this principle will be applied in subsequent cases;

(d) the publication must create some risk that the course of justice and the proceedings in question will be impeded or prejudiced by that publication;

(e) the risk must be substantial;

(f) the substantial risk must be that the course of justice in the proceedings in question will not only be impeded or prejudiced, but *seriously* so;

(g) the court will not convict of contempt unless it is *sure* that the publication has created a substantial risk of serious prejudice on the course of justice. This standard is the same as the criminal standard of proof (beyond reasonable doubt);

(h) in making an assessment of whether the publication creates this substantial risk of that serious effect on the course of justice, the following matters (amongst others) arise for consideration:

- the likelihood of the publication coming to the attention of a potential juror. This will involve consideration of whether the publication circulates in the area from which the jurors are likely to be drawn and the circulation figures for the publication in question. To declare in a speech at a public meeting in Cornwall that a man about to be tried in Durham is guilty of the offence charged and has many previous convictions for the same offence may well not carry a substantial risk of affecting his trial.[18] The same declaration at a meeting in Durham is more likely to carry such a risk;

16 14 April 1999, available at http://www.open.gov.uk/lcd/speeches.

17 See, also, *AG v ITN* [1995] 2 All ER 370, p 381.

18 Sir John Donaldson MR in *AG v News Group Newspapers* [1986] 2 All ER 833, p 840.

- the likely impact of the publication on an ordinary reader at the time of publication. This will involve consideration of (amongst other matters) the prominence of the article in the publication and the novelty of its content judged through the eyes of the likely readers of that publication. It may be the case that comments concerning a figure in the public eye are more likely to be remembered;[19]
- the residual impact of the publication on a notional juror at the time of trial. Schiemann emphasised that 'it is this last matter which is crucial'. It will involve consideration of the length of time which has, or will have, elapsed between publication and the likely trial date. As a general rule, the greater the length of time, the more likely that the impact of the publication will have become blunted by the time of the trial date, although this will depend on the particular publication. Sensational, emotive reporting may be more likely to be remembered than straightforward factual reporting.

In *AG v News Group Newspapers*,[20] Parker LJ had explained that:

> The imminence or remoteness of the proceedings will vitally affect both the existence of a substantial risk of prejudice and the question whether, if there is such a risk, it is a risk that the course of justice will be seriously impeded or prejudiced. Both the risk and the degree of prejudice will, as it seems to me, increase with the proximity of the trial but it is not possible, and indeed would be contrary to the Act, to say that no publication earlier than a certain number of months before trial could be subject to the application of the strict liability rule. Each case must be decided on its own facts and a publication relatively close to trial may escape whereas another much further from trial will not do so by reason of the impact of its content on the reader, listener or viewer, as the case may be.

This consideration of the residual impact of a publication has been dubbed the 'fade factor'.

Another important factor identified in the *Knights* case is the focusing effect on the jury of listening over a prolonged period to evidence in a case and the likely effect of the judge's directions. The court in the *Knights* case cited the decision in *Ex p Telegraph plc*,[21] when Lord Taylor had observed that:

> ... a court should credit the jury with the will and ability to abide by the judge's discretion to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in case of notoriety, are limited and the nature of a trial is to focus the jury's

19 This was one of the factors leading to a finding of contempt in *AG v Hat Trick* [1997] EMLR 76, although the Court of Appeal did not appear to find it relevant to the question of residual impact in the *Knights* case.

20 *AG v News Group Newspapers* [1986] 2 All ER 833.

21 *Ex p Telegraph plc* [1993] 1 WLR 980, p 987.

> minds on the evidence put before them rather than on matters outside the courtroom.

Or, in the words of Lawton J, 'the drama … of a trial almost always has the effect of excluding from recollection that which went before'.[22]

On the facts on the *Knights* case, the court found that, despite the fact that the articles were written in 'typical graphic tabloid style', there was no contempt. The application of the residual impact test involved multiplying 'the long odds' against a potential juror reading the publication by 'the long odds' of any reader remembering it.

References to previous convictions and bad general character

The *Knights* case provides a touchstone for a liberal interpretation of the strict liability rule. However, the Divisional Court has subsequently appeared to favour a more restrictive interpretation of the application of the substantial risk of serious prejudice test, at least in relation to reports which reveal the accused's previous convictions and/or general bad character. The publication of information of this kind (particularly information relating to previous convictions) is problematic, because it is particularly likely to lead juries to the belief that the accused has a propensity to commit the offence with which he has been charged.

In *AG v Piers Morgan and News Group Newspapers,*[23] the court considered an article published by the *News of the World* concerning an investigation carried out by the newspaper in relation to a counterfeit currency operation. Two men were identified by name in the article as being involved in the operation. One of these men was described as having 'a long criminal record for fraud, deception, car crime, drugs offences and burglary'. The article was also found to create the impression that both men were guilty of a criminal offence.

Prior to publication, the newspaper had notified the police of the results of its investigation. There was no argument on the facts that proceedings had became active and that this occurred before publication of the newspaper's article. The trial of the criminal proceedings against the men whom the newspaper had identified was subsequently stayed by the trial judge on the ground that the article presented a substantial risk that the accused men would not receive a fair trial.

The divisional court agreed with the trial judge and held that the article was 'beyond doubt' a contempt under the strict liability rule. The court bore the following considerations in mind in reaching its decision:

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22 *R v Kray* (1969) 53 Cr App R 412, p 415.

23 *AG v Piers Morgan and News Group Newspapers* (1997) Independent Legal Reports.

- the wide circulation of the article, which made it likely to have come to the attention of potential jurors;
- the skilful manner of presentation of the article, such as the banner headline 'We smash £100 million fake cash ring', was well designed to have a big impact on the reader;
- the reference to the bad character of the accused (including the criminal background) was seen by the court as being a striking feature which was likely to be remembered by readers because of its non-standard nature;
- in relation to the residual impact of the article, the court found that the newspaper reporter would have been a key witness for the prosecution. His appearance as a witness would have the effect of increasing the chance that jurors who had read the article at the time of publication would recall it;
- the court attached weight to the lapse of time between trial and the publication of the article (about eight months) as being a time period which might have blunted the effect of the article, but felt that it was not a persuasive enough factor to deflect the substantial risk that the course of justice would be seriously impaired. Neither the conscientiousness of the jurors nor the directions of the judge, the court thought, could prevent this substantial risk.

The *Piers Morgan* case also concerned a second, unconnected, article which had also appeared in the *News of the World* concerning the presence in the UK of a gang of 'vicious Vietnamese thugs'. Two alleged members of the gang had been identified by name and by photographs in the newspaper, but the article did not contain the assumptions of guilt which had permeated the fake cash ring story, nor did it refer to any previous convictions of the gang members. Unlike the fake cash article, this second article was not found to be in contempt.

The features which distinguished the articles were the reference to previous convictions/bad character which appeared in the first article but not the second, and the general assumption of guilt which permeated the first article but not the second. The court held that the first article would lead readers to the conclusion that the men identified in the article were guilty of a criminal offence whilst the second was less likely to have that effect.

The danger of publishing reports which are predicated on an assumption of guilt was also emphasised by Simon Brown J,[24] when he said that articles of that kind:

> ... undoubtedly expose the publishers to a real risk of being found in breach of the strict liability rule. To publish as fact, the guilt of a named person after his arrest and before his trial, is not a step to be taken lightly. The risk is,

24 Simon Brown J in *AG v Unger* [1998] Cr App R 308.

> moreover, heightened the more vulnerable the accused, the more high profile the case and the less accurate the reporting … All those, therefore, in the business of crime reporting should recognise that articles such as these are published at great peril. They should exercise great caution.

Television – an ephemeral medium?

The cases on the strict liability rule provide support for the view that the residual impact of a publication on a juror at the time of trial may be less strong in the case of television or radio than it would be if the publication is made in writing.

In *AG v ITN*,[25] an item in a television news bulletin concerning the arrest of two men for murder referred to a previous murder conviction of one of the men. The reference to the previous conviction was only made in one bulletin – it was removed from later bulletins. The reference was made some nine months before the trial. The court held that the broadcast had not created a substantial risk of serious prejudice. The court observed that television is 'in its nature ephemeral' and was not persuaded that there was a substantial risk that anyone who had seen or heard the broadcast would have remembered it nine months later. Different considerations might apply, said the court, if the broadcast had been repeated. Publications in newspapers might be more likely to be remembered, since even a casual reader had the opportunity of reading a particular passage twice.

Despite this ephemeral nature, television broadcasts can still be a contempt of court even when they are made months before trial. In *AG v Hat Trick*,[26] the BBC and the makers of the popular show *Have I Got News For You* were found to be in contempt of court for remarks made about the sons of Robert Maxwell, who were due to stand trial for fraud some six months after the programme. The brothers were described by the programme makers as 'heartless, scheming bastards'.

The court held that those words were 'strikingly prejudicial', in that they went to the heart of the forthcoming trial of the brothers and carried the clear implication that the Maxwells were guilty. The court balanced the fact the programme in question was humorous and irreverent and that the remarks were brief and made in the impermanent medium of television against the prejudicial nature of the words, the fact that they were addressed to a large national audience (of about 6.14 million) and the fact that the Maxwells were figures already in the public eye. On the facts, it held that a substantial risk of serious prejudice had been made out.

25 *AG v ITN* [1995] 2 All ER 370.

26 *AG v Hat Trick* [1997] EMLR 76.

Publicity during the trial

Where reports are made during the trial, the strict liability rule continues to apply. In the light of the fact that coverage will not benefit from the application of the 'fade factor' and is therefore particularly likely to be recalled by jurors, particular care must be taken over reports during this period.

The fact that the trial judge decides to stay proceedings in the light of media coverage during the trial will not of itself be determinative of contempt. However, it will operate as a 'telling pointer' if an application for contempt is subsequently made.[27]

Media coverage during a trial which does no more than accurately relate what has taken place in open court is unlikely to be a contempt, as it will be doing no more than report what took place in the presence of the jury.[28] However, if the coverage strays beyond a simple report, the chances of being in contempt are high. A recent example occurred in *Taylor and Taylor*,[29] where the Court of Appeal quashed a murder conviction and refused to order a retrial on the ground that the reporting of the trial was 'unremitting, extensive, sensational, inaccurate and misleading' to such an extent that even the trial judge's directions to the jury that they should disregard what had been reported in the media could not have prevailed against it. The court observed that:

> The press is no more entitled to assume guilt in what it writes during the course of a trial than a police officer is entitled to convince himself that a defendant is guilty and suppress evidence.[30]

Proceedings which do not take place before a jury

The most common ground on which a publication may be a contempt is where it involves the risk of prejudicing members of the jury. As a general rule, judges and other legally qualified persons, such as stipendiary magistrates, are presumed to be able to put aside what is reported in the media and to judge cases on the evidence before them.[31] But non-jury cases may also be impeded or prejudiced if the effect of publicity on the parties to

27 *AG v Birmingham Post and Mail* [1998] 4 All ER 49.

28 Contempt of Court Act 1981, s 4.

29 *Taylor and Taylor* [1993] 98 Cr App R 983.

30 For further detail, see Naylor, B, 'Fair trial or free press' [1994] CLJ 492.

31 *Re Lonrho* [1989] 2 All ER 1100.

the litigation or on witnesses[32] is such as to create a substantial risk of serious prejudice. An example where this might arise is where media coverage intimidates witnesses from coming forward or from giving evidence.

Defences to the strict liability rule

The Act provides for a number of defences to the strict liability offence as follows.

Innocence

Section 3(1) of the Contempt of Court Act 1981 provides for a limited defence of innocent publication if the publisher can show that, having taken all reasonable care, he did not know *or had no reason to suspect* that proceedings were active at the time of publication. Note that the mistake must concern the active status of the proceedings. It is no defence under s 3(1) for the publisher to show that it did not know that the publication contained material which was a contempt (although, in some circumstances, this defence is available to a distributor, as set out immediately below).

A defence is available to *distributors* under s 3(2) of the Act (rather than to publishers in the strict sense of the word) where the distributor can show that it did not know and had no reason to suspect having taken all reasonable care that, at the time of distribution, it contained such material.

The burden of proof in relation to both the s 3 defences lies upon the person who seeks to rely on the defence,[33] who must show that he took reasonable care in establishing whether proceedings were active (s 3(1) defence) or in relation to the content of the material he is distributing (s 3(2) defence).

Contemporary reports of proceedings

Under s 4 of the Act, a person is not guilty of contempt under the strict liability rule in respect of a 'fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith'.[34] The defence

32 And see *AG v Channel Four* (1987) *The Times* 18 December, where the broadcast of a re-enactment of an appeal hearing was ordered to be delayed until after judgment had been given by the Court of Appeal on the ground that the enactment might give a misleading impression about the credibility of witnesses and might influence the public view of the rightness of the court's judgment. This decision has not been followed, and in the light of Schiemann LJ's guidelines in *AG v MGN*, the chances of it being followed are even more remote.

33 Contempt of Court Act 1981, s 3(3).

34 *Ibid*, s 4(1).

relates to *reports* of proceedings. If the media exceed this boundary and begin to comment in their reports of the proceedings, or to seek out and report extraneous events, s 4 will not provide a defence. Trial by newspaper will not be permitted.[35] The court has power to postpone the reporting of certain matters which take place during a trial until the end of the trial. If a report is made in contravention of a s 4 postponement order, the offending publisher might be in contempt of court for disobedience of the terms of a court order. Section 4 orders are considered further below.

Incidental discussion in good faith

Section 5 of the Act provides for a defence to prosecutions brought under the Act where the report is made in the context of a general discussion of public affairs. It provides as follows:

> A publication made as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.

Section 5 purports to implement a recommendation of the Phillimore Committee[36] to provide against the gagging of *bona fide* discussion on the ground that legal proceedings in which some particular instance of the issue is being considered just happen to be ongoing.

The Act does not define what is meant by 'public interest'. Case law on public interest was considered in Chapter 5 in the context of breach of confidence. Establishing public interest generally means showing that the material in question is of legitimate concern to the public.

It is important to note that s 5 involves more than simply showing that the report is on a matter of public interest. If the defence is to be made out, it must also be shown that the risk of prejudice to particular legal proceedings is only incidental to the more general discussion.

The requirement that the discussion must be in good faith raises difficulties. The Act gives no indication as to whether good faith is to be assessed subjectively or objectively. The onus is on the Attorney General to show that the publication was not in good faith. This is likely to involve showing some kind of improper motive in publishing the material in question[37] – although this issue is yet to be definitively resolved.

35 *AG v News Group Newspapers* [1988] 2 All ER 906, *per* Watkins LJ, p 915.

36 *Report of the Committee on Contempt of Court*, Cmnd 5794, 1974.

37 *AG v English* [1982] 2 WLR 959.

The operation of the defence is illustrated by the case of *AG v English*,[38] which concerned a doctor who was on trial for the murder of a baby which had been born with Down's Syndrome. During his trial, the *Daily Mail* published an article about the candidature for Parliament of a woman who had been born without arms. In the course of the article, the writer stated that 'today, the chances of such a baby [as the candidate] surviving would be very small indeed. Someone would surely recommend letting her die of starvation or otherwise disposing of her'. The article made no express reference to the trial of the doctor.

The Attorney General brought proceedings against the publishers of the article for contempt of court, alleging that the article created a substantial risk that the course of justice in the criminal proceedings against the doctor would be seriously impeded or prejudiced. The House of Lords agreed with the Attorney General that a substantial risk and serious prejudice had been made out, but it went on to uphold the newspaper's defence under s 5 of the Act.

The Law Lords adopted the following reasoning:

- the article was found to constitute a discussion in good faith of public affairs of general public interest – the moral justification of mercy killing;
- under s 5, it was necessary to determine whether the risk of prejudice to the proceedings against the doctor was merely incidental to the general discussion.

The House of Lords held that the onus was on the prosecution to show that the risk of prejudice to the doctor's trial was *not* 'merely incidental' to this discussion, rather than for the defence to show that it was.

The test to determine whether the risk was incidental was not whether an article could have been written as effectively without the passages but whether the risk created by the words chosen by the author was no more than an incidental consequence of expounding the main theme.

On the facts, the prosecution was not able to show that the risk of prejudice to the proceedings was not incidental to the discussion. The decision would probably have been different if the article had made express reference to the prosecution or had involved reports of or scenarios involving the same or similar facts to those at issue in the criminal proceedings.

Guidance on the application of the s 5 'incidental' test was also considered by Lloyd J in *AG v TVS Television*,[39] who thought that the following was a relevant consideration:

38 *AG v English* [1982] 2 WLR 959, although it would seem that the usual practice would be to refer the matter to the Attorney General: *AG v Times Newspapers* [1974] AC 273; and Hodgson J in *AG v Sports Newspapers* [1992] 1 All ER 503.

39 *AG v TVS Television* (1989) *The Times*, 7 July.

> ... look at the subject matter of the discussion and see how closely it relates to the particular legal proceedings. The more closely it relates, the easier it will be for the Attorney General to show that the risk of prejudice is not merely incidental to the discussion. The application of the test is largely a matter of first impression.

(b) Common law contempt

As we have seen, the Contempt of Court Act provides for an offence of strict liability contempt in relation to media reports which can only be invoked when proceedings are active. But the Act is not a complete codification of the law of contempt. Section 6(c) of the Contempt of Court Act 1981 provides that nothing in the Act 'restricts liability for contempt in respect of conduct intended to impede or prejudice the administration of justice'.

An offence of intentional contempt of court continues to exist at common law and, as we shall see, many of the safeguards built into the Act to protect the media against capricious prosecutions do not apply to the common law offence.

The requirements of intentional contempt at common law

In order to give rise to a contempt at common law, the publication in question must give rise to a risk of prejudice to a fair trial which must be shown by the prosecution to be a real possibility.[40]

The prosecution must also prove a *specific intent* on the part of the publisher to impede or prejudice a particular trial. A general intent to interfere with the administration of justice will not be sufficient. The intent need not be the sole motivation for publishing the article. The intent of the publisher may be inferred from the surrounding circumstances, including the foreseeability of the consequences of the publication – although the probability of such consequences occurring must be 'little short of overwhelming' before intention is inferred on the grounds of foreseeability alone.[41]

Unlike strict liability contempt, the common law does *not* require that proceedings must be 'active' in order for a prosecution to be brought. The common law offence is most likely to be invoked in relation to proceedings which are not active – for example, before an arrest in criminal proceedings or between the trial and the filing of an application for permission to appeal. As we have seen, once proceedings have become active, the strict liability rule applies and proceedings for contempt may be brought without any need to prove the publisher's intent to cause prejudice.

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40 *R v Duffy* [1960] 2 All ER 891.

41 *AG v News Group Newspapers* [1988] 2 All ER 906.

The lack of a requirement that proceedings must be active at common law means that a publication may be a contempt even where proceedings have not yet been commenced. The orthodox view is that proceedings must at least be imminent before a prosecution for intentional contempt may be brought.[42] The term 'imminent' is vague, and this uncertainty was one of the defects in the common law of contempt which the Phillimore Committee identified in its 1974 Report, where it observed that:[43]

> A particular cause for anxiety on the part of the press is the uncertainty as to the time when the law of contempt applies … The view was pressed on us that these uncertainties have an unfortunately inhibiting effect upon the press and that it is of great importance to those who are concerned with public communication to be given more definite guidance.

The Committee recommended the introduction of demarcation lines governing the time at which publications may be held to be in contempt (this recommendation was taken up in an amended form in the definition of 'active' in the Contempt of Court Act 1981). The Committee also recommended that contempt proceedings should only be brought where proceedings have been commenced or in criminal cases where a suspect has been charged or a summons served.

These recommendations have not been incorporated into the common law. It remains possible for the media to commit an intentional contempt at common law by reporting the commission of a crime before anyone has been arrested or charged.

The question of whether proceedings are imminent should be judged through the eyes of the publisher, and it is a test of apparent imminence judged at the time of publication. The court should ask itself: 'What appeared to the publisher at the time of publication to be likely to happen?'[44] The issue should not be judged with the benefit of hindsight in the light of what actually happened.

In *AG v Sport Newspapers*, *The Sport* newspaper published an article about a man that the police wished to question concerning the abduction of a young girl. The article identified the man and described him as 'a vicious evil rapist' with 'a horrific history of sex attacks'. At the time that the article was published, all that was known about the suspect was that he had disappeared. There was nothing to indicate that he would be apprehended shortly after publication. In fact, a warrant was issued shortly after publication, and the suspect was arrested shortly after that. The court held that proceedings were not apparently imminent at the time of publication judged through the eyes of the publisher at that time – although, on the facts, they turned out to be so.

42 *AG v Sport Newspapers* [1992] 1 All ER 503.

43 *Phillimore Committee on Contempt of Court*, Cmnd 5794, 1974.

44 *AG v News Group Newspapers* [1988] 2 All ER 906.

Imminence – an unacceptable extension?

We have seen that the vague test of imminence is an unsuitable yardstick against which the media should have to regulate their actions. Yet, worryingly, the courts have sought to extend the circumstances in which a prosecution for contempt at common law may be brought by seeking to do away with the need for proceedings to be imminent at all.

In *AG v News Group Newspapers,*[45] *The Sun* was found to have committed intentional contempt by publishing an article which the court found was intended to prejudice the trial of a doctor against whom the newspaper were *considering* funding a private prosecution. The publication was in contempt, even though proceedings were only contemplated or envisaged. The court observed that:

> The circumstances in which a criminal contempt at common law can be committed are not necessarily, in my judgment, confined to those in which proceedings are either pending or imminent … The common law surely does not tolerate conduct which involves the giving of encouragement and practical assistance to a person to bring about a private prosecution accompanied by an intention to interfere with the course of justice by publishing material about the person to be prosecuted which could only serve to and was so intended to prejudice the fair trial of that person.[46]

In the later case of *AG v Sport Newspapers,*[47] Bingham LJ expressed himself technically unable to depart from *The Sun* decision, although he had reservations about it. He observed that *The Sun* decision had the effect of 'enlarging a quasi-criminal liability in a field very recently considered by Parliament [in the Contempt of Court Act 1981].[48] In the same case, Hodgson J described *The Sun* decision as 'wrong' and indicated that he would refuse to follow it. He drew attention to the fact that *The Sun* decision concerned unusual facts. The newspaper had not only published the offending report about X, but was also giving active support for the commencement of a private prosecution against X over the matters which were the subject of its report. It is possible that, in the light of the *Sport* decision, *The Sun* case will be confined to its own facts in the future.

The common law offence militates against freedom of expression

The retention of common law contempt presents a real difficulty for the media.

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45 *AG v News Group Newspapers* [1988] 2 All ER 906.

46 Watkins LJ in *ibid*, p 920.

47 *AG v Sport Newspapers* [1992] 1 All ER 503.

48 *Ibid*, p 514.

The wider the interpretation of the term 'imminent' (or the removal of that requirement altogether, à la *The Sun* decision), the more serious are the potential implications for freedom of expression. There was no consideration in *The Sun* case of the implications that the removal of the need for imminence might have on the media's freedom of expression.

Example

A newspaper wishes to highlight an alleged crime and to stimulate a demand for prosecution against the alleged perpetrator. This is part of the media's role as watchdogs which the European Court of Human Rights has highlighted on numerous occasions (provided that the reporting is carried out in a responsible fashion).[49] Yet, the possibility of prosecution at common law for contempt of court may deter the media from reporting such stories on the ground that they will cause prejudice to any trial which might eventually take place. As Hodgson J observed in the *Sport* case, 'many of the "targets" of investigative journalism are rich and powerful, and who is to say that they, when attacked, will not respond by seeking leave to move for contempt [at common law]'.[50]

It is therefore important that common law contempt is applied in a similar way to strict liability contempt – to ensure that an application for contempt will only be made out where there is a realistic possibility that a report will influence the outcome of legal proceedings.

There have, in fact, been few prosecutions for common law contempt since the 1981 Act came into force. In the light of the importance of the 'fade factor' which the courts have emphasised in relation to the strict liability rule, the residual impact of publications made before proceedings were even commenced is especially unlikely to be found to be sufficiently sharp in the minds of jurors by the time of any eventual trial to give rise to a finding of contempt. But each case must be judged on its merits. The possibility remains that a successful prosecution for contempt at common law may be brought in appropriate circumstances where proceedings were not active at the time of publication.

Contempt of court and the Human Rights Act 1998

The incorporation of the Human Rights Act 1998 is likely to be beneficial to the media in the field of contempt of court. A successful prosecution for contempt of court is a restriction on freedom of expression, and in order to be

49 Eg, *Observer v UK* (1991) EHRR 153.

50 Hodgson J in *AG v Sport Newspapers* [1992] 1 All ER 503, p 535.

compatible with European Convention jurisprudence it must be prescribed by law and necessary in a democratic society. The risk of prejudice caused by a publication to the proceedings in question must accordingly be realistically evaluated in every case. The *Knights* judgment focuses on the importance of assessing whether prejudice is *really* likely to have been caused from a realistic standpoint. To that extent, the judgment is in line with the requirements of the Convention. It serves to underline the fact that freedom of expression ought only to give way to other interests where there is a real, rather than a fanciful or remote, need for them to do so.

Penalties for strict liability and intentional contempt

In the *Piers Morgan* case, a fine of £50,000 was imposed. The court accepted that there was no intention to interfere with the course of justice. However, the public interest required that the penalty reflected the very serious effect which the article had had on the administration of justice. The article had resulted in the counterfeiting prosecution being permanently stayed. Factors taken into account in imposing the penalty were deterrence and the means of the defendant on the one hand, and in mitigation on the other hand the fact that the *News of the World* had a laudable record of co-operating with the police in the investigation of crime.

The *Piers Morgan* case was used as a benchmark in the case of *AG v Associated Newspapers*,[51] where a fine of £40,000 was imposed in respect of the publication in the *Evening Standard* of information which the court had ordered not to be disclosed. Kennedy LJ observed that the publication was a serious contempt which had resulted in a criminal trial being aborted and a significant penalty was required. Relevant to the amount of the fine was the culpability of the offender and the offender's means. It was accepted that there had been no intention to interfere with the administration of justice. The publication had been a negligent mistake. Also relevant in mitigation was the fact that the newspaper had never previously been found to be in contempt, that an apology had been given to the court and that steps had now been put in place by the newspaper to prevent a recurrence. These factors justified a lesser fine than had been imposed in the *News of the World* case.

In the *Birmingham Post and Mail* case,[52] a fine of £20,000 was imposed. The court weighed aggravating factors against mitigating factors as follows.

51 *AG v Associated Newspapers* (1997) unreported.

52 *AG v Birmingham Post and Mail* [1998] 4 All ER 49.

Aggravating

- The fact that the jury had had to be discharged and the proceedings started afresh involving additional expense of £87,000.

Mitigating

- This was the first finding of contempt against the respondents.
- The publication took place in a regional rather than a national newspaper with a circulation of approximately 26,000.
- The publication resulted from a mistake. There was no intention to prejudice the administration of justice, nor a conscious and deliberate taking of risk with a view to selling papers. The mistake had been taken seriously and proper procedures had been put in place to guard against any recurrence.
- An apology was given to the court. However, in the light of the fact that the contempt allegation had been contested by the respondent, the court observed that it was difficult to place much weight on the plea.

In *AG v Hat Trick*, fines of £10,000 were imposed on each respondent. Auld LJ described the case as involving 'a most serious contempt' following a decision to publish of 'a risk taking variety'.

The culpability of the offender is relevant to the amount of the fine both under the strict liability rule (although, as we have seen, liability itself is not dependent on the guilt or otherwise of the offender) and at common law (where it *is* necessary to prove intent in order to establish liability). Where an intention to interfere with the administration of justice is proved, the penalties are likely to reflect that fact. In *AG v News Group Newspapers*, where intention contempt was established against *The Sun*, a fine of £75,000 was imposed.

REPORTING RESTRICTIONS[53]

Open justice

The courts have long recognised the principle of open justice – the right of public access to the workings of the courts. In *AG v Leveller Magazine,*[54] Lord Diplock opined on why open justice is important. He said:

53 The Newspaper Society has produced a useful fact sheet on Guidelines on court reporting restrictions available on www.newspapersoc.org.uk.

54 *AG v Leveller Magazine* [1979] AC 440, pp 449–50.

> As a general rule, the English system of administering justice does require that it be done in public. If the way that courts behave cannot be hidden from the public ear and eye, this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself, it requires that they should be held in open court to which the Press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court, the principle requires that nothing should be done to discourage this.

In other words, justice must not just be done; it must be seen to be done.

Art 6(1) of the European Convention on Human Rights requires that, in general, court hearings are to be held in public. The press and public may be excluded only for the reasons specified in the article, namely 'in the interests of morals, public order or national security, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

Where a court – whether criminal or civil – does not sit in public, the hearing is known as a hearing held *in camera*.

Hearings in private – civil proceedings

This principle of open justice is incorporated into the Civil Procedure Rules, which regulate the conduct of civil (that is, non-criminal) proceedings in England and Wales.

Rule 39.2 of the CPR provides that:

(1) The general rule is that a hearing is to be in public.

…

(3) A hearing, or any part of it, may be in private if:

  (a) publicity would defeat the object of the hearing;

  (b) it involves matters relating to national security;

  (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;

  (d) a private hearing is necessary to protect the interest of any child or patient;

  (e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;

  (f) it involves uncontentious matters arising in the administration of trusts or in the administration of a dead person's estate;

  (g) the court considers this to be necessary in the interests of justice.

The practice direction to this rule provides that the decision as to whether to hold a hearing in public or private must be made by the judge conducting the proceedings having regard to any representations which may have been made to him and to Art 6 of the European Convention on Human Rights. The direction provides that the judge may need to consider whether the case is within any of the exceptions permitted by Art 6(1).

The principles embodied in the criminal law cases regarding private hearings should also be considered.

Civil hearings in chambers

Some court hearings are held in chambers. Such hearings generally relate to procedural matters and they usually take place before trial. As a matter of administrative convenience, hearings in chambers invariably take place in the judge's rooms rather than in open court. But hearings in chambers are not private in the same sense as hearings held *in camera*.

In the recent case of *Hodgson v Imperial Tobacco*,[55] the Court of Appeal clarified the following principles about hearings in chambers:

- the public (and the press) have no right to attend hearings in chambers because of the nature of the business transacted in chambers and because of the physical restrictions on the room available, but, if requested, permission should be granted to the public attend the hearing when and to the extent that this is practical;
- what happens during proceedings in chambers is not confidential – information about what occurs and the judgment or order of the court can, and in the case of a judgment or order should, be made available to the public when requested;
- if members of the public who seek to attend proceedings in chambers cannot be accommodated in the judge's room, the judge should consider adjourning the proceedings in whole or in part into open court to the extent that this is practical or allowing one or more representatives of the media to attend the hearing in chambers;
- the disclosure of what occurs in chambers does not constitute a breach of confidence, nor does it amount to contempt so long as any comment which is made does not substantially prejudice the administration of justice;
- the above general principles do not apply in exceptional circumstances where a court with authority to do so orders otherwise. It is likely that CPR 39.3 will apply to determine the exceptional circumstances in which a court is justified in departing from the general rules.

55 *Hodgson v Imperial Tobacco* [1998] 1 WLR 1056.

Hearings in private – criminal proceedings

There is no equivalent of the Civil Procedure Rules in relation to criminal trials. The general principles about hearings held *in camera* are drawn from case law, which has consistently emphasised that the decision to sit *in camera* should only be made in exceptional circumstances where the administration of justice requires it. There must be compelling reasons for the decision to exclude the public. In *AG v Leveller*,[56] Lord Diplock emphasised that the departure from the norm of open justice must be justified to the extent and to no more than the extent that the court reasonably believes to be necessary in order to serve the ends of justice.

In *R v Lewes Prison (Governor) ex p Doyle*,[57] the Divisional Court observed that it was impossible to enumerate all the contingencies, but that where the administration of justice would be rendered impracticable by the presence of the public, whether because the case could not effectively be tried or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the court, the court has power to exclude the public.[58]

Later cases have emphasised that sitting in private is an exceptional step to take and should be avoided if there is any other way of serving the interests of justice.[59] Alternatives to sitting in private are contained in ss 4 and 11 of the Contempt of Court Act 1981, which are considered below.

Postponing media reports

Section 4(2) of the Contempt of Court Act 1981

This section provides as follows:

> The court may, where it appears necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings or any other proceedings, pending or imminent, order that the publication of any report of the proceedings or any part of the proceedings be postponed for such period as the court thinks necessary for that purpose.

Note the following about the section:

- the court must *order* postponement. A judicial request will not suffice;[60]
- the risk of prejudice must be to the proceedings in question or to other proceedings which are imminent or pending. The same uncertainty as to

56 *AG v Leveller Magazine* [1979] AC 440, p 450.

57 *R v Lewes Prison (Governor) ex p Doyle* [1917] 2 KB 254, DC, p 271 (Viscount Reading CJ).

58 This has been put on a statutory footing in relation to vulnerable or intimidated witnesses by the Youth Justice and Criminal Evidence Act 1999 – see below.

59 See, eg, *R v Reigate Justices ex p Argus Newspapers* (1983) 5 Cr App R(S) 181, DC.

60 *AG v Leveller Magazine* [1979] AC 440, p 473.

the meaning of 'imminent' bedevils the application of this section as it does the application of the common law of intentional contempt (considered above). What is clear is that the risk must be to some specific proceedings rather than in the interest of the administration of justice generally;

- the risk of prejudice must be substantial. As we have seen in relation to s 2, this means that the risk must be more than remote;[61]
- the order is for postponement of a report of the whole or any part of the proceedings. It is not an open-ended postponement. The period of delay must be as long as the court thinks necessary for avoiding the substantial risk of prejudice;
- the order must be necessary. In the context of interpreting s 10 of the same Act, the House of Lords have held that 'necessary' means more than desirable, convenient, expedient or useful.[62]

The courts have interpreted s 4(2) restrictively. In *R v Horsham Justices ex p Farquharson*,[63] Lord Denning remarked of the section:

> I cannot think that Parliament in s 4(2) ever intended to cut down or abridge the freedom of the press as hitherto established by law. All it does is to make clear to editors what is permissible and what is not. In considering whether to make an order under s 4(2), the sole consideration is the risk of prejudice to the administration of justice. Whoever has to consider it should remember that at a trial judges are not influenced by what they may have read in the newspapers. Nor are the ordinary folk who sit on juries. They are good, sensible people. They go by the evidence that is adduced before them and not by what they may have read in the newspapers. The risk of their being influenced is so slight that it can usually be disregarded as insubstantial and therefore not the subject of an order under s 4(2).

This *dictum* was cited by Lord Lane CJ in a case involving a misuse of the powers under s 4(2), *Ex p Central Television*.[64] In that case, the jury retired to a hotel overnight to consider its verdict. The trial judge made an order that no report of the case should be broadcast that night. He did so with the express purpose of ensuring that the jury was able to relax that night. On appeal, the order was overturned. Nothing in the broadcast reports during the trial gave rise to the fear that the reports would be anything other than fair and accurate. There were no grounds on which the judge could have concluded that there was a substantial risk of prejudice. Lord Lane CJ indicated that, even where

61 *AG v English* [1982] 2 All ER 903.

62 *Re an Inquiry under Company Securities (Insider Dealing) Act 1985* [1988] AC 660, *per* Lord Griffiths, p 704.

63 *R v Horsham Justices ex p Farquharson* [1982] 2 QB 800.

64 *Ex p Central Television* [1991] 1 WLR 4.

there was a slight risk of prejudice, a judge should bear in minds the extract from Lord Denning's judgment in *R v Horsham Justices* when deciding whether to make a s 4(2) order.

An example of circumstances where a s 4(2) order might be appropriate was given by the House of Lords in *AG v Leveller*,[65] who remarked that a *voire dire* (or a trial within a trial), which is held in the absence of a jury on matters such as the admissibility of evidence, might be an appropriate subject of an order postponing a report of those proceedings until the jury has given its verdict. A fair and accurate report of that procedure might prejudice the position of the defendant if published prior to the jury's verdict.

Section 11 of the Contempt of Court Act 1981

Section 11 of the Contempt of Court Act 1981 provides as follows:

> In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of the name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.

The section is recognition of the court's ability to withhold publication of certain types of information, such as the identity of a witness, from the public in the course of civil or criminal proceedings. Where the court has such power, s 11 provides that the court may prohibit publication of the material in question, *but only where it appears necessary to do so for the purpose for which the material has been withheld during the proceedings*.

The section does not permit a court to prohibit publication of material which has not been withheld from the public during the trial.[66]

The form of s 4(2) and s 11 orders

Where the court makes an order under s 4(2) or s 11 of the Contempt of Court Act, it must keep a permanent record of the order. The order must be formulated in precise terms, setting out its precise scope and, where appropriate, the time at which the order will cease to have effect and the specific purpose for making the order.

The courts should normally give notice to the press that an order has been made, and court staff should be prepared to answer any inquiry about a particular case, but it is the responsibility of the media to ensure that no

65 *AG v Leveller Magazine* [1979] AC 440, p 473.

66 *R v Arundel Justices ex p Westminster Press* [1985] 2 All ER 390, where it was held that the court could not prohibit publication of the name of a defendant where the name had been freely used during the course of the trial.

breach of the order occurs and the onus rests with them to make any inquiry in cases of doubt.[67]

Other reporting restrictions

There are a ragbag of statutes which contain restrictions on the reporting of certain court proceedings. As a result, it can be difficult to get a complete overview of the law. A selection of the most important restrictions which apply to particular types of proceedings are set out below.

Anonymity for victims of sex offences

Victims of the following types of sex offence may not be identified in reports of both civil and criminal proceedings:[68] rape (including male rape),[69] attempted rape, aiding, abetting, counselling or procuring rape or attempted rape, incitement to rape, conspiracy to rape and burglary with intent to rape. Similar restrictions apply to various other sexual offences, including buggery and indecent assault.[70] The restrictions apply not only to the victim's identity, but also to material which could lead the victim to be identified. This prohibition on identification is mandatory. No court order is required to implement it.

The restrictions apply from the time of an allegation of the above offences by the victim or by some other person. They continue to apply throughout the victim's lifetime, even where the allegation is withdrawn or the accused is ultimately tried for a lesser offence. The restrictions apply throughout the UK.[71]

A judge can remove the victim's anonymity where he is satisfied that it imposes a substantial and unreasonable restriction on the reporting of the trial and that it is in the public interest to lift it.[72] The anonymity may also be lifted on the application of the defence to bring witnesses forward where the judge is satisfied that the defence would otherwise be substantially prejudiced or the accused would suffer substantial injustice.

The victim may also waive his/her right to anonymity provided that the consent is given freely.

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67 *Practice Direction* [1983] 1 All ER 64.

68 Sexual Offences (Amendment) Act 1976, as amended by the Criminal Justice Act 1988 and set out in the Sexual Offences (Amendment) Act 1992.

69 Criminal Justice and Public Order Act 1994.

70 Sexual Offences (Amendment) Act 1992.

71 Youth Justice and Criminal Evidence Act 1999.

72 Sexual Offences (Amendment) Act 1976, s 4(3).

The restrictions do not apply to the identity of the *accused*[73] (unless naming the accused is likely to reveal the identity of the victim), but the trial judge might place restrictions on the identification of the accused by virtue of his powers under s 11 of the Contempt of Court Act 1981.

The reader is also referred to s 25 of the Youth Justice and Criminal Evidence Act 1999 for details of the court's ability in criminal proceedings to make orders for the exclusion of persons from the court when vulnerable witnesses are giving evidence. Section 25(4) provides that such orders (known as 'special measures directions' under the Act) may be made where the proceedings relate to a sexual offence.[74]

In addition to the above statutory provisions, the Code of Practice which is enforced by the Press Complaints Commission provides that newspapers should not publish material which is likely to contribute to the identification of victims of sexual assault, unless there is adequate justification for it and by law they are free to do so.[75]

Committal hearings

Section 8 of the Magistrates' Court Act 1980 places restrictions on the contents of reports of preliminary hearings of indictable offences which take place in magistrates courts, for example, committal proceedings. Such reports are limited to the provision of general information – typically the names of the parties (if not prevented by other reporting restrictions), the charges and the decision of the bench to commit. The accused can apply to have the restrictions lifted.[76] Even where they are lifted, the general law of contempt will apply, in particular the strict liability rule set out in the Contempt of Court Act 1981 and the common law of intentional contempt.

73 Criminal Justice Act 1988.

74 Section 62 defines 'sexual offences' for the purposes of the 1999 Act.

75 PCC Code, cl 12.

76 Magistrates' Court Act 1980, s 8(2).

CHILDREN AND YOUNG PERSONS

Civil proceedings

Section 39 of the Children and Young Persons Act 1933 (as amended by s 49 of the Criminal Justice and Public Order Act 1994)

Section 39 of the Children and Young Persons Act 1933 provides as follows:

(1) In relation to any proceedings in any court … the court may direct that:

(a) no newspaper report of the proceedings shall reveal the name, address, or school, or include any particulars calculated to lead to the identification of any child or young person concerned in the proceedings, either as being the person [by or against] or in respect of whom the proceedings are taken, or as being a witness therein;

(b) no picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid,

except in so far (if at all) as may be permitted by the direction of the court.

The section applies to any person under the age of 18.[77] It applies to civil proceedings. Criminal proceedings are now covered by the Youth Justice and Criminal Evidence Act 1999 (considered below).

The section applies to broadcasts as well as to press reports.

Criminal proceedings

Youth Justice and Criminal Evidence Act 1999

This Act contains a bundle of reporting restrictions which apply to *criminal proceedings*. The restrictions have their origins in a Government document entitled *Speaking Up For Justice* (June 1998). The document made a number of recommendations about the treatment of vulnerable and intimidated witnesses in criminal proceedings. The objective of the recommendations, and of the Act's provisions, is to assist such witnesses to give evidence where they would otherwise have difficulty doing so or would be reluctant to do so. The restrictions contained in the Act on media reports have the potential to be extremely significant unless they are implemented with caution.

The Act contains the following restrictions on media reports:

77 Criminal Justice Act 1991, s 68.

Reports concerning persons under the age of 18

Section 44

The section applies where a *criminal* investigation has begun in respect of an alleged offence against the law of England and Wales or Northern Ireland. The term 'criminal investigation' is defined as an investigation conducted by police officers or other persons charged with the duty of investigating offences with a view to it being ascertained whether a person should be charged with the offence.[78]

The restrictions in the section accordingly apply at an early stage – before criminal proceedings could be said to be imminent or pending.

The section provides that no matter relating to any person involved in a criminal offence as defined above shall, while the person is under the age of 18, be included in any publication if it is likely to lead members of the public to identify the person as a person involved in the offence.[79] If the person reaches the age of 18 whilst the proceedings are ongoing, it appears that the restrictions cease to apply.

The Act provides a non-exhaustive list of the type of information which will fall foul of the restrictions. These include the person's name, address, school or place of work or a still or moving picture.[80]

The court may dispense with the restrictions where it is satisfied that it is necessary in the interests of justice to do so,[81] but the court must have regard to the welfare of the person concerned when deciding whether to lift the restrictions.[82] Note that a court order is not required to implement the provisions in s 44.

Most controversial is the definition of 'person involved in an offence'.[83] It includes the person by whom the offence is alleged to have been committed. But it also includes the following persons:

(a) a person against or in respect of whom the offence is alleged to have been committed; and

(b) a witness to the alleged offence.

The inclusion of the latter two categories of persons to whom the restrictions will apply caused great consternation amongst the media. A restriction on reporting any matter which would be likely to lead members of the public to identify the victim of a crime or a witness to it would effectively prevent the

78 Youth Justice and Criminal Evidence Act 1999, s 44(13).

79 *Ibid*, s 44(2).

80 *Ibid*, s 44(6).

81 *Ibid*, s 44(7).

82 *Ibid*, s 44(8).

83 *Ibid*, s 44(4).

media from reporting many incidents. The media supplied the Government with bundles of articles which, it was claimed, would have been impossible to write if the s 44 restrictions had been in force at the time when they were published. These included reports of the stabbing of the headmaster, Philip Lawrence and the attack on the Wolverhampton nursery school teacher, Lisa Potts. As a result of this lobbying, something of a fudge was arrived at.

The restrictions set out in s 44 will apply to the extent that they could lead to identification of the alleged perpetrator of the offence. But the Government agreed to keep the s 44 restrictions in reserve in so far as they relate to persons against or in respect of whom the offence is alleged to have been committed and witnesses to the offence. The restrictions will only be brought into force in respect of such persons when the Home Secretary lays a draft order before Parliament which is to be approved only after separate debates in both the House of Commons and the House of Lords.[84] Speaking on behalf of the Government, Paul Boateng MP stated:

> We are persuaded of the need to provide protection for children who might be harmed by publicity in relation to a crime. It is only sensible, when crimes and criminal investigations are reported, to ensure that attention is paid to the welfare of children and the possible consequences of their being identified in the media. Children should not be identified if this would put them at risk or do them harm.
>
> But we are also clear that there is a proper balance in the public interest to be struck and that Parliament should not without good reason bring into effect restrictions on responsible and legitimate reporting of news.

This speech can be interpreted as a guarded warning to the media – be responsible in your reporting of criminal offences involving persons under the age of 18, or the provisions of s 44 may be implemented in full.

The restrictions contained in s 44 cease to apply once the offence becomes the subject of criminal proceedings. At that stage, s 45 of the Act enables the court to separate restrictions on reporting criminal proceedings involving persons under the age of 18.

Section 45

Section 45 of the Act applies to reports concerning persons under the age of 18 after criminal proceedings have begun (the Act does not contain a definition of the starting point for such proceedings). The restrictions apply to criminal proceedings for an alleged offence against the laws of England and Wales or Northern Ireland.[85]

84 Government press release, 16.6.1999.

85 Youth Justice and Criminal Evidence Act 1999, s 45(1).

During the course of such proceedings, *the court may direct* that nothing relating to any person concerned in the proceedings shall, while that person is under the age of 18, be included in any publication if it is likely to lead members of the public to identify that person as a person concerned in the proceedings.[86] Note that a court order is required – the provisions of s 45 are not mandatory.

The Act provides that, for the purposes of s 45, a reference to a person concerned in the proceedings is a reference to a person against or in respect of whom proceedings are taken or to a person who is a witness in the proceedings.[87]

The Act contains a non-exhaustive list of the type of matters which is likely to lead to identification.[88] It is in identical terms to the list contained in s 44 above.

A court may dispense with any restrictions imposed by an order referred made under s 45 where:

(a) it is satisfied it is necessary to do so in the interests of justice;[89] or

(b) it is satisfied that their effect is to impose a substantial and unreasonable restriction on the reporting of the proceedings *and* it is in the public interest to remove or relax the restriction.[90]

When considering whether to make an order restricting publication or a direction dispensing with such restriction, the court shall have regard to the welfare of the person concerned.[91]

REPORTING RESTRICTIONS AND INTIMIDATED AND VULNERABLE PERSONS

The Youth Justice and Criminal Evidence Act 1999 also provides for reporting restrictions to be imposed when vulnerable or intimidated persons are giving evidence, irrespective of the age of the persons concerned.

The Act provides that a court can apply 'special measures' to assist or encourage such persons to give evidence. The special measures include screening a witness from the accused while he/she is giving evidence, provision for evidence to be given by way of a live link and provision for video recorded evidence. One of the special measures relates to the exclusion

86 Youth Justice and Criminal Evidence Act 1999, s 45(3).

87 *Ibid*, s 45(7).

88 *Ibid*, s 45(8).

89 *Ibid*, s 45(4).

90 *Ibid*, s 45(5).

91 *Ibid*, s 45(6).

of the public from the court while the witness is giving evidence.[92] Representatives of news gathering or reporting organisations may be amongst the excluded persons.

In recognition of the principle of open justice, the Act does make provision[93] that, where a direction is made to exclude members of the public, one named representative of a news gathering or news reporting organisation may remain in court. The representative should be nominated for the purpose by one or more news gathering/reporting organisations.

A special measures direction (or order) may be made on the application of the prosecution or the defence, or the court may make such a direction of its own motion.

The Act provides that a special measures direction may only provide for exclusion of members of the public where:

(a) the proceedings relate to a sexual offence as defined in s 62 of the Act; or

(b) it appears to the court that there are reasonable grounds for believing that any person other than the accused has sought or will seek to intimidate the witness in connection with testifying in the proceedings.

Where the public is excluded from part of a hearing under the above provisions, the Act provides that proceedings shall nevertheless be taken to be held in public for purposes of any privilege or exemption from liability for contempt of court in respect of fair, accurate and contemporaneous reports of legal proceedings in public.[94]

In making a special measures direction (including an exclusion direction), the court must consider all the circumstances of the case including, in particular, any views expressed by the witness and whether the measure might tend to inhibit such evidence being effectively tested by a party to the proceedings.[95]

Special measures may only be directed where the witness in question meets criteria set out in ss 16 and 17 of the Act.

Section 16 applies to witnesses suffering from mental or physical impairment and witnesses under the age of 17 at the time of the hearing.

Section 17 has a wider scope. A complainant in a sexual offences case who is a witness in proceedings relating to that offence is automatically classed as eligible unless she/he has informed the court of their wish not to be so eligible.[96] Also eligible under s 17 are witnesses in respect of whom the court

92 Youth Justice and Criminal Evidence Act 1999, s 25.

93 *Ibid*, s 25(3).

94 *Ibid*, s 25(5).

95 *Ibid*, s 19(3).

96 *Ibid*, s 17(4).

is satisfied that the quality of their evidence is likely to be diminished by reason of fear or distress in connection with testifying on the part of the witness.[97]

Other reporting restrictions under the Act

Section 46 of the Youth Justice and Criminal Evidence Act 1999 provides for further reporting restrictions where the court makes a 'reporting direction' in relation to any witness, regardless of his age. A reporting direction will provide that no matter relating to the witness shall, during the witness's lifetime, be included in any publication if it is likely to lead members of the public to identify him as a witness to the proceedings.[98] The Act gives a non-exhaustive list of the type of matter which might be likely to lead to identification. It includes the following matters:

- the name of the witness;
- the address of the witness;
- identification of his place of work or educational establishment;
- a still or moving picture of the witness.[99]

A reporting direction may be made in relation to criminal proceedings against the laws of England and Wales or Northern Ireland and it may concern a witness in such proceedings (other than the accused) who is 18 or over.[100]

A court may give a reporting direction if it determines:

- a witness is eligible for protection; and
- the reporting direction is likely to improve the quality of the witness's evidence, and the level of co-operation given by the witness to any party to the proceedings in connection with that party's case.[101] The Act states that this will include co-operation with the prosecution.[102]

A witness is eligible if the court is satisfied that:

(a) the quality of the evidence given by the witness; or

(b) the level of co-operation,

is likely to be diminished by reason of fear or distress on the part of the witness in connection with being identified by the public as a witness in the proceedings.[103]

97 Youth Justice and Criminal Evidence Act 1999, s 17(1).
98 *Ibid*, s 46(6).
99 *Ibid*, s 46(7).
100 *Ibid*, s 46(1).
101 *Ibid*, s 46(2).
102 *Ibid*, s 46(12).
103 *Ibid*, s 46(3).

The court must also take into account the following matters when determining eligibility:

- nature and alleged circumstances of the offence;
- the age of the witness;
- social and cultural background and ethnic origins of the witness;
- the witness's domestic and employment circumstances;
- the witness's religious or political opinions;
- any behaviour towards the witness on the part of the accused, members of the accused's family or his associates, or any other person who is likely to be accused or a witness to the proceedings.[104]

The court should also take into account the views expressed by the witness.[105]

The court should also consider:

(a) whether the direction would be in the interests of justice; and

(b) the public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of the proceedings.[106]

Challenging reporting restrictions

The media can challenge orders restricting the reporting of proceedings in court.

Orders made by magistrates' courts may be challenged by way of an application to the Divisional Court for judicial review.

Other orders relating to criminal proceedings may be challenged under the procedure set out in s 159 of the Criminal Justice Act 1988, which provides for appeal to the Court of Appeal against orders made under s 4 or 11 of the Contempt of Court Act 1981:

(a) restricting admission of the public to the proceedings or any part of the proceedings;

(b) restricting the reporting of proceedings or part of the proceedings (for example, a reporting direction under the Youth Justice and Criminal Evidence Act 1999).

It is likely that s 4 or 11 orders made during the course of civil proceedings may be challenged by way of application for judicial review or on appeal to the Court of Appeal.

104 Youth Justice and Criminal Evidence Act 1999, s 46(4).

105 *Ibid*, s 46(5).

106 *Ibid*, s 46(8).