

## MEDIA CONTEMPT AND REPORTING CRIME

Key professional rules for reporting crime and covering criminal proceedings:

- \* Laws that control communication to protect the right to fair trial (Article 6 of the European Convention on Human Rights (ECHR)) and the administration of justice meaning criminal enquiries, litigation and legal proceedings at all levels;
- \* Key issues to remember: substantial risk (timing and scale of publication) of serious prejudice (content of publication) or impeding justice (disruption/impact on enquiry) applying from the time of arrest;
- \* UK Supreme Court ruling in *Bloomberg v ZXC* in February 2022 means all crime suspects have a reasonable expectation of privacy before being formally charged with any offence. There may be very rare exceptions. Even if the police name a suspect on the record or off the record, take specialist legal advice before publishing. Qualified privilege for libel offers no defence. The situation follows case law developments in cases such *Richard v BBC* 2018 and *Sicri v Associated Newspapers* 2020. The threshold of public interest to defeat this is so high in practice it will most likely operate as a default position. This may end the ambiguity of UK Broadcasters not naming Met Police officer Wayne Couzens for murdering Sarah Everard prior to charge in 2021, when many newspaper publishers did;
- \*UK Media law has been extending statutory and common law lifelong anonymity for many more categories of trial participants and people involved in criminal inquiries, and news events. Breaching this area of the law can attract criminal prosecutions with fines and potential imprisonment for journalists and editors. The risk of jigsaw identification liability is growing more problematical and great care is needed in reporting and publication. The red flags include anybody complaining of a sexual assault even when the police are not involved,

youths aged 17 and under, alleged victims of blackmail, people trafficking, forced marriages, all crime suspects before charge, any teacher accused of committing a crime against a pupil or student where they are working, people called for jury service, vulnerable witnesses protected by court orders, notorious criminals given new identities to protect their right to life, anonymous child killers who reach adulthood, undercover and firearms police officers, criminal informants, state intelligence personnel, and members of UK Special Forces;

\* Judges in media law cases in the UK are increasingly emphasising the need for editors, producers and journalists to keep a written and evidential trail of their decision making so that they can prove that open justice and freedom of expression imperatives are reasonably, properly and fairly balanced with the duty of care to respect court orders, rule of law on anonymity, avoiding jigsaw identification and the right to reasonable expectation of privacy;

\* The successful prosecution of the *Daily Mirror* and *The Sun* in 2011 for vilification of retired teacher Christopher Jefferies who was an exonerated suspect in the murder enquiry of Joanna Yeates remains a benchmark in preventing the 'monstering' of people suspected of crimes whether or not they are charged and go to trial;

\* Any failure to observe the restrictions on copying and transmitting live, remote online, or pre-recorded court proceedings can attract prosecutions for contempt of court as the fine imposed on the BBC for doing so in 2021 has demonstrated;

\* The successful prosecution of the *Daily Mail* and *The Sun* for publishing online prejudicial images of a defendant during the trial that were not seen by the jury and removed shortly after publication continues to protect the issue of identification in future trials once a case is active;

\* The successful prosecutions of Condé Nast *GQ* in 2015 for publishing a prejudicial opinion piece during the phone-hacking trial of former *News of the World* editors and the *Spectator* weekly magazine in 2011 for a prejudicial editorial column at the beginning of a murder trial and while postponing reporting bans were in force highlights how media contempt law protects running trials;

\* The successful prosecution of the *Daily Mirror* and *Daily Mail* for publishing background in the 2011 trial of Levi Bellfield for murdering Milly Dowler when jury were deliberating on a lesser charge for an offence against another victim indicates the risk of prejudicing retrials and covering part-verdict outcomes;

\* Analysing substantial risk (fade factor – size of audience and timing) and serious prejudice (nature of content). The first test case: the man who walked into the Queen’s bedroom;

\* Successful prosecutions of one juror for online research and communicating to an acquitted defendant on Facebook in 2011, and another for online research into the background and previous criminal trial of a defendant despite being ordered not to do so by the trial judges in 2012. In 2012, the European Court of Human Rights upheld a contempt of court prosecution and fines against a juror and the *Times* Newspaper for revealing the secrets of jury deliberation from a criminal trial. Subsequently, jury misconduct of this kind has been made a crime triable in the courts by jury under sections 20D to 20G of the Juries Act 1974 in England and Wales and remains a contempt of court in the Scottish jurisdiction;

\* Successful prosecutions of political activists such as Craig Murray in 2021 and Tommy Robinson (real name Stephen Yaxley-Lennon) in 2018 highlight how blogging and broadcasting on social media and defying directions or orders of the court will be regarded as a serious contempt of court whatever the argument and debate about whether the original orders were right in law or not;

\* Angela Wrightson case of 2016 has confirmed how Judges can issue orders and injunctions controlling media use of social media and removing online archive articles and postponing publication of articles and broadcast of programmes if there is deemed to be a substantial risk of serious prejudice to forthcoming or concurrent jury trials;

\* Breaching embargoes on the confidential prior release of court rulings can be contempt of court. This was the case in 2021 when Environmental lawyer Tim Crosland tweeted a UK Supreme Court ruling the day before its formal announcement;

\* Cross-jurisdictional reach. If you publish outside the UK, but your publications can be read, seen and heard in the UK, you can arguably still be liable and vice versa. The complexity and extra care needed was highlighted by PJS v Sun case of 2016, and reporting restrictions imposed in New Zealand giving anonymity to Jesse Shane Kempson when on trial in 2019 for murdering British student Grace Millane;

\* Although parliamentarians and foreign publications appear to have immunity from contempt prosecution, this does not necessarily extend to anyone reporting the information that is injunctioned/banned/interdicted (that's the term used in Scotland) or likely to be a serious prejudice or impedance to the administration of justice;

\* Relatives or friends of persons convicted of crime should not generally be identified without their consent, unless genuinely relevant to the story and particular regard should be paid to the potentially vulnerable position of children who witness, or are victims of crime;

\* The Bribery Act of 2010 and journalist codes of ethics have significantly limited the practice of buying stories through direct payments or favours. Public officials face prosecution for the common law offence of misconduct in public office and there is no public interest defence for this crime or offences committed under the Bribery Act;

\*No payment or offer of a payment to a witness – or any person who may reasonably be expected to be called as a witness – should be considered let alone made in ‘active’ criminal cases (after arrest etc) until the suspect has been freed unconditionally without charge or bail, proceedings have been discontinued, a guilty plea has been entered and accepted, or announcement of not guilty verdict. The payment to witness rule also applies when legal proceedings are likely and foreseeable, and any payment to a witness later cited to give evidence in criminal cases must be disclosed to the prosecution and defence, with the witness being advised of this obligation. There is a total ban on paying witnesses while cases are active and a quasi-ban (subject to the public interest test) when they are not active or likely and foreseeable;

\*Case law has demonstrated that journalists paying public officials can only be convicted if it can be shown the stories they were pursuing ‘damaged the public interest.’ There is no public interest defence for paying people for confidential information in private business when this can be construed as a bribe to betray a duty or obligation in employment;

\* Secondary media law regulation states payment or offers of payment for stories, pictures or information that seek to exploit a particular crime or to glorify or glamorize 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. This is subject to public interest but when invoked, the editors need to demonstrate good reasons;

\*Broadcasters (radio and television) must not include material that is likely to encourage or incite the commissioning of crime or to lead to disorder, and descriptions or demonstrations of criminal techniques which contain essential details that can enable the commission of crime must not be transmitted unless editorially justified

\*Journalists must avoid publishing material that could put people's lives in danger or prejudice inquiries into hijacks or kidnappings (regulatory requirement for broadcasters). All journalists, whether print, online or broadcast, should cooperate with police requests for news 'blackouts' aimed at saving a victim's life. Any coverage of anti-terrorist or hostage recovery events must not include live material that would help assailants counter armed police or anti-terrorism operations.;

\*Threats, intimidation, physical attacks, and even worse the killing of professional working journalists has been recognised as a growing risk and problem in the UK, Europe and other countries. The killing of the journalists Daphne Caruana Galizia in Malta in 2017, Jamal Khashoggi in the Saudi Arabian consulate in Istanbul, Turkey in 2018, Lyra McKee in (London)Derry, Northern Ireland in 2019, and Peter R. de Vries in Amsterdam, Holland in 2021 have been cited as evidence of the jeopardy experienced by working journalists covering and investigating controversial issues. The Media Lawyers Association has produced an online guidance to help journalists recognise and understand when abuse breaks the law and what they can do about it.

\* A downloadable sound file of these 'bullet points' on media contempt and reporting crime.

1.0 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast10mp3>

A videocast explaining key UK media law points on media contempt and reporting crime

1.Video-cast: <https://www.youtube.com/watch?v=jwUhxxahYQw>

## 1.1 BALANCING FREEDOM OF EXPRESSION WITH THE INDIVIDUAL'S RIGHT TO A FAIR TRIAL

The UK legal system balances the right of the media to report its proceedings, known as 'open justice' with the right of a person to have a fair trial, which is enshrined in Schedule 1, Article 6 of the Human Rights Act 1998 (HRA) derived from Article 6 of the ECHR. (See companion website for the text).

When reporting people accused of crime you have an ethical obligation to uphold the principles of accuracy, avoid privacy intrusion and harassment, and must not publish anything that could lead to the identification of sexual assault victims and other categories of people entitled to anonymity. Furthermore, you must avoid identifying innocent relatives or friends who are not relevant to the story, whose relationship is not in the public domain, and where it is not in the public interest to identify them.

In 2015, the Independent Press Standards Organisation, IPSO, ruled in favour of a woman who complained when the Times published an old picture of her with a man accused in Hong Kong of murder and described her in the caption as a 'friend.' IPSO said the woman 'was plainly not personally relevant to the story. No public interest could reasonably be regarded as justifying the intrusion into the complainant's life caused by so prominently and publicly associating her with an alleged criminal.'

IPSO's predecessor, The Press Complaints Commission, PCC, upheld a complaint against the *Evening Standard* in 2005 when it wrongly alleged that an Islamic bookshop near Baker Street in London stocked extremist literature and DVDs. The report was published in the aftermath of the July 7 suicide bombings and the PCC said: 'the consequences of the misleading allegations

- particularly given the fact that the shop’s contact details had been prominently displayed
- could have been extremely serious for the complainant’.

In other cases IPSO has found in favour of news publishers who reported the involvement of family members when mentioned in open court proceedings because ‘their relevance to the story is established as a matter of record.’

Human Rights Act 1998

<https://www.legislation.gov.uk/ukpga/1998/42/contents>

Articles are set out at <https://www.legislation.gov.uk/ukpga/1998/42/schedule/1>

See relevant IPSO rulings:

Bobin v *The Times* <https://www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=01657-14>

McConnell v *Ardrossan & Saltcoats Herald*:

<https://www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=00456-16>

Jamelia v *The Sun*:

<https://www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=00149-19>

Jamelia v *Mail Online*:

<https://www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=00148-19>

Jamelia v [dailyecho.co.uk](http://dailyecho.co.uk):

<https://www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=00151-19>

PCC ruling: Samir El-Atar v *Evening Standard* (Report 72, 2005)

<http://www.pcc.org.uk/cases/adjudicated.html?article=MjE3Mw==>



\* A downloadable sound file of this section about balancing media freedom with the right to a fair trial.

1.1 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast11mp3>

## 1.2 EXPLAINING MEDIA CONTEMPT

Statutory contempt (an offence created by an Act of Parliament, in this case the 1981 Contempt of Court Act) is publishing information that creates a substantial risk of serious prejudice, or impedes the administration of justice. Prosecution under section 83 of the Criminal Justice Act 2003 for breaching media court orders can be by summary process, e.g. at magistrates' court level only, where maximum jail sentence is six months. Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which came into effect on 12 March 2015, means fines with previous upper limits of £5,000 or more are no longer capped, and are unlimited. The criminal sanctions on conviction for an offence under the 1981 Contempt of Court Act include an unlimited fine and/or maximum jail sentence of two years' imprisonment. These are 'strict liability offences' which means that lack of intention is no defence. Cases can only be prosecuted by the Attorney General, one of the government's law officers, a politician and usually an experienced lawyer such as a senior solicitor (lawyer who tends to advise and prepare litigation) or court advocate (known as barristers or QCs (Queen's Counsel)).

Media contempt as a crime is usually triable before a judicial panel of three or two judges in the Divisional Court of the English High Court (Administrative division) in London, though the Spectator case in 2012 indicates there can be an option for summary prosecution

before a District Judge in the magistrates' court under section 83 of the Criminal Justice Act 2003. In Scotland proceedings would be held before the High Court of Justiciary. The crime has to be proved beyond reasonable doubt.

There is an offence of contempt under common law (an offence created by judge-made case law/precedent and historical custom and practice). Unlike the statutory form of the crime, the Attorney General has to prove intention. Campaigning newspapers, websites, bloggers and broadcast programmes with a partial position could be liable under common law contempt if there is a provable intention to prejudice a future trial at any stage of a civil or criminal case (even before an individual has been arrested), and the emotional, political, potentially malicious and partial nature of the publication becomes evidence of intention.

Under the 1981 Contempt of Court Act, the strict liability rule applies from the time a case is active. This is once someone has been arrested for a crime, or a warrant has been issued for arrest, issuing of a summons, oral charging, or when a civil case is set down for trial. The contempt risk in civil cases is usually only relevant to the very rare cases they are requested in actions for false imprisonment, civil fraud, and malicious prosecution. The 2013 Defamation Act removed their involvement in libel trials. A case remains active until proceedings are over. A notice to appeal against conviction and sentence after a jury trial is not usually considered to be a continuation of the proceedings or the activation of a new media contempt risk. This is because it has rarely been admitted by the judiciary that professional judges are susceptible to seriously prejudicial coverage. The situation may not be the case with lay magistrates though the issue has not been tested. When retrials are ordered the Appeal Court Criminal Division can impose Section 4(2) CCA 1981 postponing orders if it is feared foregoing proceedings contain too much prejudicial information.

Matters deemed to create a substantial risk of serious prejudice and impedance to the administration of justice could include (on the basis of previous prosecutions):

- a publishing previous convictions or acquittals;
- b suggesting an accused person(s) has confessed;
- c suggesting accusations of more serious crime or crimes than the accused persons are facing;
- d suggesting accused people are guilty;
- e saying something so bad about them that you could prejudice a potential juror against them;
- f publishing photographs or sketches of the accused when identification is likely to be a contested issue at a future trial, or images that visually communicate seriously prejudicial information about the accused;
- g publishing information that disrupts or disables a police enquiry and/or defence case by preventing the collection of critical evidence e.g. discouraging witnesses from coming forward to tell the truth or catastrophically discrediting or invalidating their evidence.

\* A downloadable sound file of this section explaining media contempt

1.2 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast12mp3>

### 1.3 REPORTING RESTRICTIONS AND THE QUASI-CONTEMPT IN BREACHING THEM

The legal concept of media contempt and the extent of liability for media communicators has a wider remit. The Director of Public Prosecutions (DPP) and Crown Prosecution Service

(CPS) for England and Wales discussed 'quasi-contempt' as also including the breach of statutory restrictions on the reporting of proceedings which are treated as substantive criminal offences. These include:

### **Anonymity for children in crime cases**

\* section 45 Youth Justice and Criminal Evidence Act 1999 gives the courts discretionary power to protect the welfare of under-18 witnesses, victims & defendants by ordering the media not to publish specific information that is likely to lead members of the public to identify youths as being concerned in the proceedings. An order made under s.45 will last until the person reaches the age of 18 and then ceases to have effect. It can be extended as a lifelong restriction by application to the High Court for *contra mundum* (against the world) injunction;

<https://www.legislation.gov.uk/ukpga/1999/23/section/45>

### **Lifetime anonymity orders for adult and child witnesses in court cases.**

\* sections 45A Youth Justice and Criminal Evidence Act 1999 (under-18s) and 46 (adults) give the criminal courts power to order the media not to publish specific information relating to the victim or witness during his lifetime that is likely to lead members of the public to identify him as being concerned in the proceedings. This provision enables courts to protect vulnerable witnesses, blackmail victims previously identified in some way, and other witnesses whose anonymity can be justified under Articles of the Human Rights Act such as 2 (right to life) 3 (right not to be subject to inhuman or degrading treatment or

punishment) 6 (right to fair trial) and 8 (right to privacy). This reporting restriction is not available for defendants;

<https://www.legislation.gov.uk/ukpga/1999/23/section/45A>

<https://www.legislation.gov.uk/ukpga/1999/23/section/46>

### **Anonymity for children in civil and youth courts**

\* section 39 of the Children and Young Persons Act 1933 gives the civil courts the discretionary power to prohibit publication of a name, address or school calculated to identify a child, and under section 49 provides default and mandatory prohibition in relation to all youth court proceedings ;

<https://www.legislation.gov.uk/ukpga/Geo5/23-24/12/section/39>

<https://www.legislation.gov.uk/ukpga/Geo5/23-24/12/section/49>

\* section 52A of the Crime and Disorder Act 1998 imposes automatic reporting restrictions on the media when reporting ‘the allocation and sending proceedings’ taking place in the Magistrates’ Courts of England and Wales. These are usually the first court appearances of people accused of serious indictable offences that have to be tried at the Crown Court.

<https://www.legislation.gov.uk/ukpga/1998/37/section/52A>

### **Anonymity for sexual offence complainants**

\* sections 1, 2 and 5 Sexual Offences (Amendment) Act 1992 – prohibit publication of details that identify a victim of rape and the wide range of other complainants of sexual offences entitled to anonymity. The anonymity continues from the time an allegation has been made and continues after the conclusion of any trial whatever the verdict and even if

the sexual offence charge is withdrawn during the trial. Section 2 of the legislation sets out all the criminal offences providing complainants with anonymity.

<https://www.legislation.gov.uk/ukpga/1992/34/section/1>

<https://www.legislation.gov.uk/ukpga/1992/34/section/2>

<https://www.legislation.gov.uk/ukpga/1992/34/section/5>

### **Anonymity for teachers accused of crimes against children they teach unless charged**

\* section 13 of the Education Act 2011 which amended Section 141F of the Education Act 2002 provides statutory anonymity for life for teachers accused of criminal offences against the children attending the school where they work unless the teachers are ever charged, or unless they waive their right to anonymity in writing.

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

### **Anonymity for victims of FGM**

\* section 71 of the Serious Crime Act 2015, coming into force 3 May 2015 imposes an automatic reporting restriction for the victims of female genital mutilation often referred to as FGM. The restriction applies from the moment an allegation is made and imposes a lifetime ban on identifying any person as being the alleged victim of FGM.

<https://www.legislation.gov.uk/ukpga/2015/9/section/71/enacted>

### **Anonymity for victims of forced marriages**

\* sections 173 and 174 of the Policing and Crime Act 2017 imposes lifelong anonymity for any person alleged to have been made a victim of forced marriage. Only forced marriage victims aged 16 and above can consent in writing to waive their anonymity.

<https://www.legislation.gov.uk/ukpga/2017/3/section/173>

<https://www.legislation.gov.uk/ukpga/2017/3/section/174>

### **Anonymity for victims of modern slavery and people trafficking**

\* section 2 of the Modern Slavery Act 2015 has extended the list of sexual offences in the 1992 Sexual Offences Act to include all victims (and alleged victims) of any offence under the Modern Slavery Act. This encompasses 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.

<https://www.legislation.gov.uk/ukpga/2015/30/section/2>

<https://www.legislation.gov.uk/ukpga/1992/34/section/2>

### **Pre-trial hearing reporting restrictions**

\* sections 8A & 8C of the Magistrates' Court Act 1980, sections 39, 40, 41 and 42 of the Criminal Procedure and Investigations Act 1996 impose automatic reporting restrictions applying to rulings on the admissibility of evidence or points of law at forthcoming trials. These are known as 'pre-trial hearings'. These cease once the trial or trials are concluded.

<https://www.legislation.gov.uk/ukpga/1980/43/section/8A>

<https://www.legislation.gov.uk/ukpga/1980/43/section/8C>

<https://www.legislation.gov.uk/ukpga/1996/25/section/39>

<https://www.legislation.gov.uk/ukpga/1996/25/section/40>

<https://www.legislation.gov.uk/ukpga/1996/25/section/41>

<https://www.legislation.gov.uk/ukpga/1996/25/section/42>

### **Preparatory hearing reporting restrictions**

\* section 37 of Criminal Procedure and Investigations Act 1996 and section 11 of Criminal Justice Act 1987 impose automatic restrictions on the reporting of preparatory hearings at the Crown Court that can sometimes be held in relation to terrorism-related trials, long, complex or serious criminal trials and serious fraud cases.

<https://www.legislation.gov.uk/ukpga/1996/25/section/37>

<https://www.legislation.gov.uk/ukpga/1987/38/section/11>

### **Dismissal hearing reporting restrictions**

\* section 11 of the Criminal Justice Act 1987 and schedules in the Criminal Justice Act 1991 and Crime and Disorder Act 1998 provide for automatic reporting restrictions at the Crown Court in relation to unsuccessful 'dismissal proceedings' where accused persons apply for the dismissal of the charges they face in relation to fraud, sexual offences or cruelty against children.

<https://www.legislation.gov.uk/ukpga/1987/38/section/11>

<https://www.legislation.gov.uk/ukpga/1991/53/schedule/6>

<https://www.legislation.gov.uk/ukpga/1998/37/schedule/3>

### **Prosecution appeal reporting restrictions**

\* section 71 of the Criminal Justice Act 2003 imposes automatic reporting restrictions on Crown Court, Court of Appeal and Supreme Court hearings when the prosecution appeals decisions to expedite a prosecution appeal, adjourn a case, or discharge the jury. All these legal matters take place in the absence of the jury so it should be obvious to any trained and experienced journalists that these matters should not be published.



<https://www.legislation.gov.uk/ukpga/2003/44/section/71#section-71-4>

### **Special measures reporting restrictions**

\* section 47 of the Youth Justice and Criminal Evidence Act 1999 prohibits the reporting of special measures directions, directions relating to the use of Live Link for an accused and directions prohibiting an accused from cross-examining a witness in person.

<https://www.legislation.gov.uk/ukpga/1999/23/section/47>

### **Reporting restrictions protecting secret witnesses and information**

\*section 11 of the Contempt of Court Act 1981 is a discretionary power enabling criminal courts to prohibit identification of 'a name or other matter' withheld from the public before the proceedings. This can formalize common law rights to anonymity for blackmail victims (where the menaces threatened are embarrassing to alleged victim) criminal informants, undercover police and firearms officers, agents and officers for the intelligence services. This order is usually used to protect and restrict information and individuals covered by the Official Secrets Acts. It can sometimes be invoked in cases where it is argued that identification is a threat to right to life under Section 2 of the Human Rights Act. This is an absolute right and if engaged, there is no balancing exercise with qualified rights under Articles 10 (freedom of expression) and 8 (privacy). But the threshold of evidence is high. Applicants have to demonstrate the risk to life or of serious physical harm is 'real and immediate' and supported by 'cogent evidence' of specific identified threats; not merely abuse and threats on social media.

<https://www.legislation.gov.uk/ukpga/1981/49/section/11>

RXG v Ministry of Justice & Ors [2019] EWHC 2026 (QB) (29 July 2019)

<https://www.bailii.org/ew/cases/EWHC/QB/2019/2026.html>

Hold The Front Page Law Column: 'Police officer facing criminal trial fails in bid for anonymity'

<https://www.holdthefrontpage.co.uk/2022/news/law-column-police-officer-facing-criminal-trial-fails-in-bid-for-anonymity/>

### **'Indecent details calculated to injure public morals' reporting restriction**

\* section 1 (1)(a) of the Judicial Proceedings (Regulation of Reports) Act 1926 prohibits publication in court reports of any 'indecent medical, surgical or physiological details which would be calculated to injure public morals.' There are no records of any successful prosecution of anyone for being in breach of this restriction. It may be the case this is an example of 'dead letter law' and it does not serve any public interest. On the other hand might there be an argument for the exercise of restraint in reporting the detail of how to carry out an unlawful abortion?

<https://www.legislation.gov.uk/ukpga/Geo5/16-17/61/section/1>

### **Derogatory mitigation reporting restrictions**

\* section 58 of the Criminal Procedure and Investigations Act 1996 provides courts with the power to postpone publication of derogatory remarks made in mitigation. These relate to 'derogatory assertions' made about named or identified persons in a mitigation speech by defence lawyers during a sentence hearing. The order should not be made if the allegation had been made during open trial and previous proceedings, and the order lasts for a period

of 12 months. There has been no record of any media publisher being in breach of such an order or any report of an order being made under this legislation.

<https://www.legislation.gov.uk/ukpga/1996/25/section/58>

### **Postponing publication of trials reporting restrictions**

\*section 4(2) of the 1981 Contempt of Court Act provides courts with the power to postpone reporting of proceedings so as to avoid a substantial risk of prejudice to the administration of justice. This is one of the most common reporting restrictions impacting on journalists reporting criminal trials.

<https://www.legislation.gov.uk/ukpga/1981/49/section/4>

### **Photography, filming and sound recording of court hearing restrictions**

\*section 41 of the Criminal Justice Act 1925 prohibits photography or sketching in court and extends the ban on photography or filming to people entering or leaving the precincts of the court which is usually interpreted as the court building and its immediate forecourt. Section 9 of the 1981 Contempt of Court Act prohibits sound recording court proceedings without permission and also for broadcast or publication. Schedule 25 of the Coronavirus Act 2020 prohibits unauthorised recording or publication of remote court hearings.

<https://www.legislation.gov.uk/ukpga/Geo5/15-16/86/section/41>

<https://www.legislation.gov.uk/ukpga/1981/49/section/9>

<https://www.legislation.gov.uk/ukpga/2020/7/schedule/25/enacted>

### **In camera or in chambers secret hearing excluding media and public**

\* Criminal Procedure Rules 2015 at r.6.6(3)(c) (and updated versions) advise criminal courts that whenever the prosecution or defence make an application for a case to be heard in secret, a party must explain why no measures other than trial in private will suffice. Such applications have to be made not less than 5 business days before the trial is due to begin. Decisions on secret hearings need to be publicised by public notice and communicated to reporters. They can also be appealed as with other crown court reporting restrictions directly to the Court of Appeal Criminal Division under Section 159 of the Criminal Justice Act 1988. Open Justice means secret hearings, particularly at the Crown Court, should be very rare. The practice of holding bail applications in chambers at the Crown Court was successfully challenged in 2006.

6.6-8 Criminal Procedure Rules 2015 at:

<https://www.legislation.gov.uk/uksi/2015/1490>

Updated version Criminal Procedure Rules and Practice Directions (updated 2022)

Parts 5 and 6 relevant to court reporting.

<https://www.judiciary.uk/wp-content/uploads/2022/03/CrimPD-12-CONSOLIDATED-March-2022.pdf>

<https://www.cps.gov.uk/legal-guidance/hearings-private-camera>

<https://www.legislation.gov.uk/ukpga/1988/33/section/159>

Malik v Central Criminal Court & Anor [2006] EWHC 1539 (Admin) (27 June 2006)

<https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2006/1539.htm>

\* A downloadable sound file of this section on reporting restrictions and the quasi-contempt in breaching them.

### 1.3 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast13mp3>

### 1.4 ANONYMITY FOR CRIME SUSPECTS BEFORE BEING CHARGED AND THE NEED TO SHOW RESPECT FOR REASONABLE EXPECTATION OF PRIVACY

In February 2022 the UK Supreme Court ruled unanimously in *Bloomberg v ZXC* that there is a reasonable expectation of privacy for all suspects investigated for crime prior to being charged and this is private information. Lord Hamblen fully supported the Court of Appeal's view stated in 2020: '... 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.' Lord Hamblen said the identification of ZXC would be a serious attack on his reputation and this 'must cause prejudice to personal enjoyment of the right to respect for private life.'

The ruling explained that ZXC is a US citizen working for a publicly listed company 'X Ltd' operating overseas in several foreign countries and both had been subject to a criminal investigation by a UK law enforcement body 'UKLEB' since 2013. It also stated that despite this anonymisation 'The integrity of various transactions involving X Ltd has been publicly questioned, including by UK Parliamentarians, for a number of years, including its transactions in the foreign state.'

The precedent has been widely condemned by media publishers and journalism bodies including the Guardian, Sun, Society of Editors and Chartered Institute of Journalists. It now means the public interest threshold to enable naming of crime suspects must be very high and even where the police and state investigating bodies officially or unofficially name and

confirm a crime suspect, there will always be a certain risk of litigation for breach for privacy. The qualified privilege defence in libel will offer no defence.

This may end the ambiguity of situations such as when Metropolitan police officer Wayne Couzens was arrested for the kidnapping and murder of Sarah Everard in 2021. While broadcasting media withheld his name until charged, this was not the case with many newspaper publishers.

There are three cases where anonymity for crime suspects has been fully developed:

UK Supreme Court summary, full ruling and video of legal submissions and Lord

Hamblen's presentation in Bloomberg LP (Appellant) v ZXC (Respondent)

<https://www.supremecourt.uk/cases/uksc-2020-0122.html>

<https://www.supremecourt.uk/cases/docs/uksc-2020-0122-judgment.pdf>

Summary ruling on YouTube [https://youtu.be/uuuE38tX\\_VY](https://youtu.be/uuuE38tX_VY)

Anonymising the suspect- The UK Supreme Court delivers blow to press freedom, CloJ The Journal

<http://cioj.org/thejournal/anonymising-the-suspect-the-uk-supreme-court-delivers-blow-to-press-freedom/>

ZXC v Bloomberg Appeal Court decision in May 2020

<https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2020/611.html>

Richard v BBC High Court decision in July 2018.

<https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Ch/2018/1837.html>

Sicri v Daily Mail & Mail Online High Court decision in December 2020

<https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2020/3541.html>

These cases 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. It would be very unwise for any media publication to identify any crime suspect without taking specialist legal advice.

The BBC was unable to show consideration of Sir Cliff Richard privacy rights. 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 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.

\* A downloadable sound file of this section on anonymity for crime suspects before being charged and the need to show them respect for reasonable expectation of privacy.

1.4 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast14mp3>

1.5 IMPORTANCE OF KEEPING WRITTEN RECORDS OF DECISION MAKING- MENTIONING PUBLIC INTEREST, AND CONSIDERING REASONABLE EXPECTATION OF PRIVACY

There is a growing trend in the UK for Judges and courts in media law cases to place emphasis on the importance of editors, producers and journalists to keep a written and evidential trail of their decision making. In this way they can demonstrate open justice and freedom of expression imperatives were reasonably, responsibly and fairly balanced with the duty of care to respect court orders, the rule of law on anonymity, the need to avoid jigsaw identification and full respect for the right to reasonable expectation of privacy on the part of protagonists in news stories. Use of phrases such as 'reasonable expectation of privacy', 'proportionality' 'Article 10 public watchdog journalism rights' 'protection of journalists' sources' and matching 'public interest' to categories defined in the Editors' Code and Broadcasting Code and any other relevant professional journalist's code of ethics would undoubtedly strengthen future potential defences to civil litigation or criminal enquiry.

When they have a duty to comply with any code of ethics as part of their employment, it would be useful for journalists to have a written record showing they gave proper consideration to the relevant code. This is certainly the impact of section 12(4)(b) of the Human Rights Act which obliges courts to look at compliance with ethics codes when dealing with litigation conflicts between freedom of expression and privacy.

Mr Justice Mann in the successful privacy action by Sir Cliff Richard against the BBC made it clear in his ruling that the BBC did not give enough consideration to the claimant's privacy rights when deciding to identify him as the subject of a police investigation that would later be dropped. Mr Justice Warby in *Sicri* discussed 'ethics of journalism' and the Editors' Code's requirement that editors should be able to demonstrate that they reasonably believed that a publication was in the public interest. Mr Justice Nicklin in his 2021 ruling in the *Lachaux v Independent* libel case quoted the defendant newspaper's code:



‘Detailed notes and contemporaneous records of conversations with a source could be crucial in defending a potentially libellous story, so you should take such notes and make sure you preserve them securely, bearing in mind that you may have to produce them as evidence in court. If a source needs to remain confidential you need to ensure that they cannot be identified in any way in your notes or other material.’

The judge observed: ‘Strikingly, there are no documents that record, or even refer to, the decision-making process that led to the original publication of the articles and, specifically, any assessment of whether, and if so, why it was concluded that it was in the public interest originally to publish the articles, or, thereafter, to continue to publish them at the various points at which additions or amendments were made to the terms of the articles.’

He added: ‘In other areas, where professionals are asked to account for events that have happened and decisions they have taken, the Courts are used to seeing contemporaneous records. For example, doctors, nurses, teachers, police officers, lawyers, surveyors, dentists, accountants, opticians, and architects routinely take notes and keep records of their professional lives; information received, advice given, decisions made, and actions taken. Partly, this record keeping assists them to do their respective jobs, but one of the reasons that these records are kept is because the professional may be called upon to account for his/her decisions or actions – to superiors, a regulator or even in litigation – and the recognition that memory alone may be an unreliable tool upon which to rely.’

It can certainly be argued that effective record keeping of decision making is needed to ensure compliance with what is known as ‘the journalism exemption’ or ‘special purposes’ in data protection law. This is now codified under paragraph 26 of Schedule 2 of the 2018

Data Protection Act. The new legislation states that data processing of private information can be done in relation to 'journalistic, academic, artistic or literary material... with a view to publication' and when there is a reasonable belief the publication 'would be in the public interest.' The 'data controller', in other words the editor and publisher, 'must take into account...the special importance of the public interest in the freedom of expression and information' and 'have regard' to relevant codes of practice and guidelines namely: '(a)BBC Editorial Guidelines; (b)Ofcom Broadcasting Code; (c)Editors' Code of Practice.'

Journalism special purpose defence in 2018 Data Protection Act

<https://www.legislation.gov.uk/ukpga/2018/12/schedule/2/paragraph/26>

Lachaux v Independent Print Ltd & Anor libel ruling July 2021.

<https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2021/1797.html>

\* A downloadable sound file of this section on the importance of keeping written records of media law decision making.

1.5 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast15mp3>

## 1.6 REPORTING COURT CASES: TEN SIMPLE GROUND RULES

See the companion website chapter for this guidance briefing and see Chapter 2 for more detail on reporting the courts.

The open justice rights of journalists to report court cases are indicated by Section 4(1) of the 1981 Contempt of Court Act which states 'a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.'

<https://www.legislation.gov.uk/ukpga/1981/49/section/4/2005-09-27>

Absolute and qualified privilege in defamation law is determined by producing a 'fair and accurate report' of court proceedings, public meetings, press conferences, and local authority and legislative meetings.

<https://www.legislation.gov.uk/ukpga/2013/26/section/7>

The right to take notes during any court hearing have been confirmed as a key part of the Open Justice principle in the case of *Ewing v Crown Court Sitting at Cardiff & Newport & Ors* [2016] EWHC 183 (Admin) (08 February 2016)

<https://www.bailii.org/ew/cases/EWHC/Admin/2016/183.html>

\* A downloadable sound file of this section on the ten simple ground rules of reporting court cases

1.6 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast16mp3>

1.7 THE PUBLIC INTEREST DEFENCE AND MERELY INCIDENTAL TO COURT PROCEEDINGS  
DEFENCE IN MEDIA CONTEMPT LAW

There is a defence under section 5 of the 1981 Contempt of Court Act to protect publications on matters of public interest about subjects that are 'merely incidental' to ongoing trials and proceedings. 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?

The defence is more likely to succeed if the reporting or comment on the debating issue does not specifically refer to an active criminal or civil case where juries decide the issue and in particular, does not express an opinion that an individual is guilty of a criminal offence.

The origin of the defence is the seminal investigative campaign led by the late Sir Harold Evans and *The Sunday Times* against the drug company responsible for manufacturing thalidomide which was linked to deformities in children born to mothers who had taken it during their pregnancies. In 1973 the Law Lords ruled the paper would be in contempt of court for prejudicing pending civil proceedings, but the European Court of Human Rights in 1979 ruled that this was a breach of Article 10 freedom of expression.

The key test case for the Section 5 defence is the successful defence by the *Daily Mail* for an editorial comment during the trial of a paediatrician in 1981 who was eventually acquitted of murdering a new-born baby with Down's syndrome. The newspaper article by Malcolm Muggeridge discussed the ethics of euthanasia, did not mention the criminal trial, and had been in support of a 'pro-life' candidate standing in a by-election. In contrast *The Sunday*

*Express* published a comment article which inaccurately alleged that the defendant had drugged the victim. It further stated that the baby had died 'unloved and unwanted.' The paper and its editor, John Junor, admitted contempt and received fines totalling £11,000.

Section Five of the 1981 Contempt of Court Act

<https://www.legislation.gov.uk/ukpga/1981/49/section/5>

European Court of Human Rights *The Sunday Times v The United Kingdom* 1979.

<https://www.bailii.org/eu/cases/ECHR/1979/1.html>

Law Commission Consultation Paper No 209 on Contempt of Court published in 2012.

(See chapter 2 on contempt by publication)

[https://www.lawcom.gov.uk/app/uploads/2015/03/cp209\\_contempt\\_of\\_court.pdf](https://www.lawcom.gov.uk/app/uploads/2015/03/cp209_contempt_of_court.pdf)

\* A downloadable sound file of this section on public interest merely incidental proceedings defence in media contempt law.

1.7 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast17mp3>

## 1.8 TRIAL ONLINE BY GOOGLE, TWITTER AND FACEBOOK ETC- CONTROLLING SOCIAL MEDIA PREJUDICE

Pre-emptive orders to protect trials from 'trial by Google' online and social media prejudice. In 2016 the Court of Appeal was so disturbed by the scale and nature of abuse and prejudice being broadcast in comments on social media sites during a murder trial, it decided to halt reporting on those platforms. The mainstream media were unable to disable the comment streams of their reports communicated on social media platforms such as Facebook and

Twitter. Sir Brian Leveson explained in his ruling: ‘The world has now changed and observations which were previously communicated orally or had the most limited publication now appear on social media sites and are readily accessible by a potentially vast audience. In that regard, what is published can extend beyond the reach of the traditional media (whether newspaper or television).’ 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. 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.

Case histories indicate courts tend to err on the side of caution in issuing injunctions and orders to postpone publication/transmission and the removal of archive online articles. In July 2012, Mr Justice Flaux at Birmingham Crown Court made an order under section 45 of the Senior Courts Act 1981 postponing the BBC’s transmission of two documentaries about the summer riots of the previous year while presiding over the trial of eight defendants later acquitted in relation to the deaths of three men run over by a car. Also in 2012 Mr Justice Fulford directed that online background reports on PC Simon Harwood, later acquitted of the manslaughter of Ian Tomlinson at Southwark Crown Court, should be temporarily removed until the end of the proceedings.

Ruling in Angela Wrightson case controlling social media commentary. British Broadcasting Corporation & Eight Other Media Organisations, R (on the application of) v F & D 2016.

<https://www.bailii.org/ew/cases/EWCA/Crim/2016/12.html>

\* A downloadable sound file of this section on trial by social media in contempt law.

1.8 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast18mp3>

## 1.9 SUCCESSFUL PROSECUTION OF NATIONAL NEWSPAPERS WHICH VILIFIED AN INNOCENT SUSPECT IN MURDER ENQUIRY

On 29 July 2011 the Lord Chief Justice, Lord Igor Judge, ruled that *The Sun* and *Daily Mirror* newspapers had committed media contempt by vilifying the reputation of retired teacher Christopher Jefferies after his arrest during the enquiry into the murder of Joanna Yeates in Bristol at the end of 2010 and beginning of the New Year 2011. Vincent Tabak was subsequently convicted of Joanna's murder. Mr Jefferies was an entirely innocent man. The case generates the legal principle that 'the vilification of a suspect under arrest' can be a potential impediment to the course of justice.

The Sun reported 'he was a stalker, with an obsession with death, who let himself into the flats of other occupants of the building where Miss Yeates lived, and that he had an unhealthy interest in blonde young women'. The judge said the Daily Mirror had published two articles with the headlines on the front page declaring: 'Jo suspect is peeping Tom', 'Arrest landlord spied on flat couple', 'Friend in jail for paedophile crimes', 'Cops now probe 36-years old murder'. The ruling observed: 'while positively asserting that Mr Jefferies was a voyeur, without directly asserting that he was involved in paedophile crimes or a long unresolved murder, the impression conveyed to an objective reader was that he was somehow linked with not one but two awful, additional crimes'.

The Lord Chief Justice added these articles vilified Mr Jefferies long before the fade factor could have begun to operate, and ‘the risks to the preparation of his defence would have been serious’. The court imposed fines of £18,000 on The Sun and £50,000 on the Daily Mirror.

This case demonstrates that the crime of media contempt involves publications that create a substantial risk of impeding as well as prejudicing the administration of justice. Impeding justice means disrupting or frustrating a criminal enquiry or preparation of a defence case. Media contempt is not just a matter of prejudicing the minds of jurors.

Full court ruling HM Attorney-General v MGN Ltd & Anor [2011] EWHC 2074 (Admin) (29 July 2011)

<https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2011/2074.html>

\* A downloadable sound file of this section on media contempt committed when demonizing an arrested suspect.

1.9 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast19mp3>

#### 1.10 SUCCESSFUL PROSECUTION OF NEWSPAPERS WHICH PUBLISHED PREJUDICIAL ONLINE IMAGES OF A DEFENDANT

On 3 March 2011 Lord Justice Moses and Mr Justice Owen ruled that the *Daily Mail* and *The Sun* newspapers had created a substantial risk of serious prejudice by publishing online photographs of a defendant, Ryan Ward, when he was on trial at Sheffield Crown Court for murdering a 39-year-old father who had intervened after Ward had head-butted a young woman.



The photograph, taken from a social networking site, depicted Ward holding a pistol. This was the first case of national newspapers in Britain being prosecuted for media contempt by online publication. The jury had been warned not to consult the Internet. After the prosecution opening, the Mail online published an image that 'showed Ward holding a pistol in his right hand with his index finger on the trigger whilst he indicated firing a handgun with his left hand'. It remained online for nearly five hours until the mistake had been spotted. Digital data analysis indicated that 112 users in the Sheffield area obtained access to the article. Publication in The Sun occurred on the second day of the trial for about 19 hours and 'although the picture was carefully cropped for newspaper publication so as to exclude Ward's left hand and any view of the gun, when the picture was cropped for publication online, the top part, the barrel, of the gun was visible'.

Seventy-eight unique visitors to the article in Sheffield were established. The trial judge found that no members of the jury had seen the online articles. But the Divisional Court ruled 'The criminal courts have been troubled by the dangers to the integrity and fairness 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.'

The judges concluded: 'we are sure that there was a substantial risk that a juror would see the photograph and that there was a substantial risk of serious prejudice, namely that the jury would have had to be discharged, had that occurred'. Both newspapers were fined £15,000 each and ordered to pay legal costs of just over £28,000.

Attorney General v Associated Newspapers Ltd & Anor [2011] EWHC 418 (Admin) (03 March 2011)

<https://www.bailii.org/ew/cases/EWHC/Admin/2011/418.html>

Attorney General v Associated Newspapers Ltd & Anor [2011] EWHC 1894 (Admin) (19 July 2011)

<https://www.bailii.org/ew/cases/EWHC/Admin/2011/1894.html>

\* A downloadable sound file on this section concerning media contempt by online image.

1.10 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast110mp3>

#### 1.11 SUCCESSFUL PROSECUTIONS FOR COMMENT ARTICLES PREJUDICING CURRENT AND HIGH PROFILE CRIMINAL TRIALS

In 2015 the Attorney General successfully prosecuted the Condé Nast GQ magazine for publishing an article by Michael Wolff during the phone hacking trial of former *News of the World* editors Andy Coulson and Rebekah Brooks. 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.

On 17 November 2011 the columnist Rod Liddle had written and published an article in the weekly periodical the *Spectator* that coincided with key evidence from a prosecution witness at the Old Bailey trial of two men accused of murdering Stephen Lawrence in 1993. The article stated: 'it would be a singularly perverse judge who took action against me: for the last 18 years the public has been assured that all five of the men originally named as suspects, including Dobson and Norris, were absolutely guilty, bang to rights [ ... ] Should we care about these undoubtedly violent, often criminal, certainly unpleasant white trash? That they were (and probably still are) racists is quite beyond dispute.' The article discussed the connections between the five suspects and organized crime as well as the previous convictions of the defendant Norris. Senior District Judge Howard Riddle fined the magazine £3,000 (maximum penalty at the time was £5,000) and ordered it to pay £2,000 compensation to the parents of Stephen Lawrence as well as £610 costs and a £15 victim surcharge. The article was a breach of an order made by the Court of Appeal in September 2010, widely circulated to news organizations, that reporting details of previous convictions and associations of the two accused was postponed until the end of the trial. Breaches of such orders are summarily prosecuted in the lower magistrates' court. The magazine could have been prosecuted for breaching the 1981 Contempt of Court Act at the Divisional Court, but the Attorney General decided to refer the matter to the DPP and CPS for summary jurisdiction and the magazine pleaded guilty and apologized. Judge Riddle said:

'Apart from the fact that the article breached a court order the reality is that as a result of publication there was at least a brief period during a sensitive part of the trial in which the whole trial process itself was in jeopardy. I don't need any imagination whatsoever to see what distress this might have caused, not least to the Lawrence family and friends.

Fortunately it is clear that the jury did not read the article and the trial was able to come to

a fair conclusion. But for Mr and Mrs Lawrence and members of their family the prospect of the trial collapsing must have been terrifying.'

HM Attorney General v The Condé Nast Publications Ltd [2015] EWHC 3322 (Admin) (18 November 2015)

<https://www.bailii.org/ew/cases/EWHC/Admin/2015/3322.html>

ITV News 9 May 2012 Magazine charged over article

<https://www.itv.com/news/story/2012-05-09/spectator-charged-over-article/>

BBC News 7 June 2012 Spectator fined after admitting Stephen Lawrence breach

<https://www.bbc.co.uk/news/uk-18350615>

\* A downloadable sound file on media contempt by publishing seriously prejudicial articles after trials have started.

1.11 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast111mp3>

1.12 PROSECUTION OF TWO NATIONAL NEWSPAPERS FOR PUBLISHING BACKGROUND IN TRIAL OF SERIAL KILLER WHO MURDERED MILLY DOWLER WHEN JURORS WERE STILL DECIDING ON A LESSER CHARGE FOR AN ATTEMPTED KIDNAP OFFENCE IN RELATION TO ANOTHER VICTIM

In May 2011 Levi Bellfield was tried for the murder of 13-year-old Milly Dowler on 21 March 2002 and the attempted kidnap of 11-year-old Rachel Cowles on the previous day. The jury knew he had been convicted on 25 February 2008 of murdering Marsha McDonnell on 4 February 2003, Amelie Delagrangre on 19 August 2004, and the attempted murder of Kate

Sheedy on 28 May 2004. The jury found him guilty on 23 June 2011 of kidnapping and murdering Milly Dowler and while they continued their deliberations, the broadcast media and national newspapers published background about Bellfield which was not part of the evidence at the trial and despite an email warning from the CPS that nothing should be published that might prejudice the jury in its ongoing deliberations. The Attorney General prosecuted two national newspapers for contempt and the President of the Queen's Bench Division ruled they were guilty because: 'the articles in the *Daily Mail* purported to link Bellfield to another murder and more importantly put forward an account of the drug induced rape of schoolgirls. The article in the *Daily Mirror* set out his rape of a disabled girl on a car bonnet and his depraved sexual abuse of two of the witnesses who had not given evidence of these matters.' The articles were highly prejudicial because they 'set out material in relation to his sexual perversion in relation to his partners and his perverted interest in and rape of girls'. The newspapers had argued that: 'Given what the jury knew about the depravity of Bellfield, these further descriptions of his depravity could not have resulted in a substantial risk of serious prejudice to the proceedings. [ ... ] There was nothing in the material published which was directly relevant to the count of attempted kidnapping that the jury was considering.' The newspapers argued that TV news channels such as Sky, ITN and the BBC had broadcast background not known to the jury, but the court ruled: 'none carried the allegations of a sexual interest in girls or his rape of girls'.

Full court ruling in HM Attorney General v Associated Newspapers Ltd & Anor [2012]

EWHC 2029 (Admin) (18 July 2012)

<https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2012/2029.html>

Newspapers each fined £10,000 for contempt with £25,000 legal costs in trial of Levi Bellfield.

Attorney General v Associated Newspapers Ltd & Anor [2012] EWHC 2981 (Admin) (16 October 2012)

<https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2012/2981.html>

\* A downloadable sound file of this section on media contempt by publication while a jury is still considering verdicts.

1.12 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast112mp3>

1.13 CRIMINAL LAW RELATING TO MISCONDUCT OF JURORS AND JOURNALISTS WHO SOLICIT INFORMATION ABOUT THEIR CONFIDENTIAL DELIBERATIONS.

There is a tendency for judges to create a cordon sanitaire around jurors in terms of their identity. Sketching, photographing and filming of jurors could be considered ‘impeding’ the administration of justice. This is despite the fact that jurors answer to their names when sworn in and are rarely concealed in public proceedings. It would not be advisable to report/publish the names of jurors and it might well be considered a contempt of court to do so. There have been occasions when jurors have discussed their concerns that jury decisions could amount to a miscarriage of justice. The ECtHR case in 2012 involving an appeal by a jury foreman and *The Times* newspaper over a conviction for contempt by

revealing jury deliberation indicates that Article 10 freedom of expression rights do not trump existing UK legislative law on this issue.

In 2013 a judge at Oxford Crown Court asked a reporter for a local newspaper to explain why she had photographed two jurors outside the court building and asked them to help identify a defendant. He accepted her explanation that this had happened by accident and there was no intimidation. As will be explained in Chapter 8, in Northern Ireland there is a statutory ban on identifying jurors serving in trials for all time.

In an earlier incident at the Central Criminal Court in 1982 a Guardian journalist was detained for potential contempt of court for approaching a juror in the trial of Mr 'Nice' Howard Marks after his acquittal for drug smuggling. The reporter was released after counsel persuaded the judge no offence had been committed.

In 2015 jury misconduct criminal law was coded into legislation and has become an indictable offence to be tried by jury in the Crown Court and prosecutions can only be approved by the Attorney General. This has replaced using common law civil contempt powers or Section 8 of the 1981 Contempt of Court Act which was also directed at journalists soliciting confidential information about jury deliberations. This means that under Section 20D of the Juries Act 1974 jury misconduct offences whether involving jurors, journalists or anyone else will be tried with juries deciding the verdicts rather than by the trial judge or two judges at the Divisional Court.

In 2012 the Lord Chief Justice jailed a university psychology lecturer, Dr Theodora Dallas, for six months for carrying out online research about a man on trial at Luton Crown Court accused of causing grievous bodily harm. She had learned that he had been previously acquitted of rape and told her fellow jurors about what she had discovered. The trial was aborted after her conduct was reported to the judge.

Dr Dallas explained that she had carried out the research because she had been having language difficulties and apologized, but Lord Judge said: 'The damage to the administration of justice is obvious. Misuse of the Internet by a juror is always a most serious irregularity and an effective custodial sentence is virtually inevitable.' Dr Dallas was not successful in her appeal to the European Court of Human Rights. She argued she had been found guilty of a criminal offence on account of an act which did not constitute a criminal offence at the time when it was committed.

\* A downloadable sound file of this summary of jury misconduct law and soliciting of their deliberations by journalists.

1.13 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast113mp3>

Section 20D of the Juries Act 1974

<https://www.legislation.gov.uk/ukpga/1974/23/section/20D>

Michael Alexander Seckerson & Times Newspapers Ltd v the United Kingdom - 32844/10 and 33510/10 [2012] ECHR 241 (24 January 2012)

<https://www.bailii.org/eu/cases/ECHR/2012/241.html>



Dallas v. The United Kingdom - 38395/12 (Judgment (Merits and Just Satisfaction) : Court (First Section)) [2016] ECHR 174 (11 February 2016)  
<https://www.bailii.org/eu/cases/ECHR/2016/174.html>

#### 1.14 ATTORNEY GENERAL VERSUS FIVE NATIONAL NEWSPAPERS OVER PREJUDICIAL REPORTING OF THE CASE OF MICHAEL FAGAN WHO WALKED INTO THE QUEEN'S BEDROOM

The first test case for media contempt was the prosecution of five national newspapers over their coverage of the case of Michael Fagan after he had been arrested and charged for burglary following his uninvited visit to the Queen's bedroom in 1982. See the companion website chapter for the detailed account of this precedent.

Attorney-General v Times Newspapers Ltd and Others: CA 12 Feb 1983

<https://swarb.co.uk/attorney-general-v-times-newspapers-ltd-and-others-ca-12-feb-1983/>

Independent feature: 'Who was Michael Fagan and why did he break into the Queen's bedroom?'

<https://www.independent.co.uk/life-style/royal-family/the-crown-michael-fagan-the-queen-b1722584.html>

\* A downloadable sound file of this section on the first prosecution for media contempt under the 1981 Contempt of Court Act over press coverage of the Queen's bedroom intruder.

#### 1.14 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast114mp3>

#### 1.15 USE OF TWITTER AND LAPTOP WI-FI/EMAIL IN COURT REPORTING

The Lord Chief Justice of England and Wales, Lord Igor Judge, issued a guidance notice effective from 14 December 2011. There is no requirement for journalists and legal commentators to seek permission to use text-based devices to communicate from court. These include hand-held computer devices such as smartphones and laptop/notebook computers with Wi-Fi/mobile radio communications. Members of the public will have to apply, formally or informally, if they want to do so: 'The use of live text-based forms of communication (including Twitter) from court for the purposes of fair and accurate reporting' relates to court proceedings which are open to the public and 'to those parts of the proceedings which are not subject to reporting restrictions'.

Photography in court remains strictly forbidden as there is a statutory prohibition under the 1925 Criminal Justice Act. Sound recordings may only be made with the court's consent and will only be for note-taking purposes and not for broadcasting as set out in section 9 of the 1981 Contempt of Court Act and subsequent Practice Directions. Restrictions on recording remote hearings accessed online via computers have been introduced in Schedule 25 of the Coronavirus Act 2020.

The guidance cautions about the use of such devices during hearings about inadmissible evidence that 'may influence members of a jury', and the risk that 'witnesses who are out of court may be informed of what has already happened in court and so coached or briefed

before they give evidence'. Electronic texting has to comply with reporting restrictions as in the case of any previous method of reporting. Judges are warned to be mindful of how simultaneous reporting from the courtroom could put pressure on witnesses, particularly in family and civil proceedings.

For practical purposes, professional journalists should have verifiable identification (e.g. a National Press card) and identify their status and presence to court staff beforehand and also indicate to the clerk of the court that they intend to electronically report from the courtroom. Having a copy of the Lord Chief Justice's guidance would also be helpful. Any method of disabling the photographic, video and sound recording function of the electronic machines used would be helpful and if this were not possible, journalists would have to take very special care that none of these prohibitive functions were activated accidentally.

A key quotation from the guidance states: 'the use of an unobtrusive, hand held, silent piece of modern equipment for the purposes of simultaneous reporting of proceedings to the outside world as they unfold in court is generally unlikely to interfere with the proper administration of justice'. The key words are clearly 'unobtrusive' and 'silent'.

Practice Guidance: The use of live text-based forms of communication (including Twitter) from court for the purposes of fair and accurate reporting.

<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/ltbc-guidance-dec-2011.pdf>

\* A downloadable sound file of this section on tweeting from court.

1.15 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast115mp3>

#### 1.16 BROADCASTING AND ONLINE COVERAGE OF THE COURTS

Section 41 of the 1925 Criminal Justice Act prohibits the use of cameras or live sketching during court proceedings in England and Wales. The legislation does not apply in Scotland. Scottish judges therefore have discretion to permit photography, filming or sketching. It is also an offence to photograph and film people entering and leaving 'court precincts'. It would be advisable to find out what constitutes the precincts at specific court complexes so that camera/tripod positions are not challenged by the police.

Section 9 of the 1981 Contempt of Court Act makes it an offence to use a tape recorder or bring into a court a tape recorder for use without leave of the court. There are also Practice Directions from the Lord Chief Justice of England and Wales prohibiting the broadcasting of tape recordings of court hearings. However, unlike cameras, in theory reporters should be able to use devices to record sound interviews in a court building outside the courtrooms. Security officers are usually instructed to prohibit media personnel bringing into court buildings camera or sound recording equipment. It is useful to make arrangements with nearby shops and commercial premises to leave the machinery to be picked up after the hearing and it is not unknown for the proprietors to do this in return for a modest fee of say a pound or two.

The Scottish legal system has permitted broadcasting of criminal proceedings, though with very restrictive qualifications and permission arrangements. The United Kingdom Supreme Court enabled televising and live-streaming of rulings and proceedings since it was constituted in 2009 and its enabling legislation in section 47 of the Constitutional Reform Act 2005.

Section 32 of the Crime and Courts Act 2013 enables the Lord Chancellor, with the agreement of the Lord Chief Justice, to make an order specifying circumstances in which the prohibitions on recording and broadcasting may be lifted. This has been done to allow recording and broadcasting of proceedings in the Civil and Criminal Divisions of the Court of Appeal, which has taken place successfully since 2013. Courts and tribunals have the power to deny televising or sound broadcasting in order to 'ensure the fairness of any particular proceedings [...] or to ensure that any person involved in the proceedings is not unduly prejudiced'. No appeal will be allowed against any such decision and it has been made clear that broadcasting will be restricted to lawyers making opening and closing speeches, and judges' decisions and sentencing; witnesses, jurors and defendants will remain out of view. The Crown Court (Recording and Broadcasting) Order 2020 enabled the broadcast of judges' sentencing remarks and in the Court of Appeal would make permissible the broadcast of judgments and advocates' arguments in selected family proceedings. Live-streaming of English Appeal Court civil division hearings and their rulings on YouTube has been taking place since 2018.

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.

*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.

The prohibition on video copying court proceedings derives from the Criminal Justice Act 1925 and Schedule 25 of the Coronavirus Act 2020. The latter 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.

BBC South East recorded 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 broadcasting a short 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.

Earlier in 2020 the High Court had to deal with a breach of restrictions on distributing/disseminating live Zoom links to a libel trial. Video/and or audio of the proceedings at the trial was live streamed to people in USA, Cyprus and Russia for three days without the Court's permission and without any application being made for permission.

Ministry of Justice: Proposals to allow the broadcasting, filming, and recording of selected court proceedings in 2012

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/217307/broadcasting-filming-recording-courts.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217307/broadcasting-filming-recording-courts.pdf)

Section 41 Criminal Justice Act 1925

<https://www.legislation.gov.uk/ukpga/Geo5/15-16/86/section/41/2013-10-30>

Section 9 of the Contempt of Court Act 1981

<https://www.legislation.gov.uk/ukpga/1981/49/section/9/enacted>

Section 47 Constitutional Reform Act 2005

<https://www.legislation.gov.uk/ukpga/2005/4/section/47>

Schedule 25 of the Coronavirus Act 2020

<https://www.legislation.gov.uk/ukpga/2020/7/schedule/25/enacted>

PA Media & Press Gazette report on 'Mail on Sunday features writer avoids jail after recording court hearing on phone.'

<https://www.pressgazette.co.uk/mail-on-sunday-features-writer-avoids-jail-after-recording-court-hearing-on-phone/>

Attorney General v Stephen Yaxley-Lennon. Mr Justice Warby 9<sup>th</sup> July 2019

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

Finch, R (On the Application Of) v Surrey County Council [2021] EWHC 170 (QB) (03 February 2021)

<https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2021/170.html>

Gubarev & Anor v Orbis Business Intelligence Ltd & Anor [2020] EWHC 2167 (QB) (06 August 2020)

<https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2020/2167.html>

UK Press Card Authority

<https://www.ukpresscardauthority.co.uk/>

\* A downloadable sound file of this section on restrictions and rights in respect of sound and visual reporting of UK courts.



## 1.16 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast116mp3>

## 1.17 KEY RESTRICTIONS APPLYING TO NEWSWORTHY FIRST COURT APPEARANCES AT MAGISTRATES' COURTS

Most sensational criminal cases begin with a first and only appearance at the Magistrates' court. They are sometimes referred to as 'preliminary', 'sending' or 'allocation' hearings. 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 automatic rules. Under Section 52A of the Crime and Disorder Act 1998 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 had been 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.

In 1973 the Eastbourne Herald was unfairly prosecuted and fined £200 for including in a Magistrates remand hearing report that the defendant was a 'New Year's Day Bridegroom ... bespectacled and dark- suited' and the charges were 'serious'. Geoffrey Robertson and Andrew Nicol in their textbook *Media Law* have rightly pointed out that an appeal would have been successful because these matters were 'not part of the proceedings'. It is important to remember that the restrictions permit reporting arrangements for bail and whether it is granted or not. It would be a breach to report any reasons argued for or

against such as police fears of absconding, committing further offences or intimidating witnesses. The overall purpose of these restrictions is to prevent references to evidence in the case, an accused person's previous conviction and other prejudicial material.

In practice although describing the court scene, reporting denials of guilt and making a choice for trial by jury are not included in the Section 52A rules, it is unlikely this would attract any prosecution. In 2013 the *Sun* newspaper was fined £3,350 for reporting key prosecution evidence mentioned at a preliminary hearing at Oldham Magistrates.

At the time of writing many clauses of the Judicial Review and Courts Bill 2021 proposed 'Single Justice Procedure' reforms of many preliminary and 'transfer of case' hearings between the magistrates' court and the Crown Court. This will mean journalists will no longer be able to attend a first court appearance for serious cases at the Magistrates Court. More decisions will be made and more information disclosed behind closed doors. The companion website will endeavour to brief and explain how these changes come into effect.

Section 52A Crime and Disorder Act 1998.

<https://www.legislation.gov.uk/ukpga/1998/37/section/52A/2013-04-01>

PA Media Lawyer & Press Gazette report: 'Judge condemns 'shoddy journalism' as Sun fined £3,350 for gas explosion reporting-restrictions breach'

<https://www.pressgazette.co.uk/judge-condemns-shoddy-journalism-as-sun-fined-3350-for-gas-explosion-reporting-restrictions-breach/>

\* Downloadable sound file on reporting first magistrates' court appearance in cases going to crown court for trial.

1.17 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast117mp3>

## 1.18 BREACHING REPORTING RESTRICTIONS, COURT INJUNCTIONS AND DIRECTIONS

If any court makes an order postponing or prohibiting publication in any form, it could be a contempt of court to intentionally or unintentionally subvert it, breach it or defy it. You can be in contempt of court 'by accident' if it can be shown that you acted in bad faith throughout. Even if you believe that the court has made a wrong order in law, this does not give you any justification to breach the court order.

If you are aware that the information you are banned from publishing is being published online by others inside or outside the legal jurisdiction of England and Wales, Scotland, or Northern Ireland, copying and publishing the information gives you no defence. If a court order is made in only the English (and Welsh) jurisdiction and no attempt has been made to apply for an equivalent order in the Scottish jurisdiction (which has a separate legal system independent of England and Wales) then the English court order will not apply in Scotland and it may be the case that the Scottish media will be disseminating information banned in England and Wales.

There have been two cases involving political activists using online and social media where the consequences of defying media law court orders resulted in custodial sentences. The

right-wing activist Stephen Yaxley-Lennon, known as Tommy Robinson, was jailed for nine months in 2019 for live streaming on Facebook and being in breach of reporting restrictions applying to trials at Leeds Crown Court and Canterbury Crown Court. The Divisional Court said it was concerned ‘to demonstrate its determination to uphold the rule of law by deterring conduct of this kind, and to ensure future compliance with orders of the court.’

In May 2021 the blogger and former diplomat, Craig Murray, was sentenced to eight months in jail for contempt of court relating to the Alex Salmond trial in the Scottish legal jurisdiction. He had observed two days of the former First Minister’s trial in March 2020 from the public gallery of Edinburgh’s High Court. The High Court of Justiciary decided he was in contempt of court because he published material in his blog and Twitter feed that was capable of identifying four of the women accusing Mr Salmond of sexual abuse. Mr Salmond was later acquitted of all 13 charges. Lady Dorrian explained why it was necessary to send Craig Murray to jail even though he was 62 years old, had a family and was of previous good character with no criminal convictions: ‘It appears from the posts and articles that he was in fact relishing the task he set himself, which was essentially to allow the identities of complainers to be discerned – which he thought was in the public interest – in a way which did not attract sanction ... These actions create a real risk that complainers may be reluctant to come forward in future cases, particularly where the case may be high profile or likely to attract significant publicity ... The actions strike at the heart of the fair administration of justice.’

British lawyer and climate campaigner Tim Crosland was fined £5,000 in May 2021 for breaching an embargo on the release of a UK Supreme Court judgment about Heathrow Airport's expansion. He revealed the information on his Twitter feed. He was one of the involved parties to receive a draft of the ruling and broke the embargo deliberately as 'an act of civil disobedience' to protest what he described as the 'deep immorality' of the court's decision.

While Westminster parliamentarians have freedom of speech immunity against court orders under the 1689 Bill of Rights it is arguable that may not always extend to the media and people who wish to report the breaching of injunctions/court orders by MPs or peers (members of the House of Lords). It would be wise to seek legal advice and obtain editorial approval.

The nature of the platform for communicating a breach of a court order makes no difference to the construction of the offence, though may be mitigation in terms of the sentence. Hence, the use of Twitter, the Internet, social networking, pamphlets, speaking in public, person-to-person verbal contact and email is treated the same as radio, television, newspaper, magazine or book publication. Bloggers, 'citizen journalists', tweeters and non-journalists are treated in the same way as accredited media professionals. When criminal offences are being investigated and the liberty of people is at issue in criminal enquiries, courts in foreign jurisdictions can be persuaded to order Internet, digital mobile media, and social networking platforms, based overseas, to hand over the content of potentially contemptuous communications and reveal the full identity of the authors.

## **Importance of protecting sexual offence complainants and avoiding jigsaw identification.**

It will be a potential disciplinary issue (as well as criminal offence) to identify victims of sexual assault or publish material likely to contribute to such identification unless there is adequate justification and you are legally able to do so. There is no public interest defence in primary or secondary media law. IPSO has strongly cautioned against publications including 'seemingly innocuous detail' that can lead to identification and insists on editors applying 'scrupulous construction' of any such stories. Where a victim waives his or her anonymity it is essential for this to be confirmed and obtained in writing and great care taken that in the subsequent interview the rights of others to anonymity as the victims of sexual assault are not compromised in any way.

Details seemingly insignificant to a third party can immediately lead to identification. The confidentiality is breached if anyone related to or friendly with the complainant can triangulate the link. This has been so when a newspaper reported the victim's age, health record, attack details and location of the offence together, when the report of a rape trial revealed the victim's clothing at the time of the attack and her hobby, and when the publication of the nature of an injury could have identified an under-age victim.

There is a long-standing professional obligation in the UK media to avoid jigsaw identification (also regarded as a legal requirement and potential criminal offence). Very simply this is where the relationship between accused and victim when publicized would identify a sexual offence complainant. All the media, with no exceptions, have to maintain a policy of either identifying the relationship and making anonymous all those involved, or

identifying the defendant only (the victim of a sexual offence can never be identified unless by order of the court and waiving of anonymity) and under no circumstances whatsoever publicizing the defendant's relationship with the complainant. Only sexual offence complainants aged 16 and over have the power to waive their own anonymity. For children under this age, it will be a matter for the courts.

The Tony Jaffa Media Law Column in *Hold The Front Page* alerted professional journalists to some clarification of this 'tricky' jeopardy in crime and court reporting arising out of the National Security High Court case of Attorney-General v BBC in May 2022. Mr Justice Chamberlain explained that while 'The phrase "likely to lead to" has been held to refer not to a statistical probability, but to "the real risk, the real danger, the real chance" that the individual will be identified', it is also the case the court 'must also be astute not to allow the threat to justify a blanket prohibition on disclosure of any piece of the jigsaw.' Jaffa argues the question of balance remains, but the problem should not mean no publication of any parts of the jigsaw. Journalists need to recognise a 'real risk, danger and chance of identification' in relation to the information included in a report.

### **Liabilities, penalties and punishment**

It has already been indicated that the offence of media publication contempt of court is indictable to High Court trial with an unlimited fine and maximum jail sentence of two years.



The editor of the offending publication is usually the individual who has to take responsibility in terms of punishment, though the last time an editor was dispatched to prison for contempt was in 1949 when Silvester Bolam, editor of the *Daily Mirror*, received three months for his paper's reporting a murder case. It published the details of an alleged confession to several murders of a man already under police arrest and included a reference to his drinking the blood of his victims. This was the notorious case of 'acid bath' murderer, John Haigh.

The operation of contempt law at that time was different. The 'motion to commit' was not brought by the Attorney General but by the accused himself. The contempt hearing took place before Haigh's trial so the issue of whether the paper's actual publication was contempt in the context of the accused pleading to insanity was not properly explored. The *Mirror's* lurid article about Haigh's predilection to vampire-like behaviour did not specifically name him. In addition to jailing the editor, the Lord Chief Justice of the time, Lord Goddard, fined the newspaper £10,000 and described the article as a gross contempt that 'violated every principle of justice and fair play which it has been the pride of this country to extend to the worst of criminals'.

Recent rulings on media contempt show that fines imposed will usually involve five figure penalties. In 2002 an article in the *Sunday Mirror*, which led to the collapse of the first trial of two Leeds United footballers on charges arising out of an assault on an Asian student, attracted a fine of £75,000 and an order to pay costs of £54,160.

While the English High Court continues to apply 'corporate'- style penalties, it has been known to impose separate contempt penalties on individual reporters. A BBC broadcast journalist has been individually fined £500 for breaching an anonymity order. The British courts also have the option to make 'wasted costs' orders against publications that undermine expensive trials and court hearings. This power has been in force since 2004 and means that any third party who causes proceedings to be aborted by an 'improper, unreasonable or negligent act or omission' can be ordered by a judge or magistrate to pay the prosecution and defence costs.

All journalists and media publishers need to appreciate that Parliament has lifted the cap on fines for what is known as class five offences in the summary jurisdiction from 12 March 2015. This means District Court judges and lay justices have a discretion to impose unlimited financial penalties for media law offences which previously carried a risk of only a maximum fine of £5,000. When combined with the further option of wasted costs orders, the financial consequences of breaching media law could be catastrophic.

In 2016 The *Daily Telegraph* was fined £80,000 at Westminster Magistrates for unlawfully identifying the teenage victim of former England footballer Adam Johnson. The Telegraph Media Group apologised unreservedly for using a pixelated image taken from the 15-year-old's Facebook page which it conceded could have led to jigsaw identification. The publisher said it would no longer use such pictures with reports of sex offence cases and was ordered to further pay the victim £10,000 in compensation, as well as £1,473 in prosecution costs and a victim surcharge of £120. The pixelated image was the same as that used by the *Sun* in March 2015 which led to the newspaper's then editor, David Dinsmore, having to pay

£2,300 in costs and compensation but the publication and prosecution took place before the £5,000 cap had been lifted.

### **Cross-jurisdictional issues**

If you publish outside the UK, but your publications can be read, seen and heard in the UK, you can arguably still be liable and vice versa. The complexity and extra care needed was highlighted by the PJS v Sun case of 2016. The English court's injunction in a privacy case did not extend into Scotland or Ireland, or indeed the rest of the world. The PJS case was focused on protecting the welfare of children and Justice Neuberger 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 remains protected by court order.

The reporting restrictions imposed in New Zealand giving anonymity to Jesse Shane Kempson when on trial in 2019 for murdering British student Grace Millane challenged the Open Justice culture of UK journalism. The purpose of the restriction was to enable the New Zealand courts to try Kempson afterwards for further separate violent attacks on women including rape. Some UK news publications persisted in identifying Kempson. Others respected the New Zealand court orders. A similar clash of freedom of expression cultures emerged when the New Zealand law suppressed the identity of a terrorist knifeman who had been shot dead in Auckland in September 2021 for 24 hours after he had carried out his attack in a supermarket. There is a growing debate that commonwealth legal jurisdictions should agree reciprocity on respecting each other's media law particularly in a

digital information age where social media and online communications are difficult to police in terms of territorial borders.

HM Attorney General v Yaxley-Lennon (Rev 2) [2019] EWHC 1791 (QB) (09 July 2019)

<https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2019/1791.html>

Sentencing decision 11 July 2019

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

Finding of contempt of court against Craig Murray. Ruling by Lady Dorrian 25 March 2021

[https://www.bailii.org/scot/cases/ScotHC/2021/2021\\_HCJ\\_2.html](https://www.bailii.org/scot/cases/ScotHC/2021/2021_HCJ_2.html)

Sentencing of Craig Murray for contempt of court by Lady Dorrian 11 May 2021

<https://www.judiciary.scot/home/sentences-judgments/sentences-and-opinions/2021/05/11/craig-murray-petition-and-complaint>

Rejection of appeal by Craig Murray by High Court of Justiciary 8 June 2021

[https://www.bailii.org/scot/cases/ScotHC/2021/2021\\_HCJ\\_3.html](https://www.bailii.org/scot/cases/ScotHC/2021/2021_HCJ_3.html)

Attorney General v Mirror Group Newspapers Limited 2002.

<https://www.5rb.com/case/attorney-general-v-mgn-ltd-2/>

The Costs in Criminal Cases (General)(Amendment) Regulations 2004

<https://www.legislation.gov.uk/uksi/2004/2408/made>

Decision in the proceedings for Contempt: Mr Tim Crosland May 2021

<https://www.supremecourt.uk/news/decision-in-the-proceedings-for-contempt-mr-tim-crosland.html>

Her Majesty's Attorney General v Crosland [2021] UKSC 15 (10 May 2021)

<https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2021/15.html>

Guardian report: 'Daily Telegraph fined £80,000 over Adam Johnson photograph'

<https://www.theguardian.com/uk-news/2016/oct/10/daily-telegraph-fined-80000-over-adam-johnson-photograph>

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

<https://www.bailii.org/uk/cases/UKSC/2016/26.html>

The Scotsman: 'Jesse Shane Kempson: who is Grace Millane's killer and why couldn't he be named under New Zealand law?'

<https://www.scotsman.com/news/crime/jesse-shane-kempson-who-grace-millanes-killer-and-why-couldnt-he-be-named-under-new-zealand-law-3075878>

Inform article by Erica Henshilwood: 'Justice for Grace Millane: a new Commonwealth contempt framework?'

<https://inform.org/2019/11/27/justice-for-grace-millane-a-new-commonwealth-contempt-framework-erica-henshilwood/>

Hold The Front Page Law Column: Jigsaw ID revisited – the latest guidance from the High Court

<https://www.holdthefrontpage.co.uk/2022/news/law-column-jigsaw-id-revisited-the-latest-guidance-from-the-high-court/>

HM Attorney General for England And Wales v British Broadcasting Corporation (BBC) (No. 3) [2022] EWHC 1189 (QB) (18 May 2022)

<https://www.bailii.org/ew/cases/EWHC/QB/2022/1189.html>

\* A downloadable sound file of this section on the consequences of breaching court restrictions and injunctions.

1.18 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast118mp3>

## 1.19 DEFENCES AND CHALLENGES

In the United Kingdom there is a well-established common law 'open justice' principle that is reinforced by Article 10 of the HRA, derived from Article 10 of the ECHR:

Article 10 Freedom of expression:

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.

Furthermore, the legislation, under section 12(4), does give freedom of expression an emphasis, if not priority, when a balance needs to be considered by the courts in relation to other Convention rights:

‘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.’

At the time of writing the UK government was consulting on ‘Human Rights Act Reform: A Modern Bill Of Rights’ with a proposal to provide legislatively for ‘a stronger and more effective provision’ to protect freedom of expression. In particular, it was stated the government ‘believes there should be a presumption in favour of upholding the right to freedom of expression, subject to exceptional countervailing grounds.’ Such reform could transform UK Media Law and any future developments will be covered on the book’s companion website.

Whilst this book focuses on what journalists and media communicators should not do, it is important to appreciate that media law controls have to be balanced with a common law

principle of freedom of expression developed over centuries of history, and Article 10 of the Human Rights Act 1998 derived from the ECHR.

Open justice means that court proceedings (the administration of justice) should be done in public, with the public and media having a right to attend, and enabled to report fully and contemporaneously. Restrictions imposed by court order, whether statutory or discretionary, should be exceptional, and necessary in terms of proportionality, with a pressing social need in the context of a democratic society. This means that statutory postponement and prohibition (whether declared by Act of Parliament or statutory instrument such as Practice Directions) could be incompatible with the ECHR.

The Reporting Restrictions Guide says: 'The open justice principle is reflected in rule 6.2 of the Criminal Procedure Rules 2015, which requires the court, when exercising its powers in relation to reporting and access restrictions, and when furthering the overriding objective, to have regard to the importance of dealing with criminal cases in public and allowing a public hearing to be reported to the public.'

The Open Justice principle is clearly defined with four guiding rules:

- The general rule is that the administration of justice must be done in public. The public and the media have the right to attend all court hearings and the media is able to report those proceedings fully and contemporaneously
- Any restriction on these usual rules will be exceptional. It must be based on necessity
- The burden is on the party seeking the restriction to establish it is necessary on the basis of clear and cogent evidence
- The terms of any order must be proportionate – going no further than is necessary to meet the relevant objective



As an accredited and assigned journalist, or legitimate journalistic publisher, you could find yourself in three positions when attending court as a media communicator: reporter, person subject to reporting restriction, person accused of breaching a reporting restriction/contempt of court. As a reporter it is advisable to dress and conduct yourself in a respectful manner to take into account the professional and cultural ritual of court proceedings. The parties are usually under considerable emotional and intellectual pressure. They expect the media to take the process seriously and appreciate the position and feelings of everyone involved in a process of justice. The trial forum is not unlike a religious ritual such as a church, mosque, synagogue or temple service. Making respectful and clear contact with court officers, ushers and officials means that everyone will know who you are and return the respect you offer them.

Should you find yourself in a position to challenge or address the court on a reporting restriction matter it is advisable to have to hand the pdf files of the Criminal Procedure Rules 2015, Part 6 of the Criminal Procedure Rules and Practice Directions updated at the time of writing in March 2022 and latest edition of the Judicial College's 'Reporting Restrictions in the Criminal Courts.' Another powerful resource and reference will be the ruling of the Lord Chief Justice in *Sarker, R v* [2018] EWCA Crim 1341 (13 June 2018). Lord Burnett of Maldon 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.

He explained:

‘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.’ His ruling set out in great detail how the Open Justice principle has developed in case law and this section of his ruling has been extracted for this chapter of the companion website.

If presented with a reporting restriction you believe to be censorship of Open Justice and unjustified you may wish to quickly write a note/letter for the judge/court along these lines:

From: name, publisher, telephone number, address, email address

To: His Honour/Mr Justice, etc [it is important to address the judge with the proper title]

Dear Judge Smith/Mrs Justice Smith,

I am a reporter for the XY community news-site published at [URL] and wish to challenge the order you made on [date] in the case of [R v X, Y Z (names of defendants if known)] under section 4(2) of the 1981 Contempt of Court Act.

My argument is based on Article 10 of the Human Rights Act 1998 that the order is not proportionate or necessary in terms of a pressing social need in a democratic society and undermines my right to the freedom of expression to report this case fairly, accurately and contemporaneously.

The copy of the order I have does not indicate when the restriction ends, it prevents me from reporting all of the proceedings, when I believe it should only apply to the legal argument heard in the absence of the jury. When it was made, I understand that no members or representatives of the media were present to address you or guide you in

terms of the importance of dealing with criminal cases in public and allowing them to be reported under Section 6 of the Criminal Procedure Rules and Practice Directions 2015 updated and consolidated in 2022. I believe that the Court of Appeal case in Sarker, R v [2018] EWCA Crim 1341 (13 June 2018) at: <https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Crim/2018/1341.html> may assist you in appreciating why I believe you should consider varying or lifting your order.

Should you wish to hear oral submissions on my part, I would be happy to do so either before or at the end of today's proceedings or at another convenient time, though it would be best if the matter was resolved as soon as possible. Equally I am happy for you to consider my application in the form of this letter. I have no wish to disrupt the complicated and demanding task you have of conducting the trial.

It may be the case you have not had immediate access to the Judicial College's guide on Reporting Restrictions in the Criminal Courts, or Section 6 the Criminal Procedure Rules and Practice Directions. I am happy to attach these if they should be of assistance. The HMCTS Reporters' Charter agreed with the Media Lawyers' Association may also be relevant and helpful.

Yours sincerely and respectfully, Name/signature.

This *pro forma* is offered by way of an example. It can be adapted to any of the reporting restriction situations you may find yourself in and can be added to and subtracted from in order to fit any set of circumstances in relation to contempt and issues of anonymity, privacy and media and public exclusion and secrecy orders referred to in Chapters 3, 4 and 8.

The last and obviously least fortunate position you might find yourself in is as a person accused of contempt of court. You must seek immediate legal advice, first by contacting your employing media organization. You should not be dealt with summarily as media contempt issues should by precedent be referred by the courts to the Attorney General for consideration. But if you are summoned to appear to make an explanation, you should have legal representation.

It is advisable not to admit to committing contempt of court, but certainly it helps to be humble, apologetic for any disruption and inconvenience your alleged conduct has caused. An expression of humility combined with the obvious need for you to seek legal advice before explaining or elucidating on the situation is the best holding position. It is advisable that you are a member of a professional journalists' trade union organization such as the Chartered Institute of Journalists or National Union of Journalists, which provide emergency legal advice to members. There are specialist insurers that provide media law protection policies for individual journalists.

There may be a myriad of defences that you are entitled to. These could include mistaken identity in terms of publication (something that can be easily established) or a non-distribution or inadequate dissemination of the court order. Any evidence of the effort you made in good faith to establish the existence of court reporting restrictions in terms of email, notes etc would be helpful. Your reporting may not be proven beyond reasonable doubt to breach the strict liability rule. In common law contempt you may not have had an intention to commit contempt. The court order may have been constructed in its writing in such a way as not to render you in breach of it. In other words the judge may have executed

a wrong expression of his/her intention. Should you find yourself in this position, the engagement of specialist legal representation and advice is an absolute necessity.

Criminal Procedure Rules and Practice Directions 2015, consolidated and updated March 2022. See 6B.1 to 6B.7 pages 63 to 65.

<https://www.judiciary.uk/wp-content/uploads/2022/03/CrimPD-12-CONSOLIDATED-March-2022.pdf>

Sarker, R v [2018] EWCA Crim 1341 (13 June 2018)

<https://www.bailii.org/ew/cases/EWCA/Crim/2018/1341.html>

Judicial College. Reporting Restrictions in the Criminal Courts April 2015 (Revised May 2016)

<https://www.judiciary.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf>

HMCTS Reporters' Charter May 2022

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1074233/HMCTS702\\_Reporters\\_Charter\\_A4P\\_v4.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1074233/HMCTS702_Reporters_Charter_A4P_v4.pdf)

UK Ministry of Justice Human Rights Act Reform: A Modern Bill Of Rights- A consultation to reform

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1040409/human-rights-reform-consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf)

\* A downloadable sound file voicing this section on potential defences and challenges to media reporting restrictions.

1.19 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast119mp3>

## 1.20 CONTACTING MEMBERS OF THE UK JUDICIARY FOR COMMENT AND INTERVIEW

UK judges are not allowed to make any comment on the cases they preside over and they cannot discuss their decisions – particularly sentences in criminal hearings. They are not permitted to analyse or comment on decisions made in other court cases. This is also true of lay magistrates and coroners. IPSO's predecessor body, the PCC advised in the past that as there are no circumstances when judges can speak to the media in these contexts, any journalistic approaches to them or their families could constitute ethical harassment. It is possible that members of the judiciary might be prepared to take part in documentary programmes or features about their general role in the judiciary, or discussion of legal issues that are not specific to any cases they have been involved in. This would normally require the permission of the senior judiciary and negotiated via the Judicial press office, which is part of the Judicial Office and is independent of Her Majesty's Courts and Tribunal Service(HMCTS) and the Ministry of Justice.

The UK's judiciary, and in particular judges in the English and Welsh jurisdiction have recognised that the 'way the media report and comment on the news is changing all the time, and becoming faster and more varied' and that Judges 'cannot ignore this reality' and nor should they want to. In 2012 the Judicial Office produced 'Media Guidance for the Judiciary' which was updated in 2014. In 2018 HMCTS and the MoJ published 'General guidance to staff on supporting media access to courts and tribunals' in cooperation with journalists and news publishers. Both documents recognise the needs of contemporary journalists, their use of smartphones for reporting, and define the legal and professional boundaries of communication and encounter. This includes reminding courts and tribunal

judges, non-legal members in tribunals and magistrates that they have a public role and are not entitled to anonymity as determined in the cases of R v Felixstowe Justices ex p Leigh(1987) and R v Evesham Justices ex p McDonagh (1988).

Media Guidance for the Judiciary 2014 (England and Wales)

<https://www.transformjustice.org.uk/wp-content/uploads/2017/07/media2014-august-2014.pdf>

General guidance to staff on supporting media access to courts and tribunals 2018 updated 2021

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/996681/HMCTS314\\_HMCTS\\_media\\_guidance\\_June\\_2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/996681/HMCTS314_HMCTS_media_guidance_June_2021.pdf)

\* A downloadable sound file of this section on rules relating to media interviewing of the judiciary.

1.20 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast120mp3>

### 1.21 PAYMENTS TO WITNESSES, CRIMINALS, REPORTING CRIME, AND 'CHEQUE-BOOK JOURNALISM'

There is a secondary media law prohibition on making payments to or offering payments to witnesses in criminal proceedings once they are active under the 1981 Contempt of Court Act and until they are over. This applies to print/online journalists as well as broadcasters.

There is a public interest exemption where the proceedings are not yet active, but are likely and foreseeable and if arrangements are entered into, there must be no conditions on the

outcome of the trial and the witnesses must be informed that if they are cited to give evidence, the fact of the payment will be disclosed to the prosecution and defence. The Editors' Codebook under Clause 15 bans approaching witnesses with offers of payment while they are giving evidence and indeed such conduct could be construed as a possible contempt of court.

There is an ethical obligation to avoid exploiting, glorifying or glamorizing crime in general, and Clause 16 makes clear that payments to criminals, their family, friends and colleagues can only be entered into if there are good reasons to support the public interest. Regulation indicates strongly public interest is not a defence for making entertainment about crime narratives, the kiss-and-tell dimension of romance or sex associated with the narrative or 'irrelevant gossip, which intrudes on the privacy of others'.

The same rules apply to broadcasters subject to Ofcom and BBC regulation. For example, sections 3.1 and 3.2 of the Ofcom Code stipulate: 'Material likely to encourage or incite the commission of crime or to lead to disorder must not be included in television or radio services. [ ... ] Descriptions or demonstrations of criminal techniques which contain essential details which could enable the commission of crime must not be broadcast unless editorially justified.' There has to be a likelihood of encouragement or incitement, and filming of a criminal activity is not in itself a breach of the rule. In November 2007 Ofcom decided that an edition of the Channel Four investigative programme Dispatches called 'Undercover Mosque' did not breach rule 3.1 when it featured secretly filmed footage of teaching in Mosques and Islamic organisations that appeared to condone taking violent or criminal action in the name of Islam. Ofcom said while the programme contained strong emotive



language, it 'did not consider that the transmission of these clips, when taken in the context of an investigative documentary, could have amounted to an incitement to crime.'

The Ofcom ban on paying criminals and their relatives and friends to take part in programmes about their crimes is underpinned by its recognition of the legal constraints imposed on convicted criminals under the Proceeds of Crime Act 2002, to prevent criminals from benefiting from their crimes. However, Ofcom recognizes that the rule should not prevent reformed criminals developing a new career in the media as a process of rehabilitation. Furthermore, payments are acceptable if they amount to 'legitimate expenses reasonably incurred in the production or pre-production of a programme or part of programme; for example, travel and subsistence'. This is covered by Sections 3.3 to 3.5 of the Broadcasting Code.

In 2008 IPSO's predecessor, the PCC adjudicated against *Full House* magazine when one of its feature writers approached a prosecution witness during the trial of a woman later receiving a 30 year recommendation life sentence for poisoning her husband with antifreeze. The witness received by letter the offer of a fee for an interview once the trial had finished. The PCC said: 'The terms of Clause 15 are absolutely clear: there should be no offer of payment to a witness while proceedings are active.'

In 2013 the PCC upheld a complaint against *That's Life* magazine for paying the sister of a convicted murderer for her account and perspective of the crime. The regulator said this 'was a clear instance in which a crime had been exploited.' The sister of the murderer had directly benefited from her brother's crime.

The BBC has a comprehensive set of guidelines under Section 8 covering 'Reporting Crime and Anti-social Behaviour'. The BBC says it reports crime and anti-social behaviour as a matter of public interest and its coverage is aimed at giving audiences the facts in their context and therefore 'reflects our right to freedom of expression and the audience's right to receive information and ideas.' The BBC says it aims to reflect the work of the agencies which fight crime, examine the nature of criminality, and report on its causes and consequences.

The BBC accepts 'Some of this output is likely to require production methods that carry risks' and it is committed to weighing 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.'

In addition to the sirens recognized by the IPSO and Ofcom, the BBC engages a wider framework of ethical issues and potential problems when reporting crime. These include witnessing serious criminal activity as a reporter; interviewing criminal fugitives; entering UK or foreign prisons without the permission of the authorities; interviewing or permitting the live broadcast of prisoners; granting anonymity to law-breakers; hiring convicted criminals; hiring undercover operatives; recording the unlawful harming of animals; suspicions of online grooming of children; identifying anyone aged 17 and under accused in the courts of a criminal offence; investigating crime or anti-social behaviour; using covert surveillance/recording techniques; and/or confronting 'terrorists, serious criminal or extremist or violent political groups', and reporting hate speech which is likely to encourage criminal activity or lead to disorder. The BBC said its reporting 'must not add to people's fear of becoming victims of crime if statistics suggest it is very unlikely'. In short the BBC

appears to expect its journalists not to exploit the narrative of real crime cases in order to make entertainment by giving people nightmares and more particularly 'seek to balance the public interest in reporting crime with respect for the privacy and dignity of victims and their families'.

PCC investigation into an offer of payment by *Full House* magazine

<http://www.pcc.org.uk/cases/adjudicated.html?article=NTEsNw>

PCC investigation into *That's Life* magazine for paying a relative of a convicted criminal for an article headlined "A moment of madness", published on 10 January 2013

<http://www.pcc.org.uk/cases/adjudicated.html?article=ODM2MA>

Editors' Code of Practice. See clauses 15 and 16.

<https://www.ipso.co.uk/editors-code-of-practice/>

BBC Editorial Guidelines Section 8: 'Reporting Crime and Anti-social Behaviour – Introduction'

<https://www.bbc.co.uk/editorialguidelines/guidelines/crime/>

Full guidelines.

<https://www.bbc.co.uk/editorialguidelines/guidelines/crime/guidelines>

Reporting Crime and Anti-social Behaviour - Mandatory Referrals

<https://www.bbc.co.uk/editorialguidelines/guidelines/crime/mandatory-referrals/>

Ofcom Broadcasting Code. Section Three: Crime, disorder, hatred and abuse

<https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-three-crime-disorder-hatred-abuse>

Guidance notes in pdf file for Section Three.

[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0021/24258/section\\_3\\_2016.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0021/24258/section_3_2016.pdf)

Ofcom ruling in complaint against Channel Four's Dispatches programme 'Undercover Mosque', November 2007

[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0022/46930/issue97.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0022/46930/issue97.pdf)

\* A downloadable sound file on this section dealing with the issue of cheque-book journalism and sensationalizing crime narratives.

1.21 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast121mp3>

## 1.22 ETHICAL OBLIGATIONS IN RELATION TO WAR, TERROR, EMERGENCIES, KIDNAPPING AND HOSTAGE-TAKING NEWS STORIES

Section 3.8 of the Ofcom Code states that '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.' In 2019 IPSO published detailed guides for news publishers and the public on dealing with major incidents. It has been a long-standing tradition and ethic since 1975 that media organizations cooperate with police enquiries into kidnappings where they observe a news blackout in return for briefings on the development of the investigation and media access to people if and when the victims have been released into safety. This degree of cooperation is encouraged by the UK Society of Editors and the National Police Chiefs Council which replaced ACPO, the Association of Chief Police Officers 1<sup>st</sup> April 2015. IPSO have published guides for the public on 'Dealing with the press if you're involved in a major incident' and 'Press reporting on a death.'

The Ofcom Code is designed to ensure that there is no live coverage of events that could assist hostage-takers to frustrate rescue attempts. One really cannot think of any journalist who would rather their competitive ambition clumsily risk the life and safety of a kidnapping or hostage victim. However, state authorities and media need to be cautious about the circumstances of agreed news blackouts. The arrangement relating to Prince Harry's deployment on active military service to Afghanistan in 2008 became controversial.

The BBC has a detailed section on 'War, Terror and Emergencies in its Editorial Guidelines. Of particular importance is the need for pre-moderating in respect of online or social media publication, prohibition on interviewing perpetrators live on air, or broadcasting any video and/or audio provided by a perpetrator live on air. The transmission of any recordings made by perpetrators requires referral to a senior editorial figure or commissioning editor in the case of independents. The BBC also has a policy of using a delay device when taking live feeds from 'sensitive stories, for example a school siege or plane hijack'.

The BBC expects its journalists to engage acute consideration of issues of impartiality, accuracy, evaluation of audience comment, use of language, risk of identifying victims before next of kin have been notified by relevant authorities, avoid encouraging or inflaming riots and disturbances, and follow strict procedure in the event of threats or bomb hoaxes. Other important considerations concern national security and counter-terrorism, terrorism acts, and referral to the BBC Safety's High Risk Team in respect of covering hostile and dangerous environments. Most of the headings of events and incidents in the 'War, Terror

and Emergencies' section require BBC employees to follow mandatory referrals to senior editorial figures, commissioning editors and Director of Editorial Policy.

BBC Editorial Guidelines, Section 11: War, Terror and Emergencies

<https://www.bbc.com/editorialguidelines/guidelines/war-terror-emergencies/guidelines>

Ofcom Broadcasting Code, Section 3: Crime, disorder, hatred and abuse

<https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-three-crime-disorder-hatred-abuse>

IPSO Guide to Reporting major incidents

<https://www.ipso.co.uk/member-publishers/guidance-for-journalists-and-editors/reporting-major-incidents/>

IPSO guide for the public- Dealing with the media reporting on major incidents

<https://www.ipso.co.uk/harassment/advice-for-the-public/#MajorIncidents>

IPSO guide for the public- Reporting on a death

<https://www.ipso.co.uk/news-press-releases/blog/reporting-on-a-death/>

\* A downloadable sound file on this section concerning the ethics of reporting war, terror, emergencies, kidnappings, sieges and hostage-taking.

1.22 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast122mp3>

1.23 PROTECTION AGAINST THREATS, VIOLENCE, AND INTIMIDATION

Threats, intimidation, physical attacks, and even worse the killing of professional working journalists has been recognised as a growing risk and problem in the UK, Europe and other countries.

Many attacks on journalists in the UK have been from defendants, their families and relatives in and around court buildings. This has also been accompanied by abuse and threats targeted at journalists in social media and digital communications.

This is why it is important that accredited professional journalists are accommodated away from public galleries when reporting court cases, preferably in special allocated spaces for media representatives.

In the global context the killing of the journalists Daphne Caruana Galizia in Malta in 2017, Jamal Khashoggi in the Saudi Arabian consulate in Istanbul, Turkey in 2018, Lyra McKee in (London)Derry, Northern Ireland in 2019, and Peter R. de Vries in Amsterdam, Holland in 2021 have been cited as evidence of the jeopardy experienced by working journalists covering and investigating controversial issues.

The UK government has responded in March 2021 by establishing a 'National Action Plan for the Safety of Journalists' and the Council of Europe established an online 'Platform to promote the protection of journalism and safety of journalists.'

The UK government's strategy aims to increase understanding of the growing problem of attacks on journalists, enhance the criminal justice system response in tackling crimes against journalists, support journalists and their employers to build the resources they need to protect personal safety, help online platforms to tackle the wider issue of abuse online, and improve public recognition of the value of journalists. The Media Lawyers Association has produced online guidance to help journalists recognise and understand when abuse breaks the law and what they can do about it.

In September 2021 The Chartered Institute of Journalists called on the Law Commission to research and investigate the introduction of aggravated sentencing in prosecutions for crimes committed against journalists connected to their professional work.

Council of Europe: Platform to promote the protection of journalism and safety of journalists

<https://www.coe.int/en/web/media-freedom>

UK government's National Action Plan for the Safety of Journalists

<https://www.gov.uk/government/publications/national-action-plan-for-the-safety-of-journalists/national-action-plan-for-the-safety-of-journalists>

Media Lawyers Association

<https://medialawyersassociation.files.wordpress.com/2021/06/combating-online-harassment-and-abuse-23.06.2021-09.10-5.pdf>

\* A downloadable sound file on this section concerning protection against threats, violence and intimidation of journalists

1.23 podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast123mp3>

1.24 UPDATES, BBC REGULATION AND EDITORIAL GUIDELINES

British media law changes, sometimes week by week. This book's companion website gives you a direct link to updates, developments and information you need to know that has emerged after the book's print publication.



New developments in UK Media Law

<https://ukmedialawpocketbook.com/2021/08/06/new-developments-in-uk-media-law/>

Chapter One Media Contempt and Reporting Crime

<https://ukmedialawpocketbook.com/2016/10/30/blog-post-title-2/>

Other media laws concerning privacy and secret hearings (excluding media and public) are dealt with in later chapters. Differences and issues relating specifically to Scotland and Northern Ireland are dealt with in Chapter 9.

Regulation of the BBC changed from 3<sup>rd</sup> April 2017. The BBC Board became responsible for internal regulatory management of the BBC through Editorial Guidelines and Ofcom is now fully responsible for statutory regulation of the BBC externally in terms of all content, competition issues and performance.

The BBC has substantially updated and developed its editorial guidelines and these are currently published online in two large categories of accessible information: The BBC Editorial Guidelines themselves and around 80 Editorial Guidance briefings which include Impartiality and Racism, and Racist language (including racial slurs and racist/ethnic abuse).

Ofcom is the final arbiter for complaints but operates a Broadcaster-first complaints policy on most content issues, which means complainants have to take their complaints to the BBC first. Ofcom becomes involved only if the complaint goes to an appeal stage. Complaints about Fairness and Privacy (Sections 7 and 8 of Ofcom's Broadcasting Code) can be dealt with directly by Ofcom. Complaints about the BBC World Service are still 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 are judged against the Ofcom Broadcasting Code only. Editorial complaints to the BBC continue to be assessed against the BBC's Editorial Guidelines.

Since 2003, the structure of management accountability has changed from BBC Governors, to BBC Trust and currently at the time of writing the BBC Board with internal self-regulation changing to external regulation by Ofcom. The changes from internal self-regulation to external regulation by Ofcom can be linked to a series of major inquiries into journalism failures and scandals.

The Hutton Judicial Inquiry into the death of Dr David Kelly in 2003 reported in 2004 that the BBC had broadcast 'unfounded' accusations on the BBC R4 programme *Today* against the government about Iraqi weapons of mass-destruction, and the BBC's editorial and management processes were 'defective'. The BBC's Chair of Governors and Director-General, along with the journalist responsible for the broadcast, Andrew Gilligan, all resigned.

The Pollard Review published in 2012 was an inquiry into a dropped BBC Two *Newsnight* investigation in 2011 which featured allegations of sexual abuse by the DJ Jimmy Savile. The review concluded the decision to halt the Savile investigation and not broadcast the report was 'seriously flawed.' The Review also said there had been chaos, confusion and 'a lack of leadership' from senior executives which combined 'rigid management chains' meant the BBC proved 'completely incapable' of dealing with the Jimmy Savile scandal.

The Dyson Report of 2021 investigated how BBC *Panorama* reporter Martin Bashir obtained the interview with Diana, Princess of Wales in 1995 which eventually led to her divorce from Prince Charles. The report concluded Bashir had mocked up fake bank statements and showed them to Diana's brother, Earl Spencer, to gain access to the princess. Bashir had 'acted inappropriately' and engaged in a 'serious breach' of the BBC's 1993 producers' guidelines on straight dealing. The current relevant section of BBC Editorial Guidelines is Section 6 on 'Fairness to Contributors and Consent.' Internal reviews of Bashir's conduct in 1996 were 'flawed and woefully ineffective.' On the issue of whether the BBC had covered up what had happened, Lord Dyson said: 'By failing to mention on any news programme the fact that it had investigated what Mr Bashir had done and the outcome of the investigations, the BBC fell short of the high standards of integrity and transparency which are its hallmark.'

BBC Editorial Guidelines

<https://www.bbc.co.uk/editorialguidelines/guidelines>

BBC Editorial Policy Guidance briefings

<https://www.bbc.co.uk/editorialguidelines/guidance>

The 2003 Hutton Inquiry and Report

<https://webarchive.nationalarchives.gov.uk/ukgwa/20090128221550/http://www.the-hutton-inquiry.org.uk/>

The 2012 Pollard Review report

[https://www.bbc.co.uk/bbctrust/our\\_work/editorial\\_standards/pollard\\_review.html](https://www.bbc.co.uk/bbctrust/our_work/editorial_standards/pollard_review.html)

The 2021 Dyson Report

<https://www.bbc.co.uk/mediacentre/2021/dyson-report>

\* A downloadable sound file on this section concerning updates to the law of media contempt and reporting crime and updates to BBC Regulation.

1.24 Podcast downloadable

<https://soundcloud.com/comparativemedialaw/podcast124mp3>