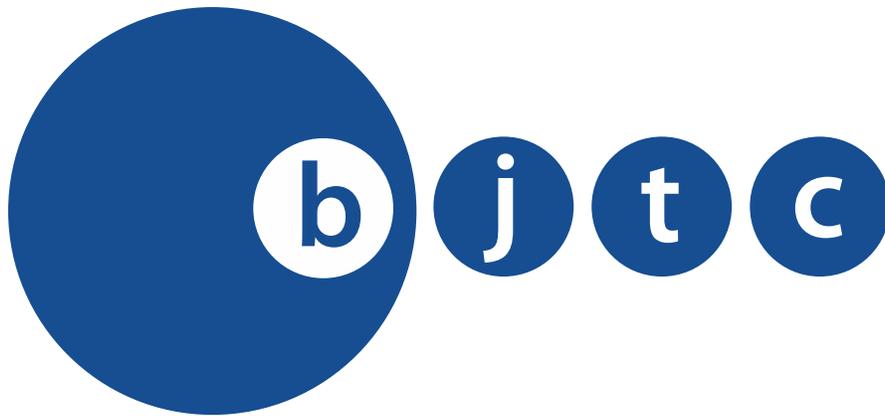


The BJTC Media Law, Regulation & Ethics Handbook 2021

By Tim Crook



Broadcast Journalism Training Council



Above Logo for UK Broadcast Journalism Training Council <http://www.bjtc.org.uk> and
Royal Courts of Justice in the Strand, London. Image by Tim Crook.
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The Author

Professor Tim Crook BA Hum BA Open LLB LLM PhD Emeritus of Goldsmiths, University of London is President of the Chartered Institute of Journalists which is the world's longest established professional association of journalists and only such body with a Royal Charter.

He is the author of *Comparative Media Law & Ethics*, *UK Media Law Pocketbook*, (Routledge 2009 & 2013 with 2nd editions in 2021) and *BJTC Media Law, Regulation and Ethics Handbook* (annual).

From 1981 to 2000 he ran a specialist news agency covering the Royal Courts of Justice and Central Criminal Court for UK broadcasters and was the UK's first specialist broadcast legal affairs correspondent for IRN/LBC.

He negotiated the first recorded broadcast from the Lord Chief Justice's Court of the valedictory ceremony for Master of the Rolls Lord Denning in 1982, and campaigned against courtroom secrecy throughout the 1980s and 1990s.

In the process, he secured a European Court of Human Rights settlement with the UK government following a judicial review in his name which exposed the lack of any appeal or legal remedy against court reporting bans and decisions to exclude the press and the public from Crown Court proceedings.

This resulted in the special Section 159 appeal procedure in the 1988 Criminal Justice Act which provides the media with a direct appeal route to the Court of Appeal Criminal division against reporting bans and secret hearings.

Professor Crook received a Campaign for Freedom of Information Award in recognition of the achievement in improving the rights of journalists and news publishers in 1988.

He presented two significant appeals against courtroom secrecy at the Appeal Court during the 1990s and is currently advocating several Freedom of Information cases on Article 10 grounds in the First Tier Tribunal and Upper Tribunal Information rights system.

He founded media law and ethics teaching at Goldsmiths, University of London and has been lecturing and seminar leading there for 31 years. He was a visiting media law instructor to the BBC for over 20 years. He also campaigned and lobbied for the inauguration of a law department at Goldsmiths. In 2019 he received a special award from the Broadcast Journalist Training Council for services to Journalism and Journalism training.

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Key Principles on a Page. Avoiding the six media law sins.

Key notes

<p>1. Libel 2. Privacy 3. Contempt 4. Copyright 5. Criminal 6. <i>Damnum Sine Injuria</i> (ethics/regulation)</p>
<p>1. Libel = serious harm to reputation by online/radio/tv publication including implication and innuendo where meaning is constructed by victim and authorial intention no defence/ commentary/picture juxtaposition always a risk BUT defended through privilege: court/government proceeding = Absolute/high qualified. Public meeting/press conference and release at low qualified level, fairness and accuracy paramount and gist of alleged person's side when demanded required at the low qualified level. Innocent dissemination/Truth (in substance and fact)/Honest Opinion based on true facts or privileged material/Public Interest through neutral reportage (not adopting allegations) editorial decision-making conditions considered/Web operator's system/defence for user generated comments moderated or not moderated- complaints need to be addressed within 48 hours/qualified privilege for academic conferences and papers that are peer-reviewed.</p>
<p>2. Privacy = publishing and intrusive conduct about private information and situations- matters of public interest trumping on balance with intense focus of circumstances including confidential information where there is a reasonable/legitimate expectation of privacy and right to family life/filming & sound recording in private geography without permission.</p>
<p>3. Contempt = publishing in any way to third party (including by social media) creating a substantial risk of serious prejudice to administration of justice when cases are active after arrest/warrant/opening inquest hearing or impeding process of justice by monsterring and thereby intimidating/discouraging witnesses/suspects.</p>
<p>4. Criminal = committing crimes through conduct and publication (intention sometimes is not required to be proved) like contempt, disobeying court orders even when wrong (max 2 years jail/unlimited fine/prosecution by attorney general), but more particularly anything that can lead to identification of sexual offence complainants/young people juveniles (17 & under)/harassing by causing distress on at least 2 occasions/computer and phone interception/bribing/and agreeing to incite a civil servant (police officer/service-person etc.) to commit misconduct in public office. Since 2010 Bribery Act paying, sources for information likely to be an offence (no public interest defence). Media have to consider risk of people who know victims doing their own detective work to put two and two together. This means pixilation, silhouetting and electronic voice distortion is not enough. Actors have to be used. Individual journalists not just editors can be held liable for criminal offences.</p>
<p>5. Copyright = publishing substantial part of image, script, publication, table, database of person/organization without permission unless there is a defence of fair dealing by criticism/review, parody, 'quotation or otherwise', or use in reporting current event BUT photographs excluded from current event defence, rare public interest defence available where image is something so awful/outrageous/depicting wrong and no other way of reporting. Also defence of public domain 70 years after death of author/70 years after death of director/producer/composer/original production (but beware of other layered copyright interests. Only photographs/images put into public domain prior July 1912 are safe from copyright liability.</p>
<p>6. <i>Damnum Sine Injuria</i> (ethics/regulation) = being nasty/unpleasant/discourteous/using people instrumentally instead of intrinsically/being on the wrong side of prevailing 'public interest'/breaching IPSO Editors' Code/Ofcom Code/IMPRESS Code/BBC Editorial Guidelines, employer's contract/professional trade union's code of honour/not treating other people as you would yourself.</p>

Brief Over-view of Legal System England & Wales.

The diagram 'The Structure of the Courts' features on page 6 of the excellent guide on the Judicial System of England and Wales at <https://www.judiciary.uk/wp-content/uploads/2016/05/international-visitors-guide-10a.pdf>

This graphic is not only informative about how the legal system works in terms of the routes of appeal, but it also demonstrates that the England & Wales jurisdiction is among the most complex with one or two extra levels of appeal more than other systems. The disadvantage here is that justice and case histories that could operate as guiding precedents will take longer to be established and in a largely privatized system of access to justice will be every expensive to achieve. Redress and remedies are likely to be available to mainly the rich, powerful and those backed by NGOs, public bodies or sponsors who have the financial gearing to invest in litigation. The guide emphasizes at page 6 the commitment to 'Open Justice.'

'Open justice is a long-standing and fundamental principle of the legal system of England and Wales. Justice must be done and seen to be done if it is to command public confidence, and so the relationship between the judiciary and courts and the media is a vital one.'

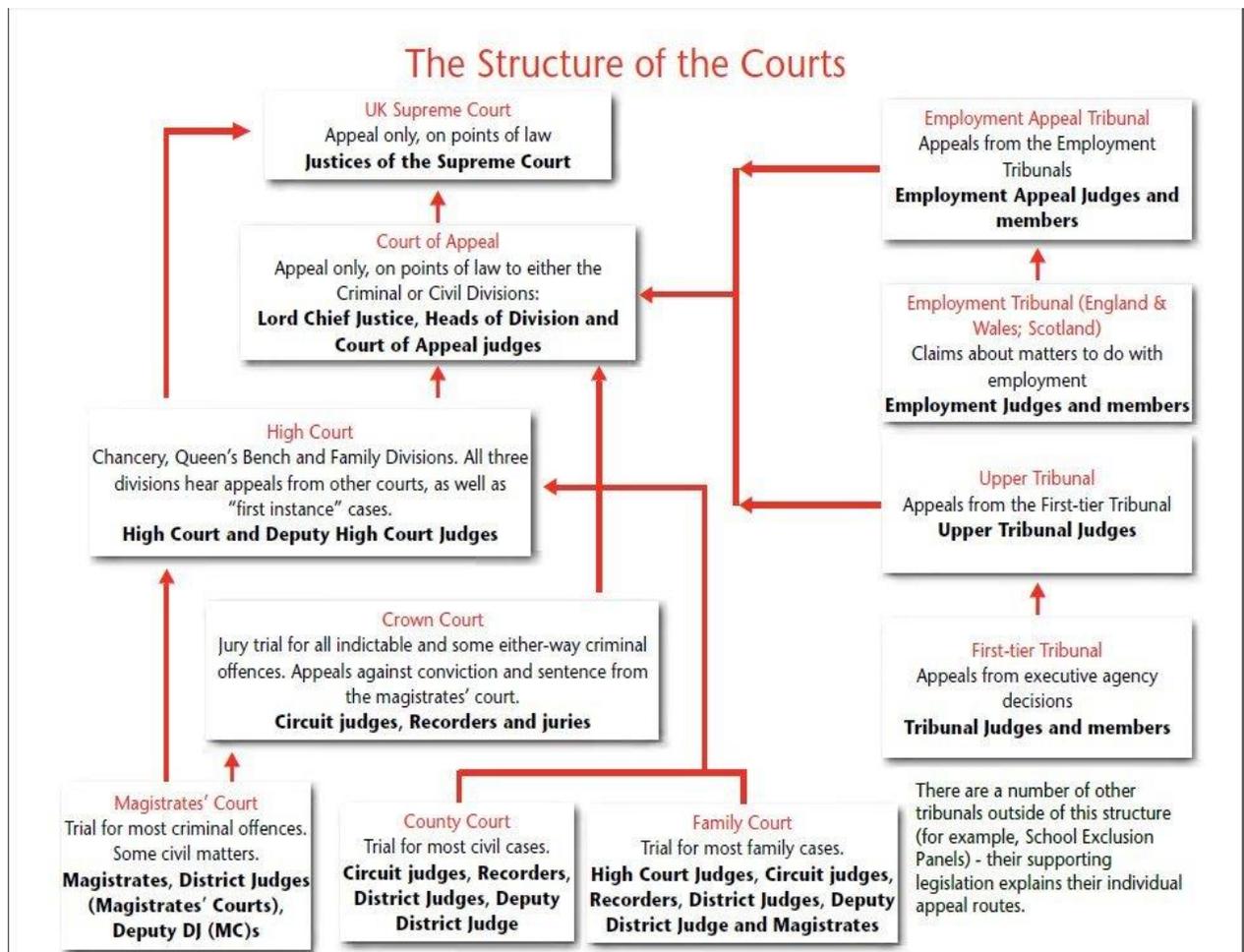


Image by judiciary.gov.uk used for criticism and review.



UK Supreme Court in Parliament Square. Image by Tim Crook

Some basic information about the nature of the legal system in England and Wales.

There are three legal jurisdictions in the United Kingdom. Scotland has its own legal system and so does Northern Ireland though that is more similar to the system in England and Wales.

The English and Welsh system affects the vast majority of the UK population; that's 57 million. Scotland has a population of 5.3 million and Northern Ireland 1.8 million. These figures are from 2011. It is assumed the UK's population is now much larger and any increase should be in evidence with the result of the 2021 census.

There are two spheres of law: criminal law and civil law.

Criminal System.

[Crimes are mostly investigated by the police and prosecuted by the independent Crown Prosecution Service \(CPS\) whose head is the Director of Public Prosecutions. \(DPP\)](#)

The police process involves either an on the spot fine, or reporting an offence for minor motoring crimes, or arrest for the more serious offences. After an arrest suspects will be questioned, there will be the collection of evidence and a decision will be made to charge or not by the CPS.

Most crimes are dealt with in [Magistrates Courts](#) that can sit with full-time District Judges or panels of lay magistrates. These courts can sentence to a maximum of 6 months for a single offence and up to one year for two offences. If they think a crime with a high maximum penalty requires harsher punishment they can refer the case to the Crown Court. In March 2015, the cap of £5,000 on fines by Magistrates Courts was lifted. [See the scale of maximum fines for different offences set out by the Sentencing Council.](#)

In 2019 a major reform of criminal justice procedure for lesser crimes was introduced known as ['single justice procedure' or SJP.](#) This has resulted in more than half of all cases in the Magistrates' court being dealt with by a single magistrate in an office rather than a court room accessible to the public and reporters. Most defendants in SJP prosecutions plead guilty through correspondence only and are not required, or indeed allowed to attend. Examples of SJP cases are traffic offences and BBC TV license evasion.

When people are arrested for very serious crimes, known as indictable offences, they appear first at the Magistrates Court and the case is then immediately transferred to [the Crown Court for trial.](#)

Trial at the Crown Court takes place in front of a jury of 12 people which decides the facts in terms of a guilty or not guilty verdict. A single judge decides matters of law and imposes the sentence. The Prosecution have to prove the cases so that the jury are sure- a standard of proof that used to be known as 'beyond reasonable doubt.' If defendants plead guilty, the Crown Court proceeds to deal with the matter with a sentence hearing.

Appeals against sentence and verdict go [the Court of Appeal- Criminal Division.](#)

Civil System.

[Civil wrongs in law are litigated by private parties known as the claimant and defendant.](#) Legal disputes involving property and services of less than £10,000 are dealt with in the County Court. These claims are administered through the [County Court Money Claims Centre.](#) These can be launched online. If a case cannot be dealt with by mediation and goes to hearing, the parties can represent themselves, and the procedure is largely informal. Single judges decide the facts on the balance of probabilities and make any decision concerning damages, or injunction. For claims higher than £10,000 the procedure and hearing is more formal and usually requires the assistance of professional lawyers before a [County Court judge.](#)

Disputes involving larger potential claims (usually over £30,000) are heard before the High Court that mainly sits in London, but also sits in regional centres such as Birmingham, and Manchester. The High Court has several divisions: Chancery, Queen's Bench Division, Family and Administrative which can deal with first instance cases for judicial review or appeals on points of law from County and Magistrates courts.

It is very rare for civil actions to be decided by juries. It is now only known to happen in actions for malicious prosecution or unlawful imprisonment.

There is an [Appeal Court Civil Division](#) and further appeals on points of law of general public importance can be heard at the [UK Supreme Court.](#) If there are human rights' issues there is recourse to the [European Court of Human Rights in Strasbourg.](#)

The United Kingdom left the European Union on 1st January 2020 and consequently rulings of the EU's European Court of Justice are no longer binding on UK courts. It is possible they may continue to be 'influential' but their relevance may be no more than and even less than a ruling of the US Supreme Court.

However, under section 2 of the 1998 Human Rights Act, UK courts are supposed to 'take into account' ECtHR rulings. Under section 3 the interpretation of UK legislation 'must be read and given effect in a way which is compatible with the Convention rights.' There continues to be some degree of uncertainty about the impact of the phrase 'take into account' on how UK courts will interpret this. Some media law experts, more sympathetic with the perspective of journalists' rights, suspect the majority of senior judges take into account Strasbourg jurisprudence as if it is binding when it suits claimants and litigants in actions against media publishers, and appear more reluctant to give effect to Strasbourg rulings when it is in the interests of freedom of expression and journalism publishers.

Some Online multimedia resources explaining the operation of the legal system.

[What is the difference between Civil and Criminal Law?](#)

[Watch - Inside the Magistrates' Court- what happens?](#)

[A day in the life of Magistrates' Court by BBC News](#)

[Watch - Inside the Crown Court- what happens?](#)

[What is the Crown Prosecution Service- a presentation by Wil Sprenkel for A'level Criminology](#)

What happens in a real life criminal investigation and how do the police prepare their cases for the CPS before they are given permission to charge criminal suspects.

If available online it could be instructive to watch episodes from the Channel 4 documentary series

['24 Hours in Police Custody' following Bedfordshire CID in real life criminal investigations.](#)

'The landmark documentary series that captures real life drama at its most intense, following police detectives around the clock as they investigate major crimes.'

Warning: You will need to register with Channel 4 television to watch online. There is no fee. Please also bear in mind that for privacy and copyright reasons C4 may withdraw access and not archive the full catalogue of documentaries and series in this strand publicly. However, students, lecturers and alumni registered with academic libraries should be able to view the programmes via Box for Broadcasts.

McNae's Essential Law for Journalists 25th Edition offers several chapters that provide more detailed briefings on the England and Welsh legal system: Chapter 1 'Sources of Law', pages 3-10, Chapter 6 'Crimes- categories and definitions', pages 71-76. Chapters 7 and 8 on Magistrates court hearings, pages 77-98. Chapter 9 'Crown courts and appeal Courts', pages 99-110, Chapter 10 'Juveniles in court proceedings' pages 111-127. Chapter 13, 'Civil courts,' pages 164-172.

There are 3 dimensions to the subject:

- 1) **Primary Media Law-** statute (acts of Parliament/legislation) and case law/precedent-rulings of courts/judiciary. In the UK we still reference and take into account the jurisprudence (case law) via the Human Rights Act 1998 of the European Court of Human Right in Strasbourg.
- 2) **Secondary Media Law-** regulation by statutory and industry bodies enforcing codes of ethics/editorial guidelines such as: Ofcom (tv & radio); the Independent Press Standards Organisation (IPSO) for print and online media, and the case law and guidance of its predecessor body The Press Complaints Commission (PCC); BBC for BBC employees and independent production companies making programmes for the BBC). **[The Royal Charter on the Press established after the Leveson Inquiry Report of 2012, has set up a Press Recognition Panel that in late 2016 approved IMPRESS as an independent 'Leveson compliant' regulator of print and online media. From April, 2017 most BBC content became subject to regulation by Ofcom.**
- 3) **Professional moral values and ethics-** Your employer, peers, professional trade union/institute/association, personal conscience, social community and religion.

But we start with an:

Introduction to main themes of Media Law

It is important to understand that any journalist publishing in the United Kingdom is operating in a country that was [ranked 35 for media freedom in 2020](#). The ranking for 2019 was 33, and 40 in 2018. Reporters Without Borders said 'Despite the UK co-hosting a Global Conference for Media Freedom and assuming the role of co-chair of the new Media Freedom Coalition, the UK's domestic press freedom record remained cause for concern throughout 2019. The killing of journalist Lyra McKee whilst observing rioting in Derry in April, and continued threats to journalists covering paramilitaries in Northern Ireland, underscored the need for urgent attention to the safety of journalists; however there was no apparent progress towards the establishment of a National Committee for the Safety of Journalists and a National Action Plan on Safety of Journalists as announced by the Department of Digital, Culture, Media and Sport in July. Wikileaks founder Julian Assange received a disproportionate prison sentence of 50 weeks for breaking bail. The Home Secretary gave the green light to the court to consider the US' extradition request, and Assange remained in custody at the high security Belmarsh Prison despite widespread international concern for his health and treatment, including by the UN Special Rapporteur for Torture. Counter-terrorism and crime legislation adopted during the year

contained worrying provisions that could restrict reporting and put journalists' data at risk. The London Metropolitan Police pursued the publication of leaked information from diplomatic cables as a "criminal matter." Strategic Lawsuits Against Public Participation (SLAPPs) were used as a means to attempt to silence public interest reporting, such as in defamation cases brought by Arron Banks against journalist Carole Cadwalladr. During the general election campaign, the Conservative Party threatened to review the BBC's licence fee and Channel 4's public service broadcasting licence if the party returned to government.' For a number of years now the UK has remained one of the worst-ranked Western European countries in the World Press Freedom Index, largely due to a heavy-handed approach towards the press, often in the name of national security. There is no constitutional guarantee of media freedom in UK legislation. Article 10 freedom of expression from the European Convention on Human Rights is highly qualified with conditions, restrictions and penalties, and equally balanced with other rights, and the interests of 'national security or public safety'. Conduct and publication is controlled by primary media law in the form of acts of Parliament and case law made by the courts, and secondary media law from a range of regulators:

Ofcom stands for the Office of Communications. It is a statutory regulator for licenced broadcasters and can fine, suspend and remove the licence of broadcasting publishers. Ofcom is a large and complex government funded body constituted by legislation. It has a direct responsibility and impact on the regulation of the content of broadcast radio, television and 'on demand' bulletin services. Video-on-demand services include TV catch-up, online film services and those providing a library of archive content. The main home page of Ofcom is at: <http://www.ofcom.org.uk/> . However, your main interest will be in the regular publications of adjudications on investigations into complaints about radio, television and on demand services at <https://www.ofcom.org.uk/tv-radio-and-on-demand> . Ofcom enforces a Broadcasting Code that contains rules which TV and radio broadcasters must follow, and includes the rules for video-on-demand service providers. This is set out at <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code> . The nature of full BBC regulation by Ofcom from 3rd April 2017 is set out at in the [BBC regulation and Operating Framework published by Ofcom.](#)

IPSO is a regulator refusing to be recognised by the statutory Press Regulation Panel. It describes itself as 'the independent regulator for the newspaper and magazine industry in the UK'. Most of the country's print and online media groups contract into its content regulation including the publishers of the *Sun*, *Times*, *Sunday Times*, *Daily/Sunday Telegraph*, *Daily Mail/Mail on Sunday*, *Daily/Sunday Mirror*, *Sunday People*, *Daily/Sunday Express*, the *I* newspaper, and regional/local newspaper groups. It has the power to fine for breaches of the Editor's Code and can order corrections. It has started an arbitration scheme for media law disputes where claimants can pay a fee that is capped at £100 and potentially achieve damages of up to £60,000 and recover costs up to £25,000. The details are set out at: <https://www.ipso.co.uk/arbitration/> IPSO argues that its arbitration scheme is an excellent alternative to media law litigation because it's low cost with a one-off fee of £100, it helps to keep other costs down, it's quicker than taking a matter to court, and it reduces inequality as it puts you and the newspaper on an equal footing.

IPSO adjudicates on the largest number of complaints made against journalists in the UK and its rulings are regularly published at: <https://www.ipso.co.uk/rulings-and-resolution-statements/>

IMPRESS is a regulator recognised by the PRP and is being substantially funded by the family trust of Max Mosley- a media standards campaigner. It describes itself as 'the first truly independent press regulator in the UK'.

It has established through consultation its own code of standards and ethics which can be downloaded and examined online at <https://www.impress.press/standards/impress-standards-code.html> . IMPRESS has also written a detailed guidance on the interpretation of its Standards' Code which it describes as 'a modern Code that aims to assist journalists by promoting and supporting their work. It also aims to protect the public from invasive journalistic practices and unethical news reporting. The Code is practical and responsive to emerging challenges in the digital era including issues like verifying the authenticity of sources and information and using content from social media.'

IMPRESS is running a low-cost arbitration scheme, and has the advantage that those media publishers agreeing to be regulated by IMPRESS will not be subject to exemplary (punitive) damages in media law cases, or the risk of having to pay the legal costs of all sides even if successful. Micro publishing businesses that do not turn over more than £2 million per year, or do not have more than 10 employees, will not be subject to these penalties under the 2013 Crime and Courts Act.

<http://www.impress.press/>

IMPRESS has also begun to investigate complaints and issue adjudications.

See: <https://www.impress.press/regulation/complaint-adjudications.html>

The *Guardian and Observer*, *Independent online*, *London Evening Standard*, and *Financial Times* are significant publishers who have not yet agreed to be regulated by any external body. Should any of them join IMPRESS, then the UK newspaper and magazine industry is likely to have the confusing situation of two active and rival regulators with separate codes of ethics and standards.

The BBC employs the largest number of journalists of any publishing organisation in the UK, and although subject to full future Ofcom content regulation from 2017, still obliges its employees to comply with BBC Editorial Guidelines.

<http://www.bbc.co.uk/editorialguidelines/>

The Information Commissioner's Office regulates the Data Protection Acts, the EU's General Data Protection Regulation, known as GDPR, and Freedom of Information Act. In particular if you process digital information about other individuals for journalistic purposes your employing publisher or you yourself as a freelance will be obliged to register with the ICO: 'The Data Protection Act 1998 requires every data controller (e.g. organisation, sole trader) who is processing personal information to register with the ICO, unless they are exempt'. For most individuals and organisations, the annual registration fee as at 2018 is £35.

<https://ico.org.uk/>

The Information Commissioner fined the Daily Telegraph £30,000 for misusing the data it had collected from its subscribers so that it could send hundreds of thousands of emails on the day of the general election urging readers to vote Conservative.

See: [Telegraph fined £30,000 over email urging readers to vote Tory. Editor's message asking hundreds of thousands of readers to oppose the most 'leftwing Labour leader for a generation' crossed a line, says watchdog.](#)

From the 25th May 2018, the ICO became responsible for enforcing a new data protection regime in the UK combining GDPR with the new Data Protection Act 2018 (DPA 2018).

See: <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/>

More detail on the GDPR implications for journalists is explored later on in the guide. The Information Commissioner does provide a guide for journalist/media bodies setting out their legal duties as data controllers. See: <https://ico.org.uk/for-organisations/media/>

In particular journalists should make sure any of their working personal data, particularly of contacts and sources, is kept securely and that would require the encryption of information being transported on USB keys/memory sticks that are easily lost and misplaced.

These short summaries and guidance on media law must not be regarded as constituting professional and qualified legal advice. Media law is in many parts an extremely complicated specialism of the law and should you have the misfortune of finding yourself in difficulties it is important you receive professional and qualified advice.

In the face of the many legal and regulatory jeopardies you face, it might be prudence to adopt a defensive journalism strategy if you not backed by expert media law resources and advice and a news publisher with long pockets and budgets prepared to fund legal defence and intervention policy.

We would suggest a media law survival strategy represented by the acronym, **SPECTACULAR**, with the letters standing for the following principles. This also features in the chapter on media law in the second edition of Paul Bradshaw's *The Online Journalism Handbook: Skills to Survive and Thrive in the Digital Age*: at <https://www.routledge.com/The-Online-Journalism-Handbook-Skills-to-Survive-and-Thrive-in-the-Digital/Bradshaw/p/book/9781138791565>

S is for Serious implications if you transgress media law. Not only can you be financially ruined if sued- you could be criminally prosecuted, fined or even jailed.

The basic detail- key information and points you need to understand:

Civil litigation is pursued by a privatised profit led legal profession in the United Kingdom that operates with very high costs. Legal fees charged by English media lawyers have been researched and surveyed as being in the region of well over 100 times that charged in European countries. Damages awarded and agreed are generally seen in Europe as disproportionate, but in this country many lawyers think they are fair and justly remedying. From April 6th 2019 success fees were [no longer recoverable in defamation and privacy claims](#). Media law firms have continued to [consider the viability of conditional fee arrangements \(CFAs\) for claims with a high likelihood of success](#). After The Event ("ATE") insurance, which protects claimants from paying their opponents' legal costs in the event of a lost claim remains recoverable only from the damages awarded and not from the losing party.

Most media law crimes are strict liability, which usually means that the prosecution does not have to prove intention, with construction of meaning by subjective interpretation of the alleged victim, or objective interpretation by judges. The UK judiciary has been observed by sociologists as being majority male, white, privately and Oxbridge educated and operating as a self-perpetuating elite. The size of audience (i.e. how many Twitter followers you have and your Facebook privacy setting), traditional readers, listeners, viewers, and number of Internet site visitors will be mitigation on damages and criminal penalty, but not a defence. If defamatory comments streaming under your web postings (damaging to reputation- generally known as libel) have not been moderated (i.e. not checked editorially or legally prior to going live), this does not guarantee you are immune from legal problems. European case law is beginning to be ambiguous about whether it makes any difference to have moderation or not; particularly if the trolling verges on hate crime abuse.

See: [DELFI AS v. ESTONIA - 64569/09 - Grand Chamber Judgment \[2015\] ECHR 586 \(16 June 2015\)](#) And a recent English case has confirmed that the criminal courts can order the banning of social media reporting of sensitive criminal trials because Tweeting and Facebook postings cannot be detached from comments and replies. See: [British Broadcasting Corporation & Eight Other Media Organisations, R \(on the application of\) v F & D \[2016\] EWCA Crim 12 \(11 February 2016\)](#)

In theory, there may be defences for what you do, but the power of the state/private claimant and their lawyers' costs are so great, 'the chilling effect' (in the USA it is called SLAPP- strategic lawsuits against public participation) means it is easier, less risky, and cheaper to surrender, settle and apologise for trying to tell the truth (well what you think is the truth). The alternative is to remain silent- generally seen as self-censorship and compliance in a climate of fear. In England and Wales, where the legal profession is well over 90% privatised and there is less eligibility for legal aid than at any time since the Second World War, if you were courageous (and/or foolish?) enough to defend and represent yourself, Citizens Advice Bureaux are over-stretched and if you are lucky you might have volunteer *pro bono* lawyers to advise you, but most of these are likely to be law students or the newly qualified.

It is also very important to understand that anything you do and publish in the cyber-digital sphere is subject to another dimension of control and liability. This is the private contract you have with the private corporation that hosts your communications. The terms and conditions of global Internet businesses such as Twitter, Google, Facebook and Wordpress offer additional legal duties and liabilities. Your service could be withdrawn with devastating consequences when your work and archives have not been backed up. In July 2016, the *Guardian* reported that writer and artist Dennis Cooper learned that his Gmail account had been deactivated – along with the blog that he had maintained for 14 years. He complained that the decision meant two of his transgressive novels had been taken off the Internet along with what was described as censorious 'erasing of an unfinished book.'

See: <https://www.theguardian.com/books/2016/jul/14/dennis-cooper-google-censorship-dc-blog>

Facebook and Twitter in recent years have frequently been in the firing line for closing accounts and removing material from users without prior notice.

The decision by YouTube to halt the streaming of TalkRadio over allegedly problematic COVID-19 health discussion [is a most recent example of the exercise of private corporate power and censorship in online communications](#). It silenced and closed down what is regarded as a mainstream radio broadcaster in the UK regulated by Ofcom.

YouTube's ban on the output of TalkRadio for about 12 hours was justified on the grounds that its internal 'moderation' and regulatory infrastructure had decided there were breaches of its 'community guidelines' in relation to discussion of COVID-19 health information.

The implications of this incident are serious. The digital Radio station had been given no warning and there was considerable delay over their learning what had been responsible for the alleged breach. The removal of this transmission was an exercise of much more draconian and peremptory disciplining than could be applied if the complaint had been made to the national broadcast regulator Ofcom. [The position of TalkRadio is that it is Ofcom-licensed and a properly regulated broadcaster with robust editorial controls in place, which always take very great professional care to balance debate](#). Ofcom could have only investigated this post-broadcast with a considerable amount of more 'due process' in terms of communicating the complaint and content problem, giving an opportunity to TalkRadio to make their representations, and publicly publish an adjudication in a Broadcast Bulletin with accountability, transparency and public scrutiny of the process.

P is for Privacy- have you invaded somebody's reasonable expectation of privacy without public interest justification? If you expose private intimacies to do with sexuality, education, and family matters, then you could be breaking the law.

The basic detail- key information and points you need to understand:

Privacy is also about intrusive conduct about private information and situations. The UK courts measure the principle of freedom of expression in terms of public interest against privacy rights. This is an equal balancing exercise with an intense focus on the circumstances of each case. Questions that will be asked will include whether there was a duty and entitlement to confidentiality. Article 8 of the ECHR convention talks about the right to home, family and correspondence. The concept of media privacy is so wide-ranging it can include filming digital video on a smartphone at a private location without permission. The victory by Sir Cliff Richard against the BBC indicates the privacy rights extend to the anonymity of individuals subject to police investigation. See: [Richard v The British Broadcasting Corporation \(BBC\) & Anor \[2018\] EWHC 1837 \(Ch\) \(18 July 2018\)](#). This restriction has been consolidated with the cases [Sicri v Associated Newspapers Ltd \(Rev 1\) \[2020\] EWHC 3541 \(QB\) \(21 December 2020\)](#) and [ZXC v Bloomberg LP \[2020\] EWCA Civ 611 \(15 May 2020\)](#)

E is for Ethics- the Editors' Code set for IPSO is regarded as a benchmark on ethical and legal communication.

The basic detail- key information and points you need to understand:

There is no harm studying and respecting the IPSO code at: <https://www.ipso.co.uk/editors-code-of-practice/> [The Editors' Codebook](#) is also a very important and useful resource elucidating the interpretation of the Code's clauses and discussing relevant case histories and

complaints adjudications. For broadcasters it is very important to respect and understand [Ofcom's Broadcasting Code](#).

The BBC's Editorial Values and Standards at <http://www.bbc.co.uk/editorialguidelines/> are also very influential. They are the first base for standards and duties for anyone working for the BBC. You need to bear in mind that from 2017 Ofcom was given powers to regulate all of the BBC's content.

Outside any legal obligations in law and regulation, you should also consider moral and ethical values. Professional reputation and audience loyalty will be jeopardised by a publication policy and behaviour that is unpleasant and unfair and only just stops short of breaching law and regulation. It is known by the Latin expression *damnum sine injuria*. This is about being nasty, discourteous, unpleasant, using people instrumentally instead of intrinsically, and not treating other people as you would yourself. Professional associations such as the [National Union of Journalists](#) and [Chartered Institute of Journalists](#) have a separate code of ethics that sets standards that are in addition to law and regulation.

You might like to consider alternative codes of ethics from the English-speaking world that are influential beyond the narrow prism of British journalism. The US Society of Professional Journalists approves and publishes a code that is much more grounded on moral and ethical principles than the mere pragmatism of staying on the right side of existing law. An example of an ethical maxim not normally emphasised in UK journalism codes is: 'Boldly tell the story of the diversity and magnitude of the human experience. Seek sources whose voices we seldom heard'. See: <https://www.spj.org/pdf/spj-code-of-ethics-bookmark.pdf>

The US Radio, Television, Digital News Association updated its code of ethics in 2015 to take into account the 21st century ecology of digital online journalism, and a specific standard unique to online communications is: "Trending," "going viral" or "exploding on social media" may increase urgency, but these phenomena only heighten the need for strict standards of accuracy'. See: http://www.rtdna.org/content/rtdna_code_of_ethics

C is for Contempt of court- protecting the right to a fair trial without prejudice from media coverage or as a former Attorney General once said: 'trial by Google'.

The basic detail- key information and points you need to understand:

The key question to ask is have you created a substantial risk of serious prejudice, or impeded a fair trial, or breached court orders postponing or prohibiting publication? If you have- it is likely to be the jail spot on the Monopoly board.

Contempt of court is a specific criminal offence in the UK with a maximum jail sentence of two years and unlimited fine. It involves publishing in any way to a third party, including by social media, seriously prejudicial information when criminal cases are active after an arrest, warrant for arrest, or opening of an inquest hearing. It can also be impeding the process of justice by monsterring an arrested suspect and any form of threatening or intimidation of witnesses.

It is, therefore, very important to avoid using online media to comment on any ongoing legal case; whether civil or criminal after arrests, or warrant for arrests have been issued or when litigation is being heard in court. As an individual, you may be unlikely to be aware of any special and additional reporting restrictions that are only known at editor or media lawyer level. Although there are defences to some media law crimes of 'unintentional publication' case law has indicated that the legal system shows little sign of compassion or interest in your 'ignorance of

the law,' or indeed that you were not directly informed, or had knowledge of a reporting restriction. It will be assumed that you should have shown 'good faith' in finding out, and your professional status should be such that you had been properly trained about the risks.

'C' is also for criminal behaviour by committing crimes through conduct and research leading up to your online publication. This could be harassing anyone by causing distress on at least two occasions, computer and phone interception, and bribing people for information through treating, or promising favours. This is covered by two criminal offences in the UK: agreeing to incite a civil servant, including police officers, or members of the armed forces, to commit misconduct in public office, and since 2010, the Bribery Act means that in some circumstances paying sources for information could be a crime with no public interest defence. The Computer Misuse Act 1990 is another piece of legislation making it a crime, for example, to use somebody's computer without their permission to obtain information, or to 'hack' into another person's computer, smartphone or digital tablet having guessed, or obtained their password without their knowledge.

T is for Testing your copy rigorously for any possible breach of media law and ethics before publication. Read, re-read and re-read again. If in doubt, leave it out, seek advice and never, ever take anything for granted. Professional decision making in any form of journalism requires legal checking. You need to be risk averse. You need to be defensive. You need to be professional. The risks in media law come from all directions and are often unexpected. If you have an instinct that something is wrong- trust it and act on it.

A is for Anonymity- in the UK there are many classes of persons who have anonymity for life because of their involvement in criminal processes or legal proceedings. They are often victims or witnesses.

The basic detail- key information and points you need to understand:

All sexual offence complainants have anonymity for life, so do victims of people trafficking, female genital mutilation, known as FGM, blackmail victims where the menaces are embarrassing, children (aged 17 and under) in court cases, and teachers accused of offences against their students prior to being charged. The list is not exhaustive. It includes the identity of jurors in criminal trials and anything concerning their verdict deliberations. Victims of people trafficking criminal offences were given statutory anonymity in 2016 and there is a growing lobby to ensure that victims of 'revenge porn' have the same legal protection. The anonymity applies as soon as the complaint about the crime is made.

All media publishers have to carefully consider the risk of people who know the victims doing their own detective work to put two and two together. This means pixilation, silhouetting and electronic voice distortion are not enough. Actors have to be used. Individual journalists not just editors can be held liable for criminal offences. It is very important to avoid including any kind of specific detail that could enable anyone to make the identification.

What was in the public domain and not subject to a reporting restriction last week or yesterday may not be the case today or tomorrow, and you may not know about it. The English legal system sometimes somersaults between identification and anonymity; for example, in the search for missing youths who could be the victims of sexual offences. The investigating authorities may release names and images in the public interest to secure their safety. As soon

as this is done, and the arrest of the suspect has been made, all forms of media must then delete and remove anything identifying the victims previously made public. What is public knowledge yesterday, may be contempt of court and a serious criminal offence today.

C is for Copyright or Intellectual property. This is a legal protection for the creation of work and includes a large range of media content.

The basic detail- key information and points you need to understand:

You should not steal other people's intellectual property; particularly in words, images and music. The best defence is to always get permission for using other people's creative work. Breach of copyright is publishing the substantial part of image, script, publication, table, database belonging to another person or organization without permission unless there is a defence of fair dealing by criticism or review, parody, 'quotation or otherwise', or use in reporting a current event.

However, you must always remember that digital images and photographs are excluded from the reporting current event defence. You might have a very rare public interest defence where an image discloses something so awful, outrageous, and wrong there is no other way of reporting it. You may also have the defence that the material is now in the public domain because the publication is 70 years after the death of the author, 50 years after the date of a broadcast, 70 years after the public release of a sound recording (from 1st January 1963), and 70 years after the death of the director, screenplay author and composer of an original film production. Media publications such as films and online websites often have multiple layered copyright interests where the duration varies. Only photographs and images put into the public domain prior to July 1912 are absolutely safe from copyright liability. Computer programmes, coding, and software are also copyright protected.

The Creative Commons license is a vital defence and enabling facility for the use of in copyright images and multimedia in online publications. For more detail on the different categories of license available see: <https://creativecommons.org/licenses/>

You need to be cautious about siphoning information from online databases for the purposes of using infographic style software to produce data journalistic designs and lay-outs. In the UK database owners are entitled to 'database rights' under an EU 1996 Database directive that was implemented in English law a year later. Commercial databases are often updates and this means that the 15 year duration is extended when this happens. While the EU Database *sui generis* protection ended for databases made commercially available after 1st January 2021, [the government has indicated it will legislate to continue the protection in future UK law.](#)

U is for Unreasonable- if your language is, then there is a risk you are ringing media law alarm bells.

The basic detail- key information and points you need to understand:

Communications on electronic networks such as on the Internet or social media like Twitter make you liable under section 127 of the 2003 Communications Act to criminal prosecution for messages that are 'grossly offensive or of an indecent, obscene or menacing character'. That could mean up to 6 months of imprisonment and a fine of up to £5,000. In 2011, over 1,200 people were prosecuted under this law. By 2014 the figure had risen to over 1,500 with 55 individuals jailed. Examples have included tweeting jokes at airports that have been

misunderstood. What you think is a strong opinion could be seen as 'grossly offensive' by the police, Crown Prosecution Service and Director of Public Prosecutions. Actual convictions in Scotland [reached a peak of 974 in 2013 and dropped to 567 in 2018](#). The Met Police released figures on arrests, charges and prosecutions [up until 2019](#).

Section 127 can also be used for 'message stalking' that you might regard as protesting or a campaign if it can be proved that your electronic utterances are 'for the purpose of causing annoyance, inconvenience or needless anxiety to another.'

Section 1 of the Malicious Communications Act 1988, that applies to old mail as well as electronic communication, makes it a criminal offence with the same penalties as above, to 'threaten', message indecently, grossly offensively, or with false, or believed to be false information on the part of sender.

In 2013 the DPP finalised guidelines on when it is not in the public interest to prosecute menacing messaging. Prosecutions are likely if social media communication contains 'a credible threat of violence, a targeted campaign of harassment against an individual or which breaches court orders'. The 'grossly offensive' category is expected to be reserved for racial/gendered orientation or hate crime abuse.

See: [Social Media - Guidelines on prosecuting cases involving communications sent via social media](#).

In January 2021 Ofcom announced that [it was adjusting its definition/meaning of 'Hate Speech' to take into account the rubric of the European Union Charter on Human Rights](#). It would now embrace:

'All forms of expression which spread, incite, promote or justify hatred based on intolerance on the grounds of disability, ethnicity, social origin, gender, sex, gender reassignment, nationality, race, religion or belief, sexual orientation, colour, genetic features, language, political or any other opinion, membership of a national minority, property, birth or age.'

L is for Libel- attacking anyone's reputation in a serious and inaccurate way can lead to litigation.

The basic detail- key information and points you need to understand:

Libel is anything said by image or words that causes serious harm to the reputation of anyone or indeed a business and company by any form of media publication- even an email.

Tweets, re-tweets, blogs, Facebook, Instagram images or digital video, WhatsApp messaging, YouTube, Vimeo, text messaging & 'status' notices and emails 'copied' and 'distributed' to more than a second party i.e. beyond the traditional single mail correspondent can be libellous and represent publications in terms of English law. The old rule was the letter seen by one person was not a libel publication unless opened by a butler or secretary. You should bear in mind that libel in Scotland, which has a separate legal system, includes a damage to reputation communication to one person only.

The libel can be committed by implication, innuendo and jigsaw juxtaposition identification e.g. any reader connects a fragment of information online to something said on the radio, television or in a newspaper. You do not even have to name people to get into trouble or even explicitly state or repeat an allegation. The House of Commons Speaker's wife, Sally Bercow, was

successfully sued for libel for one tweet when she asked why a former Tory politician was 'trending' and added 'innocent face.' This was deemed to be libel by jigsaw identification/implication because allegations of child abuse had been broadcast by the BBC, and on the Internet, and somebody the BBC did not name was being identified in blogs and social media.

The libellous meaning is constructed by the victim and your authorial intention is no defence. In multimedia you have to watch out for something general and libellous being said in commentary being connected to illustrative 'wallpaper' still or moving images with specifically identifiable people in the *mise en scène* of the imagery.

But there are defences. For example, there are privileged shields where your information and reporting is derived from court or government proceedings. This gives you absolute or high qualified privilege. Public meetings, press conference and press releases have a privilege at a lower qualified level. Fairness and accuracy are paramount and you must publish the gist of a person subject to defamatory allegations if they demand it. Other defences include innocent dissemination, truth in substance and fact, honest opinion based on true facts, or publication in the public interest. You could have the defence of neutral reportage provided the language of the reporting is balanced and you are not shown to adopt and agree with the libellous allegations being reported. Editorial decision-making conditions are considered in the evaluation of the public interest defence. There is also a specific web operator's defence for user generated comments whether they are moderated or not. Complaints need to be addressed within 48 hours. The Defamation Act 2013 introduced a qualified privilege for academic conferences and papers that are peer-reviewed. It is very important to appreciate that malice on your part will probably defeat many of these defences. Malice means deliberately setting out to harm somebody usually to an unlawful extent.

A is for Attitude- keep it professional and cautious. It does not mean you have to 'self-censor' and sacrifice your freedom of expression. You can write in an angry way, but your anger needs to be channeled through truthful and lawful writing that is in the public interest. The interest needs to be more than just what interests the public. And being abusive, menacing and threatening is likely to be unlawful.

R is for Rights- other people's, which under the Human Rights Act 1998 are protected in so many ways. Article 10 Freedom of Expression as a right is equally balanced with Article 8 right to privacy and Article 6 right to a fair trial. At its extreme digital, analogue printed, and digital online communications could threaten somebody's right to life under Article 2 and right not to be subject to inhuman and degrading treatment under Article 3. Read them and understand them at: <http://www.legislation.gov.uk/ukpga/1998/42/schedule/1>

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The added Online dimension of media law makes the subject asymmetrical. This means that it intersects myriad dimensions of private, public, analogue, digital, UK and international forms of law and regulation. It also means it is dynamic, complex, and changing.

For the past thirty to forty years UK media law has been substantially influenced by European law and the rulings of the European Court of Human Rights in Strasbourg and the European Court of Justice at Luxembourg. UK courts have to 'take into account' rulings of the ECHR derived from the European Convention on Human Rights and Fundamental Freedoms which became statutory UK law with the passing of the 1998 Human Rights Act and came into force from October 2000. Since the UK joined what was then the European Common Market in 1972, all rulings of the ECJ (the European Union Court) had been binding on UK courts. However, the UK's exit as of 1st January 2020 and end of transition period 1st January 2021 means that this is no longer the case.

Another unstable and ambiguous aspect of media law is that there are often no clear right and wrong decisions on publication. They are merely arguable in law and not certain. Lawyers will be happy to be paid to argue the issues in courtrooms, but you personally, and your employing publisher, may not care to pay for the huge costs involved. In the digital online information age, we are also experiencing an intense transition and combination of production between analogue printed media and online digital media. The law does not necessarily have an answer and clear policy for both dimensions of publication.

It can also be argued that media law is a very political subject. The development of media laws and the impact of civil litigation can be construed as the result of social and political activism. The son of Britain's Fascist leader during the 1930s, Max Mosley, has performed a major role in funding legal action by 'media victims' and tabloid news coverage perceived as 'ruining people's lives.' He has been a significant funder of the media victim campaigning body 'Hacked Off' and his family foundation has provided most of the funding (reported to be up to £3 million) to the alternative press and online regulator IMPRESS.

See: <http://www.newsmediauk.org/Latest/nma-why-impress-should-not-be-granted-recognition-as-an-approved-press-regulator> Mr. Mosley is a controversial figure. He is a former racing driver, Parachute Regiment territorial, qualified barrister specializing in intellectual property law, based in Monaco, former head of Formula One Racing and successful claimant against the *News of the World* Newspaper in 2008 after it had published surreptitious footage of his involvement in an S&M party he had paid £30,000 to take part in. He has been pursuing litigation at the European Court of Human Rights to establish a legal obligation for news publishers to inform potential media privacy victims prior to publication. The ECtHR ruled that this would be detrimental to freedom of expression. Mr. Mosley sought to appeal the issue to [the Grand Chamber, but was unsuccessful.](#)

See: [MOSLEY v. THE UNITED KINGDOM - 48009/08 \[2011\] ECHR 774 \(10 May 2011\).](#)

Other aspects to his controversial identity relate to his family history. His father, Sir Oswald Mosley, married Diana Mitford, in a ceremony in Germany attended by Joseph Goebbels and Adolf Hitler. Sir Oswald was detained for several years during World War Two. As a young man in the late 1950s and early 60s, Max Mosley, was involved in his father's Union Movement, though he has distanced himself from the politics of his youth. Thus, a multi-millionaire has taken a significant role campaigning against media abuse of power that has led to the closing down of what was the UK's most successful and largest circulation Sunday newspaper, the establishment of the Leveson Inquiry, high profile and expensive police inquiries into journalistic

behaviour, and legislation curtailing and controlling what have been described as ‘the excesses’ of media publication and conduct.

Similar action by wealthy donors has impacted on the role of sensationalist and media privacy harming media publishers in the USA. In 2016, the online site, Gawker, shut down after 13 years following an award of damages against it of \$140 million for breaching the privacy of Hulk Hogan whose real name is Terry Bollea. The late *Guardian* editor, Peter Preston, argued: ‘The collapse of the libertarian, scandalous news site has secretly relieved some less aggressive media companies. But the implications are truly ominous.’ See: <https://www.theguardian.com/media/2016/aug/28/gawker-gone-cant-look-other-way-press-freedom> . As New York Times writer, Farhad Manjoo, explains Gawker’s demise is due to the fact that ‘Nine years ago, Peter Thiel, a wealthy and secretive Silicon Valley investor, read something about himself online that he didn’t appreciate. He apparently vowed revenge, eventually carrying out a plan to fund lawsuits against Gawker Media, the publisher that upset him, culminating this week with the shuttering of the flagship Gawker.com.’ See: http://www.nytimes.com/2016/08/25/technology/gawkers-gone-long-live-gawker.html?_r=1

Peter Thiel is the billionaire co-founder of PayPal. Thiel secretly funded Hulk Hogan’s legal case in Florida with around \$10m. He was motivated by the fact that in 2007 Gawker had published a story revealing that he was gay. Thiel told the *New York Times* ‘it’s less about revenge and more about specific deterrence.’ He said the story about his own sexuality was one of many that had ‘ruined people’s lives for no reason’. And like Max Mosley in England, he decided to help fund ‘victims’ of the site to mount legal cases against Gawker. See: <https://www.theguardian.com/media/2016/may/26/paypal-co-founder-peter-thiel-admits-bankrolling-hulk-hogan-gawker-lawsuit>

Recommended specialist media law books:

The latest editions of:

McNae’s Essential Law For Journalists, edited by Mark Hanna and Mike Dodd, [25th Edition in 2020, Oxford University Press.](#)

Media & Entertainment Law by Ursula Smartt, [4th Edition 2019, Routledge.](#)

Online Law For Journalists by Cleland Thom, [2nd Edition 2017, clelandthom.co.uk](http://clelandthom.co.uk)

UK Media Law Pocketbook by Tim Crook, 1st Edition 2013, Routledge. [New edition planned for 2021].

Law for Journalists by Frances Quinn, [6th Edition 2018, Pearson.](#)

Comparative Media Law and Ethics by Tim Crook, 1st Edition 2009, Routledge [New edition planned for 2021].

The Editors’ Codebook, edited by Jonathan Grun, Edition 2021, an electronic book downloadable from <https://www.editorscode.org.uk/downloads/codebook/Codebook-2021.pdf>

The more detailed briefings begin with 3) **Professional moral values and ethics**

As journalists and media communicators we are expected to:

- 1: Understand that media communication involves the exercise of **power and responsibility**;
- 2: Our conduct and communication has **consequences** and we have a duty to consider **the impact** of what we do and how we communicate in relation to the people we interview and

meet, and our audience. Our fellow human beings should be treated intrinsically rather than instrumentally . This means respecting people for who they are rather than how useful they can be for us .
3: In our relationship of communication we are expected to show respect for other individuals and carefully evaluate any justification we may have to cause harm and offence . We should strive to be fair in our behaviour and publishing;
4: As we live and work in a democratic society with an independent judiciary we are expected to abide by and respect the rule of law even if we disagree with the nature of any existing laws;
5: In news reporting we are expected to avoid allowing our personal opinions and politics to influence our construction of stories and representation of opinion;
6: In news reporting we are expected to aspire to impartiality with an acknowledgement that objectivity is rarely achievable in its absolute degree;
7: We are expected to be transparent about any conflict of interest in our journalism and accountable for our behaviour and communication;
8: We are expected to develop our professional skills to do our job to a high standard so that our audience can trust our ability, judgment and the content we produce in all the different media in which we work.

It is very difficult to apply in **absolutely positive and negative terms** the values of **right and wrong** and **good and bad** in journalistic conduct and communication. Human life teaches us the reality of having to negotiate **ambiguities**. This means that the values 1 to 8 are aims that we strive for. There is nothing original in these concepts.

For example, in 2015, the BBC pledged to uphold the following **values** to its audience and [the matrix has been archived in a resource for the School Report project](#).

<p>Truth and accuracy Accuracy means not only getting the objective, verifiable 'facts' right but accurately reporting opinions expressed by those who you report.</p>	<p>Independence The BBC's obligation to its audiences means journalists have to be able to show the independence of their decision-making and do all they can to eliminate doubt about it.</p>	<p>The public interest In the public interest or what the public's interested in - the difference is crucial. And, of course, there are many different audiences with variable interests.</p>
<p>Accountability Being accountable to BBC audiences means being able to show good reasons for your decisions. Why you must listen to your audience and acknowledge your mistakes.</p>	<p>Impartiality The BBC's Charter and Agreement requires BBC journalism to be impartial - it's part of the contract with audiences. Find out what this means to journalists in their daily decision-making.</p>	<p>BBC values The BBC's ethics and values are non-negotiable for every journalist; from the most junior to the most experienced.</p>

Understanding and applying principle and aim number 4: **respecting the rule of law**. What does that mean and what are the potential ambiguities?

It is a professional necessity that journalists learn about media law to the highest standard possible. It is a requirement of all industry/professional accreditation, and no media publisher is going to employ a journalist without accomplished and reliable applied legal knowledge. However, journalists rarely have the power to make the laws they have to comply with. Legislation and court rulings sometimes leave **uncertainty** about the application of law and how to comply with it.

This was the case with the phone hacking law- the Regulation of Investigatory Powers Act of 2000. When the first prosecution of a journalist and private investigator was being decided in 2006, there was argument amongst lawyers that the statute did not make it a criminal offence to listen to a mobile phone message stored on an account after it had been heard by the subscriber without his/her permission. The situation was not clarified by the Appeal Court until 2013.

However, it would appear a number of journalists eavesdropped on phone messages believing that they were not committing an actual criminal offence.

In the legal profession, this is seen as **damnum sine injuria** meaning the worst conduct in moral terms and causing damage just short of breaking an actual law.

In terms of ethics, it is clear that such activity is **immoral**, an **intrusion into somebody else's privacy**, and there would need to be a very strong **public interest** to justify such behaviour if it were not a criminal offence.

It is the equivalent of opening a cabinet in a stranger's house and reading a file of intimate letters or opening somebody's mail without their permission. Everyone knows that such actions are immoral, unethical and unacceptable.

Here is an example of interpretation of the law being **ambiguous**, but the ethical position is certainly not.

Can you think of a situation when phone hacking might be morally justified?

An example might be when a mailbox message contains information that is a matter of life and death to a subscriber who is unconscious or in a coma. The action would still be a criminal offence, but it is hoped that the Crown Prosecution Service/Director of Public Prosecutions would choose not to prosecute since to do so would not be in the **public interest**.

Understanding and applying principle and aim number 6: **impartiality**. What does that mean and what are the potential ambiguities?

The BBC has spent much money, time and anguish defining, developing and debating the concept. It can be understood as avoiding the intention and appearance of bias, trying to be balanced, or fair and proportionate in representing all sides to an issue. It can also be perceived as avoiding the alienation and marginalizing of minorities. It can mean verifying the assertion of facts, seeking the point of view and opinion of somebody or an organization facing allegations, and fairly reporting the reply.

It can also be seen as part of a process of achieving trust with your audience that you are not propagandizing rather than reporting; that you are not deliberately, or through laziness, omitting important and relevant facts, and opinions.

Since it is now accepted that philosophically it is very difficult to achieve an absolute notion of objectivity in journalism on the basis we are all socially influenced and conditioned subjects, it is more than likely that applying the principle of impartiality presents many potential ambiguities. Here are two examples.

1. It has been argued that global warming and its evolved theory of climate change enjoys a near consensus among the world's scientists and conclusions of peer-reviewed papers. More recently the balance was said to have been 95% supporting the theory and only 5% dissenting. It follows that a news report or feature could be misleading the audience by representing the argument in terms of a balanced debate with an equal amount of space and significance given to both sides of the argument. It might even be argued that the dissenting view may not have any place in a broadcast programme on the subject. A similar line of thinking could be applied to the controversy over the MMR vaccine that is said to have discouraged parents immunizing their children and creating the conditions for the resumption of measles and whooping cough in young children; sometimes leading to death from these diseases. However, an adherent to the writings of the 19th century political theorist and philosopher John Stuart Mill would argue that the tyranny of majority opinion should not silence minority voices because truths can be postulated in the form of half-truths and history informs us that a lone voice such as Galileo, asserting that the world was not flat, turned out to be correct. It may well be the case that majority truths should collide with what are seen as minority 'errors'. This is a time-honoured debate in media/journalism ethics. There are no guaranteed formulas and solutions, but the value of proportionality, fairness and open-mindedness combined with social responsibility are all values to bring to bear in the argument and discussion.
2. At election time what are our ethical duties in reporting and representing extremist and minority parties? The vast majority of professional journalists in a liberal democratic society would not be enthusiastic about reporting the opinions of political groups advocating racist and bigoted ideology. But ignoring, suppressing and censoring this facet of political life would challenge, would it not, the pledge to report and communicate impartially? In fact, UK broadcasters, under statutory Ofcom regulation, have a duty to identify that such politicians are candidates standing in an election. How does the journalist and its publication determine the extent of such coverage? The practice in Britain is to ensure a proportion of balanced coverage to political parties which is equal to the support they received in the previous election. But this has led to complaints of exclusion and discrimination from parties enjoying a major boost/improvement in opinion polls. This has also hindered 'Independents' in Mayoral elections who had no previous electoral candidature and therefore no previous results to found a calculation for coverage. The print and online media in the UK have no legal obligations to provide fair and balanced coverage of all the parties standing in elections. The ethical position becomes more awkward and ambiguous in situations where minority extremist parties spouting an ideology that was previously offensive (e.g. racist or xenophobic) become supported by the mainstream in opinion polls. What should the journalist and media do? Maintain or heighten critical and questioning coverage, or ignore the extent of popularity? The former might be seen discriminatory and biased if the style of coverage was more critical for one party and less for another. The latter can be seen as unethical and unprofessional in not only being biased, but also failing to report factually the extent of public support for a political group.

3. At any time and in any social, political and cultural context there is consensus that some opinions and values are not expected to be communicated with in terms of impartiality. For example, what moral justification has anyone to be impartial about violent crime? Nobody would be expected to have an impartial attitude to genocide or rape. But these taboos may not necessarily endure as universalizable or immutable values. Prior to 1967 homosexuality was a crime in the United Kingdom and so was abortion. Prior to 1991 rape in marriage was not a crime. And prior to these legal changes for centuries social attitudes tolerated and encouraged the exercise of what has now become regarded as unconscionable actions, attitudes, prejudices and discrimination. Abortion remains a subject where the arguments for and against are part of a legitimate debate. Anyone arguing that men or women have a right to rape their partners in marriage is likely to be greeted with contempt and outrage. Discrimination on the grounds of gender or sexual orientation is now unlawful. In non-Muslim countries, hostile and satirical visual depictions of the prophet Mohammed may be regarded as discourteous, and rude, but not unlawful. In Islamic states, such expression is not tolerated and regarded as insulting and unlawful. Denying the Holocaust in the USA is protected by the free speech First Amendment of the country's written constitution. In France and Austria, countries where so many of its citizens were victims of the Final Solution during the Second World War, such communication is regarded as a hate crime and meriting criminal prosecution. Impartiality, therefore, shifts its parameters and boundaries, sometimes referred to as 'red lines' or 'crossing the Rubicon', across time in terms of history and place in terms of geographical location and cultures.
4. In recent years the BBC has found itself under attack over the issue of impartiality. There have been two significant case histories, which have been much debated.
Maga Munchetty September 2019. [The BBC Breakfast host was found to have breached guidelines by criticising Donald Trump's motives after he said four female politicians should "go back" to "places from which they came"](#). The corporation said its editorial guidelines "do not allow for journalists to... give their opinions about the individual making the remarks or their motives for doing so - in this case President Trump". After a storm of protest against the decision the BBC's director general [Lord Hall reversed the decision](#). He told staff that Munchetty's words were not 'sufficient to merit a partial uphold' of the complaint against her. He reiterated that 'racism is racism and the BBC is not impartial on the topic.' Ofcom [decided not to investigate Munchetty's exchange](#) with co-host Dan Walker, saying it did not break its broadcasting rules around impartiality. The regulator also criticized what it saw as the BBC's 'lack of transparency' over its handling of the original complaint.
Emily Matlis May 2020. The BBC decided that an introduction about Downing Street political advisor Dominic Cummings on the BBC Two programme *Newsnight* [did not meet the required standards of due impartiality](#). The programme began with presenter Emily Maitlis saying 'the country can see' he had 'broken the rules.' The BBC said it should have made clear the remarks were 'a summary of the questions we would examine' about the prime minister's aide. The Independent reported that the BBC [had received over 24,000 complaints about the introduction](#). Press Gazette [reported that the BBC's head of news said that the monologue about Dominic Cummings belonged 'more on the op-ed page in a newspaper'](#) than as the introduction to 'an impartial broadcast programme.' In March 2021 [Ofcom decided not to pursue investigating a complaint of](#)

[breaching 'due impartiality' and explained](#): 'we also considered that the presenter's opening remarks had the potential to be perceived by some viewers as an expression of her personal view on a matter of major political controversy and major matter relating to current public policy. In light of the action already taken by the BBC, we did not consider the programme raised issues warranting investigation. However, we have reminded the BBC that when preparing programme introductions in news programmes, which are designed to catch the audience's attention –particularly in matters of major political controversy –presenters should ensure that they do not inadvertently give the impression of setting out personal opinions or views.'

US Public radio perspective on impartiality. It is certainly instructive to consider how the doctrine of professional impartiality is observed and regulated by equivalent public service broadcasters in the English-speaking world. National Public Radio in the USA [maintains a detailed section of its Ethics Handbook online dealing with the subject of impartiality](#) and sets out as a general principle the argument that 'the public deserves factual reporting and informed analysis without our opinions influencing what they hear or see. So we strive to report and produce stories that transcend our biases and treat all views fairly. We aggressively challenge our own perspectives and pursue a diverse range of others, aiming always to present the truth as completely as we can tell it.' The NPR doctrine in impartiality seeks to ensure: 'Impartiality in our personal lives; awareness that a loved one's political activity may create a perception of bias; impartiality as citizens and public figures; adherence to the guideline don't sign, don't advocate, don't donate; not serving on government boards and commissions and ensuring that standards of impartiality also apply to social media.

NPR advises its journalists covering the news to 'stick to reporting and analysis. We should not tread beyond well-supported conclusions based on our reporting and should not present opinions as fact. Our aim is to give the public the evidence to weigh and develop their own opinions, without the intrusion of ours.' NPR is aware that it is not possible to separate the style of journalistic language from professional ethics. Consequently, 'when language is politicized, seek neutral words that foster understanding.'

Impartiality and Professor Roy Greenslade. In March 2021 the former City University journalism ethics professor, Guardian and Evening Standard columnist and Daily Mirror editor Roy Greenslade wrote articles for the Sunday Times and British Journalism Review article justifying his support for terrorism by the Provisional IRA. The [BJR article was titled 'What I did in the war'](#) and introduced as 'The IRA's terror campaign in support of Irish unification was supported by a figure at the heart of the UK newspaper industry. He explains why.' Mr Greenslade's position and articles were condemned by the journalist Stephen Glover who wrote a feature headlined ['IRA backer Roy Greenslade and the Republican cell at heart of Guardian who went to war... on me.'](#) One of his former students Tom Goodenough wrote an article in the Spectator asking the question ['Why did I pay £9,000 for Roy Greenslade to lecture me on media ethics?'](#) Mr Greenslade resigned what had become his Emeritus Professorship at City University. The Chartered Institute of Journalists criticised his support for terrorism while holding the positions he did in journalism explaining that they undermined respect for the significance of journalistic independence, impartiality, transparency and honesty. The violence perpetrated by the Provisional IRA cost the lives of news photographer Ed Henty

covering the City of London Bishopsgate truck bomb in 1993 and Daily Express journalist Philip Geddes in the Harrods car bomb of 1983. The Institute's position was that it is professionally incompatible for any journalist, let alone a national newspaper editor and Professor of journalism ethics, to lead a double life of propagandising one side in any armed conflict with a fake identity while at the same time working for news publishers seeking to report on it. The Institute believed this is about the safety of journalists as well as trust in the integrity and fairness of reporting and publication coverage. The CloJ made it clear that in journalism ethics a journalist cannot and should not be a double-agent for any government or paramilitary group using violence to further their political ends. Former Guardian editor Alan Rusbridger said [Roy Greenslade ought to have been 'frank about his own political beliefs and attachments'](#) when writing about Northern Ireland matters, and the Guardian apologies to a woman who complained about an article he wrote criticising her involvement in a television documentary that investigated her allegation of rape by a member of the IRA. Press Gazette published [a long feature exploring the implications of his admission of support for the IRA for his past journalism.](#)

Understanding and applying principle and aim number 8: Duty to develop **Professional skills** to do our job to a **high standard**. What does this mean and what are the potential ambiguities?

The professional journalist has a duty to develop a high standard of skills in order to fulfill the duties of effective, reliable and trustworthy communication to the audience. This is an ethical dimension not usually highlighted in standard media and journalism ethics books. Acquiring an operational skill in shorthand is an example of the professional ethic in achieving a high accomplishment of a practice skills portfolio. Shorthand contributes towards accuracy. It is essential when reporting in environments where electronic recording devices are not permitted and its use extends from accuracy to fairness and then to complying with legal obligations.

The accurate shorthand note is the evidence that your version of the truth is reliable. It is the typography of the first draft to witnessing history. Being seen to use shorthand is also an advertisement to interviewees that you are committed to a professional standard of accuracy and aide-mémoire note-taking.

Further key media journalist skills that build trust and confidence and show respect to the audience include writing, presentation, appropriate and sensitive editorial decision-making and operational skills with media technology.

The radio journalist who is not competent in operating the hand-held digital recording device or multi-media smart-phone could be said to be disrespecting people interviewed. Their time is wasted if sound, video and images are unusable. Their representation is flawed and undermined by poor quality.

Presentation in voice and appearance contributes authority and clarity as well as a positive disposition to any audience.

This means that the professional journalist has an ethical obligation to hone, polish, practice, and improve every aspect of essential practice skills. Precision, good style, scansion, euphony, appropriate use of adjectives and adverbs (if at all) narrative exposition, intro/lead-in and headline writing, writing that avoids under-estimating or over-estimating the intelligence of the audience are important factors in consolidating an ethical relationship with employer, colleagues, contributors in research and interviewees. If the

communication is obscure, confused, slapdash, illiterate, incoherent, patronizing and over-simplistic journalists and media communicators risk jeopardizing the trust and loyalty of their reading, listening and viewing audiences.

The paradox and ambiguity of this realm of ethics emerges when journalists are subjected to social and employment conditions to hinder the development of skills through lack of training and investment in new technology. Rationalization, cutbacks and exploitative employment practices can leave professional journalists over-stressed, exhausted through over-work and surrounded by colleagues who have been employed without the necessary experience and qualifications. Professionalism in skills and value can also be undermined by an employing culture within a media institution that is overwhelmed by competitive pressures to 'cut corners' and legitimize unethical and potentially unlawful practices. This is where it is argued that professional journalists should be supported by the ethic of a conscience opt-out to enable them to reject instructions without reprisal in employment and the law should support those who insist in refusing to comply with unethical and illegal newsroom cultures.

We now move onto 1) **Primary Media Law-**

Journalists need to be aware of four major areas of the law when reporting and writing articles:

1. **The Law of Media Contempt:** Ensuring people have a fair trial
2. **Defamation (Libel):** Ensuring that people's reputations are not unfairly damaged by inaccurate and malicious information.
3. **Privacy.** Demonstrating respect for the right to privacy (family, home and correspondence and private information)
4. **Copyright and Intellectual Property.** Avoiding infringing other people's rights of property in information and publication.

There are many criminal sanctions for journalists who break media law and draconian punishment and embarrassment through secondary media law and ethics regulation, for example, by IPSO and Ofcom.

In 2020 I was commissioned to research, investigate and report on the development and state of Open Justice in the UK legal jurisdiction.

This has been an initiative by the United Nations Development Programme (UNDP), via the 'Rule of Law Partnership in Uzbekistan' project (run by USAID, the Supreme Court of the Republic of Uzbekistan, and UNDP)



Open Justice- balance between
media, judiciary and public interest in
UK culture, society and politics

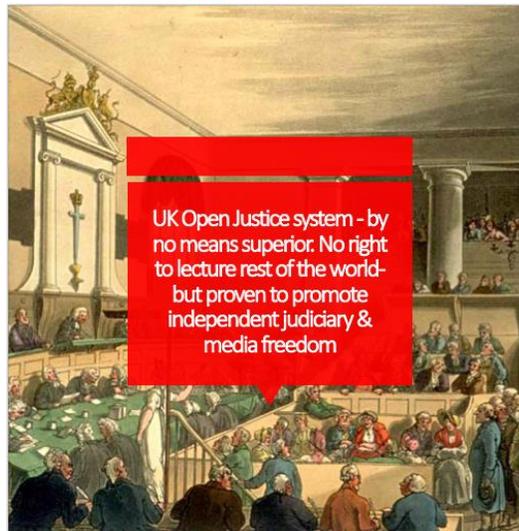
By Professor Tim Crook PhD, Emeritus Goldsmiths, University of
London and President of the Chartered Institute of Journalists (World's
longest established professional association of journalists) Author of
Comparative Media Law & Ethics, UK Media Law Pocketbook,
(Routledge 2009 & 2013) and BTTC Media Law, Regulation and Ethics
Handbook (annual)

I presented to a special conference session in Uzbekistan on December 4th 2020 with judges, judicial officials and journalists who have been developing the country's engagement with Open Justice culture.

The conference sessions engaged comprehensive discussion and reflection about comparative practices and insights and ideas for future development.

This section includes the body of research and analysis provided for discussion.

This includes particular recognition and concern for the implications of the current global crisis of the COVID pandemic and the problem in many countries of the growing decline in print circulation and loss of news publication advertising to online digital oligopolies.



The UK Open Justice system – is by no means superior

Every citizen of the world should guard against ethnocentrism- believing everything in their country and society is superior to everywhere else and they have the right to export the model to ‘civilize’ and improve the rest of the world.

I have no right to pontificate to judges and journalists in other countries. I have no intention of doing so. And my presentation about the UK system is necessarily critical and contrite about its failings and problems.

Another thing I want to try to avoid is media law and ethics tourism. That’s superficially online researching another country and culture’s legal and media system to pick and choose things I think would work well and help reform the UK situation.

A few weeks in Amsterdam, New York City, Kuala Lumpur, Beijing or Moscow without fluent knowledge of the language is not going to equip me with proper understanding of socio-economic, cultural and historical roots, values and imperatives.



But the UK’s largely Open Justice system has been proven to promote an independent judiciary and advance media freedom.

Both are considered as very strong constitutional factors that underpin democratic society, promote equality before the law, and the necessary stability of respect for the rule of law.

What has been learned very, very slowly over hundreds of years in the United Kingdom?

Democratic policing is successful policing by consent.

A Democratic legal system is one where the authority of the legal system and courts has public respect and support.

There are three legal jurisdictions in the UK: England & Wales; Scotland; and Northern Ireland. All vector to the UK Supreme Court at Westminster. All are very similar with appointed professional, not elected judges.

In the matter of serious criminal cases where the accused plead not guilty the verdict is determined by a jury of lay persons (non-judges).

There are 12 in England and Wales and Northern Ireland, and 15 in Scotland.

They are selected randomly from electoral registers.

This is considered to be the vulnerability to media prejudice and what UK legislation describes as the substantial risk of serious prejudice to the administration or impendance of justice.

And in the UK, it has been decided to apply criminal legal sanctions to media publications and their editors who generate so much prejudice, hate, suspicion and pre-judgement in relation to an impending criminal trial with jury determination.

This is all about vilifying an accused or defendant and in more vernacular language sometimes called 'monsterring a suspect'.

Preventing fair trial by jury in the UK can lead to prosecution, an unlimited fine and a maximum prison sentence of two years.

The last time an editor went to prison for this kind of offence was in 1948- Sylvester Bolam, a Durham University graduate and editor of the mass circulation Daily Mirror newspaper.

He approved publication before criminal trial of a news article in which the serial killer, John George Haigh, after being arrested for multiple murders was said to have confessed to drinking the blood of his victims like some kind of 20th century vampire.

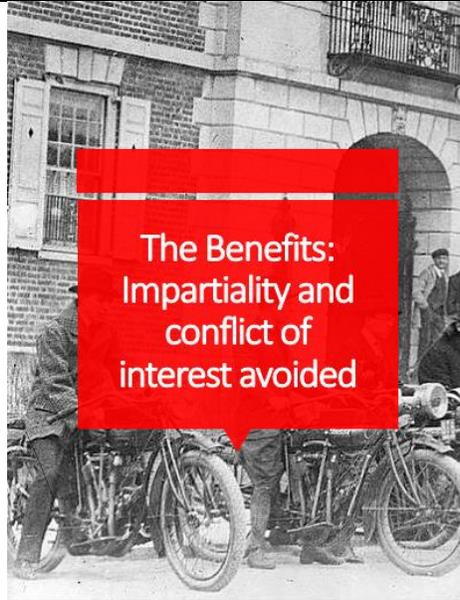
He was not named in the report, but any future jury could obviously make the connection.

This three-month imprisonment experience of a well-educated middle-class bourgeois newspaper editor was said to have broken his health and he died five years after his release.

He was only 48 years old when he passed away in 1953. In the modern age such punishment would most likely be considered disproportionate.

Jailing journalists or editors for publication offences is discouraged in many legal jurisdictions though there have been exceptions in the UK with two journalists being imprisoned in the early 1960s for refusing to reveal their sources to a judicial public enquiry.

More recently a handful of professional journalists were imprisoned for criminal offences connected to the phone hacking scandal.



The Benefits of Open Justice: Impartiality and avoiding judicial conflict of interest.

Justice depends on the impartiality of the judges and the court officials operating any legal system.

The avoidance of conflict of interest must be in the appearance as well as the material fact.

This cannot be achieved without justice being open and subject to the scrutiny of professional journalists reporting fairly and accurately, and without fear or favour.

We go back in time now to an everyday Magistrates Court case about a motorcycle collision and road traffic offences in a country town in Sussex, England in 1924.

R v Sussex Justices concerned a motorcyclist called McCarthy who was accused of dangerous driving.

It became an important test case in setting the value and principle of judicial impartiality.

The clerk to the justices (the judicial officer of the court) was a member of the firm of lawyers acting in a civil claim against Mr McCarthy arising out of the accident which had led to the criminal prosecution.

The clerk retired with the three lay justices trying the case when they were discussing whether to find him guilty or not.

They did return to convict the defendant. The justices said the clerk had said nothing to them and not directly influenced them.

But on appeal Lord Chief Justice Hewart explained: ‘...it is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.’

These words have become iconic whether quoted in or out of context.

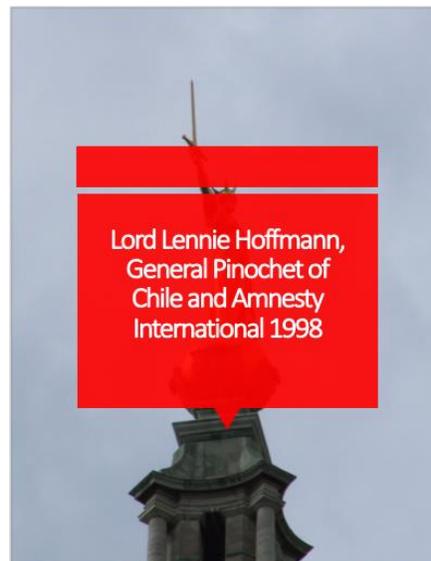
The Natural Justice principle here could only be upheld because of Open Justice.

Everyone in court including the journalists and public were able to know who the clerk was, who the justices were and the identity of the defendant or accused. The connections could be made.

Back in 1982 there was a test case declaring that there can be no situation where the identity of judges and justices should ever remain secret.

This happened at the huge shipping container port of Felixstowe on the east coast of England where the lay justices refused to give their names to reporters because they were frightened that people they had punished might carry out reprisals against them.

It was ruled that this risk was far too remote and where there was any evidence of threats or a risk of retaliation, the matter should be sorted out by investigation, prosecution and deterrence on the part of the police.



Lord Lennie Hoffmann, General Pinochet of Chile and Amnesty International 1998

Lord Lennie Hoffmann's failure to declare his links with Amnesty International before ruling on whether former Chilean dictator Augusto Pinochet was immune from prosecution [led to the unprecedented setting aside of a House of Lords legal judgment.](#)

The House of Lords judicial Committee was then the highest UK level court.

A Spanish judge wanted General Pinochet extradited from the UK to Spain to stand trial for crimes against humanity and these included torture and murder against political opponents when he was the military dictator of Chile.

The extradition application was made by Spain in Britain because Pinochet had been travelling there for medical treatment.

The global human rights NGO Amnesty International was an intervening party in this case and supported the Spanish Judge's bid to have Pinochet detained in Britain and extradited to Spain where his victims were seeking justice for what had been done to them many years before in Chile.

A full panel of five Law Lords (they are now called Supreme Court Justices) convened a correcting court and criticised the failure of Lord Hoffmann to declare his connections with Amnesty International.

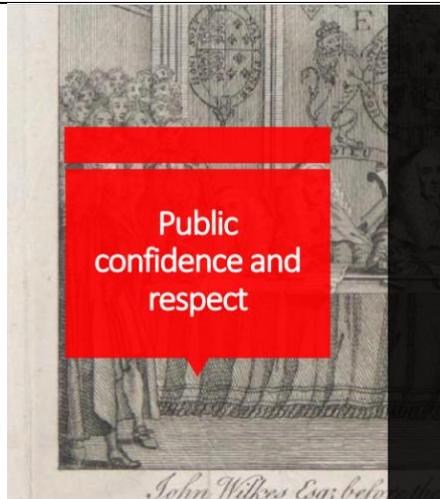
Lord Hoffmann appeared rather unrepentant. He later said to the Daily Telegraph newspaper: 'the fact is I'm not biased. I am a lawyer. I do things as a judge. The fact that my wife works as a secretary for Amnesty International is, as far as I am concerned, neither here nor there.'

He'd actually served as unpaid director of the Amnesty International Charity Ltd since 1990.

[This is a case where Open Justice helped guarantee transparency and accountability.](#)

There is a famous quotation from an early 17th writer called Thomas Fuller: 'Be Ye Never So High, the Law is above You.' In more modern English this means: 'Be you ever so high, you are never above the law.' And in the instance of the Pinochet extradition case this included one of the highest judges in the land.

This scrutiny and correction were achieved by Open Justice in the courts.



Public confidence and respect

Scrutiny of all court proceedings and access to those proceedings maintains faith in the administration of justice whether civil or criminal.

It's educational and an assurance that the state is protecting the individual citizen from crime and providing legal remedies when people suffer from negligence, the failure to fulfil contracts, and they need to claim damages, restitution and compensation for shoddy and harmful services.

Open Justice deters abuse of power and inappropriate behaviour by the judges and courts.

It stops judges bullying lawyers or defendants. It also prevents lawyers and defendants bullying judges and behaving disrespectfully.

It encourages judicial officers to do their very best and to uphold the rule of law.

Open justice is the observation of the process of justice, the legal holding to account of government and powerful people and corporations.

It's the source of public debate about the quality and performance of judges and lawyers, and the fairness of legal procedure.

Without Open Justice, journalism and the media cannot be the watchdogs of democracy.

Yes, like barking, snarling, and howling dogs and to extend the metaphor they can also, of course, be contented dogs wagging their tails with approval.

How does this work in practice? Here is a short narrative of a dramatic episode in British social and legal history.

The Birmingham pub bombings of 1974.



Memorial to those killed in the Birmingham pub bombings, unveiled outside New Street Station on 21 November 2018.
[Image by Elliott Brown. CC BY-SA 2.0](#)

Irish Republican terrorists murdered 21 young people by exploding bombs in two pubs in Britain's second biggest city. There were other terrorist atrocities at that time— notably bomb explosions at pubs used by British soldiers in Guildford and Woolwich towards the end of 1973, and the bombing of a bus containing soldiers.

But it was the Birmingham incident that caused a hurricane of outrage. The police were under pressure to make arrests. They detained the wrong suspects.

The six men with Irish backgrounds were beaten up and tortured into making false confessions. They were beaten up again when held in prison.

What had happened to them became obvious when they first appeared in court with their faces covered in bruises and injuries, and this could be observed by the attending media.

[Unreliable forensic evidence combined with the false confessions led to their wrongful conviction and imprisonment for 16 years.](#) The same injustice was visited on the four people convicted of the Guildford and Woolwich pub bombings.

The British judiciary was incapable of imagining that innocent people could have been frightened into making false confessions and subject to threats and violence.

In 1980, a senior judge called Lord Denning upheld an appeal by the West Midlands Police against a civil action brought by the Birmingham Six for injuries they received in custody.

He said that if these six men were allowed to win their case ‘it would mean that the police were guilty of perjury; that they were guilty of violence and threats; that the confessions were involuntary and improperly admitted in evidence; and that the convictions were erroneous... That was such an appalling vista that every sensible person would say, ‘It cannot be right that these actions should go any further.’”

Eleven years later the ‘appalling vista’ would turn out to be the truth.



Open Justice makes legal reform and improvement possible

It enables society to judge the quality of justice administered in its name and whether the law needs modification.

The persistence of media investigation and coverage of the campaign for the release of what became known as ‘The Birmingham Six’ eventually led to their freedom in 1991 when their convictions were quashed.

But that had been the third appeal.

At the end of the second appeal in 1988 the most senior judge in England and Wales, Lord Chief Justice Lord Geoffrey Lane, said: ‘The longer this case has gone on, the more convinced this court has become that the verdict of the jury was correct.’ As with Lord Denning in 1980, he and the other judges hearing the cases, could not have been more wrong.

The catastrophe of so many miscarriages of justice involving terrorist trials engaged introspection and questioning by judges, lawyers and journalists. The system reformed.

A Criminal Cases Review Commission was set up to make appealing miscarriages of justice fairer. The law was changed to improve disclosure of information by the prosecution to the defence in criminal cases.

The media questioned whether it had contributed to prejudice and hatred that might have influenced the juries trying the cases and could journalists have done more to give voice to the wrongly accused people and their families?

[What about the failure of the police to investigate and pursue the real killers of those 21 young people in Birmingham in 1974?](#)

An open inquest decades later investigated what had happened, what had gone wrong in the police investigation, and whether the media with their knowledge of the truth could have done more to help unmask the real killers.

This inquest led to a new police inquiry and at least one man has been arrested and questioned over the murders.

After all this time Detective Chief Superintendent Kenny Bell, head of Counter Terrorism Policing in the West Midlands said: ‘We are committed to finding those responsible for the terrible murders of 21 innocent victims almost 46 years ago.

‘Let me assure families of the victims and the people of Birmingham that we’re working relentlessly to find the bombers and bring them to justice.’

This is a long historical narrative.

It tells a deeply tragic story and highlights how openness, scrutiny and questioning is a sure way for a legal system and the media covering it to earn public confidence and respect.

I covered these cases and reported on the appeals and met and talked to the people who suffered so badly when things went so wrong in the criminal justice system.

It was more like a criminal injustice system.

These were among the most serious miscarriages of justice in British history and represented most probably the biggest failure in the criminal justice process.

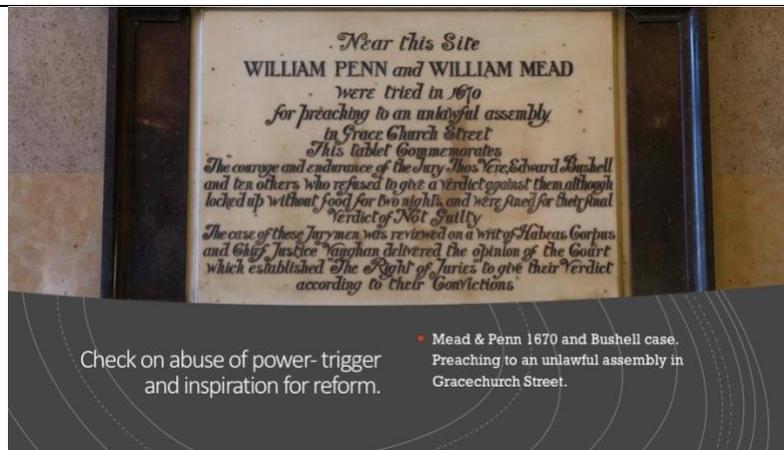


Image of plaque by [Paul Clarke CC BY-SA 2.0](#)

Check on abuse of power- The trigger and inspiration for reform

William Mead & William Penn 1670 and the case of Bushell the recalcitrant juror.

This is a foundation stone of the constitutional protection against state abuse of power when a jury has the constitutional right to return a verdict contrary to judge's direction and any unjust law that government and legislature decide to pass.

This constitutional bulwark only works when the media and public are there to witness it through contemporaneous reporting.

I have spent many hours contemplating this monument which is placed in the ground floor lobby of the Central Criminal Court, the Old Bailey in London. It is only yards away from the office where I worked as a resident court correspondent for more than ten years.

It commemorates: 'The courage and endurance of the Jury Thomas Vere, Edward Bushell and ten others who refused to give a verdict against them although locked up without food for two nights and were fined for their final verdict of Not Guilty. The case of these jurymen was reviewed on a writ of Habeas Corpus and Chief Justice Vaughan delivered the opinion of the Court which established The Right of Juries to give their verdict according to their convictions.'

Habeas Corpus is a Latin phrase and in law means 'deliver up the body' to the court-preferably alive.

These two young men were radical for their time being non-conformist Baptist preachers or early Quakers. They liked to do their preaching on street corners.

William Penn went on to found the US state of Pennsylvania which was named after him.

A pamphleteer (or early kind of reporter) took down a shorthand note of the proceedings.

There was a biased panel of judges who disliked Mead and Penn for their religion and politics. They were prejudiced against them and determined that they should be found guilty and jailed.

The two defendants were ordered to put on their hats in court and then fined for contempt of court in wearing them. The abuse and bullying were farcical.

The jury found the two defendants 'guilty of speaking in Gracechurch Street' but refused to add 'to an unlawful assembly.'

The infuriated judges (there were several on the panel including the Lord Mayor of London thus introducing an additional political element) were outraged and told the jury that they 'shall not be dismissed until we have a verdict that the court will accept.'

The jury modified the verdict to 'guilty of speaking to an assembly in Gracechurch Street' only- omitting the key adjective 'unlawful.'

The judges had them locked up overnight without food, water or heating.

They ordered Penn bound and gagged.

He protested, shouting to the jury, 'You are Englishmen, mind your Privilege, give not away your Right.'

The juror Edward Bushell replied, 'Nor shall we ever do.'

Another two days passed, and a very hungry, cold and thirsty jury continued to be stubborn and stayed true to their conscience.

They returned a not guilty verdict.

The judges responded by fining the jury for contempt of court for returning a verdict contrary to their own findings of fact and ordered them to languish in prison until the fine was paid.

Penn protested that this violated an early bill of rights called Magna Carta from the beginning of the 13th century and he was forcibly removed from the court.

Most of the jurors paid the fine.

But Edward Bushell and Thomas Vere refused.

They would be released by Lord Chief Justice Vaughan and an early form of appeal court which ruled that juries should not be punished for the verdicts they return- even when they appeared to defy a judge's directions.

The ruling and the interpretation of it that followed protected what is sometimes called a 'perverse verdict.'

This case and the monument are the foundation stones of the inviolability and integrity of the right of any jury not to be punished for the verdicts they return.

[The full transcript of the trial of Penn and Mead can be read online.](#)



Graphic produced by the Metropolitan Police to represent their view of the success of Operation Elveden first published in February 2016.

The public can know if crimes are investigated and tried

Open Justice allows the public to judge and evaluate how criminal cases are investigated and brought to trial through prosecution, conviction and sentencing.

It helps answer the crucial questions:

Who is committing crime?

Who are the victims?

Is it right what is being done?

The picture here is a public relations illustration of [Operation Elveden by the Metropolitan Police in London.](#)

They came under pressure to investigate crimes arising out of what became known as the Phone Hacking scandal and corruption by journalists- mainly working for high circulation and competitive tabloid/popular newspapers.

Criminal proceedings against a journalist and a private detective on a Sunday newspaper called the News of the World in 2006 and 2007 revealed corrupt payments to obtain the passwords of mobile telephone messages of so-called 'celebrity public figures' including the at least one of the children, Prince William, the son of Prince Charles and Diana Princess of Wales.

The Guardian newspaper's investigative journalist Nick Davies asked further questions and followed up sources who indicated that the police enquiry had uncovered industrial scale interception of mobile phone communications to obtain confidential private messages that would be the source of hundreds perhaps thousands of stories.

The issue became a national and, indeed international scandal when the Guardian revealed that a murdered 14-year-old girl's mobile phone had been unlawfully intercepted by the private investigator and journalist phone-hacking racket at the News of the World.

Had this impeded the police investigation trying to find her and identify her killer- who turned out to be a notorious serial killer?

A public enquiry followed led by a judge and conducted by lawyers examining journalist ethics, relationships between police, journalists, newspapers and politicians.

It was named 'The Leveson Inquiry' after the senior judge running it- Sir Brian Leveson.

There were criminal trials over the phone-hacking. One former News of the World editor who had gone onto to be the Director of the Prime Minister's media communications was jailed.

Prosecuting industrial scale phone hacking led to evidence of systematic corruption by popular journalists and newspapers of police officers, civil servants and government officials.

The evidence was largely provided by the newspapers themselves in the form of digital email records when they feared being prosecuted for corporate corruption.

Operation Elveden became the largest police investigation of professional journalists and the public official sources they had paid information for in western legal jurisdictions and indeed legal history.

And the Open Justice dimension was clear. The public were able to judge the nature of the victim-hood, the justification for and controversy surrounding it, and the proportionality of the process.

Was it justifiable spending nearly £15 million over five years to investigate digital email communications that had been given to the police by two publishers in defiance

of the promise by journalists and editors to protect the police and public official sources providing the information?

The public trials of journalists accused of making the payments were unsuccessful. Juries largely found them not guilty accepting their defence that the payments had been for important public interest stories.

Only one journalist's conviction- where he had pleaded guilty actually stood. Over 30 of the journalists who had been charged or tried were acquitted. Where there had been guilty verdicts, these were overturned on appeal.

In the end 33 of the 34 convictions related to the public official sources found guilty or pleading guilty. The juries and public seemed less sympathetic to 'whistle-blowers' including nine police officers for taking money and what were seen as bribes in return for confidential information learned during their public official work as civil servants.

But the crime they were being prosecuted for 'misconduct in public office' had not been a legislated for criminal offence created by Parliament. Was there an issue here of no crime without law? Had the state made up a law to prosecute journalists and their whistle-blowers because of the political pressure created as a result of the phone-hacking scandal?

Had the sources been entitled to the protection of journalist sources enshrined under Article 10 Freedom of Expression Human Rights? Operation Elveden and its associated trials ended in 2016- but the public debate about Who is committing crime? Who are the victims?

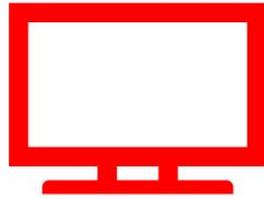
Is it right what has been done, continues.

One of the public officials is appealing to the European Court of Human Rights. He said he was betrayed by the newspapers who had paid him and promised to protect him as a confidential source for public interest information about security and safety in the prison system.

The former prison officer Robert Norman was jailed and ruined by the prosecution, trial and conviction.

He is saying this should not have happened. What he was doing was not a crime when he was doing it.

As a confidential journalist's source, he said he should have been protected by the publisher and indeed the legal system that should have recognised his rights under Article 10 freedom of expression to communicate important public interest information to a journalist.



Everyday reporting = notice
of rule of law in progress

- The media can ensure that the public has a full understanding that the legal system is operating the assertion of the rule of law in progress and that this is continuing.
- Contemporaneous access and dissemination sustains the communication of the existence of the rule of law.

Everyday reporting = notice of rule of law in progress

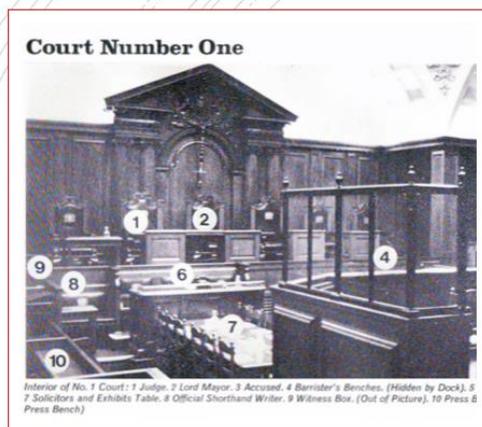
The media can ensure that the public has a full understanding that the legal system is operating the assertion of the rule of law in progress and that this is continuing.

Contemporaneous access and dissemination sustain the communication of the existence of the rule of law.

This is a surreptitious photograph taken of a judge sentencing a murderer to death in 1912 in the number one court of the Old Bailey. In 1925, it became a criminal offence to secretly take photographs in court. It represents the intense and sensational coverage of criminal justice resulting in capital punishment.

During the 20th century it would be the method of asserting deterrence against murder and at the same time the very reason capital punishment could be properly debated and questioned as the right thing to do.

When it became apparent that the weaknesses and inherent faults in the system could lead to the state killing innocent people, the hanging of convicted murderers would be abolished in the 1960s.



Witnesses under pressure to tell the truth

The whole truth and nothing but the truth cannot be sustained and monitored without open reporting and the journalists there as the eyes and ears of the public.

A lie told in public proceedings is more likely to be exposed than one told behind closed doors.

Illustration of the architecture of the Number One court of the Central Criminal Court taken from published guide for members of the public in 1960s & 70s. The numbering offers an opportunity to review the functions of trial participants in open court proceedings and the nature of public gaze and scrutiny.

Open Justice should mean that witnesses are under pressure to tell the truth

The whole truth and nothing but the truth cannot be sustained and monitored without open reporting and the journalists there as the eyes and ears of the public.

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Yes, the design of these old court-rooms does have the element of the public spectacle about them.

Courtrooms designed and built at the end of the 19th century and early 20th century- what we call in Britain the Victorian and Edwardian ages because they were named after the Kings and Queens of the time, have the look of theatres or music halls with raised sections as some kind of performance stage for judge, defendant, jury, lawyers and witnesses and ‘public galleries’ for people to satisfy their desire, curiosity and wish to find out what is going on.

Is it voyeurism, the demand for entertainment, the pleasure of seeing a ritual performance based on others’ tragedies and misfortune? Or is it the most effective way of society and the state using due legal process to find out the truth?

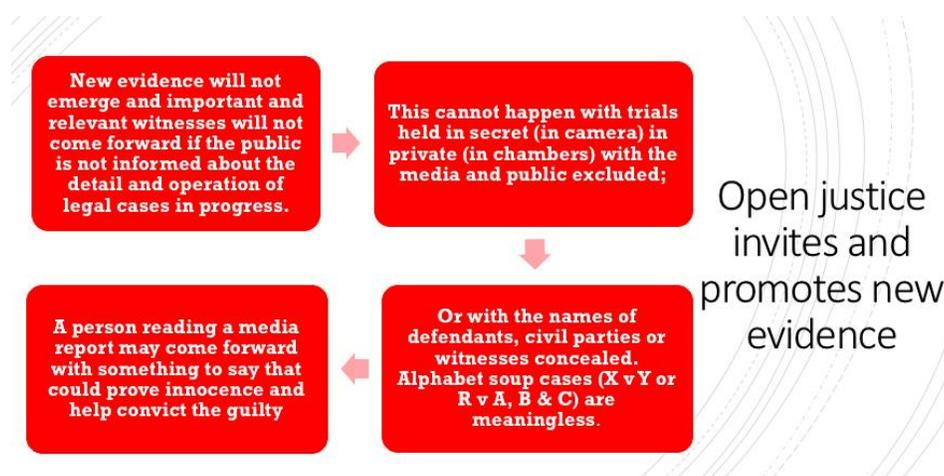
In a recent Metropolitan Police Operation called ‘Midland’ a man used the cloak and legal mask of anonymity as a sexual abuse victim to tell outrageous lies about public figures and politicians falsely accusing them of sexual abuse and murder of children.

This led to the wrongful police investigation of these public figures, their wrongful arrest, the searching of their homes and their public humiliation of being wrongly labelled as suspected murdering paedophiles in the media.

The man called 'Nick' would eventually be put on trial for perjury and perverting the course of justice.

Open Justice would eventually expose 'Nick' as Carl Beech. He was found to have been a paedophile himself and in July 2019, he was found guilty and sentenced to 18 years in prison.

Open Justice here led to the unravelling of his lies that ruined other people's lives.



Open justice invites and promotes new evidence

New evidence will not emerge, and important and relevant witnesses will not come forward if the public is not informed about the detail and operation of legal cases in progress.

This cannot happen with trials held in secret (in camera) in private (in chambers) with the media and public excluded.

Or with the names of defendants, civil parties or witnesses concealed. 'Alphabet soup' cases (X v Y or R v A, B & C) are meaningless.

A person reading a media report may come forward with something to say that could prove innocence and help convict the guilty.

This is why I campaigned against secret justice and unfair reporting bans in the 1980s.

I launched an appeal to the European Commission and Court of Human Rights at Strasbourg and the government settled by agreeing to introduce legislation so that

journalists and news organisations had the right to appeal and challenge court reporting bans and decisions to hold trials in secret.

Along with another journalist we were successfully granted a hearing before the Lord Chief Justice and Appeal Court, criminal division in 1994. The only problem is that this appeal was held in secret and its decision could never be reported. We described this as Kafkaesque after Franz Kafka's famous novel *The Trial*.

It was absurd that an appeal against the decision to hold a trial in secret was heard in secret itself and that the court's ruling could not be reported because of this secrecy.

But at least we had done our best to challenge the secrecy. Many years later the same court would accept that no English trial could ever be held in total secrecy.

The identity of the defendants, the names of the lawyers, the judge, the nature of the charges, and the decisions of the court and especially a jury's verdict at the very least required identification and publication.



Deterrence in criminal justice = publicity

- A key purpose of criminal justice is the deterrence and prevention of crime.
- Anyone considering committing a crime will think twice and be discouraged if they know about the consequences.
- Punish the wrongdoer. Defend the children of the poor.

Deterrence in criminal justice = publicity

A key purpose of criminal justice is the deterrence and prevention of crime.

Anyone considering committing a crime will think twice and be discouraged if they know about the consequences.

The declaration 'Punish the wrongdoer. Defend the children of the poor' is carved into the granite stone facing at the front of the Central Criminal Court.

The aspiration here is a noble one that justice should be seen to protect those least able to protect themselves.



Open Justice dissolves rumour, prejudice, 'fake news.'

Public trial is an organized and disciplined social ritualizing a process of remedy, retribution and restitution.

This is to avoid vigilante and mob justice, but it cannot work without open, fair and accurate reporting.

Open Justice reporting diminishes and lessens the risk of uninformed, inaccurate rumour, and 'fake news.'



Open Justice promotes public debate about acute issues

The legal system adjudicates disputes, problems, and human behaviour on the front line of social fractures, problems, and crises.

It exposes and contains the best and the worst in human conduct.

It reveals the trends and manifestations of anti-social behaviour, crime, socio-economic injustice and inequality.

It is the forum for informing the public and precipitating debate, discussion and political response.

It is the intersection between independent judiciary, democratically elected legislature, executive government and independent free press and media.

It is a complicated constitutional equation. But the cases arising are fascinating.

In 1982 a man called Michael Fagan who was struggling with heroin addiction and personal and social problems admired the Queen so much that when he saw a window open from the street at Buckingham Palace he thought he could climb in and perhaps have a chat with her about his unhappiness and problems.

He 'visited' the Palace two times in this way.

Climbing the drain-pipe and slipping through under the open window on each occasion.

Nobody saw him. No alarm was activated.

On the first occasion he helped himself to some wine that had been a present to Prince Charles for the Royal Wedding with Princess Diana the previous year.

He was too shy to talk to the Queen.

During his second visit, he did knock on the Queen's door when she was in bed waiting for her morning tea. She ran out and he was arrested.



Buckingham Palace. Image: Tim Crook

The legal process and its engagement with media coverage were extraordinary and fascinating.

The scandal raised serious public interest questions about the security of the Queen, Buckingham Palace and the Royal Family during a time of Provisional IRA terrorism attacks throughout the UK.

The Queen's cousin Earl Mountbatten had been assassinated and blown up in his pleasure boat in Ireland in 1979 along with members of his near family.

More than one million pounds had been spent on a sophisticated new electronic security system at the Palace. It had clearly not worked.

What had Michael Fagan actually done that was wrong? The state decided to put him on trial in the number one court of the Old Bailey for burglary- stealing the bottle of wine he had found after climbing through the window and having a walk around the corridors and sitting on the throne.

In a public trial before a jury, it was argued that this was disproportionate and an over-reaction. The jury agreed and found him not guilty.

The prosecution wanted him subject to a hospital order without limit of time because of his mental illness, his plea of guilty to taking his partner's car without consent and a minor assault when he had an altercation with his stepson.

This would have meant that a politician, the Home Secretary, would have been the person to decide when he should be released.

The judge at the time decided Michael Fagan should not be made a scapegoat for the faults and failings of others that his misadventure and, it has to be said, rather entertaining to read shenanigans in Buckingham Palace had exposed.

The judge insisted on imposing a hospital order which meant only medical doctors would decide when Mr Fagan could leave and go home- which he did six months later.

Had Michael Fagan been denied a fair trial because of the prejudicial and sensational newspaper coverage after his arrest?

They called him Spiderman- somebody who could literally jump walls, was a master burglar because he could pick locks; somebody who had been a frequent visitor to the Palace; not only drinking Royal Wine but helping himself to Prince Philip's cigars as well.

He was called a dangerous, morose, unsociable and unpredictable misfit and a junkie.

The media coverage would be the first test case of a new media contempt law passed in 1981 setting a new bar on the beyond reasonable doubt proof that would be required.

The offending media content had to create a substantial risk of serious prejudice.

And the court would decide most of the Fagan coverage was prejudicial but not seriously prejudicial.

The risk became less substantial if the time of publication was distant from the jury trial and the scale and impact of publication remote and small.

The British system here struck a balance. Only publications close to the trial that interfered and distorted the issues to be tried would be judged to be guilty of media contempt.

Saying that Michael Fagan had confessed to burglary when he had not. Saying he had stabbed his stepson with a knife when he was only accused of a minor assault.

Successful model of live streaming and communication of UK Supreme Court hearings and rulings using online media. Click on the screen-grab to view any currently available live-stream.



Best practice in open justice reporting is always aspired to but not necessarily achieved

Professional news publishers need advance notice of court cases (lists, names, parties, the identity of judges, a summary of cases in terms of charges, crime, nature of litigation).

They need access and the facility to be present during the live proceedings- a press bench, an audio-visual facility, the ability to use computers connected to WiFi, the right to use their smartphone for text (e.g. Twitter) transmission.

They need remote access when cases are geographically distant, or journalism reporting resources are limited.

They need access to non-verbal evidence and documentation presented in court.

Audio-visual streaming can be a solution; particularly during the current COVID pandemic.

They need immediate access to documentary rulings and sentencing.

They need access and use of digital audio and visual recordings of rulings and sentencing and as much of the content of the proceedings as possible.

They need access and the use of contemporary documentary streaming and archive of transcripts.

Under the current COVID pandemic of 2020 going into 2021 much of this is being achieved.

Accredited journalists are remotely covering criminal trials by audio-visual link. It is a weird and complicated experience. One young court reporter, Charles Maloney, has written about it. There are obvious advantages. He says:

‘There are ongoing discussions between HMCTS (Her Majesty’s Courts and Tribunal Service) and media representatives to explore the possibility of keeping the door open for journalists to join court hearings digitally in a number of different forums.

I am a fully converted member of the digital access brigade as I think this historic technological advance in open justice is something to be grabbed with both hands. Publications and freelancers will be more likely to cover courts if they do not have to pay the travel costs for sending their reporters in person.

This will lead to more scrutiny, particularly of some regional courts which currently do not get any coverage at all. Me sitting in my living room to cover a major trial is a win for journalism in that sense.’

But his article quite rightly reflects on ‘covering “traumatising” trials from home by video-link’. Is it really a proper substitute for being physically present and verifying the actuality and ‘truthfulness’ of what is going on?

See: [‘Reporter urges support for colleagues covering ‘traumatising’ trials from home’](#)

The judiciary in England are also particularly nervous about the reliability of journalists and publications to respect the strictures banning sound or video recording and the broadcasting of the material they are seeing online by tele-video link.

Contempt proceedings [have been launched against the BBC for allegedly broadcasting a sequence from a live high court hearing.](#) And the current senior Judge in England [told a conference of editors that perhaps there was a need 'to take a step back.'](#)



Tensions and problems. Freedom of expression balanced equally with other rights.

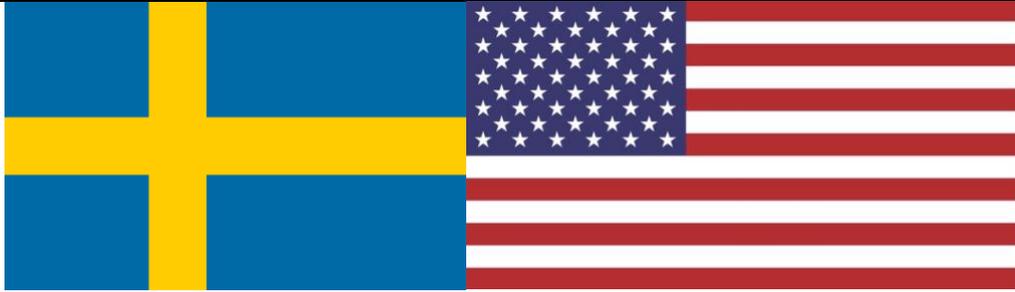
Open Justice is a default position in UK law, but it is a qualified doctrine.

Exceptions are open-ended though discouraged.

Exceptions are set by Parliament and developed by custom and practice in case law.

Under the European Convention of Human Rights and Fundamental Freedoms (now legislated for in 1998 Human Rights Act) Article 10 Freedom of Expression is equally balanced with Article 6 Right to Fair Trial and Article 8 Right to Privacy.

Article 10 is also explicitly qualified by the needs of national security, and other human rights such as Article 2 Right to Life, and Article 3 Right not to be subject to inhuman or degrading treatment.



• Sweden

• United States of America

How is this different compared to other countries e.g. USA and Sweden?

USA and Sweden have written constitutions. The UK does not.

There has never been a statutory declaration of media freedom in the UK.

The US First Amendment guaranteeing freedom of the press gives pragmatic priority to media freedom and Open Justice rights.

Sweden was the first country documented in history to have freedom of the press written into the constitution of 1766.

The first Swedish Freedom of the Press Act pioneered the principle of public access to information and made it legal to publish and read public documents.

The principle of public access is still a cornerstone of the Swedish Constitution. Judges and courts in Sweden cannot issue reporting bans and censor publications.

The First Amendment in USA prevents US judges and courts from doing so.

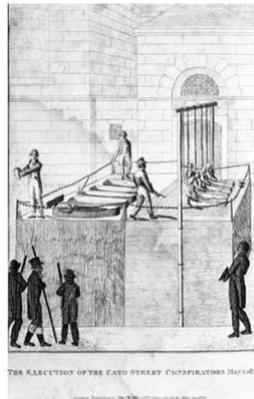


Illustration of the execution of the Cato Street conspirators in 1821 from a contemporaneous pamphlet.

Open Justice & Secret Justice tension in UK

Why is the situation in the UK different to the United States?

The power to reach out beyond courtroom walls to control the media began in Britain in the case of Clement from 1821.

In 1820 there had been a series of trials of what were known as the Cato Street conspirators.

This concerned a group of men accused of plotting to blow up the government of the time.

It was alleged government agent provocateurs created the conspiracy and entrapped the political radicals.

The Observer newspaper defied the ban to report the series of trials preceding the last one.

The editor Clement was prosecuted and fined £500 for contempt of court- a huge sum of money in those days.

The justification for controlling the media coverage was flawed because some of the same jurors served in subsequent trials.

The risk of media prejudice could not be properly argued as proper justification for the ban on reporting.

What was really going on here was a determination by the Judiciary and government of the time to limit publicity of a trial process because they feared rioting and protest.

The public execution of the convicted conspirators shown above in the grizzly illustration of public hanging and beheading was attended by considerable tension and protests by the attending spectators.



Are controls on media reporting justifiable? Sobering case history from 1910

- Legal doctrine of media contempt and control of competitive media sensationalizing and interfering with justice increased as a result of trial of US doctor Hawley Harvey Crippen in 1910.
- A largely privatized legal system (no legal aid then, and it is limited now combined with police, lawyer and media corruption to create conditions for miscarriage of justice.
- Crippen accused of murdering his wife Cora so he could live and eventually marry his lover & secretary Ethel Le Neve.

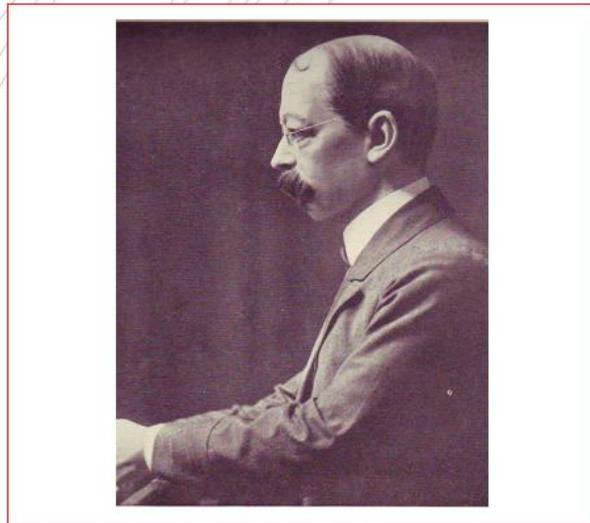
Are controls on media reporting justifiable? Sobering case history from 1910

The legal doctrine of media contempt and controlling competitive media sensationalizing and perceived interference with justice increased as a result of the trial of US doctor Hawley Harvey Crippen in 1910.

A largely privatized legal system (there was no legal aid then, and it is still very limited now) combined with police, lawyer and media corruption to create the conditions for a haunting miscarriage of justice.

Crippen was accused of murdering his wife Cora, so he could live with and eventually marry his lover & secretary Ethel Le Neve. They are seen here making their first court appearance at Bow Street Magistrates in London's Covent Garden area. It has since been sold off and just recently converted into a hotel.

Photograph taken of Dr. Hawley Harvey Crippen while in the dock of the Central Criminal Court in 1910.



Trial by media

Crippen and Ethel Le Neve had tried to flee the UK on an Atlantic crossing liner to Canada.

There had been overwhelming Trial by Media which pre-judged them.

The Metropolitan Police had originated a poster headlined: 'Wanted for Murder and Mutilation.'

They had a defence solicitor who was funded by cheque-book journalism and wrongly persuaded them to return to the UK when extradition would probably have failed.

Crippen in particular was provided with a poor defence team who failed to effectively challenge police evidence (including at least one paid prosecution witness), and an exaggerating forensic scientist who wrongly asserted that some human remains found buried in the cellar of Crippen's London home had a scar feature that very likely belonged to the alleged victim.

Crippen was found guilty and hanged. His corrupt lawyer sold a fake 'eve of execution confession' to a Sunday newspaper.

Letters to the Governor of Pentonville Prison where Dr. Crippen was held before his hanging had been written by a woman signing herself as the alleged murder victim Mrs Cora Crippen.

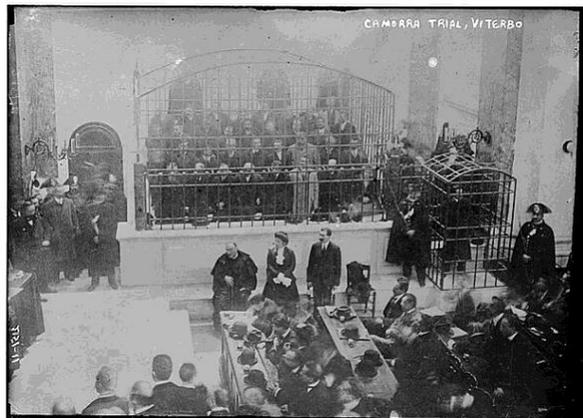
This was clear evidence that she was still alive and Dr. Crippen's story that they had agreed she would leave the country to go to America to avoid the social embarrassment of separation and divorce may have been true.

These letters were never disclosed to defence.

One was given to the then Home Secretary, Winston Churchill, and never seen again.

100 years later DNA testing proved the human remains were not Cora Crippen, but that of a man.

A public trial of organised crime group 'Camorra' in Viterbo, Naples region in 1910-11. Early use of courtroom photography.



Growing problems- generated and provoked by irresponsible media?

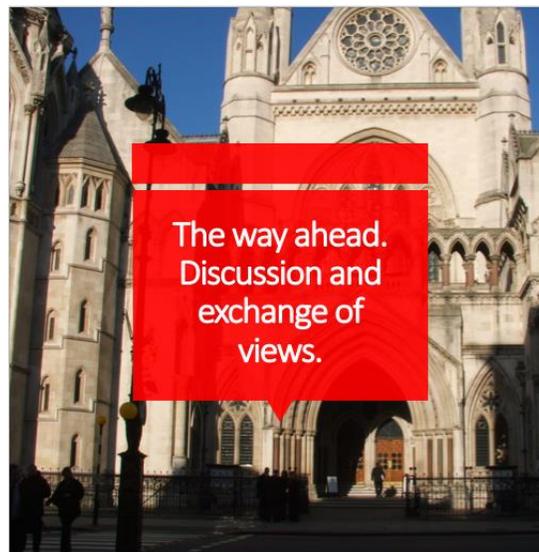
In the UK there is public and political consensus that vulnerable crime victims e.g. sexual offence complainants, youths (under 18), victims of human trafficking, FGM (female genital mutilation) should have anonymity for life.

This is now being extended to any criminal suspect arrested before charge, teachers accused of any criminal offence against their pupils/students prior to charging, and armed police officers who kill during the course of their duty.

Any involvement of national security, intelligence agencies, and terrorism or espionage normally engages draconian reporting restrictions, secret evidence and trial processes.

This is part of an ongoing repetitive pattern of over-sensational and what is seen as irresponsible media reporting leading to backlash, and an increase in restrictions.

The problem for UK Open Justice is that there a tendency for bad cases and experiences being used and cited to generate and justify new laws so that the exception to Open Justice then becomes the rule for Secret Justice.



The way ahead. Discussion and exchange of views.

There will always be a continuing tension between judiciary and media.

An independent judiciary needs an independent and enthusiastically reporting media as much as competitive media needs access to the drama and news urgency of court cases.

Culturally there will always be a professional difference of opinion. Police, lawyers and judges are more acutely aware of the dignity, suffering and feelings of people involved in their cases.

They do not necessarily fully appreciate and understand that the importance of what they do being reported depends on the media being able to frame dramatic narratives. Yes, sensationalism = entertainment.



Progress- slow, gradual but positive

In England and Wales, HM Courts & Tribunals Service and Ministry of Justice have been consulting with media organisations to promote ‘Open Justice’ to develop practical measures to improve reporting and journalist coverage of the legal system at all levels.

The current senior judge, Lord Chief Justice Burnett, has been sympathetic to the situation where reporters and news organisations do not have the resources to challenge reporting restrictions.

And he made this clear in a ruling in 2018 referenced as [Sarker, R v \[2018\] EWCA Crim 1341 \(13 June 2018\)](#) which gave guidelines to judges to be vigilant before agreeing to applications for reporting restrictions when there were no reporters present in court.

In a section headed ‘Open Justice’ his ruling set out seven key concepts contained in the Open Justice principle:

When dealing with applications for reporting restrictions, the default position is the general principle that all proceedings in courts and tribunals are conducted in public.

This is the principle of open justice. Media reports of legal proceedings are an extension of the concept of open justice.

The huge decline in newspaper circulation, loss of jobs, closure of titles and publications due to the dominance of Google and Facebook advertising and online digital commerce by Amazon, means professional journalism has fewer resources to resist and challenge courtroom secrecy and gagging orders limiting media coverage.

Local, regional and national media no longer have the same financial resources to instruct lawyers to properly and effectively challenge the restrictions being applied for in courtrooms where there are no reporters or media present.

As already indicated, after courtroom photography was banned in 1925, there's been some progress in broadcast coverage of the courts.

As indicated earlier there is now live [streaming of the UK Supreme Court, the Appeal Court Civil Division](#), and there has been Parliamentary and judicial agreement to broadcast criminal sentencing sometime in the future.

In 2018 the Chartered Institute of Journalists produced an Open Justice Report with recommendations for the release of audio recordings of rulings and sentencing, and the setting up of judge media committees so that journalists and judges could meet regularly and discuss Open Justice issues.

The House of Lords Communications and Digital Select Committee released a report in November 2020 on the future of journalism and argued that to [avoid the literal 'breaking of public interest news' coverage more could be done to facilitate court reporting](#) including the release for reporting and publication of digital sound recordings.

We are sure that a commitment on both sides can lead to mutual understanding, the agreement to disagree on some issues, but with a continual discussion and conversation on how to achieve a successful balancing exercise between the coinciding imperatives of an independent judiciary and independent media.

There is every reason why Open Justice can co-exist with media responsibility.

There is no doubt that Open Justice and Freedom of Expression can continue to be key cornerstones serving the social and public interest needs of a democratic society in the 21st century.

McNae's Essential Law for Journalists 25th Edition covers many Open Justice issues in Chapter 15 'Open Justice and access to court information', pages 182-211.

Media Contempt

As previously explained media contempt law in the UK is designed to prevent lay jurors being exposed to serious prejudice after criminal or inquest cases become active. The substantial risk period is live after any suspect has been arrested, or in the case of a coroner's inquiry, an inquest has been formally opened. Publications that have been found by the courts to be contempt include: publishing previous convictions; suggesting the defendant has confessed; suggesting accusations of more serious crimes or crimes they are not facing; suggesting arrested suspects are guilty; saying something so bad about them that you could seriously prejudice the mind of any potential juror against them; joining in a media crowd mentality of libelling and demonizing somebody arrested in a police inquiry or wanted by warrant for arrest.

Section 2(2) of the 1981 Contempt of Court Act explains that what constitutes media contempt is a 'publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.'

The size of an online audience can be quite small to trigger a media contempt conviction. This was the case in 2011 when the *Daily Mail* and *Sun* newspapers were fined for publishing online photographs of a man on trial for murder and pictured him holding a handgun. The prosecution determined that there had been 190 unique visitors to the images in Sheffield where the trial was being held before the papers removed them. See: [Attorney General v Associated Newspapers Ltd & Anor \[2011\] EWHC 418 \(Admin\) \(03 March 2011\)](#)

The Divisional Court observed: 'The criminal courts have been troubled by the dangers to the integrity of a criminal trial, where juries can obtain such easy access to the internet and to other forms of instant communication. Once information is published on the internet, it is difficult if not impossible completely to remove it.'

There are many other case law examples of media contempt convictions. One such case is the Attorney General's successful prosecution of the Condé Nast GQ magazine that published an article by Michael Wolff during the phone hacking trial of former *News of the World* editors Andy Coulson and Rebecca Brooks. See: [HM Attorney General v The Condé Nast Publications Ltd \[2015\] EWHC 3322 \(Admin\) \(18 November 2015\)](#)

The Lord Chief Justice ruled that the article 'implied that Mr. Rupert Murdoch was a participant in the phone hacking, that the defendants must have been aware of the phone hacking, that the defence was being funded by him and conducted on the defendants' instructions so as to protect his interests, but in a way that might also secure their acquittal.' He imposed a fine of £10,000 with £50,000 to pay in legal costs.

Contempt explained

Contempt carries criminal sanctions such as an unlimited fine and maximum jail sentence of two year's imprisonment on conviction at the High Court. Prosecutions can also be taken at Magistrates Court level. So, it is always worth remembering that once someone has been arrested for a crime, or a warrant has been issued for their arrest, and until proceedings are over, you may not 'create a substantial risk of serious prejudice' for example by:

- a. publishing previous convictions;
- b. suggesting the defendant has confessed;
- c. suggesting accusations of more serious crimes or crimes they are not facing;
- d. suggesting they are guilty;
- e. saying something so bad about them that you could prejudice a potential juror against them;
- f. joining in a media crowd mentality of libelling and demonizing somebody arrested in a police inquiry or wanted by warrant for arrest.

New case-law has expanded the duty set out in f., already present in the 1981 Contempt of Court Act statute, to avoid 'impeding' the administration of justice by demonising or 'monstering' a suspect through critical depiction of a suspect's character/personality such that other equally significant suspects will not be investigated and the police enquiry will be diverted/undermined or adversely affected.

You need to be clear that media contempt applies after a criminal justice process becomes 'active' under the 1981 Contempt of Court Act and the 'Strict Liability Rule' applies.

The relevant sections of the Act are sections 1 and 2, and at 2(4) the reference to Schedule 1 of the Act when a case becomes 'active.' <https://www.legislation.gov.uk/ukpga/1981/49>

In criminal investigations this is set out in section 4 of Schedule 1 as:

'4 The initial steps of criminal proceedings are:—

- (a) arrest without warrant;
- (b) the issue, or in Scotland the grant, of a warrant for arrest;
- (c) the issue of a summons to appear, or in Scotland the grant of a warrant to cite;
- (d) the service of an indictment or other document specifying the charge;
- (e) except in Scotland, oral charge;

You need to be aware that media coverage of the story carries the risk of being in contempt of court defined as: 'conduct [...] tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so.' That means lack of intention ('I didn't mean it') is no defence.

Problematical media content needs to be judged according to the 'substantial risk'- taking into account the 'fade factor' between publication and potential trial by jury which is determined by the size of the audience communicated to and the timing of publication, and whether it is 'seriously' prejudicial.

These factors were considered in great detail in the AG's prosecution of newspapers for their coverage after the arrest of Michael Fagan who trespassed at Buckingham Palace in 1982. For the Sunday Times to say he was charged with a more serious offence than was the case (wounding instead of actual bodily harm) in relation to an argument with his stepson prior to the Buckingham Palace shenanigans, and for the Daily Star to say that he had confessed to drinking a bottle of wine in the Palace (the subject of the burglary charge) when he had not were deemed 'seriously' prejudicial and the fade factor was not enough to distance jury reception of the information and remembering this when they were sworn in to try him. The Divisional Court also decided that media contempt could be committed if the publication prejudiced the prosecution as well as the defence case.

The ruling by the Divisional Court in Attorney-General v Times Newspapers and others (1983) was reported in the Times 12/2/83.

The Mail on Sunday published an article suggesting a homosexual liaison between him and one of the Queen's police bodyguard, but the Divisional Court said the security of the Queen was a matter of serious public concern and the risk of prejudice, though undoubtedly present, was incidental; The Mail on Sunday was therefore protected by s.5 the 1981 Contempt of Court Act where:

'5 Discussion of public affairs.

A publication made as or 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.'

This defence could be very useful if a court case was accompanied by demonstrations outside the court building. Cases sometimes cue wider debates about social and political issues. Parliament intended to prevent the incidence of court proceedings shutting down public interest discussion. However, the defence has important elements that need to be engaged in order to succeed. Key issues to be decided include answers to the following questions:

Discussion in good faith of public affairs?

Matters of general public interest?

Risk of impediment or prejudice [...] merely incidental to the discussion?

It was decided that the Section 5 defence was not available to the far-right activist Stephen Yaxley-Lennon, also known as Tommy Robinson, in the contempt prosecution discussed further on. It might be worth noting that if public order issues spilled over into the public gallery of a courtroom, anything libellous by anyone in the public gallery said would not necessarily be guaranteed the absolute privilege protection in libel. Privilege attaches to protagonists in a court case e.g. witnesses, advocates and defendants.

Another very important test case to consider is AG v Mirror and Sun in respect of the coverage of the arrest of retired teacher Christopher Jefferies in 2011. Seriously prejudicial media coverage can also 'impede' the administration of justice by preventing witnesses coming forward that can assist the police investigation or properly exonerate a wrongly

arrested suspect. Mr Jefferies was considered to have been 'monstered' and 'vilified' so badly his Article 6 right under the Human Rights Act to a fair trial had been impeded.

See: [HM Attorney-General v MGN Ltd & Anor \[2011\] EWHC 2074 \(Admin\)](#)

Essentially media contempt is no longer observed in its breach with a much more severe policy of prosecutions by the former Tory/LibDem coalition government Attorney General Dominic Grieve QC and the DPP- this has included prejudicial coverage after arrest and where nobody was even charged, publication of a prejudicial image online only that was taken down soon after the complaint, prejudicial coverage after the return of part- verdicts with the jury still deliberating on lesser charges, and prejudicial commentary behind a paywall after a trial had begun. There has also been a clampdown on non-professional media publication in social media by jurors- many have been jailed. Failure to observe reporting restrictions at the Magistrates Court has also led to successful prosecution.

In addition to media contempt law, journalists in the UK need to be aware of additional restrictions and protections afforded to criminal suspects prior to formal charge. This has developed as civil privacy legal protection for all potential criminal suspects and statutory protection for suspects who happen to be teachers when investigated for committing offences against their pupils/student prior to ever being charged.

The statutory protection for teachers is covered by Section 13 of the Education Act 2011. This provides statutory anonymity for life unless the teacher is ever charged, or unless they waives their right to anonymity in writing.

See: <https://www.legislation.gov.uk/ukpga/2011/21/section/13/enacted>

'(1) This section applies where a person who is employed or engaged as a teacher at a school is the subject of an allegation falling within subsection (2).

(2) An allegation falls within this subsection if—

(a) it is an allegation that the person is or may be guilty of a relevant criminal offence, and
(b) it is made by or on behalf of a registered pupil at the school.

(3) No matter relating to the person is to be included in any publication if it is likely to lead members of the public to identify the person as the teacher who is the subject of the allegation.'

The English and Welsh Appeal Court and High Court have fully established a reasonable expectation of privacy that being investigated for crime prior to being charged is private information.

This protected a sitting Conservative MP in the Westminster Parliament from being identified in the media after being accused of raping a woman. The Met Police decided not to proceed with the case.

These are the three key court precedents developing this protection.

[Sicri v Associated Newspapers Ltd \(Rev 1\) \[2020\] EWHC 3541 \(QB\) \(21 December 2020\)](#)

[ZXC v Bloomberg LP \[2020\] EWCA Civ 611 \(15 May 2020\)](#)

[Richard v The British Broadcasting Corporation \(BBC\) & Anor \[2018\] EWHC 1837 \(Ch\) \(18 July 2018\)](#)

The Sir Cliff Richard case is given more detailed analysis later in the Handbook.
The rule now is very clear:

‘... those who have simply come under suspicion by an organ of the state have, in general, a reasonable and objectively founded expectation of privacy in relation to that fact and an expressed basis for that suspicion.’

These cases have made clear that professional news media will not succeed with a defence of ‘public interest’ if they show no evidence that there was editorial engagement of the balancing exercise of considering the suspect’s privacy rights as well as the public interest in reporting the investigation of serious crime.

The BBC was unable to show this in relation to the Sir Cliff Richard case. The judge in that case heard evidence that the reporter responsible for investigating and naming Sir Cliff had been told off the record by the police that it was unlikely the inquiry would result in him being charged for sex offences against a child.

The judge said the BBC would have breached privacy even with an unsensational copy report in a news bulletin rather than the spectacular use of a media helicopter filming the South Yorkshire police raiding his apartment in Berkshire.

The claimant in the Sicri case was a suspect in the awful Ariana Grande concert terrorism attack at Manchester Arena. Suicide bomber, Salman Abedi, detonated an improvised explosive device in the foyer, murdered 22 and injured more than 800 people, many of them children and young people.

Mr Justice Warby decided the MailOnline was not entitled to identify Alaedeen Sicri:

‘The claimant had a right to expect that the defendant would not publish his identity as the 23-year-old man arrested on suspicion of involvement in the Manchester Arena bombing. By 12:47 on 29 May 2017, the defendant had violated that right; it had no, or no sufficient public interest justification for identifying the claimant.

It continued to do so.

Later, another publisher (The Guardian) did the same or similar. But the claimant’s right to have the defendant respect his privacy was not defeated or significantly weakened by the fact that others failed to do so. He is entitled to compensation. The appropriate sum is £83,000 in general and special damages.’

It is also important to appreciate that even if a suspect is a major public figure with the global resonance of, for example, Sir Cliff Richard, the very fact that the media in other legal jurisdictions are publishing the name and identity is no defence for doing so. This can be very frustrating for publishers in England and Wales when identification is happening as close as Scotland or the Republic of Ireland.

What happens abroad does not necessarily increase public interest justification.

Justice Neuberger in the UK Supreme Court case of *PJS v The Sun* in 2016 said: 'There are claims that between 20% and 25% of the population know who PJS is, which, it is fair to say, suggests that at least 75% of the population do not know the identity of PJS.' On that footing, the Supreme Court restrained wider disclosure of the name and to this day the identity of PJS identity remains protected by court order.

[PJS v News Group Newspapers Ltd \(Rev 1\) \[2016\] UKSC 26 \(19 May 2016\)](#)

The media law situation in this area at the time of writing is controversial, problematic and ambiguous. The Bloomberg case is going to be heard by appeal to the UK Supreme Court. It is apparent that many UK news publishers identified the police officer suspect in the kidnapping and murder case of Sarah Everard in March 2021 and by implication the woman living at the officer's home address in Deal who was arrested for assisting an offender. Yet the Met Police, clearly for legal reasons, officially did not name the officer. This police policy continued in a later announcement from the Metropolitan Police Commissioner who referred to the arrested suspect as one of their officers though again without formal confirmation of his actual name and identity. BBC News [did not name the officer](#). No doubt the BBC was particularly conscious of the implications of the Sir Cliff Richard case that had cost them so dearly. However, other broadcasters, subject to Ofcom regulation, such as [Sky News](#) and [ITV news](#) avoided naming the arrested officer. There is some irony that the [BBC News review](#) of the daily national newspapers displayed the identification of officer via the images of their front pages.

McNae's Essential Law for Journalists 25th Edition covers the theme of media contempt law in Chapter 5 'Crime- media coverage prior to any court case', pages 61-70, and Chapter 19 'Contempt of Court', pages 261-283.

Covering the Courts.

Most of the newsworthy cases you are likely to cover will be at the Crown Court, or High Court of Justiciary in Scotland where lay juries (12 in England & Wales and 15 in Scotland) will decide the facts in terms of the verdict (guilty or not guilty in England & Wales/guilty, not guilty, or not proven in Scotland).

Where the accused has admitted the offence(s) and there is not going to be a trial, you will be attending a sentencing hearing for which there are unlikely to be many restrictions.

But where a not guilty verdict has been declared, the presence of a jury will mean you have to take great care in observing media contempt law until **all** the verdicts have been returned.

Most sensational criminal cases begin with a **first and only appearance at the Magistrates court**. This is likely to be a journalistic assignment when you are a

general reporter and unless reporting restrictions are lifted (all defendants have to agree) you must comply with these very specific rules. You can only report the following from **what you see and hear of the proceedings in front of you:**

- (a) the identity of the court and the name of the justice or justices;
- (b) the name, age, home address and occupation of the accused;
- (c) in the case of an accused charged with serious or complex fraud cases, any relevant business information which includes:

- (i) any address used by the accused for carrying on a business on his own account;
- (ii) the name of any business which he was carrying on his own account at any relevant time;
- (iii) the name of any firm in which he was a partner at any relevant time or by which he was engaged at any such time;
- (iv) the address of any such firm;
- (v) the name of any company of which he was a director at any relevant time or by which he was otherwise engaged at any such time;
- (vi) the address of the registered or principal office of any such company;
- (vii) any working address of the accused in his capacity as a person engaged by any such company; and here "engaged" means engaged under a contract of service or a contract for services.

- (d) the offence or offences, or a summary of them, with which the accused is or are charged;
- (e) the names of counsel and solicitors engaged in the proceedings;
- (f) where the proceedings are adjourned, the date and place to which they are adjourned; [This is usually to a Crown Court]
- (g) the arrangements as to bail; [Note- like with previous restrictions NOT the objections or any arguments about bail]
- (h) whether a right to representation funded by the Legal Services Commission [used to be called legal aid] as part of the Criminal Defence Service was granted to the accused or any of the accused.

In most first hearing serious crime cases being transferred to the Crown Court you will **NOT be allowed to publish the names or addresses of witnesses, which was allowed previously.** You can report what goes on outside the court, but what you report from beyond the proceedings **is subject to the Contempt of Court Act- meaning nothing that creates a substantial risk of serious prejudice or impedance to the administration of justice.**

Reporting court cases: some simple ground rules

- a. Never report anything said in the absence of the jury until after all the verdicts have been returned.
- b. Stick to reporting accurately what is said in court and do not paraphrase using exaggerated, dramatic and sensationalist language, avoid comment, and never present allegations as fact.
- c. Make sure your reports are fair and accurate. To be fair involves putting the other side of the story. Make sure you state that the defendant(s) has pleaded not guilty, and the trial is continuing at the end of the day.

d. Always comply with reporting restrictions, reporting prohibitions and postponements. For a detailed briefing on the comprehensive details of these restrictions, download, read and follow the Judicial College's guide to reporting restrictions in the criminal courts (England and Wales). See: <https://www.judiciary.gov.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf>

Check and update the guide every year so you are briefed on the latest extension of restrictions, which at the time of publication have included anonymity for alleged victims of people trafficking, and victims of FGM (female genital mutilation).

It also important to appreciate that anonymity provisions controlling the reporting of the British legal systems are continually expanding. In the civil arena, the higher courts have begun sustaining anonymity for people who have died. This included the identity of a 50 year- old woman who was reported as saying she had lost her 'sparkle' and no longer wished to have life-sustaining medical treatment. In April 2016, the Court of Protection agreed to a continuation of the court order banning identification in order to protect the privacy interests of surviving relatives. See: [V v Associated Newspapers Ltd & Ors \[2016\] EWCOP 21 \(25 April 2016\)](#)

In another Court of Protection case in June 2016, a high court judge came to a similar decision in respect of any reporting of the identity of a woman in a minimally conscious state (MCS) after she had died. See: [M v Press Association \[2016\] EWCOP 34 \(23 June 2016\)](#)

Anonymity was also continued in the case of a three-and-a-half-month-old baby who had died following civil litigation over his treatment. Another court sustained anonymity for a 14-year-old teenage girl from London who wished to be preserved in a cryogenic state in America after her death from cancer. See the case of [JS \(Disposal of Body\), Re \[2016\] EWHC 2859 \(Fam\) \(10 November 2016\)](#)

The judge postponed reporting of the case until one month after her death to give time for her family to grieve. An indefinite court injunction prevents any identification of the girl, her family, or the hospital trust and staff involved in the case.

e. Never ever publish anything that can lead to the identification of somebody involved in legal proceedings who is aged 17 and under unless the court specifically allows it. (Scotland used to have a bar of 15 and under, but in 2015 they raised it to 17 for young people who are the accused, victim or witness in criminal proceedings to make it the same as in England and Wales. See: <https://www.scotcourts.gov.uk/current-business/court-notices/contempt-of-court-orders/reporting-restrictions-children-under-18>)

f. Never ever publish anything that is likely to lead to the identification of anyone complaining of a sexual offence unless they agree to be identified and that agreement is in writing [range of sexual offences includes voyeurism, indecent exposure, 'flashing' and has substantially expanded]

g. You also need to watch out for special court orders banning identification of frightened witnesses, and undercover police, intelligence and customs officers. Blackmail victims (where the menaces are embarrassing) have common law anonymity for life as soon as they make the complaint.

h. Go out of your way to check if there are any special reporting bans/orders relating to the legal case and/or proceedings that you are covering. Keep proof of any emails and contacts demonstrating your efforts to carry out this checking.

Publishing anything that identifies anyone complaining of a sexual offence is a criminal offence if only one person can identify that individual from what you have reported. You will have no defence even when the person making the connection has been playing at private detective.

For reporting restrictions in Northern Ireland [consult the online guide provided by the Judicial Studies Board of the province.](#)

The Scottish Courts and Tribunal service has published [a detailed guide for dealing with the media and reporting access to court hearings.](#)

You need to be accredited when visiting court complexes to cover cases. It is advisable to join a professional journalists' association such as the NUJ, CloJ or BAJ and be in possession of a press/media card. At the very least have a letter of accreditation from your editor, or tutor (if still a journalism student).

You should be able to use smartphone devices, tablets and laptop computers to make notes, email or text reports and Tweet live reports, but always remember that it would be a criminal offence if you were to use your device to record sound or digital video. Broadcast facilities are being slowly introduced in some courtrooms, but they are organised by complex installation and processes of approval and control. Download, study and keep the Lord Chief Justice of England's guidelines on courtroom tweeting at: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/ltbc-guidance-dec-2011.pdf>

The right to take notes in a courtroom is essential for any reporter and you should have a polite reference point confirming this, should a judge or court service staff try to stop you. The 2016 case of *Ewing v Cardiff Crown Court* determined that courts should have a very good reason to make orders preventing note-taking in the public gallery. The case involved a non-journalist, but asserted note-taking as part of the open justice principle. See: [Ewing v Crown Court Sitting at Cardiff & Newport & Ors \[2016\] EWHC 183 \(Admin\) \(08 February 2016\)](#)

Social Media Controls

Unlike in the USA, which has a constitutional First Amendment, the British Courts have greater powers to prohibit and ban the reporting of legal proceedings in all kinds of digital and analogue media. In 2016 the Court of Appeal became so concerned about the overwhelming abuse and prejudice being communicated in comments on social media sites during a murder trial, it decided to halt reporting on those platforms. This was because the mainstream media were unable to disable the comment streams of their reports communicated on social media platforms such as Facebook and Twitter. The first trial of the two 14 year-old-girls, accused of torturing and murdering a 39-year-old woman called Angela Wrightson, had been stopped, and a retrial ordered in another city.

See: [British Broadcasting Corporation & Eight Other Media Organisations, R \(on the application of\) v F & D \[2016\] EWCA Crim 12 \(11 February 2016\)](#)

The court approved a court order made by the trial judge to media publishers not to place any report of the trial of the girls on their respective Facebook profile page or pages, to refrain from

issuing or forwarding tweets relating to the trial, and to disable the ability for users to post comments on their respective news websites.

The identification of children tried in the adult courts will always be a matter of discretion on the part of the trial judge who has a statutory duty to balance Open Justice with the interests of the welfare of the child. The most recent dispute over whether child killers could be named after conviction and sentence concerned the prosecution of 15-year-old Stan Markham and Kim Edwards for the murder of Kim's mother and 13-year-old sister in Spalding. See: [Markham & Anor v R \(Rev 1\) \[2017\] EWCA Crim 739 \(09 June 2017\)](#)

The trial judge decided this was an exceptional case and there was a strong public interest in full and unrestricted reporting. The decision was challenged by the defendants' lawyers and the organization Just Kids for Law. In a ruling of the Court of Appeal Criminal Division in June 2017, Sir Brian Leveson said there was: 'no evidence before us that reporting their identities would adversely affect the future rehabilitation of the appellants, and, thus, be contrary to the welfare of a child, which would give rise to a weighty consideration in the balancing of competing considerations in the assessment that we must make. The reality is that anonymity lasts only until 18 years of age and both appellants face a very considerable term of detention that will stretch long into their adult life.'

However, it can be argued that there is a trend developing in the British legal system to protect young offenders even beyond the time they reach the age of 18 with perpetual anonymity.

At the age of 14, RXG plotted to murder police officers in Australia on Anzac Day, instructing an Australian jihadist to launch attacks during a 2015 parade. At the time the teenager from Blackburn in Lancashire was Britain's youngest terrorist and had sent encrypted messages to Sevdet Besim telling him to kill officers at the remembrance parade in Melbourne. Shortly before his 18th birthday, RXG's lawyers asked the High Court to grant him lifelong anonymity to protect his rehabilitation. In a judgment in July 2019, Dame Victoria Sharp granted RXG lifelong anonymity, saying that 'if he were named, he will never escape being associated with his past offending.' See: [RXG v Ministry of Justice & Ors \[2019\] EWHC 2026 \(QB\) \(29 July 2019\)](#)

The 13 and 14 year old murderers of Angela Wrightson in Hartlepool were handed life sentences at Leeds Crown Court in 2016 and told they must serve a minimum of 15 years behind bars. At the end of the trial, judge Mr Justice Globe refused to lift reporting restrictions preventing the media from identifying the killers, due to their vulnerability. Their anonymity automatically expired when they turned 18, but their lawyers asked a High Court judge in October 2020 last to grant them lifelong anonymity. In February 2021, Mrs Justice Tipples granted the pair - known only as D and F - permanent injunctions, preventing them from being identified. See: [D & Anor v Persons Unknown \[2021\] EWHC 157 \(QB\) \(04 February 2021\)](#)

Other examples of perpetual anonymity for notorious convicted criminals include:

Jon Venables and Robert Thompson who were 10 when they abducted, tortured and murdered two-year-old James Bulger in Liverpool in February 1993. On their release at the age of 18 they received perpetual anonymity protection in relation to their new identities. In

2019, the High Court rejected a bid by Ralph and Jimmy Bulger, James's father and uncle, to vary the order in respect of Venables to allow the publication of any names used by him before he was recalled to prison in 2017 for possession of child pornography. See: [Venables & Anor v News Group Papers Ltd & Ors \[2019\] EWHC 494 \(Fam\) \(04 March 2019\)](#)

Mary Bell who was aged 10 and 11 when she strangled two small children in Newcastle in 1968, and was later convicted of manslaughter by reason of diminished responsibility. In 2003, she applied for lifelong anonymity to prevent the press publishing her new identity. Dame Elizabeth, the same judge who granted Venables and Thompson lifelong anonymity, said Bell's 'fragile mental health' would be 'seriously exacerbated if she were to be identified and pursued by the press or members of the public'. See: [X \(A Woman Formerly Known As Mary Bell\) & Anor v O'Brien & Ors \[2003\] EWHC 1101 \(QB\) \(21 May 2003\)](#)

Maxine Carr whose then boyfriend Ian Huntley murdered Holly Wells and Jessica Chapman in Soham, Cambridgeshire, in August 2002. She was sentenced to three and a half years in prison in 2003 after being found guilty of conspiring to pervert the course of justice in giving Huntley a false alibi. The High Court made an injunction to protect her new identity in 2005, with Mr Justice Eady saying such an order was 'necessary to protect life and limb and psychological health.' See: [Carr v News Group Newspapers Ltd & Ors \[2005\] EWHC 971 \(QB\) \(24 February 2005\)](#)

The Edlington brothers were convicted of grievous bodily harm for torturing and humiliating two young boys in South Yorkshire in 2010. The pair, who were 10 and 11 at the time, strangled their victims, hit them with bricks, made them eat nettles and forced them to sexually abuse each other in a 90-minute ordeal. In 2016, two days before the younger brother's 18th birthday - when his anonymity would have automatically expired - the High Court granted the pair lifelong anonymity, with Sir Geoffrey Vos saying 'they would be at extremely serious risk of physical harm' if their identities were revealed. See: [A & B v Persons Unknown \[2016\] EWHC 3295 \(Ch\) \(19 December 2016\)](#)

Reporting Restrictions and the problems in challenging them or breaching them

Parliament has a habit of extending and widening the categories of people involved in court cases who are entitled to statutory anonymity. Here is more detail on alleged victims of forced marriages, alleged victims of people trafficking, and alleged victims of FGM (female genital mutilation).

Victims of forced marriages have anonymity for life and the protection is similar to that offered to sexual offence complainants.

Anything published that could lead to their identification would be enough to attract a prosecution and criminal conviction for the journalists and publication responsible. It is important appreciate that UK authorities have a tendency to prosecute the individual journalist or editor found culpable and not the news organisation.

Section 173 of the Policing and Crime Act 2017.

<https://www.legislation.gov.uk/ukpga/2017/3/part/9/chapter/1/crossheading/forced-marriage-anonymity-for-victims/enacted>

Prohibition on the identification of victims in publications

(1) This paragraph applies where an allegation has been made that an offence of forced marriage has been committed against a person.

(2) No matter likely to lead members of the public to identify the person, as the person against whom the offence is alleged to have been committed, may be included in any publication during the person's lifetime.

Only forced marriage victims aged 16 and above can consent in writing to waive their anonymity.

Anonymity was extended to the victims of female genital mutilation [by section 71 of The Serious Crime Act 2015](#), which provides a ban on reporting the victim of FGM from the time of the allegation and for life. The legislation states: 'No matter likely to lead members of the public to identify the person, as the person against whom the offence is alleged to have been committed, may be included in any publication during the person's lifetime.' Similarly only FGM victims aged 16 and above can consent in writing to waive their anonymity.

The list of sexual offences in the 1992 Act has been extended to include all victims (and alleged victims) of any offence [under section 2 of the Modern Slavery Act 2015](#). Offences under the Modern Slavery Act encompass a wide range of human trafficking crimes, such as exploitation for the purposes of indecent photographs of children, illegal organ donation, trafficked sex workers, forced labour and domestic servitude.

One of the most common reporting restrictions under the 1981 Contempt of Court Act is usually under section 4(2) which amounts to a postponement of publication of proceedings to a certain time in the future when it is judged that media prejudice impact on a jury has passed.

The current Lord Chief Justice of England and Wales, Lord Burnett of Maldon (as of February 2021) in [Sarker, R v \[2018\] EWCA Crim 1341 \(13 June 2018\)](#) made it clear that in order to preserve Open Justice judges in criminal trials were obliged to consider less draconian alternatives to shutting down the entire reporting of trials.

Consider Lord Burnett's observations on Open Justice:

'When dealing with applications for reporting restrictions, the default position is the general principle that all proceedings in courts and tribunals are conducted in public. This is the principle of open justice. Media reports of legal proceedings are an extension of the concept of open justice.

i) In one of the first cases decided under the 1981 Act, Lord Denning MR noted that open justice and freedom of the press are "two of our most fundamental principles": *R -v- Horsham Justices ex parte Farquharson* [1982] QB 762, at 793H. At common law, the court has no power to make an order postponing the publication of a report of proceedings conducted in open court; any such power must be conferred by legislation: *Independent Publishing Co Ltd* at [67] per Lord Hoffmann.

- ii) Attending court in person is not practical for any but a handful of people, and live-streaming and broadcasting of court proceedings remain restricted. The only way that citizens can be informed about what takes place in most of our courts is through media reports. In that way the media serve both as the eyes and ears of the wider public and also as a watchdog: In re S at [18] per Lord Steyn.
- iii) Full contemporaneous reporting of criminal trials (and other legal proceedings) promotes public confidence in the administration of justice and the rule of law: In re S at [30].
- iv) On a practical level, the public nature of court hearings (and media reports of them) fulfils several objectives: (1) it enables the public to know that justice is being administered impartially; (2) it can lead to evidence becoming available which would not have been forthcoming if reports are not published until after the trial has completed or not at all; (3) it reduces the likelihood of uninformed or inaccurate comment about the proceedings; and (4) it deters inappropriate behaviour on the part of the court (and we would add others participating in the proceedings): ex parte Kaim Todner at 977E-G per Lord Woolf MR.
- v) On the rare occasions when a court is justified in sitting in private, both the public and media are prevented from accessing the proceedings altogether. Reporting restrictions are different. The proceedings are there to be seen and heard by those who attend court, but they cannot be reported. Reporting restriction orders, albeit not as great a departure from open justice as the court sitting in private, are nevertheless "direct press censorship": Khuja at [16] per Lord Sumption.
- v) Reporting restrictions orders are therefore derogations from the general principle of open justice. They are exceptional, require clear justification and should be made only when they are strictly necessary to secure the proper administration of justice: Practice Guidance (Interim Non-disclosure Orders) [2012] 1 WLR 1003 at [10]; they are measures of last resort: In re Press Association [2013] 1 WLR 1979 at [13] per Lord Judge CJ.
- vii) Any derogation from open justice must be established by clear and cogent evidence: Scott -v- Scott [1913] AC 417, at 438–439 per Viscount Haldane LC; Practice Guidance (Interim Non-disclosure Orders at [13].'

The Lord Chief Justice also advised all Crown Court Judges to adopt 'The proper approach to a section 4(2) postponement order application.' He said a clear articulation of the approach to be adopted 'is to be found in the judgment of Longmore LJ in Sherwood at [22] (which was approved by the Privy Council in Independent Publishing Co Ltd at [69]).

- i) The first question is whether reporting would give rise to a substantial risk of prejudice to the administration of justice in the relevant proceedings (see paragraph 32 below). If not, that will be the end of the matter.
- ii) If such a risk is perceived to exist, then the second question arises: would a section 4(2) order eliminate it? If not, there could be no necessity to impose such a ban. On the other hand, even if the judge is satisfied that an order would achieve the objective, he or she would still have to consider whether the risk could satisfactorily be overcome by some less restrictive means. If so, it could not be said to be "necessary" to take the more drastic approach: ex parte Central Television plc at 8D-G per Lord Lane CJ.
- iii) If the judge is satisfied that there is indeed no other way of eliminating the perceived risk of prejudice; it still does not necessarily follow that an order has to be made. The judge may still have to ask whether the degree of risk contemplated should be regarded as tolerable in the sense of being "the lesser of two evils". It is at this stage that value judgments may have

to be made as to the priority between the competing public interests; fair trial and freedom of expression/open justice: ex parte Telegraph plc at 986B-C.]’

Courts also have a habit of wrongly imposing restrictions/orders under Section 11 of the 1981 Contempt of Court Act. These should be limited to:

‘Publication of matters exempted from disclosure in court.

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 that 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.’

Such orders should not apply to any name that has not been withheld from the public in proceedings before the court. If the identity has been revealed during the court proceedings the order would not be appropriate. If somebody’s health or life is at risk any application for restrictions should address Article 2 of the Human Rights Act (right to life) and the provisions of section 46 of the Youth Justice and Criminal Evidence Act 1999 where a court may restrict publication of an adult witness’s identity because: ‘if the quality of his evidence or his co-operation with the preparation of the case is likely to be diminished by reason of fear or distress in connection with identification by the public as a witness.’

If a judge has made a mistake by not imposing an order that should have been imposed, or using the wrong legislation to do it, it would be taking a grave risk to defy the court’s wrongly made order and intentions. This was demonstrated clearly in the 2007 case of [Times Newspapers Ltd. & Ors v R. \[2007\] EWCA Crim 1925 \(30 July 2007\)](#). A Downing Street civil servant and House of Commons researcher were prosecuted under the Official Secrets Act over communication of confidential discussion between UK PM and US President. During the trial the content of the transcript was revealed in open court when it should have been kept from the public before the proceedings. The trial judge made an order under the wrong legislation but the Appeal Court decided it was the purpose of the retrospective direction, that this was legitimate and should be sustained.

In July 2019 the far-right political activist Stephen Yaxley-Lennon, also known as Tommy Robinson, was found to be in contempt of court after filming outside Leeds Crown Court in May 2018. During a trial still being heard with a jury he live-streamed the video on Facebook with information that breached reporting restrictions under Section 4(2) of the 1981 Contempt of Court Act. He also approached defendants and told his followers to “harass them”.

The media contempt consisted three breaches of the law:

1. Publishing information that was subject to a restriction prohibiting any reporting of the trial until a later, related trial had concluded;
2. Publishing a video encouraging his followers to harass the defendants, creating a substantial risk that their rights would be seriously impeded;
3. Illegally photographing and intimidating defendants as they entered court.

See the ruling of the Divisional Court at:

<https://www.judiciary.uk/wp-content/uploads/2019/07/ag-v-yaxley-lennon-jmt-190709.pdf>

He was subsequently jailed for nine months.

<https://www.judiciary.uk/wp-content/uploads/2019/07/yaxley-lennon-decision-on-penalty-190711.pdf>

While Robinson/Yaxley-Lennon was not a professional journalist his attempt to politically propagandize by using social media to 'report' information that interfered with the administration of justice highlights the clear boundaries that the UK judiciary intends to set for media contempt law. He was not afforded any defence or protection under Section 5 of the 1981 Contempt of Court Act.

Recording live proceedings inside the courtroom or remote proceedings by video-streaming, YouTube or Microsoft Teams.

Section 9 of the 1981 Contempt of Court Act creates [a contempt of court for anyone to make sound recordings of court proceedings without the leave of the court, and to ever broadcast such a sound recording.](#)

Mail On Sunday feature journalist Marcia Angela Johnson was prosecuted and convicted for sound recording on her smartphone at Southwark Crown Court in October 2019 and received a suspended prison sentence and fine. See: [Mail on Sunday features writer avoids jail after recording court hearing on phone.](#)

There are two prohibitions on video copying court proceedings. The Criminal Justice Act 1925 makes it a criminal offence to use photography inside a courtroom or on the court precincts. [And Schedule 25 of the Coronavirus Act 2020](#) makes it a criminal offence to 'to make, or attempt to make— (a) an unauthorised recording, or (b) an unauthorised transmission' of any kind of remote hearing in terms of video or audio. These offences are inserted into Section 85 of the Courts Act 2003 and similar offences are created in relation to any recordings of remote hearings at the First Tier Tribunal and Upper Tribunal.

Unfortunately, BBC South East decided to record Microsoft Teams remote proceedings of a judicial review hearing at the High Court towards the end of 2020 and despite there being notice given of the restrictions: 'It is a contempt of court, a criminal offence, for anyone else to make a recording of any part of these proceedings [...] although we are conducting the hearing remotely, it is a formal court process and everyone should behave as they would if they were physically in court.'

The BBC was fined £28,000 for contempt of court for recording the proceedings and actually broadcasting a clip during news bulletins. The ruling stated that the BBC had succumbed to 'collective brain freeze' and that it 'beggars belief' nobody at any stage of the process realized that what was happening was in fact unlawful.

The full judgement is available at: [Finch, R \(On the Application Of\) v Surrey County Council \[2021\] EWHC 170 \(QB\) \(03 February 2021\)](#)

And: [In the matter of a Contempt application of the court's own initiative pursuant to CPR 81.6. 2 February 2021](#)

Earlier in 2020 the High Court had to deal with a breach of restrictions on distributing/disseminating live Zoom links to a libel trial in [Gubarev & Anor v Orbis Business Intelligence Ltd & Anor \[2020\] EWHC 2167 \(QB\) \(06 August 2020\)](#)

'The judge found that there had been misconduct in the form of a breach of section 41 of the Criminal Justice Act 1925 and/or section 9 of the Contempt of Court Act 1981 and/or disobedience to paragraph 8 of an Order which he had made in the proceedings on 14 July 2020, in that for 3 days in July 2020 video/and or audio of the proceedings at the trial of the action was live streamed to a number of individuals outside the jurisdiction (including the United States, Cyprus and Russia) without the Court's permission and without any application being made for such permission. At that stage, the judge had been given a list of 7 people who had used a Zoom link in remote locations to access the trial, and information that possibly 2 more had done so.'

Reporting the legal system- steps to improve 'Open Justice' and facilitate professional journalists

In England and Wales Her Majesty's Courts and Tribunal Service is now fully guided on relations with the media covering the legal system. HMCTS has agreed on the publication of several briefings for different parts of the system. Some of the common protocols include an understanding of the role of the professional journalist in respect of their training, knowledge, and needs. This is set out at the beginning of the [General guidance to staff on supporting media access to courts and tribunals:-](#)

'Most journalists covering court and tribunal hearings will have had training in media law as part of wider professional qualifications and so should be familiar with legal issues relating to reporting proceedings.

The law sets out clearly what can and cannot be published in respect of criminal and other proceedings and it is newspapers and other media organisations themselves, not HMCTS, that carry the legal obligation to make sure that these are met.

Our job in HMCTS is to facilitate and support the media attending proceedings, and to provide relevant information asked for by journalists (following the guidelines set out in this document). Sometimes these requests are made under the pressure of production deadlines, and we should recognise this.'

The main badge of accreditation has been identified as the UK Press Card:

'The recognised accreditation to identify a bona fide journalist is the UK Press Card issued under a scheme operated by the [UK Press Card Authority](#). There are currently 12 organisations that issue press cards including the BBC, the National Union of Journalists, the News Media Association and the Foreign Press Association. These are issued only to professional journalists and have standard, copyrighted characteristics as you can see at <http://www.ccsi.co.uk/Press/UKPressCardAuthorityPoster.pdf>.'

The general guidance presents a commitment in respect of basic listing information:

‘Bona fide media organisations and journalists who request lists and registers should be issued proactively with the full magistrates’ court lists routinely and without charge. At a minimum, the lists should contain each defendant’s name, age, address and, where known, his profession and the alleged offence. Courts will not breach data protection legislation by providing the media with such information.’

There is further recognition about the rights of professional journalists to make text-based broadcasts from the courtroom:

‘Unlike the public, the media do not need to apply to use text-based devices to communicate from court. This includes using live broadcasting on Twitter and other social media networks, texting and emailing and using internet-enabled laptops. Use of devices should however not cause a disturbance or distraction. The judge or magistrate always retains full discretion to prohibit live, text based communications from court, in the interests of justice.’

The right to Tweet report was fully established by [a practice direction issued by Lord Chief Justice Iqor Judge in 2011](#). However, the final paragraph does make clear: ‘Permission to use live, text-based communications from court may be withdrawn by the court at any time.’

Here are the direct links to the various guides now available that were published in March 2020.

[HMCTS media guidance - managing high profile cases](#)

[Media protocol on sharing magistrates' court lists, registers and documents](#)

[HMCTS media guidance - criminal court guide](#)

[HMCTS media guidance - civil court guide](#)

[HMCTS media guidance - family court guide](#)

[HMCTS media guidance - tribunals guide](#)

HMCTS even has a policy on supporting the training of student journalists with supervision from their lecturers:

‘Student journalists will often attend court cases or hearings as part of their training. We should support this as one way to encourage greater court reporting. They are not entitled to sit in press seats but should sit in the public gallery where they are entitled to take notes without permission from the court or judge/magistrate. However, in sensitive cases (such as organised crime), it will help the judge and staff to avoid any misunderstanding if they identify themselves in advance to explain that they plan to do so.

Student journalists do need to make an application to the court if they want to use text-based devices to communicate from court. If you receive a request from a student journalist, please speak to the judge presiding over the case or trial. If a lecturer wants to attend court with a

group of students to observe a case or hearing, it is good practice (but not mandatory) to let the court know in advance.'

Another significant resource for court reporting; particularly in the criminal courts is to have access on the smart-phone to the latest edition of Judicial College's [Reporting Restrictions in the Criminal Courts April 2015 \(Revised May 2016\)](#)

The Crown Prosecution Service (operating in England and Wales) operates a 'Media protocol' to ensure greater openness in the reporting of criminal proceedings. This is an agreed policy between the CPS, the police and media representatives to improve the representation of evidence and trial content both during and after newsworthy criminal proceedings have taken place- usually in the Crown Court. The main advantage for the media of the [joint protocol](#) for working together is that CPS officials and centres have experience and understanding of the needs of the media in a democratic society and professional media have access to prosecution materials.

There are four key principles involved in this arrangement:

1. 'The aim of the CPS is to ensure that the principle of open justice is maintained - that justice is done and seen to be done - while at the same time balancing the rights of defendants to a fair trial with any likely consequences for victims or their families and witnesses occasioned by the release of prosecution material to the media.
2. Prosecution material which has been relied upon by the Crown in court and which *should* normally be released to the media, includes:
 - Maps/photographs (including custody photos of defendants)/diagrams and other documents produced in court;
 - Videos showing scenes of crime as recorded by police after the event;
 - Videos of property seized (e.g. weapons, clothing as shown to jury in court, drug hauls or stolen goods);
 - Sections of transcripts of interviews/statements as read out (and therefore reportable, subject to any orders) in court;
 - Videos or photographs showing reconstructions of the crime;
 - CCTV footage of the defendant, subject to any copyright issues.
3. Prosecution material which may be released after consideration by the Crown Prosecution Service in consultation with the police and relevant victims, witnesses and family members includes:
 - CCTV footage or photographs showing the defendant and victim, or the victim alone, that has been viewed by jury and public in court, subject to any copyright issues;
 - Video and audio tapes of police interviews with defendants, victims and witnesses;
 - Victim and witness statements.
4. Where a guilty plea is accepted and the case does not proceed to trial, then all the foregoing principles apply. But to ensure that only material informing the decision of the court is published, material released to the media must reflect the prosecution case and

must have been read out, or shown in open court, or placed before the sentencing judge.'

It can certainly be argued that this protocol serves to enhance the nature of court reporting; particularly in serious and high public interest cases.

Accessing the courts in England and Wales

During the COVID lockdown the [UK Supreme Court](#) in Parliament Square at (the highest court in the land which decides often very high profile cases) has been holding all its hearings online and [streaming them from its website](#). The Supreme Court also [provides useful information background on its current appeals](#). Furthermore, the court maintains an [impressive archive of appeal hearings and judgments](#).

This is also the case with the Appeal Court, Civil Division from the Royal Courts of Justice on YouTube via the website <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/the-court-of-appeal-civil-division-live-streaming-of-court-hearings/>

Journalists have access to an impressive national resource of court lists by registering on <https://www.courtserve.net> Courtserve explains: 'We receive and process over 3,000 lists from the Crown and Magistrates' Courts every week. We also distribute over 1,800 lists every week from the Royal Courts of Justice, the Rolls Building, the County Courts (civil & family) and all Employment Tribunals.' This is an invaluable resource for finding out about court hearings in London and at all regional Crown Court, Magistrate, County Court, and High Court centres across the country.

During the COVID lockdown, it was possible to apply to join court hearings at the High Court in London remotely by applying via an email address provided in the court listings provided by Courtserve. Accredited professional journalists have also been able to arrange remote attendance via HMCT service.

The special arrangements were [first published in March 2020 and later updated in November of that year](#).

HMCT service explained:

'Where accredited journalists wish to report on proceedings remotely then they should put in a request to the relevant court as set out above. There have been some early [examples where courts have enabled the media to have remote telephone and video access to hearings](#). This is not available for criminal jury trials.

Special arrangements are being put in place for criminal jury trials in the Crown Court including the use of a second courtroom linked by closed circuit TV to enable the media and others to watch proceedings while maintaining social distancing.'

It remains to be seen whether the facilitation of remote reporting access will continue after lockdown restrictions are lifted following distribution of the COVID vaccine in 2021.

McNae's Essential Law for Journalists 25th Edition provides several detailed chapters on court reporting and restrictions. These include Chapter 7 and 8 on reporting summary and most serious cases from magistrates courts, pages 77-98, Chapter 9 'Crown courts and appeal courts' pages 99-110, Chapter 10 'Juveniles in court proceedings', pages 111-127, Chapter 11 'Anonymity for victims and alleged victims of sexual offences, human trafficking, female genital mutilation and forced marriage offences', pages 128-146, Chapter 12 'Court reporting, other restrictions', pages 146-163, Chapter 13 'Civil courts and reporting restrictions', pages 164-172. Chapter 14 'Family courts and restrictions', pages 173-181, Chapter 15 'Open Justice and access to court information', pages 182-211, Chapter 16 'Challenging the courts', pages 212-242, Chapter 18 'Tribunals and public inquiries' pages 255-260, and Chapter 19 'Contempt of court', pages 261-283.

Defamation also usually known as libel

Libel in England & Wales has been reformed by the Defamation Act 2013, and expected to be enacted (come into force) in the autumn of this year. A libellous statement is defined as being **'words, pictures, visual images, gestures or any other method of signifying meaning.'** Damage will be presumed rather than materially evaluated in terms of financial harm (apart from bodies operating for profit) The 2013 Defamation Act also gives courts a general power to order a summary of its judgment to be published, (a kind of right of reply or correction after winning an action) and order the removal of a libellous statement or the cessation of its distribution. 'Libel tourism' by persons not domiciled in the UK or an EU member State is being discouraged so that where a publication has 5,000 copies distributed in Britain but 100,000 in Australia, the law encourages Australia to be the appropriate jurisdiction to hear the action.

Prior restraint by court injunction- courts preventing the first publication of libellous articles and statements is rare in Britain. The 1891 court case of *Bonnard v Perryman* established the principle that when a publisher defendant declares they intend to defend the libel on the basis that it is true and can be justified, prior restraint should not be given in order to respect freedom of expression. If the publisher subsequently loses the libel trial, they are at risk of being ordered to pay aggravated and quite possibly exemplary (punitive) damages. Lord Chief Justice Coleridge said: 'the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions.'

Defamation carries civil law sanctions such as being sued for huge amounts of money and having to pay lawyers huge amounts in fees. [As already mentioned a research study in 2008 demonstrated that lawyers in England charge 140 times more than in other European countries.] Despite recent reforms libel is an extremely vulnerable risk factor in journalism and media communication. Unlike in any other form of civil proceedings, **the burden of proof is on the media defendant.** The problem of successful claimants being able to sue on conditional fee arrangements with 100% uplift on lawyers' fees has been removed, but after event insurance is still available for cases deemed to have a likely chance of success.

Defamation: **four basic definitions in common law:**

- a. what you write exposes someone to hatred, ridicule and contempt
- b. what you write lowers the estimation of right thinking people generally
- c. what you write damages someone in their trade, profession or office
- d. what you write causes people to shun and avoid your subject

The Defamation Act 2013 states 'a statement is not defamatory unless its publication **has caused or is likely to cause serious harm to the reputation of the claimant,**' and 'harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body **serious financial loss.**' Bodies that trade for profit are usually companies and corporations.

There has been some legal nuancing of the significance and meaning of the expression 'serious harm.' An early High Court case suggested that it might favour media defendants in giving the meaning of 'serious' a high threshold.

See: [Cooke & Anor v MGN Ltd & Anor \[2014\] EWHC 2831 \(QB\) \(13 August 2014\)](#) Mr Justice Bean said the new serious harm requirement 'raises the bar over which a claimant must jump'. The serious harm can be obvious in relation to the words when, for example, calling somebody a paedophile, or terrorist. Claimants are now expected to demonstrate damage to reputation as perceived by others.

A later case of *Lachaux v Independent Print Ltd* went to the UK Supreme Court with a ruling in 2019 on this issue. Lord Sumption said: "This shows, very clearly to my mind, that it not only raises the threshold of seriousness... but requires its application to be determined by reference to the actual facts about its impact and not just to the meaning of the words." He said: "The reference to a situation where the statement 'has caused' serious harm is to the consequences of the publication, and not the publication itself. [...] It points to some historic harm, which is shown to have actually occurred. This is a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had. [...] It depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated. The same must be true of the reference to harm which is 'likely' to be caused." See: [Lachaux v Independent Print Ltd & Anor \[2019\] UKSC 27 \(12 June 2019\)](#)

What this means in practice is that libel claimants now have to prove serious harm to their reputation as a matter of fact in order to bring a successful cause of action for libel under the Act.

The Section One reform in the 2013 Defamation Act and UK Supreme Court ruling in *Lachaux* means only cases where statements causing serious harm to the claimant's reputation will be successful. It will now be necessary for claimants to consider to whom the statement was actually communicated, and the impact of that communication. They have to assess if serious harm to their reputation was caused in fact and not just presumed by the construction of meaning in the alleged libel.

It is clear then that Judges, not you, decide what is capable of being defamatory. This is the approach they take:

The legal principles relevant to meaning ... may be summarised in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any 'bane and antidote' taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation...'... (8) It follows that 'it is not enough to say that by some person or another the words might be understood in a defamatory sense.' (taken from Sir Anthony Clarke MR in [Jeynes v News Magazines Limited \[2008\] EWCA Civ 130](#) at [14])

Identification: even if you do not name someone explicitly, if it is possible to work out who you are talking about, you are in trouble. In other words, the construction of understanding a libel can be achieved by jigsaw identification between different media platforms and publications making one liable with the other.

The most famous 'Twibel' in recent years involved the wife of the House of Commons speaker, Sally Bercow, who in 2012 had tweeted 'Why is Lord McAlpine trending? *Innocent Face*'. The late Lord McAlpine had been wrongly accused of historic sexual abuse. The court decided Ms Bercow had libelled by innuendo in the context of multimedia coverage elsewhere.

See: [McAlpine v Bercow \[2013\] EWHC 1342 \(QB\) \(24 May 2013\)](#)

The implications of Twibel have been brought home to the journalist and broadcaster Katie Hopkins who refused an invitation to apologize after wrongly defaming food writer Jack Monroe. She applied for an insolvency agreement to avoid bankruptcy in order to deal with hundreds of thousands of pounds in damages and legal costs arising from two Tweets she published in 2015.

See: [Katie Hopkins applies for insolvency agreement to avoid bankruptcy](#)

See also the ruling in the case: [Monroe v Hopkins \[2017\] EWHC 433 \(QB\) \(10 March 2017\)](#) & [Monroe v Hopkins \(Rev 1\) \[2017\] EWHC 645 \(QB\) \(28 March 2017\)](#)

Publication to a third party; not just a newspaper or magazine, sending a postcard with a defamatory comment is good enough.

A golden rule of testing your copy: Imagine you are the most sensitive person being criticized and think the very worst interpretation of what could be misunderstood by the language you have used in your copy.

Bane and antidote: When evaluating your copy consider the worst possible ‘reading’ of your material (known as the bane), make your assessment on one quick and immediate reading (the natural and ordinary meaning expected of your audience), then look for any antidote in terms of putting the other side, indicating that the bane is ridiculous, meaningless satire that nobody would believe, and contextualisation which would ensure that any reasonable reader would not derive any defamatory meaning.

Separating fact from comment: Facts have to be proved and if defamatory are the most dangerous parts of your copy. Comment should be opinion, honestly held and based on true facts or allegations made in legally privileged contexts.

Avoid alleging and/or imputing defamatory motive: Not even the prosecution has to prove motive in a criminal trial. It is almost impossible to prove unless admitted. There is a famous legal quotation about how impossible it is to guess the state of man’s mind as it would be to guess the state of his digestion.

Examples of libel:

Saying somebody has lied about something means you are saying they have deliberately been untruthful. The verb ‘lie’ implies an intention which it is very difficult to prove in law and in libel the burden of proof is on you. The claimant does not have to prove they did not lie. So you might be able to prove that they were mistaken in what they said, but how could you prove that they intended to say something they knew to be wrong?

Reporting somebody saying that somebody else lied about something is the same as you’re saying the other person lied. Repeating or reporting a libel by attribution still makes you liable to libel.

This means that the old sayings ‘think before you open your mouth’ or in the 21st century ‘think before you tweet or text, ‘talk with your brain and not your heart’, ‘when in doubt leave it out’, ‘never take anything for granted’, are wise counsels and can save your career as well as your financial wellbeing. A former editor of the *Guardian* (when it was based in Manchester) was C.P. Scott and his famous maxim ‘Comment is free, facts are sacred’, is widely quoted. In media law you should remember that in libel ‘facts when substantially true are free, comment when not honest opinion is expensive.’

Online Libels

Online libels are now taking up much more of the business of the courts. *Easeman v Ford* is an example of a case where a filmmaker had successfully sued an activist and blogger for ‘a long-running and extensive campaign of online vilification and harassment.’

See: [Easeman v Ford \[2016\] EWHC 1576 \(QB\) \(29 June 2016\)](#)

Another case concerned two South Korean sports journalists and rose from postings on Facebook and Instagram. See: [Kim v Lee \(Rev 1\) \[2021\] EWHC 231 \(QB\) \(09 February 2021\)](#)

‘This claim for libel arises from the publication by the Defendant of eight posts on Facebook and Instagram between 6 and 11 December 2018. At the material time, both

the Claimant and the Defendant worked in the UK as football reporters and journalists for Korean media companies, delivering English and European football news to South Korea and to the Korean community in this jurisdiction. For the Claimant, this was a part-time job alongside his primary occupation as a church pastor in New Malden, Surrey.'

There are a number of libel risks peculiar to online production and communication. When tweeting be careful about any juxtapositions with hashtags. If you are reporting about an identifiable individual you should avoid any association of that person with #murder, #crooks etc. When you are producing online postings be very cautious about labelling files with language that is potentially defamatory. Such information is readable in some browsers when activated by the curser, and file properties are usually discoverable by right clicking.

The same is true when embedding information in cascading stylesheet online platforms that you might think is hidden. In reality, the inclusion of such linkage in 'alternative text', or click through urls could generate defamatory meaning. If you have an apparently innocent image of somebody that clicks through to a visual image communicating something despicable or scandalous then it could be argued that you are constructing an online defamation.

Hyperlinks to libelous web-pages on their own should not constitute a repetition of a libelous posting unless the libel is summarized and stated in the phrase encapsulated in the link, or it is quite clear there is a context of encouraging people online to visit the libelous page with the intention of damaging somebody's reputation.

Libel Defences

You may be able to avoid getting sued if any of the following apply:

1. It has come from a senior police officer or government department –you may have qualified privilege [subject to explanation or contradiction] Conditions include fairness & accuracy without malice. The qualified privilege under 2013 Defamation Act now applies to governments anywhere in the world; authorities anywhere in the world performing governmental functions, and international organisations or international conferences.
2. It was said in open court, or in the Houses of Parliament –you should have absolute privilege for court reports and high qualified privilege for parliamentary reports. High qualified privilege means it can only be defeated by malice. Key conditions include fairness and accuracy. Absolute privilege enables you to report malicious statements made in evidence and requires that the reports are 'contemporaneous'- i.e. published to nearest deadline in respect of court reports. The absolute privilege in court reporting also applies to foreign courts and international courts and tribunals. Qualified privilege also applies to legislatures anywhere in the world.
3. It was said at a public meeting [held for a lawful purpose] –you should have qualified privilege (fair, accurate, and in the public interest) but you need to get or at least be receptive to the side of the person being attacked and report the gist of that if provided. This is what being subject to contradiction or explanation means. Again, the conditions

of fairness and accuracy are required. This defence has been extended to public meetings abroad.

4. It was said at a press/media conference provided this satisfied the recognized conditions of a public meeting above. This means that any member of the media had access to the conference. This could be in the street or on private premises. This excludes one to one interviews. Press/media releases accompanying the conference attract the privilege provided the content is not substantially different from what was said at the conference. Your report has to be fair and accurate. The defence has been extended to press conferences abroad.

5. The statement you are reporting is substantially true. The defence will succeed if your report contains substantially untrue imputations that 'do not seriously harm the claimant's reputation.' Remember **you have to prove this defence.**

6. You are reporting an 'honest opinion' such as in a review or editorial. The defence needs the following conditions: i **it is opinion**; ii report/publication **includes 'in general or specific terms, the basis of the opinion'**; iii 'an honest person could have held the opinion' **based on a 'fact which existed at the time the statement complained of was published'**, or **'anything asserted to be a fact in a privileged statement published before the statement complained of.'** This means the opinion could be based on allegations made in a court case, in Parliament, in a peer-reviewed statement in a scientific or academic journal, or in a publication satisfying the new public interest defence under section 4 of the Defamation Act 2013. What does the 'honest' part of the defence mean? It means the defence **fails if the author of the statement did not hold the opinion**, or if the **reporter/publisher 'knew or ought to have known that the author did not hold the opinion.'**

Get all this right, then you might be let off the hook.

7. You might have a **public interest defence** under section 4 of the Defamation Act 2013. Public interest is not defined in the Act, but the courts have set out ideas in case histories and they include:

"What it is in the public interest that the public should know and what the publisher could properly consider that he was under a public duty to tell the public";

"In a simpler and more direct way, whether the public was entitled to know the particular information";

"The interest is that of the public in a modern democracy in free expression and, more particularly, in the promotion of a free and vigorous press to keep the public informed";

"The general obligation of the press, media and other publishers to communicate important information upon matters of general public interest and the general right of the public to receive such information... there must be some real public interest in having this information in the public domain." This last quotation was from Baroness Hale in *Jameel v Wall Street Journal* in 2006 and she added: "This is, as we all know, very different from saying that it is information which interests the public - the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it."

This defence is available to the **publication of facts and opinions.**

For the defence to succeed you need to prove that you **'reasonably believed that publishing the statement complained of was in the public interest.'** In doing that you will be entitled to argue **'allowance for editorial judgement.'** This is likely to be

informed by previous court definitions of 'responsible journalism', which was known as the 'Reynolds' defence and had been developed by 3 key case histories: See: [Reynolds v. Times Newspapers Ltd and Others \[1999\] UKHL 45 \(28th October, 1999\)](#) [Jameel & Ors v. Wall Street Journal Europe Sprl \[2006\] UKHL 44 \(11 October 2006\)](#) and [Flood v Times Newspapers Ltd \[2012\] UKSC 11 \(21 March 2012\)](#)

The criteria for responsible journalism included: giving fair opportunity for people criticized to give their side of the story, reporting a gist of this; evaluating the reliability of your source who might have an axe to grind, and avoiding sensationalist language and bias.

The critical thing in the field of defamation is if in doubt get professional legal advice before publication.

8. Qualified privilege in being a statement published in a scientific or academic journal, The conditions are: i statement must relate to scientific or academic matter; ii statement was peer-reviewed by editor and one or more persons with academic expertise relating to the scientific/academic matter/issue; iii malice will defeat the defence.

9. Innocent defamation. This is available under section 1 of the 1996 Defamation Act and applies when as the journalist/publisher you had no warning or reasonable anticipation that the libel would be communicated on your media platform- this could be a live broadcast or website. The conditions will be developed by case law, but at the time of writing there is little of it available. The defence hinges on the concept of responsibility for publication and will be satisfied if in defence you can show that **you took reasonable care in relation to the publication**, and you did not know, and had no reason to believe, that what you did caused or contributed to the publication of a defamatory statement.

The defence has to square with the statute stating that it is necessary that you are 'not the author, editor or publisher of the statement complained of.' In practice if you are responsible for an internet publication you should have a "notice and take down policy." You need to remove potentially defamatory material from public access as soon as you have been given notice of the complaint. This is both European and UK law. The Internet Service Provider is usually not regarded as liable as long as the 'take down' is engaged promptly to remove libellous material when notified. Furthermore, the defence is likely to be unavailable if comments and user generated material is editorially moderated prior to publication.

10. Operator of Website Defence (enacted by Section 5 of 2013 Defamation Act in January 2014) This is a new defence for the operators of websites where a defamation action is brought against them in respect anything posted on their websites, which they were not responsible for. Website operators no longer have to pre-moderate reader comments. This is a 'report and remove' system that people can use if they believe they have been defamed on a website message board.

The system enables website operators to deal with all initial correspondence in-house. This will save legal fees.

As a result of the new guidelines, website operators should:

- Have a robust, written complaints policy
- Designate and train staff to deal with complaints correctly, and within the new timescales. Timing is critical
- Acknowledge and deal with complaints promptly – preferably by email, in order to comply with the 48-hour deadline
- Give website users clear instructions on how to complain, and who to. This may mean providing a Report Abuse button
- Update their website terms and conditions to reflect the new arrangements
- A website operator providing message boards is advised to register users before they are allowed to make a post
- Registration should include taking their names and contact details
- Users should be told, before they accept site terms and conditions, that the operator may divulge their details if they post anything defamatory
- Keep proper written records of complaints, with the dates and times of actions taken.

This looks like a complicated defence, needing the involvement and interpretation by media lawyers, and it may be best to evaluate web publication defence strategies for libel in terms of 1996 Defamation Act innocent dissemination. However the rules for this defence say it will not be necessarily lost when Internet postings are moderated.

See the full detail of the guidelines that website operators need to comply with in order to engage this defence: <http://www.legislation.gov.uk/ukdsi/2013/9780111104620>

11. Neutral Reportage. This has been codified in the Defamation Act 2013 within the public interest defence. Essentially this is neutral reporting of a row/dispute where the sides are libelling each other. Your reporting has to remain neutral by avoiding any explicit or implicit language indicating that you agree or support the defamatory statements. For example, an investigative journalist writing a book about allegations of corruption against police detectives cannot have the defence if he entitles his book 'Bent Coppers.' Section 4(3) of the Defamation Act 2013 gives the defence further statutory underwriting: '(3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.' This means when impartially and accurately reporting a spat where libels are being spun, you are not obliged to investigate and confirm the truth of what is being said.

Successful media libel defence case histories

Although very expensive to defend- usually in terms of risking over a million pounds in damages and costs, the post 2013 Defamation Act climate has not always been 'claimant friendly.'

Two Conservative Party politicians have been defeated in high profile libel litigation.

In November 2014 Mr Justice Mitting ruled against the Tory Chief Whip, Andrew Mitchell who had denied calling police officer Toby Rowland 'a pleb' when stopping him from riding through Downing Street security gates without getting off his bicycle. Mitchell had sued the *Sun* for publishing the allegation and PC Rowland had sued Mr Mitchell for accusing him of lying. See: [Rowland v Mitchell \[2014\] EWHC 4015 \(QB\) \(27 November 2014\)](#)

In November 2015 Mr Justice Warby ruled in favour of the *Sunday Times* after the former Suffolk South MP Tim Yeo sued the paper for the allegation that he was prepared and had offered to act in breach of the MPs' Code of Conduct by acting as a paid Parliamentary advocate for a foreign energy company, while chair of the Commons Energy and Climate Change Select Committee.

See: [Yeo v Times Newspapers Ltd \[2015\] EWHC 3375 \(QB\) \(25 November 2015\)](#)

One of the more difficult cases the *Sunday Times* successfully defended involved property developer and an alleged figure in organized crime, David Hunt. In July 2013, Mr Justice Simon found in favour of the newspaper which had described Mr Hunt as 'a crime lord' in a ruling that turned on the prior Defamation Act 2013 Reynolds defence of responsible journalism. See: <http://www.5rb.com/wp-content/uploads/2013/07/david-hunt-v-times-newspapers-ltd-5.pdf>

Being sued for publishing false but not libellous information: Malicious Falsehood

1. Publications that cause **material financial harm to businesses** through the communication of knowingly false, though not necessarily defamatory information can be sued for using the law of 'Malicious Falsehood.' The civil wrong of malicious falsehood operates on the basis that it is substantially different to libel, and some journalists would argue that freedom of expression would be improved by some of its criteria applying to libel.
2. Malicious falsehoods are statements which themselves are not defamatory but are untrue and cause damage. An example would be to say that a rival expert in your field has retired when you know this not to be the case. He/she would lose business and be harmed financially, but there is nothing intrinsically defamatory about saying somebody has retired. Malicious falsehoods often arise when trade/business competitors make false claims about each other's services and products. For example, deliberately and falsely stating your competitor's prices are more expensive than your own could be a malicious falsehood.
3. Necessary ingredients for malicious falsehood include:
 - 1) **Burden of proof is on the claimant**, not on the defendant in terms of establishing that the **allegation is untrue**;
 - 2) Allegation must have been '**calculated to cause pecuniary damage**' to the claimant's 'office, profession, calling, trade or business.'
 - 3) Allegation must have been **published maliciously**.
4. In many respects, malicious falsehood mirrors the position of libel in the USA in terms of public interest claimants: it can only succeed when the claimant proves financial damage, falsity and either reckless disregard for the truth, or actuation by malice. It is also similar to the US tort of 'false light' - where there is a remedy for damages over non-defamatory information that is wrong and damaging.
5. Its existence and operation in the English legal system can leave media defendants subject to the double jeopardy of being sued for libel and malicious falsehood.
6. Useful precedents:

See: [Spring v Guardian Assurance \[1994\] UKHL 7 \(07 July 1994\)](#)

The key legal issue related to 'is whether one who supplies a defamatory reference about a person in response to a request from a concern with which that person is seeking employment is liable in negligence to the subject of the reference if it has been compiled without reasonable care.' Effect of the House of Lords ruling is that it would not be legally malicious to be negligent without an intention to cause harm, but it would be legally malicious to combine negligence with an intention to injure.

Kaye v Robertson from the English Court of Appeal in 1991 is probably the most famous malicious falsehood action of modern times; largely for reasons beyond malicious falsehood and being the seed for media respect for the right to privacy. The remedy allowed by the courts was the damage to the actor Gordon Kaye's commercial/professional office in it being posited by the Sunday Sport that he would

have agreed to an interview with a tabloid reporter while recovering from a catastrophic brain injury in his hospital bed. See: [Kaye v Robertson & Anor \[1990\] EWCA Civ 21 \(16 March 1990\)](#)

McNae's Essential Law for Journalists 25th Edition offers detailed chapters on defamation, libel, slander, malicious falsehood and obscenity across chapters 20 o 25 and pages 287-348.

Privacy

1. The Human Rights Act 1998 means freedom of expression is balanced with the right to respect for privacy. The English and European courts recognize that private information cannot be reported unless it is in the public interest.
2. No go areas include the nature of health treatment and state of health, education, sexuality, family life and personal relationships.
3. It now means that people who do not give permission to be photographed in public, and are not the subject of a public interest story, are entitled to privacy protection.
4. The principle of when media privacy law applies is when any individual has 'a reasonable expectation of privacy.'
5. Privacy as an European legal concept means dignity, honour, reputation (overlapping with libel) identity, family life, home space, and privacy communications (correspondence, email, mobile, Skype, palm computer devices etc.)
6. It goes without saying the privacy concept underpins the fact that intercepting anyone's mobile, mail, email and communications devices is a criminal offence and so is giving bribes or impersonating anyone to unlawfully obtain private information. It is also a criminal offence and civil wrong to 'harass' anyone on the basis of causing distress on at least two separate occasions.
7. This means that any journalist and media body committing a criminal offence can also be sued in the civil courts for the invasion of their privacy.
8. The European Court of Justice ruled in 2014 that EU citizens are entitled under a 'right to be forgotten' to ask data processing Internet search engines to remove links to pages that contain old, inaccurate or even just irrelevant data about them. Any legal obligation to remove such information does not apply to online journalistic publishers and their archives. Despite the UK leaving the European Union with end of transition year 1st January 2021, 'the right to be forgotten' concept had been recognized in English legal jurisprudence and case law. See [ABC v Google Inc \[2018\] EWHC 137 \(QB\) \(01 February 2018\)](#)
9. It needs to be remembered that in the UK privacy and freedom of expression are balanced equally. This can lead to the May 2015 Supreme Court case of pianist James Rhodes whose autobiography was blocked by publication because of concern about the impact of his revelations about being abused as a child on his own children. Although he won the case, the fact that his book had been subject to prior restraint through such a long and complex process of litigation indicates how freedom of expression can be held in abeyance until the courts decide the issue. See: [Rhodes v OPO & Anor \[2015\] UKSC 32](#)

Public Interest

The most extensive definition of public interest that can be used to defend against media law actions can be found in the IPSO Editors' Code of Practice:

'The public interest includes, but is not confined to:

Detecting or exposing crime, or the threat of crime, or serious impropriety.

Protecting public health or safety.

Protecting the public from being misled by an action or statement of an individual or organisation.

Disclosing a person or organisation's failure or likely failure to comply with any obligation to which they are subject.

Disclosing a miscarriage of justice.

Raising or contributing to a matter of public debate, including serious cases of impropriety, unethical conduct or incompetence concerning the public.

Disclosing concealment, or likely concealment, of any of the above.

There is a public interest in freedom of expression itself.

The regulator will consider the extent to which material is already in the public domain or will or will become so.

Editors invoking the public interest will need to demonstrate that they reasonably believed publication - or journalistic activity taken with a view to publication – would both serve, and be proportionate to, the public interest and explain how they reached that decision at the time.

An exceptional public interest would need to be demonstrated to over-ride the normally paramount interests of children under 16.'

This definition is very significant for UK journalists because their statutory defence for the purposes of journalism under section 32 of the 1998 Data Protection Act is dependent on any processing of private data being in the public interest.

There is a possibility there could be an increase in litigation against journalists and publishers for processing data for the purposes of journalism that could be argued to be private information. Actions could be successful where it can be shown that the data process controllers could not reasonably believe the information being processed is in the public interest.

See: [Top media law QC says Sun could face action under Data Protection Act over front-page pic of six-year-old Kai Rooney](#)

Academics and media lawyers are beginning to call this 'the new libel' meaning that where libel litigation is more difficult to succeed when harm to reputation has to be serious, actions based on data processing of private information which harms personal dignity is more likely to succeed.

Two Conflicting Privacy Standards

In an information age that is understood to be globalized, it has to be accepted that there is no single globalized standard for what is permissible in communicating private information.

UK and European law ordinarily allows legal prohibition of communicating truthful information if it is 'private'. This is not the situation in the US where such legal censorship would be unconstitutional under the First Amendment. This resulted in the 2016 Supreme Court ruling

sustaining a court injunction against the English and Welsh media publishing anything that could identify a celebrity connected to a US publication revealing gossip about his private relationships. See: [PJS v News Group Newspapers Ltd \(Rev 1\) \[2016\] UKSC 26 \(19 May 2016\)](#)

The difficulty of this division in the exercise of information rights is that it is not even possible to identify in this guide the name of the US publication regularly revealing scandals concerning public figures that it would be unlawful to publish in England and Wales. It also means that in the English and European context digital online publishers will be subject to a stricter control on content that their visitors and readers will be easily able to access elsewhere.

Another division has emerged in relation to what is known as the 'right to be forgotten' through the data processing of Internet search engines. The European Court of Justice ruled in 2014 that EU citizens are entitled under a 'right to be forgotten' to ask Internet search engines to remove links to pages that contain old, inaccurate or even just irrelevant data about them. Any legal obligation to remove such information does not apply to online journalistic publishers and their archives. It applied specifically to Google in terms of it being seen as a 'data processor' rather than publisher.

See: [Mario Costeja Gonzalez v Google Spain and Google \(Judgment of the Court\) \[2014\] EUECJ C-131/12 \(13 May 2014\)](#)

Google has been forced to set up a system of receiving and deciding requests. See: <https://support.google.com/legal/answer/3110420?rd=2>

The right to be forgotten does not extend to search engine operations beyond the European Union, but efforts are being made to prevent EU Internet users by-passing right to be forgotten removals, and in England, the Information Commissioner has directed Google to sever links to professional media sites that report successful right to be forgotten decisions.

Up until May 2015 the BBC set up a resource of [BBC web pages which have been removed from Google's search results](#). However, after June 2015 it does not appear to have been continued.

The 'right to be forgotten' principle has been substantially extended in English privacy law with the ruling against Google in April 2018 in which a businessman was given the right to have his past criminal wrong-doing concealed by anyone using the search engine. His right of anonymity even extended to his litigation to achieve this aim. Mr Justice Warby gave the businessman known as 'NT2' full anonymity and ordered Google to de-list published news reports about his conviction by its Internet Search Engine. The judge said: 'In short, anonymity is required to ensure that these claims do not give the information at issue the very publicity which the claimants wish to limit. Other individuals and organisations have been given false names in this judgment for the same reason: to protect the identities of the claimants.' The ruling explained what NT2 wished to have covered up: 'NT2 was involved in a controversial business that was the subject of public opposition over its environmental practices. Rather more than ten years ago he pleaded guilty to two counts of conspiracy in connection with that business, and received a short custodial sentence. The conviction and sentence were the subject of reports in the national and local media at the time. NT2 served some six weeks in custody before being released on licence.'

The sentence came to an end over ten years ago. The conviction became "spent" several years ago. The original reports remained online, and links continued to be returned by Google Search. NT2's conviction and sentence have also been mentioned in some more recent publications about other matters, two of them being reports of interviews given by NT2. In due course, NT2 asked Google to remove such links.'

See: [NT 1 & NT 2 v Google LLC \[2018\] EWHC 799 \(QB\) \(13 April 2018\)](#)

Privacy Case Histories Turning on the Interests of Children

In January 2013, the third husband of the Oscar winning British actress Kate Winslet won a privacy action against the Sun over the publication of images taken of him at a private party that had previously been posted on Facebook. Mr Justice Briggs said: 'The question is whether the publication of the Photographs, or of a more detailed description of their contents than the fact that the claimant is depicted partially naked, would add anything beyond mere titillation. In my judgment it would not'.

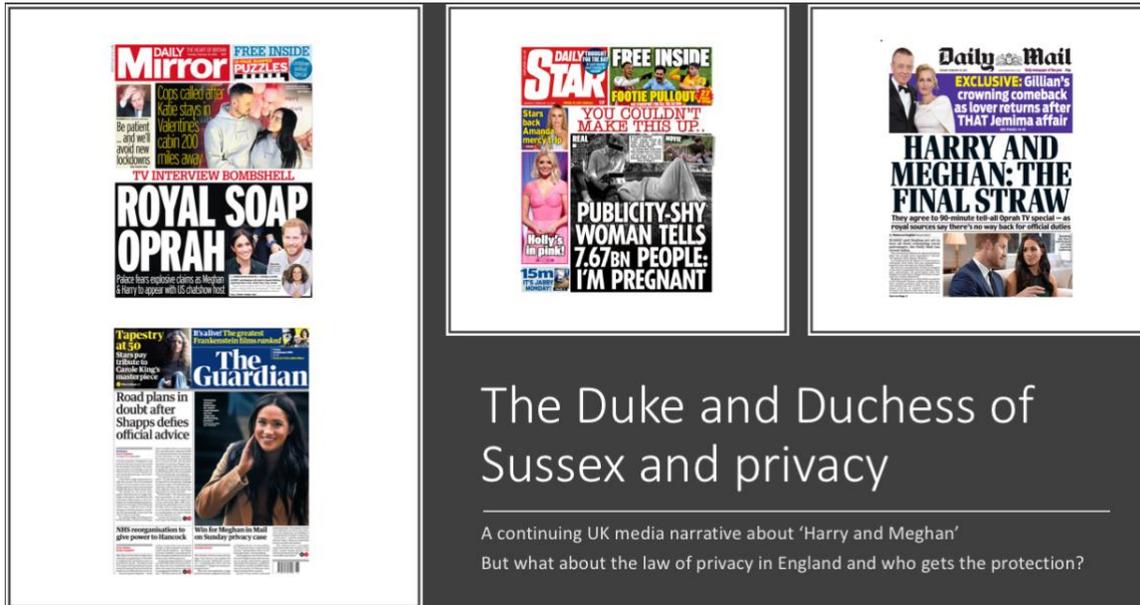
He said the threat to publish them 'comes very shortly after the belated discovery by the media of the claimant and Miss Winslet's recent marriage, at a time when the claimant finds himself in a temporary blaze of largely reflected publicity'.

The judge also engaged the issue of there being no possible reason for exposing Kate Winslet's 'children to a real risk to additional embarrassment or upset from the nationwide publication of photographs (or their contents) depicting their other carer behaving in a foolish and immature manner when half naked'. See: [Rocknroll v News Group Newspapers Ltd \[2013\] EWHC 24 \(Ch\) \(17 January 2013\)](#)

This case highlights the sensitivity of the English courts to any matters that concern the interests of children. Hence the 2014 ruling in favour of singer Paul Weller who objected to the MailOnline publishing a photograph of him with his three children taken in a public place in Los Angeles. See: [Weller & Ors v Associated Newspapers Ltd \[2014\] EWHC 1163 \(QB\) \(16 April 2014\)](#)

The 2016 UK Supreme Court case of [PSJ v The Sun on Sunday](#) also concerned itself with the potential harm to the claimant's children of any media exposure of the celebrity's personal sexual relationships being made public. See: [PJS \(Appellant\) v News Group Newspapers Ltd \(Respondent\)](#) Lady Hale observed: 'It is simply not good enough to dismiss the interests of any children who are likely to be affected by the publication of private information about their parents with the bland statement that "these cannot be a trump card". Of course they cannot always rule the day. But they deserve closer attention than they have so far received in this case, for two main reasons. First, not only are the children's interests likely to be affected by a breach of the privacy interests of their parents, but the children have independent privacy interests of their own. They also have a right to respect for their family life with their parents. Secondly, by section 12(4)(b), any court considering whether to grant either an interim or a permanent injunction has to have "particular regard" to "any relevant privacy code". It is not disputed that the IPSO Code, which came into force in January, is a relevant Code for this purpose.'

Meghan Markle v The Mail on Sunday 2021- Controversy



Lord Justice Warby explained that the actress Meghan Markle became the Duchess of Sussex after her marriage to Prince Harry. He said in his ruling that the relationship with her father, Thomas Markle, 'was difficult at the time.' Three months after the wedding, on 27th August 2018, she sent her father a five-page letter. In September 2018, Mr Markle sent a letter in reply. The privacy action arose from the later reproduction of large parts of her letter in articles published in the *Mail on Sunday* and *MailOnline*.

The existence of her letter first became public on 6th February 2019, when it was mentioned in an eight-page article appearing in the US magazine *People* under the headline: "*The Truth About Meghan – Her best friends break their silence*". Thomas Markle provided the letter or a copy of it to the Mail. On 9th February 2019, they published in print and online five articles which quoted extensively from the letter. The headline across pages 4 and 5 of the *Mail on Sunday* said: "*Revealed: the letter showing true tragedy of Meghan's rift with a father she says has 'broken her heart into a million pieces'*".

Megan complained that the publication of the Mail articles misused her private information, and an infringed her copyright in the letter.

Her lawyers argued that letter's contents were private; this was correspondence about her private and family life, not her public profile or her work; the letter disclosed her intimate thoughts and feelings; these were personal matters, not matters of legitimate public interest; she enjoyed a reasonable expectation that the contents would remain private and not be published to the world at large by a national newspaper; and the Mail's conduct in publishing the contents of the letter was a misuse of her private information.

The Mail countered that the contents of the letter were not private or confidential and Meghan had no reasonable expectation of privacy. It said any privacy interest she enjoyed was slight, and outweighed by the need to protect the rights of her father and the public at large.

The judge gave a summary ruling in favour of Meghan Markle on the privacy and copyright actions. He said: 'the disclosures were manifestly excessive and hence unlawful. There is no prospect that a different judgment would be reached after a trial. The interference with freedom of expression which those conclusions represent is a necessary and proportionate means of pursuing the legitimate aim of protecting the claimant's privacy.'

In relation to the Mail's defence on copyright, Lord Justice Warby said: 'the defendant's factual and legal case on this issue both seem to me to occupy the shadowland between improbability and unreality. The case is contingent, inferential and imprecise. It cannot be described as convincing, and seems improbable.'

The full ruling is available at:

[HRH The Duchess of Sussex v Associated Newspapers Ltd \[2021\] EWHC 273 \(Ch\) \(11 February 2021\)](#)

The court case was part of a continuing sensationalist narrative about Prince Harry and Megan Markle's decision to move to the USA and end their working relationship with the British Royal Family.

The key significance in this ruling is that the defence to a high profile privacy claim has been struck out with summary judgment given on the main issues, including copyright.

It is rare for this to happen when defences were being advanced by the media publisher which adamantly argued should have been decided after a full trial of the evidence. The case has also provided a precedent on the privacy adhering to a private letter and the meaning of 'correspondence' in Article 8 of the ECHR.

It is unlikely Meghan Markle would have succeeded if she had pursued her case in the US legal system.

The US First Amendment would have given Associated Newspapers as the publisher of the Mail on Sunday and MailOnline much greater public interest justification for the use of her correspondence; particularly as her father's freedom of expression rights would have been given greater value and prominence in the issues being decided.

At the time of writing Associated Newspapers was appealing the ruling.

Lord Justice Warby further ordered that the [Mail on Sunday must publish a front-page statement about the Duchess of Sussex's success in her copyright claim against the newspaper with a further more detailed notice on page 3 of the paper.](#) The judge further ordered that a declaration that it lost the case needed to be published on the home page of its web publication MailOnline for seven days. The Duchess's lawyers had asked for the MailOnline statement to remain on the home page for six months. He set out in his ruling the content of the front page notice as:

'The Duchess of Sussex wins her legal case for copyright infringement against Associated Newspapers for articles published in The Mail on Sunday and posted on Mail Online – see page 3.'

He also set out the detail of the content of the statement to be published on page 3 of the printed newspaper and remain on the home page of MailOnline for seven days:

'The Duchess of Sussex

Following a hearing on 10-20 January 2021, the Court has given judgment for The Duchess of Sussex on her claim for copyright infringement. The Court found that Associated Newspapers infringed her copyright by publishing extracts of her handwritten letter to her father in The Mail on Sunday and in Mail Online.

There will be a trial of the remedies to which the Duchess is entitled, at which the court will decide whether the Duchess is the exclusive owner of copyright in all parts of the letter, or whether any other person owns a share.'

The MailOnline statement required 'these additional words at the end of the first paragraph, hyperlinked to the judgment and summary: "The full judgment and the Court's summary of it can be found here."

He explained:

'...the coverage of the case in MailOnline has not been very informative about the issues in the case and how they were resolved. The coverage could be read as suggesting that judgment in the claimant's favour on privacy "WITHOUT a trial" (sic) is a startling and unusual one, and that the entire question of whether the claimant owned any copyright was to go to trial. (The article said, "Mr Justice Warby ruled the issue over ownership of copyright of the letter she wrote to Mr Markle can be decided at trial".) There was a sentence in the article inviting readers to "read the [Summary Judgment] in full here", with a link to the full text on the judiciary website. But this was far from conspicuous. It came at the very end of a long article, running to over 1,100 words, which contained reporting and criticism of the judgment, and reports on other features of the litigation. Until guided to it by Counsel, I had failed to spot the link when reading the MailOnline article. There was no link to the two-page summary of the Summary Judgment that I prepared, which was also on the judiciary website, the purpose of which was to help readers follow its structure and easily identify and understand my conclusions.

I also place some weight on the fact that the defendant saw fit to continue the publication on MailOnline of articles that I had held to be a misuse of private information and an infringement of copyright, making them accessible (so it appears) to anyone from anywhere in the world. This cannot be accidental, or an oversight. In the absence of any explanation, I am tempted to infer that it is a form of defiance. But I do not need to make a finding.'

This outcome shows that the courts in the UK are now prepared to use their powers to determine how their court rulings are presented and represented editorially by unsuccessful media defendants in privacy and copyright actions. This injunction by a court to have

information actually published in a losing media publication, with clear directions as to font size and positioning, has been described as unprecedented.

The tension between Open Justice and Privacy

In July 2017, the UK Supreme Court ruled that a man previously known as PNM and 'a prominent figure in the Oxford area' could be identified by the media as having been arrested by the police in a 2012 child grooming enquiry known as Operation Bullfinch. Five years before he had been given police bail, released, told that his case would be kept under review and never charged. A Magistrates court had prevented his identification when named in court proceedings for nine other men charged and he continued to be referred to during their Old Bailey trial. PNM did not feel it was right that he should become collateral damage as a result of being named and associated in a criminal trial arising from an enquiry where he been effectively cleared of any wrongdoing. PNM and his lawyers fought for his right to be protected from exposure through the privacy laws from 2012 to 2017. Five out of the seven Supreme Justices decided that the right to Open Justice prevailed in these circumstances. Lord Sumption said: 'The material is there to be seen and heard, but may not be reported. This is direct press censorship.'

The ruling in [PNM v Times Newspapers Ltd & Ors \[2017\] UKSC 49 \(19 July 2017\)](#) revealed for the first time that PNM's actual name was Tariq Khuja. He always protested his innocence. A victim who had told police detectives that she had been raped by somebody called Tariq had not picked him out in an identity parade, and she did not believe her rapist was in the line-up. It remains to be seen whether this Supreme Court ruling will halt an increasing trend for privacy injunctions in criminal proceedings. In one case the media had been prevented from reporting a criminal investigation into financial crime where the owner of the company had been interviewed under caution and in another, a court order prevents the media identifying a witness in a criminal investigation.'

Case History Sir Cliff Richard v BBC July 2018- A critical analysis published in The Journal, CloJ online

See: <http://cioj.org/thejournal/the-sir-cliff-richard-v-bbc-ruling-is-a-significant-precedent-and-damaging-to-media-freedom/>

For the full High Court ruling see: [Richard v The British Broadcasting Corporation \(BBC\) & Anor \[2018\] EWHC 1837 \(Ch\) \(18 July 2018\)](#)

The political fall-out from Mr Justice Mann's ruling in Sir Cliff Richard's successful privacy action against the BBC over their naming of him as a suspect in a sexual assault inquiry has had the flavour of the Brexit debate. Partiality, polemicism, win or lose, right or wrong, good and evil. It's either one way, or the other.

There are many who say the BBC **deserved to lose the case**, should never have defended it, and the judge's ruling **poses no threat whatsoever to press freedom**. In short: **'Shame on the BBC!'** The judge's reasoning and interpretation of the law is fully supported and so is his

assertion that ‘It is simply wrong to suggest there is now some blanket restriction on reporting investigations.’ The BBC had been strongly urged not to appeal.

On the other hand there has been consensus among mainstream media publishers in press and broadcasting that the ruling does set a disturbing precedent, **is a significant blow to media freedom**, and **needs to be resisted**.

The ruling and its consequences require analysis attended by some measure of even-handedness and proportionality.

Why professional journalists disagree with the judge’s ruling



BBC Headquarters in London. Image: Tim Crook.

Professional journalists at the BBC and elsewhere are aggrieved it has been ordered to pay £210,000 in damages and much more in legal costs for reporting accurately that Sir Cliff Richard had been investigated by the police for historical child sexual assault claims. They had repeatedly reported his side of the story and **only said they were allegations**. They reported that the police interviewed him, did not arrest him, and later fully exonerated him. They always reported his position that there was no truth whatsoever in the allegations.

They think it unfair that damages have to be paid **for a story that was true and when they consistently and repeatedly reported his denials**, expressions of innocence, and final exoneration. They do not understand why it was not in the public interest to name him when there was an **intensive and widespread political and public debate about well-known celebrities being subject to historical child sexual allegations** some of whom were later tried, convicted and jailed, and others later cleared but complaining their reputations had been unfairly destroyed. There have been significant judge led inquiries into the issue and multimillion pound police investigations. They honestly cannot understand or accept **why it was not in the public interest** to publish the truthful information that the police were investigating Sir Cliff Richard- one of Britain’s pre-eminent and powerfully influential

entertainers whose public interest status *par excellence* has always been heavily defined by his avowed Christianity.

In this context, even if it was accepted he had a reasonable expectation of privacy when suspected of crime, professional journalists believe they had a public interest duty to report that the police were investigating Sir Cliff Richard for sexually assaulting a child at a Billy Graham meeting in Sheffield in 1985.

The BBC were truly shocked by the ruling largely because they considered it as a retrospective penalty for doing something at the time that custom, practice and law had always permitted.

Privacy law and culture



Royal Courts of Justice in the Strand. Image: Tim Crook.

The professional news and journalistic culture of this country has not come to terms with how the law on media privacy has been developed by the courts and apparently supported by public and political opinion over the last 18 years. There is a severe dislocation in values and understanding between journalistic culture and the legal, public and political spheres.

Sir Cliff Richard v BBC was a contested media privacy case involving two of the most powerful parties you could ever find in British public life. It is an action that would not have been possible prior to the year 2000, the year the 1998 Human Rights Act came into force, and which introduced into English primary law **Article 8 of the European Convention on Human Rights**: 'Everyone has the right to respect for his private and family life, his home and his correspondence.' Parliament decided **under section 12(4) of the Act** that 'The court must have particular regard to the importance of the Convention right to freedom of expression' when litigation related to journalistic matters. In this situation the court must consider the extent to which it was 'in the public interest for the material to be published.'

Most professional journalists understood from this that Parliament required that the courts should give pragmatic priority and consideration to freedom of expression particularly when there was public interest in the material.

Source of Sir Cliff Richard's reasonable expectation of privacy



Parliament at Westminster. Image: Tim Crook

The view that Parliament instructed the courts to give pragmatic priority or 'particular regard' to freedom of expression in litigation over journalism said to be in the public interest was not shared by the UK courts when they began hearing media privacy litigation. 2004 was the year that supermodel Naomi Campbell had established in the UK's then highest court, the **judicial committee of the House of Lords**, that a respect for the right to media privacy did exist in law as a result of the Human Rights Act.

The approach of the majority of the Law Lords in her case was to adopt a balancing exercise between Article 8 privacy and Article 10 freedom of expression. It was recognised that there was a right to a reasonable expectation of privacy in a wide range of situations that could only be defeated by public interest in publication.

The right to media privacy also included protection from damage to reputation caused by the publication of truthful though private information. In the same year **Lord Steyn in Re S(FC) (A Child) (Appellant) [2004]** set a binding precedent that neither respect for privacy nor freedom of expression 'has as such precedence over the other.'

He set out the way judges in future would approach litigation of this kind: '...where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.' Lord

Steyn and his fellow judges would deny that this is judicial activism on their part and a rejection of Parliament's intentions. They would say the Human Rights Act gives them the power to take into account European Court of Human Rights case law that also advocates 'the ultimate balancing test.'

Long ago in the early 1960s there was case law making it clear that reporting that somebody had been helping the police with their enquiries when they were subsequently neither arrested nor charged was not libellous. The media had always recognised that they had a public duty to publish stories about individuals who were suspected of crime, had had their home and premises searched as a result of a police enquiry, and when they were being interviewed by the police whether or not they had been formally arrested. The public interest intensified where an individual was well-known, powerful, had public figure status, or was part of a public interest set of circumstances and narrative. The law protected publication if the facts were accurate.

But the developing law of privacy as evidenced by Mr Justice Mann's ruling fundamentally changed this situation. Most of the commentary on the Sir Cliff Richard case has failed to acknowledge that Parliament in the 2011 Education Act provided statutory life-long anonymity for teachers accused of criminal conduct against the students they teach unless and until such time they were formally charged by the police. Teachers became the first group of professional people in British legal history to be given automatic anonymity when they are accused of a criminal offence at work. There was a short period between 1976 and 1988 when men accused of rape offences had statutory anonymity unless and until they were convicted by the jury in a crown court trial.

Mr Justice Mann confirmed that the Sir Cliff Richard and BBC case was legally significant in advancing a reasonable expectation of privacy for criminal suspects. It was not something which been 'clearly judicially determined, though it has been the subject of judicial assumption and concession in other cases.' (Judge's ruling at paragraph 234). Four rulings at High Court and Appeal Court level in 2014, 2015, 2016, and 2017 had developed the case law: *PNM v Times Newspapers Ltd*, *Hannon v News Group Newspapers Ltd*, *ERY v Associated Newspapers Ltd*, and *ZXC v Bloomberg LP*. He also strongly drew on the pronouncements of Sir Brian Leveson in his inquiry report into the Culture, Practices and Ethics of the Press in 2012. He cited the importance of Leveson's view '...that it should be made abundantly clear that save in exceptional and clearly identified circumstances (for example, where there may be an immediate risk to the public), the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public.'

The Judicial Response to the Law Commission Consultation Paper on Contempt of Court in 2013 fully endorsed Leveson's view. Mr Justice Mann called upon the 2013 College of Policing's Guidance on Relationships with the Media which appears to repeat word for word Sir Brian Leveson's prescription: '... save in clearly identified circumstances, or where legal restrictions apply, the names or identifying details of those who are arrested or suspected of crime should not be released by police forces to the press or public.' He took on the observations of Sir Richard Henriques in his 'Independent review of the Metropolitan Police

Service's handling of non-recent sexual offence investigations alleged against persons of public prominence.'

Sir Richard had been discussing the position of prominent and well known entertainers who 'are all victims of false allegations and yet they remain treated as men against whom there was insufficient evidence to prosecute them. The presumption of innocence appears to have been set aside.'

Critical analysis of Mr Justice Mann's ruling



Entrance to High Court in London. Image: Tim Crook.

It can be argued that Mr Justice Mann has cherry-picked from extra-judicial sources and, indeed dissenting views in case law that question the capacity of the public to accept legal exoneration and not guilty verdicts. This is an astonishing jurisprudential position to take. It questions the very impact of the rule of law and treats the media and its general public audience as a malicious, prejudiced, uncontrollable, rabid and witch-hunting mob incapable of respecting and acknowledging the very justice inherent in the due process of the law.

Mr Justice Mann's **reasoning in paragraph 248 of his ruling** is contentious: 'If the presumption of innocence were perfectly understood and given effect to, and if the general public was universally capable of adopting a completely open- and broad-minded view of the fact of an investigation so that there was no risk of taint either during the investigation or afterwards (assuming no charge) then the position might be different. But neither of those things is true. The fact of an investigation, as a general rule, will of itself carry some stigma, no matter how often one says it should not.' It can also be argued the judge made a fundamental mistake in law in making the risk of some stigma as justification for reasonable expectation of privacy in these circumstances to take precedence. He was wrong to decide that the inevitability of some stigma residing in some people should trump the public interest of a media publication

reporting the criminal justice process and identifying an individual suspected of a criminal offence.

Perhaps Mr Justice Mann would have benefited from being referred to **Lord Devlin's words in Lewis v Telegraph 1964**: 'Suspicion of guilt is something very different from proof of guilt [...] A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done.' No evidence has been produced showing that anything in the BBC's coverage implicitly or explicitly suggested there was fire behind the smoke. If that had been the case Sir Cliff Richard could have sued the BBC and any other media publication responsible for such coverage for libel.

Sir Cliff Richard said in interviews after his High Court victory that he believed the BBC 'took it upon themselves to be judge, jury, and executioner.' But Sir Cliff Richard was not being tried by the BBC. He was simply the subject of reporting about a police enquiry investigating an allegation against him that the police eventually decided did not merit arrest, charge and criminal proceedings.

Failure to give weight to UK Supreme Court Precedent



UK Supreme Court. Image: Tim Crook

It could be argued that Mr Justice Mann does not give sufficient weight to the powerful authority in the UK Supreme Court rulings of **In re Guardian News and Media Ltd in 2010** and **PNM v Times Newspapers Ltd in 2017**. In the Guardian 2010 case Lord Rodger, in a unanimous ruling, specifically referred to the publication of the names of defendants in advance of criminal trials and observed: 'In allowing this, the law proceeds on the basis that most members of the public understand that, even when charged with an offence, you are innocent unless and until proved guilty in a court of law. That understanding can be expected to apply, a fortiori, if you are someone whom the prosecuting authorities are not even in a position to charge with an offence and bring to court.' The general principle on public interest in these circumstances established by the UK Supreme Court is the default position of most members of the public accepting innocence until proved guilty; not the risk that some may not.

In PNM in 2017 Lord Sumption in the majority ruling 5-2 said: 'The sexual abuse of children, [...] is a subject of great public concern. The processes by which such cases are investigated

and brought to trial are matters of legitimate public interest. The criticisms made of the police and social services inevitably reinforce the public interest in this particular case.'

Yes, this case can be distinguished from that of Sir Cliff Richard, but its similarity and relevance is that PNM was arrested but not charged and sought anonymity by injunction when mentioned peripherally in the criminal proceedings of other men. Lord Sumption said the public interest in the identity of individuals involved in the criminal justice process 'depends on (i) the right of the public to be informed about a significant public act of the state, and (ii) the law's recognition that, within the limits imposed by the law of defamation, the way in which the story is presented is a matter of editorial judgment, in which the desire to increase the interest of the story by giving it a human face is a legitimate consideration.' Both Supreme Court rulings acknowledged and respected the competitive and commercial nature of public interest journalism.

Lord Rodger explained in 2010: 'The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.' The BBC would not be able to justify its income from the license fee if its news programmes did not successfully compete for audiences.

In journalism the pursuit of the scoop, with what Mr Justice Mann and no doubt most members of the public would regard as a sensationalist style of coverage, has been fully recognized as a valid part of the public interest role of media publication. That is why **Lord Nicholls in Reynolds v. Times Newspapers in 1999** said: 'it should always be remembered that journalists act without the benefit of the clear light of hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment. Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.'

It can be argued that this is a significant authority that Mr Justice Mann should have taken into account when carrying out his intense focus on the evidence in Sir Cliff Richard's litigation.

Mr Justice Mann's rejection of the BBC's case

There is no doubt that public and political opinion are strongly sympathetic and supportive of Sir Cliff Richard's successful action against the BBC. His position on anonymity for criminal suspects is backed by **an opinion poll conducted by YouGov** where 86% of respondents support the anonymity of suspects under investigation and 62% favour anonymity for those on

trial who have not yet been found guilty of an offence. The poll was conducted on 19th and 20th of July 2018 with a sample of 1669 adults in Great Britain.

Paragraphs 20 to 28 of Mr Justice Mann's ruling offer a withering deconstruction of the reliability of the BBC's witnesses. Of the BBC's reporter Daniel Johnson he said: 'he was capable of letting his enthusiasm get the better of him in pursuit of what he thought was a good story so that he could twist matters in a way that could be described as dishonest in order to pursue his story.' Of the BBC's deputy to the Director of News, Fran Unsworth (who was later promoted to Director) he observed: 'Her acts and thinking on the day, like the acts and views of others, were affected by the desire to protect the scoop.' She was 'tinged with wishful thinking and a bit of ex post facto convenient rationalization.' The judge decided on the balance of probabilities to accept the South Yorkshire Police case that they felt pressurized into agreeing to tell the BBC when they were going to search Sir Cliff's apartment in Berkshire.

They said they made that offer in order to prevent Mr Johnson publishing a story prior to the search, thereby potentially compromising it. Mr Justice Mann decided the BBC did not give sufficient consideration to Sir Cliff's reasonable expectation of privacy when they decided to name him as the suspect while at the same time using spectacular helicopter coverage of the search, which he condemned as a 'significant degree of breathless sensationalism.'



Traditional Metropolitan Police Lamp. Image: Tim Crook

He highlighted the content of emails between news editors and reporters that revealed the crassness and competitive hubris of journalists when working under pressure to deliver coverage that was entered for and received a nomination for the Royal Television Society award in the category 'Scoop of the Year.' In the light of a previous Law Lord recognizing the public interest in journalists discharging vital functions 'as a bloodhound as well as a watchdog', and acting 'without the benefit of the clear light of hindsight' is it possible the Judge has not evaluated the BBC's conduct with the proper perspective? He actually added £20,000 in aggravated (punitive) damages for the decision to enter the coverage for an award. Has the judge properly taken into account Lord Rodger's view that judges should accept that 'editors

know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information?’

The rejection of the BBC’s position on public interest

Mr Justice Mann rejected the BBC’s argument that it had a public interest duty to identify Sir Cliff Richard as a suspect when covering the police search of his home in England.

What is also significant is that in the absence of the hullabaloo helicopter sensationalism a boring copy read by a presenter in the studio naming Sir Cliff Richard would still have been a serious breach of his privacy: ‘A lower key report of the search and investigation (for example, done merely by a measured reading of the relevant facts by a presenter in the studio) would, on my findings be a serious infringement, and would not be outweighed by the BBC’s rights of freedom of expression.’ In cross-examination BBC deputy editor of News Fran Unsworth identified two BBC editorial guidelines on public interest that she believed applied in this case: ‘exposing or detecting crime’ and ‘protecting people’s health and safety.’

But the judge said ‘it was not clear to me whether she actually considered them at the time,’ and added: ‘...while I am prepared to accept that a journalist’s views on the justification of publication (or his/her absence of views) might assist the court in detecting the public interest in the balancing exercise, the ultimate question is one for the court, not for the journalist. So it does not help much if Ms Unsworth did not consider the guidelines, considered the wrong ones, or misinterpreted the right ones.’ Is it significant that when listing the BBC’s editorial guidelines on public interest in his judgement, he omitted ‘There is also a public interest in freedom of expression itself.’ Can it not be argued that Mr Justice Mann has not given fair consideration to the public interest defence position of journalists and editors who have to make decisions in the heat of competitive deadline pressures and without the benefit of hindsight?

Even the 2013 Defamation Act imposes a statutory duty on courts under section 4[4] to ‘make such allowance for editorial judgement as it considers appropriate’ when determining whether it was reasonable for a media defendant to believe that publishing the statement complained of was in the public interest.

Is Mr Justice Mann’s ruling a significant precedent?

Mr Justice Mann seemed to take exception to the mainstream media coverage of his ruling and said: ‘It is simply wrong to suggest there is now some blanket restriction on reporting investigations.’

Close reading of his ruling proves that he does set a precedent on a wide range of issues. He says so himself when declaring at paragraph 322: ‘I agree that the case is capable of having a significant impact on press reporting...’

At paragraph 248 he says: ‘It seems to me that on the authorities, and as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police

investigation, and I so rule. As a general rule it is understandable and justifiable (and reasonable) that a suspect would not wish others to know of the investigation because of the stigma attached.'

His ruling creates a chilling effect for any news publication that wishes to name a suspect under police investigation. Editors now know that to do so will run the risk of an action for breach of privacy and this could be costly. The position is inhibiting. The legal cost liability is estimated to be in terms of millions of pounds. We may be revisiting the chilling effect of disproportionate costs to damages that led the European Court of Human Rights in 2011 to decide in the Naomi Campbell case that the level of legal fees was a breach of Article 10 freedom of Expression.

The award of an additional £20,000 in aggravated damages for pursuing professional awards recognition of a breach of privacy story is certainly unprecedented. It means that news publishers face being awarded damages against them for being competitive in the pursuit of scoops and awards for stories that could turn out to be breaches of privacy. Mr Justice Mann stated more clearly than any previous case that in breach of privacy damages can be collected for harm to reputation- a remedy usually encompassed by libel law. But in privacy, unlike libel, claimants are not required to prove that their reputations have suffered 'serious harm, or a likelihood of serious harm.'

This is creating a telescoping and inequitable overlap between libel and privacy; particularly when privacy can be a remedy for truthful and untruthful information. The case breaks new ground in making clear that there is a special damages liability for the consequences of a media breach of privacy when this triggers further problems for a claimant as a result of the behaviour of other people. Special damages are to be assessed for the costs involved in employing lawyers and public relations experts to deal with the fall-out from the BBC's coverage. This includes a Facebook site called 'Christians against Cliff,' which contained 'a large number of outrageous, highly offensive and defamatory allegations and remarks about Sir Cliff.' His lawyers had to also head off attempts by other newspapers and broadcasters to publish false allegations, there was an attempted blackmail, potential US immigration difficulties, and a lost book deal.

The future

There is one immediate lesson that all professional journalists, the BBC and media could learn from the case. Absolute care and caution needs to be taken in electronic communications between journalists in the newsroom.

The kind of communications that have been traditionally common-place between reporters and their editors should never be allowed to be funnelled into the public arena of judgment and condemnation of media legal litigation.

The gallows humour, satire and irony that relieves stress and tension should be kept analogue, ephemeral and unrecorded. The decision by the BBC not to appeal the case after Mr Justice Mann refused leave to appeal means that until another case emerges **the issues and problems**

identified here will remain unresolved. There is the possibility of a future direction of travel in reasonable expectation of privacy and anonymity in the criminal process that could well extend to the identity of people arrested, charged, put on trial, acquitted, and released after the completion of their sentences.

This is because of the emphasis Mr Justice Mann has placed on the problem of stigma never being checked by the presumption of innocence and indeed its legal declaration and confirmation through public exoneration and not guilty verdict.

It is unusual for all mainstream media publishers, including the Society of Editors, to join in a consensus about the judge's ruling damaging media freedom and all the more disappointing that these concerns cannot be addressed by the higher courts. While public and political opinion appears to support the ruling and Sir Cliff Richard's campaigning for suspect anonymity, the situation could change. Would the public be content if the leader of one of the main political parties, or key members of the Royal Family found themselves suspects in a serious criminal investigation and the media were prevented from making any identification?

During his lifetime the entertainer Sir Jimmy Savile was protected by the libel laws when over a 54 year period between 1955 and 2009, 500 people aged between 5 and 75 complained that he had sexually assaulted them. With the burden of proof in libel on the media defendant news publishers were unable to publish allegations made against him. It was feared that the credibility of his vulnerable and often disturbed victims would not have survived aggressive cross-examination in adversarial trials. He was interviewed and investigated by the Surrey and Jersey police forces in 2007 and 2008 over indecent assault allegations, but the cases never proceeded to charge.

It can certainly be argued that Mr Justice Mann's ruling will not assist any media investigation into another case like it. It should not be the role of any judge or court to change laws that are strictly matters for Parliament, and in particular, the democratically elected chamber of the House of Commons.

Something as serious as the right of any criminal suspect prior to formal arrest and charge to anonymity is a constitutional issue that should be decided by Parliament; not by some single judge in the Chancery Division of the High Court who has not addressed and followed binding previous precedent from the United Kingdom Supreme Court. Any party to legal proceedings should be subject to robust public criticism; particularly where the issue will not be tried by lay jury. However, the BBC had come under vituperative public and political pressure not to appeal the matters of legal principle arising.

It is disturbing that rather than use the legal system, it has felt the need to directly contact the government and Parliament for redress.

The financial consequences of pursuing an appeal were clearly disproportionate in terms of the rising and accruing costs compared to the actual amount of general damages awarded. The English legal system does not assist here in having so many levels and layers of appeal and potential redress. Any freedom of expression and privacy dispute has the potential of six

legal forums: High Court to Appeal Court to UK Supreme Court for injunctive relief, and the same three part staircase for any trial of the substantial issue.

This sorry case is a worrying precedent and there is no doubt that freedom of expression and the rights of the media have been left bruised and compromised. We are a long way from the judicial rhetoric of the courts recognising that in a democracy the media must be allowed to perform their **watchdog role as bloodhounds**. Time will tell if Sir Cliff Richard v BBC has replaced the bloodhound with a poodle.

When the Director-General of the BBC, Lord Tony Hall, appeared before the House of Commons Digital, Media and Sport House of Commons Select Committee a few months after the ruling he conceded 'I felt we overdid it to be blunt... if we were to appeal we'd be unlikely to win, cost licence fee money and prolong what Sir Cliff had been through, so I felt on those counts we should not appeal..

However he did highlight the wider ramifications of the case and pointed out: 'this is an issue for reporting which - rather than judges - parliament should decide. MPs should say what is right for us to report.'

See: [BBC 'overdid it' with coverage of raid on Sir Cliff's home, director-general admits](#)

How anonymity for crime suspects prior to charging has been consolidated by the High Court and Appeal Court

Subsequent events have shown that Mr Justice Mann's approach in the Sir Cliff Richard case has been developed and strengthened so much so that it will be an exceptional situation for any UK media news publisher to publish the name of somebody being arrested; particularly if this is very newsworthy and the person is a public figure.

As indicated in the media contempt law section, The English and Welsh Appeal Court and High Court have fully established a reasonable expectation of privacy that being investigated for crime prior to being charged is private information, and this is, at the time of this edition, the norm.

This new approach fully protected a sitting Conservative MP in the Westminster Parliament from being identified in the media after being accused of raping a woman. The Met Police decided not to proceed with the case, the complainant has complained about the situation with a full front-page story in a national newspaper publication, but the identities of the people involved, and in particular, the MP himself, remains concealed and protected.

These are the key court precedents developing this protection.

[Sicri v Associated Newspapers Ltd \(Rev 1\) \[2020\] EWHC 3541 \(QB\) \(21 December 2020\)](#)

[ZXC v Bloomberg LP \[2020\] EWCA Civ 611 \(15 May 2020\)](#)

The claimant in the Sicri case was a suspect in the awful Ariana Grande concert terrorism attack at Manchester Arena. Suicide bomber, Salman Abedi, detonated an improvised explosive device in the foyer, murdered 22 and injured more than 800 people, many of them children and young people.

Mr Justice Warby decided the MailOnline was not entitled to identify Alaedeen Sicri:

‘The claimant had a right to expect that the defendant would not publish his identity as the 23-year-old man arrested on suspicion of involvement in the Manchester Arena bombing. By 12:47 on 29 May 2017, the defendant had violated that right; it had no, or no sufficient public interest justification for identifying the claimant.

It continued to do so.

Later, another publisher (The Guardian) did the same or similar. But the claimant's right to have the defendant respect his privacy was not defeated or significantly weakened by the fact that others failed to do so. He is entitled to compensation. The appropriate sum is £83,000 in general and special damages.’

The Judge concluded that the rule is now very clear:

‘... those who have simply come under suspicion by an organ of the state have, in general, a reasonable and objectively founded expectation of privacy in relation to that fact and an expressed basis for that suspicion.’

Professional news media will not succeed with a defence of ‘public interest’ if they show no evidence that there was editorial engagement of the balancing exercise of considering the suspect’s privacy rights as well as the public interest in reporting the investigation of serious crime.

In *ZXC v Bloomberg*, the Court of Appeal set the binding precedent with Lord Justice Simon explaining: ‘Since the matter arises for decision in the present case, I would take the opportunity to make clear that those who have simply come under suspicion by an organ of the state have, in general, a reasonable and objectively founded expectation of privacy in relation to that fact and an expressed basis for that suspicion. The suspicion may ultimately be shown to be well-founded or ill-founded, but until that point the law should recognise the human characteristic to assume the worst (that there is no smoke without fire); and to overlook the fundamental legal principle that those who are accused of an offence are deemed to be innocent until they are proven guilty.’

This is an important shift in jurisprudential thinking in the UK, and fully underpins the reasonable expectation of privacy protection for people in investigated and arrested but not or never charged. Lord Justice Simon even acknowledged that the court’s conclusion is challenged by the weight of academic opinion: ‘... we were referred to an article by Professor Nicole Moreham, ‘Privacy, Reputation and Alleged Wrongdoing: why police investigations should not be regarded as private’, in (2019) *Journal of Media Law*, 11:2, 142-162. It will be

apparent from the title that I disagree with her conclusions; but I would wish to acknowledge the illuminating contribution of the article to the debate on the issues that arise.'

This precedent may well be challenged at UK Supreme Court level and until overruled will leave news publishers in England and Wales under the considerable jeopardy of civil actions for misuse of private information if they identify anyone being investigated prior to criminal charge for any kind of serious crime.

The abstract for [Professor Moreham's *Journal of Media Law* article](#) argued:

'A handful of recent English authorities have held that, up to the point of charge, individuals will usually have a reasonable expectation of privacy in respect of police investigations into their conduct. This article argues this is problematic. It maintains, first, that neither the potential confidentiality of police investigations nor the need to protect a claimant's reputation provides a sound basis for concluding that such investigations should generally be private. Then it argues that the fact that a police investigation into one's conduct is taking place does not sit comfortably with the types of private information usually protected by English courts (e.g. information about one's health or sexual life). Finally, it says the reasonable expectation of privacy in respect of police investigations needs to be reconciled with the well-established common law principle that individuals should not be allowed to suppress evidence of their own wrongdoing.'

Important links for this case history

[BBC Statement on losing the case](#)

[BBC Statement on deciding not to appeal](#)

[Campbell v MGN Ltd \[2004\]](#)

[S \(a child\), Re \[2004\]](#)

[Appeal Court PNM v Times Newspapers Ltd](#)

[UK Supreme Court ruling 2017 PNM v Times Newspapers Ltd](#)

[In re Guardian News and Media Ltd \[2010\]](#)

[Hannon v News Group Newspapers Ltd](#)

[ERY v Associated Newspapers Ltd](#)

[ZXC v Bloomberg LP](#)

[Reynolds v Times Newspapers 1999. Lord Nicholls.](#)

[Yougov poll on public opinion concerning anonymity for crime suspects.](#)

[Mosley v United Kingdom 2011.](#)

[MGN v United Kingdom 2011.](#)

Key useful background facts about UK Privacy

a. The law developed because the Human Rights Act 1998 (enacted from October 2000) placed a statutory obligation on the UK judiciary that courts and tribunals must apply the European Convention of Human Rights to its decisions (Section 6) and **'must take into account'** any judgment, decision, declaration or advisory opinion of the European Court of Human Rights and any decision of the Committee of Ministers of the Council of Europe (the non EU body that runs the ECtHR) (Section 2) Under Section 6 it is 'unlawful for a public authority to act in a way which is incompatible with a Convention right,' and public authority includes any court or tribunal. Under Section 12 Freedom of Expression, UK courts have to carry out an equal balancing act between Article 8 Privacy and Article 10 Freedom of Expression with an intense scrutiny of the facts in each case. They have to consider the extent to which there was public interest for the material to be published, and have particular regard for freedom of expression and for any privacy code.

Under Section 3 of the Act UK legislation has to be interpreted so that it 'must be read and given effect in a way which is compatible with the Convention rights.'

b. Prior restraint by injunctions became possible in privacy actions because of the idea that privacy was like a cube of ice. Once exposed to the heat of exposure it would melt and be lost forever. However, the practice became controversial due to hearings being in secret, the media not being notified or represented to argue for freedom of expression, and 'superinjunctions' preventing any reporting of the fact that an injunction had been applied for and granted. There had also been an increase in anonymity for the parties involved in privacy actions. The *Guardian* newspaper had complained that a court injunction and superinjunction relating to a report on the activities of the corporation Trafigura and its disposal of chemical waste in third world countries prevented their ability to even report discussion of it in Parliamentary proceedings [see <http://www.theguardian.com/world/2009/oct/16/trafigura-carter-ruck-the-guardian>]. A report of a Parliamentary committee chaired by the Master of the Rolls, Lord Neuberger, in 2011 'on super-injunctions, anonymity injunctions and open justice,' observed 'Super-injunctions are now only being granted, for very short periods, and only where this level of secrecy is necessary to ensure that the whole point of the order is not destroyed.' The report recommended that 'When anonymised orders are made, the court has and should wherever practicable provide a reasoned judgment for its decision,' and follow procedure and guidelines to 'enable the media to be informed about applications in advance as Parliament envisaged when it passed section 12 of the Human Rights Act 1998.'

c. The right to respect for privacy became consolidated in May 2004 when at the UK's then highest court, the Judicial Committee of the House of Lords (after 2009 this was replaced by the UK Supreme Court) ruled that the supermodel Naomi Campbell had had her privacy breached when the *Daily Mirror* linked a published photograph of her in a Chelsea Street with her receiving therapy at Narcotics Anonymous for an addiction illness. [[Campbell v MGN Ltd \[2004\] UKHL 22 \(6 May 2004\)](#)] One of the Law Lords, Baroness Hale explained that the issue at stake was not trivial: 'The information revealed by the article was information relating to

Miss Campbell's health, both physical and mental. Drug abuse can be seriously damaging to physical health; indeed it is sometimes life-threatening.' In her assessment of the public interest in freedom of speech she observed: 'The political and social life of the community, and the intellectual, artistic or personal development of individuals, are not obviously assisted by pouring over the intimate details of a fashion model's private life.'

It is important to note that on appeal to the ECtHR in 2010 the UK House of Lords decision on privacy/breach of confidence was upheld, but the fact that the media defendant Mirror Group Newspapers had to pay nearly £1 million in legal costs through the conditional fee agreement success fees system was a breach of Article 10 Freedom of Expression. [MGN LIMITED v. THE UNITED KINGDOM - 39401/04 \[2011\] ECHR 919 \(9 June 2011\).](#)

In June 2004 at the ECHR in Strasbourg, Princess Caroline of Monaco won a case over the persistent photographing of her in public and private locations where there was deemed to be no public interest. [VON HANNOVER v. GERMANY - 59320/00 \[2004\] ECHR 294 \(24 June 2004\)](#) The court ruled: 'The present case does not concern the dissemination of "ideas", but of images containing very personal or even intimate "information" about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution.'

In a concurring opinion Judge Zupancic observed: '...it is impossible to separate by an iron curtain private life from public performance. The absolute incognito existence is the privilege of Robinson; the rest of us all attract to a greater or smaller degree the interest of other people [...] I believe that the courts have to some extent and under American influence made a fetish of the freedom of the press.'

d. Political contestation in UK Privacy. Media privacy has developed out of the common law of confidentiality that protects individuals, businesses, corporations and even government bodies. The Human Rights Act 1998 and British law interlocking with European Court of Human Rights law meant that the confidential legal obligations between two parties could be extended to third party publishers via the legal duty of the judiciary as a public authority to apply the rights enshrined in the European Convention on Human Rights and fundamental freedoms. Privacy as a right became enforceable through judicial remedy in an horizontal vector between individual and individual via the vertical vector of the individual to the state in the form of the courts as a public authority. The European legal principles of i) the infringement of the human right being clearly proscribed by an existing law ii) there needing to be a proportionate interference with the human right and iii) the requirement of a pressing social need in the context of a democratic society for the interference with any human right had to be applied in the balancing act in any intense focus on the facts of any case where there was a conflict between Article 8 Privacy and Article 10 Freedom of Expression.

e. The political and jurisprudential struggle remains in a state of flux. It is neither certain nor predictable. For example, in [A v B & C \[2002\] EWCA Civ 337 \(11th March, 2002\)](#) a privacy battle between the then premiership footballer Gary Flitcroft and the *Sunday People* newspaper over revelations about his private life in respect of extramarital affairs, the Court of Appeal ruled freedom of expression should take precedence. The then Lord Chief Justice Lord Harry Woolf said: 'A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a

private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure. The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public attention then you have less ground to object to the intrusion which follows. In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation, then it can be appropriately taken into account by a court when deciding on which side of the line a case falls. The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest. The same is true in relation to other parts of the media.'

After the Campbell and Von Hannover cases in 2004, injunctions against the media for anonymous claimants about infidelity became common. The superinjunction would prohibit publication about the very existence of the injunction. This was seen as killing off the tabloid 'kiss and tell' genre of story. Even media journalist celebrities such as Andrew Marr and Jeremy Clarkson later admitted to obtaining superinjunctive privacy relief about their private lives.

The media would win some cases, but lose others and it became apparent that publishing private information with what was seen as 'trivial' tabloid style entertainment public interest justification became an expensive and risky enterprise.

The legal process often concerned leading sports celebrities such as Premiership soccer players. Some selected case histories:

1. Loreena McKennitt- successful privacy injunction by the folk singer against former friend and employee Niema Ash who wished to publish a book including descriptions about McKennitt's private life. [McKennitt & Ors v Ash & Anor \[2005\] EWHC 3003 \(QB\) \(21 December 2005\)](#) was upheld by Court of Appeal. Mr Justice Eady had said: "Even where there is a genuine public interest, alongside a commercial interest in the media in publishing articles or photographs, sometimes such interests would have to yield to the individual citizen's right to the effective protection of private life."

2. Lord Browne of BP v *Mail on Sunday*/Associated Newspapers. Mr Justice Eady decided BP's shareholders had the right to know that Lord Browne had lied in court. But they did not need to know the details of his personal conversations with ex-boyfriend Jeff Chevalier, which remained private. See: [Browne v Associated Newspapers Ltd \[2007\] EWHC 202 \(QB\) \(09 February 2007\)](#).

3. Prince of Wales v Associated Newspapers. Mr Justice Blackburne balanced Articles 8 and 10 of the Human Rights Act and found that Privacy was stronger than Freedom of Expression in the case of publishing the prince's diary. See Court of Appeal: [Associated Newspapers Ltd v HRH Prince of Wales \[2006\] EWCA Civ 1776 \(21 December 2006\)](#)

4. Douglas v *Hello!* House of Lords 2007. After a complex series of litigation and rulings, the UK's highest court ruled that Michael Douglas and Catherine Zeta-Jones were entitled to collect damages against *Hello!* magazine for publishing surreptitiously taken images of their wedding when they had made a commercial prior exclusive arrangement for *OK!* Magazine

on the grounds of breach of confidence. See: [Douglas & Ors v. Hello! Ltd & Ors \[2007\] UKHL 21 \(02 May 2007\)](#).

5. Max Mosley- privacy injunction failed because intrusive video of orgy had already been published by the *News of the World*, but privacy action on substantive issue of intrusion succeeded with £60,000 damages. See: [Mosley v News Group Newspapers Ltd. \[2008\] EWHC 1777 \(QB\) \(24 July 2008\)](#)

6. Tiger Woods- privacy injunction in December 2009, but ineffective because all of the information already in global public domain after US coverage where the First Amendment freedom of expression and media has precedence.

See:

7. John Terry- privacy injunction over extra-marital affair with girlfriend of fellow team-player, but lifted after media appeal. See: [Terry v Persons Unknown \(Rev 1\) \[2010\] EWHC 119 \(QB\) \(29 January 2010\)](#).

8. Ryan Giggs- privacy injunction, but breached by Twitter publication. First ruling by Mr Justice Eady when Giggs was referred to as 'CTB' see: [CTB v News Group Newspapers Ltd & Anor \[2011\] EWHC 1232 \(QB\) \(16 May 2011\)](#) and [CTB v News Group Newspapers Ltd & Anor \[2011\] EWHC 1334 \(QB\) \(23 May 2011\)](#). A year later Mr Justice Tugendhat gave permission for Giggs to be named and observed: 'The way that this case has been conducted by the parties has done much to undermine confidence in the administration of justice.' See: [Giggs v News Group Newspapers Ltd & Anor \[2012\] EWHC 431 \(QB\) \(02 March 2012\)](#)

9. Rio Ferdinand- unsuccessful privacy action over *Sunday Mirror* article about his extra-marital affairs. See: [Ferdinand v MGN Ltd \(Rev 2\) \[2011\] EWHC 2454 \(QB\) \(29 September 2011\)](#)

10. Fred 'The Shred' Goodwin- Royal Bank of Scotland Chief Executive, privacy injunction over extra-marital affair with colleague in the bank, later partially lifted when injunction contested. Mr Justice Tugendhat said: '...what is of interest to the public is not the same as what it is in the public interest to publish. Newspaper editors have the final decision on what is of interest to the public: judges have the final decision what it is in the public interest to publish.' He prevented the media from identifying the colleague with whom Goodwin had conducted his affair and further observed: 'The circumstances of injunctions applied for out of hours on the telephone are not favourable to a considered development of the law...To the extent that media defendants choose not to submit evidence and argument to the courts, judges will find it difficult to develop the law of privacy to meet the needs of society.' See: [Goodwin v NGN Ltd \[2011\] EWHC 1437 \(QB\) \(09 June 2011\)](#)

11. In early February 2012 the ECtHR is said to have re-balanced the recognition of public interest when Caroline Von Hannover lost a case concerning photographs taken of her in public by German magazines, and a well-known German television actor was unsuccessful in claiming privacy over the exposure of his minor drug possession offending. A Grand Chamber of the ECtHR did not find that photographs of Caroline and her family in a public street in St Moritz breached their right to privacy because of the general public interest in the health of Prince Albert' The judges ruled that the German courts had 'carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken.' See: [Von Hannover v. Germany \(no. 2\) 40660/08 \[2012\] ECHR 228 \(7 February 2012\)](#)

In the case of the German actor and his minor drug convictions, the Grand Chamber of the ECtHR reaffirmed the principle 'Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment...it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".' The court observed in its reasoning: 'that the articles in question concern the arrest and conviction of the actor X, that is, public judicial facts that may be considered to present a degree of general interest. The public do, in principle, have an interest in being informed – and in being able to inform themselves – about criminal proceedings, whilst strictly observing the presumption of innocence'

See: [AXEL SPRINGER AG v. GERMANY - 39954/08 \[2012\] ECHR 227 \(7 February 2012\)](#).

12. Some media lawyers are arguing that these key rulings of the ECtHR mean that the pendulum on British privacy is swinging to allow reporting of infidelity where public figures have a role model function. But these 2 cases suggest the boundaries and interpretations of public interest and private right continue to vary and fluctuate.

In August 2012, former England soccer manager Steve McClaren lost in his bid to injunct the *Sun* over a story alleging he had had an extramarital affair. Mr Justice Lindblom gave his reasons the following month and said: 'the claimant belongs to the category of those from whom the public could reasonably expect a higher standard of conduct. Even if one allows for the degree of difference there must be between the position of a former manager and that of a serving captain of England's football team, he is clearly still a prominent public figure who has held positions of responsibility in the national game.' See: [McClaren v News Group Newspapers Ltd. \[2012\] EWHC 2466 \(QB\) \(05 September 2012\)](#)

As discussed and referenced above in January 2013, the third husband of the Oscar winning British actress Kate Winslet won a privacy action against the *Sun* over the publication of images taken of him at a private party that had previously been posted on Facebook. Mr Justice Briggs said: 'The question is whether the publication of the Photographs, or of a more detailed description of their contents than the fact that the claimant is depicted partially naked, would add anything beyond mere titillation. In my judgment it would not.' He said the threat to publish them 'comes very shortly after the belated discovery by the media of the claimant and Miss Winslet's recent marriage, at a time when the claimant finds himself in a temporary blaze of largely reflected publicity.' The judge also engaged the issue of there being no possible reason for exposing Kate Winslet's 'children to a real risk to additional embarrassment or upset from the nationwide publication of photographs (or their contents) depicting their other carer behaving in a foolish and immature manner when half naked.' See: [Rocknroll v News Group Newspapers Ltd \[2013\] EWHC 24 \(Ch\) \(17 January 2013\)](#)

13. The Right To Be Forgotten. As indicated and discussed earlier in May 2014 the European Union Court of Justice asserted the 'right to be forgotten' allowing individuals to force removal of links to web articles. The EU court has 'direct effect' in UK media law and represented a sobering reminder that British publishers are increasingly becoming subject to European developments in media law and regulation, particularly with regard to privacy, data protection and data processing. The case involved a Spanish lawyer who objected to Google linking to old information about an unpaid debt. The ruling opened the floodgates for people demanding that links to old news about them online should be deleted. It does not mean that news

publishers will be under a duty to remove archived articles. It applies specifically to Google in terms of it being seen as a 'data processor' rather than publisher. For the full text of the ECJ ruling in Google Spain and Google see: [Mario Costeja Gonzalez v Google Spain and Google \(Judgment of the Court\) \[2014\] EUECJ C-131/12 \(13 May 2014\)](#).

Google were forced to set up a system of receiving and deciding requests. By July Google was having to deal with 1,000 demands every day. In September 2014 Press Gazette reported that more than 80 stories across the national press and BBC websites had been subject to 'right to be forgotten' removals. (<http://www.pressgazette.co.uk/more-80-stories-across-national-press-and-bbc-have-right-be-forgotten>) The right to be forgotten does not extend to any legal duty for journalistic publishers to remove online articles even from their archives. However, the implications of the ruling are that individual online users would find it harder to access information about people they were carrying out 'searches' on. The EJC ruling does not apply to Google's search engine operations outside the European Union. The case coincided with the UK Information Commissioner's Office (ICO) carrying out its public consultation on new guidance on data protection and the media and the publication of 'Data protection and journalism: a guide for the media' in September 2014.

This is downloadable available at: <https://ico.org.uk/for-organisations/guide-to-data-protection/>

By 2015 the Information Commissioner's Office was taking a more pro-active and interventionist approach to applying Data Protection law when it was judged that a continuing online media publication that had been de-linked from the Google search engine still needed a public interest justification. The Chartered Institute of Journalists became concerned after the [2018 ruling in NT2 v Google](#) that the English High Court was setting a trend that would disassemble [the online index of public record of journalistic coverage of past criminal convictions](#).

14. Paul Weller on behalf of his children v MailOnline (Associated Newspapers) 2014. The ruling by Mr Justice Dingemans was seen as a significant development of UK privacy media law in barring the interference of privacy rights of children photographed in a public place, anywhere in the world. Associated Newspapers were refused leave to appeal to the UK Supreme Court so the precedent stands. See: [Weller & Ors v Associated Newspapers Ltd \[2014\] EWHC 1163 \(QB\) \(16 April 2014\)](#) The article was titled: "A family day out... Paul Weller takes wife Hannah and his twin sons out for a spot of shopping in the hot LA sun." The photographs were taken on 16th October 2012 by an unnamed photographer in Santa Monica, Los Angeles, California, United States of America. The photographs were of Paul Weller and the children out shopping in the street, and relaxing at a café on the edge of the street.

The first child shown in the photographs was Dylan Weller ("Dylan"), then aged 16 years. Dylan was misdescribed in the photographs as Hannah Weller, who is Paul Weller's wife. The other children shown in the photographs were the twins John Paul ("John Paul") and Bowie Weller ("Bowie"), then aged 10 months, sons of Paul Weller and Hannah Weller. All three children were the claimants acting by their father and litigation friend Paul Weller.

The article was illustrated with seven photographs which showed, among other matters, the faces of Dylan and the twins. The claimants contended that the pictures of the children's faces should have been pixelated and took the proceedings for damages for misuse of private information and breach of the Data Protection Act, and an injunction. The MailOnline denied that the publication of the unpixelated photographs was wrongful, or that the Claimants were entitled to any relief. The judge said: 'these photographs were intrusive as they showed a

range of emotions shown by the children on a family outing with their father.’ This is how he approached his legal reasoning: ‘In my judgment the balance comes down in favour of finding that the article 8 rights override the article 10 rights engaged. These were photographs showing the expressions on faces of children, on a family afternoon out with their father. Publishing photographs of the children's faces, and the range of emotions that were displayed, and identifying them by surname, was an important engagement of their article 8 rights, even though such a publication would have been lawful in California. There was no relevant debate of public interest to which the publication of the photographs contributed. The balance of the general interest of having a vigorous and flourishing newspaper industry does not outweigh the interests of the children in this case. I consider that, although the interpretation of the Editors' Code is not for me, this conclusion is consistent with the approach set out in the Editors' Code which recognises that private activities can take place in public, and that editors should not use a parent's position as sole justification for the publication of details of a child's private life. For these reasons, I find that the Claimants have established their claims for misuse of private information’. In respect of the Data Protection Act claim he said: ‘It is common ground that the claim for infringement of the Data Protection Act stands or falls with the claim for wrongful misuse of private information. In the light of my finding above I find that the claims for breach of the Data Protection Act are established’. He concluded: ‘I find that there was a misuse of private information in the publication, from 21 to 22 October 2012, by MailOnline of photographs showing the faces of the Claimants on a family outing with their father. There was also a breach of the Data Protection Act. I have made awards of damages of £5,000 for Dylan, £2,500 for John Paul and £2,500 for Bowie, and I have made no award of aggravated damages. The undertaking not to publish the photographs again should be offered to the Court to provide clarity for the parties. I do not grant any other injunctive relief.’

McNae's Essential Law for Journalists 25th Edition provides several chapters on breach of confidence and privacy; namely: Chapter 4 'Journalism avoiding unjustified intrusion', pages 41-58, Chapters 26 and 27, pages 351-374.

Making 'Privacy'/'Private Use' Decisions when editing and publishing photographs

As with so many media publication decision making the professional ethics and private morality are often bound up with existing and developing law.

When does reality and the imperative to report fact face pressure and, indeed obligation, to give way to self-censorship, or perhaps even recognition of the rule of law?



This is an iconic image from the Warsaw Ghetto uprising of 1943 and of the Holocaust directed against European Jewry by the German Nazi regime. Do privacy rights belong to an historical photograph taken by the SS as part of their report on the liquidation of the Ghetto and murder of Jewish men, women and children? Does it matter if the child raising his hands later died in a concentration camp, or survived to be an adult? In his moment of terror and persecution he has no control and are we entitled to gawk and stare at this terrible injustice and outrage of human dignity even 70 or more years later? Holocaust historians have investigated the identity of the child. See:

<http://www.holocaustresearchproject.org/nazioccupation/boy.html>

As is clear, there is much debate about who the boy actually was. He was 'self-identified' as seven-year-old Tsvi Nussbaum. After the war, Nussbaum moved to Israel, and then to the United States, where he worked as a physician in New York City. See: http://www.ihr.org/jhr/v14/v14n2p-6_Weber.html Would it matter if Dr. Nussbaum insisted that the photograph was not used because of the impact of post-traumatic stress disorder every time he saw it in contemporary media?

The parents and families of two 11 year-old-girls Holly Wells and Jessica Chapman have repeatedly asked the media not to republish the image of them wearing Manchester United FC shirts shortly before they were murdered by their killer Ian Huntley in 2002. The photograph was originally released to the media in the search for them and before their bodies had been found. Would such use of the image, that can be easily found online, now constitute a breach of the Data Protection Act, misuse of private information and breach of Article 8 Human Rights? The image in the BBC archive system is labelled 'Do-Not-Use.' Many years after their murders [it is still featured in online features published by mainstream news publications.](#)

What would be the situation in respect of an of two substitute girls used in a reconstruction by the police after their disappearance?

Questions to be answered would certainly revolve around public interest justification- even in respect of using the photograph of the actual two murder victims. These substitute girls would now be young adult women. Would they not have privacy rights in the use of their image when children for a specific public interest purpose in 2002, but not necessarily so in a feature article about the murder investigation in 2019?

The MailOnline decided to use the original picture of Holly and Jessica in a 2016 article about an 18-year-old woman who had discovered that Ian Huntley was, in fact, her father.

See: <http://www.dailymail.co.uk/news/article-3682494/How-Ian-Huntley-real-father-Aged-14-Samantha-Bryan-googled-school-project-saw-photograph-revealed-truth.html> If you were the MailOnline editor what public interest justification could you advance to justify the inclusion of the image?

Harold Evans' iconic book on news photography *Pictures on a Page* (London: William Heinemann, 1978) featured many images showing the moment or near moment of death that were chosen in the historical context as significant news photographs worthy of publication in different cultural and national contexts. They included Communist regime secret policemen being executed during the Hungarian uprising in Budapest 1956, a girlfriend smiling at a press photographer while her boyfriend lay dying from drowning in Italy, and a mother and child jumping out of a burning apartment in New York City. The mother did not survive. During the Tet offensive in Saigon in 1968, at the height of the Vietnam War, a South Vietnamese General executed a captured Vietcong guerilla. This was depicted in shocking black and white news photograph as well as colour news film footage. What are your views on whether it would be possible to justify publication in the public interest according to contemporary Ethics codes?



This is a screen-grab from a YouTube posting removed for 'violating YouTube's policy on violent or graphic content' at <https://www.youtube.com/watch?v=iU83R7rpXQY>

The sequence showed the moment the fatal bullet strikes the head of US President Jack Kennedy in Dallas in 1963. The amateur footage filmed by Jack Zapruder was withheld from

the public domain until several years after the assassination. Is there any justification for publishing this sequence and any screen grab image of when the fatal bullet strikes the President's head?

To pixilate or not?

In 2016 three members of family holidaying in Newquay, Cornwall were washed into the sea by a wave. The father and young daughter did not survive despite being rescued by the RNLI. Consider the coverage in the MailOnline in August 2016 at:

<http://www.dailymail.co.uk/news/article-3756265/She-s-peacefully-resting-daddy-Two-year-old-girl-swept-sea-Newquay-father-dies-hospital.html>

The images included indicate contemporary application of pixilation policy on the grounds of ethics, regulation and law. Can you break down the principles, primary and secondary media law applying? An image was published showing emergency medical treatment being given on the quayside to the father and daughter who both died in the incident. There is clear photographic editing to conceal the identification of the people being given emergency aid. The article also includes a family photograph showing the adult parents, but concealing the faces of their children.

It is likely that the MailOnline would have been applying the Editors' Code of Practice applied by IPSO regulation which states under clause 4 that in stories involving personal grief or shock, 'enquiries and approaches must be made with sympathy and discretion and publication handled sensitively.' Furthermore, under clause 6 (iii) 'concerning children it is also possible that consideration was given to the principle that children under 16 must not be interviewed or photographed on issues involving their own or another child's welfare unless a custodial parent or similarly responsible adult' had consented. The parents at this stage were clearly not in a position to be consulted. The father had died and the mother was dealing with the most dreadful shock and grief.

The desperately sad images of Aylan Kurdi who drowned while trying to migrate from Turkey to EU territory in 2015 became emblematic of the Syrian refugee crisis. Was the inclusion of these images justified in terms of ethics? Some news publishers pixilated Aylan's face.

The images were originally taken by Nilüfer Demir, a Turkish photographer for the Dogan News Agency.

They achieved considerable global impact when re-tweeted by Peter Bouckaert of Human Rights Watch who in the film in this Time online posting at <http://time.com/4162306/alan-kurdi-syria-drowned-boy-refugee-crisis/> argues that now Aylan should be given back his dignity with the media removing the pictures of his dead body from circulation.

The Paul Weller case of 2014 seems to indicate that private zone of law protection applies to children in public spaces where there is a reasonable expectation of privacy. And the fact that they are the relatives of celebrity is not regarded as in the public interest.

McNae's Essential Law for Journalists 25th Edition explores the media law relating to taking photographs at Chapter 36 'Right to take photographs, film and record between pages 459-464.

But the position of Wayne Rooney and his children appears to receive different treatment by tabloid news publishers. Is it because Mr. Rooney and his wife have previously decided to make their children part of a public presentation and profiling ritual?

No effort had been made to pixelate the children when they and Coleen Rooney had been the victims of a crime in news coverage by the Daily Mirror on August 11th 2016. See: <http://www.mirror.co.uk/3am/celebrity-news/coleen-rooney-takes-kids-stroll-8611678>

Wayne Rooney selected his son Kai as a mascot in the packed 'stadium of dreams,' at Manchester United's Old Trafford and the photograph has pride of place in the article in MailOnline 16th March 2015.

See: <http://www.dailymail.co.uk/tvshowbiz/article-2996738/Wayne-Rooney-walks-son-Kai-Old-Trafford-pitch-official-mascot-ahead-Man-United-s-win-Tottenham.html>

To what extent has he forfeited his young son's privacy rights?



This brings us to the front page of the *Sun* after England had been defeated by Iceland in the European Championship with their manager resigning immediately after. The paper decided to include on its front page the picture of Kai Rooney holding his head in despair and showing distress over his father being on the losing side.

Data Protection Acts and EU General Data Protection Regulation

The influential media lawyer, Hugh Tomlinson QC argued in *UK Press Gazette* that the Sun had breached the Data Protection Act 1998 because there was no public interest at all in ever

deciding to use the picture of 6-year-old Kai in distress for publication as soon as it was viewed. See: [Top media law QC says Sun could face action under Data Protection Act over front-page pic of six-year-old Kai Rooney.](#)

He said: 'A data controller which processes a photograph showing a crying child cannot reasonably believe that publication of this photograph would be in the public interest. As a result, section 32 does not apply.' Section 32 is a statutory defence available where the data is being processed 'with a view to the publication by any person of any journalistic, literary or artistic material.' The section states that there has to be a belief on the part of the data controller that publication would be in the public interest, that this belief had to be 'a reasonable one' and 'regard may be had to his compliance with any code of practice which is relevant to the publication in question.'

From the 25th May 2018, the Information Commissioner took on the role of enforcing a new data protection regime in the UK combining General Data Protection Regulation, known as GDPR with the new Data Protection Act 2018 (DPA 2018).

See: <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/>

Under the Data Protection Act 2018, journalists are exempted from compliance with certain requirements providing they can satisfy the two-step test of:

- the processing being carried out with a view to the publication by a person of journalistic, academic, artistic or literary material, and
- the controller reasonably believes that the publication of the material would be in the public interest.

The Information Commissioner has explained how it would view compliance on the part of journalists and publishers.

1. View to Publication

The ICO guidance states that the information must be used with a view to publication of journalistic material. As long as the ultimate aim is to publish a story (or for someone else to publish it), all the background information collected, used or created as part of a journalist's day-to-day activities could also be exempt, even if those details are not included in any final article or programme – and even if no story is actually published or broadcast.

In this context, "publish" means "make available to the public or any section of the public".

This means that the exemption can potentially cover any information collected, created or retained as part of a journalist's day-to-day activities, both before and after publication. However, the exemption cannot apply to anything that is not an integral part of the newsgathering and editorial process.

This element of the test is relatively straightforward and easier to satisfy than the requirement to show publication would be in the public interest which is explored below.

2. In the Public Interest

The DPA 2018 puts the onus on the media to make their own independent decisions on whether publication is in the public interest, as long as those decisions are reasonable.

- Any consideration of the public interest should ultimately aim to strike an appropriate balance between freedom of expression and privacy rights. The ICO advises organisations: and freelance journalists to take into account:
- the general public interest in freedom of expression
- any specific public interest in the subject matter
- the level of intrusion into an individual's private life, including whether the story could be pursued and published in a less intrusive manner
- the potential harm that could be caused to individuals.

The ICO therefore accepts that there will be a public interest in the full range of media output, from day-to-day stories about local events to celebrity gossip to major public interest investigations. However, this does not automatically mean that publication is always in the public interest. Any consideration of what is in the public interest must involve an element of proportionality – it cannot be in the public interest to disproportionately or unthinkingly interfere with an individual's fundamental privacy and data protection rights.

If the method of investigation or the details to be published are particularly intrusive or damaging to an individual, a stronger and more case-specific public interest argument will be required to justify that, over and above the general public interest in freedom of expression.

Where the journalist is working as part of an organisation it is the belief of the data controller that counts, not the individual journalist. However, a particular journalist's belief could count as the belief of the data controller depending on the organisation's policies and how they allocate responsibility for reaching the decisions. In principle the data controller could allow individual journalists to apply the public interest test in each case and it would be the journalists' beliefs that count as being the beliefs of the data controller and these would be looked at for reasonableness.

The ICO will expect organisations to be able to show that there was an appropriate decision-making process in place to consider the public interest of a story. The ICO takes the view that it is the belief at the time of the processing that is important.

The data controller must be able to demonstrate that it had a belief about the public interest, i.e. that the issue of public interest was actually considered. It should be able to show, too, that it was considered at the time of the relevant processing of personal data and not just after the event.

If a journalist initially considers that a story will be in the public interest, but in the end the organisation decides not to publish, the exemption can still cover all journalistic activities undertaken up to that point.

Secondly, the exemption requires only a reasonable belief. The ICO does not have to agree that publication is in the public interest, as long as the intended publisher's belief is a reasonable one.

In determining whether it is reasonable to believe that publication would be in the public interest, the controller (the organisation or the freelance journalist) must have regard to whichever of the following codes of practice or guidelines are applicable to the medium of publication in question:

- BBC Editorial Guidelines
- Ofcom Broadcasting Code
- Editors' Code of Practice

In practice, the ICO is likely to accept there was a reasonable belief that publication was in the public interest if the organisation or freelance journalist:

- has clear policies and procedures on public interest decisions
- can show that those policies were followed
- can provide a cogent argument about the public interest
- has complied with any relevant industry codes.

(The briefing on GDPR for journalists was prepared by Boyes Turner for the Chartered Institute of Journalists 19th June 2018)

The ICO provides an online guide for journalist/media bodies setting out journalist and media publisher legal duties as data controllers. See: <https://ico.org.uk/for-organisations/media/> Journalists and publishers should be vigilant in managing the collection of personal data, particularly of contacts and sources. These should be protected by firewalls, IT security and if transported by on USB keys or memory sticks have additional encryption.

The Data Protection Act 2018 sets out a criminal offence under section 170:

‘Unlawful obtaining of personal data’

(1) It is an offence for a person knowingly or recklessly—

(a) to obtain or disclose personal data without the consent of the (data) controller,

(b) to procure the disclosure of personal data to another person without the consent of the (data) controller, or

(c) after obtaining personal data, to retain it without the consent of the person who was the (data) controller in relation to the personal data when it was obtained.

Journalists have the following potential defences where the unlawful obtaining of personal data:

2(a) was necessary for the purposes of preventing or detecting crime,

2(c) in the particular circumstances, was justified as being in the public interest.

And under

3(c) the person acted (ii) with a view to the publication by a person of any journalistic, academic, artistic or literary material, and

(iii) in the reasonable belief that in the particular circumstances the obtaining, disclosing, procuring or retaining was justified as being in the public interest.

Section 171 of DPA 2018 has created a new offence of re-identification of de-identified personal data. This takes place where personal data that has been anonymised by a data controller is later amended to reveal the data without consent. This could affect journalists and researchers who use software to remove the redaction on documents. To use such software, without consent, would be a criminal offence.

There are no custodial sentences in respect of offences under DPA 2018 and no powers of arrest; all offences are punishable only by a fine. From 2017, the maximum cap of £5,000 for fines in the Magistrates Court for summary offences was lifted in order to apply the principle that the ‘punishment fits the offender.’

Example of data protection regulation by [ICO leading to imposition of a fine of £120,000 on television production company sustained though substantially reduced after Tribunal System \(Information Rights\) hearing](#)

Tony Jaffa's law column at HoldtheFrontPage.co.uk in February 2021 analysed a First-Tier Tribunal ruling which has been one of the first to look at the journalism exemption in data protection law.

[True Vision Productions v ICO](#) was about TVP filming the documentary called 'Child of Mine' in 2017. Jaffa explained that the case is unusual because it considered 'the journalism exemption in the context of a publisher having been fined by the Information Commissioner's Office for a data protection breach', rather than actually defending a data protection breach.

This was observational documentary about the experience and aftermath of stillbirths. The TVP team recorded visual and audio CCTV of expectant mothers having medical consultations when they were concerned about the health of their babies. The Tribunal found that the purpose of the recording was to capture the moment when the mother was informed that her baby had died.

TVP did not ask for the consent of the mothers prior to recording the consultations because to receive informed and effective consent, the mothers would have needed to be told that there was a prospect that their babies had died.

Tony Jaffa explained that TVP had 'failed on the issue of transparency.' The Tribunal ruled that hand-held cameras could have been used instead of CCTV, and this would have made the mothers aware that they were being recorded. This would have 'prevented the collection and retention of data without the mother being aware it was taking place.'

The production company had been originally issued with an [ICO Monetary Penalty Notice for £120,000](#), but this was reduced to £20,000 by the Tribunal because the breach was deemed to be non-deliberate, TVP had considered privacy rights prior to filming, and the breach did not warrant putting a company out of business.

The media lawyer specialist chambers [5RB said one of the lessons of this case](#) is that 'journalists must consider what can be done to maximise fairness', even if it is reasonable to believe that full compliance with sensitive data protection cannot be achieved.

5RB also explained 'This was the first and only occasion on which the ICO imposed an MPN on a media organisation under the DPA 1998. Under the DPA 2018, the ICO requires the permission of the Court before an MPN can be imposed in respect of processing for the special purposes.'

McNae's Essential Law for Journalists 25th Edition covers the subject of 'Data Protection' at Chapter 28, pages 375-380.

Copyright/Intellectual Property

Copyright resides in two main categories of expression:

1: Authorial/primary works. LDMA standing for- Literary, Dramatic, Musical and Artistic.

2: Entrepreneurial/derivative/secondary works. SFBCT standing for- Sound recordings, Films, Broadcasts, Cable programmes, Typographical works.

Copyright law in the UK is derived from the 1988 Copyright, Patents and Designs Act, its amendments since then and European Union Directives on copyright and intellectual property.

Copyright does not protect slogans, facts, news, ideas or information, but it does offer protection in the way they are expressed. Tables and listings of information are a copyrighted expression of selected facts. So is computer coding, software and online digital databases.

Copyright takes effect as soon as copyright protected material is created.

It is the information you select and the way you arrange that information that makes it unique. In order for material to have copyright protection it has to result from independent intellectual, or creative effort. In other words, you must have put some work into it.

Copyright lasts for the duration of the author's life plus 70 years for literary, dramatic or musical works. The situation is the same for directors, screenplay authors and musical directors of films, 70 years for sound recordings and 25 years for published typographical editions.

Copyright in databases lasts for 70 years in the case of identifiable authors who have made them with intellectual effort and creativity, and 15 years for databases of information produced as the result of investment. The UK's Intellectual Property Office has recently published a new guide on duration. See: [Copyright Notice: Duration of copyright \(term\) Published 15 January 2021](#).

There is copyright in iconic designs that are the logos of public and private corporations. For example, the design of the London Underground map is copyrighted. Photographing and publishing images of banknotes is a criminal offence unless you comply with the reproduction conditions set out by the relevant authority e.g. The Bank of England.

See: <https://www.bankofengland.co.uk/banknotes/using-images-of-banknotes>

Journalists have 'a fair dealing' defence if they use quotations and material during the course of reporting current events, criticism or review, and where only the less than substantial part of a literary, dramatic, musical or artistic work is used. What 'less than substantial' means varies from case to case but the general principle is that it is not excessive beyond the purpose of reporting, or reviewing, and does not undermine a copyright owner's commercial interests. It is a matter of quantity and quality.

It is necessary that the quotations are attributed. It should be fairly obvious that publishing the substantial part or key, identifying element of a copyrighted work without permission undermines the defence.

In *Fraser-Woodward v BBC* in 2005, the High Court decided that 14 photographs of David Beckham and his family taken by a celebrity photographic agency had been used for the purposes of criticism and review in a documentary about tabloid journalism. The judge observed: 'Apart from one which was on screen for about 4 seconds, they were shown for no more than 2 or 3 seconds each, and some of them less than that. On occasions, they were shown as part of a brief still image; on others the camera panned quickly across them or zoomed in relation to them'.

See: [Fraser-Woodward Ltd v British Broadcasting Corporation Brighter Pictures Ltd \[2005\] EWHC 472 \(Ch\) \(23 March 2005\)](#)

In another case in that year the court decided that the Sun newspaper had not satisfied the criticism and review concept. In a half page advertisement of its new TV listings magazine it had also reproduced without permission the cover of a rival TV listings title.

See: [IPC Media Ltd v News Group Newspapers Ltd \[2005\] EWHC 317 \(Ch\) \(24 February 2005\)](#)

Facts re-written do not amount to a breach of copyright. Blatant lifting of the original work (i.e. another story) with the same words, skill, labour and judgment of the original journalist is a breach of copyright, but rewriting a news story broken by a rival publisher is unlikely to be so.

In 2001 the Sunday Telegraph was not allowed to depend on Article 10 freedom of expression rights when defending a breach of copyright action involving the former leader of the Liberal Democrats, Paddy Ashdown. The newspaper's political editor had included substantial sections of Mr. Ashdown's confidential note of a meeting with the Prime Minister. The quotations went much further than those normally incorporated in a news report.

See: [Ashdown v Telegraph Group Ltd \[2001\] EWCA Civ 1142 \(18 July, 2001\)](#)

In theory, there is 'a public interest' defence for copyright under common law and the 1998 Human Rights Act, but it is rarely recognized. The threshold for refusing to enforce copyright on public interest grounds would be 'if the work, (the images) were immoral, scandalous, contrary to family life, injurious to public life, public health and safety or the administration of justice.' A small claims court judge ruled in favour of a regional newspaper that had copied images from a website showing the activities of urban explorers in derelict buildings because they illustrated police concern that crimes were being committed.

Image Issues

You cannot usually publish a picture without permission from the copyright holder. You should ensure you use images online that you and your colleagues have originated yourself. If you are relying on a Creative Commons license for an image derived from Wikipedia, Wikimedia, Flickr, Pinterest, or Google images, make sure that you comply with all the specific terms. See: <https://creativecommons.org/>

The licenses usually require a specific attribution such as:

'Creative Commons 10th Birthday Celebration San Francisco' by tvol is licensed under CC BY 2.0'. When publishing on an online platform you can do a number of things that show respect and courtesy to the CC licensing. For example, in Wordpress editing you can embed the url of the source image hosting so that it clicks through. You should use captioning to fulfil attribution, and hyperlinking can also act as source acknowledgement.

Copyright law still applies to photographic images distributed by Twitter, Instagram, or other social media platforms such as Facebook.

The raiding by mainstream news publishers of private social media domestic images for use in news stories because of some misconceived idea of a wider public interest in news stories has become an increasing problem and prompted the online journalism trade website Press

Gazette to produce a guide [Taking photos from social media: What news publishers need to know.](#)

The fair dealing defence for news and current affairs does not apply to images. Image fair dealing only relates to criticism and review. This should mean that you can use images to illustrate your genuine criticism or review of a photographic exhibition or book of photographs. But your selection and publication should not be so excessive that you would defeat the purpose of anyone visiting the exhibition or buying the book of photographs.

Getty Images does provide a qualified embedding licence for public interest and news event use on websites. That only permits linking to their images without any right to modification and certainly not copying. Commercially run news publishers operating for profit may not be permitted to use the embedding option. See: [Embed images for your non-commercial website or blog in three easy steps:](#) It is very important to always check [the terms of use for this resource.](#)

For example: 'You may only use embedded Getty Images Content for **editorial purposes (meaning relating to events that are newsworthy or of public interest)**. Embedded Getty Images Content may not be used: (a) **for any commercial purpose (for example, in advertising, promotions or merchandising) or to suggest endorsement or sponsorship;** (b) in violation of any stated restriction; (c) in a **defamatory**, pornographic or otherwise unlawful manner; or (d) outside of the context of the Embedded Viewer.'

All images (photographs, designs, artwork, sculptures etc) have rights implications in Europe (including UK) where made and published/exhibited after 1st July 1912. In the USA the position is more complicated because of copyright renewal provisions.

Case law in England and Wales is trying to catch up with the Internet and online social media communications. But copyright law still applies to photographic images distributed by Twitter, Instagram, or other social media platforms such as Facebook.

If you find user generated image content on Twitter, for example, you can direct message the account holder to find out if they originated the image and would be prepared to allow you to use the image with a credit. It is important to establish that the person giving permission has the right to do so and ideally owns the photograph.

Social media images and photographs taken for domestic purposes are protected by a privacy provision in section 85 of the 1988 Copyright, Patents and Designs Act, so it is important to seek permission and check the origin and provenance of such imagery. Family images on a Facebook page connected to somebody involved in a news event could have a copyright belonging to the person who commissioned them as well as the person who was paid to take them. An example would be a wedding or official school photographer.

Although it is becoming a common practice for mainstream news publishers to 'screengrab' images from television coverage of news events to use in their online publications, a strict interpretation of copyright law is that this could be infringement without the permission of the

source provider. Mohammed Al Fayed successfully sued the *Sun* for publishing two stills from the security video-tape of his property Villa Windsor in Paris. The newspaper argued they were running a public interest news story disputing how much time his late son Dodi and the late Diana, Princess of Wales had been there. The court ruled the information from the images could have been published without infringing photographic copyright.

See: [Hyde Park Residence Ltd v Yelland & Ors \[2000\] EWCA Civ 37 \(10 February 2000\)](#).

The situation appears to be different though when using short clips of digital video or sound from publishers covering a news event. This is derived from a test case in 1991 involving the BBC and the satellite news provider BSB. The case established that within a 24-hour period rival media organizations can use extracts of video for news reporting taken from exclusive rights coverage of public interest sport and news events. In this case it was the World Cup. Again, the extracts had to acknowledge the source/origin, not be substantial in use, be used after the rights holder had first published, and such occasional limited news usage did not undermine or compete with the original publisher's commercial interests in buying the rights exclusively. The BSB use had been deemed reasonable in terms of using clips ranging between 14 to 37 seconds and only up to four times in any 24-hour period.

The 2016 case taken by the England and Wales Cricket Board and Sky against the Fanatix sports app indicated that an excessive use of short though qualitative clips became a tipping point of 'purely commercial rather than genuinely informative' usage.

See: [England And Wales Cricket Board Ltd & Anor v Tixdaq Ltd & Anor \[2016\] EWHC 575 \(Ch\) \(18 March 2016\)](#)

In 2014 the fair dealing defence was reformed to include quotation of works (whether for criticism or review or otherwise) and copying works for the purposes of caricature, parody or pastiche. This has opened up a debate about whether this expands the fair dealing defence for online photographs and images. It could be argued that in order to quote a statement or event presented on a website, using a screengrab of the relevant webpage for current reporting purposes might qualify under this extension of fair dealing.

However, it is unlikely to change the exclusion of photographic images in current event fair dealing. The government's Intellectual Property Office has said: 'Whilst the exception applies to all types of copyright work, it would only be in exceptional circumstances that copying a photograph would be allowed under this exception. It would not be considered fair dealing if the proposed use of a copyright work would conflict with the copyright owner's normal exploitation of their work. For example, the ability to sell or license copies of photographs for inclusion in newspapers would be a normal exploitation'.

See:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375951/Education_and_Teaching.pdf

Quite detailed research needs to be undertaken to ascertain rights holders in photographic images and legal disclaimers will need to be published to avoid future actions from the owners of what appeared to be 'orphan' works. [material previously published with no assigned and traceable ownership/originality.]

Original images of other images, or two, or three-dimensional works of art are subject to rights implications where they are taken in private exhibition spaces or from in copyright publications. However, public architecture and sculptures are deemed to be in the public domain; however recently built and created.

You need to be aware that the use of digital still and video images taken in people's homes, on private and corporate property are not copyright free. You will need to obtain permission. Sometimes you might be in an environment that you think is public, but is, in fact, privately owned. This could even be a park, shopping mall, railway station, airport, or transport hub.

Incidental Use

There is an incidental use defence in UK copyright when images, designs, words and indeed music, video and broadcasting might be included in a separate publication whether photographic or filmic or online video sequence. The key expression from section 31 of the 1988 copyright legislation in this defence turns on the idea that the defence fails 'if it is deliberately included'. An example of incidental use would be the filming of a documentary about shoplifting and in a sequence showing somebody being arrested the store's background music is playing, or if the sequence was in an electrical goods shop with large plasma screen televisions, there might be a film or broadcast television service showing on the screens. Obviously if you digitally edited the ironic selection of a scene from a film showing shop-lifting onto the screens, then you would need to obtain the rights for the use of that sequence. It would be different if this was incidental and a rather miraculous showing at the time of the arrest. The mere serendipity of such a coincidence could be argued to be an incidental use.

Moral Rights

Most employed journalists producing online publications are not entitled to the CDP 1988 Act's establishment of the right to be identified as the author or director of a published work and the right to object to derogatory treatment of the work. These are known as 'Moral Rights', but journalists are still entitled to the protection against false attribution of their work. This means that it would be unlawful for somebody else to claim credit for your work or for a publisher to put your name to a publication that you had no involvement in.

Small Claims Actions

It is important to appreciate that copyright infringement actions are becoming more frequent and easier to launch. The Small Claims track of the Intellectual Property Enterprise Court (IPEC), a division of the High Court in London, is now operating for actions involving damages of less than £10,000. It means that individual photographers can litigate on their own behalf in a less formal legal process. More than 60 actions are being heard each year.

See: <https://www.gov.uk/guidance/take-a-case-to-the-intellectual-property-enterprise-court>

Music Issues

Music publishers, composers, musicians, and record companies have two very powerful music licensing organisations, PRS, and PPL, actively enforcing copyright compliance in all dimensions of media. If you are involved in an online/web publisher that regularly uses in copyright music for entertainment, there will be an obligation to pay for an annual license and

probably make detailed returns on the music that has been used. PPL will be anxious that as a music publisher you have control over your own streaming. This could require hosting your music use on your own server. There may be difficulties obtaining a music use license if your music usage is encoded from a host platform such as Soundcloud, Youtube or Vimeo. This is because access to the music is provided to all users of the host platforms rather than your own online publication.

It is possible to use music journalistically with the current event reporting and criticism and review, as well as quotation fair dealing defences. However, the music used would have to be relevant, illustrative and short- certainly not the substantial part in length of any track. An European Union Directive extended copyright duration for music recordings from 50 to 70 years in October 2013. This means that recorded music released for public consumption prior to 31st December 1962 is likely to be out of copyright, though music compositional and arrangement copyright continues for 70 years after the death of the author. Any musical recording published after 1st January 1963 will remain in copyright until at least the end of 2043.

Database Issues

It is very important to appreciate that data journalism and Internet data scraping software programmes generate two risks of copyright infringement in UK media law. Database copyright exists where the database itself is a literary work of an author's own intellectual creation, and a Database Right resides in a collection of independent works, data or other materials which are arranged in a systematic or methodical way and individually accessible by electronic or other means.

The Database Right does not require any intellectual or creative effort. It exists if there has been a substantial investment in obtaining, verifying or presenting the contents of the database, and investment for these purposes means any investment whether in financial, human or technical resources. The information does not have to be confidential. The Database copyright duration lasts 70 years from the death of the author, and the Database *sui generis* Right lasts 15 years from the end of the calendar year when the production of the database was finished. Obviously if the commercial database is continually updated, developed and added to, the copyright duration will extend from when that it is done and not the first public release of the database.

This means that the extraction or re-utilisation of all or a substantial part of the contents of online sites that qualify under the definition of databases is likely to be UK copyright infringement. Copying the contents to another digital electronic storage device amounts to extraction. Making the contents available to the public by any means amounts to re-utilisation. This would, of course, include the engagement of computer graphics data journalism software to organise the data extracted in an illustrative form.

There is a fair dealing defence for Database copyright in terms of current event reporting, for criticism or review, or quotation for journalistic purposes. This could operate where a journalist had extracted database information from different sources and is setting out an analysis or comparison for public interest purposes. The fair dealing defence for Database Right infringement is explained as extraction by a lawful user, extraction for the purpose of illustration

or teaching or for a non-commercial purpose, and where the source is indicated. This would appear to provide a defence for data journalistic illustration provided that the source is indicated. However, it will be wise to check the terms and conditions applying to visitors of online database resources. When the terms and conditions exclude visiting the website for the purposes of data scraping, there is an argument that the journalist researcher is not 'a lawful user' of the site. The ultimate and most effective defence is, of course, the consent and the agreement of online database owners.

Such database arrangement protection, does not apply in the USA where compilation copyright does not apply to all the data extracted from a copyright database. And in the case of databases not protected by copyright law it could be lawful to 'scrape' all of a database unless the website's terms and conditions make it a breach of contract in relation to registered site members or visitors. The European database right is only available to companies based in EU countries.

As indicated earlier Brexit means some adjustment in the applicability of *sui generis* database copyright. Brexit means that new commercial databases made available after 1st January 2021 do not have the EU *sui generis* database copyright protection, though the UK government has made clear it will be introducing legislation to ensure that they do. See: [Sui generis database rights from 1 January 2021. How protection in the EU for databases produced in the UK will change from 1 January 2021.](#)

McNae's Essential Law for Journalists 25th Edition covers the subject of copyright at Chapter 29 between pages 381-397.

Reporting Courts-Martial- This section is informed and largely derived from the content of 'Practice in the Court Martial: Collected memoranda, version 4' at <http://www.justice.gov.uk/downloads/courts/judge-advocate-general/practice-memos-court-martial.pdf> and 'The Court Martial and the Summary Appeal Court guidance - Volume 2: Guide for court members - Version 6' at <http://www.justice.gov.uk/downloads/courts/judge-advocate-general/procedure-guide-vol-2.pdf>

1. The courts martial system in the British Services is run by the office of the Judge Advocate General and Military Court Service. The current JAG is His Honour Judge Jeffrey Blackett.
2. The system consists of 4 Primary Permanent Courts operating from British Force Germany at Sennelager, Bulford, Catterick and Colchester in England. These sit full-time on a continuous basis 43 weeks of the year in modern, fully equipped facilities. There are 8 secondary courts situated at the 4 centres above and additionally at Aldergrove, Northern Ireland (two courts) and Cyprus (Episkopi) and Portsmouth.
3. This system of courts tries criminal offences as well as breaches of specific armed forces discipline and duties. Summary Appeal Courts hear appeals from summary decisions and punishment handed out by commanding officers.
4. At courts martial in trial and sentence hearings a professional judge known as the Judge Advocate presides over the proceedings. He/she is joined by a court martial board that consists of a minimum of 3 and maximum of 7 service people at commissioned officer and warrant officer level who have served for not less than three years. The senior officer is called the President of the Board. The Judge rules and directs on law and the members of the board decide the facts

and also the sentence. This means the risk of media prejudice extends between findings of guilt and the sentence hearing.

5. The board members operate like jurors in the civilian courts, though unlike jurors they have a role in determining the sentence with the Advocate General who does not have a vote in relation to the determination of the verdict which is known as a 'finding' in military courts. Courts martial board members must not have been the commanding officer of any defendant/appellant, nor have served in the same unit at any time from the date of the alleged offence.
6. Cases are prosecuted by the Service Prosecuting Authority. During trial the Judge Advocate is addressed as 'Sir' or 'Madam', the Judge Advocate General as 'Your Honour' and when a High Court Judge presides, as Mr Justice McKinnon did at Bulford in the Baha Mouza case, the proper address is 'My Lord.'
7. The usual composition of a military court board is five and this can deliver majority verdicts of three to two. The Appeal Court ruled in 2009 that courts martial can no longer reveal whether verdicts are unanimous. The Court Martial Appeal Court ruled in 2010 that majority verdicts do not infringe the right to a fair trial or produce an unsafe conviction.
8. The principle of open justice as expressed in *Scott v Scott* in 1913 applies to the Court Martial just as it does in any other criminal court, and the presumption is that all criminal court proceedings are open and accessible to the public. There is a statutory requirement that the Court Martial sit in open court unless there is a compelling reason for the judge to direct otherwise: for instance, cases involving matters which could lead to the disclosure of security classified information may be held in camera.
9. In Courts Martial just as in other criminal courts, automatic reporting restrictions apply under certain circumstances which may render discretionary restrictions unnecessary, such as: restrictions on publishing information identifying of victims or alleged victims in sexual offence cases; rulings made at preliminary hearings. The judge may provide guidance to the media as to the applicability of automatic reporting restrictions in a specific case. The media remain responsible for ensuring they comply with the law.
10. Discretionary reporting restrictions can be imposed by a judge under the Contempt of Court Act 1981. Section 4(1) of the Act provides that publication of a fair, accurate and contemporaneous report of proceedings held in public is lawful, and s 4(2) provides: In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in 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.
11. The Armed Forces Court Martial Rules give military courts the power to give leave for any name or other matter given in evidence in proceedings to be withheld from the public. The Coroners and Justice Act 2009 s 86 provides for witness anonymity orders (s 94 makes it clear this provision applies to Service courts). A witness anonymity order requires specified measures to be taken in relation to a witness to ensure that the identity of the witness is not disclosed in or in connection with the proceedings. The kinds of measures to be taken include measures for securing that the witness's name and other identifying details may be withheld or removed from materials disclosed to any party; that the witness may use a pseudonym; that the witness is not asked questions that might lead to his or her identification; that the witness is screened; and that the witness's voice is subjected to modulation.
12. The Contempt of Court Act 1981 s 11 provides: 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 that 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. S 11 directions may be made in relation to the defendant or a witness, or any other "matter" relevant to proceedings (for instance, evidence which is sensitive for security reasons).

13. Prosecution or defence counsel may apply for orders imposing reporting restrictions so as to withhold from the public the identity of defendants or witnesses only if such an order is necessary for avoiding a risk of impediment to or frustration of the administration of justice. This may be in the instant proceedings or in future proceedings. For the protection of a particular witness, directions may be given for example permitting the witness to give evidence from behind a screen or under a pseudonym ("X") rather than their real name. It is not sufficient that the reporting of the name, etc. would cause the defendant or witness embarrassment, or even financial loss; those applying for such a restriction must show by way of evidence that failure to exercise the discretion to withhold the name would risk frustrating or impeding the administration of justice, for example because there are reasonable grounds for fearing that the operational or personal safety of these individuals is threatened.
14. Judges consider each such application on its merits, giving due weight to the public interest in the principle of open justice and to the qualified right to freedom of expression (the right both to impart and receive information) under Article 10 of the European Convention on Human Rights (ECHR). Personal safety considerations may, where there is cogent evidence in support, justify non-disclosure of identity on the grounds that disclosure would contravene the rights of the individual under ECHR Articles 2 right to life & 8 right to privacy. The Armed Forces (Court Martial) Rules 2009 r 26 contain general provisions enabling the judge to conduct the proceedings: "...in such a way as appears to him to be in the interests of justice."
15. A Court Martial Appeal Court case involving the *Times* and *Guardian* and a trial of members of the Special Forces in 2008 established a two-fold test for deciding whether to withhold the name of the defendant: either that 'the administration of justice would be seriously affected were it not to grant anonymity' (from *Scott v Scott*) or that 'there is a real and immediate risk to life' (a more modern limb arising from ECHR Article 2 as recognized in the 2007 House of Lords case about police officer witnesses to an inquiry in Northern Ireland known as *Re Officer*. The ruling in the case of Marine A, Sgt Alexander Wayne Blackman in December 2013, convicted of executing a wounded Afghan insurgent re-affirmed this principle. This case also stipulated that anonymity issues had to be resolved before the beginning of courts-martial and any release of footage or image of the victims of murders or serious crimes should consider the impact on their or their families' rights to respect for privacy and family life.
16. Where practicable the media must be notified in advance about any applications for reporting restrictions and have the opportunity to make submissions in relation to the application. Failing that, in an exceptional case, an order should be expressed to be interim and be followed up by a further hearing open to the public and notified to the media at which the judge reconsiders the reporting restrictions already made, after giving the media an opportunity to be heard or represented.
17. Media representatives prefer to and are entitled to expect to be given an avenue for making representations at the time when the restrictions are originally imposed. The media may appeal against reporting restrictions imposed in the Court Martial to the Court Martial Appeal Court.
18. The Judicial Communications Office circulates the existence of media restriction orders to a wide circle of media contacts, and deals with phone calls or queries from the media about actual or possible reporting restrictions. The Court Officer hands out hard copies of the order imposing reporting restrictions locally to any media representatives present at court on the day. Simple queries received locally may be dealt with locally, if the answer is sufficiently obvious, but otherwise are referred to JCO.
19. Whenever there is significant media interest in a forthcoming trial, with the likelihood of many press and broadcast media personnel attending, MoD Media Ops make arrangements for management, accreditation, etc of the journalists and if required for a pre-trial briefing. MoD Media Ops may arrange a photo-opportunity for the defendants, if they agree. Nothing prevents the media from taking any other photographs or videos outside of the court precincts in the same way as for a Crown Court. MCS Court Officer arranges for journalists and their vehicles to be

accommodated suitably inside and outside the court centre, and may arrange a photo-opportunity for the judge, if he agrees.

20. Media representatives address requests for access to images, documents, or video material to the prosecutor in the first instance, and the prosecutor takes the initial decision to permit or deny access. It has been agreed that the prosecutor will have regard to the Crown Prosecution Service / Association of Chief Police Officers (CPS/ACPO) document "Publicity and the Criminal Justice System – Protocol for working together" (October 2005), insofar as it is relevant. The overriding objective is to provide an open and accountable prosecution process, by ensuring the media have access to all relevant material wherever possible, and at the earliest appropriate opportunity.
21. Although the ECHR Article 10 guarantees the right to impart and receive information, this must be balanced against the other rights guaranteed, notably by Article 2 (Right to Life) and Article 8 (Right to Respect for Private and Family Life). Additional considerations for a military prosecutor would be whether material should not be disclosed for operational reasons or for reasons relating to the personal safety of military personnel.
22. In September 2014, The Society of Editors said it would be investigating complaints that the Military Court Service was not providing enough information to journalists about forthcoming cases heard in the military courts. 'Society of Editors to investigate military trial 'obstructionism'' See: <http://www.theguardian.com/media/greenslade/2014/sep/15/military-open-justice>
23. There was also concern expressed in September 2014 that MOD guidelines on contact between service people and journalists would create a chilling effect, discourage public interest disclosure and a culture of secrecy. See 'Secret state: Members of armed forces must notify press officers even if they meet a journalist socially' at: <http://www.pressgazette.co.uk/secret-state-members-armed-forces-must-notify-press-officers-even-if-they-meet-journalist-socially>
24. The guidelines are set out in a document known as 'The Green Book.' See: <https://www.gov.uk/government/publications/the-green-book>

Reporting Inquests

1. Under the Coroners and Justice Act 2009 a coroner must conduct an investigation into violent or unnatural deaths, deaths where the cause is unknown and deaths which occur in custody or otherwise in state detention. In certain cases, this investigation will include the coroner holding an inquest.
2. Inquests convened by Coroners are inquisitorial court proceedings and fair, accurate and contemporaneous reporting provides absolute privilege in terms of libel- reverting to qualified privilege when reporting is not to the nearest deadline of publication.
3. Inquests are covered by the Contempt of Court Act 1981 so it is possible to commit media contempt- not so much in relation to influencing the professional coroner, but to those hearings where a jury is convened to decide on a verdict of sudden death occurring in prison or in police custody, or in the execution of a police officer's duty, or if it affects public health or safety. Inquests will be held into the deaths of service people abroad in the coroners' jurisdictions where the body is brought back to Britain. Between 7 and 11 jurors can sit at Inquests and the largest minority allowed in a majority conclusion is 2.
4. Inquest proceedings become active in terms of contempt of court risk as soon as the first 'opening' hearing takes place. (Determined by a Court of Appeal Case Peacock v LWT 1986). This means publications that create a substantial risk of serious prejudice or impedance to the administration of justice by discouraging witnesses to give truthful evidence could attract prosecution by the Attorney General.
5. IPSO's Editors' Code of Practice and broadcasting regulation stipulate rules of conduct in cases involving grief and shock. For instance, publication in such circumstances must be handled sensitively and, when reporting suicide, care should be taken to avoid excessive detail about the

method. In 2008 the Ministry of Justice published a discussion paper 'Sensitive Reporting in Coroners' Courts' setting out how bereaved people can be upset by media coverage.

6. All inquests must be held in public in accordance with the principle of open justice, and so members of the public and journalists have the right to, and indeed may, attend (although parts of a very small number of inquests may be held in private for national security reasons).
7. Suicide notes and personal letters will not usually be read out at the inquest unless the coroner decides it is important to do so. If they are read out, their contents may be reported.
8. An inquest is a limited, fact-finding inquiry to establish who has died, and how, when and where the death occurred. An inquest does not establish any matter of liability or blame. Although it receives evidence from witnesses, an inquest does not have prosecution and defence teams, like a criminal trial; the coroner and all those with "proper interests" simply seek the answers to the above questions.
9. Coroners have powers to issue reporting restrictions that postpone and prohibit the reporting of their proceedings under the 1981 Contempt of Court Act, 1933 Children and Young Persons Act-relating to young people aged 17 and under, and the statutory protection of sexual offence complainants applies at inquests as in any other proceeding or situation.
10. Coroners have an inherent jurisdiction in common law to order that witnesses give evidence anonymously where there is a real and immediate risk to their safety and this is also backed by Article 2, right to life under the 1998 Human Rights Act. [R v HM Coroner for Inner South London High Court 2004 and in re Officer L Northern Ireland, House of Lords 2007]
11. Coroners now record conclusions as to death rather than the term 'verdict.' These include: I.Accident or misadventure; II.Alcohol/drug related; III.Industrial disease; IV.Lawful/unlawful killing; V.Natural causes; VI.Open; VII.Road traffic collision; VIII.Stillbirth; IX.Suicide
12. As an alternative, a brief narrative conclusion may be made. The standard of proof required for the short form conclusions of "unlawful killing" and "suicide" is the criminal standard of proof- 'so the coroner or jury are sure, beyond all reasonable doubt.' For all other short-form conclusions and a narrative statement the standard of proof is the civil standard of proof- 'on the balance of probabilities.'
13. It is becoming standard practice for police firearms officers involved in the fatal shooting of members of the public, and members of the Special Forces to have anonymity during inquests. Sir Michael Wright, the coroner in the 2008 inquest into the death of Brazilian electrician Charles de Menezes, who was shot by police when mistaken for a terrorist, warned the media that any attempt to take photographs of police officer witnesses granted anonymity would be contempt of court.
14. The Chief Coroner publishes a detailed guide online titled: 'The Coroner and the Media'. The latest version updated in 2016 is available at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/guidance-no-25-coroners-and-the-media.pdf>
15. This document places a considerable emphasis on the principle of Open Justice and states: 'Coroners will be guided in the first instance by the important principle of open justice. This is best explained in the well-known Court of Appeal case of Guardian News and Media Ltd which applies to all courts including coroners' courts. It is the principle behind public courts, open hearings, recording hearings, public notification of inquests in advance, and provision to the media where appropriate of access to documents.' See: [Guardian News and Media Ltd, R \(on the application of\) v City of Westminster Magistrates' Court \[2012\] EWCA Civ 420 \(03 April 2012\)](#)
16. When Southwark Coroner's Court in London inadvertently failed to notify the media of the opening of an inquest into the perpetrators of the terrorist attack on London Bridge and Borough Market in 2017, accredited journalists were permitted to take notes from a recording of the hearing. See: [Opening of inquest into deaths of London Bridge terrorists goes unreported as journalists not informed.](#)

17. The Coroners (Inquests) Rules 2013 provide detailed guidance on procedure. There are three types of hearing: a pre-inquest review hearing; an inquest opening; and the full hearing that may also be described as the final hearing. Inquests can be adjourned. Rule 9 of the 2013 Coroners (Inquests) Rules stipulates that the date, time, and location of an inquest hearing must be publicly available. The Chief Coroner has issued a guidance briefing stating that:
1. The coroner must, in advance of a 'final' inquest hearing, and where possible seven days before it, publish (preferably online) certain details including the date, time and place of the inquest, name and age of the deceased, and date and place of their death.
 2. Where possible such advance notice should be given for pre-inquest review and 'opening' hearings, and that it is 'good practice' to use email to update the media about forthcoming cases.
18. Rule 11 states that there is a general expectation for any pre-inquest hearing and inquest hearing to be held in public but that:
- a. A coroner can direct that the public be excluded if it is considered to be in the interests of justice to do so;
 - b. A coroner who does not have immediate access to a courtroom or other appropriate place in which to open the inquest can open it privately and then announce that it has been opened at the next hearing held in public;
 - c. A coroner can direct that the public (including journalists) should be excluded from all or part of a hearing that the coroner considers would be in the interests of national security to do so.
19. The availability of the recording of the inquest from Southwark Coroner's Court in the case set out in paragraph 16 was the result of the implementation of the 2013 rules which required Coroners to keep an audio recording of every inquest hearing including 'pre-inquest reviews.' A copy of the recording can be provided to what is considered as a 'proper person' to have possession of it. This facility was used by Kent Online in 2017 to defend a complaint made against it by somebody who alleged it had published an inaccurate report. Any publication or broadcasting of recordings provided is prohibited with prosecution for contempt of court engaged by anybody doing so.
20. In June 2020 the current Chief Coroner issued [Guidance No. 38 Remote participation in Coronial proceedings via video and audio broadcast](#). This dealt with the impact of the COVID pandemic which increased the need to use technology to facilitate remote participation in inquest hearings. However, unlike judges sitting in civil and criminal jurisdictions, Coroners must be physically present in a Courtroom to hold an Inquest. This is not the case with legal practitioners, interested persons, witnesses, the media or the public. Legally they do not need to be physically present as well. This curious situation has led to the development of hybrid or 'Harlequin hearings'- a term first coined by the Senior Coroner for Brighton & Hove, Veronica Hamilton-Deeley, who pioneered the running of such inquests during the first coronavirus lockdown in 2020.
21. The Chief Coroner has emphasised that 'this should not inhibit the use of physical courtrooms in line with social distancing' and the court room should, 'as far as possible remain open' even if partially remote participation is taking place. The guidance states that Open Justice is the fundamental principle meaning public access to justice and this underpins the way in which all Coroners must deal with any remote hearing. In practice this allows the relaying of a live feed from a main courtroom hearing an Inquest to a secondary courtroom holding, for example, members of the press or public, which has occasionally happened in high profile Inquests. But it remains unlawful for there to be any livestreaming of inquest proceedings from a Coroner's Court. This means live video with audio transmission over the internet. A recording or transmitting onwards of voice and images is not permitted and amounts to a potential contempt of court. The Coroner can allow the use of audio only lines to enable the Press and Public to

participate provided the Coroner makes a Ruling that disapplies expressly the effect of Section 9 of The Contempt of Court Act 1981. Coroners are advised to remind the media and public that it remains a Contempt of Court to record, distribute, publish or broadcast the proceedings in any way.



A composite of the stills that Judge Advocate General Jeffrey Blackett agreed could be released for use by the media during the 2013 trial of Royal Marines for murder in Afghanistan. He ruled against the release of moving video and any still image of the actual death of the wounded Taliban fighter.

He did agree to a release of the sound from the video. His decision that all five soldiers originally charged, including Marine Sergeant A found guilty, should be identified was challenged by the servicemen at the Court Martial Appeal Court. In a significant precedent the three-judge appeal, including the Lord Chief Justice, decided Sergeant Alexander Wayne Blackman should be named and at least two of those who had been acquitted. The risk to the right of life had to be 'real and immediate' and the standard of decision 'reasonableness.'

The court also decided releasing footage or images of victims of murders and assaults might be a serious encroachment on their and their families' rights to respect for privacy and family life. In 2017, following a substantial campaign supported by the thriller writer Frederick Forsythe, the Daily Mail and politicians saying Sergeant Blackman was the victim of a miscarriage of justice when he was convicted of murder and jailed for life with a minimum of eight years, a further appeal resulted in the substitution of a conviction for manslaughter and a jail sentence enabling near immediate release.

See the ruling at [Blackman, R. v \[2017\] EWCA Crim 190 \(15 March 2017\)](#)

McNae's Essential Law for Journalists 25th Edition covers the media law of reporting 'Coroner's courts and inquests' at Chapter 17 between pages 243-254.

Questions to ask yourself in relation to your reporting

Is your story in the public interest? (not just sensational title tattle or gossip)	Libel/privacy/secondary media law regulation.
Is your information from a privileged source e.g. court hearing, public inquiry, public meeting, press conference, government body press release (e.g. police) academic journal/conference, local authority/assembly/parliamentary proceeding? These contexts operate as legally privileged shields against libel, but they require conditions- the most important being fairness, accuracy and the absence of malice.	Contempt for court hearings, libel everything else.
At first base you have to ask yourself is your reporting fair and accurate? And are you sure you are not operating under any hidden agendas that could be perceived as malicious?	Libel/contempt
Are children/youths-(17 and under) involved? Check if they are subject to anonymity orders because of criminal/civil/family proceedings. Obtain guardian & parent permission if under 16 or I/V interaction is in a school.	Contempt, privacy and secondary media law regulation. Separate standalone criminal office.
Is a complaint of a sexual offence being made? If so anything that could lead to identification of the complainant has to be removed. You can't rely on police and authorities to do this. Any identifying feature that would be recognized by the complainant's relative or close friend would be enough to convict you. Sex offence complaints often wish to keep their suffering and experience from their family and friends. The UK legal systems are extending the range of anonymity rights. This includes police firearms officers, intelligence agency personnel, members of the special forces, jurors, the alleged victims of people trafficking offences, alleged victims of forced marriages, alleged victims of female genital mutilation (FMG) blackmail victims where the menaces are the threat to expose something embarrassing, and teachers accused of offences against children at their schools prior to any decision to formally charge them.	Contempt/privacy/secondary regulation. Separate standalone criminal offence.
Can you double-check/cross reference your notes? (is your shorthand good enough/do you have a recording?) Do they tally with PA/news agencies, and other reporters?	Everything. There is no public interest defence for inaccuracy.
What is the prior history/contact with the subject(s) of the story? Is it clear there is nothing that could be construed/constructed as any form of prior negative disposition, or malice? Make sure there are no conflicts of interest e.g. you have not been paid or been given any favours/freebies/junkets. Has your conduct been courteous/polite throughout? Make sure you have no negative comments or doodles in your notes/computer systems against anyone referred to for the story.	Libel/privacy.

Make sure you have made no material promises or offered favours and/or inducements to obtain information, or used the threat of exposure/publication to obtain a response/cooperation/supply of information.	Potential criminal offences of bribery and blackmail.
Have you maintained neutral non-sensationalist language throughout to publication, including in investigatory/research emails/notes in case of litigation that might scoop up files/documentation by legal discovery?	Libel/privacy.
Have you given a reasonable opportunity for anyone being criticized or accused of anything to respond to the allegations and give their side of the story? Has the gist been included in the report? Did you accurately represent the allegations/criticism that they face?	Libel/secondary media law regulation.
Is it possible to find out if there is or has been any investigation into the issue you are reporting on carried out by any authority (whether employer/government body/professional disciplinary/regulation/state authority or police)? If there is, can this support the story? Sometimes state authorities allow unlawful conspiracies to run while suspects are under surveillance to collect evidence of more serious crimes, or there may be undercover agents inside the operation with participating informants. Also bear in mind that the FBI and other federal investigative authorities in the USA are known to allow illegal operations to run across international borders, particularly on the Internet, in order to collect evidence. Their agents and participating informants could be at the heart of and in control of the activity.	Libel/privacy/secondary media law regulation
If you are investigating something deemed unlawful, anti-social/controversial, have you excluded the possibility that the subject has been given special permission to be doing what's going on e.g. for charitable/humanitarian/compassionate reasons or as a result of prior exceptional agreement?	Libel/privacy.
Have you checked and double-checked that documentary/witness information for the story has not been fabricated/forged by informant sources with malicious/conspiratorial/political/situationist/mischiefous hoaxing motives?	Libel/privacy/secondary media law regulation.
Have you checked and double-checked that your source(s) do not have any legally disabling axes to grind/past feuds with people and organizations they are criticising? Were they previous employees/contractors? Are they commercial/reputational rivals?	Libel/privacy/secondary media law regulation.
Have you made sure that what you state as facts are not in fact your opinions? Have you made sure that allegations/criticisms are attributed to sources and are not expressions of your editorial point of view e.g. 'editorializing.' Pay close attention to your use of adjectives and adverbs. If using sound or televisual media take care to avoid sarcasm and double meanings through voice inflection, facial expression, and body language.	Libel/secondary media law regulation.
Have you checked that your story and its multimedia content are not breaches of privacy e.g. ask if your subjects have a reasonable/legitimate expectation of privacy? Have they given permission for its publication, or is the information already in the public domain? Does it relate to personal sexuality/relationships/family life, home, correspondence (all personal communications), private space including salary/financial affairs/education/activities that take place on private property? If you are alerted to any affirmative answers to these questions, you next need to	Privacy.

ask if public interest in an equal balancing act with freedom of expression would defeat the right to respect for privacy.	
Is there a risk of breaking any existing criminal law or professional ethical rule in the process of your researching and publishing this story? If there is you need to check your conscience, support and approval of your employer, and professional association/union. You need to establish if there is a public interest defence for the crime. If not, does the DPP/CPS operate any public interest policy on deciding whether or not to decide to charge and prosecute?	All primary and secondary media law.
Are you using surreptitious/ clandestine devices and subterfuge? Have you established that you cannot obtain the information/story by any other non-deceptive technique? Since any use of surreptitious recording devices and subterfuge involves breaching privacy, have you established there is credible prior information of an issue that justifies such intrusion in the public interest? This excludes imaginative 'fishing expeditions' based on intuition and mere suspicion.	Privacy and secondary media law.
Does your story need witnesses and sources who would be willing and effective to give evidence in defence of privacy and defamation actions? If so are sworn affidavits in place? If documents have been supplied by public authorities are you sure they will not challenge their use in defence of libel or privacy actions?	Libel/privacy.
Have you recorded interviews and actuality without the knowledge and agreement of your subjects? In backing your notes and research in the UK you can record telephone/mobile calls without the other party knowing and this is legal as long as your recording device does not electronically intercept a telephone system that you do not own. Recording without the other party's permission can be a criminal offence in foreign jurisdictions. You cannot use these recordings for broadcasting on Ofcom licenced stations without the permission of the other party unless there is an Ofcom recognized public interest.	Criminal law and secondary media law regulation.
Are your images/photographs compliant with UK copyright? You do not have a current event fair dealing defence for using in copyright images. So are they your pictures, or if they have been taken by somebody else, do you have permission for use in your publication? Better to have this in writing by email. If there is a creative commons usage possibility, check the conditions to make sure your publication meets these. Make sure you have attributed/acknowledged the copyright holder.	Copyright/Intellectual Property
If you do not have permission, have you made sure your pictures were not taken on private property since this is likely to be a breach of privacy and copyright? Buildings and sculptures in public can be photographed for publication, but art/photographs/exhibitions in private corporate space have IP rights and require permission.	Copyright/Intellectual Property and Privacy
Have you sought permission from the guardian/school, and/or parent(s) when taking images/digital video and sound recording of children (16 and under) prior to broadcast/internet multimedia use? Use of media equipment to record a child on school premises requires the permission of the school as well as the parent/guardian.	Secondary media law regulation/privacy
Have you promised confidentiality to any of your sources? If you have, does your employer/publisher know and will they agree to support the confidentiality? How secure have you made your protection? You and	Secondary media law regulation/Primary media law statute and case law.

<p>your source become more vulnerable, the greater the number of people who know. Meeting confidential sources in public places (such as cafes, pubs, and restaurants) is less secure than in private spaces. Using digital communications is also insecure, though encryption and proxy servers help. The world's leading intelligence services have broken all forms of digital/Internet encryption. You cannot count on digital/Internet communications being free of surveillance or detection. Essentially the more sensitive the story, the greater risk of being under surveillance or exposed. You need to be careful about how much secrecy and confidentiality you can promise to a source.</p>	
<p>Is it clear and have you evidence that your source is lying to you or manipulating/deceiving you? Bear in mind that your professional pledge of confidentiality can be released in these circumstances. If the information provided turns out to be fabricated and untruthful, professional ethics allow you to be released from your confidentiality. Equally if you need your source to be on the record, you can seek to use persuasion. If your source comes to you with information supplied to you illegally and the result of criminal behaviour, ECHR and English common law offers an argument for the protection of your source, but the issue will be balanced with other issues such as national security etc. You need to seek legal/editorial advice before getting yourself deeply involved and obligated in these situations.</p>	<p>Secondary media law regulation/Primary media law statute and case law.</p>
<p>Is there a risk that the police, or another state investigative authority will want your media recordings of a public event? If requested you should politely ask the authority to seek a court order under the Police and Criminal Evidence Act 1984. It is advisable to label your equipment 'Media material protected by special procedure duty under PACE 1984.' If your notebooks and digital equipment contains confidential information held by you for the purposes of journalism, you can inform any state authority trying to seize and examine it that it is 'excluded' material under PACE 1984 and their access to it requires the permission of a court. Labelling, though tedious, gives your equipment a clearly stated status under the law.</p> <p>Be aware that if your sources are police officers, members of the armed forces or connected with state intelligence bodies and the story is politically sensitive it is likely you will be vulnerable to covert examination of your phone records and Internet activities. These concerns are based on the revelations of former CIA contractor Edward Snowden and the details of the Metropolitan Police report in Operation Alice which revealed detectives had used the Regulation of Investigatory Powers Act 2000 to obtain phone records of the newsdesk and political editor of the Sun thereby enabling them to identify the police officer sources for the allegations made against former Government chief whip Andrew Mitchell's about altercation with officers outside 10 Downing Street.</p> <p>You should adopt counter-surveillance measures such as email/database encryption, use of onion servers that can conceal your ISP number, avoid all digital communications and carrying of devices even when seemingly switched off, and working in 'analogue world' e.g. commit key information to your memory or writing on paper which you can much more reliably and easily destroy if necessary.</p>	<p>Secondary media law regulation/Primary media law statute and case law.</p>

<p>When interviewing your source(s) has it been made clear what is meant by 'on the record', 'non-attributable', 'off the record', Chatham House Rules'? There are conventions in journalism that although clear to reporters/editors are not so clear to their subjects. If it needs clarification make sure your interviewees know whether i. their comments are for publication and attribution; ii. Are for publication but not attributable and using a conventional description e.g. 'Whitehall source'(s) 'friends of'; iii not for publication unless confirmed and corroborated by another named source; iv not for publication under any circumstances- the information is background guidance; v 'Chatham House rules' which means 'comments can be reported, however neither the identity of the speaker nor their affiliation, i.e. who they work for, must be revealed.' Rule was devised in 1927 and revised in 1992 and 2002.</p> <p>See: https://www.chathamhouse.org/about-us/chatham-house-rule</p>	<p>Secondary media law regulation.</p>
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Analysis of Ethics and Law- case history from the past.



Page 143 *On Liberty, Today [Della Liberta, Oggi]* by Anthony Smith, Alberto Abruzzese, Erik Barnauw, Jo Groebel, Rome, Italy: Special Edition for Prix Italia, Ravenna.

[Caption: '23 January 1987 – The Pennsylvania State Treasurer, Budd Dwyer, accused of corruption, shot himself before the television cameras at a press conference. Only a few television stations broadcast this sequence. Its exceptionally dramatic nature and the decision to screen it gave rise to heated debate throughout the world.

See: <http://www.nytimes.com/1987/01/23/us/official-calls-in-press-and-kills-himself.html>

These are archive images from the USA where a politician has called a media conference and takes his own life by shooting himself in the mouth. The aftermath

of the suicide, which is obviously very distressing and unpleasant has not been included in this guide, but you do not need much imagination to envisage the horror of the event. It is understood that the politician killed himself during live television and radio coverage, and press photographers also captured what happened. In Britain no primary laws would be broken by recording and broadcasting the event, but profound ethical and secondary media law issues arise.

1. If the person concerned had given prior warning he was going to kill himself, media organizations would have to ethically challenge their reason for going to the press conference and thereby contributing to the event;
2. Running live coverage of media events in licensed broadcasting raises the importance of operating a delay device so that unforeseen events of this kind can be intercepted before actual transmission;
3. Broadcasting the moment of death in western media is generally seen as a moral taboo;
4. Any part of this sequence in broadcasting would have to be evaluated in terms of 'harm and offence.' Any evidence of 'under eighteens' being a significant proportion of the audience would question its inclusion in a newscast. A warning about the content would be expected at any time.
5. Under the Editors' Code of Practice for the Independent Press Standards Organisation (IPSO) and, indeed other regulatory codes, publication in print or online would engage a range of issues. Certainly, publishing after the event requires consideration of the impact on the politician's family. Had next of kin been informed? To what extent is the use of the imagery in the public interest? What is informative, gratuitous and voyeuristic about inclusion of the images? The context may well be differing for the print online media if the event had been live broadcast on television and radio and was continuing to be recycled. Then the debate on taste, decency, media harm and offence is active.
6. Recycling the footage in any form could compound the distress, and reproducing it in later years for anniversary items or illustration in feature and documentary publications would continue to have an impact on the politician's surviving family. This is why great care must be taken when replicating police released images of crimes and trials in later journalism. The families of two 11-year-old murder victims Holly Chapman and Jessica Wells have pleaded with the British media to stop using what became an iconic image of the two girls in Manchester United shirts that was actually taken on the day of their murder in 2002.
7. Any reporting of suicide in the media has been judged to have profound emotional consequences for those involved and members of any media audience. The British media have begun to recognize the advice and guidance of The Samaritans and their informative briefings on the social implications of use of language and purpose of representation in relation to suicide.
8. What are the copyright/intellectual property issues arising? The BBC v BSB case of 1990 may provide a defence for using screen-grabs or an edited portion of the tv sequence within 24 hours of the event taken from the

- broadcaster which had decided to publish. This may come under fair dealing in relation to a news and current event. For an elected politician to act in this way and use a live firearm for violent and shocking self-destruction would certainly come under the common law and 1998 Human Rights Act jurisprudence of 'public interest.'
9. The wider media would have a fair dealing defence under criticism or review if using a less than substantial proportion in the context of the media ethics debate. Acknowledgement of the source of the images would be needed to qualify for fair dealing.
 10. In the UK the Independent Press Standards Organisation [has published a detailed briefing on reporting suicide](#) which is often updated as a result of consultation with relevant NGOs and charities such as The Samaritans. The Editors' Code does not seek to prevent reporting of suicide and recognises that there is always a public interest in raising awareness of suicide as a significant public health issue. However, IPSO advises that care should be taken to limit the risk of vulnerable people being influenced by coverage of suicide and choosing to end their own lives. Journalists should be prepared to justify the inclusion of any detail of the method of suicide in any report. Particular care should be taken when reporting on novel methods of suicide. It does take some degree of fortitude and professional bearing to argue that the fact of someone's death is not private and deaths affect communities as well as individuals and are a legitimate subject for reporting. There will be circumstances where people in a state of grief or shock will not fully appreciate this and consequently they must be approached with sensitivity. Reporting should be handled sensitively and appropriate consideration should be given to the wishes and needs of the bereaved.
 11. IPSO advises that journalists keep in mind the following set of questions when compiling the content of suicide reports:
 - a. What details are you going to include in your report about the death?
 - b. Do any details relate to the method of suicide?
 - c. Is the method of suicide you are reporting on novel?
 - d. If so, what is your justification for including those details?
 - e. Have you considered how the material will be presented online to ensure that you do not publish excessive detail of the method? IPSO suggests journalists should address the following further key questions and issues:
 1. How will you approach the family at inquest?
 2. Have you considered the effect of your behaviour on the family of the deceased?
 3. How have you checked the accuracy of your reporting of the inquest?
 4. If you are including photos of the deceased, how have you chosen the photos you are publishing?
 5. What language are you using in your report to describe the suicide?
 6. What prominence will you give your report about suicide? What is the reasoning for that?
 7. How will you report the suicide of a young person?

8. Have you included contact details for appropriate organisations in your article? [Samaritans](#) publishes their [own guidelines on reporting suicides for the media](#) and provide an advice service for journalists. They also have a [factsheet on talking to bereaved families](#). [PAPYRUS Prevention of Young Suicide](#) focuses on the prevention of youth suicides and provide some [resources for journalists](#). [Mind](#) runs a [media advisory service](#) focusing on the reporting of mental health, including suicide.

We now move onto 2) **Secondary Media Law**- regulation by statutory and industry bodies.

This dimension moves from acting under moral principle in terms of duties and responsibilities (having the honourable motive and intention) to a position of compliance and acting on inclination to observe the rules of regulation which when transgressed can be enforced by sanctions. Having the worthy motive and intention is sometimes seen as morally superior to only making decisions to avoid punitive and unpleasant consequences to you personally. But this virtue is vulnerable to the paradox that 'the path to hell is paved with good intentions.' This is an acknowledgement that always telling the truth can do more damage than good. Many writers and experienced journalists have reflected on the good judgment including using discretion on what not to report in terms of ethics.

Secondary media law sometimes overlaps with primary media law where the sanctions include criminal prosecution and punishment and civil law actions with damages/compensation and court orders (known as injunctions).

The ethics codes are critical to determining hard-fought over primary legal cases. This is because section 12(4)(b) of the 1998 Human Rights Act obliged the courts to reference them when adjudicating a dispute between Article 10 Freedom of Expression and Article 8 Privacy.

The court **must have particular regard to the importance of the Convention right to freedom of expression** and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

- (a) the extent to which—
 - (i) the material has, or is about to, become available to the public; or
 - (ii) it is, or would be, in the public interest for the material to be published;
- (b) any relevant privacy code.**

The most regulated journalists in terms of secondary media law in the UK are broadcast journalists who are news and story gathering and publishing for licensed broadcasters in radio and television. This regulation directly stems from legislative and executive government control. The statutory regulator Ofcom is constituted by Act of Parliament and a body of legislation and statutory instruments and is also

answerable in many ways to the Department of Culture, Media and Sport and Secretary of State for this department who has a seat in the Cabinet. From April 3rd 2017 it assumed full regulation of the BBC both for all content publication and ancillary issues such as competition and performance.

Ofcom Regulation

Ofcom has the power to punish licensed broadcasters though cannot award compensatory damages to complainants. Breaches of licensing and the broadcasting code can result in substantial fines, and the suspension and deletion of the licence of some broadcasters.

Regulation has the potential to discipline broadcasters and journalists for professional mistakes that do not breach primary media law such as libel, privacy, copyright and media contempt. It sets up a liability with consequences for inaccuracy, or political bias.

Broadcast journalists should be vigilant in monitoring Ofcom 'Broadcast and On Demand Bulletin reports on the outcome of investigations into potential breaches of Ofcom's codes and rules for TV, radio and video-on-demand programmes, as well as the licence conditions with which broadcasters regulated by Ofcom are required to comply.'

The bulletin reports are released in pdf files at: <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/broadcast-bulletins>. The bulletin for 11th September 2017 reported on an investigation into Channel 4 News:

'On 22 March 2017, Channel 4 News reported on the terror attack in London which had taken place earlier that day. The report included coverage live from Westminster of the aftermath of the events, as well as analysis from the studio and discussions in various formats between journalists and contributors to the programme. The first half of the programme focused on a man, Abu Izzadeen, who Channel 4 News incorrectly identified as the person responsible for the terror attack and who had been shot dead by police. In fact, Abu Izzadeen was in prison. Six complainants subsequently objected to this.'

Ofcom decided that 'Channel 4 News' rush to get this story to air resulted in it broadcasting a significant error on a major news story.' It also noted that it was the fourth case in three years in which Ofcom had found Channel 4 News in breach of the requirement to report news with due accuracy, under Rule 5.1 of the Code.

In deciding the sanction on this occasion Ofcom said: 'We took into account that the Licensee had taken a number of steps to ensure that its audience was aware of the error and to correct it. However, given the serious breach in this case, Ofcom directs the Licensee to broadcast a summary of Ofcom's Decision in a form and manner to be decided by Ofcom.'

In 1998, Ofcom's predecessor regulatory authority, the Independent Television Commission imposed a fine of £2 million on the former ITV broadcaster in the Midlands, Central Television, for including fabricated scenes in a documentary about heroin-smuggling from Columbia to Britain. The programme, called *The Connection*, had won awards for its investigative journalism and Ofcom justified

the level of the fine by pointing out the damage the deception had caused to the trust of viewers in the integrity of broadcast journalism. The ethical problems of the programme had been exposed by an investigation carried out by the Guardian newspaper.

The largest fines imposed by Ofcom amount to a total of £5.675m in 2008 for what was described as the 'abuse' of premium-rate phone lines in popular light entertainment programmes.

The shows included Ant and Dec's *Saturday Night Takeaway*, Ant and Dec's *Gameshow Marathon* and *Soapstar Superstar*. Viewers had been misled by competitions they had been invited to participate in. Ofcom's sanctions committee said: 'millions of paying entrants were misled into believing they could fairly interact with some of ITV's most popular programmes.' In one instance the broadcaster did not point out that transmissions were not live so people ringing in were still charged for taking part. ITV was ordered to transmit six on-air apologies for their transgressions of broadcast regulation. Ofcom also investigated the BBC for unfair conduct of viewer and listener competitions that included *Children In Need* and *Comic Relief*. The highest fine imposed was £400,000.

See: <https://www.theguardian.com/media/2008/may/08/itv> and <https://www.theguardian.com/media/2008/jul/30/bbc.ofcom>

In 2012 Ofcom withdrew its licence from Press TV, a news channel funded by the Iranian government. The service broadcast in English from the UK and had not addressed concerns that its editorial content was determined from Tehran, and had not paid a fine of £100,000 for broadcasting an interview with Maziar Bahari, an imprisoned Newsweek journalist, that had been conducted under duress.

See: <https://www.theguardian.com/media/2012/jan/20/iran-press-tv-loses-uk-licence>

Ofcom does not have any legal powers to curtail or end the licences of public service broadcasters such as the BBC, Channel 4 and S4C (in Scotland). Primarily its investigation and sanctions against broadcast journalists are concerned with the concepts of 'harm and offence,' the protection of children, the representation of crime, and the maintenance of the principles of fairness and 'due impartiality and due accuracy.' Like the press regulators it applies a public interest formula to complaints about broadcast journalist conduct in relation to deception and misrepresentation, secret filming and recording, and issues of privacy.

You should regularly check and evaluate Ofcom rulings in Broadcast and On Demand Bulletins.

See: <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/broadcast-bulletins>

The online Channel 4 Producers' Handbook very effectively analyses key adjudications that set secondary media law precedent for broadcasters.

For example, see 'Ofcom finds against Fox News for Due Impartiality Breaches'

See: <https://www.channel4.com/producers-handbook/news/ofcom-finds-against-fox-news-due-impartiality-breaches>

And 'Unwarranted use of "body cam" footage Channel 5's "Can't Pay? We'll Take it Away!'

See: <https://www.channel4.com/producers-handbook/news/unwarranted-use-body-cam-footage-channel-5s-cant-pay-well-take-it-away>

The Ofcom Broadcasting Code

Section one: Protecting the under-eighteens

This section outlines the rules around scheduling and content information in programmes with regard to protecting children under the age of eighteen.

Example: Material that might seriously impair the physical, mental or moral development of people under eighteen must not be broadcast. TV watershed is before 2100 and after 0530. Radio broadcasters must have particular regard to times when children are particularly likely to be listening.

Section two: Harm and offence

This section outlines standards for broadcast content so as to provide adequate protection for members of the public from harmful and/or offensive material and this includes strong language.

Example: Factual programmes or items or portrayals of factual matters must not materially mislead the audience. Material which may cause offence must be justified by the context.

[Case history: Issue 420 8th February 2021 complaint against Capital Xtra Reloaded.](#) Capital Xtra Reloaded is a radio station which predominantly broadcasts dance, hip hop and RnB music. The licence for Capital Xtra Reloaded is held by Global Radio Limited. Ofcom received a complaint about racially offensive language in the music track *I Got 5 On It* by Luniz. Ofcom welcomed the Licensee's apology and the steps it has taken to prevent a recurrence. However, for the reasons given above, Ofcom's Decision is that the broadcast of offensive language in this programme was in breach of Rule 2.3.

Section three: Crime, disorder, hatred and abuse

This section of the Code covers material that is likely to incite crime or disorder, reflecting Ofcom's duty to prohibit the broadcast of this type of programming.

Example: Material likely to encourage or incite the commission of crime or to lead to disorder must not be included in television or radio services or BBC ODPS (on demand programme services) and this includes hate speech.

[Case history: Issue 421, 22nd February 2021. Financial penalties imposed on Khalsa Television Ltd of £20,000 and £30,000; direction not to repeat the content; and a direction to broadcast a statement of findings.](#) A music video and a discussion programme expressed views that were likely to encourage or incite the commission of crime or lead to disorder. The potentially highly offensive material was not justified by the context.

[Case history: Issue 418 11th January Notice of Sanction- Worldview Media Network Limited. Financial penalty of £20,000; direction to broadcast a statement of Ofcom's findings in this case](#) on Republic Bharat, a satellite television channel

broadcasting rolling news and current affairs to the Hindi speaking community in the UK, predominantly in the Hindi language. During a current affairs discussion programme, the presenter and some of his guests made several statements which amounted to hate speech against, and derogatory and abusive treatment of, Pakistani people. The content was also potentially offensive and was not sufficiently justified by the context.

Section four: Religion

This section relates to the responsibility of broadcasters with respect to the content of religious programmes.

Example: The religious views and beliefs of those belonging to a particular religion or religious denomination must not be subject to abusive treatment.

Section five: Due impartiality and due accuracy

To ensure that news, in whatever form, is reported with due accuracy and presented with due impartiality. To ensure that the special impartiality requirements of the Act are complied with.

Examples:

“Due” is an important qualification to the concept of impartiality. Impartiality itself means not favouring one side over another. “Due” means adequate or appropriate to the subject and nature of the programme. So “due impartiality” does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented.

Significant mistakes in news should normally be acknowledged and corrected on air quickly.

No politician may be used as a newsreader, interviewer or reporter in any news programmes unless, exceptionally, it is editorially justified. In that case, the political allegiance of that person must be made clear to the audience.

Due impartiality on matters of political or industrial controversy and matters relating to current public policy may be achieved within a programme, or over a series of programmes taken as a whole.

[Case history, Issue 422, 8th March. Notice of Sanction –Star China Media Limited.](#)

[Outcome: Financial penalty of £125,000](#) The licence for the provision of the CGTN service was held by Star China Media Limited (“SCML” or “the Licensee”) until 4 February 2021 when the Licence was revoked. In the UK, the channel was broadcast on satellite. The sanction related to the broadcast of five programmes concerned with the protests which were ongoing in Hong Kong during this period. These protests were initially in response to the Hong Kong Government’s Extradition Law Amendment Bill that would have allowed criminal suspects in Hong Kong to be sent to mainland China for trial. In the decisions published on 26 May 2020 in [Issue 403 of the Broadcast and On Demand Bulletin](#), Ofcom found that each of the five programmes had failed to maintain due impartiality and had breached Rules 5.1, 5.11 and 5.12 of the Code.

Section six: Elections and referendums

This section covers the special impartiality requirements and other legislation that must be applied at the time of elections and referendums.

Examples: In determining the appropriate level of coverage to be given to parties and independent candidates broadcasters must take into account evidence of past

electoral support and/or current support. Broadcasters must also consider giving appropriate coverage to parties and independent candidates with significant views and perspectives.

Discussion and analysis of election and referendum issues must finish when the poll opens.

Broadcasters may not publish the results of any opinion poll on polling day itself until the election or referendum poll closes.

If a candidate takes part in an item about his/her particular constituency, or electoral area, then broadcasters must offer the opportunity to take part in such items to all candidates within the constituency or electoral area representing parties with previous significant electoral support or where there is evidence of significant current support. This also applies to independent candidates. However, if a candidate refuses or is unable to participate, the item may nevertheless go ahead.

Any constituency or electoral area report or discussion after the close of nominations must include a list of all candidates standing, giving first names, surnames and the name of the party they represent or, if they are standing independently, the fact that they are an independent candidate. This must be conveyed in sound and/or vision.

If, in subsequent repeats on that day, the constituency report does not give the full list of candidates, the audience should be directed to an appropriate website or other information source listing all candidates and giving the information set out above.

Section seven: Fairness

This section is to ensure that broadcasters avoid unjust or unfair treatment of individuals or organisations in programmes.

Examples: Where a person is invited to make a contribution to a programme (except when the subject matter is trivial or their participation minor) they should normally, at an appropriate stage:

- be told the nature and purpose of the programme, what the programme is about and be given a clear explanation of why they were asked to contribute and when (if known) and where it is likely to be first broadcast;
- be told what kind of contribution they are expected to make, for example live, pre-recorded, interview, discussion, edited, unedited, etc.;
- be informed about the areas of questioning and, wherever possible, the nature of other likely contributions;
- be made aware of any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and which might cause material unfairness;
- be told the nature of their contractual rights and obligations and those of the programme maker and broadcaster in relation to their contribution; and
- be given clear information, if offered an opportunity to preview the programme, about whether they will be able to effect any changes to it.

If a contributor is under sixteen, consent should normally be obtained from a parent or guardian, or other person of eighteen or over in loco parentis. In particular,

persons under sixteen should not be asked for views on matters likely to be beyond their capacity to answer properly without such consent.

If a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.

[Case History Issue 421 22nd February 2021. Complaint by Mrs Rachael Tooher-Rudd about *How To Stop Nuisance Calls* on Channel 5 television.](#) The programme examined the rise of “nuisance” calls, with a particular focus on calls made during the national Covid-19 lockdown period. The programme referred to the complainant, Mrs Rachael Tooher-Rudd as having “ran” an automated calls company along with her husband, and which was fined £400,000 by the Information Commissioner’s Office (“the ICO”). She complained that this was wrong and that she had nothing to do with running the company. Ofcom found that the broadcaster did not take reasonable care to satisfy itself that material facts had not been presented, disregarded, or omitted in a way that was unfair to Mrs Tooher-Rudd.

[Case History ongoing at the time of writing, March 2021. Meghan Markle and Piers Morgan on ITV’s programme *Good Morning Britain* which led to his sacking/resignation.](#)

Section eight: Privacy

This section is to ensure that broadcasters avoid any unwarranted infringement of privacy in programmes and in connection with obtaining material included in programmes.

Examples:

Where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.

Legitimate expectations of privacy will vary according to the place and nature of the information, activity or condition in question, the extent to which it is in the public domain (if at all) and whether the individual concerned is already in the public eye. There may be circumstances where people can reasonably expect privacy even in a public place.

Broadcasters can record telephone calls between the broadcaster and the other party if they have, from the outset of the call, identified themselves, explained the purpose of the call and that the call is being recorded for possible broadcast (if that is the case).

Surreptitious filming or recording should only be used where it is warranted. Normally, it will only be warranted if:

- there is prima facie evidence of a story in the public interest; and
- there are reasonable grounds to suspect that further material evidence could be obtained; and
- it is necessary to the credibility and authenticity of the programme.

[Case history: Issue 412 12th October 2020 Complaint by Mrs Nichola Corner on behalf of the Ms Lyra McKee \(deceased\) about Newsnight: The 'Real' Derry Girls and the Dissidents.](#) Ofcom has upheld this complaint about unwarranted infringement of privacy in the programme as broadcast. The programme featured a report about terrorism in Northern Ireland, with a particular focus on Derry, or Londonderry. The report described the circumstances which led to the murder of Ms Lyra McKee, who was a journalist covering a story when she was hit by a bullet after a gunman opened fire on the police. The programme included a brief piece of footage that appeared to show Ms McKee lying in the street in her dying moments after being shot. The footage, filmed on a mobile phone, included around three seconds which focused on Ms McKee as she lay on the ground with people crowding around her. Whilst the footage was brief, of low quality and Ms McKee was largely obscured, it included a glimpse of her footwear. Mrs Corner, Ms McKee's sister, complained that Ms McKee's privacy was unwarrantably infringed in the programme as broadcast by the inclusion of this footage.

Section nine: Commercial references on TV

This section relates to broadcasters' editorial independence and control over programming with a distinction between editorial content and advertising.

Examples:

Product placement is not permitted in the following:

- a) religious programmes;
- b) consumer advice programmes; or
- c) current affairs programmes.

News and current affairs programmes must not be sponsored.

No undue prominence may be given in programming to a product, service or trade mark. Undue prominence may result from:

the presence of, or reference to, a product, service or trade mark in programming where there is no editorial justification; or
the manner in which a product, service or trade mark appears or is referred to in programming.

Section ten: Commercial communications on radio

This section relates to radio broadcast only and is to ensure the transparency of commercial communications as a means to secure consumer protection.

Examples:

Spot advertisements must be clearly separated from programming.

No commercial reference, or material that implies a commercial arrangement, is permitted in or around news bulletins or news desk presentations.

No commercial reference, or material that implies a commercial arrangement, is permitted on radio services primarily aimed at children or in children's programming included in any service.

Broadcasters may broadcast appeals for donations to make programming or fund their service. Listeners must be told the purpose of the appeal and how much it raises. All donations must be separately accounted for and used for the purpose for which they were donated.

Ofcom's Regulation of the BBC

From April 3rd 2017, Ofcom became the new external regulator of the BBC. Its job is to 'hold the BBC to account.' Regulation covers three main areas: Content standards – including assessing the impartiality and accuracy of BBC news and current affairs programmes; Competition issues – including the final determination on new BBC services or significant changes to existing services, and ensuring the BBC's commercial services are not unfairly cross-subsidised by the licence fee; and Reviewing the BBC's performance against its mission and public purposes. The Government has decided that a new BBC unitary board will govern and run the BBC, and ultimately be responsible for editorial and management decisions.

Previously Ofcom rules about the protection of children, harm and offence, crime, disorder, hatred and abuse, religion, and fairness and privacy, all applied to the BBC already. After April 3rd 2017 Ofcom now enforces the remaining rules on accuracy and impartiality, elections and referendums, and commercial references in programmes.

The BBC has substantially updated and developed its editorial guidelines and these are currently published online in two large categories of accessible information. First there are the [BBC Editorial Guidelines](#) substantially more expanded than the situation 10 or 20 years ago. Secondly, there are around 80 [Editorial Guidance briefings](#) alphabetically arranged. These include, for example, [Impartiality and Racism](#), and [Racist language \(including racial slurs and racist/ethnic abuse\)](#).

How will complaints against BBC programmes be handled after April 3rd 2017?

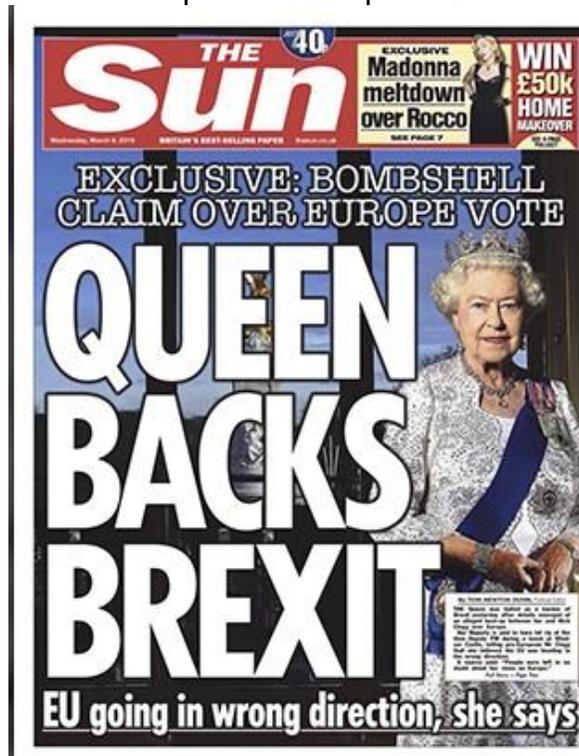
Ofcom is the final arbiter for complaints. Under the new system, Ofcom operates a Broadcaster-first complaints policy – that is complainants must address their complaints to the BBC first and Ofcom will only be involved if the complaint goes to an appeal stage. However, complaints about Fairness and Privacy (Sections 7 and 8 of Ofcom's Broadcasting Code) can go direct to Ofcom. Complaints about the BBC World Service will still be the sole responsibility of the BBC, with no appeal to Ofcom. Ofcom can offer advice about other online material, judged against the BBC's Editorial Guidelines. Appeals to Ofcom will be judged against the Ofcom Broadcasting Code only. Editorial complaints to the BBC will continue to be assessed against the BBC's Editorial Guidelines.

In this section I have set out the detail of the UK Independent Press Standards Organisation (IPSO) [Editors' code of practice](#) adopted and developed from that of its predecessor body the Press Complaints Commission (PCC), and grafted ethical rules set out by the UK's Chartered Institute of Journalists and National Union of Journalists. A rival press and online regulator to IPSO, [IMPRESS](#) has been approved by the Press Recognition Panel set up by post the Leveson Inquiry Royal Charter.

I have included extracts from its own code of standards operational from April 2017. As you can see there is wide consensus and coincidence of regulation between professional and regulatory bodies covering all forms of media

publication, but there are also differences between print/online and licensed broadcasting by analogue or digital signal.

Breaching these rules carries sanctions. IPSO (<https://www.ipso.co.uk/what-we-do/>) took over from the PCC, Press Complaints Commission (<http://www.pcc.org.uk/>) 8th September 2014. Its status and efficacy is an ongoing matter of controversy in the light of the Leveson Inquiry and continuing criticisms by media victim groups such as Hacked Off and the Media Standards Trust. Although it is said that 90 per cent of newspaper, magazine and online media have contracted to be regulated by IPSO, the Financial Times, Independent, London Evening Standard and Guardian newspapers have still not at the time of writing (3rd October 2017). Those media companies contracting to IPSO are part of a regulatory regime that can impose fines of up to £1 million and make directions to publish apologies and corrections. Up until the time of writing there have been no substantial fines, but newspapers have been directed to publish corrections in more prominent positions; sometimes accompanied by an Editor's protests. This was the case with the Sun and its story in 2016 that the Queen was opposed to the UK's membership of the European Union.



Buckingham Palace v The Sun- IPSO found this headline and story 'significantly misleading' and ordered the paper to publish its critical adjudication on page 2. See: <https://www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=01584-16>

News publishers who do not participate in any Royal Charter backed and recognized form of regulation could be subject to punitive (described as 'exemplary') damages if sued for media law civil wrongs such as libel and privacy under the 2013 Crime and Courts Act. The provisions at sections 34-39 of the

[Crime and Courts Act 2013 relating to exemplary and aggravated damages in claims against the press come into force in November 2015.](#) Successive Conservative governments have decided that the related costs provisions at section 40 should not be enacted, though it remains the policy of the Labour and LibDem parties that they should.

Journalists responsible for mistakes and transgression will continue to face disciplinary action by their employers ultimately leading to dismissal. The sanctions facing broadcasters can be imposed by their employers. Under the force of statute, Ofcom can fine, admonish, suspend or delete the broadcasting licenses. Disciplinary action is frequently taken against employees of independent television and radio and the BBC for breaching the Ofcom Broadcasting Code and/or the BBC's Editorial Guidelines.

McNae's Essential Law for Journalists 25th Edition covers 'Press Regulation' under Chapter 2 pages, 11-24, and 'Broadcast Regulation' under Chapter 3, pages 25-40.

IPSO researches, publishes and updates briefings and guides on journalism regulatory and ethical issues. They all merit close reading and consideration and often respond to current debates and concerns about reporting trends or complaints about media standards.

[Guidance on reporting deaths and inquests](#)

[Guidance on due prominence](#)

[Guidance on reporting major incidents](#)

[Guidance on reporting sexual offences](#)

[Guidance on publishing information from social media](#)

[Guidance on reporting suicide](#)

[Guidance on researching and reporting stories involving transgender individuals](#)

[Guidance on reporting Muslims and Islam](#)

[Case studies of rulings and resolutions related to Covid-19](#)

In January 2016 IPSO updated the Editors' Code of Practice in various parts and placed emphasis on news publishers honouring its spirit as well as maintaining an effective complaints system. [The Editors' Codebook is also regularly updated and accessible online.](#)

IPSO Code Preamble

The Code – including this preamble and the public interest exceptions below – sets the framework for the highest professional standards that members of the press subscribing to the Independent Press Standards Organisation have undertaken to maintain. It is the cornerstone of the system of voluntary self-regulation to which they have made a binding contractual commitment. It balances both the rights of the individual and the public's right to know.

To achieve that balance, it is essential that an agreed Code be honoured not only to the letter, but in the full spirit. It should be interpreted neither so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it infringes the fundamental right to freedom of expression – such as to inform, to be partisan, to challenge, shock, be satirical and to entertain – or prevents publication in the public interest.

It is the responsibility of editors and publishers to apply the Code to editorial material in both printed and online versions of their publications. They should take care to ensure it is observed rigorously by all editorial staff and external contributors, including non-journalists.

Editors must maintain in-house procedures to resolve complaints swiftly and, where required to do so, co-operate with IPSO. A publication subject to an adverse adjudication must publish it in full and with due prominence, as required by IPSO.

[IPSO adjudication 13th March 2015. Hawk v metro.co.uk Decision: Breach - sanction: action as offered by publication. Relevant code provisions 1 \(Accuracy\) 2015 Publication metro.co.uk \(Associated Newspapers Limited\)](#)

IMPRESS Code Preamble

Journalism plays a crucial role in society. Every day, journalists report significant events, policies and controversies, expose wrongdoing, challenge unfairness and satirise, amuse and entertain. Such power comes with responsibility. IMPRESS aims to ensure that journalists behave responsibly, while protecting their role to investigate and report freely. All publishers regulated by IMPRESS agree to abide by the following rules, which together constitute the IMPRESS Standards Code.

This Code seeks to balance the rights of the public, journalists and publishers. The Code should be read alongside the guidance, which provides information about what these rules mean in practice.

This Code is intended to be:

A practical working tool that enables journalists, editors and publishers to do their jobs;

Easily understood by the public; and

Effectively enforceable through IMPRESS's powers and remedies as a regulator.

Publishers will be held directly responsible for compliance with this Code, which applies to all content and newsgathering activities for which publishers are responsible under the terms of their Regulatory Scheme Agreement with IMPRESS, regardless of the medium or platform of publication. All references here to publishers apply equally to anyone acting under a publisher's authority. All references here to journalists apply equally to anyone acting in a journalistic capacity.

This Code is distinct from the law and publishers are separately responsible for ensuring that they comply with the law.

1. Accuracy, Opportunity to reply, Due Impartiality.

IPSO

1. Accuracy

- i) The Press must take care not to publish inaccurate, misleading or distorted information or images, including headlines not supported by the text.
- ii) A significant inaccuracy, misleading statement or distortion must be corrected, promptly and with due prominence, and — where appropriate — an apology published. In cases involving IPSO, due prominence should be as required by the regulator.
- iii) A fair opportunity to reply to significant inaccuracies should be given, when reasonably called for.
- iv) The Press, while free to editorialise and campaign, must distinguish clearly between comment, conjecture and fact.
- v) A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.

[Case history Slade v The Argus \(Brighton\) Decision: No breach - after investigation](#)
[Relevant code provisions 1 \(Accuracy\) 2015 2 \(Opportunity to reply\) 2015 Publication](#)
[The Argus \(Brighton\) \(Newsquest Media Group\)](#)

IMPRESS

1. ACCURACY

- 1.1. Publishers must take all reasonable steps to ensure accuracy.
- 1.2. Publishers must correct any significant inaccuracy with due prominence, which should normally be equal prominence, at the earliest opportunity.
- 1.3. Publishers must always distinguish clearly between statements of fact, conjecture and opinion.
- 1.4. Whilst free to be partisan, publishers must not misrepresent or distort the facts.

2. ATTRIBUTION & PLAGIARISM

- 2.1. Publishers must take all reasonable steps to identify and credit the originator of any third party content.
- 2.2. Publishers must correct any failure to credit the originator of any third party content with due prominence at the earliest opportunity.

NUJ – A journalist

- 2. Strives to ensure that information disseminated is honestly conveyed, accurate and fair.
- 3. Does her/his utmost to correct harmful inaccuracies.
- 4. Differentiates between fact and opinion.

CloJ

- 1) You have a duty to maintain the highest professional standards of accuracy and clearly distinguish between fact, conjecture or opinion in all your work.
- 4) If a factual inaccuracy is discovered in your work, you will seek to have it corrected at the first available opportunity, in the same format of publication, and with due prominence so that similar readership will be aware of the correction.
- 11) You should be able to compensate sources of any kind in proportion to the public interest value of their information and the risks they are undertaking.

Ofcom

2a All news in any part of the service should be presented with due accuracy and impartiality.

2b Due impartiality should be preserved on the part of persons providing the service as respects matters of political or industrial controversy or relating to current public policy.

Meaning of "due impartiality":

"Due" is an important qualification to the concept of impartiality. Impartiality itself means not favouring one side over another. "Due" means adequate or appropriate to the subject and nature of the programme. So "due impartiality" does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented. The approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience. Context, as defined in Section Two: Harm and Offence of the Code, is important.

Due impartiality and due accuracy in news

5.1 News, in whatever form, must be reported with due accuracy and presented with due impartiality.

5.2 Significant mistakes in news should normally be acknowledged and corrected on air quickly. Corrections should be appropriately scheduled.

5.3 No politician may be used as a newsreader, interviewer or reporter in any news programmes unless, exceptionally, it is editorially justified. In that case, the political allegiance of that person must be made clear to the audience.

Special impartiality requirements: news and other programmes

Matters of political or industrial controversy and matters relating to current public policy

Meaning of "matters of political or industrial controversy and matters relating to current public policy":

Matters of political or industrial controversy are political or industrial issues on which politicians, industry and/or the media are in debate. Matters relating to current public policy need not be the subject of debate but relate to a policy under discussion or already decided by a local, regional or national government or by bodies mandated by those public bodies to make policy on their behalf, for example non-governmental organisations, relevant European institutions, etc.

The exclusion of views or opinions

(Rule 5.4 applies to television and radio services except restricted services.)

5.4 Programmes in the services (listed above) must exclude all expressions of the views and opinions of the person providing the service on matters of political and industrial controversy and matters relating to current public policy (unless that person is speaking in a legislative forum or in a court of law). Views and opinions relating to the provision of programme services are also excluded from this requirement.

The preservation of due impartiality

(Rules 5.5 to 5.12 apply to television programme services, teletext services, national radio and national digital sound programme services.)

5.5 Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service (listed above). This may be achieved within a programme or over a series of programmes taken as a whole.

Meaning of "series of programmes taken as a whole":

This means more than one programme in the same service, editorially linked, dealing with the same or related issues within an appropriate period and aimed at a like audience. A series can include, for example, a strand, or two programmes (such as a drama and a debate about the drama) or a 'cluster' or 'season' of programmes on the same subject.

5.6 The broadcast of editorially linked programmes dealing with the same subject matter (as part of a series in which the broadcaster aims to achieve due impartiality) should normally be made clear to the audience on air.

5.7 Views and facts must not be misrepresented. Views must also be presented with due weight over appropriate timeframes.

5.8 Any personal interest of a reporter or presenter, which would call into question the due impartiality of the programme, must be made clear to the audience.

5.9 Presenters and reporters (with the exception of news presenters and reporters in news programmes), presenters of "personal view" or "authored" programmes or items, and chairs of discussion programmes may express their own views on matters of political or industrial controversy or matters relating to current public policy. However, alternative viewpoints must be adequately represented either in the programme, or in a series of programmes taken as a whole. Additionally, presenters must not use the advantage of regular appearances to promote their views in a way that compromises the requirement for due impartiality. Presenter phone-ins must encourage and must not exclude alternative views.

5.10 A personal view or authored programme or item must be clearly signalled to the audience at the outset. This is a minimum requirement and may not be sufficient in all circumstances. (Personality phone-in hosts on radio are exempted from this provision unless their personal view status is unclear.)

Meaning of "personal view" and "authored":

"Personal view" programmes are programmes presenting a particular view or perspective. Personal view programmes can range from the outright expression of highly partial views, for example by a person who is a member of a lobby group and is campaigning on the subject, to the considered "authored" opinion of a journalist, commentator or academic, with professional expertise or a specialism in an area which enables her or him to express opinions which are not necessarily mainstream.

Matters of major political or industrial controversy and major matters relating to current public policy

5.11 In addition to the rules above, due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service (listed above) in each programme or in clearly linked and timely programmes.

Meaning of "matters of major political or industrial controversy and major matters relating to current public policy":

These will vary according to events but are generally matters of political or industrial controversy or matters of current public policy which are of national, and often international, importance, or are of similar significance within a smaller broadcast area.

5.12 In dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views

must be included and given due weight in each programme or in clearly linked and timely programmes. Views and facts must not be misrepresented.

The prevention of undue prominence of views and opinions on matters of political or industrial controversy and matters relating to current public policy (Rule 5.13 applies to local radio services (including community radio services), local digital sound programme services (including community digital sound programme services) and radio licensable content services.)

5.13 Broadcasters should not give undue prominence to the views and opinions of particular persons or bodies on matters of political or industrial controversy and matters relating to current public policy in all the programmes included in any service (listed above) taken as a whole.

Meaning of "undue prominence of views and opinions":

Undue prominence is a significant imbalance of views aired within coverage of matters of political or industrial controversy or matters relating to current public policy.

Meaning of "programmes included in any service taken as a whole":

Programmes included in any service taken as a whole means all programming on a service dealing with the same or related issues within an appropriate period.

BBC

[The BBC's editorial guidelines on accuracy are set out in Section 3.](#)

The BBC is committed to achieving due accuracy in all its output. This commitment is fundamental to our reputation and the trust of audiences. The term 'due' means that the accuracy must be adequate and appropriate to the output, taking account of the subject and nature of the content, the likely audience expectation and any signposting that may influence that expectation.

Accuracy

- [3.1 Introduction](#)
- [3.2 Mandatory Referrals](#)
- [3.3 Guidelines](#)
 - [Gathering Material](#)
 - [Accuracy in Live Content](#)
 - [Reporting Statistics and Risk](#)
 - [User-Generated Content](#)
 - [Material from the Internet and Social Media](#)
 - [Material from Third Parties](#)
 - [Note-Taking for Journalism and Factual Programmes](#)
 - [Avoiding Misleading Audiences](#)
 - [Programmes Affected by Changing Circumstances](#)
 - [Correcting Mistakes](#)

The BBC is responsible for maintaining its own standards in relation to due impartiality and its guidelines are set out in [Section 4 of the Editorial Guidelines](#).

Due impartiality usually involves more than a simple matter of 'balance' between opposing viewpoints. We must be inclusive, considering the broad perspective and ensuring that the existence of a range of views is appropriately reflected. It does not require absolute neutrality on every issue or detachment from fundamental democratic principles, such as the right to vote, freedom of expression and the rule of law. We are committed to reflecting a wide range of subject matter and perspectives across our

output as a whole and over an appropriate timeframe so that no significant strand of thought is under-represented or omitted.

Impartiality

- [4.1 Introduction](#)
- [4.2 Mandatory Referrals](#)
- 4.3 Guidelines
 - [Diversity of Opinion](#)
 - [Due Weight](#)
 - [Impartiality in BBC Content](#)
 - [Contributors' Affiliations](#)
 - [Where BBC Content or the BBC is the Story](#)
 - [Contentious Views and Possible Offence](#)
 - [Consensus, Campaigns and Scrutiny](#)
 - [Elections and Referendums](#)
 - [Impartiality in Series and Over Time](#)
 - [Impartiality and Audiences](#)
 - [Drama, Entertainment and Culture](#)
 - [Personal View Content](#)

The BBC also has a policy on '**Right to Reply**' in its [Section 6 on Fairness to Contributors and Consent](#)

6.3.38 When our output makes allegations of wrongdoing, iniquity or incompetence or lays out a strong and damaging critique of an identifiable individual or institution the presumption is that those criticised should be offered a right of reply, that is, given a fair opportunity to respond to the allegations.

Fairness to Contributors and Consent

- [6.1 Introduction](#)
- [6.2 Mandatory Referrals](#)
- 6.3 Guidelines
 - [Contributors and Informed Consent](#)
 - [Finding Contributors](#)
 - [Safety and Welfare of Contributors](#)
 - [Intimidation and Humiliation](#)
 - [Game Shows, Quizzes, Talent Shows and Programmes Offering Life-Changing Opportunities](#)
 - [Fair Editing](#)
 - [Anonymity](#)
 - [Contributors, Access Agreements, Indemnity Forms and Editorial Independence](#)
 - [Right of Reply](#)
 - [Refusals to Take Part](#)
 - [Deception](#)
 - [Portrayal of Real People in Drama](#)

Sources

IPSO

14. Confidential sources

Journalists have a moral obligation to protect confidential sources of information.

[Case history Wadhams v The Times Decision: No breach - after investigation Relevant code provisions 1 \(Accuracy\) 2015 2 \(Opportunity to reply\) 2015 14 \(Confidential sources\) 2015 Publication The Times \(News UK\)](#)

IMPRESS

8. SOURCES

8.1. Publishers must protect the anonymity of sources where confidentiality has been agreed and not waived by the source, except where the source has been manifestly dishonest.

8.2. Publishers must take reasonable steps to ensure that journalists do not fabricate sources.

8.3. Except where justified by an exceptional public interest, publishers must not pay public officials for information.

NUJ

Protects the identity of sources who supply information in confidence and material gathered in the course of her/his work.

CloJ

7. You will maintain the confidences you agreed with any contributors.

9. You will check sources and understand that previously published material may not always have been created using the exacting standards of a professional journalist and will independently seek to verify that the information is accurate.

12. You should be able to compensate sources of any kind in proportion to the public interest value of their information and the risks they are undertaking.

OFCOM

7.7 Guarantees given to contributors, for example relating to the content of a programme, confidentiality or anonymity, should normally be honoured.

BBC

Sources

3.3.17 We should normally identify on-air and online sources of information and significant contributors and provide their credentials, so that our audiences can judge their status.

(See [Guidance: Investigations](#))

3.3.18 When quoting an anonymous source, especially a source making serious allegations, we must take all appropriate steps to protect their identity. However, we should give the audience what information we can about them and in a way that does not materially mislead about the source's status.

(See [Section 6 Fairness to Contributors and Consent: 6.3.26-6.3.31](#))

Whenever a promise of anonymity is made, both the journalist and the source must understand how this commitment extends to all those in the BBC who are aware of the identity of the source.

Where it is sought, the relevant editor, including the Director-General, as editor-in-chief, has the right to be told a source's identity and is equally obliged to keep this information confidential. In cases involving serious allegations we should resist any attempt by an anonymous source to prevent their identity being revealed to a senior BBC editor or, for independent production companies, the relevant commissioning editor. If this happens, it should be made clear that the information obtained confidentially may not be broadcast.

Anonymity

6.3.26 Sometimes information in the public interest is available only through sources or contributors on an 'off-the-record' or anonymous basis.

When practicable, referral should be made to a senior editorial figure or, for independent production companies, to the commissioning editor, who may consult Editorial Policy, before an agreement is made to protect a source's anonymity. Consideration should be given to whether anonymity should be granted and how it will be achieved.

Anonymity should be offered only when there is an editorial justification for doing so. When we grant a contributor or source anonymity as a condition of their participation, we must agree the extent of anonymity we will provide. In order to achieve that, we will need to understand who the contributor wishes to be anonymous from and why. It may be sufficient to ensure that the contributor or source is not readily recognisable to the general public, or they may wish to be rendered unidentifiable even to close friends and family. We should keep a record of conversations with sources and contributors about anonymity.

(See [Section 3 Accuracy: 3.3.15](#) and [3.3.18](#))

6.3.27 We must ensure when we promise anonymity that we are in a position to honour it, taking account of the implications of any possible court order demanding the disclosure of our unbroadcast material. When anonymity is essential, no document, computer file, or other record should identify a contributor or source. This includes notebooks, administrative paperwork, electronic devices, as well as video and audio material.

6.3.28 Effective obscuring of identity may require more than just anonymity of face. Other distinctive features, including hair, clothing, gait and voice may need to be taken into account. Where anonymity is essential, we should normally blur pictures, rather than pixelate them, and revoice contributions, rather than technically distort them, as both pixelation and technical distortion can be reversed. Audiences should be informed that the contribution has been revoiced.

6.3.29 To avoid any risk of 'jigsaw identification' (that is, revealing several pieces of information in words or images that can be pieced together to identify the individual), our promises of anonymity may also need to include, for example, considering the way a contributor or source is described, blurring house numbers, editing out certain pieces of information (whether spoken by the contributor or others) and taking care not to reveal the precise location of a contributor's home. Note that, in some circumstances, avoiding the 'jigsaw effect' may require taking account of information already in the public domain.

6.3.30 We may need to disguise the identity of international contributors to meet our obligations of anonymity or if their safety may be compromised. Third-party websites sometimes reproduce our content globally without our knowledge or consent so no guarantee can be given that a contribution will not be seen in particular countries.

(See [Guidance: Anonymity](#))

Crisis in the Protection of Journalist Sources

The confidentiality of journalists' investigations, research and communications is closely bound up with the professional duty to protect sources. The whistle-blower, Edward Snowden, revealed the extent of surreptitious interception of online data by state intelligence agencies. In the UK, the online magazine *Press Gazette* highlighted police force use of the Regulation of Investigatory Powers Act 2000 to obtain journalists' phone data without any court hearing

and scrutiny by an independent judge. While steps are being taken to lobby Parliamentarians to improve journalist source protection, you would be advised to follow techniques and advice that provide some level of information security for journalists. [A ruling of the Investigatory Powers Tribunal in the case of Scottish investigative journalist and former police officer, Gerard Gallacher](#), suggest the legal system is beginning to provide a remedy for breaches of the right to protect journalist sources. In 2016, he was awarded £10,000 damages against Police Scotland when detectives unlawfully collected communications data when trying to identify his source(s) for a series of stories on an unsolved murder inquiry.

In 2017 the IPT awarded damages of £3,000 each to two police officers whose phone records had been unlawfully accessed by Cleveland Police investigating leaks to the regional newspaper the Northern Echo. But in the case of [Dias and Others against Cleveland Police](#) the journalists whose records had been unlawfully intercepted received nothing in compensation. See: <http://www.pressgazette.co.uk/cleveland-police-illegal-phone-records-grab-police-officers-given-3000-but-journalists-get-nothing/>. The large-scale criminal prosecution of journalists and their official civil servant sources in Operation Elveden demonstrated the risk of the authorities using criminal remedies to punish the phenomenon of leaking, and leaving the courts to decide whether such actions were in the 'public interest.' All journalists prosecuted who denied any criminal wrongdoing were eventually acquitted or cleared, but most of their official sources were convicted and many jailed. The implications of not protecting journalists' sources have been explored in two online articles published by The Conversation.

See: [Protect journalists' sources or give up on British democracy](#)

And: [The lack of justice for journalists' sources is a catastrophe for democracy](#)

Former Belmarsh prison officer Robert Norman is challenging his conviction and jail sentence and although he was unsuccessful at the Court of Appeal in the ruling [Norman, R v \[2016\] EWCA Crim 1564 \(20 October 2016\)](#). He is pursuing his appeal to the ECHR in Strasbourg on the basis that he was entitled to Article 10 Human Rights freedom of expression protection as a valid source providing information to a journalist that was in the public interest. He also argues that his rights under Article 7 (no crime without law) of the convention were breached in that the use of the common law offence of misconduct in public office to criminalize public official sources giving information to journalists in the public interest did not exist when he begin his source/journalist relationship with Daily Mirror report Stephen Moyes. His payments totaling £10,000 were disclosed to the police by the newspaper publishers of the Daily Mirror and now defunct News of the World. In November 2017, and his legal team at Garden Court Chambers held a seminar to raise the implications of his case and discuss his appeal to Europe.

Important UK existing media law relating to journalists' sources

Under clause 14 of the Editors' Code followed by IPSO, all journalists and their news publishers are deemed to have a moral obligation to protect their confidential sources: 'Journalists have a moral obligation to protect confidential sources of information.' This is also a professional obligation in the codes of the NUJ and CloJ. The obligation is also in the IMPRESS code.

IPSO rulings have repeatedly berated publications that fail to protect sources. See: [A woman v Evening Chronicle \(Newcastle upon Tyne\)](#) and more recent cases of [05823-20 A woman v the Halifax Courier IPSO ruling](#) [10508-20 A man v Central Fife Times & Advertiser IPSP ruling](#)

But at the same time in the UK there is no legal obligation on the part of journalists and their publishers to protect their sources. This may develop as an area of confidentiality or privacy law in the future. In the USA journalists or publishers who 'burn' their confidential sources can be sued. This was established in 1991 in the US Supreme Court case of Cohen v. Cowles Media. Jerome A. Barron in an academic article for the William & Mary Bill of Rights Journal explained its [significance for First Amendment law and journalism in the USA](#).

At present there appears to be no law of negligence on UK journalists sources that could result in any legal comeback for journalists or publishers who betray them through negligence or even worse, malicious mischief.

Section 7.7 of Ofcom's Broadcasting Code states that: 'Guarantees given to contributors, for example relating to the content of a programme, confidentiality or anonymity, should normally be honoured.' Ofcom has statutory powers to fine broadcast licencees if they decide that the consequences of breaching 7.7 have been so serious.

IMPRESS, in its standards code, states: 'Publishers must protect the anonymity of sources where confidentiality has been agreed and not waived by the source, except where the source has been manifestly dishonest.'

Another problem in the UK is that the relationship between journalists, their publishers and their sources is affected by the fact there is no public interest defence should anyone [breach the 2010 Bribery Act](#).

The offence is wide-ranging:-

'A person ("P") is guilty of an offence if either of the following cases applies.

(2)Case 1 is where—

(a)P offers, promises or gives a financial or other advantage to another person, and

(b)P intends the advantage—

(i)to induce a person to perform improperly a relevant function or activity, or

(ii)to reward a person for the improper performance of such a function or activity.

(3)Case 2 is where—

(a)P offers, promises or gives a financial or other advantage to another person, and

(b)P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.'

The offence works both ways and potentially could catch both a source and a reporter. The same issue applies to the common law of conspiracy to commit misconduct in public office where a source is a public official or civil servant.

A recent ruling of Lord Chief Justice Morgan in Northern Ireland in July 2020 in the case

[Fine Point Films and Trevor Birney's Application, Barry McCaffrey's Application and PSNI and Durham Constabulary for search warrants' Application](#) demonstrates that journalists pursuing public interest investigations have Article 10 freedom of expression protection of source confidentiality. Under [Section 11\(1\)c of the Police and Criminal Evidence Act 1984](#) any computers, smartphone devices and office records should attract the protection of 'excluded journalistic material.'

Furthermore, if a journalist source ever get to court there would be the protection of [Section 10 of the 1981 Contempt of Court Act](#) which was the first UK legislation to statutorily protect journalist source confidentiality:-

'10 Sources of information.

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.'

Misconduct in public office can only be proved against a journalist if it can be shown that the publication of the information obtained actually damaged the public interest.

The position of journalists' rights when covering public interest stories has been highlighted somewhat acutely with the arrest and detention of professional freelance photographer Andy Aitchison who covering protests outside a detention centre for migrants in Folkestone, Kent in February 2021. The Kent police arrested him at his home for alleged criminal damage. They seized the SD card from his camera and his smartphone. Index on Censorship and other journalist NGOs, including Mr Aitchison's own trade union, NUJ, [say his treatment is an attack on press freedom](#). Index raised a ['Harassment and intimidation of journalists' alert with the Council of Europe in relation to his case](#). The Council of Europe constitutes the European Court of Human Rights at Strasbourg. The Kent police subsequently dropped the enquiry and returned his equipment.

Case History. Robert Norman v United Kingdom ECtHR 2018.

The European Court of Human Rights 4th Section

It is a struggle to find any other example in case law with a set of circumstances as seriously damaging to Article 10 protection of source rights. Operation Elveden, through the prosecution of a previously non-existent and unknown ancient common law offence, criminalized every aspect of the applicant's decision to inform a professional journalist at the highest circulation national news publishers in the country of serious public interest issues concerning the prison system. The applicant was one of scores of public officials disproportionately humiliated, shamed and criminalized by the state and legal system for exercising the legitimate aim and pressing social need to contact journalists confidentially for the purposes of public interest journalism. The personal consequences for him could not be more impactful and devastating as a warning to any other public or private individual seeking to communicate anything they wish to a journalist. In the industry's recognized online platform for professional and specialist news, *UK Press Gazette*, and the *Guardian* newspaper the individual personal cost to his professional and family life was laid bare. It was reported that he had to 'sell his house in order to pay the £51,000

costs of his defence. His wife's mental health, already fragile, deteriorated. She attempted to take her own life and was committed to psychiatric care on three occasions.'

See: 'Trinity Mirror's chiefs should resign for failing to protect a source' Guardian 24th November 2016. At: <https://www.theguardian.com/media/greenslade/2016/nov/24/trinity-mirrors-chiefs-should-resign-for-failing-to-protect-a-source>

He served six months in prison and five under home detention. It was also reported he was living on the £64 a week, which he was receiving from the state as his wife's full-time carer.

The applicant and the journalist to whom he communicated have consistently emphasized that the motivation was to bring matters to do with prison security, welfare and management to the wider attention of the public. Stephen Moyes, in the statement he released when he was told he was not going to face a criminal trial for conspiracy to commit misconduct in public office, said of the applicant: 'Without him a number of important security and safety exposés would have been hushed up – by the same negligent prison management who were responsible for them. His concerns – of sweeping staff cuts when they were at full capacity, threatening the lives of warders, inmates, and the general public – were backed up by reports and statistics from the independent prison inspector and charities such as the Howard League for Penal Reform.'

See: 'Case against cleared Sun reporter Stephen Moyes said he 'demonised' Suffolk Strangler by writing stories about him'

<https://www.pressgazette.co.uk/evidence-against-cleared-sun-reporter-stephen-moyes-said-he-demonised-suffolk-strangler-writing/>

The applicant has been denied all of the Article 10 freedom of expression rights he was entitled to as a protected journalistic source as reaffirmed in the ruling of [The ECtHR Grand Chamber at paragraphs 50 to 51 of Sanoma Uitgevers B.V. v. the Netherlands \(no. 38224/03\)](#):

'50. Freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. Whilst the press must not overstep the bounds set, not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (Observer and Guardian v. the United Kingdom, 26 November 1991, § 59, Series A no. 216) The right of journalists to protect their sources is part of the freedom to "receive and impart information and ideas without interference by public authorities" protected by Article 10 of the Convention and serves as one of its important safeguards. It is a cornerstone of freedom of the press, without which sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information to the public may be adversely affected.

51. The Court has always subjected the safeguards for respect of freedom of expression in cases under Article 10 of the Convention to special scrutiny. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, an interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.'

ECtHR jurisprudence has indicated that the importance of the source and journalist confidentiality and protection from disclosure is such that it is not necessary that the information being provided has to be proved to be of public interest. This was acknowledged in the summary of submissions in the case of [GOODWIN v. THE UNITED KINGDOM - 65723/01 \[2008\] ECHR 61 \(22 January 2008\)](#) at paragraph 37: 'the degree of public interest in the information could not be a test of whether there was a pressing social need to order the source's disclosure. A source may provide information of little value one day and of great value the next; what mattered was that the relationship between the journalist and the source was generating the kind of information which had legitimate news potential.'

Further ECtHR case law in [TELEGRAAF MEDIA NEDERLAND LANDELIJKE MEDIA BV AND OTHERS v. THE NETHERLANDS - 39315/06 - HEJUD \[2012\] ECHR 1965 \(22 November 2012\)](#) has emphasized that the motivation of the source is not critical to determining the pressing social need for journalist and source protection. At paragraph 128 the court observed in its ruling:

'While it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose (for example, by intentionally fabricating false information), courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. In any event, given the multiple interests in play, the Court emphasizes that the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10 § 2 (Financial Times Ltd. and Others, cited above, § 63).'

The importance of the conduct of the source was fully considered in [FINANCIAL TIMES LTD AND OTHERS v. THE UNITED KINGDOM - 821/03 \[2009\] ECHR 2065](#) at paragraph 63:

'In the case of disclosure orders, the Court notes that they have a detrimental impact not only on the source in question, whose identity may be revealed, but also on the newspaper against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on the members of the public, who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves (see, mutatis mutandis, Voskuil v. the Netherlands, no. 64752/01, § 71, 22 November 2007). While it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose and disclosed intentionally falsified information, courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. In any event, given the multiple interests in play, the Court emphasises that the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10 § 2.'

As a long form investigative academic researcher and journalist concentrating on the criminal justice system and the conduct of state investigation agencies and public bodies, I have detected two significant diminishing reductions in source confidence and communication. From the year 2000 longstanding sources became much more apprehensive about the security of electronic communications, the use of traceable landline and mobiles for discussion and there was a sense that their identification was much more vulnerable. Many years later that apprehension was fully justified when it became apparent that the Regulation of Investigatory Powers Act 2000 afforded police and state investigatory bodies access to mobile phone records and other communications data without independent judicial oversight. The Act enabled approval for such data acquisition from a senior officer in the same force or body.

The Leveson Inquiry in 2011 signaled a critical and hostile social and political view of journalist and public official contact; particularly with regard to any accompanying hospitality and the payment of fees for stories. The central charge was that unofficial police and journalist contact had become too close to the extent it was potentially compromising and corrupting. This was accompanied by lurid and sensational media reports of public officials and journalists being arrested in Operation Elveden for misconduct in public office offences. It was reported that overly large teams of detectives raided the homes of suspects, conducted intrusive searches when family and children were present, a sense that the crimes being investigated were being treated as seriously as terrorism or murder, followed by very long periods of police bail, sometimes as much as two years, before decisions were taken to charge and proceed to trial. Reports of public official sources receiving custodial sentences began emerging

towards the end of 2012. It was noticeable that several personal sources connected with the prison and criminal justice system became unavailable. This kind of 'chilling effect' impact was reported throughout the profession of journalism.

In 2013 the BBC's Home Affairs Correspondent, Guy Smith, concluded in a quantitative and qualitative academic dissertation and survey that 'Both police communicators and crime journalists are in sharp disagreement with how they perceive each other's methods. The results suggest both have low professional opinions of each other in terms of manipulating information.' He added the Operation Elveden had 'destabilised the relationship and caused significant damage.'

See: ['Police relationship with crime reporters under strain, research finds Survey finds lack of understanding between forces' media officers and journalists since prosecutions and Leveson inquiry'](#)

(Smith, G (2013) Is the relationship broken? A study of how police communicators and crime journalists perceive each other post-2011. Unpublished CIPR Diploma Project. The online link to this dissertation is no longer active.)

In 2016 Millar and Scott reported in their influential legal textbook on newsgathering law that although Lord Justice Leveson had urged in his report "that "remedial action" has the potential of going too far in the direction of disengagement or, speaking more colloquially, battenning down the hatches," retrenchment and a chilling effect in communication developed. They observe that the College of Policing's 2013 guidance on police and journalist relations 'pays little heed to Lord Justice Leveson's warning. All officers or civilians who meet a journalist, are interviewed, or provide information on a matter for which they are responsible should record "a note of the meeting or disclosure...In a diary or pocket book." Chief Officers should "record all contact with the media where policing matters are discussed." Millar and Scott further observed that 'a simple rule' on contact 'would discourage contact by junior officers in deference to senior officers heading investigations and to force press officers.

The guidance was derided by one experienced crime reporter as "a top-down, paranoid, defensive over-reaction by officers [who] are not accountable to anybody". She also highlighted the fact that it had caused the suspension of one Metropolitan Police Officer for "sending texts to a journalist", and another for having "a journalist's number on their mobile phone". The upshot has been a significant loss of trust between journalists and the police.' Millar and Scott chronicled a significant chilling effect descending on media relations between journalists and civil servants with changes in the Civil Service Management Code which from 2015 would preclude: '...any activities or...public statement which might involve the disclosure of official information or draw upon experience gained in their official capacity without the prior approval of their department or agency. They must clear in advance material for publication, broadcasts or other public discussion which draws on official information or experience. All contacts with media should be authorized in advance by the relevant Minister unless a specific delegation or dispensation has been agreed which may be for blocks of posts or areas of activities.' [...] The revision was criticized ... as "a blanket ban on media contact for civil servants [that is] ... an unnecessary, unworkable, and unjustified restriction on the work of the civil service ...we can see no justification for this sudden, drastic change, other than intimidating civil servants into silence."

(All quotations from pages 117-119 and sections 6.55 to 6.60 Millar & Scott 2016)

The *Guardian's* veteran and retired crime correspondent and author, Duncan Campbell, explained how the Leveson Inquiry had constructed a problematization of journalist and police contact. The Inquiry's QC Robert Jay had listed five potential features that suggested the relationships were 'over-cosy': inappropriate hospitality; off-the-record briefings; leaks; press attribution of "police sources"; and the press turning up at incidents because they had been tipped off by the police.' (Campbell 2016:231) The denunciation of the expression 'police sources' was infused with an implication of bad faith: 'a term which is redolent of impropriety, or at the very least carries with it the possibility of inappropriate

behavior, either because the police officer has indulged in gossip or leaks, or because the term is in truth a cipher or fig-leaf for an invented story because the source does not in fact exist'. (ibid) The former Met Police Commissioner Lord Condon introduced a sense of disgust when talking about how 'hospitality can be the start of a grooming process' as though he were discussing the strategies of child abusers.

In 2011 the Home Secretary and Metropolitan Police Commissioner asked Dame Elizabeth Filkin to investigate 'The Ethical Issues Arising From Relations Between the Police and the Media.' She reported in 2012 and recommended that police officers should watch out for 'late-night carousing, long sessions, yet another bottle of wine at lunch – these are all long-standing media tactics to get you to spill the beans. Avoid.' Other Dame Filkin homilies included 'Mixing the media with alcohol is not banned but should be an uncommon event,' drinking with officers 'may be seen as inappropriate hospitality' and the police should watch out for reporters 'flirting'.

Dame Filkin's report is available at:

<http://webarchive.nationalarchives.gov.uk/20140122180353/http://www.levesoninquiry.org.uk/wp-content/uploads/2012/03/Report-by-Elizabeth-Filkin.pdf>

Duncan Campbell summarizes the cumulative chilling effect of Operation Elveden arrests and prosecutions, the Leveson and Filkin reports in the words of Sean O'Neill, the Crime Editor of the *Times*, in that it had "created a culture of fear reinforced by a set of rules and regulations that have left sensible officers worried about the impact on their careers of having conversations with journalists." (Campbell 2016:234). Mr. O'Neill warned that Operation Elveden was overwhelmingly damaging to the public interest because it would lead to 'a press that is all too willing to bash the police at every opportunity because it has now seen bully-boy policing up close' (ibid).

Mr. Campbell contrasts the post Operation Elveden chilling effect with the more open and effective policy of former Met Police Commissioner, Sir Robert Mark, who has been credited with checking and rooting out police corruption during the 1960s and early 70s and who issued a memorandum in May 1973 which sought to build cooperation and goodwill with the public by fostering symbiotic and positive police and media relations: 'He urged that the police should supply the media with information "within officers' knowledge at as low a level as possible"- that is to say that a detective constable on a minor case should be able to talk directly to a reporter. And he also acknowledged that, "The new approach to dealings with the news media will of course involve risks, disappointments and anxieties; but officers who speak in good faith may be assured of my support even if they make errors of judgement when deciding what information to disclose."' (ibid 147) Mr. Campbell ended his chapter on what he titled as the 'Leveson Leviathan' with the response of a senior serving detective in March 2015 whom he had asked to interview about media/police relations: "Much as I would like to, I cannot speak to journalists without a senior press officer present and they only give permission to comment factually on jobs. The world is a very different place. Sorry." (ibid 235)

The chilling effect generated by the applicant's experience as a suspect and convicted defendant in Operation Elveden should also be contextualized with the fact that notwithstanding his betrayal by the very news publisher which had invited him to accept remuneration in return for his public interest stories on the prison system, the Police would have been able to identify him as a journalistic source without any intervening judicial scrutiny by using their powers under the Regulation of Investigatory Powers Act 2000. In September 2014 the *UK Press Gazette* spotted that the Metropolitan Police had somewhat triumphantly revealed their use under the legislation to obtain, without any court hearing, the phone records of *Sun* newspaper journalists in contact with unauthorized police sources in a dispute between a leading politician and officers on security duty at the gates of 10 Downing Street.

Press Gazette's subsequent investigation through Freedom of Information Act requests revealed large-scale use of such powers to identify largely police and public official sources suspected of leaking stories to the media over many years.

In February 2015, the then Interception of Communications Commissioner's Office reported that in an investigation going back the previous three years they had established that detectives had been able to obtain the communications data of 82 journalists using these RIPA 2000 powers. A separate non-attributable source disclosed to me: 'Think of any significant police and civil servant leak since the Act was passed and assume that the name of the journalist's source and much more was found out by the police being able to access data without having to go to a judge for a court hearing.' In the three year period 'there were 242 suspected sources investigated by police under ... 34 investigations, with 233 having their communications data taken.

The IOCCO concluded that police forces generally 'did not give the question of necessity, proportionality and collateral intrusion sufficient consideration.' It said that while generally Article 8 (privacy) of the European Convention of Human Rights was considered, Article 10 (freedom of speech) was not. The IOCCO's report also stated 80 per cent, 484 out of 608 RIPA applications in this three year period related to Operation Elveden, the Metropolitan Police's investigation into alleged inappropriate payments to public officials. The Office recommended that Parliament legislated so that 'judicial authorisation is obtained in cases where communications data is sought to determine the source of journalistic information.'

See: [Some 82 journalists have had their communications data obtained by police under the Regulation of Investigatory Powers Act in three years, the Interception of Communications Commissioner's Office has found.](#)

IOCCO report available at: <http://www.statewatch.org/news/2015/feb/uk-IOCCO-Communications-Data-Journalist-Inquiry-Report.pdf>

In conclusion, it can be strongly argued that this applicant's case under Article 10- Freedom of Expression and Article 7- No punishment Without Law, is in the context of a national regime of law, state body practice and judicial decision-making that disrespects and violates the democratic and constitutional necessity of confidential journalistic source protection under Article 10. Neither existing law, nor judicial intervention and scrutiny offered the necessary protection to the applicant, and the other source and journalist suspects targeted in Operation Elveden. The Police were operating in a culture where Article 10 rights for sources and journalists were irrelevant, ignored, and given no effective and proper consideration. The scale of improper acquisition of communications data by the police using their powers under RIPA 2000, and which enabled the identification of confidential sources without a Police and Criminal Evidence Act 1984 style production order hearing that respected the status of 'Excluded Material', is evidence of public authority antipathy to the purpose and importance of Article 10.

There is no evidence that the United Kingdom state has shown sufficient interest in safeguarding Article 10 rights for journalists and sources through the legislative provision of public interest defences for the purposes of journalism. It is absent from the 2010 Bribery Act. It did not exist when common law misconduct in public office was conjured to operate as an old Section 2 Official Secrets Act, Trojan Horse, Catch-all that criminalized any public official seeking to leak public interest information to journalists and their news publishers. The Leveson and Filkin reports have demonized and problematized public official and journalistic exchange and encounter. The collective trauma of Operation Elveden arrests, prosecution, and convictions has not served the essential vital public interest that underpins the purpose of protecting journalists' sources; namely the public interest in free communication of news and opinions.

The overall message presented by Operation Elveden, and the applicant's involvement in it, is that journalist sources on a massive scale were not protected by the UK legal system, they were disproportionately criminalized, and they will not be protected in the future. The fact that the UK state has failed to protect journalist sources in this unprecedented police inquiry means UK journalists are not going to be able to obtain information enabling them to uncover matters in society that constitute the heart of political, social and cultural debate and hold powerful government bodies and private corporations to account.

Society's paramount interest in the free communication of news and opinions has not been protected. The UK state had no overriding requirement in the public interest to use the confidential information identifying the applicant for the purposes of a criminal prosecution. He had stopped providing information to Mr. Moyes a year before the newspaper's disclosure. The sourcing of his information for story publication had been in the public interest for journalistic purposes. No crime for providing such information to a journalist when working as a public official was properly prescribed by law at the time. The engagement of criminal investigation for what had been regarded in law as an employment disciplinary matter was wholly disproportionate to any harm in relation to the rights of others. None of what happened to the applicant was necessary in a democratic society.

Recognizing journalist and source liability on the part of publishers and the pressing social need for Article 10 rights to accrue to journalist sources.

How the applicant as a source has been betrayed and his confidentiality breached to enable the police to prosecute him for an invalid crime that did not exist when he began giving information to Mr Moyes and the *Daily Mirror* is, arguably, not the pre-eminent issue. His betrayal was without his consent and that of his journalist contact. The disclosure action was by the publisher employing his journalist contact and without the knowledge of either the applicant or his journalist contact. The publisher had also been employing the applicant as its source since it was the party that had been paying him and not the individual journalist, Mr Moyes.

The narrative in terms of nexus and cause and effect is much more complicated than previous case law decided on Article 10 protection of sources by the ECtHR. The applicant's case is unique. Both he and the journalist he provided his information to have always sought to sustain the confidentiality of the protected source role that is considered so important by ECtHR jurisprudence. But that has not been the case in respect of the publisher which took the decisive action to surrender the identification of the source and electronic communications he had with the journalist to the police. It is also the case the Metropolitan Police, Crown Prosecution Service, and judiciary, at Crown Court, Appeal Court and Supreme Court level have not intervened to properly ensure the applicant's Article 10 rights.

At no stage has there been any independent judicial hearing into whether the applicant's and Mr. Moyes' Article 10 rights on protection of journalist source confidentiality preclude any use of the data provided by Mirror Group Newspapers. The Crown Court and Appeal Court engaged a balancing act using the very information that Article 10 freedom of expression journalistic source protection was supposed to shield, or to use the terminology of the Police and Criminal Evidence Act 1984 to fully exclude.

Norman V United Kingdom could be an opportunity for the European Court of Human Rights to fully recognize the applicant's standalone right as an anonymous source. It is a key foundation for the legal mechanism to protect the right of the public to a free press. His right and standing in relation to Article 10 Freedom of Expression's protection of journalist source principle should be fully recognized as equivalent to that of the journalist to whom he has entrusted his public service imperative whistle-blowing. The protection from disclosure and the jeopardy of identification has to exist independently of

any action being taken against the journalist or not. The circumstances of the applicant's case give rise to the pressing social need for such protection to accrue directly to the source and should vector legally on a vertical dimension between citizen and public authority or body, and horizontally in respect of citizen to citizen.

ECtHR case law on protection of sources is expanding and widening the frame of source vulnerability when it has previously resided in disproportionate and improper orders and directions to journalists for disclosure. In [BECKER v. NORWAY - 21272/12 \(Judgment : Violation of Article 10 - Freedom of expression-{general} \(Article 10-1 - Freedom of expression Freedom to impart information...\) \[2017\] ECHR 834 \(05 October 2017\)](#) the ECtHR was invited to explore Article 10 protection of source rights when the source had apparently volunteered his identity and participation in a criminal trial process. Yet, the court quite rightly evaluated the protection of source rights asserted almost theoretically by a journalist witness being ordered to give evidence about the identity of her source and any dealings with him. I would argue that the Court in Becker recognized changing circumstances and contexts necessitating the continuing assertion of protection of source principle. In Becker it was stated: '... the Court has held that protection afforded to journalists when it comes to their right to keep their sources confidential is "two-fold, relating not only to the journalist, but also and in particular to the source who volunteers to assist the press in informing the public about matters of public interest"' (Paragraph 76).

I would argue that paragraph 74 is of particular significance in enabling consideration of the applicant's special needs and recognition for *sui generis* stand-alone source protection when his Article 10 rights are not being considered by the journalist who wrote up his story or the news publisher that brought it to the attention of the public:

'74. The Court confirms that it has not previously had an occasion to consider the specific question arising in the present case. At the same time the Court recalls that in cases where a source was clearly acting in bad faith with a harmful purpose, it held that the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into account in the balancing exercise under Article 10 § 2 of the Convention (see, paragraphs 67-68 above quoting *Financial Times Ltd and Others*, cited above, §§ 63 and 66, and also *Telegraaf Media Nederland Landelijke Media B.V. and Others v. The Netherlands*, no. 39315/06, § 128, 22 November 2012). Consequently, a journalist's protection under Article 10 cannot automatically be removed by virtue of a source's own conduct. In the Court's view, these considerations are also relevant in a situation when a source comes forward, as in the present case. The Court recalls, moreover, that it has previously held that source protection under Article 10 applied also when a source's identity was known to the investigating authorities before a search.'

At paragraph 70 the ECtHR in Becker amplified the different set of circumstances and position for source protection when its identity had already been known to the police:

'Issues concerning source disclosure have not only arisen with respect to disclosure orders, but also in cases dealing with investigative searches, including *Görmüş and Others v. Turkey*, no. 49085/07, 19 January 2016 and *Nagla v. Latvia*, no. 73469/10, 16 July 2013. In the latter, the Court noted that there was a fundamental difference between that case and other cases, where disclosure orders had been served on journalists, requiring them to reveal the identity of their sources. However, the distinguishing feature lay not, as the Government in that case had suggested, in the fact that the source's identity had been known to the investigating authorities prior to the search. According to the Court, that fact "[did] not remove the applicant's protection under Article 10 of the Convention" (*Nagla*, cited above, § 95).'

The Court in Becker also drew on a wider range of international declarations that in my opinion can enable the present court to accommodate the recognition that the applicant's protection source rights have been severely derogated disproportionately and without a legitimate aim. On 8th September 2015

the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression submitted a report to the UN General Assembly (A/70/361), which stated:

‘...both reporter and source enjoy rights that may be limited only according to article 19 (3). Revealing or coercing the revelation of the identity of a source creates disincentives for disclosure, dries up further sources to report a story accurately and damages an important tool of accountability. In the light of the importance attached to source confidentiality, any restrictions must be genuinely exceptional and subject to the highest standards, implemented by judicial authorities only. Such situations should be limited to investigations of the most serious crimes or the protection of the life of other individuals.’ (Paragraph 40) I would argue that these observations support the applicant’s case in that the revelation or coercion of his identity brought about by Mirror Group Newspapers as the publisher clearly created a devastating disincentive for other sources to come forward to assist with news publication. The restrictions envisaged by the Special Rapporteur of investigating serious crime or protecting life did not apply to the applicant’s arrest and prosecution.

Throughout *Becker v Norway*, there are, in my opinion important jurisprudential openings to recognize the special protection that adheres to the applicant as someone who volunteered to assist the press in informing the public about significant matters of interest: ‘...the Court has held that protection afforded to journalists when it comes to their right to keep their sources confidential is “two-fold, relating not only to the journalist, but also and in particular to the source who volunteers to assist the press in informing the public about matters of public interest” (see *Nordisk Film & TV A/S v. Denmark* (dec.), no. 40485/02, ECHR 2005-XIII and, for example, *Stichting Osade Blade* (dec.), no. 8406/06, § 64, 27 May 2014). (Paragraph 76) I also think it is significant that the Court in *Becker* extrapolated the following section of the explanatory report on the right of journalists not to disclose their sources of information, adopted by the Committee of Ministers of the Council of Europe on 8 March 2000:

“d. Information identifying a source

18. In order to protect the identity of a source adequately, it is necessary to protect all kinds of information which are likely to lead to the identification of a source. The potential to identify a source therefore determines the type of protected information and the range of such protection. As far as its disclosure may lead to an identification of a source, the following information shall be protected by this Recommendation:

- i. the name of a source and his or her address, telephone and telefax number, employer’s name and other personal data as well as the voice of the source and pictures showing a source;
- ii. “the factual circumstances of acquiring this information”, for example the time and place of a meeting with a source, the means of correspondence used or the particularities agreed between a source and a journalist;...” (Paragraph 41) Again this is another example of a standalone recognition of how European Human Rights law can specifically protect the source as a separate juridical entity from the journalist.

The unprecedented decisions by News International and MGN/Trinity Mirror to engage in such large-scale disclosure breaching the journalist source confidentiality of so many journalists and their informants has changed the terms and legal geography in this area of law. That which had never been done before and on this scale has impacted so fundamentally upon Article 10 freedom of expression rights that I strongly urge the Court to recognize any extension necessary to bring the applicant into the remit of the longstanding protection of journalist source human rights jurisprudence. The Chartered Institute of Journalists recognized the urgency of the need to buttress and strengthen the specific protections and needs of the journalistic source with a resolution at its Annual General Meeting in 2013:

‘Motion on protection of sources.

‘The Institute deplores and condemns the disastrous surrendering of confidential material on journalists sources by News Corporation’s Management and Standards Committee (MSC) to the Metropolitan Police.

It is apparent that much of this information was confidential journalistic material and should have been subject to the protection of the Police and Criminal Evidence Act 1984. This information should not have been released unless by court order after a hearing before a judge at which the sources and individual journalists concerned should have had the right to independent representation.

The Institute calls on Parliament to introduce legislation so that confidential sources who have been negligently and without court order identified by the media institutions receiving, using or paying for their information can sue for compensation for the breach of their Article 10 Freedom of Expression protection of source rights as recognized by English common law and the European Court of Human Rights in a longstanding line of powerful rulings.'

UK law on the right of sources to have a legal remedy against media publishers that betray their duty of confidentiality should be given the same recognition as set out in the [US Supreme Court in Cohen v Cowles Media Co 501 US 663 \(1991\)](#).

The UK's new independent press regulator in the UK, IMPRESS, which has been recognized by the Press Recognition Panel as being fully compliant with the terms of the Leveson Inquiry, has recognized the obligation of 'publishers' as well as journalists to protect the anonymity of sources in its standards code.

'Publishers must protect the anonymity of sources where confidentiality has been agreed and not waived by the source, except where the source has been manifestly dishonest.'

(IMPRESS standards Code)

See: <https://impress.press/standards/impress-standards-code.html>

'Journalists have a moral obligation to protect confidential sources of information.' (UK editors' code of practice)

See: http://www.editorscode.org.uk/the_code.php

'You will maintain the confidences you agreed with any contributors'

'You should be able to compensate sources of any kind in proportion to the public interest value of their information and the risks they are undertaking.' (Chartered Institute of Journalists code of conduct)

See: <https://cioj.org/the-cioj-code-of-conduct-for-our-members/>

'A journalist protects the identity of sources who supply information in confidence.'"(National Union of Journalists' code of conduct)

See: <https://www.nuj.org.uk/about/nuj-code/>

'Protecting sources is a key principle of journalism for which some journalists have gone to jail.' (BBC editorial guidelines)

See: <http://www.bbc.co.uk/guidelines/editorialguidelines/assets/guidelinedocs/Producersguidelines.pdf>
[This link is no longer live.]

As shown above all of the ethical codes of regulators and professional journalism associations in the UK fully recognize that the protection of sources is a moral, professional and legal duty and central to the essential human right of freedom of expression. In conclusion, I would suggest the language, spirit and scope of these legal and ethical obligations invest the applicant's argument that his protection of source rights have been violated. There was no pressing social need and it was not necessary in a democratic society for the surrender of his confidentiality by MGN/Trinity Mirror to be used by the police and legal system to disproportionately prosecute him for a criminal offence that had no legitimacy, clarity and proper application at the time he offered to provide public interest stories to a *Daily Mirror* journalist.

The very fact that disclosure was made by the newspaper publisher and not ordered by a court, or given up by the journalist whose source he was, is, in my opinion, an urgent invitation to the ECtHR to strengthen stand-alone rights for the journalist source. As Judge Tsotsoria so eloquently stated in *Becker v Norway* in 2017: '...we are living in the modern digital era where the legal framework of the protection of journalistic sources is under significant strain. This expands the risk of erosion, restriction

and compromise in the work of journalists, with an impact on freedom of expression, the media and investigative journalism in particular. The Court has been a frontrunner and an advocate of judicial protection of journalists and their sources and in so doing it has also served as an inspiration for many other jurisdictions.’ (Concurring opinion). The applicant’s case is a dramatic manifestation and example of the significant strain referred to and professional journalists in the United Kingdom are hoping that the function they have in furthering the country’s democratic tradition can be supported by holding that his rights under Article 7 and 10 have been violated.

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This is an extract from the affidavit provided by Professor Tim Crook in Norman v United Kingdom Application no, 41387/17, August 2018 combined with articles published in The Journal of the Chartered Institute of Journalists in 2020 and 2021.

McNae’s Essential Law for Journalists 25th Edition covers some of these issues at Chapter 34 ‘Protecting journalist’s sources and neutrality’ pages 432-447.

Case History Discussion. The Snoopers’ Charter.

In September 2018 the European Court of Human Rights ruled the UK Government’s mass surveillance programmes were unlawful and violated the freedom of the press. ECtHR Judges found, by five votes to two, that the UK’s mass interception regime revealed by NSA whistleblower Edward Snowden in 2013 violated the Article 8 right to privacy under the European Convention on Human Rights.

This was because its bulk surveillance was ‘effectively indiscriminate, without basic safeguards and oversight’, and it did not have sufficient legal basis under the Regulation of Investigatory Powers Act 2000. The court also ruled there had been a breach of Article 10, the right to freedom of expression, due to the ‘potential chilling effect that any perceived interference with the confidentiality of journalists’ communications and, in particular, their sources might have on the freedom of the press.’

There were insufficient safeguards in respect of confidential journalistic material. The case was brought by a number of parties, including the Bureau of Investigative Journalism, campaign groups Big Brother Watch and English PEN, and human rights groups including Amnesty International.

Rachel Oldroyd, TBIJ managing editor was reported in Press Gazette saying: 'The Bureau believes the freedom of the press is a vital cornerstone of democracy and that journalists must be able to protect their sources. We are particularly concerned about the chilling effect that the threat of state surveillance has on whistleblowers who want to expose wrongdoing, and this ruling will force our government to put safeguards in place.'

See: <https://www.pressgazette.co.uk/extremely-good-day-for-journalism-as-echr-rules-uk-government-surveillance-regime-violated-freedom-of-the-press/>

See: The ECtHR ruling: [BIG BROTHER WATCH AND OTHERS v. THE UNITED KINGDOM - 58170/13 \(Judgment : Remainder inadmissible : First Section\) \[2018\] ECHR 722 \(13 September 2018\)](#)

The ruling reported the 'deep concern' of the UK Media Lawyers' Association that domestic law was moving away from the strong presumption that journalistic sources would be afforded special legal protection, since surveillance regimes allowed the authorities to intercept journalists' communications without the need for prior judicial authorisation. Since the protection of journalists' sources was one of the core components of Article 10, more robust protection was required.

The majority ruling stated at paragraphs 487 to 489: 'The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. The protection of journalistic sources is one of the cornerstones of freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public about matters of public interest. As a result the vital public-watchdog role of the press may be undermined, and the ability of the press to provide accurate and reliable information may be adversely affected. The Court has always subjected the safeguards for respect of freedom of expression in cases under Article 10 of the Convention to special scrutiny. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, an interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.'

The Court has recognised that there is "a fundamental difference" between the authorities ordering a journalist to reveal the identity of his or her sources, and the authorities carrying out searches at a journalist's home and workplace with a view to uncovering his or her sources. The Court considered that the latter, even if unproductive, constituted a more drastic measure than an order to divulge the source's identity, since investigators who raid a journalist's workplace have access to all the documentation held by the journalist. However, the Court has also drawn a distinction between searches carried out on journalists' homes and workplaces "with a view to uncovering their sources", and searches carried out for other reasons, such as the obtaining of evidence of an offence committed by a person other than in his or her capacity as a journalist.'

The court decided: '...in view of the potential chilling effect that any perceived interference with the confidentiality of their communications and, in particular, their sources might have on the

freedom of the press and, in the absence of any "above the waterline" arrangements limiting the intelligence services' ability to search and examine such material other than where "it is justified by an overriding requirement in the public interest", the Court finds that there has also been a violation of Article 10 of the Convention.'

In relation to the complaint of the violation of Article 8- the privacy of journalists and their sources, the court decided that regime of surveillance under the Investigatory Powers Act 2000 'was not in accordance with the law as it permitted access to retained data for the purpose of combating crime (rather than "serious crime") and, save for where access was sought for the purpose of determining a journalist's source, it was not subject to prior review by a court or independent administrative body.'

The UK government's attempts to amend and develop the Investigatory Powers Act, otherwise known as 'The Snoopers' Charter' had hit more legal buffers in April 2018 in the ruling of the English High Court.

The court ruled that parts of the Investigatory Powers Act 2016, dubbed the "Snoopers Charter", must be amended as it runs contrary to European Union law.

Judges found that the Data Retention and Investigatory Powers Act 2015 (DRIPA), which the 2016 Act replaced and expanded upon broke the law by allowing access to individuals' phone and internet records without the suspicion on criminal activity.

Parts of the 2016 Investigatory Powers Act are also unlawful.

The court concluded: 'For the reasons we have given this claim for judicial review succeeds in part, because Part 4 of the Investigatory Powers Act 2016 is incompatible with fundamental rights in EU law in that in the area of criminal justice:

- (1) access to retained data is not limited to the purpose of combating "serious crime"; and
- (2) access to retained data is not subject to prior review by a court or an independent administrative body.

We have concluded that the legislation must be amended within a reasonable time and that a reasonable time would be 1 November 2018, which is just over 6 months from the date of this judgment. We have also concluded that the appropriate remedy is a declaration to reflect our judgment.

See: <http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2018/975.html>

See the Liberty briefing at: <https://www.libertyhumanrights.org.uk/campaigning/people-vs-snoopers-charter>

At the heart of the [2016 Investigatory Powers Act](#) is the government's belief that we do not own our communications data.

The information about who we contact, on which day and at what time, where and in what way belongs to private internet service providers and telecommunications companies.

That is why the legal access is a relationship between government and data processors; not the users.

There is nothing in the Act to explicitly declare that the content of a communication is our personal property, but perhaps that is implied.

The trick played on journalists and everyone else is that the police, intelligence agencies and any of the 50 state investigatory bodies given access powers in the 2016 legislation have the data map to that content should it be preserved on computer hard discs or any form of digital storage server.

It is the roadmap to finding the more detailed evidence if required.

US government whistle-blower [Edward Snowden and Liberty say the Investigatory Powers Act is the most invasive surveillance regime of any democracy in the world.](#)

The fear for all of us is that it introduces staggering state spying powers that give the government access to up to one year of everybody's web histories, email, text and phone records.

The government says it makes us more safe and free from all the dangers of terrorism and other awful crimes.

The Dystopian Big Brother vista of doom conjured by privacy campaigners is an unnecessary and inaccurate exaggeration.

Ministers say IPA was intended to introduce transparency to state surveillance following Snowden's revelations of unlawful mass monitoring of the public's communications.

But Liberty's legal experts say it simply legalises the practices he exposed – and introduces hugely intrusive new powers which undermine our privacy, free press, free speech, protest rights, protections for journalists' sources and whistle-blowers and legal and patient confidentiality.

When it was passed in Parliament at the end of 2016 there was an atmosphere of shambolic opposition and a political climate reeling from the implications of the EU referendum.

The government was criticized for not providing any credible evidence that the extreme indiscriminate powers included in the legislation complied with European Union and European Human Rights law and were fully necessary to prevent or detect crime.

[A public petition has called for its repeal](#) with more than 200,000 signatures, but has not been debated by Parliament.

In January 2018, the English Court of Appeal ruled that near-identical powers in the Government's previous surveillance law – the Data Retention and Investigatory Powers Act – were unlawful because they let public bodies access the nation's internet activity and phone records with no suspicion of serious crime and no independent sign-off.



Twin towers of the European Court of Justice, in Kirchberg, Luxembourg. Image: Tercer. Creative Commons licence.

This ruling had applied an [earlier judgment in the same case from the European Court of Justice \(ECJ\)](#).

The Government has conceded that Part 4 of the new Act needs reform, in the light of these cases, but further intervention by the courts is not needed.

IPA not only gives state agency access to communications data on demand.

The law also allows the State to hack computers, phones and tablets on an industrial scale, and collect the content of our digital communications and records about those communications created by our computers, phones and other devices.

The scandal over Facebook's leak of data [belonging to 87 million social media users](#) has heightened public sensitivity about the significance of personal data.

It is being likened to 'the new oil' or to coin another metaphor 'the oxygen of the information age,' meaning that while it is vital to life it is also very dangerous in its pure form especially when mixed with a burning substance.

The flame of an investigation will burn ever so more brightly with IPA access to a detailed picture of a person's movements, contacts, habits and views.

The Act purports to provide safeguards for the protection of confidential journalistic information and journalist source data.

But these provisions are not equal to those offered by the [Police and Criminal Evidence Act 1984](#) where independent judicial hearings have to take place with representation for the journalist and news publisher as parties to the applications.

The IPA system does not recognize that the journalist has a right to be party to the review.

The Act appoints [a Judicial Commissioner to adjudicate applications](#) and journalists have no rights to be informed about the applications or access to their information.

[The Investigatory Powers Commissioner's Office](#) has now been up and first under Sir Adrian Fulford with a plan to use around 15 current and recently retired High Court, Court of Appeal and Supreme Court Judges as Judicial Commissioners. He was succeeded in early 2020 by

Sir Brian Leveson and there has been an expansion of the IPCO's resources and the establishment of the OCDA (Office for Communications Data Authorisations).

Everything will be conducted in secret with no public scrutiny at all and absolutely no due process of legal representation.

'Protections' for sensitive categories such 'confidential journalistic material' and 'sources of journalistic information,' are invalidated where the 'information is created or acquired for the purpose of furthering a criminal purpose.'

And it seems that the threshold of 'serious crime' now involves only investigation of an offence which carries a maximum term of imprisonment of only one year or more.

This means any public official trying to leak anything to a journalist will be furthering a criminal purpose because the maximum sentence is life imprisonment for misconduct in public office and will be 14 years for leaking info under a proposed Espionage Bill.

At a judicial review hearing brought by Liberty, the government's QC James Eadie contended that the vast majority of communications data retained will never be accessed by the state because most people are not affected by police or other relevant investigations.

This is certainly not the case with professional journalists.

Under the old Regulation of Investigatory Powers Act 2000 scores, [perhaps hundreds of journalists had their data secretly accessed](#) with a sign-off from a senior police officer in the same force.

The lack of scrutiny in such oversight chimes ironically with a profession castigated during the Leveson Inquiry for 'marking its own homework.'

When RIPA 2000 was debated in Parliament politicians assured the media industry its powers would never be used against journalists in leak inquiries.

The government lawyer said that accessing a person's entire communications data history would require the most serious justification and 'in reality the law does not permit vast, intrusive collection by the state of communications data.'

See: <http://cioj.org/thejournal/contesting-the-worlds-most-invasive-surveillance-regime/>

It is certainly arguable that the current position of oversight infrastructure of the Investigatory Powers Commissioners' Office (IPCO) and Office for Communications Data Authorisations (OCDA) is not adequate for protecting the public interest freedom of information rights of professional journalists and their sources.

[IPCO's 2019 report](#) states that communications data requests affecting journalists are 'subject to an independent decision by the Office for Communications Data Authorisations (OCDA) and are not subject to Judicial Commissioner review.'

IPCO

Investigatory Powers
Commissioner's Office

OCDA

Office for Communications
Data Authorisations

Annual Report of the Investigatory Powers Commissioner 2019

Cover of IPCO report for 2019.

The report also confirms that confidential journalist material is not protected from access 'if the journalist was using professional communications for the furtherance of serious crime.' The problem here is that serious crime is defined as any criminal offence with a maximum jail sentence of more than one year and this means there is no protection in relation to any leak enquiry of any form of government body information.

Misconduct in public office is a common law offence which in theory carries a maximum sentence of life imprisonment and has been deployed as a substitute for the notorious and repealed Section 2 of the 1911 Official Secrets Act that made it a crime to communicate any official information to a journalist.

In the digital and online sphere it is reasonable to fear that protection of journalists' sources is practically non-existent and it is extremely difficult for journalists to carry out news gathering confidentially and communicate with their sources freely and securely without the fear and suspicion of snooping, later reprisals and consequences for people providing information to them in the public interest.

The Chartered Institute of Journalists has identified further problems with the lack of Open Justice and clarity in oversight:

1. Failure to provide the identity of the law enforcement and public authorities applying for communications data relating to journalists and their sources and the journalists and publications affected;
2. No clarity on difference between 'requests' and 'authorisations' so that some kind of quantitative measurement can be made of the nature of oversight;
3. While the system engages some independent judicial oversight, it does not facilitate Open Justice equivalence. It does not match the extent of disclosure when applications

are made for production orders and access to confidential journalistic material under the Police and Criminal Evidence Act 1984;

4. In practice the oversight process is secret justice that guarantees mystery and suspicion. The Institute believes there is a need for much more information about the justification for warrants and communications data interceptions. It should be possible at the very least to provide summary accounts.
5. There is a significant natural and open justice problem in that journalists and sources affected are excluded from any knowledge and awareness of the interception while it is being carried out and remain barred from any knowledge after the event.

The Investigatory Powers Act highlights the philosophical, sociological and indeed policy confusion about the ownership and integrity of digital online information.

Mobile and Internet communications by journalists are not deemed to be owned by them. The legislation determines that power and control resides in the private corporations providing the services and the UK state thereby exercises its power of interception and surveillance with the digital host and 'proprietor' of the communication and not the journalist authors.

The Investigatory Powers Commissioners' Office (IPCO) reported that in 2019 up to 50 UK government agencies made 116 targeted communications data requests in relation to journalists 'whilst 15 were made to identify or confirm a journalistic source.' It has further indicated that '17 applications were made for warrants under the Investigatory Powers Act 2016 (IPA) where the purpose was to obtain material which the intercepting agency believed would relate to confidential journalistic material.' The report said: 'In all cases, the Judicial Commissioners (JCs) were satisfied that the case for obtaining confidential material was well made and the proposed activity was necessary and proportionate.'

The 2019 report also says: 'Only one application was made for the acquisition of communications data which was expected to include confidential journalistic material.'

Sensitive professions

In 2019, 50 law enforcement and public authorities applied for CD in relation to individuals of sensitive professions⁸⁸ (see also chapter 3).

Profession	
Lawyer	309
Journalist	116
Journalistic Source	15
Member of Parliament	138
Minister of Religion	135
Medical Doctor	300
Total	1,013

Graphic in 2019 IPCO Report setting out communications data authorisations for 'Sensitive professions' with the 'Journalist' category highlighted.

Privacy

IPSO * indicates subject to public interest exceptions.

2. *Privacy

- i) everyone is entitled to respect for their private and family life, physical and mental health, and correspondence, including digital communications.
- ii) Editors will be expected to justify intrusions into any individual's private life without consent. In considering an individual's reasonable expectation of privacy, account will be taken of the complainant's own public disclosures of information and the extent to which the material complained about is already in the public domain or will become so.
- iii) It is unacceptable to photograph individuals, without their consent, in public or private places where there is a reasonable expectation of privacy.

[Case history. Princess Beatrice of York v Mail Online Decision: Breach - sanction: publication of adjudication Relevant code provisions 2 Privacy \(2016\) Publication Mail Online \(Associated Newspapers Limited\)](#)

IMPRESS

PRIVACY

7.1 Except where justified by the public interest, publishers must respect people's reasonable expectation of privacy. Such an expectation may be determined by factors that include, but are not limited to, the following:

- a) The nature of the information concerned, such as whether it relates to intimate, family, health or medical matters or personal finances;
- b) The nature of the place concerned, such as a home, school or hospital;
- c) How the information concerned was held or communicated, such as in private correspondence or a personal diary;
- d) The relevant attributes of the person, such as their age, occupation or public profile; and
- e) Whether the person had voluntarily courted publicity on a relevant aspect of their private life.

7.2 Except where justified by the public interest, publishers must:

- a) Not use covert means to gain or record information;
- b) Respect privacy settings when reporting on social media content; and
- c) Take all reasonable steps not to exacerbate grief or distress through intrusive newsgathering or reporting.

Ofcom

To ensure that broadcasters avoid any unwarranted infringement of privacy in programmes and in connection with obtaining material included in programmes.

Rule

8.1 Any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

Meaning of "warranted":

In this section "warranted" has a particular meaning. It means that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.

BBC

Privacy is covered in [Section 7 of the BBC's Editorial Guidelines](#).

The BBC respects privacy and does not infringe it without good reason, wherever in the world we operate. The Human Rights Act 1998 gives protection to the privacy of individuals, and private information about them, but balances that with a broadcaster's right to freedom of expression. In regulation, the Ofcom Broadcasting Code [\[1\]](#) states 'Any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.'[\[2\]](#)

Meeting these ethical, regulatory and legal obligations in our output requires consideration of the balance between privacy and our right to broadcast information in the public interest. We must be able to demonstrate why an infringement of privacy is justified, and, when using the public interest to justify an infringement, consideration should be given to proportionality; the greater the intrusion, the greater the public interest required to justify it.

Privacy

- [7.1 Introduction](#)
- [7.2 Mandatory Referrals](#)
- 7.3 Guidelines
 - [Privacy and Consent](#)
 - [Secret Recording](#)
 - [Electronic Note-Taking](#)
 - [Inconspicuous Recording Devices](#)
 - [Live Streaming](#)
 - [Private Investigators](#)
 - [Doorstepping](#)
 - [Tag-Along Raids](#)
 - [Reporting Death, Suffering and Distress](#)
 - [Personal Information](#)
 - [Missing People](#)

Harassment and Intrusion into grief or shock

IPSO

3. *Harassment * indicates subject to public interest exceptions.

- i) Journalists must not engage in intimidation, harassment or persistent pursuit.
- ii) They must not persist in questioning, telephoning, pursuing or photographing individuals once asked to desist; nor remain on property when asked to leave and must not follow them. If requested, they must identify themselves and whom they represent.
- iii) Editors must ensure these principles are observed by those working for them and take care not to use non-compliant material from other sources.

[Case history Hale and Sharp v Daily Record Decision: No breach - after investigation Relevant code provisions 3 Harassment \(2018\) Publication Daily Record \(Reach PLC\)](#)

4. Intrusion into grief or shock

In cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion and publication handled sensitively. These provisions should not restrict the right to report legal proceedings.

[Case history Family of Paul Tam v Express.co.uk Decision: No breach - after investigation](#)
[Relevant code provisions 4 Intrusion into grief or shock \(2016\) Publication express.co.uk \(Reach PLC\)](#)

[Case history A woman v Derby Telegraph Decision: Breach - sanction: publication of adjudication](#)
[Relevant code provisions 3 \(Privacy\) 2015 5 \(Intrusion into grief or shock\) 2015 6 \(Children\) 2015 Publication Derby Telegraph \(Reach PLC\)](#)

5. *Reporting Suicide

When reporting suicide, to prevent simulative acts care should be taken to avoid excessive detail of the method used, while taking into account the media's right to report legal proceedings.

[Case history Dayman v Northampton Chronicle & Echo Decision: Breach - sanction: publication of adjudication](#)
[Relevant code provisions 2 Privacy \(2018\) 5 Reporting suicide \(2018\) 4 Intrusion into grief or shock \(2018\) Publication Northampton Chronicle & Ech](#)

IMPRESS

5. HARASSMENT

5.1 Publishers must ensure that journalists do not engage in intimidation.

5.2 Except where justified by the public interest, publishers must ensure that journalists:

- a) Do not engage in deception;
- b) Always identify themselves as journalists and provide the name of their publication when making contact; and
- c) Comply immediately with any reasonable request to desist from contacting, following or photographing a person.

9. SUICIDE

9.1 When reporting on suicide or self-harm, publishers must not provide excessive details of the method used or speculate on the motives.

NUJ

6. Does nothing to intrude into anybody's private life, grief or distress unless justified by overriding consideration of the public interest.

BBC

7.3.41 We must always balance the public interest in full and accurate reporting with the need to be compassionate and to avoid unjustified infringement of privacy when we report accidents, disasters, disturbances, violence against individuals or war.

We must consider the editorial justification for portraying graphic or intrusive material of human suffering and distress. When crews arriving at the scene of a disaster or emergency are under pressures that make it difficult to judge whether recording is an unjustified infringement of privacy, they will often record as much material as possible. However, in such a situation, care must be taken to assess any privacy implications prior to broadcast. The demands of live output and speed in the use of pictures, including those from social media, should not override consideration of the privacy of those suffering or in distress.

(See [Section 5 Harm and Offence: 5.3.1-5.3.5](#) and [5.3.27-5.3.31](#) and [Section 11 War, Terror and Emergencies: 11.3.7](#))

(See [Guidance: Filming in Medical Emergencies](#))

(See [Section 5 Harm and Offence: 5.3.27-5.3.31](#) and [5.3.11](#) and [Section 7 Privacy: 7.3.46](#))

Ofcom

8.11 Doorstepping for factual programmes should not take place unless a request for an interview has been refused or it has not been possible to request an interview, or there is good reason to believe that an investigation will be frustrated if the subject is approached openly, and it is warranted to doorstep. However, normally broadcasters may, without prior warning interview, film or record people in the news when in public places.

8.16 Broadcasters should not take or broadcast footage or audio of people caught up in emergencies, victims of accidents or those suffering a personal tragedy, even in a public place, where that results in an infringement of privacy, unless it is warranted or the people concerned have given consent.

8.17 People in a state of distress should not be put under pressure to take part in a programme or provide interviews, unless it is warranted.

8.18 Broadcasters should take care not to reveal the identity of a person who has died or of victims of accidents or violent crimes, unless and until it is clear that the next of kin have been informed of the event or unless it is warranted.

8.19 Broadcasters should try to reduce the potential distress to victims and/or relatives when making or broadcasting programmes intended to examine past events that involve trauma to individuals (including crime) unless it is warranted to do otherwise. This applies to dramatic reconstructions and factual dramas, as well as factual programmes.

In particular, so far as is reasonably practicable, surviving victims and/or the immediate families of those whose experience is to feature in a programme, should be informed of the plans for the programme and its intended broadcast, even if the events or material to be broadcast have been in the public domain in the past.

Professional Values

CloJ

Publication refers to all work that is undertaken by editorial staff, during the course of their professional duties, regardless of the means of dissemination or their status as contract, freelance, contributors or staff. Specifically, this excludes private correspondence but includes contributions made in online activities.

2. You will comply with the Editors' Code of Practice. You will co-operate fully with any enquiry held by the Press Complaints Commission except where sources are compromised, and, subject to any legal advice you may receive.

5) You will not request or accept payment for the publication of editorial matter under whatever guise, including costs relating to colour separation of pictures or other devices, which compromise your editorial independence.

6) You will not accept money, or any other inducement whatsoever, to manipulate editorial comment unless it is clearly identified.

8) You will respect the work of other media professionals and will not seek to undermine exclusive stories submitted by freelance contributors.

10) You will defend the principles of a free press and freedom of speech and will do nothing to damage these principles.

NUJ

A journalist:

1. At all times upholds and defends the principle of media freedom, the right of freedom of expression and the right of the public to be informed.

8. Resists threats or any other inducements to influence, distort or suppress information and takes no unfair personal advantage of information gained in the course of her/his duties before the information is public knowledge.

10. Does not by way of statement, voice or appearance endorse by advertisement any commercial product or service save for the promotion of her/his own work or of the medium by which she/he is employed.

12. Avoids plagiarism.

The NUJ believes a journalist has the right to refuse an assignment or be identified as the author of editorial that would break the letter or spirit of the NUJ code of code.

BBC

The BBC sets out a wide range of professional values that it obliges its employees to comply with in its Editorial Guidelines. They include:

[Section 14: Independence from External Interests](#)

The BBC's reputation and the strength of its brand in the UK and around the world are based upon its fundamental values of editorial integrity, independence and impartiality. These values are central both to the BBC's Public Services and our Commercial Services. Audiences everywhere must be able to trust the BBC. In order to achieve that, our impartiality, editorial integrity and independence must not be compromised by outside interests and arrangements [1]. We must maintain independent editorial control over our content.

Independence from External Interests

- [14.1 Introduction](#)
- [14.2 Mandatory Referrals](#)
- 14.3 Guidelines
 - [Product Prominence](#)
 - [Prop Placement](#)
 - [Free and Reduced Cost Facilities, Products and Services](#)
 - [Online Links to Third-Party Platforms](#)
 - [Logos and Credits Online](#)
 - [Public Service References to BBC Commercial Services and Products and Other Material Related to Editorial Content](#)
 - [BBC Support Services](#)
 - [Product Placement](#)

[Section 15: Conflicts of Interest](#)

A potential conflict of interest arises when there is the possibility that an individual's external activities or interests may affect, or be reasonably perceived as affecting, the BBC's impartiality and its integrity, or risk damaging the BBC's reputation generally or the value of the BBC brand. Conflicts of interest may occur in any area of our work.

It is a requirement that all BBC staff must formally declare any personal interest which may affect their work with the BBC. This requirement extends to freelance presenters, reporters, producers and researchers and other workers.

Conflicts of Interest

- [15.1 Introduction](#)
- [15.2 Mandatory Referrals](#)
- 15.3 Guidelines

- [Declaration of Personal Interests](#)
- [Risks of Conflicts of Interest](#)
- [News and Current Affairs](#)
- [External Activities](#)
- [Public Expressions of Opinion](#)
- [Political Activities](#)
- [Charities and Campaign Work](#)
- [Public Speaking and Other Public Appearances](#)
- [Academic Roles](#)
- [Media Training](#)
- [Personal Benefits](#)
- [On-Air Talent and Promotional Activity Including Commercial Advertising and Endorsements](#)
- [References to BBC Content in Advertisements](#)
- [Regular Contributors to Output](#)
- [Actors and Artists Replicating Their BBC Roles in Other Output](#)
- [Talent or Agent-Owned Independent Production Companies](#)

[Section 16: External Relationships and Financing](#)

Our commitment to partnerships, specifically, is set out in the BBC Charter which says that we must: seek to enter into partnerships with other organisations, particularly in the creative economy, where to do so would be in the public interest. These partnerships must be: with a wide range of organisations including commercial and non-commercial organisations and organisations of all sizes, throughout the nations and regions of the United Kingdom covering television, radio and online services.

External Relationships and Financing

- [16.1 Introduction](#)
- [16.2 Mandatory Referrals](#)
- [16.3 Part A: Guidelines for all services](#)
- [16.3 Part B: Guidelines for public services](#)
- [16.3 Part C: Additional guidelines for BBC World Service Group](#)
- [16.3 Part D: Advertising and Sponsorship for BBC Commercial Services](#)
- [16.3 Part E: Content made by BBC Commercial Services for Third Parties](#)

[Section 17: Competitions, Votes and Interactivity](#)

Interactivity is a major and growing dimension of the media scene and has a bearing on many BBC activities, both Public Service and Commercial. We aim to offer opportunities for interactivity to everyone by using different platforms in different ways. Activity in this domain by Public Services and most Commercial Services is regulated by the Ofcom Broadcasting Code (notably sections 2, 5, 7, 8, 9 and 10) and Public Services must conform to the Statement of Policy on Use of Alternative Finance in BBC Content [\[1\]](#).

The BBC seeks to apply the following principles:

All audience interactivity must be conducted in a manner that is honest and fair.

Audiences must not be materially misled about any competition or vote.

All BBC competitions, votes and awards on our Public Services must comply with the BBC's Code of Conduct for Competitions and Voting.

Competitions, Votes and Interactivity

- [17.1 Introduction](#)
- [17.2 Mandatory Referrals](#)
- 17.3 Guidelines
 - [Competitions and Votes](#)
 - [Awards](#)
 - [Content that is Pre-Recorded, Repeated, or Available on Catch-Up Services](#)
 - [Prizes](#)
 - [The Interactivity Technical Advice and Contracts Unit \(ITACU\)](#)
 - [Telephony Services](#)
 - [Game Shows and Quizzes](#)
 - [Talent Searches and Programmes Offering Life-Changing Opportunities](#)
 - [Phone-in Programmes](#)
 - [Comment and Moderation](#)
 - [User-Generated Content](#)
 - [Mobile Content, Including Apps](#)
 - [Games](#)
 - [Interactive TV Services](#)

IMPRESS

10. TRANSPARENCY

10.1. Publishers must clearly identify content that appears to be editorial but has been paid for, financially or through a reciprocal arrangement, by a third party.

10.2. Publishers must ensure that significant conflicts of interest are disclosed.

10.3. Publishers must ensure that information about financial products is objectively presented and that any interests or conflicts of interest are effectively disclosed.

10.4. Publishers must correct any failure to disclose significant conflicts of interest with due prominence at the earliest opportunity.

Reporting children and 'children in sex cases.'

IPSO

6. *Children

i) All pupils should be free to complete their time at school without unnecessary intrusion.

ii) They must not be approached or photographed at school without permission of the school authorities.

iii) Children under 16 must not be interviewed or photographed on issues involving their own or another child's welfare unless a custodial parent or similarly responsible adult consents.

iv) Children under 16 must not be paid for material involving their welfare, nor parents or guardians for material about their children or wards, unless it is clearly in the child's interest.

v) Editors must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child's private life.

7. *Children in sex cases

The press must not, even if legally free to do so, identify children under 16 who are victims or witnesses in cases involving sex offences.

In any press report of a case involving a sexual offence against a child -

- i) The child must not be identified.
- ii) The adult may be identified.
- iii) The word "incest" must not be used where a child victim might be identified.
- iv) Care must be taken that nothing in the report implies the relationship between the accused and the child.

[Case history Rooney v Daily Mail Decision: No breach - after investigation Relevant code provisions 6 Children \(2016\) Publication Daily Mail \(Associated Newspapers Limited\)](#)

[Case history A man v Wilts & Gloucestershire Standard Decision: Breach - sanction: publication of adjudication Relevant code provisions 1 \(Accuracy\) 2015 3 \(Privacy\) 2015 7 \(Children in sex cases\) 2015 11 \(Victims of sexual assault\) 2015 Publication Wilts](#)

IMPRESS

3. CHILDREN

3.1. Except where there is an exceptional public interest, publishers must only interview, photograph, or otherwise record or publish the words, actions or images of a child under the age of 16 years with the consent of the child or a responsible adult and where this is not detrimental to the safety and wellbeing of the child. While a child should have every opportunity to express his or her wishes, journalists have a responsibility to consider carefully the age and capacity of the child to consent. Unless there is a detriment to the safety and wellbeing of a child, this provision does not apply to images of general scenes.

3.2 Except where there is an exceptional public interest, publishers must not identify a child under the age of 16 years without the consent of the child or a responsible adult unless this is relevant to the story and not detrimental to the safety and wellbeing of the child.

3.3 Publishers must give reasonable consideration to the request of a person who, when under the age of 16 years, was identified in their publication and now wishes the online version of the relevant article(s) to be anonymised.

NUJ

1. A journalist shall normally seek the consent of an appropriate adult when interviewing or photographing a child for a story about her/his welfare.

Ofcom

1.1 Material that might seriously impair the physical, mental or moral development of people under eighteen must not be broadcast.

1.2 In the provision of services, broadcasters must take all reasonable steps to protect people under eighteen. For television services, this is in addition to their obligations resulting from the Audiovisual Media Services Directive (in particular, Article 27, see Appendix 2).

1.3 Children must also be protected by appropriate scheduling from material that is unsuitable for them.

Meaning of "children":

Children are people under the age of fifteen years.

Meaning of "appropriate scheduling":

Appropriate scheduling should be judged according to:
the nature of the content;

the likely number and age range of children in the audience, taking into account school time, weekends and holidays;

the start time and finish time of the programme;

the nature of the channel or station and the particular programme; and

the likely expectations of the audience for a particular channel or station at a particular time and on a particular day.

1.4 Television broadcasters must observe the watershed.

Meaning of "the watershed":

The watershed only applies to television. The watershed is at 2100. Material unsuitable for children should not, in general, be shown before 2100 or after 0530.

On premium subscription film services which are not protected as set out in Rule 1.24, the watershed is at 2000. There is no watershed on premium subscription film services or pay per view services which are protected as set out in Rules 1.24 and 1.25 respectively.

1.5 Radio broadcasters must have particular regard to times when children are particularly likely to be listening.

Meaning of "when children are particularly likely to be listening":

This phrase particularly refers to the school run and breakfast time, but might include other times.

1.6 The transition to more adult material must not be unduly abrupt at the watershed (in the case of television) or after the time when children are particularly likely to be listening (in the case of radio). For television, the strongest material should appear later in the schedule.

1.7 For television programmes broadcast before the watershed, or for radio programmes broadcast when children are particularly likely to be listening, clear information about content that may distress some children should be given, if appropriate, to the audience (taking into account the context).

(For the meaning of "context" see Section Two: Harm and Offence.)

The coverage of sexual and other offences in the UK involving under-eighteens

1.8 Where statutory or other legal restrictions apply preventing personal identification, broadcasters should also be particularly careful not to provide clues which may lead to the identification of those who are not yet adult (the defining age may differ in different parts of the UK) and who are, or might be, involved as a victim, witness, defendant or other perpetrator in the case of sexual offences featured in criminal, civil or family court proceedings:

by reporting limited information which may be pieced together with other information available elsewhere, for example in newspaper reports (the 'jigsaw effect');

inadvertently, for example by describing an offence as "incest"; or

in any other indirect way.

(Note: Broadcasters should be aware that there may be statutory reporting restrictions that apply even if a court has not specifically made an order to that effect.)

1.9 When covering any pre-trial investigation into an alleged criminal offence in the UK, broadcasters should pay particular regard to the potentially vulnerable position of any person who is not yet adult who is involved as a witness or victim, before broadcasting their name, address, identity of school or other educational establishment, place of work, or any still or moving picture of them. Particular justification is also required for the

broadcast of such material relating to the identity of any person who is not yet adult who is involved in the defence as a defendant or potential defendant.

Drugs, smoking, solvents and alcohol

1.10 The use of illegal drugs, the abuse of drugs, smoking, solvent abuse and the misuse of alcohol:

must not be featured in programmes made primarily for children unless there is strong editorial justification;

must generally be avoided and in any case must not be condoned, encouraged or glamorised in other programmes broadcast before the watershed (in the case of television), or when children are particularly likely to be listening (in the case of radio), unless there is editorial justification;

must not be condoned, encouraged or glamorised in other programmes likely to be widely seen or heard by under-eighteens unless there is editorial justification.

Violence and dangerous behaviour

1.11 Violence, its after-effects and descriptions of violence, whether verbal or physical, must be appropriately limited in programmes broadcast before the watershed (in the case of television) or when children are particularly likely to be listening (in the case of radio) and must also be justified by the context.

1.12 Violence, whether verbal or physical, that is easily imitable by children in a manner that is harmful or dangerous:

must not be featured in programmes made primarily for children unless there is strong editorial justification;

must not be broadcast before the watershed (in the case of television) or when children are particularly likely to be listening (in the case of radio), unless there is editorial justification.

1.13 Dangerous behaviour, or the portrayal of dangerous behaviour, that is likely to be easily imitable by children in a manner that is harmful:

must not be featured in programmes made primarily for children unless there is strong editorial justification;

must not be broadcast before the watershed (in the case of television) or when children are particularly likely to be listening (in the case of radio), unless there is editorial justification.

(Regarding Rules 1.11 to 1.13 see Rules 2.4 and 2.5 in Section Two: Harm and Offence.)

Offensive language

1.14 The most offensive language must not be broadcast before the watershed (in the case of television) or when children are particularly likely to be listening (in the case of radio).

1.15 Offensive language must not be used in programmes made for younger children except in the most exceptional circumstances.

1.16 Offensive language must not be broadcast before the watershed (in the case of television), or when children are particularly likely to be listening (in the case of radio), unless it is justified by the context. In any event, frequent use of such language must be avoided before the watershed.(Regarding Rules 1.14 to 1.16 see Rule 2.3 in Section Two: Harm and Offence.)

Sexual material

1.17 Material equivalent to the British Board of Film Classification ("BBFC") R18-rating must not be broadcast at any time.

1.18 'Adult sex material' - material that contains images and/or language of a strong sexual nature which is broadcast for the primary purpose of sexual arousal or stimulation - must not be broadcast at any time other than between 2200 and 0530 on premium subscription services and pay per view/night services which operate with mandatory restricted access. In addition, measures must be in place to ensure that the subscriber is an adult.

Meaning of "mandatory restricted access":

Mandatory restricted access means there is a PIN protected system (or other equivalent protection) which cannot be removed by the user, that restricts access solely to those authorised to view.

1.19 Broadcasters must ensure that material broadcast after the watershed which contains images and/or language of a strong or explicit sexual nature, but is not 'adult sex material' as defined in Rule 1.18 above, is justified by the context.

(See Rules 1.6 and 1.18 and Rule 2.3 in Section Two: Harm and Offence which includes meaning of "context".)

1.20 Representations of sexual intercourse must not occur before the watershed (in the case of television) or when children are particularly likely to be listening (in the case of radio), unless there is a serious educational purpose. Any discussion on, or portrayal of, sexual behaviour must be editorially justified if included before the watershed, or when children are particularly likely to be listening, and must be appropriately limited.

Nudity

1.21 Nudity before the watershed must be justified by the context.

The involvement of people under eighteen in programmes

1.28 Due care must be taken over the physical and emotional welfare and the dignity of people under eighteen who take part or are otherwise involved in programmes. This is irrespective of any consent given by the participant or by a parent, guardian or other person over the age of eighteen in loco parentis.

1.29 People under eighteen must not be caused unnecessary distress or anxiety by their involvement in programmes or by the broadcast of those programmes.

1.30 Prizes aimed at children must be appropriate to the age range of both the target audience and the participants. (See Rule 2.16 in Section Two: Harm and Offence.)

BBC

The BBC mirrors and follows Ofcom regulation with [Section 9: Children and Young People as Contributors](#)

Children and young people have a right to speak out and to participate, as enshrined in the United Nations Convention on the Rights of the Child, but we must safeguard the welfare of those who contribute to our content, wherever in the world we operate and irrespective of any consent that might have been given by a parent or other adult acting in loco parentis. We are also subject to the law regarding children and the [BBC's Child Protection Policy](#).

We must ensure that under-18s are not caused unnecessary distress or anxiety by their involvement in our output. Their involvement must be editorially justified, consents should be obtained as appropriate to the circumstances of the person and the nature of the contribution and content, and support should be given to them where necessary.

Children and Young People

- [9.1 Introduction](#)
- [9.2 Mandatory Referrals](#)
- 9.3 Guidelines
 - [Safeguarding the Welfare of Children and Young People](#)
 - [Informed Consent for Children and Young People](#)
 - [The Impact of a Contribution](#)
 - [Licensing of Child Performers](#)

Hospitals

IPSO

8. *Hospitals

- i) Journalists must identify themselves and obtain permission from a responsible executive before entering non-public areas of hospitals or similar institutions to pursue enquiries.
- ii) The restrictions on intruding into privacy are particularly relevant to enquiries about individuals in hospitals or similar institutions.

[Case history from Press Complaints Commission Frank O'Sullivan, the Chief Executive of Taunton & Somerset NHS Trust Clauses Noted: 3, 8 Publication: Daily Mirror in 2011](#)

Ofcom

Under the Privacy Section of the Broadcasting Code, Ofcom lays down regulation over the coverage of **Suffering and distress**:

8.16 Broadcasters should not take or broadcast footage or audio of people caught up in emergencies, victims of accidents or those suffering a personal tragedy, even in a public place, where that results in an infringement of privacy, unless it is warranted or the people concerned have given consent.

8.17 People in a state of distress should not be put under pressure to take part in a programme or provide interviews, unless it is warranted.

8.18 Broadcasters should take care not to reveal the identity of a person who has died or of victims of accidents or violent crimes, unless and until it is clear that the next of kin have been informed of the event or unless it is warranted.

8.19 Broadcasters should try to reduce the potential distress to victims and/or relatives when making or broadcasting programmes intended to examine past events that involve trauma to individuals (including crime) unless it is warranted to do otherwise. This applies to dramatic reconstructions and factual dramas, as well as factual programmes.

In particular, so far as is reasonably practicable, surviving victims and/or the immediate families of those whose experience is to feature in a programme, should be informed of the plans for the programme and its intended broadcast, even if the events or material to be broadcast have been in the public domain in the past.

8.8 When filming or recording in institutions, organisations or other agencies, permission should be obtained from the relevant authority or management, unless it is warranted to film or record without permission. Individual consent of employees or others whose appearance is incidental or where they are essentially anonymous members of the general public will not normally be required.

However, in potentially sensitive places such as ambulances, hospitals, schools, prisons or police stations, separate consent should normally be obtained before filming or

recording and for broadcast from those in sensitive situations (unless not obtaining consent is warranted). If the individual will not be identifiable in the programme then separate consent for broadcast will not be required.

BBC

The BBC has a full guidance resource on [Guidance: Filming in medical emergencies](#).

The right of patients to privacy and confidentiality is usually paramount. To enable us to film in highly sensitive medical environments, or on location with the emergency services, we distinguish between consent to film (often verbal) and consent to broadcast (always in a form that is provable, often in writing). We would not normally broadcast any footage without clear, informed consent from patients and key medical or emergency staff featured.

Key to filming in these circumstances is the principle that we consult with the medical or emergency personnel whose work we are following before making the initial decision to film a patient.

It may be appropriate to seek consent to broadcast only after the patient's treatment is complete and the decision has been taken to include their story in our output. It will be necessary to maintain close contact with the patient and their family in order to determine how and when to discuss consent to broadcast.

- [Introduction](#)
- [Filming when patients are conscious](#)
- [Filming when patients are unconscious](#)
- [Death of a patient](#)
- [Contact with the family](#)
- [Viewings with the patient and their family](#)
- [Filming people in hospital waiting rooms](#)
- [Negotiating access with hospitals and emergency services](#)

Reporting of Crime

IPSO

9. *Reporting of Crime

i) Relatives or friends of persons convicted or accused of crime should not generally be identified without their consent, unless they are genuinely relevant to the story.

ii) Particular regard should be paid to the potentially vulnerable position of children under the age of 18 who witness, or are victims of, crime. This should not restrict the right to report legal proceedings.

iii) Editors should generally avoid naming children under the age of 18 after arrest for a criminal offence but before they appear in a youth court unless they can show that the individual's name is already in the public domain, or that the individual (or, if they are under 16, a custodial parent or similarly responsible adult) has given their consent. This does not restrict the right to name juveniles who appear in a crown court, or whose anonymity is lifted.

[Case history Bobin v The Times Decision: Breach - sanction: publication of adjudication Relevant code provisions 3 \(Privacy\) 2015 9 \(Reporting of crime\) 2015 Publication The Times \(News UK\)](#)

15. Witness payments in criminal trials

i) No payment or offer of payment to a witness – or any person who may reasonably be expected to be called as a witness – should be made in any case once proceedings are active as defined by the Contempt of Court Act 1981. This prohibition lasts until the suspect has been freed unconditionally by police without charge or bail or the proceedings are otherwise discontinued; or has entered a guilty plea to the court; or, in the event of a not guilty plea, the court has announced its verdict.

*ii) Where proceedings are not yet active but are likely and foreseeable, editors must not make or offer payment to any person who may reasonably be expected to be called as a witness, unless the information concerned ought demonstrably to be published in the public interest and there is an over-riding need to make or promise payment for this to be done; and all reasonable steps have been taken to ensure no financial dealings influence the evidence those witnesses give. In no circumstances should such payment be conditional on the outcome of a trial.

*iii) Any payment or offer of payment made to a person later cited to give evidence in proceedings must be disclosed to the prosecution and defence. The witness must be advised of this requirement.

[Case history PCC investigation into an offer of payment by Full House magazine Clauses Noted: 15 Publication: Full House. Press Complaints Commission from 2008.](#)

16. *Payment to criminals

i) Payment or offers of payment for stories, pictures or information, which seek to exploit a particular crime or to glorify or glamorise crime in general, must not be made directly or via agents to convicted or confessed criminals or to their associates – who may include family, friends and colleagues.

ii) Editors invoking the public interest to justify payment or offers would need to demonstrate that there was good reason to believe the public interest would be served. If, despite payment, no public interest emerged, then the material should not be published.

[Case history Ms Treena McIntyre Clauses Noted: 5, 16 Publication: That's Life. Press Complaints Commission from 2013.](#)

IMPRESS

6. JUSTICE

6.1. Publishers must not significantly impede or obstruct any criminal investigations or prejudice any criminal proceedings.

6.2. Publishers must not directly or indirectly identify persons under the age of 18 who are or have been involved in criminal or family proceedings, except as permitted by law.

6.3. Publishers must preserve the anonymity of victims of sexual offences, except as permitted by law or with the express consent of the person.

6.4. Publishers must not make payments, or offer to make payments, to witnesses or defendants in criminal proceedings, except as permitted by law.

Ofcom

3.1 Material likely to encourage or incite the commission of crime or to lead to disorder must not be included in television or radio services.

3.2 Descriptions or demonstrations of criminal techniques which contain essential details which could enable the commission of crime must not be broadcast unless editorially justified.

3.3 No payment, promise of payment, or payment in kind, may be made to convicted or confessed criminals whether directly or indirectly for a programme contribution by the

criminal (or any other person) relating to his/her crime/s. The only exception is where it is in the public interest.

3.4 While criminal proceedings are active, no payment or promise of payment may be made, directly or indirectly, to any witness or any person who may reasonably be expected to be called as a witness. Nor should any payment be suggested or made dependent on the outcome of the trial. Only actual expenditure or loss of earnings necessarily incurred during the making of a programme contribution may be reimbursed.

3.5 Where criminal proceedings are likely and foreseeable, payments should not be made to people who might reasonably be expected to be witnesses unless there is a clear public interest, such as investigating crime or serious wrongdoing, and the payment is necessary to elicit the information. Where such a payment is made it will be appropriate to disclose the payment to both defence and prosecution if the person becomes a witness in any subsequent trial.

3.6 Broadcasters must use their best endeavours so as not to broadcast material that could endanger lives or prejudice the success of attempts to deal with a hijack or kidnapping.

BBC

The BBC follows Ofcom regulation with [Section 8 of its Editorial Guidelines- Reporting Crime and Anti-social Behaviour - Guidelines](#)

The BBC reports crime and anti-social behaviour as a matter of public interest. Our coverage is aimed at giving audiences the facts in their context and reflects our right to freedom of expression and the audience's right to receive information and ideas [1].

The BBC will also reflect the work of the agencies which fight crime, examine the nature of criminality, and report on its causes and consequences.

Some of this output is likely to require production methods that carry risks and we must weigh them up, and ensure we act proportionately, so that we observe appropriate standards of behaviour, consider the consequences of our actions and avoid obstructing the work of the authorities.

Reporting Crime and Anti-social Behaviour

- [8.1 Introduction](#)
- [8.2 Mandatory Referrals](#)
- 8.3 Guidelines
 - [Reporting crime](#)
 - [Impact on Victims](#)
 - [Reconstructions](#)
 - [Reporting Police and Regulatory Investigations](#)
 - [Court Reporting and Covering Trials](#)
 - [Dealing with Criminals and Perpetrators of Anti-Social Behaviour](#)
 - [Payments](#)
 - [Interviews with Prisoners](#)
 - [Paedophiles and Other Sex Offenders](#)
 - [Disguising Identities](#)
 - [Children and Young People](#)
 - [Dealing with Witnesses and Victims of Crime](#)
 - [Investigations into Crime and Anti-Social Behaviour](#)
 - [Untransmitted and Unused Material from Discontinued Investigations](#)

Clandestine devices and subterfuge

IPSO

10. *Clandestine devices and subterfuge

i) The press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls, messages or emails; or by the unauthorised removal of documents or photographs; or by accessing digitally-held information without consent.

ii) Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only in the public interest and then only when the material cannot be obtained by other means.

[Case history Pell & Bales v The Sun Decision: No breach - after investigation Relevant code provisions 1 \(Accuracy\) 2015 10 \(Clandestine devices and subterfuge\) 2015 Publication The Sun \(News UK\)](#)

CioJ

3) You will behave in a transparent way.

NUJ

5. Obtains material by honest, straightforward and open means, with the exception of investigations that are both overwhelmingly in the public interest and which involve evidence that cannot be obtained by straightforward means.

Ofcom

8.12 Broadcasters can record telephone calls between the broadcaster and the other party if they have, from the outset of the call, identified themselves, explained the purpose of the call and that the call is being recorded for possible broadcast (if that is the case) unless it is warranted not to do one or more of these practices. If at a later stage it becomes clear that a call that has been recorded will be broadcast (but this was not explained to the other party at the time of the call) then the broadcaster must obtain consent before broadcast from the other party, unless it is warranted not to do so.

(See "practices to be followed" 7.14 and 8.13 to 8.15.)

8.13 Surreptitious filming or recording should only be used where it is warranted. Normally, it will only be warranted if:

there is prima facie evidence of a story in the public interest; and

there are reasonable grounds to suspect that further material evidence could be obtained; and

it is necessary to the credibility and authenticity of the programme.

(See "practices to be followed" 7.14, 8.12, 8.14 and 8.15.)

Meaning of "surreptitious filming or recording":

Surreptitious filming or recording includes the use of long lenses or recording devices, as well as leaving an unattended camera or recording device on private property without the full and informed consent of the occupiers or their agent. It may also include recording telephone conversations without the knowledge of the other party, or deliberately continuing a recording when the other party thinks that it has come to an end.

8.14 Material gained by surreptitious filming and recording should only be broadcast when it is warranted. (See also "practices to be followed" 7.14 and 8.12 to 8.13 and 8.15.)

8.15 Surreptitious filming or recording, doorstepping or recorded wind-up' calls to obtain material for entertainment purposes may be warranted if it is intrinsic to the entertainment

and does not amount to a significant infringement of privacy such as to cause significant annoyance, distress or embarrassment. The resulting material should not be broadcast without the consent of those involved.

However, if the individual and/or organisation is not identifiable in the programme then consent for broadcast will not be required. (See "practices to be followed" 7.14 and 8.11 to 8.14.)

BBC

The BBC Editorial Guidelines on secret/clandestine recordings comply with Ofcom regulation and there is special guidance on [Secret Recording](#) and carrying out [Investigations](#).

- Privacy
See [Editorial Guidelines Section 7 Privacy: Legitimate Expectations of Privacy 7.1](#) and [Secret Recording 7.3.10 – 7.3.21](#)
- Fairness to Contributors and Consent
See [Editorial Guidelines Section 6 Fairness to Contributors and Consent](#)
- Accuracy
See [Editorial Guidelines Section 3 Accuracy: Note-taking for Journalism and Factual Programmes 3.3.15](#)

The BBC sets out the following key points:

- Both stages of the secret recording process – the recording and the broadcast – may need to be assessed separately to ensure that any infringement of privacy, at either stage, is editorially justified by the public interest it serves.
- The two stage process – considering any infringement of privacy in gathering secret recording separately from any infringement in broadcasting it – is reflected in the approval process that should be carried out before secret recording is to be undertaken or included in our output.
- If agreements have been made about anonymity of our sources, care should be taken to ensure the secret recording proposal form does not include details that should not be made public.
- The subject to be secretly recorded should normally be the target of any investigation, against whom there is prima facie evidence of wrongdoing or intended wrongdoing. Any attempt to secretly record people who are not involved in committing the behaviour under investigation, especially vulnerable people or innocent victims of the behaviour, will need a strong public interest justification – the ends should justify the means.
- 'Prima Facie' evidence is the information that makes it evident, without yet providing conclusive proof, that the behaviour we are intending to capture secretly is either taking place already or is intended to take place. Without clear existing prima facie evidence the BBC will not normally carry out secret recording. The more serious the infringement of privacy in any secret recording, the stronger the prima facie evidence may need to be.
- It is not normally appropriate to use secret recording in an investigation simply for illustrative purposes.
- Safety issues should be considered for staff, contributors or other members of the public that may be involved in gathering the material.

- Accurate and reliable records and notes documenting what has been secretly recorded, how it was filmed and any relevant surrounding events can be an important tool for validating the authenticity of secretly recorded material. These notes should normally be made as contemporaneously as operationally possible.

Victims of Sexual Assault

IPSO

11. Victims of sexual assault

The press must not identify or publish material likely to lead to the identification of a victim of sexual assault unless there is adequate justification and they are legally free to do so. Journalists are entitled to make enquiries but must take care and exercise discretion to avoid the unjustified disclosure of the identity of a victim of sexual assault.

[Case history A Man v The Gazette \(Paisley\) Decision: Breach - sanction: publication of adjudication Relevant code provisions 1 Accuracy \(2016\) 2 Privacy \(2016\) 7 Children in sex cases \(2016\) 11 Victims of sexual assault \(2016\) Publication The Gazette \(Pai](#)

IMPRESS

Under 6 Justice

6.2. Publishers must protect the identity of victims of sexual assault and children under 18 years of age who are or have been involved in criminal proceedings.

Ofcom

The Ofcom Broadcasting Code makes it explicitly clear that broadcasters must not under any circumstances publish anything that could lead to the identification of sexual offence complainants under Sections One Protecting under Eighteens and this is considered to apply to the identification without consent of any adults who are also sexual offence complainants.

BBC

This is covered under [Section 18 of the Guidelines The Law Principal Considerations](#) in relation to Legal Rights to Anonymity:

18.4.2 Victims and alleged victims of sexual offences, human trafficking offences and female genital mutilation have a legal right to anonymity. The rules regarding anonymity in these cases are complex and the right of anonymity cannot always be waived. Teachers also have a legal right of anonymity in some circumstances when an allegation of an offence is made concerning a pupil.

(See [Section 6 Fairness to Contributors and Consent: 6.3.26-6.3.31](#) and [Section 8 Reporting Crime and Anti-Social Behaviour: 8.3.33-8.3.37](#))

Discrimination

IPSO

12. Discrimination

i) The press must avoid prejudicial or pejorative reference to an individual's, race, colour, religion, sex, gender identity, sexual orientation or to any physical or mental illness or disability.

ii) Details of an individual's race, colour, religion, gender identity, sexual orientation, physical or mental illness or disability must be avoided unless genuinely relevant to the story.

[Case history Trans Media Watch v The Sun Decision: Breach - sanction: publication of adjudication Relevant code provisions 12 \(Discrimination\) 2015 3 \(Privacy\) 2015 Publication The Sun \(News UK\)](#)

IMPRESS

4. DISCRIMINATION

4.1. Publishers must not make prejudicial or pejorative reference to a person on the basis of that person's age, disability, mental health, gender reassignment or identity, marital or civil partnership status, pregnancy, race, religion, sex or sexual orientation or another characteristic that makes that person vulnerable to discrimination.

4.2. Publishers must not refer to a person's disability, mental health, gender reassignment or identity, pregnancy, race, religion or sexual orientation unless this characteristic is relevant to the story.

4.3. Publishers must not incite hatred against any group on the basis of that group's age, disability, mental health, gender reassignment or identity, marital or civil partnership status, pregnancy, race, religion, sex or sexual orientation or another characteristic that makes that group vulnerable to discrimination.

NUJ

9. Produces no material likely to lead to hatred or discrimination on the grounds of a person's age, gender, race, colour, creed, legal status, disability, marital status, or sexual orientation.

Ofcom

Under Section 4 of the Broadcasting Code (<https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-four-religion>) UK licensed broadcasters are obliged to:

To ensure that broadcasters exercise the proper degree of responsibility with respect to the content of programmes which are religious programmes.

To ensure that religious programmes do not involve any improper exploitation of any susceptibilities of the audience for such a programme.

To ensure that religious programmes do not involve any abusive treatment of the religious views and beliefs of those belonging to a particular religion or religious denomination.

Ofcom also stipulates under Section Two of its code dealing with Harm and Offence that broadcasters must avoid 'discriminatory treatment or language (for example on the grounds of age, disability, gender, race, religion, beliefs and sexual orientation).'

BBC

The BBC covers issues of discrimination and prejudice under [Section 5 of its Editorial Guidelines dealing with Harm and Offence](#). It provides detailed guidance briefings on [Racism and Impartiality](#), [Racist Language](#), [Reporting and portrayal of tribal peoples](#), and [Visually impaired and hearing impaired audiences](#).

Financial Journalism

IPSO

13. Financial journalism

i) Even where the law does not prohibit it, journalists must not use for their own profit financial information they receive in advance of its general publication, nor should they pass such information to others.

ii) They must not write about shares or securities in whose performance they know that they or their close families have a significant financial interest without disclosing the interest to the editor or financial editor.

iii) They must not buy or sell, either directly or through nominees or agents, shares or securities about which they have written recently or about which they intend to write in the near future.

[Case history Complainant Name: City Slickers ruling Clauses Noted: 13 Publication: Daily Mirror Press Complaints Commission investigation into publications between 1998 and 2000.](#)

BBC

The BBC has provided special [editorial guidance covering the regulatory issues for their financial journalists](#). The main principles are:

- Journalists and presenters of the BBC's financial output should register all their shareholdings, financial and business interests or dealings in securities. All BBC employees must conform to the BBC's Employment Policy "BBC Declaration of Personal Interests"
- Journalists must not use for their own profit any privileged information or financial information they receive in advance of its general publication, nor should they pass such information to others.
- It is essential that financial journalists do not promote, or give the impression of promoting, any business or financial service in the BBC's output.
- Financial journalists are subject to some specific legal restrictions. They must not promote financial services or products without proper authorisation from the relevant regulatory authority. And they must not use non-public information they acquire to trade in securities, or pass that information on to others who may trade in securities. This is "insider trading", which is a criminal offence.
- We may need to make our audiences aware that guests on financial news output have a financial or commercial interest in the topics under discussion.
- The EU's Market Abuse Directive requires to us to make our audiences aware of some additional information if it directly recommends buying or selling some securities.

Guidance in full

- [Introduction](#)
- [Declaring interests](#)
- [Guarding against exploitation of information](#)
- [Guarding against on-air promotion](#)
- [Legal Restrictions on Financial Journalists](#)
- [Guests on Financial News Programmes](#)
- [The Market Abuse Directive](#)
- [Maintaining Awareness of these issues](#)
- [Other sources of information](#)

The Public Interest

IPSO

There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.

The public interest includes, but is not confined to:

Detecting or exposing crime, or the threat of crime, or serious impropriety.

Protecting public health or safety.

Protecting the public from being misled by an action or statement of an individual or organisation.

Disclosing a person or organisation's failure or likely failure to comply with any obligation to which they are subject.

Disclosing a miscarriage of justice.

Raising or contributing to a matter of public debate, including serious cases of impropriety, unethical conduct or incompetence concerning the public.

Disclosing concealment, or likely concealment, of any of the above.

There is a public interest in freedom of expression itself.

The regulator will consider the extent to which material is already in the public domain or will or will become so.

Editors invoking the public interest will need to demonstrate that they reasonably believed publication - or journalistic activity taken with a view to publication – would both serve, and be proportionate to, the public interest and explain how they reached that decision at the time.

An exceptional public interest would need to be demonstrated to over-ride the normally paramount interests of children under 16.

IMPRESS

PUBLIC INTEREST

In certain circumstances, there may be a public interest justification for a particular method of newsgathering or publication of an item of content that might otherwise breach the Code. Where a public interest exception may apply, this is identified in the relevant clause. A public interest means that the public has a legitimate stake in a story because of the contribution it makes to a matter of importance to society. Such interests include, but are not limited to, the following:

- a. The revelation or discussion of matters such as serious incompetence or unethical behaviour that affects the public;
- b. Putting the record straight where an individual or organisation has misled the public on a matter of public importance;
- c. Revealing that a person or organisation may be failing to comply with any legal obligation they have;
- d. The proper administration of government;
- e. Open, fair and effective justice;
- f. Public health and safety;
- g. National security;
- h. The prevention and detection of crime; and
- i. The discussion or analysis of artistic or cultural works.

The following provisions apply where a publisher is about to undertake an action that they think would otherwise breach the Code, but for which they believe they have a public interest justification. The action might be a particular method of newsgathering or publication of an item of content. Before undertaking the action, the publisher should, where practicable, make a contemporaneous note, which establishes why they believe that:

- i) The action is in the public interest;
- ii) They could not have achieved the same result using measures that are compliant with the Code;
- iii) The action is likely to achieve the desired outcome; and
- iv) Any likely harm caused by the action does not outweigh the public interest in the action.

BBC

The BBC has adjusted its avowed and published definition of 'the public interest' in [a long section and preamble to its Editorial Guidelines](#). The position is now stated as:

We have a right to freedom of expression, included in the Charter and protected under the European Convention on Human Rights and the Human Rights Act 1998. This freedom is at the heart of the BBC's independence. Our audiences have a right to receive creative material, information and ideas without interference. But our audiences also expect us to balance our right to freedom of expression with our responsibilities to our audiences and to our contributors, subject to restrictions in law.

We operate in the public interest – reporting stories of significance to our audiences and holding power to account. In our journalism in particular, we seek to establish the truth and use the highest reporting standards to provide coverage that is fair and accurate. Our specialist expertise provides professional judgement and clear analysis. We are impartial, seeking to reflect the views and experiences of our audiences – so that our output as a whole includes a breadth and diversity of opinion and no significant strand of thought is under-represented or omitted. We are independent of outside interests and arrangements that could compromise our editorial integrity. Our editorial standards do not require absolute neutrality on every issue or detachment from fundamental democratic principles. Free speech enables the exchange of information and ideas without state interference. It helps to inform public debate – encouraging us to be curious, engaged and critical. It allows, for example, dramatists, satirists and comedians to comment on the world around us. However, freedom of expression is not an absolute right – it carries duties and responsibilities and is also subject to legal restrictions and limits.

In exercising freedom of expression, we must offer appropriate protection to vulnerable groups and avoid causing unjustifiable offence. We must also respect people's privacy – only putting private information into the public domain where the public interest outweighs an individual's legitimate expectation of privacy.

We have a particular responsibility towards children and young people and must preserve their right to speak out and be heard. Where they contribute to or feature in our output, we must take due care to ensure that their dignity and their physical and emotional welfare are protected.

At 1.3 it further states: 'The BBC's Mission [4] specifies that we must 'act in the **public interest**'. It is in the public interest to fulfil our mission to produce output to inform, educate and entertain. There is no single definition of public interest, but it includes freedom of expression; providing information that assists people to better comprehend or make decisions on matters of public importance; preventing people being misled by the statements or actions of individuals or organisations. The public interest is also served in exposing or detecting crime or significantly anti-social behaviour and by exposing corruption, injustice, significant incompetence or negligence.'

Harm and Offence

Ofcom

2.1 Generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material.

2.2 Factual programmes or items or portrayals of factual matters must not materially mislead the audience. (Note to Rule 2.2: News is regulated under Section Five of the Code.)

2.3 In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context (see meaning of "context" below). Such material may include, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language (for example on the grounds of age, disability, gender, race, religion, beliefs and sexual orientation). Appropriate information should also be broadcast where it would assist in avoiding or minimising offence.

Meaning of "context":

Context includes (but is not limited to):

- the editorial content of the programme, programmes or series;

- the service on which the material is broadcast;

- the time of broadcast;

- what other programmes are scheduled before and after the programme or programmes concerned;

- the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally or programmes of a particular description;

- the likely size and composition of the potential audience and likely expectation of the audience;

- the extent to which the nature of the content can be brought to the attention of the potential audience for example by giving information; and

- the effect of the material on viewers or listeners who may come across it unawares.

Violence, dangerous behaviour, and suicide

2.4 Programmes must not include material (whether in individual programmes or in programmes taken together) which, taking into account the context, condones or glamorises violent, dangerous or seriously antisocial behaviour and is likely to encourage others to copy such behaviour. (See Rules 1.11 to 1.13 in Section One: Protecting the Under-Eighteens.)

2.5 Methods of suicide and self-harm must not be included in programmes except where they are editorially justified and are also justified by the context. (See Rule 1.13 in Section One: Protecting the Under-Eighteens.)

Exorcism, the occult and the paranormal

2.6 Demonstrations of exorcism, the occult, the paranormal, divination, or practices related to any of these that purport to be real (as opposed to entertainment) must be treated with due objectivity. (See Rule 1.27 in Section One: Protecting the Under-Eighteens, concerning scheduling restrictions.)

2.7 If a demonstration of exorcism, the occult, the paranormal, divination, or practices related to any of these is for entertainment purposes, this must be made clear to viewers and listeners.

2.8 Demonstrations of exorcism, the occult, the paranormal, divination, or practices related to any of these (whether such demonstrations purport to be real or are for entertainment purposes) must not contain life-changing advice directed at individuals. (Religious programmes are exempt from this rule but must, in any event, comply with the provisions in Section Four: Religion. Films, dramas and fiction generally are not bound by this rule.)

Meaning of "life-changing":

Life-changing advice includes direct advice for individuals upon which they could reasonably act or rely about health, finance, employment or relationships.

Hypnotic and other techniques, simulated news and photosensitive epilepsy

2.9 When broadcasting material featuring demonstrations of hypnotic techniques, broadcasters must exercise a proper degree of responsibility in order to prevent hypnosis and/or adverse reactions in viewers and listeners. The hypnotist must not broadcast his/her full verbal routine or be shown performing straight to camera.

2.10 Simulated news (for example in drama or in documentaries) must be broadcast in such a way that there is no reasonable possibility of the audience being misled into believing that they are listening to, or watching, actual news.

2.11 Broadcasters must not use techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds without their being aware, or fully aware, of what has occurred.

2.12 Television broadcasters must take precautions to maintain a low level of risk to viewers who have photosensitive epilepsy. Where it is not reasonably practicable to follow the Ofcom guidance (see the Ofcom website), and where broadcasters can demonstrate that the broadcasting of flashing lights and/or patterns is editorially justified, viewers should be given an adequate verbal and also, if appropriate, text warning at the start of the programme or programme item.

Broadcast competitions and voting

2.13 Broadcast competitions and voting must be conducted fairly.

2.14 Broadcasters must ensure that viewers and listeners are not materially misled about any broadcast competition or voting.

2.15 Broadcasters must draw up rules for a broadcast competition or vote. These rules must be clear and appropriately made known. In particular, significant conditions that may affect a viewer's or listener's decision to participate must be stated at the time an invitation to participate is broadcast.

2.16 Broadcast competition prizes must be described accurately.

(See also Rule 1.30 in Section One: Protecting the Under-Eighteens, which concerns the provision of appropriate prizes for children.)

Note:

For broadcast competitions and voting that involve the use of premium rate telephony services (PRS), television broadcasters should also refer to Rules 9.26 to 9.30. Radio broadcasters should refer to Rules 10.9 to 10.10.

Meaning of "broadcast competition":

A competition or free prize draw featured in a programme in which viewers or listeners are invited to enter by any means for the opportunity to win a prize.

Meaning of "voting":

Features in a programme in which viewers or listeners are invited to register a vote by any means to decide or influence, at any stage, the outcome of a contest.

BBC

The BBC Editorial Guidelines closely mirror Ofcom regulation under Section 5 with the same title '[Harm and Offence.](#)'

The BBC aims to reflect the world as it is, including all aspects of the human experience and the realities of the natural world. In doing so, we balance our right to broadcast innovative and challenging content, appropriate to each of our services, with our responsibility to protect the vulnerable, especially young people, and to avoid unjustifiable offence.

Harm and Offence

- [5.1 Introduction](#)
- [5.2 Mandatory Referrals](#)
- 5.3 Guidelines
 - [Audience Expectations](#)
 - [Content Information](#)
 - [Labelling On-Demand and Digital Content](#)
 - [Scheduling for Television and Radio](#)
 - [Live Output](#)
 - [Language](#)
 - [Violence](#)
 - [Intimidation and Humiliation](#)
 - [Nudity](#)
 - [Sex](#)
 - [Abusive or Derogatory Treatment](#)
 - [Portrayal](#)
 - [Alcohol, Smoking, Vaping, Solvent Abuse and Illegal Drugs](#)
 - [Suicide, Attempted Suicide, Self-Harm and Eating Disorders](#)
 - [Imitative Behaviour](#)
 - [Tragic Events](#)
 - [Religion](#)
 - [Hypnotism, Exorcism, the Occult and the Paranormal](#)
 - [Flashing Images, Strobng and Images of Very Brief Duration](#)
 - [Acquired Programmes](#)

The final instructive section for your Pocketguide is a section offering you short revision briefings on **Primary Media Law**. Here are ten fast briefings, backed up online with video-casts.

Video/podcast urls

UK Contempt and Reporting Crime

1. Demonizing crime suspects after they've been arrested by impeding a police inquiry, a defence case, or publishing seriously prejudicial material when there's a substantial risk of influencing a jury is media contempt & a criminal offence. Do not identify suspects unless charged. Likely to be a breach of privacy. There may be an exception if officially named by the police.

<http://www.youtube.com/watch?v=9jW78STg5KY>

<ol style="list-style-type: none"> 2. You can twitter and email from court unless directed not to and accurate and fair reporting's ok. 3. Taking pictures or recording sound inside a courtroom is usually a crime. 4. Alleged sex offence victims have anonymity for life from the time they complain. 5. Young people aged 17 and under, along with vulnerable witnesses, blackmail victims with embarrassing menaces, and undercover state investigators usually have legal anonymity. 6. Never report anything in the absence of the jury. 7. Don't interview jurors about their deliberations (another criminal offence), harass judges for interviews, or pay criminals and their families for stories. 8. Open justice is protected by freedom of expression Article 10 of the Human Rights Act, presumption of innocence is protected by Article 6 right to fair trial. <p>McNae's Essential Law for Journalists 25th Edition Chapter 5 'Crime- media coverage prior to any court case' pages 61-70, and Chapter 19 'Contempt of court' pages 261-283.</p>	
<p>Guide to Court Reporting Key facts and Checklist</p> <ol style="list-style-type: none"> 1. When you report court cases it's a good idea to be respectfully dressed as well as respectfully behaved. 2. Bear in mind that alleged victims of sexual offences will be named in court but you'll not be allowed to publish anything that's identifiable. 3. Be careful to remove any detail that leads to jigsaw identification, where people could put two and two together. 4. Where young people 17 and under are involved as accused or witnesses, adult courts have to make the orders, but in youth courts were the public's not admitted, there's default anonymity. 5. Orders on children also specifically cover the schools they go to. 6. Always check with the court if there are any other reporting restrictions- they might not be obvious. 7. Attribute everything, avoid comment, stick to the language you've heard in court, & satisfy fairness by representing both sides in your report. 8. You'll realize how important it was to take that shorthand writing course. Keep a couple of notes, one taking down newsworthy quotes and the other writing the story while you're there. 9. In April 2015 court reporting restrictions relating to people aged 17 and under were intensified in England and Wales. In criminal cases orders under section 45 of the Youth Justice and Criminal Evidence Act 1999 mean any youth who is not a 	<p>http://www.youtube.com/watch?v=Rv1VL2jOt1c</p>

<p>defendant has anonymity for life- beyond the time they reached the age of 18. Breaching youth anonymity orders can lead to an unlimited amount.</p> <p>10. When covering remote hearings do not under any circumstances record sound or video. This is a contempt of court.</p> <p>McNae’s Essential Law for Journalists 25th Edition has a range of chapters on covering the courts and court reporting. Chapters 7 and 8 ‘Magistrates Courts- summary’ and ‘The Most serious criminal cases’ pages 77-98, Chapter 9 ‘Crown courts and appeal courts’, pages 99-110, Chapter 10 ‘Juveniles in court proceedings’, pages 111-127, Chapter 11 ‘Victims of sexual offences, human trafficking, female genital mutilation, and forced marriage offences’, pages 128-146, Chapter 12, ‘Court reporting and other restrictions pages 146-163, Chapter 13 ‘Civil courts and reporting restrictions’, pages 164-172, Chapter 14 ‘Family courts and restrictions’, pages 173-181, Chapter 15 ‘Open Justice and access to court information, pages 182-211, Chapter 16 ‘Challenging the courts’ pages 212-242, Chapter 17 ‘Coroner’s courts and inquests’ pages 243-254, and Chapter 18 ‘Tribunals and public inquiries’ pages 255-260.</p>	
<p>Libel, Privacy, Accuracy and Balance</p> <ol style="list-style-type: none"> 1. Libel is untruthful publication to a third party, that seriously harms reputation, can identify by innuendo, & cross-media jigsaw connections, burden of proof is on defendant, & damage is presumed. 2. Harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss. 3. Defences include honest opinion, truth, a reasonable belief that the publication, either fact or opinion, was a matter of public interest with an allowance for editorial judgment, privilege in fair and accurate reports of courts, parliament, public meetings, press conferences, and peer-reviewed scientific or academic conferences & journals. 4. Prior restraint not usually available if the media defendants intend to defend their case. 5. Media privacy & confidentiality stem from Article 8 of Human Rights Act, protects private information, either truthful or not truthful such as health, relationships, sexuality, home, correspondence and family life- where there’s a reasonable expectation of privacy. Intrusion and publication has to be justified by public interest. Breach of privacy can be by media conduct as well as media publication. 6. Prior restraint usually available because privacy is like a cube of ice, It’s gone once melted. Now English courts have to hold a hearing and hear legal argument against prior restraint before issuing injunctions. Even where parties remain anonymous, the legal system has to keep and make available a record of the decision. The media must have notice of prior restraint applications. 7. Inaccurate publication that neither harms reputation nor breaches privacy can still lead to fines, prominent corrections and apologies by Ofcom regulation of broadcasters and independent press regulation of print media. No public interest defence available. 	<p>http://www.youtube.com/watch?v=oBq6CXeLHOc</p>

<ol style="list-style-type: none"> 8. Broadcasters have a legal duty to be impartial and avoid giving undue prominence to views and opinions. 9. Press can be partial, but Editors' Code expects a distinguishing between comment, conjecture & fact. 10. The right to be forgotten asserted in EU Court of Justice ruling in 2014 applies to data processing search engines such as Google; not the archive of journalistic publications. 11. Data Protection legislation in the EU and UK and regulated by the Information Commissioner's Office imposes public interest duties on media processing of private information and its publication. <p>McNae's Essential Law for Journalists 25th Edition covers defamation, libel, slander, malicious falsehood and obscenity across Chapters 20 to 25 pages 287-348. Chapter 26 covers 'Breach of confidence and privacy' at pages 351-374, and Chapter 27 'Data protection' at pages 375-380.</p>	
<p>News Gathering, Story Finding, and Public Interest</p> <ol style="list-style-type: none"> 1. Public interest used to be what interested the readers who bought newspapers, watched television, listened to the radio or went online. 2. Now it's defined by Ofcom, a government quango for broadcasters, the BBC itself, independent press regulation, politicians in legislation, government law officers such as the DPP and judges in case law. And the law is what they say, not what the audience says it wants and is interested in. 3. This means journalists committing crimes and civil wrongs have public interest defences in a few situations but are denied it in most. 4. Phone and computer hacking - no public interest, bribing police officers, civil servants or anybody else, breaching national security, stalking celebrities & public figures, fraud by subterfuge - no public interest. 5. Blagging by tricking people to get private information, harassing by door-stepping - there're limited public interest defences. 6. Journalists' sources are protected by statute and European human rights law subject to the interests of investigating crime, national security and the administration of justice. 7. If the police want unused media footage of public events they need a court order, if they want confidential info in notebooks and computers there's an excluded material protection for the purposes of journalism but the Leveson Inquiry recommended the Home Office look into whether this should be scaled down. 8. There is evidence that the police and other state agencies have been using the Regulation of Investigatory Powers Act 2000 to obtain meta-communications data and phone records of journalists without their knowledge, but this is being challenged at the European Court of Human Rights and Investigatory Powers Tribunal. 	<p>http://www.youtube.com/watch?v=WZMix7z7WhE</p>

<p>9. There is a public interest defence to copyright infringement, but this is usually limited to material that discloses or reveals crime and there is no other way of reporting the event without using the material.</p> <p>McNae's Essential Law for Journalists 25th Edition contains several chapters covering these issues. Chapter 34 'Protecting journalist's sources and neutrality' pages 432-447, Chapter 35 'Bribery, misconduct, hacking and interception' pages 433-448, Chapter 38 'The incitement of hate' and Chapter 40 'Terrorism and the effect of counter-terrorism law which are both online only.</p>	
<p>Protecting Children</p> <ol style="list-style-type: none"> 1. Minimum age of criminal responsibility in England Wales and Northern Ireland is 10, in earliest age children can be prosecuted in Scotland is 12. 2. The criminal justice system protects young people aged 17 and under with anonymity restrictions for them and their schools- This has become the same in Scotland. There's no youth court system there- They're managed in a social work oriented system of children's panels. 3. Ofcom, BBC, independent press regulation, and the courts give the protection of children, their highest priority. There's a 9 p.m. watershed for television. Ofcom makes it clear material that might seriously impair the physical, mental or moral development of people under eighteen must not be broadcast. Watershed for radio can be any time when 'children are particularly likely to be listening.' 4. Children are never usually identifiable in any reports of family court proceedings. 5. The UK media, press & broadcasting are legally obliged to protect children so they're free to complete their school education without unnecessary intrusion, children under 16 must not be interviewed or photographed without consent of guardians/parents and must not be approached or photographed at school without the school's permission. 	<p>http://www.youtube.com/watch?v=CbYig2gE0pk</p>
<p>Copyright and Intellectual Property</p> <ol style="list-style-type: none"> 1. Primary authorial works of a literary, dramatic, musical and artistic kind have copyright protection lasting 70 years after the death of the author/creator. 2. Secondary entrepreneurial works such as sound productions, broadcasts, and films have a copyright protection usually lasting 70 years after first public release. 3. Most journalists rely on the defence of fair dealing when using other people's copyright material without payment. But it's a limited and inflexible defence. 4. Things you should know- Fair dealing can be for criticism and review, but you must not use the substantial part of the original work and you must acknowledge and attribute. What is less than the substantial part is not clearly defined. 5. Fair dealing can also be for reporting current events and the application of the word 'current' is limited by case law. So TV clips of a news event covered by a rival broadcaster should only be usable with sufficient acknowledgement within 24 	<p>http://www.youtube.com/watch?v=gBP-52lw1Gs</p>

<p>hours. There's no, repeat no fair dealing for reporting current events in relation to photographs and images.</p> <ol style="list-style-type: none"> 6. But case law indicates there may be rare exceptions when an image carries great public interest value (such as showing a crime), has already been published, does not undermine the commercial rights of the photographer or publisher and its origin is fully acknowledged. 7. Can you 'fair deal' photographs for criticism & review? In theory yes, but in practice rather difficult. How can you 'quote' and extract what is the less substantial part of an image? 8. From October 1st 2014 UK copyright law extended the fair dealing defence to quotation of works (whether for criticism or review or otherwise); works for the purposes of caricature, parody or pastiche; and the making of personal copies of works (other than computer programs) for private use. However, the making personal copies provision has been ruled unlawful by the High Court. The government when enabling private copying as an exception to copyright laws did not ensure that rights holders received fair compensation. And the government's Intellectual Property Office says the quotation defence will not permit use by news media of current event photographs without the permission and/or remuneration to copyright owners. 9. Simple advice probably best to adopt a cautious approach; when using other people's stuff in media publication pay them, or get their permission. <p>McNae's Essential Law for Journalists 25th Edition covers the media law of Copyright at chapter 29 pages 381-397.</p>	
<p>Laws and Rules for Elections and Politics</p> <ol style="list-style-type: none"> 1. During the coverage of elections libel, privacy, accuracy and fairness obligations remain the same. 2. What's additional? Well there's a separate criminal offence for making or publishing a false statement of fact about the personal character or conduct of an election candidate with a purpose to affect the voting. 3. While there's a continuation of qualified privilege subject to contradiction or explanation for election meetings open to the public, the defence does not, repeat does not apply to candidates' election addresses. 4. There's a legal ban on publishing exit polls while people are voting on polling day. This does not mean you are prevented publishing the result of opinion polls surveyed before the polling stations open for voting. 5. UK broadcasters have a legal duty to be impartial and balanced in their coverage during election periods. Print and online publishers can be as biased as they want. 6. This means that broadcast presenters cannot, repeat cannot express their personal support for any candidate or party. And candidates and their parties 	<p>http://www.youtube.com/watch?v=WvddYLSkWk</p>

<p>should have an opportunity to participate in all reports and programmes covering the election.</p> <ol style="list-style-type: none"> 7. Ofcom, the BBC and the Electoral commission usually publish helpful guides for the media when elections happen. 8. Lastly when covering election counts reporters need to respect and follow the directions of election/returning officers. <p>McNae's Essential Law for Journalists 25th Edition covers the media law of Reporting Elections in Chapter 32 pages 420-425.</p>	
<p>The Secret World</p> <ol style="list-style-type: none"> 2. Journalists can breach the Official Secrets Act if they disclose information, without permission, knowing or having reasonable cause to believe it is protected...and they know the information, in the protected categories, is what is described as 'damaging'. 3. Categories include security and intelligence, defence, international relations, crime, information on government phone-tapping, interception of letters or other communications, information entrusted in confidence to other states or international organizations. 4. The UK state persecutes and terrorizes potential whistle-blowers and journalist sources- in other words crown employees/officers working in intelligence. 5. If they want to put anything into the public domain, they have to go before a secretive Investigatory Powers Tribunal, which has been criticized for giving decisions without reasons, though it does have a web-site publishing some of its rulings and has held some of its proceedings in public. 6. Journalists who annoy or embarrass the UK state can still have the indignity of being arrested and their homes, offices, papers, files and computers searched. So, a rather unpleasant message is delivered without any further legal action following. 7. Sensitive stuff that might relate to terrorism, torture and rendition is kept from the public by the use of 'special advocates' in SIAC hearings and other areas of litigation. 8. In total secrecy, suspected terrorists get lawyers who can't communicate with them but can see, hear & challenge the 'secret' information used against them. In 2013 the UK government expanded this process into the rest of the legal system in what they call 'closed material procedure.' 9. The identity of secret witnesses, unknown to the defence, is a standard practice in many criminal trials. Some witnesses appear as pseudonyms; others as letters or numbers. 	<p>http://www.youtube.com/watch?v=MtAbRSMqloY</p>

<p>10. Terrorism legislation provides no public interest defence for journalists and media workers who do anything that knowingly assists the preparation of acts of terrorism. There is a positive obligation in criminal law for journalists who have any knowledge about terrorism to report the information to the police.</p> <p>11. In 2014 the <i>Guardian</i> challenged an Old Bailey judge's decision to hold an entire terrorism trial in secret with the identity of the 2 defendants anonymized.</p> <p>12. The Appeal court ruled that the accused should be named, and elements of the trial had to be heard in open court including swearing in of the jury, reading the charges to the jury, part of the judge's opening remarks to the jury, part of the prosecution opening, the verdicts, and sentencing in the event of guilty verdicts.</p> <p>13. Accredited journalists were also permitted to attend much of the <i>in camera</i> proceedings provided they agreed to be bound by confidentiality and left their notes with the court at the end of the day. This means that should the reason for the secrecy be lifted the media will be able to report what happened behind closed doors. But this has not happened and the issue is being challenged by newspaper groups.</p> <p>McNae's Essential Law for Journalists 25th Edition at Chapter 33 has an online section on Official Secrets pages 426-431 in addition to the printed text.</p>	
<p>Scottish and Northern Ireland differences and issues</p> <ol style="list-style-type: none"> 1. Scotland and Northern Ireland have separate legal systems and the Scottish jurisdiction is substantially different because the country kept its own system after constitutional union in 1707. 2. Most restrictions on the media are similar- for example the protection of children and sexual offence complainants, the protection of trial by jury through media contempt law, and libel, though Scottish libel law is much more different. 3. Things to watch out for: If you're a broadcaster or publisher and distribute the same edition between England & Wales throughout Scotland and Northern Ireland, you need to be careful and conscious that: 4. Media contempt law in Scotland has been traditionally much more severely applied. 5. Publication of the photographs of accused people, unless they are well known public figures and celebrities, is usually contempt until the issue of formal dock identification is resolved during the trial proper. 6. Anonymity for youths in criminal courts in Scotland is now 17 and under and the same as in England and Wales. In civil and family proceedings, the same anonymity relating to people under 18 that applies in England also applies in Scotland. 7. Injunctions granted in the London courts do not apply in Scotland- a separate process to obtain what is known as an interdiction is required. 8. It is a criminal offence in Northern Ireland to publish anything leading to the identification of anyone on a jury or jury panel. 9. In Northern Ireland courts are more willing to grant anonymity to criminal defendants if there's a risk to life through sectarian vigilante attacks. 10. The reforming 2013 Defamation Act at present will not apply in Northern Ireland. 11. At present only the new qualified privilege defence for a peer-reviewed statement in scientific or academic journal applies in Scotland. The new 'having a reasonable belief in public interest defence' in the context of editorial judgment set out in the 	<p>http://www.youtube.com/watch?v=P_wqCS4XU_wc</p>

2013 Defamation Act does not apply in Scotland, but the responsible journalism defence still applies and this is informed by the leading authorities of Reynolds 1999, Jameel 2006 and Flood in 2012. The Scottish Law Commission has recommended that defamation law mirrors that of England with one year to bring an action and a public interest defence set out in statute law. See: [https://www.scotlawcom.gov.uk/files/1615/1316/5504/News_Release - Report on Defamation Report No 248.pdf](https://www.scotlawcom.gov.uk/files/1615/1316/5504/News_Release_-_Report_on_Defamation_Report_No_248.pdf)

12. Other reforms include abolishing the right to sue where a defamatory statement is made only to the person who is the subject of it and no-one else; where a statement has not caused serious harm to reputation there should be no right to sue; there should be a new 'single publication' rule- this means that the time limit for bringing a claim will not start afresh each time the same statement is downloaded by a new search on the internet.
13. The judiciary in Northern Ireland and Scotland have traditionally been more sensitive to vituperative criticism. There is a more recent history of extreme communication about judges that are not based on facts in theory attracting criminal contempt consideration- it is known as scandalizing a judge. However, any resurrection of this old law would now be regarded as socially anachronistic. However, defamatory attacks on judges have attracted libel actions. Judges in the UK do sue, and there is an acute risk that abuse of judges that crosses the line into an inaccurate attack on reputation or 'hate speech' will attract some kind of legal consequence. Section 33 of the 2013 Crime & Courts Act abolished scandalizing judges as contempt of court in England and Wales.

McNae's Essential Law for Journalists 25th Edition has two chapters on the media law of Northern Ireland and Scotland. Chapter 37 on Northern Ireland pages 465-470 is available in the printed book and [Chapter 39 on Media Law in Scotland is available online](#). Scottish Courts and Tribunals Service [online media guide on restrictions & access](#).

Social Media/Online/Blogging- the media law risks are the same and sometimes greater. Good reasons why in professional journalism there is little margin for error and you cannot afford to make mistakes.

1. Tweets, re-tweets, blogs, Facebook, Instagram images or digital video, YouTube, Vimeo, messaging & 'status' notices and emails 'copied' and 'distributed' to more than a second party i.e. beyond the traditional single mail correspondent can be libellous and represent publications in terms of English law. The old rule was the letter seen by one person was not a libel publication unless opened by your butler or secretary. Bear in mind that libel in Scotland includes a damage to reputation communication to one person only;
2. In this country (England & Wales) libel is a civil law issue where the burden of proof is on the defendant, not claimant. English libel is an emotional civil wrong and damage to reputation, is presumed not objectively measured, construction of meaning in your communication has nothing to do with your intention, and is usually assessed by the most negative perception and by the most sensitive disposition;
3. Litigation is pursued by a privatised profit led legal profession that operates with very high costs.
4. Legal fees charged by English media lawyers have been researched and surveyed as being in the region of well over 100 times that charged in European countries. Damages awarded and agreed are generally seen in Europe as disproportionate, but in this country lawyers think they are fair and justly remedying;

<https://soundcloud.com/comparativemedialaw/o-you-want-to-publish-in-the>

5. All 'social media' communications are liable to other media law infringements and these include criminal offences. The most serious risk is contempt of court and breaching reporting restrictions that are, like libel, among the most severe in the western world;
6. Do not comment on any ongoing legal case (civil or criminal) after arrests or warrant for arrests have been issued or litigation is clearly ongoing. As an individual, you are unlikely to be aware of any special and additional reporting restrictions, many of which go beyond the intention of initial legislation. The legal system shows no sign of compassion or interest in your 'ignorance of the law' or indeed that you were not directly informed or had knowledge of the restriction. It will be assumed that you should have shown 'good faith' in finding out.
7. You do not even have to name people to get into trouble or even explicitly state or repeat an allegation. The House of Commons Speaker's wife, Sally Bercow, was successfully sued for libel for one tweet when she asked why a former Tory politician was 'trending' and added 'innocent face.' This was deemed to be libel by jigsaw identification/implication because allegations of child abuse had been broadcast by the BBC and on the Internet somebody the BBC did not name was being identified in blogs and social media.
8. It is a criminal offence in Britain to name teachers accused of committing crimes against their pupils, until charged by the police. Anything you say that could lead to somebody identifying a sexual offence complainant is also a criminal offence.
9. Be very cautious about even reporting or repeating accounts or references to legal cases. If you have not been trained professionally as a journalist and are without qualifications (unseen and rigorous examinations) can you be confident that you know what you are doing? Would you know how you can guarantee fair, accurate and contemporaneous representation? Do you know what is and what is not a 'substantial risk of serious prejudice' and 'impeding the administration of justice'?
10. What was in the public domain and not subject to a reporting restriction last week or yesterday may not be the case today or tomorrow, and you may not know about it. The English legal system sometimes somersaults between identification and anonymity; for example, in the search for missing youths who could be the victims of sexual offences. What is public knowledge yesterday, may be contempt of court and a serious criminal offence today.
11. Communications on electronic networks (Twitter & Internet) make you liable under section 127 of the 2003 Communications Act to criminal prosecution for messages that are 'grossly offensive or of an indecent, obscene or menacing character.' Up to 6 months imprisonment and fine of £5,000. In 2011, over 1,200 people were prosecuted under this law. Examples have included tweeting jokes at airports that have been misunderstood. What you think is a strong opinion could be seen as 'grossly offensive' by the police, CPS and DPP.
12. Section 127 can also be used for 'message stalking' that you might regard as protesting or a campaign if it can be proved that your electronic utterances are 'for the purpose of causing annoyance, inconvenience or needless anxiety to another.'
13. And if you thought that was all, you're wrong. There's Section 1 of the Malicious Communications Act 1988 that applies to old mail as well as electronic communication and makes it a criminal offence (same penalties as above) to 'threaten', message indecently, grossly offensively, or with false and known or believed to be false information on part of sender.
14. In 2013 the DPP finalized guidelines on when it is not in the public interest to prosecute you. These were revised in 2018. Prosecutions are likely if social media

communication contains 'a credible threat of violence, a targeted campaign of harassment against an individual or which breaches court orders.' The 'grossly offensive' category is expected to be reserved for racial/gendered orientation or hate crime abuse.

See: [Social Media - Guidelines on prosecuting cases involving communications sent via social media.](#)

15. The 'Protection of Freedoms Act 2012' extended the range of behaviour that can constitute 'criminal stalking' in the 1997 Protection from Harassment Act, so the risk of being arrested for unreasonable, threatening and the menacing targeting of somebody you disagree with goes up.
16. There are only a few special privilege and public interest defences in relation to these media law infractions. This is when allegations are made in public meetings, during court proceedings, were published in an academic or scientific journal, or if you had a reasonable belief your publication was in the public interest. But malice on your part will probably defeat them. Malice means deliberately setting out to harm somebody usually to an unlawful extent.
17. Most media law crimes are strict liability, with construction of meaning by subjective interpretation of alleged victim or objective interpretation by judges. (observed by sociologists as being majority male, white, privately and Oxbridge educated and operating as a self-perpetuating elite.) The size of audience (i.e. how many Twitter followers you have and your Facebook privacy setting) internet site visitors, readers of your newspaper, listeners and viewers to your broadcasting station will be mitigation on damages and criminal penalty, but not a defence. If defamatory publication has been moderated e.g. actually checked prior to going live, this makes it more likely you will be successfully sued.
18. In theory, there may be defences for what you do, but the power of the state/private claimant and their lawyers' costs are so great, 'the chilling effect' (in the USA it is called SLAPP- strategic lawsuits against public participation) means it is easier, less risky, and cheaper to surrender, settle and apologise for trying to tell the truth. (well what you think is the truth). The alternative is to remain silent- generally seen as self-censorship and compliance in a climate of fear.
19. In England, where the legal profession is well over 90% privatised and there is less eligibility for legal aid than at any time since the Second World War, if you were courageous (and/or foolish?) enough to defend and represent yourself, Citizens Advice Bureaux are over-stretched and if you are lucky you might have volunteer pro bono lawyers to advise you. (most of whom will be students or the newly qualified.)

United States Society of Professional Journalists Code of Practice 2014

See: <https://www.spj.org/ethicscode.asp>

Preamble

Members of the Society of Professional Journalists believe that public enlightenment is the forerunner of justice and the foundation of democracy. Ethical journalism strives to ensure the free exchange of information that is accurate, fair and thorough. An ethical journalist acts with integrity.

The Society declares these four principles as the foundation of ethical journalism and encourages their use in its practice by all people in all media.

Seek Truth and Report It

Ethical journalism should be accurate and fair. Journalists should be honest and courageous in gathering, reporting and interpreting information.

Journalists should:

- Take responsibility for the accuracy of their work. Verify information before releasing it. Use original sources whenever possible.
- Remember that neither speed nor format excuses inaccuracy.
- Provide context. Take special care not to misrepresent or oversimplify in promoting, previewing or summarizing a story.
- Gather, update and correct information throughout the life of a news story.
- Be cautious when making promises, but keep the promises they make.
- Identify sources clearly. The public is entitled to as much information as possible to judge the reliability and motivations of sources.
- Consider sources' motives before promising anonymity. Reserve anonymity for sources who may face danger, retribution or other harm, and have information that cannot be obtained elsewhere. Explain why anonymity was granted.
- Diligently seek subjects of news coverage to allow them to respond to criticism or allegations of wrongdoing.
- Avoid undercover or other surreptitious methods of gathering information unless traditional, open methods will not yield information vital to the public.
- Be vigilant and courageous about holding those with power accountable. Give voice to the voiceless.
- Support the open and civil exchange of views, even views they find repugnant.
- Recognize a special obligation to serve as watchdogs over public affairs and government. Seek to ensure that the public's business is conducted in the open, and that public records are open to all.
- Provide access to source material when it is relevant and appropriate.
- Boldly tell the story of the diversity and magnitude of the human experience. Seek sources whose voices we seldom hear.
- Avoid stereotyping. Journalists should examine the ways their values and experiences may shape their reporting.
- Label advocacy and commentary.
- Never deliberately distort facts or context, including visual information. Clearly label illustrations and re-enactments.
- Never plagiarize. Always attribute.

Minimize Harm

Ethical journalism treats sources, subjects, colleagues and members of the public as human beings deserving of respect.

Journalists should:

- Balance the public's need for information against potential harm or discomfort. Pursuit of the news is not a license for arrogance or undue intrusiveness.
- Show compassion for those who may be affected by news coverage. Use heightened sensitivity when dealing with juveniles, victims of sex crimes, and sources or subjects who are inexperienced or unable to give consent. Consider cultural differences in approach and treatment.
- Recognize that legal access to information differs from an ethical justification to publish or broadcast.
- Realize that private people have a greater right to control information about themselves than public figures and others who seek power, influence or attention. Weigh the consequences of publishing or broadcasting personal information.

- Avoid pandering to lurid curiosity, even if others do.
- Balance a suspect’s right to a fair trial with the public’s right to know. Consider the implications of identifying criminal suspects before they face legal charges.
- Consider the long-term implications of the extended reach and permanence of publication. Provide updated and more complete information as appropriate.

Act Independently

The highest and primary obligation of ethical journalism is to serve the public.

Journalists should:

- Avoid conflicts of interest, real or perceived. Disclose unavoidable conflicts.
- Refuse gifts, favors, fees, free travel and special treatment, and avoid political and other outside activities that may compromise integrity or impartiality, or may damage credibility.
- Be wary of sources offering information for favors or money; do not pay for access to news. Identify content provided by outside sources, whether paid or not.
- Deny favored treatment to advertisers, donors or any other special interests, and resist internal and external pressure to influence coverage.
- Distinguish news from advertising and shun hybrids that blur the lines between the two. Prominently label sponsored content.

Be Accountable and Transparent

Ethical journalism means taking responsibility for one’s work and explaining one’s decisions to the public.

Journalists should:

- Explain ethical choices and processes to audiences. Encourage a civil dialogue with the public about journalistic practices, coverage and news content.
- Respond quickly to questions about accuracy, clarity and fairness.
- Acknowledge mistakes and correct them promptly and prominently. Explain corrections and clarifications carefully and clearly.
- Expose unethical conduct in journalism, including within their organizations.
- Abide by the same high standards they expect of others.

The SPJ Code of Ethics is a statement of abiding principles supported by additional explanations and position papers that address changing journalistic practices. It is not a set of rules, rather a guide that encourages all who engage in journalism to take responsibility for the information they provide, regardless of medium. The code should be read as a whole; individual principles should not be taken out of context. It is not, nor can it be under the First Amendment, legally enforceable.

Sigma Delta Chi's first Code of Ethics was borrowed from the American Society of Newspaper Editors in 1926. In 1973, Sigma Delta Chi wrote its own code, which was revised in 1984, 1987, 1996 and 2014.

The US Radio, Television, Digital News Association Code of Ethics 2015

Guiding Principles:

Journalism’s obligation is to the public. Journalism places the public’s interests ahead of commercial, political and personal interests. Journalism empowers viewers, listeners and readers to make more informed decisions for themselves; it does not tell people what to believe or how to feel.

Ethical decision-making should occur at every step of the journalistic process, including story selection, news-gathering, production, presentation and delivery. Practitioners of ethical journalism seek diverse and even opposing opinions in order to reach better conclusions that can be clearly explained and effectively defended or, when appropriate, revisited and revised. Ethical decision-making – like writing, photography, design or anchoring – requires skills that improve with study, diligence and practice.

The RTDNA Code of Ethics does not dictate what journalists should do in every ethical predicament; rather it offers resources to help journalists make better ethical decisions – on and off the job – for themselves and for the communities they serve.

Journalism is distinguished from other forms of content by these guiding principles:

—• **Truth and accuracy above all**

o The facts should get in the way of a good story. Journalism requires more than merely reporting remarks, claims or comments. Journalism verifies, provides relevant context, tells the rest of the story and acknowledges the absence of important additional information.

o For every story of significance, there are always more than two sides. While they may not all fit into every account, responsible reporting is clear about what it omits, as well as what it includes.

o Scarce resources, deadline pressure and relentless competition do not excuse cutting corners factually or oversimplifying complex issues.

o “Trending,” “going viral” or “exploding on social media” may increase urgency, but these phenomena only heighten the need for strict standards of accuracy.

o Facts change over time. Responsible reporting includes updating stories and amending archival versions to make them more accurate and to avoid misinforming those who, through search, stumble upon outdated material.

o Deception in newsgathering, including surreptitious recording, conflicts with journalism’s commitment to truth. Similarly, anonymity of sources deprives the audience of important, relevant information. Staging, dramatization and other alterations – even when labeled as such – can confuse or fool viewers, listeners and readers. These tactics are justified only when stories of great significance cannot be adequately told without distortion, and when any creative liberties taken are clearly explained.

o Journalism challenges assumptions, rejects stereotypes and illuminates – even where it cannot eliminate – ignorance.

o Ethical journalism resists false dichotomies – either/or, always/never, black/white thinking – and considers a range of alternatives between the extremes.

—• **Independence and transparency**

o Editorial independence may be a more ambitious goal today than ever before. Media companies, even if not-for-profit, have commercial, competitive and other interests – both internal and external -- from which the journalists they employ cannot be entirely shielded. Still, independence from influences that conflict with public interest remains an essential ideal of journalism. Transparency provides the public with the means to assess credibility and to determine who deserves trust.

o Acknowledging sponsor-provided content, commercial concerns or political relationships is essential, but transparency alone is not adequate. It does not entitle journalists to lower their standards of fairness or truth.

o Disclosure, while critical, does not justify the exclusion of perspectives and information that are important to the audience’s understanding of issues.

- o Journalism's proud tradition of holding the powerful accountable provides no exception for powerful journalists or the powerful organizations that employ them. To profit from reporting on the activities of others while operating in secrecy is hypocrisy.
 - o Effectively explaining editorial decisions and processes does not mean making excuses. Transparency requires reflection, reconsideration and honest openness to the possibility that an action, however well intended, was wrong.
 - o Ethical journalism requires owning errors, correcting them promptly and giving corrections as much prominence as the error itself had.
 - o Commercial endorsements are incompatible with journalism because they compromise credibility. In journalism, content is gathered, selected and produced in the best interests of viewers, listeners and readers – not in the interests of somebody who paid to have a product or position promoted and associated with a familiar face, voice or name.
 - o Similarly, political activity and active advocacy can undercut the real or perceived independence of those who practice journalism. Journalists do not give up the rights of citizenship, but their public exercise of those rights can call into question their impartiality.
 - o The acceptance of gifts or special treatment of any kind not available to the general public creates conflicts of interest and erodes independence. This does not include the access to events or areas traditionally granted to working journalists in order to facilitate their coverage. It does include “professional courtesy” admission, discounts and “freebies” provided to journalists by those who might someday be the subject of coverage. Such goods and services are often offered as enticements to report favorably on the giver or rewards for doing so; even where that is not the intent, it is the reasonable perception of a justifiably suspicious public.
 - o Commercial and political activities, as well as the acceptance of gifts or special treatment, cause harm even when the journalists involved are “off duty” or “on their own time.”
 - o Attribution is essential. It adds important information that helps the audience evaluate content and it acknowledges those who contribute to coverage. Using someone else's work without attribution or permission is plagiarism.
- **Accountability for consequences**
- o Journalism accepts responsibility, articulates its reasons and opens its processes to public scrutiny.
 - o Journalism provides enormous benefits to self-governing societies. In the process, it can create inconvenience, discomfort and even distress. Minimizing harm, particularly to vulnerable individuals, should be a consideration in every editorial and ethical decision.
 - o Responsible reporting means considering the consequences of both the newsgathering – even if the information is never made public – and of the material's potential dissemination. Certain stakeholders deserve special consideration; these include children, victims, vulnerable adults and others inexperienced with American media.
 - o Preserving privacy and protecting the right to a fair trial are not the primary mission of journalism; still, these critical concerns deserve consideration and to be balanced against the importance or urgency of reporting.
 - o The right to broadcast, publish or otherwise share information does not mean it is always right to do so. However, journalism's obligation is to pursue truth and report, not withhold it. Shying away from difficult cases is not necessarily more ethical than taking on the challenge of reporting them. Leaving tough or sensitive stories to non-journalists can be a disservice to the public.

A growing collection of coverage guidelines for use on a range of ethical issues is available on the RTDNA website – <http://www.rtdna.org>.

Revised Code of Ethics adopted June 11, 2015

- See more at: http://www.rtdna.org/content/rtdna_code_of_ethics#sthash.iNfkjRoR.dpuf

Guidance on using the UK Freedom of Information Act 2000

Some Useful Advice Resources

Campaign for Freedom of Information (CFFI) (key resource)

<http://www.cfoi.org.uk/>

<http://www.freedominfo.org/> 'is a one-stop portal for critical resources about freedom of information laws and movements around the world'. It is managed and primarily authored by the academic David Banisar, who edits and publishes Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws.

What Do They Know (Supports, advises on and tracks FOI requests to UK 'public bodies')

<http://www.whatdotheyknow.com/>

The 'What Do They Know' website is a voluntary resource set up to help people use the FOI Act and to keep the site's visitors informed about the progress of requests and the information obtained. It has an extensive help guide at www.whatdotheyknow.com/help/about. This explains: 'You choose the public authority that you would like information from, then write a brief note describing what you want to know. We then send your request to the public authority. Any response they make is automatically published on the website for you and anyone else to find and read.'

The Information Commissioner says requests must 'be made in writing (this can be electronically e.g. email); state the name of the applicant and an address for correspondence; and describe the information requested.'

<https://ico.org.uk/your-data-matters/official-information/>

Guardian articles on UK FOI.

<http://www.guardian.co.uk/politics/freedomofinformation>

Guardian (specific 'how to' FOI guide

<http://www.guardian.co.uk/politics/2004/dec/30/freedomofinformation.uk2>

Your Right To Know (by Heather Brooke, FOI campaigner.

<https://heatherbrooke.org/books/your-right-to-know/>

Brooke, Heather (2006) Your Right to Know, 2nd revised edition, London: Pluto Press. The book is a comprehensive kit and guide on using FOI laws for the purposes of private citizen, NGO and journalistic research. The author has been a professor at City University and provides courses and consultancies to organizations such as the UK National Union of Journalists.

A more recent practical guide on Freedom of Information for UK journalists has been written by Matt Burgess and published by Routledge in 2015.

He is the founder of the FOI Directory website:

<http://www.foidirectory.co.uk>

Two leading legal textbooks on FOI are:

Blackstone's Guide To The Freedom of Information Act 2000, Fifth Edition edited by John Wadham, Kelly Harris and Eric Metcalfe, (2013) Oxford: Oxford University Press
MacDonald On The Law of Freedom of Information, Third Edition edited by John MacDonald QC and Ross Crail, (2016), Oxford: Oxford University Press.

Replies to requests

Public bodies are supposed to have an 'FOI officer' and/or a 'publication scheme'. They are supposed to reply to you within 20 working days e.g. 4 weeks.

For an example of a publication scheme see the Goldsmiths College website:
<http://www.gold.ac.uk/foi/>

Complaints If you are unhappy about the response you can ask for an internal review and this should be dealt with within 20 working days e.g. 4 weeks.

If the Internal Review does not provide the answer you want, you can complain to the Information Commissioner. You must make your complaint within 28 days of your last response from the public authority whether or not you have received a decision on their Internal Review.

The complaint form is available at:

<https://ico.org.uk/media/report-a-concern/forms/1477/access-official-information-form.pdf>

The Information Commissioner provides detailed briefings and guidance notes on FOI law and a growing body of jurisprudence is developing from decisions of the Information Tribunal. The Scottish Information Commissioner provides a similar resource of information and guidance at:

<http://www.itpublicknowledge.info>

Appeals

The next stage in the appeal process is the First Tier Information Tribunal. Any appeal must be brought within 28 days of the date of the ICO's decision.

For information on how to appeal see this website that includes a link to downloading the appropriate appeal form. Appeals have to be constructed on matters of law. You must explain why you think the ICO decision is wrong in law (e.g. the ICO did not give adequate reasons for its decision) and state the outcome you are seeking.

<https://www.gov.uk/guidance/information-rights-appeal-against-the-commissioners-decision>

Refusal of requests

There are twenty-three exceptions to enable public bodies to refuse your request for information. The key ones are: public interest in confidentiality is greater than public interest in disclosure; commercial interests; absolute exceptions (e.g. intelligence agencies and national security); information is accessible by other means; prejudice to effective conduct of public affairs; legal professional privilege; information is intended for future publication; cost is too much.

Cost

Ministers have claimed that most requests for information will be free.

If the cost of answering your request is less than £450 (or £600 for central government) it will be free.

Officials may ask you to pay for the cost of photocopying and postage. If a request costs more than these limits, a public body can refuse outright to answer your request.

Here are some tips on making journalistic FOI requests:

- Think of the story before you think of the question.
- Immerse yourself in the statistics and language of the organization.
- Will the data you want be releasable?
- Avoid overcomplicating the question.
- The best questions are short and simple.
- Ask for comparative data, to put your figures in context.
- Ask for an index/chapter head so you can easily find what you're looking for.

UK Freedom of Information Law should undergo some progressive developments in the light of the Grand Chamber ruling of the European Court of Human Rights in *Magyar Helsinki v Hungary* 2016.

The court recognized that there was a qualified standing right under Article 10 Freedom of Expression to access state information for public interest applications by individuals and organisations that perform a social watchdog role in society. The case is also significant in that the United Kingdom government intervened to try and oppose the recognition of a right of access and was unsuccessful. See:

[MAGYAR HELSINKI BIZOTTSAG v. HUNGARY - 18030/11 \(Judgment \(Merits and Just Satisfaction\): Court \(Grand Chamber\)\) \[2016\] ECHR 975 \(08 November 2016\)](#)

The ruling said that the standing right to the information could be established if:

- The person seeking it was acting in the role of a “social watchdog” – which would typically apply to the media and non-governmental organisations, but could also cover academics, authors, bloggers and social media users;
- It was sought for the purpose of communicating information to the public on a matter of public interest;
- It was readily available to the public authority.

However, the Strasbourg court subsequently rejected a case brought by *The Times* and investigative journalist Dominic Kennedy over the Charity Commission's refusal to disclose documents relating to its investigation into a fund to provide medical help to Iraqi children.

The First Section of the Strasbourg court held that the application was inadmissible because they had not exhausted the potential remedy in the English courts. The UK courts may need to resolve the issue of whether challenges to absolute exemptions and the exercise of Article 10 rights can only be done by English common law requests followed by applications for judicial review at the High Court, which would be a much more expensive process than using the FOIA system.

TIMES NEWSPAPERS LIMITED and Dominic KENNEDY against the United Kingdom, The European Court of Human Rights (First Section), sitting on 13 November 2018 as a Committee See: <https://laweuro.com/?p=4528>

McNae's Essential Law for Journalists 25th Edition has a full chapter 30 on Freedom of Information pages 401- 409. It is also useful consulting Chapter 31 on 'Other information rights and access to meetings' pages 410-419.

Useful websites and additional resources

- [Channel 4 Producer's Handbook: Ofcom & Media Law URL](#)
- [Guardian.co.uk: Media Law URL](#)
- [UK Media Law Pocketbook companion website URL](#)
- [Comparative Media Law and Ethics companion website URL](#)
- [Ofcom - The UK Communications regulator \(About page\) URL](#)
- [IPSO \(Independent Press Standards Authority\) - independent regulator for the newspaper and magazine industry in the UK URL](#)
- [5RB Media and Entertainment Law URL](#)
- [The BBC's Editorial Values and Standards](#)
- [Reporting Court Cases in Scotland \(BBC academy\)](#)
- [Hold The Front Page Media Law URL](#)
- [McNae's Essential Law for Journalists: Online Resource Centre for 25th Edition](#)

Media Law and Racial Justice

The Black Lives Matter social and political phenomenon of 2020 intensified the pressure for a more diversified and inclusive syllabus in university teaching of all subjects. This is sometimes referred to as 'decolonizing or liberating the curriculum.'

The BJTC has produced a highly significant downloadable pdf e-book resource: [Everybody In](#) which extensively provides a journalistic guide to inclusivity and seeks to increase understanding of the personal experiences of difference – from race, gender and class to sexuality, age and regionalism.

Issues of racial justice, media law, regulation and ethics require urgent consideration; particularly in the context of journalism, media, communications and cultural studies where disparities in power, representation and equality are significant sociological and political integers in human history.

With this in mind, I have outlined some case histories that merit discussion and analysis.

Lady Mountbatten and the Sunday People 1932

In 1932 a libel case involving Lady Edwina Mountbatten and the Sunday People newspaper reveals the inherent problems of racism and discrimination in British media law.

Historical analysis enables us to appreciate in 2021 what has covered up and concealed by the libel litigation process and the exigencies of social and racial hierarchy.

The case history took place in a British Imperialist society, though somewhat ironically Lady Mountbatten would be present in India when her husband Lord Louis Mountbatten was the last Viceroy of India responsible for executively managing the transition to independence in 1947.

Race issues in Edwina Mountbatten libel case from 1932

- **'Malignant, poisonous and lying tongues that wagged'**
- Edwina Mountbatten wife of Lord Louis Mountbatten uncle to Prince Philip, mentor to Prince Charles was notorious for her serial relationships including with Jawaharlal Nehru first Prime-Minister of independent India while her husband was last Vice-Roy there.
- When her husband was posted to Malta for two years in the Royal Navy in 1931, she chose to leave 'London Society' and join him with her two children.
- A short gossip paragraph in the Sunday People written by 'The Watcher' was headlined 'Famous Hostess Exiled, Society Shaken by Terrible Scandal.' It did not name her but identified her by implication and said she had been caught in 'compromising circumstances ... with a coloured man' that was the talk of the West End. Innuendo was that she was told to clear out of England for two years so that the affair could blow over by the Royal Family.
- She sued, Sunday People immediately conceded and offered her substantial damages that she refused to receive. She gave evidence at the settlement hearing that everyone, including her friends, knew who the black man referred to was, but "In fact, I have never in the whole course of my life ever met the man referred to...The whole thing is a preposterous story."





Establishment cover-up: Casualties- truth, racism, human dignity

- 'The Watcher' was never identified.
- The Judge- Lord Chief Justice Hewart was not very pleased with a bizarre settlement of apology without damages.



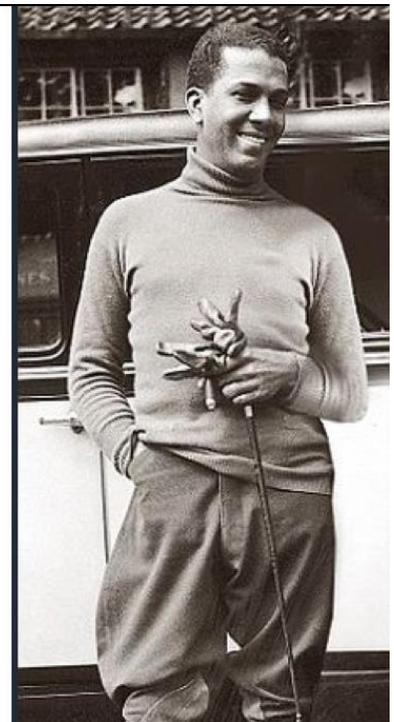
"I am able to reveal to-day the sequel to a scandal which has shaken society to the very depths. It concerns one of the leading hostesses in the country—a woman highly connected and immensely rich.
 "Her associations with a coloured man became so marked that they were the talk of the West End. Then one day the couple were caught in compromising circumstances.
 "The sequel is that the society woman has been given hints to clear out of England for a couple of years to let the affair blow over, and the hint comes from a quarter which cannot be ignored."

Mr. Birkett: The second paragraph in this publication deals with a coloured man. Is there one single word of truth in the allegations there made?—Not one single word. In fact I have never in the whole course of my life ever met the man referred to.
 Your friends have named to you the coloured man supposed to be referred to in the paragraph?—They have.
 Do you tell my lord you have never met him?—I have never met him.
K.C.'s Statement
 And you have never had anything to do with him in any shape or form?—The whole thing is a preposterous story.

The Libel was true, but the alleged lover referred to was a decoy for the real one



- What those in the establishment and the media knew, but the public did not was that the People alleged Edwina Mountbatten was having an affair with the American singer and film star Paul Robeson (left).
- The real truth was that Edwina Mountbatten was having a longstanding affair with the Granada born singer and entertainer Leslie Hutchinson – known as 'Hutch' (right).
- After The Sunday People case, Buckingham Palace refused to have Hutchinson on any Royal Command Performance bill, and Lord Beaverbrook gave orders that Hutch's name was never to be mentioned again by any of his papers."
- The outrage, disgust and scandal centred on the fear of exposure of somebody so prominent having an inter-racial relationship.
- The main casualty was the famous cabaret black artist. The circumstances of this kind of story would perhaps now be covered up by contemporary privacy law.
- The Mountbattens clearly exploited the misidentification to their advantage. See: <http://www.dailymail.co.uk/femail/article-1085883/The-royal-gigolo-Edwina-Mountbatten-sued-claims-affair-black-singer-Paul-Robeson-But-truth-outrageous-.html>



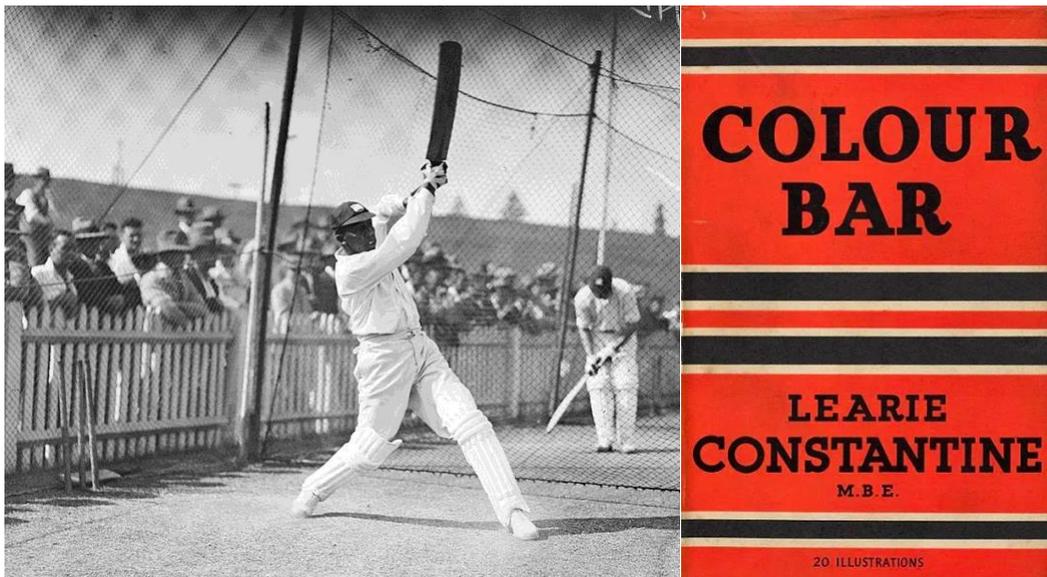
Learie Constantine- challenging 'The Colour Bar' 1944

Learie Constantine (1901-71) was a West Indian cricketer, lawyer and politician, was knighted, served as Trinidad's High Commissioner to the United Kingdom and became the UK's first black peer.

In the 1930s Constantine provided critical support for the writer C.L.R. James when he first came to Britain. Constantine joined the League of Coloured Peoples- the most prominent organisation campaigning for racial equality in Britain at the time. He helped James find a post on the Manchester Guardian thereby launching his successful career as a journalist, writer and broadcaster. In turn C.L.R James helped Constantine write his first book *Cricket and I*, published in 1933.

The Constantine v Imperial London Hotels court case of 1944 is seen as a ground-breaking precedent in British race relations and asserting the rights of black people to not be discriminated against. The case arose from an incident in London the previous year when he was playing a charity cricket match at Lord's and had booked rooms for himself and family at the Imperial Hotel for several nights. He had been told that race would not be an issue, but when arriving the hotel position had changed. The presence of a large number of American guests meant that they could stay for only one night and would have to transfer to another nearby hotel owned by Imperial. A colleague from the Ministry of Labour who intervened heard a racial slur with the use of the notorious 'n' word. At the time there was no law against racial discrimination, but Constantine sued alleging breach of contract based on his claim that the attitude of the hotel changed between his booking and arrival, owing to the presence of white American servicemen.

The judge found in Constantine's favour and awarded him damages. Mr Justice Birkett said in his ruling that Constantine 'did suffer, much unjustifiable humiliation and distress.' The legal principle was asserted in common law that he did not have to prove special damage in order to win his case, though the precedent did not allow the judge any powers to award exemplary or punitive damages. The case was widely reported and identified as the first litigation to challenge racially discriminatory practices of this kind. It was a key foundation stone for the first Race Relations Act of 1965.



Left: West Indies cricketer Learie Constantine practicing batting in the training nets, New South Wales, ca. 1930. Image: National Library of Australia. Public Domain. On the right to cover of Learie Constantine's 1954 book *Colour Bar* from a scan of a copy owned by Tim Crook.

After his retirement from professional cricket, Learie Constantine qualified as a barrister and pursued legal, political and journalistic careers. In 1954 he wrote the influential book *Colour Bar*. He said it was written 'at the request of the press' who had urged him to provide a black man's

perspective of 'the black and white problem. When it comes, let's have some real fast bowling, some respectable wickets thrown down suddenly from the gully, and hit some 6's, will you? Just let it be the real stuff.'

The book was promoted as a stark exposition of problems in 'Britain, U.S.A., South Africa, Russia and elsewhere. It examines mixed marriages, physical and mental differences, 'Ghettos' in Britain, lynchings, Communism in China and the British Empire, The Queen's Empire tour, Mau Mau [...] the Ku Klux Klan's interference in American politics today.' Constantine's book was a pioneering analysis of the race problem in terms of religion, education, sport, politics, industry, business, the professions, the arts and its grave social aspects.

Civil Rights Movement and Sullivan v New York Times 1964

This US Supreme Court case established a significant public interest defence against libel and the developing problem in English speaking common law jurisdictions of 'Strategic Lawsuits Against Public Participation'; otherwise known as SLAPPs. At the centre of it was the Civil Rights movement of the mid-20th century. The New York Times had published a full-page advertisement for making donations to defend Martin Luther King, Jr. on perjury charges. It included several minor factual inaccuracies about actions taken by the Montgomery, Alabama police. The city Public Safety commissioner, L.B. Sullivan, argued that the criticism damaged his reputation even though he was not specifically named in the publication. He sought punitive damages in a libel action under Alabama law which also included a group of African-American ministers mentioned in the advert. After a trial in Alabama a jury awarded the police commissioner \$500,000 in damages.



Dr. Martin Luther King Jr front row third from left with Vice President Lyndon B. Johnson, Attorney General Robert F. Kennedy, Benjamin Mays, and other civil rights leaders, June 22, 1963. [U.S. National Archives and Records Administration](#) Public Domain.

The Supreme Court established and founded a paradigmatic First Amendment protection for media publications defending mistakes in relation to public figure and public interest coverage. The mistakes damaging a plaintiff's reputation in this case related to an advertisement but as a precedent the Court raised the threshold of proof needed to win a libel case concerning public figures in any publication to being actuated by malice or showing a reckless disregard for the truth. The ruling also shifted the burden of proof from the defendant having to prove that a statement was true to the plaintiff proving that the statement was false. While the UK libel jurisdictions continue to adhere to the traditional rule, the New York Times case was an influence and inspiration for the development of the statutory public interest defence legislated for in the 2013 Defamation Act. Australia has followed the U.S. in making the shift on burden of proof from defendant to claimant.

Esther Thomas v News Group Newspapers 2001

When Esther Thomas first brought her case of racial harassment against the Sun Newspaper her successful outcome in resisting a move by the newspaper to have it struck out went unreported. She was supported by the London Racial Discrimination Unit. The case [attracted wider coverage](#) when the legal issue on whether the Protection of Harassment Act 1997 could be applied to the content of news publications went to the Court of Appeal.

Ms Thomas was identified and criticised by a series of Sun newspaper articles for being a black civilian clerk in a City of London police station who had reported officers for their treatment of a Somali refugee woman who had sought advice from them. Ms Thomas received hate mail and the impact of being targeted had made her ill and forced her to change her job.

The original Sun story, headlined 'Beyond a joke - fury as police sarges are busted after refugee jest,' described Ms Thomas as a 'black clerk' who had reported a private remark to her bosses. This was followed up by publication of readers' letters expressing shock and disgust at what had happened to the officers and branding her action as 'diabolical.'

The Sun published a further article reporting that officers who tried to organise a whip-round to pay a fine of £700 had been warned they could face disciplinary action, and the newspaper invited its readers to contribute to a fund.

Ms Thomas's courage and determination to pursue this issue established a ground-breaking development in media law in terms of the responsibility of media publications and their liability for potential race harassment and intimidation.

The Head of the Court of Appeal Civil Division, Master of the Rolls Lord Phillips ruled in [Thomas v News Group Newspapers Ltd & Anor \[2001\] EWCA Civ 1233 \(18 July 2001\)](#): 'When the three publications are considered together [...] I am satisfied that the respondent has pleaded an arguable case that the appellants harassed her by publishing racist criticism of her which was foreseeably likely to stimulate a racist reaction on the part of their readers and cause her distress.'

Esther Thomas's [solicitor, Lawrence Davies, said](#): 'This is the most significant decision in the fields of race relations, human rights and the media for years,' yet it could be argued that it does not receive the focus and attention in media law books that it merits. It is also the case that this hard-fought principle and development in the law by a modest and courageous black woman should be accorded greater significance in the media law curriculum.

Naomi Campbell v Trinity Mirror 2004

The ruling of the House of Lords in Naomi Campbell's privacy case against the Daily Mirror in 2004 has become one of the most important media law precedents in post Second World War British history. See: [Campbell v MGN Ltd \[2004\] UKHL 22 \(6 May 2004\)](#). It was the ground-breaking ruling that consolidated and enabled the full development of the right to media privacy under Article Eight of the European Convention of Human Rights in UK civil law. This was a herculean legal struggle and victory by one of the most successful Black British women in public life. The case turned on the intrusion of the national newspaper in publishing a photograph that challenged the confidentiality and private information of Naomi Campbell's health treatment for addiction illness. Ms Campbell's lawyers did raise a racial issue during the litigation though [this was vehemently denied by the media defendant](#). She has Jamaican and Chinese heritage and objected to the attack on her character being accompanied by [the use of the expression 'chocolate soldier.'](#)



Naomi Campbell at festival de Cannes May 2018. Image by Georges Biard. [CC BY-SA 4.0](#)

In the House of Lords ruling Lord Nicholls explained how the Daily Mirror published an article about her treatment for addition illness with Narcotics Anonymous accompanied with "a dominating picture over the caption 'Hugs: Naomi, dressed in jeans and baseball hat, arrives for a lunchtime group meeting this week'. The picture showed her in the street on the doorstep of a building as the central figure in a small group. She was being embraced by two people whose faces had been

pixelated. Standing on the pavement was a board advertising a named café. The article did not name the venue of the meeting, but anyone who knew the district well would be able to identify the place shown in the photograph.'

Lord Nicholls said after she commenced legal proceedings against Mirror Group Newspapers, the tone of the newspaper's coverage became critical:

"On 5 February 2001 the newspaper published an article headed, in large letters, 'Pathetic'. Below was a photograph of Miss Campbell over the caption 'Help: Naomi leaves Narcotics Anonymous meeting last week after receiving therapy in her battle against illegal drugs'. This photograph was similar to the street scene picture published on 1 February. The text of the article was headed 'After years of self-publicity and illegal drug abuse, Naomi Campbell whinges about privacy.' The article mentioned that 'the Mirror revealed last week how she is attending daily meetings of Narcotics Anonymous'. Elsewhere in the same edition an editorial article, with the heading 'No hiding Naomi', concluded with the words: 'If Naomi Campbell wants to live like a nun, let her join a nunnery. If she wants the excitement of a show business life, she must accept what comes with it.'

Two days later, on 7 February, the 'Mirror' returned to the attack with an offensive and disparaging article. Under the heading 'Fame on you, Ms Campbell', an article referred to her plans 'to launch a campaign for better rights for celebrities or "artists" as she calls them'. The article included the sentence: 'As a campaigner, Naomi's about as effective as a chocolate soldier.'

Naomi Campbell won her case by the slimmest of margins with the Law Lords 3-2 in favour. The Court of Appeal had ruled against her. Lady Baroness Hale of Richmond explained:

'Examined more closely, however, this case is far from trivial. What is the nature of the private life, respect for which is in issue here? The information revealed by the article was information relating to Miss Campbell's health, both physical and mental. Drug abuse can be seriously damaging to physical health; indeed it is sometimes life-threatening. It can also lead to a wide variety of recognised mental disorders (see The ICD-10 Classification of Mental and Behavioural Disorders, WHO 1992, F10 - F 19). Drug addiction needs treatment if it is to be overcome. Treatment is at several levels. There is the quick 'detox' to rid the body of the harmful substances. This will remove the immediate physical danger but does nothing to tackle the underlying dependence. Then there is therapy aimed at tackling that underlying dependence, which may be combined with a transfer of the dependence from illegal drugs to legally prescribed substitutes. Then there is therapy aimed at maintaining and reinforcing the resolve to keep up the abstinence achieved and prevent relapse. This is vital. Anyone who has had anything to do with drug addiction knows how easy it is to relapse once returned to the temptations of the life in which it began and how necessary it is to try, try and try again to achieve success.'

Baroness Hale concluded: 'The risk of harm is what matters at this stage, rather than the proof that actual harm has occurred. People trying to recover from drug addiction need considerable dedication and commitment, along with constant reinforcement from those around them. That is why organisations like Narcotics Anonymous were set up and why they can do so much good. Blundering in when matters are acknowledged to be at a 'fragile' stage may do great harm.'

Her judgement set a key threshold for reasonable expectation of privacy in the balancing exercise on an equal basis with the right to freedom of expression.

Racist attitudes and prejudices have been embedded in the history and culture of journalism since the very beginnings of the media, but it is important to be cautious about simplifying complex and ambiguous narratives. The *News Of The World* was shut down in the wake of the phone-hacking scandal in 2011, but in 1959 it was the only national newspaper offering a reward to assist the campaign by Claudia Jones to find the [racist murderers of Kelso Cochrane](#). It was the *Daily Mail* in February 1997 which published a front page accusation against five suspects for murdering Stephen Lawrence with the headline 'Murderers: The Mail accuses these men of killing. If we are wrong, let them sue us,' and this was followed by the Macpherson public inquiry and new police investigation [and prosecution resulting in two of them being convicted](#).

In the late 19th and early 20th century anti-Semitism was a significant problem in crime-reporting. Consider this report in the Leicester Chronicle and Leicestershire Mercury for January 6th 1877 headlined: 'Execution of a Jewish Murderer.' The religion and racial identity of the convicted and condemned prisoner had no relevance to any aspect of the crime and the description of Isaac Marks for being 'a miserable-looking little object' is dehumanizing, pitiless and offensive.

EXECUTION OF A JEWISH MURDERER.

The execution of the prisoner Isaac Marks, for the murder of a young man named Frederick Barnard, by shooting him with a revolver took place on Tuesday morning at nine o'clock within Horsemonger-lane Gaol. Both before and since his conviction the prisoner has been constantly visited by the Rev. Mr. Singer and the Rev. Mr. Spyers, ministers of his own belief. Marks said that he did not know what he was doing at the time, and that he only became conscious of the wickedness of the act some hours afterwards. He was deeply sorry for his crime, and requested both the reverend gentlemen to express to the widow and family of the deceased his sincere sorrow and repentance, and implored them to pardon him for having deprived them of a husband and a father. The execution was carried out in a very simple form. The Under-Sheriff and some of his officers went to the prisoner's cell, accompanied by Mr. Keene, the Governor, a few minutes before nine o'clock, and the prisoner was pinioned. He was attended to the scaffold by both the Jewish ministers, who prayed in Hebrew. The prisoner was a miserable-looking little object, and his countenance was ghastly pale. The two ministers did not go on the scaffold with the prisoner, but stood at some distance outside it, and they continued praying, not only till the drop fell, but for some time afterwards. The executioner (Marwood) allowed the prisoner a long drop, between six and seven feet, but, owing to his light weight, it would seem that none of the vertebrae of the neck were broken, and the culprit appeared to struggle for two or three minutes violently before life was extinct. After hanging an hour the body was cut down, and an inquest was held upon it by Mr. Carter, the coroner, and the usual formal verdict was returned.

Fast forward 105 years to the Daily Mail for 22nd May 1982 and here is an example of offensive demonizing and stereotyping of young black men as rapists. The racial identification of suspected rapists as black and victims as white has no justification or relevance to the news story; even in the context of the need to assist the police investigations to arrest the alleged attackers. This style of reporting and publication was widespread across many national newspapers at the time and was challenged by complaints to the Press Council.

Spinster of 81 raped by youth

By PETER BURDEN, Chief Crime Reporter

AN 81-year-old spinster is recovering in hospital after being raped in her flat by a black youth.

The old lady, who is white, let the youth in after he said he was an electricity board worker checking meters.

As soon as he was inside the third floor flat in a block off New Cross Road in South East London, the youth attacked her. He raped her and committed other sexual offences before fleeing with £5 from her handbag.

Detective Inspector Brian George, who is leading the hunt for the rapist from Deptford

police station, said yesterday that the youth may have tried to get into other homes in the area. He asked anyone who had been approached to contact him.

The rape happened about midday on Thursday.

On Sunday evening a 24-year-old white bank clerk was raped as she was walking home along a tow-path by the river Lea at Clapton, East London.

The black rapist was aged 18 to 22 and wore a dark track suit with white stripes. He rode away on a bronze racing cycle after punching, kicking and raping the woman and stealing £5.

Page 14, Daily Mail 22nd May 1982. Scan included for the purposes of fair dealing criticism and review.

For a more complex understanding of the role of journalism [in the construction of race, crime and youth the 1978 seminal text *Policing The Crisis* written by the late Professor Stuart Hall, Chas Critcher, Tony Jefferson and John Clarke](#) analysed the moral panic narrative in media publications about 'mugging' as a growing crime and social problem during the late 1970s.

While it is not the purpose of this book to fully cover criminological and cultural studies subjects relating to race, representation and inequality in the legal system, it should be regarded as a professional obligation to reflect and understand social context. Sir William MacPherson's ['The Stephen Lawrence Inquiry report of 1999](#) was a defining moment in British social history when it recognised institutional racism at the Metropolitan Police, a police force that had failed in its first investigation of the racist murder of 18 year old Black youth Stephen Lawrence. The Institute of Racial Relations has funded and published significant research on the subject of the death of black suspects in police custody ['Dying For Justice'](#) and [How Black working-class youth are criminalised and excluded in the English School System](#).

These along with David Lammy QC's [independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System](#) provide valuable research tools and background briefings on key issues of racial justice in British Society.

The Lammy Review was published in September 2017 and explained:

'Across England and Wales, people from minority ethnic backgrounds are breaking through barriers. More students from Black, Asian and Minority Ethnic (BAME) backgrounds are achieving in school and going to university. There is a growing BAME middle class. Powerful, high-profile institutions, like the House of Commons, are slowly becoming more diverse. Yet our justice system bucks the trend. Those who are charged, tried and punished are still disproportionately likely to come from minority communities.'



Despite making up just 14% of the population, BAME men and women make up 25% of prisoners, while over 40% of young people in custody are from BAME backgrounds.

If our prison population reflected the make-up of England and Wales, we would have over 9,000 fewer people in Prison – the equivalent of 12 average-sized prisons. There is greater disproportionality in the number of Black people in prisons here than in the United States.'

The reality of these statistics and critical questioning as to why they bear these implications need to be an essential part of journalistic understanding and knowledge. This should inform a more intelligent and professional approach to covering crime and the operation of the criminal justice system.

There are many high quality open access sources on British Black History that can inform and provide depth of understanding to racial justice issues. These include [West Indian Intellectuals in Britain \(Studies in Imperialism\)](#)- edited by Bill Schwarz first published in 2003. This a comprehensive discussion of the major Caribbean thinkers who came to live in 20th-century Britain and chapters discuss the influence of journalists and authors such as C.L.R. James; Una Marson; George Lamming; Jean Rhys; Claude McKay and V.S. Naipaul. The Chartered Institute of Journalists has published [an online profile of the valuable legacy of the journalist Rudolph Dunbar.](#)

Another highly significant text exploring the subject of black consciousness in British Cultural History available is Professor Paul Gilroy's [*The Black Atlantic: Modernity and Double Consciousness*](#) first published in 1993.

[Reprezentology - The Journal of Media and Diversity](#) which began publishing in the winter of 2020 is another open access resource which stated as its aim to 'build connections between the academy, journalists and broadcasters. Rather than seek piecemeal reform to address the underrepresentation of marginalised voices, we wish to go further and help create a media that reflects the richness of every part of society.'

The issue of ethnic community representation is crucial in respect of the proportion of participation in the senior levels of the judiciary and the journalism industry. The make-up of the UK Supreme Court, English Court of Appeal and High Court and editors and senior editorial roles in news publishers has not reflected and does not reflect the proportion of ethnic groups in the United Kingdom population.



One of the important duties of professional journalists is to ensure that language and vocabulary are deployed with sensitivity and respect. Language and meaning also changes through time and context. It is, therefore, important to keep up to date with professional style-guides such as those published online by [the Guardian](#) and [the BBC](#). For example, the Guardian advises that Black people from the Caribbean expect to be described as 'African-Caribbean not Afro-Caribbean.'

The US National Association of Black Journalists publishes a [regularly updated online style guide](#) which is a very important benchmark on advice and trends in journalistic use of language in respect of covering Black communities. For example, under 'T' the NABJ discourages use of the phrase 'Third World: Commonly used to describe underdeveloped countries of Africa, Asia and Latin America. These nations and the people there are often cast as being uncivilized or primitive. Avoid using term because of its negative connotations. Better to say developing countries. Use in quotes only if necessary.'

Comparative Media Law- Why is US media law so different?

The USA shares the common law legal tradition of the UK as well as being English speaking. However, there are major differences in media law which are the result of different social, political and cultural history as well as the fact the US has a written constitution and First Amendment guaranteeing, without qualification, freedom of speech and freedom of the press.

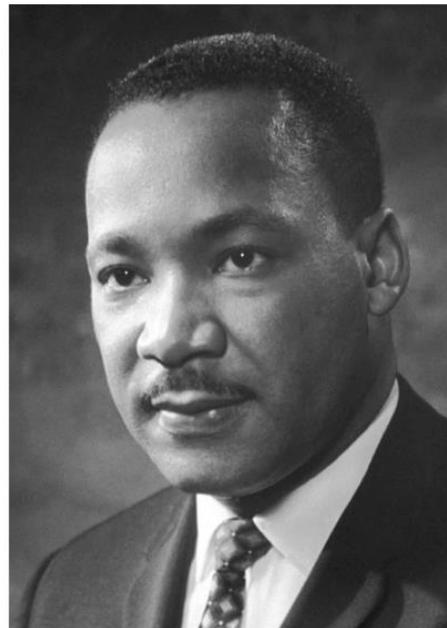
There is a predominating federal legal system as well as different legal jurisdictions across the fifty different states that make up the country.

The importance of the First Amendment of the Constitution which guarantees freedom of the press and expression was raised by two key US Supreme Court rulings arising out of the Civil Rights movement for racial equality and opposition to US involvement in the Vietnam War. During this period the courts developed a heightened protection of speech for the press.

[New York Times v Sullivan in 1964](#) has been identified as an influential case in developing a more liberal libel law in England in the 2013 Defamation Act. As explained above the US Supreme Court ruling established a much higher threshold of proof before courts in state jurisdictions could impose damages for libel cases involving public figures even when the statements in dispute turned out to be false. This is the Oyez online law report summary of the background to the case:

Sullivan v New York Times 1964

- During the Civil Rights movement of the 1960s, the New York Times published an ad for contributing donations to defend Martin Luther King, Jr., on perjury charges. The ad contained several minor factual inaccuracies. The city Public Safety Commissioner, L.B. Sullivan, felt that the criticism of his subordinates reflected on him, even though he was not mentioned in the ad. Sullivan sent a written request to the Times to publicly retract the information, as required for a public figure to seek punitive damages in a libel action under Alabama law.
- When the Times refused and claimed that they were puzzled by the request, Sullivan filed a libel action against the Times and a group of African American ministers mentioned in the ad. A jury in state court awarded him \$500,000 in damages. The state supreme court affirmed and the Times appealed.



The question to be decided by the US Supreme Court Justices: Did Alabama's libel law unconstitutionally infringe on the First Amendment's freedom of speech and freedom of press protections?

The [Oyez case law summary explained](#):

'To sustain a claim of defamation or libel, the First Amendment requires that the plaintiff show that the defendant knew that a statement was false or was reckless in deciding to publish the information without investigating whether it was accurate.'

The court delivered a unanimous opinion by Justice Brennan which was in favour of the New York Times. Justice Brennan held when a statement concerns a public figure it is not enough to show that it is false for the press to be liable for libel.

Instead, the target of the statement must show that it was made with knowledge of or reckless disregard for its falsity. Oyez says: 'Brennan used the term "actual malice" to summarize this standard, although he did not intend the usual meaning of a malicious purpose. In libel law, "malice" had meant knowledge or gross recklessness rather than intent, since courts found it difficult to imagine that someone would knowingly disseminate false information without a bad intent.'

A simple comparison of English and US libel law

UK Libel

1. Burden of proof on defendant
2. Damages presumed
3. Freedom of expression balanced equally with other rights
4. Public interest defence in terms of reasonable belief & editorial judgment- determined by judges
5. Chilling effect of cost burden on media defendants and more sensational tabloid newspaper media
6. Press regulation with statutory underpinning

US Libel

1. Burden of proof on the claimant/plaintiff
2. Damages have to be proved
3. Freedom of expression and media constitutional priority through First Amendment
4. Public interest defence for making mistake has high threshold of plaintiff having to prove actuated by malice, or reckless disregard for the truth- determined by juries
5. Ethical self-regulation by fact checking, voluntary mutuality
6. Congressional/executive regulation of the press unconstitutional

[Richmond Newspapers v Virginia in 1980](#) established, again at Supreme Court level, that there was a First Amendment affirmative right of the press and public to achieve access to information that concerned the exercise of government power.

The Oyez summary explains the significance of this case, sixteen years after *New York Times v Sullivan*.

Richmond Newspapers further reshaped the framework of freedom for journalistic publication and news gathering:

“In a 7-to-1 decision, the Court held that the right to attend criminal trials was ‘implicit in the guarantees of the First Amendment.’

The Court held that the First Amendment encompassed not only the right to speak but also the freedom to listen and to receive information and ideas.

The Court also noted that the First Amendment guaranteed the right of assembly in public places such as courthouses.

The Court emphasized that ‘certain unarticulated rights’ were implicit in enumerated guarantees and were often ‘indispensable to the enjoyment of rights explicitly defined.’”

The Richmond Newspapers judgment places a significant brake on any US court trying to issue censorial reporting restrictions beyond the courtroom walls and excluding the media and public from proceedings in order to control and limit the reporting of trials.

US privacy law is restricted to states’ jurisdiction covering intrusive reporting methods; extreme emotional distress and abusing personality rights.

Prior restraint or court bans prior to publication are unheard of in US privacy law.

The First Amendment ensures that the public interest threshold is very hard to beat by claimants/plaintiffs since freedom of expression and the media is given pragmatic priority- not absolute authority.

It has the Sullivan v New York Times standard in relation to public figures and public interest news stories.

UK/European style media privacy law is unconstitutional in USA



It could be argued that the most famous US Supreme Court privacy precedent relating to a public figure is the case of [Falwell v Hustler magazine from 1988](#).

The magazine mocked Christian religious leader Jerry Falwell and insulted the memory of his mother. He initially sued to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. He won a jury verdict on the emotional distress claim and was awarded a total of \$150,000 in damages for injury to his feelings.

The equivalent concept in European privacy law would be an attack on his honour and family dignity.

Hustler famously won at the Supreme Court on First Amendment grounds that the allegation was so unbelievable that even 'bad taste' satire had to be protected.

Falwell scored an own goal by succumbing to cul-de-sac cross examination by conceding that the literal meaning in the satire was so outrageous no one could believe it. The judges also said that in cases of this kind actual malice had to be proved.

Oyez observed: 'The Court added that the interest of protecting free speech, under the First Amendment, surpassed the state's interest in protecting public figures from patently offensive speech, so long as such speech could not reasonably be construed to state actual facts about its subject.'

US Supreme Court case of Hustler Magazine and Jerry Falwell

Jerry Falwell talks about his first time.*



FALWELL: My first time was in an outhouse outside Lynchburg, Virginia.

INTERVIEWER: Wasn't it a little cramped?

FALWELL: Not after I kicked the goat out.

INTERVIEWER: I see. You must tell me all about it.

FALWELL: I never really expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, "What the hell!"

Campari, like all liquor, was made to mix you up. It's a light, 48-proof, refreshing spirit, just mild enough to make you drink too much before you know you're schlockered. For your first time, mix it with orange juice. Or maybe some white wine. Then you won't remember anything the next morning. Campari. The mixable that amazes.

INTERVIEWER: But your mom? Isn't that a bit odd?

FALWELL: I don't think so. Looks don't mean that much to me in a woman.

INTERVIEWER: Go on.

FALWELL: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda—that's called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a

\$100 donation.

INTERVIEWER: Campari in the crapper with Mom... how interesting. Well, how was it?

FALWELL: The Campari was great, but Mom passed out before I could come.

INTERVIEWER: Did you ever try it again?

FALWELL: Sure...

lots of times. But not in the outhouse. Between Mom and the shit, the flies were too much to bear.

INTERVIEWER: We meant the Campari.

FALWELL: Oh, yeah. I always get sloshed before I go out to the pulpit. You don't think I could lay down all that bullshit sober, do you?

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CAMPARI You'll never forget your first time.

*NO HARDY—NOT TO BE TAKEN SERIOUSLY.

The key differences between US and UK media law most probably lie in the key reference points for protecting freedom of expression. The UK's Article 10 Freedom of expression legislated for in the Human Rights Act of 1998 is qualified. The US First Amendment, part of a written constitution is not.

Section 10 Human Rights Act- Article on Right to Freedom of Expression. (European Convention on Human Rights and Fundamental Freedoms 1950)

'(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

The US First Amendment 1791

'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'

This is a very simple outline of how to survive the law in English journalism and media communication. For more information read: UK Media Law Pocket Book (2013- new edition due 2021) and Comparative Media Law & Ethics (2009- new edition due 2021) by Tim Crook. Both books have companion websites that are in the process of being updated. See:

<https://ukmedialawpocketbook.wordpress.com>

<https://2ndeditioncomparativemedialawandethics.wordpress.com>

I hope it does not need saying that this guide has been written by a human being with all the fallibilities that that implies. I take full responsibility for any mistakes and omissions, and offer advance apologies should these become obvious to the reader. At the same time, do please email me any corrections, mistakes and key omissions you think are needed and I will do my very best to correct and amend. My email address is: t.crook@gold.ac.uk

This ebook has been sponsored and endorsed by the Broadcast Journalism Training Council which is a vital body that does excellent work liaising and supporting the training and educational relationship in broadcast journalism between universities and the industry.

The content has also been endorsed and adopted as a continuing professional development text by the Chartered Institute of Journalists.

I am very grateful for the opportunity to write and make available this guide. And I wish all readers a fulfilling and enjoyable career in broadcast and multimedia journalism.

Sincerely and respectfully, Tim Crook. Goldsmiths, University of London, 15th March 2021.

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The UK Supreme Court in Parliament Square
Image: Tim Crook.