

## INTRODUCTION

1.1 The rules embodied in the law of contempt of court are intended to uphold and ensure the effective administration of justice. Lord Simon said in *A-G v Times Newspapers Ltd*<sup>1</sup> that they are the means by which the law vindicates the public interest in the due administration of justice. The law does not exist, as the phrase 'contempt of court' might misleadingly suggest<sup>2</sup>, to protect the personal dignity of the judiciary nor does it exist to protect the private rights of parties or litigants<sup>3</sup>. Lord President Clyde said in *Johnson v Grant*<sup>4</sup>:

'The phrase "contempt of court" does not in the least describe the true nature of the class of offence with which we are here concerned...The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice...It is not the dignity of the Court which is offended – a petty and misleading view of the issues involved – it is the fundamental supremacy of the law which is challenged.'

It has been well said<sup>5</sup> that the law of contempt is of ancient origin yet of fundamental contemporary importance. Contempt of court certainly has a long history – *contemptus curiae* is said to have been a recognised phrase in English law since the twelfth century<sup>6</sup>, and, as will be evidenced by the rest of this book, the law continues to play a key role in protecting the administration of justice. Essentially a creature of common law, contempt has been and continues to be developed and adapted to meet changing challenges to the 'supremacy of the law'. One result of this continuing development and concern to protect the many facets of the administration of justice is that there are many forms of contempt.

One commentator<sup>7</sup> has described contempt as 'the Proteus of the legal world assuming an almost infinite diversity of forms', but equally it can be said that contempt of court is as diverse as are the means of interfering with the due course of justice<sup>8</sup>.

Since 1996, developments in both the legal framework and technological environment have occurred. This new edition seeks to describe and analyse these developments whilst retaining those elements of the previous edition that remain vital to an understanding of domestic contempt law. This introductory chapter sets out some central concepts that underpin the topic and lays down the overall chapter structure adopted in the fourth edition.

## 1.1 Introduction

- <sup>1</sup> [1974] AC 273 at 315, [1973] 3 All ER 54, HL.
- <sup>2</sup> The phrase 'contempt of court' has often been criticised as being inaccurate and misleading: see in England, eg Lord Cross in *A-G v Times Newspapers Ltd*, *ibid*, at 322, and Salmon LJ in *Jennison v Baker* [1972] 2 QB 52 at 61, [1972] 1 All ER 997, CA; in Australia, eg Mahoney JA in *A-G (NSW) v Willesee* [1980] 2 NSWLR 143 at 161 and the High Court of Australia (comprising Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ) in *Lane v Registrar of the Supreme Court of New South Wales* (1981) 148 CLR 245, 55 ALJR 529 at 534; in New Zealand, eg Richmond P in *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 at 229. The Phillimore Committee's Report on Contempt (1974, Cmnd 5794) para 12 acknowledged these criticisms but could not offer any suitable alternative name.
- <sup>3</sup> Although it should be said that such individuals undoubtedly benefit from the protection that the law of contempt provides.
- <sup>4</sup> 1923 SC 789 at 790, cited with approval *inter alia* by Lord Edmund-Davies in *A-G v Leveller Magazine Ltd* [1979] AC 440 at 459, [1979] 1 All ER 745, HL.
- <sup>5</sup> Miller: *Contempt of Court* (2nd edn, 1989, Clarendon Press) p 1.
- <sup>6</sup> Fox: *The History of Contempt of Court* (1927) p 1. For other reviews of the history of contempt see Arlidge and Eady: *The Law of Contempt* (1982, Sweet and Maxwell) and R Dhavan: 'Contempt of Court and the Phillimore Report' (1976) *Anglo-American LR* 186. For an account of contempt at the beginning of the century see the classic work by Oswald: *Contempt of Court* (3rd edn, 1910).
- <sup>7</sup> Joseph Moskovitz: 'Contempt of Injunctions, Civil and Criminal' (1943) 43 *Col LR* 780.
- <sup>8</sup> This passage was cited by Sir John Donaldson MR in *A-G v Newspaper Publishing plc* [1988] Ch 333 at 361-362, [1987] 3 All ER 276 at 294. Cf Hodgson J's remark in *A-G v Sport Newspapers Ltd* [1992] 1 All ER 503 at 536, [1991] 1 WLR 1194, DC, that 'if contempt be the Proteus of the common law then for my part I would hope that his repertoire will not be increased'.

## I THE SCOPE OF THE LAW OF CONTEMPT

1.2 Contempt can be divided into two broad categories, contempt by interference and contempt by disobedience.

The former category comprises a wide range of matters such as disrupting the court process itself (contempt in the face of the court), publications or other acts which risk prejudicing or interfering with particular legal proceedings, and publications or other acts which interfere with the course of justice as a continuing process (for example, publications which 'scandalise' the court and retaliation against witnesses for having given evidence in proceedings which are concluded).

The second category comprises disobeying court orders and breaking undertakings given to the court. It is essential that the law provides sanctions for the enforcement of the process and orders of a court. Dealing with the case of a party in civil litigation who refused to answer interrogatories, Chief Justice McKean of the United States said in 1778<sup>1</sup>:

'Since, however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case.'

Although at first sight interference and disobedience contempts seem quite distinct, in fact this is not always so. The boundaries become blurred, for example when persons are accused of aiding or abetting breaches of court orders or of frustrating their purpose. The classic example of this is the *Spycatcher* litigation<sup>2</sup>, in which certain newspapers were held to be in contempt not for breaking an injunction to which they were not a party but for

'frustrating' the order and thus interfering with the course of justice in those proceedings.

So far as the interference category is concerned a crucial distinction is between acts thought to interfere with the course of justice in particular proceedings and those which are thought to interfere with the course of justice as a continuing process. Although it is true that, in one sense, the first type of act is but a special form of the latter, as interference with the due administration of justice is a characteristic common to *all* contempts<sup>3</sup>, holding an act to be a contempt although it has no effect on *particular* proceedings, can have far-reaching consequences for freedom of speech. The classic case here is *A-G v Times Newspapers Ltd*<sup>4</sup> in which the debate was whether a publication could be condemned not for interfering with the particular litigation but because, by amounting to 'trial by newspaper', it was inherently inimical to the due administration of justice.

- <sup>1</sup> Cited by Fox: *The History of Contempt of Court* (1927) p 47.
- <sup>2</sup> *A-G v Newspaper Publishing plc* [1988] Ch 333, [1987] 3 All ER 276, *Re A-G v Observer Ltd and Guardian Newspapers Ltd* (1989) *Times*, 9 May; on appeal *sub nom A-G v Newspaper Publishing plc* (1990) *Times*, 28 February, CA and *A-G v Times Newspapers Ltd* [1992] 1 AC 191, [1991] 2 All ER 398.
- <sup>3</sup> See Sir John Donaldson MR in *A-G v Newspaper Publishing plc* *ibid* at 362 and 294 and Lord Diplock in *A-G v Leveller Magazine Ltd* [1979] AC 440 at 449, [1979] 1 All ER 745 at 749.
- <sup>4</sup> [1974] AC 273.

## Criminal and civil contempt

1.3 Traditionally contempts have been classified as being either criminal or civil<sup>1</sup>. Under this scheme it can broadly be said that interference contempt is seen as criminal contempt and disobedience contempt as civil, although the position has been confused by cases in which the courts have talked of civil contempt which 'savours of criminality'<sup>2</sup>.

Sir John Donaldson MR said in *A-G Newspaper Publishing Plc*<sup>3</sup> that whatever value classifying contempt as criminal or civil had in earlier times it now tended to mislead rather than assist. He preferred to use the categorisation discussed above and distinguish between (a) conduct which involves a breach, or assisting in a breach, of a court order, and (b) any other conduct which involves an interference with the due administration of justice. He pointed out that in all cases the standard of proof is the criminal one and that there are common rights of appeal. He considered that what distinguished the two categories was that where breach of a court order is involved the matter is raised by the parties whereas cases of interference are generally matters for the Attorney General<sup>4</sup>.

There remain, however, other practical consequences of classifying contempt as civil or criminal and these, and the procedures for dealing with each type of contempt, are dealt with in Part 5.

In so far as contempt constitutes a crime it is best to regard it as a crime that is *sui generis* since there are a number of peculiarities associated with the offence of which perhaps the outstanding example is the summary process by which such crimes are prosecuted. One of the causes of the confusion between criminal and civil contempt is that there has always been a punitive element in civil contempt as well<sup>5</sup>. The rules of civil contempt are equally concerned to

uphold the effective administration of justice and although civil contempt is basically a wrong to the person who is entitled to the benefit of the court order, the court can punish disobedience to its order (an injunction, for example) by a committal to prison, just as in the case of a criminal contempt<sup>6</sup>. In a major constitutional development the House of Lords decided in 1993 that even ministers of the Crown and their departments commit contempt if they act in disregard of an injunction made against them. They are not above the contempt jurisdiction by which the courts protect the due administration of justice<sup>7</sup>.

The rationale of both criminal and civil contempt is therefore essentially the same: upholding the effective administration of justice. If a court lacked the means to enforce its orders, and its orders could be disobeyed with impunity, not only would individual litigants suffer, the whole administration of justice would be brought into disrepute<sup>8</sup>.

<sup>1</sup> No such distinction, however, is made in Scotland, see the Phillimore Report (1974, Cmnd 5794) at para 4.

<sup>2</sup> See *Wellesley v The Duke of Beaufort* (1831) 2 Russ and M 639 at 667, 39 ER 538 at 548, per Brougham LC; *Re Freston* (1883) 11 QBD 545 at 555, per Brett MR.

<sup>3</sup> [1988] Ch 333 at 362, [1987] 3 All ER 276 at 294.

<sup>4</sup> See also Lord Scarman in *Home Office v Harman* [1983] 1 AC 280 at 310, [1982] 1 All ER 532 at 542 and Part 5 of this book. This distinction became confused in *A-G v Newspaper Publishing plc* itself, where the Attorney General, as a minister and on behalf of the Crown, was the plaintiff.

<sup>5</sup> See *Videotron Ltee et al v Industries Microlec Produits Electroniques Inc* (1993) 96 DLR (4th) 376 (Can Sup Ct).

<sup>6</sup> The Australian Law Reform Commission (Report No 35, *Contempt*, para 22) pointed out that this court-centred, rather than plaintiff-centred approach, whereby disobedience of a court order made for the benefit of a party to civil proceedings is punishable as an affront to the court, is foreign to the approach to the enforcement of judgments found in civil law systems, where the broad-ranging concept of contempt which exists in the common law is unknown.

<sup>7</sup> *M v Home Office* [1994] 1 AC 377, [1993] 3 All ER 537.

<sup>8</sup> See the citation of this passage in *Australian Meat Industry Employees Union v Mudginberry Station Pty Ltd* (1986) 161 CLR 98 at 107, (Aust HC).

## II SOURCES OF THE CONTEMPT POWER

1.4 The power to punish as contempt conduct that interferes with the course of justice has largely been developed at common law. Inasmuch as it is not confirmed by statute the contempt power is properly regarded as an inherent power, which vests in courts of record only<sup>1</sup>. As one would expect, superior courts of record have more extensive contempt powers than inferior courts, the position being broadly that superior courts can punish contempts whether committed in or outside the court whereas inferior courts can only punish contempts committed in the face of the court.

The courts' non-statutory contempt powers have proved remarkably enduring. In many Commonwealth jurisdictions contempt of court is specifically preserved as a common law crime. In Canada for example, criminal contempt is not a codified criminal offence but exists as a result of the Criminal Code, which preserves the common law power of the court to punish for contempt<sup>2</sup>. In New Zealand contempt is the only crime that can now be prosecuted at common law. Ironically, in the United Kingdom, where the contempt power first originated, there has been some attempt to put the offence on a statutory

footing. Hence, parts of criminal contempt, for example that dealing with publications interfering with the course of justice in particular legal proceedings, are now controlled by the Contempt of Court Act 1981. As we shall see, however, the 1981 Act does not by any means apply to the whole law of contempt and even in those areas where it does operate, the common law is still relevant.

<sup>1</sup> For a discussion of this inherent power see Chapters 13 and 15.

<sup>2</sup> *R v Kopyto* (1987) 39 CCC (3d) 1, 47 DLR (4th) 213.

## III CONTEMPT AND FREEDOM OF DISCUSSION – THE NEW CONSTITUTIONAL LANDSCAPE

1.5 Since the previous edition of this work was published in 1996, the constitutional context within which our domestic contempt laws are situated has undergone a dramatic, even seismic transformation. The previous edition noted correctly that, whilst freedom of discussion was an important public interest that helped to shape the form and content of both common law and statutory rules of contempt, in the final analysis the English courts tended to confer paramountcy upon the unimpeded administration of justice. A contrast was made with the position in the United States where there is tolerance under the First Amendment of pre-trial publicity and judicial hostility towards governmental restriction of the contents of speech. The US stance places emphasis upon remedial techniques available to the court (eg venue changes, jury vetting)<sup>1</sup>. The previous edition further remarked that stringent privacy rules in other jurisdictions prevented publication of matters that were caught domestically by generalised 'administration of justice' claims.

The elevations of rights to (i) freedom of expression (as enshrined in Article 10 of the European Convention on Human Rights ('ECHR')) and (ii) respect for private and family life (under Article 8 of the ECHR) to the status of constitutional values occurred with the passing into law of the Human Rights Act 1998. As a matter of domestic law therefore, the 1998 Act requires some re-calibration of the balance that have previously been struck at common law and statute between claims to freedom of expression and the interests of administration of justice (including the right to a fair trial which is also expressly protected in Article 6 of the ECHR) and individual privacy. The various ways in which these sometimes conflicting values and interests are being played out in specific contexts features across a number of the chapters in this new edition and gives a particular currency to its contents.

Whilst it is not suggested that domestic law shows signs of moving towards a US-style broad acceptance of court-related speech (and adopting consequently a more obviously remedial focus that seeks to insulate the trial process from external comment and prejudice), it may be instructive in this regard to consider the Canadian experience under the 1982 Charter of Rights and Freedoms. The Canadian settlement of 1982 conferred constitutional status upon freedom of expression and the right to a fair trial. In the context of clashes between freedom of expression and the administration of justice under the pre-1982 common law rules, freedom of expression interests were invariably subordinated to 'more pressing' administration of justice claims. According to Lamer CJ in *Dagenais v Canadian Broadcasting Company*,

however, the position after 1982 altered:

'Like the right of an accused to a fair trial, a fundamental principle of our justice which is now protected by s 11(d) of the Charter, freedom of expression, including freedom of the press is now recognised as a paramount value in Canadian society by its enshrinement as a constitutionally protected right in s 2(b) of the Charter.'<sup>2</sup>

The task of the domestic judiciary (assisted to some extent by rulings from Strasbourg) has been to work through the implications of this new constitutional landscape, assessing *inter alia* the extent to which old, common law restrictions on media reporting and comment are compatible with the Human Rights Act 1998. At the same time, privacy-based restrictions which may in the past have been supported by reference to a generalised concern to protect the administration of justice, can now be promulgated more firmly by reference to Article 8 and even in extreme cases, Article 2 (right to life).

- <sup>1</sup> For some interesting comparative analyses of national contempt laws, see G Resta (ed) *Il Rapporto tra Giustizia e Mass Media* (2010, Editoriale Scientifica, Rome) and the essays by Resta, Phillipson and Cram.
- <sup>2</sup> [1994] 3 SCR 835, 120 DLR (4th) 12, Can SC. For commentary, see I Cram, 'A Virtue Less Cloistered' (2002, Hart, Oxford) ch 1.

### New challenges in the era of electronic communications

1.6 The authors of the third edition of this work were acutely aware in 1996 that contempt rules on publications interfering with the course of justice faced novel challenges from the globalisation of information and new technology. Rules which were developed in days before even radio was dreamt of would in 1996 now have to deal with cable and satellite communications and the internet and cyberspace. Even the Contempt of Court Act 1981 was, in this context, passed in another world. Back then, the third edition observed that:

'we are now faced with a situation where it is in fact impossible to ensure that a jurisdiction is insulated from information which is available outside it. The issue that arose in *Spycatcher*', concerning the futility of trying to ban in the United Kingdom a book that was being sold in the United States, becomes more acute with every new development in communication technology and electronic publication. News networks such as CNN and Sky News serve the world and it can hardly be supposed that they will restrict what they broadcast worldwide in case the information leaks back into the United Kingdom in breach of the contempt rules<sup>2</sup>.'

The problems posed by transnational broadcasting have not diminished in the intervening years, although it may be argued that issues emanating from the use of electronic communications have come to greater prominence. In recent times, concerns have been raised about the contempt implications of access to certain material held on blogs, social networking sites and also newspaper archive holdings. The tendency of some jurors to 'google' in their own private time the names of defendants and witnesses concerned in proceedings now would seem from anecdotal evidence to be quite common and has come to the attention of the criminal courts. Whilst this practice is routinely discouraged by judges, it may be doubted whether such warnings to focus solely on the evidence presented to the court are wholly effective<sup>3</sup>. Twitter now offers jurors the instantaneous means of broadcasting their latest thoughts about the criminal proceedings as they unfold before them and, as such, has the potential

to frustrate judicial orders restricting publication.

Aside from the activities of jurors, persons not concerned in the proceedings may also wish to impart information or views about on-going proceedings in ways that pose a challenge to existing contempt rules. The breach of court orders in the case of *Baby P* by various 'vigilante-style' web sites is discussed in Chapter Three of this edition. In a separate instance in 2008, *Wikipedia* agreed to a request to remove material on its pages about the previous convictions of Peter Tobin who at the time of the request was on trial for murder of a young woman<sup>4</sup>. The entry also disclosed material that had not been previously produced in a court and could only be described as highly prejudicial.

Some would argue that these developments should prompt an urgent reappraisal of the way that trials are protected from prejudice and that a greater emphasis on jury selection and other remedial techniques, as it is practised in the United States, will now have to be given much closer consideration.

- <sup>1</sup> *A-G v Newspaper Publishing Plc* [1988] Ch 333, [1987] 3 All ER 276, *A-G v Newspaper Publishing plc* (1989) Times, 9 May and (1990) Times, 28 February, and *A-G v Times Newspapers Ltd* [1992] 1 AC 191, [1991] 2 All ER 398.
- <sup>2</sup> See discussion in Chapter 1 of the 3rd edition and also the *Bernardo/Homulka* trial at pp 280–281.
- <sup>3</sup> See thus A Hirsch, 'Is the internet destroying juries?' *The Guardian* (2010) 26 January. The article quotes Lord Judge, the Lord Chief Justice as stating, 'Nowadays, judges [direct] the jury not to look at the internet in connection with the trial. [But] inevitably, from time to time, an individual juror will disregard the direction and make his own private enquiries.'
- <sup>4</sup> 'Tobin: Previous murder conviction threatened fair trial' *The Herald* (2008) 3 December.

## IV THE SIGNIFICANCE OF THE LAW OF CONTEMPT

1.7 The sanctions of the law of contempt are powerful ones, particularly the sanction of imprisonment, but it is important to put the rules and the sanctions into perspective. The law of contempt is only one of the ways in which the due processes of the law are supported and furthered. It does, however, play a key role in protecting the administration of justice. It is an important adjunct to the criminal process and provides the final sanction in the civil process. Inevitably when its procedures and sanctions have come down to us over the centuries there are features which seem unsuited to a modern system of law. To some extent the ill effects of such features have been mitigated or eliminated by erosion and the good sense of the courts when called upon to consider to what extent the law of contempt should be applied. Some of the more obvious defects such as lack of the right of appeal have been remedied by statute. However, the resulting law is still imperfect. Even with its imperfections, however, there are those who believe that the law of contempt does a good job and one commentator said in 1979<sup>1</sup>:

'However uncertain its definition and scope may be in some respects, contempt of court is undoubtedly one of the great contributions the common law has made to the civilised behaviour of a large part of the world...'

One recent source of disquiet over the law is the role that it played in the *Spycatcher* affair, where its impact on a matter which was really to do with government secrecy demonstrated how wide, draconian, and, in some peo-

that the relevance of any common law defence has receded in the human rights era where the common law will only rarely be utilised and even then only in the clearest of cases.

<sup>1</sup> [1983] 1 AC 116, [1982] 2 All ER 903, HL.

## CIVIL CONTEMPT

### I INTRODUCTION

6.1 Civil contempt is that area of law concerned with the enforcement of judgments or orders of the court. The administration of justice can only be effective if it has the means to enforce court judgments or orders and it is in part upon the law of contempt that such enforcement depends. It is a contempt to disobey a judgment or order which requires the performance of a specified act within a given time or to abstain from doing a specified act. It is also a contempt to breach an undertaking given to the court, on the promise of which the court demands a particular course of action, or inaction. Solicitors, as officers of the court, are subject to a special jurisdiction of the court, and undertakings given to them in their professional capacity can be summarily enforced even if such undertakings are not given directly to the court. It is also contempt to refuse to comply with an order for interrogatories, or discovery or inspection of documents (disclosure). The court also has the power to punish as for contempt other acts of misconduct committed by solicitors in their official capacity<sup>1</sup>.

Before discussing in detail the various ways in which civil contempt may be committed and reviewing the powers of the various courts, certain introductory points should be made<sup>2</sup>.

<sup>1</sup> *N (A Child)* [2009] EWHC 1807 (Fam), [2010] 1 FLR 272, [2009] Fam Law 1036.

<sup>2</sup> See also *Re Marriage of Sahari* (1976) 11 ALR 679 at 681–693.

6.2 (1) Coercive orders made by the courts must be obeyed and undertakings formally given to the court must be honoured unless they are set aside. Furthermore, it is generally<sup>1</sup> no defence that the order disobeyed or the undertaking breached should not have been made or accepted. The proper course to challenge an order or undertaking is to apply to have it set aside. As Romer LJ put it in *Hadkinson v Hadkinson*<sup>2</sup>:

‘It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.’

This principle was reiterated by Lord Donaldson MR in *Johnson v Walton*<sup>3</sup>:

'It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted or accepted in the first place.'

And, in *Isaacs v Robertson*<sup>4</sup>, the Privy Council upheld a finding that the appellant was in contempt where he had breached an injunction of the High Court of St Vincent notwithstanding that the order ought not to have been made. In so ruling, the court rejected the contention that there was a distinction between 'void' orders which could be ignored with impunity and 'voidable' orders which may be enforced until they are set aside. Lord Diplock said that such contrasting concepts<sup>5</sup>:

'are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either regular or irregular. If it is irregular it can be set aside by the court that made it upon application to the court; if it is regular it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies.'

It has been pointed out<sup>6</sup> however, that at common law there was some authority for the proposition that a journalist was not guilty of contempt for refusing to reveal his source if it was subsequently ruled that such a question was unnecessary<sup>7</sup>. Under s 10 of the Contempt of Court Act 1981 it is asserted that there is no such obligation 'unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime'<sup>8</sup>. And, before a finding of contempt can be made it is for the prosecution to show that the question falls into one of the four exceptions provided by the Act<sup>9</sup>. In interpreting 'interests of justice' the court will not order disclosure unless there is evidence that further breaches are likely and that the disclosure sought would help to avert them<sup>10</sup>.

<sup>1</sup> But see further below.

<sup>2</sup> [1952] P 285 at 288, [1952] 2 All ER 567, CA.

<sup>3</sup> [1990] FCR 568, [1990] 1 FLR 350 at 352, CA.

<sup>4</sup> [1985] AC 97, [1984] 3 All ER 140. See also *M v Home Office* [1994] 1 AC 377 at 423, [1993] 3 All ER 537 at 565, per Lord Woolf.

<sup>5</sup> *Ibid* at 103 and 143.

<sup>6</sup> See Miller, [1984] All ER Annual Review at 66 and *Contempt of Court* (2nd edition) pp 438-440, 443-445. There may, however, be less scope for questioning the general proposition with regard to undertakings, cf the comment on *Johnson v Walton* at [1990] Fam Law 260.

<sup>7</sup> As pointed out by Miller, *op cit*, relying on *A-G v Luddin* (1982) 75 Cr App Rep 90, [1982] Crim LR 296, DC.

<sup>8</sup> The Civil Court Practice Vol 2 2009, p 4563.

<sup>9</sup> See Chapter 2 at para 2.6.

<sup>10</sup> *Saunders v Punch Ltd* [1998] 1 All ER 234, [1998] 1 WLR 986.

6.3 (2) Given that orders and undertakings should be obeyed the motive for the breach is irrelevant. As Lord Sterndale MR said in *R v Poplar Borough Council (No 2)*<sup>1</sup>:

'Unless and until the time comes when the law of this country is that a person may disobey an order of the court or the laws as much as he likes if he does it conscientiously the question of motive is immaterial.'

However, there appears to be a defence, where, for example, there are breaches

of anonymity orders made under s 11 of the 1981 Act<sup>2</sup> and orders made under s 12(2) the Administration of Justice Act 1960 directing that there be no publication of an order made by a court sitting in private, if the orders were not properly made.

It is not a defence to a finding of contempt that it is the defendant's first breach of the order in question. As Leggatt LJ said in *A v D (Contempt: Committal)*<sup>3</sup>, it is a heresy to think that in cases of injunctions to restrain domestic violence, for example, there is a concept of 'one free breach'.

(3) Court orders bind everyone against whom they are made<sup>4</sup>. This includes a government department or a minister of the Crown in his official capacity. This point was established by the House of Lords in *M v Home Office*<sup>5</sup>. In that case, Garland J issued a mandatory order requiring the Home Secretary to return M, a citizen of Zaire, who had unsuccessfully claimed political asylum, to the jurisdiction of the court. The Secretary of State for the Home Office received legal advice that Garland J had no power to issue the order against the Crown and that the appropriate course was to apply to set the order aside. It was also decided not to return M to England because of the difficulties in removing him thereafter if, as was confidently expected, it was found that asylum had been properly denied. The court rejected legal argument that a finding of contempt cannot be made against a government department or a minister of the Crown in his official capacity, and held that it was incumbent on the Secretary of State to obey the order and that by not doing so he had committed contempt. However, unlike the Court of Appeal, the House of Lords ruled that the contempt had been committed by the Secretary of State in his official, rather than his personal, capacity<sup>6</sup>.

(4) Notwithstanding the general obligation to obey court orders, unless they are coercive or injunctive in form they cannot be enforced by committal or sequestration. This was first established by *Webster v Southwark London Borough Council*<sup>7</sup>, in which it was held that because a declaration is declaratory rather than coercive it was not a contempt for the party affected by it to refuse to comply with the order. A similar line of reasoning has been applied to certain child related orders such as access to children and directions against removing a child from the jurisdiction<sup>8</sup>, and also with regard to whether artificial hydration and nutrition of a protected party in a persistent vegetative state could lawfully be withdrawn<sup>9</sup>.

(5) The sanction for a finding of civil contempt includes imprisonment, fines or sequestration of property.

(6) Contempt, however, is a blunt weapon by which to enforce obedience and those desirous of maintaining a relationship with the party against whom the application is made, for example, members of a family or those in an commercial relationship, need to balance carefully the benefits and disadvantages of invoking the contempt process. Ormrod LJ commented in *Ansah v Ansah*<sup>10</sup>:

'Breach of...an injunction is, perhaps unfortunately, called contempt of court, the conventional remedy for which is a summons for committal. But the real purpose of bringing the matter back to the court, in most cases, is not so much to punish the disobedience as to secure compliance with the injunction in the future. It will often be wiser to bring the matter before the court again for further directions

before applying for a committal order. *Committal orders are remedies of last resort; in family cases they should be the very last.*'

(emphasis added).

(7) The courts are reluctant to exercise their powers and will do so only in the clearest cases, namely, where an offender, having had proper notice of the order, has been shown to the criminal standard – beyond all reasonable doubt – to have committed the contempt. In addition, in most cases the offender will have been shown to have intentionally, deliberately or wilfully disobeyed the court order.

(8) Although this aspect of contempt is designated civil, because of the penal sanctions that apply, it has been said to 'partake of a criminal nature'<sup>11</sup> and many of the rules that normally apply when seeking to prove an accused guilty of a criminal offence apply when seeking to show that the defendant has committed civil contempt. In consequence, the rules safeguarding contemnors' rights must be strictly complied with. This means that there must be a high standard of procedural fairness<sup>12</sup>.

(9) In many ways, this branch of contempt law exists to protect the private interests of litigants, and its prime function is coercive rather than punitive. As a US judge said in *Hicks v Feiock*<sup>13</sup>:

'In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order'.

However, the underlying object of this aspect of contempt law, is to protect the public interest, namely, that every court must have the means of enforcing its own orders. In this respect such proceedings act as the guardian of public interest and enforce the supremacy of the law. As one Canadian judge put it:

'To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn...If the remedies that the courts grant to correct...wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result in the destruction of our society.'

And as Cameron JA in a recent South African decision said:

'In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.'<sup>15</sup>

Further, in *Videotron Ltée v Industries Microlec Produits Électroniques Inc*<sup>16</sup>, the majority of the Supreme Court of Canada held that the penalty for contempt of court, even when used to enforce a purely private order, inevitably involves an element of public law, 'because respect for the role and authority

of the courts, one of the foundations of the rule of law, is always at issue'.

This public interest in the enforceability of court orders and therefore in civil contempt becomes more pressing where the disobedience is public, particularly if the offender is deliberately pursuing a policy of challenging a court's authority as for example, in connection with trade union opposition to the Industrial Relations Act 1971 in general and the National Industrial Relations Court in particular<sup>17</sup>. In such cases<sup>18</sup> the object is one of enforcing a court order and maintaining the authority of the court. In such cases, the sanctions imposed are both coercive and punitive<sup>19</sup>.

(10) The Convention rights of those so bound should be considered. Although the respondent is not an accused person he is entitled to the protection of the Convention rights. Such considerations are especially relevant in respect of the enforcement of judgments and orders<sup>20</sup>:

<sup>1</sup> [1922] 1 KB 95 at 103, CA; see also *R v Leicester Union* [1899] 2 QB 632; *Re Thompson, R v Woodward* (1889) 5 TLR 565 and 601.

<sup>2</sup> Discussed in Chapter 7 at para 7.15.

<sup>3</sup> [1993] Fam Law 519, in which it was pointed out that such a heresy was firmly rejected in *Jordan v Jordan* [1992] 2 FCR 701, [1993] 1 FLR 169, CA.

<sup>4</sup> Even non-parties can commit contempt if they aid and abet a breach, or if they knowingly do an act which frustrates the very purpose of the order.

<sup>5</sup> [1994] 1 AC 377, [1993] 3 All ER 537, see also in general Harlow, 'Accidental Loss of an Asylum Seeker' (1994) 57 MLR 620, and on the contempt aspects; Miller, [1994] All ER Annual Review 105–106. Cf in Australia *R v Watt, ex p Slade* [1912] VLR 125, in which Madden CJ considered that the court had power to attach with a writ of mandamus a Minister of the Crown for a failure to comply, requiring him to discharge duties required of him by statute. In Canada see *Minister of Employment and Immigration v Bhatnager* (1990) 71 DLR (4th) 84 (Can SC).

<sup>6</sup> For a criticism of this part of the decision see Harlow: (1994) 57 MLR at 623.

<sup>7</sup> [1983] QB 698, [1983] 2 WLR 217, per Forbes J.

<sup>8</sup> *D v D (Access: Contempt: Committal)* [1991] FCR 323, [1991] 2 FLR 34, CA, and *Re P (minors) (Custody Order: Penal Notice)* [1990] 1 WLR 613, [1990] FCR 909, CA. *Re L (children) (abduction: declaration)* [2001] 2 FCR 1.

<sup>9</sup> See *NHS Trust A v H* [2002] 1 FCR 713, [2001] 2 FLR 501.

<sup>10</sup> [1977] Fam 138 at 144, [1977] 2 All ER 638, CA. See also *Danchevsky v Danchevsky* [1975] Fam 17 at 22, [1974] 3 All ER 934, CA per Lord Denning MR and *Marshall v Marshall* (1966) 110 Sol Jo 112, where it was held that committal was a serious matter and should not be treated as a weapon in domestic affairs. But note *Jones v Jones* [1993] 2 FLR 377, in which Russell LJ said that Ormrod LJ's comment should not be treated as laying down a general principle that 'irrespective of circumstance, an immediate custodial sanction should not be imposed'.

<sup>11</sup> Per Lord Denning MR in *Re Bramblevale Ltd* [1970] Ch 128 at 137, [1969] 3 All ER 1062, CA.

<sup>12</sup> See in South Africa in *Coetzee v Government of the Republic of South Africa* [1995] ZACC 7; 1995 (4) SA 631 (CC) para 61, where statutory procedures for committal of non-paying judgment debtors to prison for up to 90 days – which the statute classified as contempt of court – were held unconstitutional. Art 6 convention rights are engaged in the UK see *Mubarak v Mubarak* [2001] 1 FLR 698, [2001] Fam Law 178, CA Brooke LJ said at [64]: 'In my judgment, it is essential for family law practitioners who are concerned with [committal] proceedings...to be fully acquainted with the requirements of [Convention] Art 6 before they embark on any similar process in future'. *Mubarak v Mubarak* [2007] EWCA Civ 879 per Wall LJ settled the application of Convention rights especially Art 6(3). As David Burrows in NLJ vol 158, iss 7368 notes 'On analogy with *Mubarak* (see paras [29]–[30]) a person liable to committal under s 39A–40 is 'charged with a criminal offence (see *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647 at 677 paras [80]–[82])'. He is therefore entitled to the full protection of Art 6(3). To clarify this it may be helpful to examine the Debtors Act 1869, s 5 and parts of Magistrates Courts Act 1980 alongside s 39A. From these the following features emerge:

- (i) There must be default in payment of a sum due to be paid following a court order. (Magistrates Courts Act 1980 s 76(1) suggests that this sum should be 'adjudged', which – if 'adjudgement' means following a defendant's opportunity to contest the amount adjudged—only tangentially applies to liability orders (see previous articles in this series)
- (ii) Application is made to the adjudicating court for issue of a summons
- (iii) Issue by that court of a warrant to commit to prison (whatever that may mean to the average liable parent (see Art 6(3)(a) above); and perhaps to many practising lawyers, as well).
- (iv) Committal can only follow where there has been wilful refusal or culpable neglect by the debtor to pay (that the debtor 'has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default' in terms of s 5). Sections 39A–40 are directly derived from Debtors Act 1869, s 5. Given this close relationship the later provisions can be analysed, in the same way as does the Court of Appeal of s 5 in *Mubarak* and through the prism of ECHR Art 6(3). Section 5 enables proceeds by judgment summons (Family Proceedings Rules 1991 (SI 1991/1247) R 7.4 in family proceedings). Where a defendant is proved to have the means to pay an order, the summons seeks his committal to prison.
- <sup>13</sup> [1988] USSC 72; 485 US 624 (1985) at 635.
- <sup>14</sup> O'Leary J in *Canadian Metal Co Ltd v Canadian Broadcasting Corp'n (No 2)* (1975) 48 DLR (3d) 641 at 669 (Ont).
- <sup>15</sup> See *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 at para [8].
- <sup>16</sup> *Videotron Ltée v Industries Microlec Produits Électroniques Inc* (1992) 96 DLR (4th) 376 (SCC) 398.
- <sup>17</sup> See eg *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15, [1972] 3 All ER 101, HL; *Goad v Amalgamated Union of Engineering Workers (Engineering Section) (No 2)* [1973] ICR 42; *Goad v Amalgamated Union of Engineering Workers (Engineering Section) (No 3)* [1973] ICR 108 and *Con-Mech (Engineers) Ltd v Amalgamated Union of Engineering Workers (Engineering Section)* [1973] ICR 620. Similar problems have been encountered in Canada, see eg *Skeena Kraft Ltd v Pulp and Paper Workers of Canada Local (No 4)* (1970) 17 DLR (3d) 17, [1970] 1 WWR 515, BC SC; *R v United Fishermen and Allied Workers' Union* (1968) 65 DLR (2d) 579; *Tony Poje v A-G of British Columbia* (1952) 105 CCC 311, sub nom *Canadian Transport (UK) Ltd v Alsbury* 7 WWRNS 49; affd [1953] 1 SCR 516, [1953] 2 DLR 785, CA and *United Nurses of Alberta v A-G for Alberta* [1992] 1 SCR 901, (1992) 89 DLR (4th) 609 (Can SC).
- <sup>18</sup> See Sir John Donaldson in *Con-Mech (Engineers) Ltd v Amalgamated Union of Engineering Workers (Engineering Section)* [1973] ICR 620 at 625.
- <sup>19</sup> Indeed in Canada these contempts are classified as criminal, see the Canadian cases cited at footnote 5 above.
- <sup>20</sup> A considerable jurisprudence is developing on this point see *Compare Nel v le Roux* [1996] ZACC 6, 1996 (3) SA 562 (CC) para 11, where it was held that a recalcitrant witness who is examined under s 205 of the Criminal Procedure Act 51 of 1977 under the procedure of s 189 is not an 'accused person' and therefore not entitled 'directly' to fair trial rights, but that such an examinee is 'unquestionably entitled to procedural fairness'.

#### A Article 1 Protocol 1

#### 6.4 Article 1 of the European Convention on Human Rights provides:

- (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

#### Article 5 provides:

- (1) Everyone has the right to liberty and security of person. No one is to be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
- (2) The lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

- (3) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

#### Article 6 provides:

- (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- (2) Everyone charged with a criminal offence must be presumed innocent until proved guilty according to law and has certain minimum rights;

#### Article 8 provides:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence;
- (2) There must be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society for, inter alia, the protection of the rights and freedoms of others;

#### Article 10 provides:

- (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.

## II THE WAYS IN WHICH CIVIL CONTEMPT MAY BE COMMITTED

### A Breach of injunction

6.5 An injunction is an order made by the court expressly enjoining a party either to perform a particular act, (mandatory injunction), or to refrain from doing a particular act, (prohibitory injunction). As Kindersley V-C said, it is of the:

By way of comment, this latest set of automatic reporting restrictions adds yet another layer of controls to what may be published about criminal proceedings, albeit impacting at the earlier stage of police investigations into suspected criminal activity. If an order bringing these restrictions into force is ever made, it is to be expected that media organisations would test their Article 10 compatibility, particularly given the absence of a public interest defence to a s 44(2) offence.

<sup>1</sup> Youth Justice and Criminal Evidence Act 1999, s 44(4)(a).

<sup>2</sup> Youth Justice and Criminal Evidence Act 1999, s 44(4)(b).

<sup>3</sup> Youth Justice and Criminal Evidence Act 1999, s 44(1).

<sup>4</sup> Youth Justice and Criminal Evidence Act 1999, s 50(2).

<sup>5</sup> Youth Justice and Criminal Evidence Act 1999, s 50(3).

<sup>6</sup> Youth Justice and Criminal Evidence Act 1999, s 44(7), (8), (10).

## REPORTING CIVIL COURT PROCEEDINGS

### I INTRODUCTION

8.1 This chapter details those principles and statutes that apply exclusively or primarily to the reporting of civil court proceedings (other than family proceedings, which are considered in the next chapter). Several of the most significant court powers that can be used to restrict the reporting of such proceedings – the power to postpone reports of proceedings (s 4(2), Contempt of Court Act 1981)<sup>1</sup>, the power to prohibit the publication of matters withheld from the public during proceedings (s 11 of the 1981 Act)<sup>2</sup> and the power to prohibit the identification of children or young persons concerned in proceedings (s 49 of the Children and Young Persons Act 1933)<sup>3</sup> – are more often used in relation to criminal proceedings and readers should therefore consult Chapter 7 in addition to this chapter for a complete guide to the relevant law.

The reporting of private hearings is, by virtue of s 12 of the Administration of Justice Act 1960, subject to greater restrictions than the reporting of proceedings in open court. This chapter therefore begins with a consideration of when a court may sit in private, before considering the detail of the restrictions imposed by the 1960 Act. Restrictions on the reporting of proceedings in open court are then considered, including the principles applicable where individuals involved in proceedings seek anonymity. Finally, as civil court proceedings are increasingly a paper-based rather than an oral procedure, the chapter concludes by detailing the rules governing access by non-parties to case documents (statements of case, witness statements, transcripts, orders and judgments).

<sup>1</sup> See paragraphs 7.4 to 7.14.

<sup>2</sup> See paragraph 7.15.

<sup>3</sup> See paragraph 7.25.

### II WHEN A CIVIL COURT MAY SIT IN PRIVATE

8.2 The leading case in this area is *Scott v Scott*<sup>1</sup>. There, the House of Lords affirmed the general principle that justice must be administered in public. It was recognised, however, that in exceptional circumstances courts of law had

an inherent jurisdiction to sit in private. The exceptional circumstances were where the proceedings concerned:

- (a) wards of court;
- (b) 'lunatics'<sup>2</sup>; and
- (c) secret processes (such as trade secrets or confidential information where the whole point of the proceedings would be lost by holding them in public).
- (d) The majority held that a court could also hear a case in private in order to protect the administration of justice. In *A-G v Leveller Magazine Ltd*<sup>3</sup>, Lord Scarman, relying on Viscount Haldane LC in *Scott*, considered that there was power to sit in private in cases involving national safety where such a factor 'appears to endanger the due administration of justice, for example by deterring the Crown from prosecuting in cases where it should do so...'

Any departure from the general rule that hearings are to be in public is only justified to the extent necessary to serve the ends of justice<sup>4</sup>. Where, therefore, a court has power to order that a hearing be in private, it has the power to make any alternative order which would protect the same interests but involve less derogation from the principle of open justice, such as ordering that a particular identity or piece of evidence not be mentioned in open court.

When the court sits in private and excludes the public it will normally mean that the press is excluded as well, but in exceptional cases there may be good reasons for only excluding the public<sup>5</sup>. The Court of Appeal has said that there will often be members of the public with a direct concern in the case who will have as good a claim to be present as the press and it would not be right to favour the latter over the former<sup>6</sup>.

CPR 39.2 provides, 'the general rule is that a hearing is to be in public'<sup>7</sup>. The Rule notes, however, that there is no requirement for 'the court to make special arrangements for accommodating members of the public'<sup>8</sup>. The Rule goes on to provide that 'a hearing, or any part of it, may be in private' if:

- (a) publicity would defeat the object of the hearing;
- (b) it involves matters relating to national security;
- (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
- (d) a private hearing is necessary to protect the interests of any child or protected party;
- (e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;
- (f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or
- (g) the court considers this to be necessary, in the interests of justice<sup>9</sup>.

The Practice Direction to Part 39 provides that in determining whether to hold a hearing in private a judge must have regard to Article 6(1) of the European Convention on Human Rights, which provides that:

'the public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'<sup>10</sup>

The Practice Direction also gives the following list of hearings that 'shall in the

first instance be listed by the court as hearings in private under rule 39.2(3)(c)':

- (1) a claim by a mortgagee against one or more individuals for an order for possession of land,
- (2) a claim by a landlord against one or more tenants or former tenants for the repossession of a dwelling house based on the non-payment of rent,
- (3) an application to suspend a warrant of execution or a warrant of possession or to stay execution where the court is being invited to consider the ability of a party to make payments to another party,
- (4) a redetermination under rule 14.13 or an application to vary or suspend the payment of a judgment debt by instalments,
- (5) an application for a charging order (including an application to enforce a charging order), third party debt order, attachment of earnings order, administration order, or the appointment of a receiver,
- (6) an order to attend court for questioning,
- (7) the determination of the liability of an LSC funded client under regulations 9 and 10 of the Community Legal Service (Costs) Regulations 2000, or of an assisted person's liability for costs under regulation 127 of the Civil Legal Aid (General) Regulations 1989,
- (8) an application for security for costs under section 726(1) of the Companies Act 1985, and
- (9) proceedings brought under the Consumer Credit Act 1974, the Inheritance (Provision for Family and Dependents) Act 1975 or the Protection from Harassment Act 1997,
- (10) an application by a trustee or personal representative for directions as to bringing or defending legal proceedings<sup>11</sup>.

Paragraph 5.1 of the Practice Direction supplementing Part 27 (relating to the hearing of claims in the small claims track) provides that the judge may decide to hold a small claim hearing in private if the parties agree.

CPR 39.2(3) appears to allow courts to sit in private in situations other than those described by the House of Lords. A declaration that the rule was ultra vires and a breach of Article 6 of the European Convention was sought in *R (Pelling) v Bow County Court (No 2)*<sup>12</sup>. The Divisional Court held that the rule was not ultra vires as it was not inconsistent with *Scott v Scott*, nor was it a breach of Article 6. CPR r 39.2(3) was merely 'facultative' and it was always to be assumed that the decision to sit in private would be 'in the interests of justice'<sup>13</sup>. That would mean that, despite the language of the rule, a court cannot in fact sit in private unless exception (g) applies, even if one or more of the exceptions in (a)-(f) apply. However, such a reading appears unnecessary as Buxton LJ went on to hold that it was clearly Parliament's intention with the Civil Procedure Act 1997 to make 'a new start' in areas such as this.<sup>14</sup>

<sup>1</sup> [1913] AC 417, 82 LJP 74.

<sup>2</sup> Hearings in the Court of Protection are now governed by the Mental Capacity Act 2005 – for the rules governing the Court's approach to reporting restrictions see Practice Direction A to Rule 13 of the Court of Protection Rules 2007.

<sup>3</sup> [1979] QB 31, [1978] 3 All ER 731.

<sup>4</sup> *A-G v Leveller* [1979] AC 440 above, per Lord Diplock at 450, Lord Russell of Killowen at 467 and Lord Scarman at 471.

<sup>5</sup> See *R v Waterfield* [1975] 2 All ER 40, [1975] 1 WLR 711, CA where the press was allowed to remain during the showing of allegedly indecent films so that they could report what type of 'censorship' was being imposed while the ordinary public was excluded to prevent the atmosphere which would be created by 'persons with a taste for the nasty' (per Lawton LJ at 44) just coming in to watch.

<sup>6</sup> *Re Crook* [1992] 2 All ER 687 at 694.

<sup>7</sup> CPR 39.2(1).

<sup>8</sup> CPR 39.2(2).

<sup>9</sup> CPR 39.2(3).

<sup>10</sup> Paragraph 1.4A. *Doorson v Netherlands, Application 20524/92* (1996) 22 EHRR 330, makes clear that Article 6 requires the Article 8 interests of others such as witnesses and victims to be considered. The rights of the parties, the press and the public under Article 10 will also be relevant, and in some circumstances rights under Articles 2 and 3.

<sup>11</sup> CPR PD 39, paragraph 1.5.

<sup>12</sup> [2001] UKHRR 165.

<sup>13</sup> At [22].

<sup>14</sup> At [23].

### A Interlocutory hearings and hearings 'in camera' and 'in chambers' in civil cases

8.3 Prior to the introduction of the CPR, hearings in civil cases were often said to take place 'in camera' or 'in chambers'. The CPR has now abandoned these terms and instead refers to hearings being 'private' or 'secret'.

Hearings 'in chambers' were hearings in which counsel were unrobed and solicitors and clerks had a right of audience<sup>2</sup>. The implications of a hearing being 'in chambers' were perhaps surprisingly unexplored until *Forbes v Smith*<sup>3</sup> and *Hodgson v Imperial Tobacco Ltd*<sup>4</sup>. In the latter case, Lord Woolf MR made it clear that although the public had no right to access such hearings, permission to attend should not ordinarily be denied on request, and that judges should consider adjourning to a larger room or allowing a press representative to attend if necessary<sup>5</sup>. CPR 39.2 now provides that although hearings are to be in public, courts are not required to make special arrangements for accommodating the public<sup>6</sup>.

Hearings 'in camera' were hearings where the court had deliberately excluded the public, akin to what are now referred to as private hearings<sup>7</sup>.

<sup>1</sup> See *Department of Economics, Policy and Development of the City of Moscow and another v Bankers Trust Co and another* [2005] QB 207 at [7] to [22]. The Criminal Procedure Rules still use 'in camera' and 'in chambers': see, eg, Criminal Procedure Rules, rr 16.10 and 16.11.

<sup>2</sup> On the practice at 'in chambers' and 'in camera' hearings, see further *Clibbery v Allan* [2001] 2 FCR 577, [2001] 2 FLR 819 at [23]–[27].

<sup>3</sup> [1998] 1 All ER 973, [1998] 2 FCR 342.

<sup>4</sup> [1998] 2 All ER 673, [1998] 1 WLR 1056, CA.

<sup>5</sup> At 1072.

<sup>6</sup> CPR 39.2(2).

<sup>7</sup> See footnote 3 above and *Department of Economics, Policy and Development of the City of Moscow and another v Bankers Trust Co and another* [2004] EWCA Civ 314, [2005] QB 207 at [19], [22] and [28], [2004] 2 All ER (Comm) 193.

## III RESTRICTIONS ON REPORTING PRIVATE HEARINGS

### A The statutory position under English law: Administration of Justice Act 1960, s 12<sup>1</sup>

<sup>1</sup> See para 9.47.

8.4 The effect of sitting in private is to deprive members of the public and therefore, the press, of the right to attend the hearing. However, a reporter, though excluded from the hearing, may be able to obtain information relating to the proceedings from those (such as a party, a witness or a lawyer) who are lawfully present. One might have expected that since the whole object of

sitting in private is to deprive the public of the right of access to the hearing, the publication of a purported report of or information relating to such proceedings would ipso facto be a contempt<sup>2</sup>. However, such publications are not necessarily contempts.

The reporting of proceedings properly heard in private is prima facie governed by s 12 of the Administration of Justice Act 1960, which states<sup>3</sup>:

- (1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say:
  - (a) where the proceedings:
    - (i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;
    - (ii) are brought under the Children Act 1989; or
    - (iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor;
  - (b) where the proceedings are brought under the Mental Capacity Act 2005, or under any provision of the Mental Health Act 1983 authorising an application or reference to be made to the First-tier Tribunal, the Mental Health Review Tribunal for Wales or a county court;
  - (c) where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published;
  - (d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings;
  - (e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.
- (2) Without prejudice to the foregoing sub-section, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.
- (3) In this section references to a court include references to a judge and to a tribunal and to any person exercising the functions of a court, a judge or a tribunal; and references to a court sitting in private include references to a court sitting in camera or in chambers.
- (4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section (and in particular where the publication is not so punishable by reason of being authorised by rules of court).

Section 12(1) does not in itself provide a defence, but rather clarifies that it is not of itself an offence to publish information relating to proceedings heard in private, save in the types of case specified in s 12(1)(a)–(e)<sup>4</sup>. Nor does the section exclude the operation of other aspects of the law of contempt, such that it would still be a contempt of court to publish information about private proceedings other than those specified in s 12(1)(a)–(e) if such publication were calculated to interfere with the administration of justice or which gave rise to a 'substantial risk of serious prejudice'<sup>5</sup>.

Contempt liability for publishing information relating to proceedings of the type identified in s 12(1)(a)–(e) will depend upon whether the decision to hear the case in private was lawfully made<sup>6</sup> and whether the publisher is aware that his publication relates to private proceedings. Provided, however, these two requirements are satisfied, then it is a prima facie contempt at common law, regardless of intent, to publish information relating to the private proceedings<sup>7</sup>. The wording of s 12(1) ('shall not of itself be contempt of court except in the following cases'), would appear to make such publications automatically

a contempt. However, the Court of Appeal ruled in *Re F (Otherwise A) (a minor) (Publication of Information)*<sup>8</sup> that s 12(4) has the effect of preserving any defence which would have been available at common law. In other words s 12 read as a whole does not create any new instances of contempt and even the express instances provided for by s 12(1) are subject to the common law. This interpretation was approved by the House of Lords in *Pickering v Liverpool Daily Post and Echo*<sup>9</sup>.

The court has an unfettered discretion to grant leave to publish information that would otherwise breach s 12. In determining whether to do so it will balance the competing interests of privacy with that sought to be pursued by the disclosure (such as assisting criminal investigations): *Re F (Minors) (Wardship: Police Investigation)*<sup>10</sup>.

Section 12(3) continues to define a hearing 'in chambers' as being one 'in private' and therefore, while the CPR does not provide for hearings to take place 'in chambers' as such, it would be arguable that a hearing that took place in the manner in which such hearings formerly took place would be subject to s 12(1). Although any hearing dealing with the subjects referred to in s 12(1) would almost certainly be in private (in the CPR sense), this discrepancy in the definition of private could in theory lead to a member of the public attending a hearing (as he would be entitled to under CPR 39.2) receiving information which he could not divulge to anyone without being prima facie in contempt of court (under s 12(1)). This is an unfortunate position which should be amended, preferably, it is submitted, by making clear that hearings in chambers in any court are not, without more, private hearings.

No immunity from contempt attaches to fair and accurate reports of proceedings heard in private, nor are such reports the subject of privilege in respect of any defamation claim. The latter point was made clear by Lord Atkinson in *Scott v Scott* when he said<sup>11</sup>:

'if anything which took place in camera were published it must be published without the privilege which protects the publication of a full and fair report of proceedings in public open courts of justice, and would subject the publishers to all the risks attending the publication of anything which takes place in a private house or at a private meeting. If the matter published amounted to a libel or to a slander, the person defamed could sue for damages, or possibly in the former case, prosecute for criminal libel. If the printed matter published were, in addition, indecent, the public authority might prosecute for the publication of an obscene libel, etc.'

The decision to hear a case in private does not impose a perpetual obligation to remain silent so that in some cases publication might be permissible after the passage of time or change of circumstances, even without judicial consent<sup>12</sup>.

For s 12 to operate at all, information must (a) be published, and (b) relate to proceedings heard in private.

<sup>2</sup> That this is not the position was remarked upon as 'perhaps strange' by Sir Igor Judge in *AF Noonan (Architectural Practice) v Bournemouth and Boscombe Athletic Community Football Club Ltd* [2007] 1 WLR 2614 at [16].

<sup>3</sup> As amended by Children Act 1989, Sch 13, para 14; Children Act 2004, s 62(2); Mental Capacity Act 2005, Sch 6, para 10; Transfer of Tribunal Functions Order 2008 (SI 2008/2833), Sch 3, para 22.

<sup>4</sup> This was confirmed by the Court of Appeal in *AF Noonan (Architectural Practice) v*

*Bournemouth and Boscombe Athletic Community Football Club Ltd* [2007] EWCA Civ 848, [2007] 1 WLR 2614, (2007) Times, 12 July.

<sup>5</sup> See Chapter 4.

<sup>6</sup> See above.

<sup>7</sup> Per Scarman LJ in *Re F (a minor) (Publication of Information)* [1977] Fam 58; [1976] 3 All ER 274.

<sup>8</sup> [1977] Fam 58, [1976] 3 All ER 274.

<sup>9</sup> [1991] 2 AC 370, [1991] 1 All ER 622. It also seems in line with Viscount Kilmuir's view who said when introducing the Bill (at HL Debs Vol 222 col 254): 'Nothing in Clause 12 will have the effect of making something punishable as contempt of court which would not have been so punishable as contempt under the existing law'. As Lord Bridge pointed out at 421, 633, in relation to a court exercising a novel and purely statutory jurisdiction (such as a mental health review tribunal) the common law principle can only be applied by analogy.

<sup>10</sup> [1989] Fam 18, [1988] 3 WLR 818, CA.

<sup>11</sup> [1913] AC 417 at 452.

<sup>12</sup> See Lord Shaw in *Scott v Scott* [1913] AC 417 at 483 who suggested that publicity may be resumed when eg a ward attains his majority or when confidentiality has been abandoned or the secrets become public property. See also Wynn-Parry J in *Re De Beaujeu* [1949] Ch 230 at 435, [1949] 1 All ER 439 and Geoffrey Lane LJ in *Re F* [1977] Fam 58 at 107.

## B Publication

8.5 Publication has the same broad meaning in relation to s 12 as it has in the law of defamation. The embargo therefore extends to any communication to another person, whether by speech, written word, or, in theory, gesture or conduct<sup>1</sup>. It will include communication to 'a Member of Parliament, a Minister of the Crown, a Law Officer, the Director of Public Prosecutions, the Crown Prosecution Service, the police (except when exercising child protection functions), the General Medical Council, or any other public body or public official': *Re B (A Child) (Disclosure)*<sup>2</sup>.

The only exception is 'communication of information by someone to a professional, each acting in furtherance of the protection of children': *Re B (A Child) (Disclosure)*<sup>3</sup>. Following the decision in *Re B*, the Family Proceeding Rules and s 12(4) of the 1960 Act were expressly amended to give statutory effect to the decision, the latter now providing that publication will not be contempt of court where it is 'authorised by rules of court'. The communication of information to child protection professionals will thus be protected from s 12 both by common law (it is not 'publication' within the meaning of the statute) and by statute.

<sup>1</sup> For the law of defamation as regards publication, see, eg, *Gatley on Libel and Slander* (11th edition), para 6.6; and see 3.1 for the variety of ways in which material has been held to have been 'published'.

<sup>2</sup> [2004] EWHC 411 (Fam), [2004] 3 FCR 1, [2004] 2 FLR 142 per Munby J at [73].

<sup>3</sup> *Ibid*, at [72].

## C Information relating to proceedings

8.6 What s 12 prohibits in the specified instances is the publication of information about *the proceedings*. A description, however brief, of evidence given in any private proceedings covered by s 12 is therefore impermissible<sup>1</sup>.

The prohibition in s 12 extends beyond the publication of information relating to the actual hearing to include the evidence on the court file such as affidavits and pleadings, statements of witnesses, reports and account of interviews<sup>2</sup>,

position statements, skeleton arguments or other documents filed in the proceedings, transcripts or notes of the evidence or submissions, and transcripts or notes of any judgment<sup>3</sup>. The prohibition includes publication of extracts or quotations from any such documents<sup>4</sup>, or summaries<sup>5</sup>. The prohibition applies equally whether or not the information or the document being published has been anonymised<sup>6</sup>.

There is, however, a great deal of information in respect of private proceedings falling within s 12(1)(a)–(e) the publication of which is not prohibited by s 12. In particular, as Munby J has stated (in a wardship case), it does not prohibit publication of:

- (a) the fact, if it be the case, that a child is a ward of court and is the subject of wardship proceedings or that a child is the subject of residence or other proceedings under the Children Act 1989 or of proceedings relating wholly or mainly to his maintenance or upbringing<sup>7</sup>;
- (b) the name, address or photograph of such a child;
- (c) the name, address or photograph of the parties (or, if the child is a party, the other parties) to such proceedings;
- (d) the date, time or place of a past or future hearing of such proceedings;
- (e) the nature of the dispute in such proceedings;
- (f) anything which has been seen or heard by a person conducting himself lawfully in the public corridor or other public precincts outside the court in which the hearing in private is taking place;
- (g) the name, address or photograph of the witnesses who have given evidence in such proceedings;
- (h) the party on whose behalf such a witness has given evidence; and
- (i) the text or summary of the whole or part of any order.<sup>8</sup>

With regard to (a) and (b) there is a substantial body of case law in relation to wards of court<sup>8</sup> which establishes that unless the court has expressly ordered otherwise, the mere reference to the fact that the child is a ward of court is not caught by s 12. As Scarman LJ said in *Re F (Otherwise A) (a minor) (Publication of Information)*<sup>9</sup>:

‘...what is protected from publication is the proceedings of the court; in all other respects the ward enjoys no greater protection against unwelcome publicity than other children. If the information published relates to the ward, but not to the proceedings, there is no contempt.’

In *A v Ward*<sup>10</sup>, Munby J put the position thus:

- i) “Information relating to [the] proceedings” includes:
  - a) documents prepared for the purpose of the proceedings; and
  - b) information, even if not reduced to writing, which has emerged during the course of information gathering for the purpose of proceedings already on foot.
- ii) In contrast, “information relating to [the] proceedings” does not include:
  - a) documents (or the information contained in documents) not prepared for the purpose of the proceedings, even if the documents are lodged with the court or referred to in or annexed to a witness statement or report; or
  - b) information (even if contained in documents falling within paragraph (i)(a)) which does not fall within paragraph (i)(b);
 unless the document or information is published in such a way as to link it with the proceedings so that it can sensibly be said that what is published is “information relating to [the] proceedings”.

[...]

...one has to distinguish between, on the one hand, the mere publication of a fact (fact X) and, on the other hand, the publication of fact X in the context

of an account of the proceedings, or the publication of the fact (fact Y) that fact X was referred to in the proceedings or in documents filed in the proceedings. The publication of fact X may not be a breach of section 12; the publication of fact Y will be a breach of section 12 even if the publication of fact X alone is not.

With regard to (d) and (e) the leading case is *Pickering v Liverpool Daily Post and Echo Newspapers Plc*<sup>11</sup>, in which the House of Lords held that it was not contrary to s 12(1)(b) to publish the fact that a named patient had made an application to a Mental Health Tribunal for his discharge nor to publish information as to the date, time or place at which the proceedings had been or were to be heard. As Lord Bridge observed:

‘The essential privacy which is protected by each of the exemptions in paragraphs (a) to (d) of s 12(1) attaches to the substance of the matters which the court has closed its doors to consider, not to the fact that the court will sit, is sitting or has sat at a certain date, time or place behind closed doors to consider those matters.’<sup>12</sup>

However, with regard to (e), there is a fine line to be drawn between publishing information as to ‘the nature of the dispute’ (or as Munby J put it in *Kelly v British Broadcasting Corpn*<sup>13</sup>, ‘some discussion of the issues’), which is permissible, and publishing information which amounts to a summary of the evidence, which is not. In *X v Dempster*<sup>14</sup>, a statement that a mother had been ‘portrayed as a bad mother who is unfit to look after her children’ was found to be on the wrong side of the line and in contempt. In *Re B (A Child) (Disclosure)*<sup>15</sup>, Munby J’s provisional view was that statements summarising the evidence of an expert witness as to how a mother may have killed her son breached s 12, but ‘to identify the issues in a case as being whether the mother suffered from Munchausen’s Syndrome by Proxy and whether she had killed (or attempted to kill) her child(ren) by, for instance, smothering or poisoning, and to identify the various medical experts who have given evidence in relation to those issues, and to state which of the parties each expert has given evidence for or against’ would not have done so.

(g) follows naturally from (f): *X v Dempster*<sup>16</sup>.

With regard to (i), s 12(2) expressly provides that ‘publication of the text or a summary of the whole or part of an order made by the court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication’. Section 12(2) does not itself confer a power to prevent publication of the order, and the court must find such a power elsewhere.

Warning has also been given that the embargo extends to *speculation* as to the evidence being heard. In Lord Widgery CJ’s view:

‘It is just as damaging for information of that kind to leak out as it is to have the representatives of the press present and taking their notes at the time. It is even more serious if people can let themselves speculate as to what may or may not be going on in the courts during periods when they are in camera...There is in each of these articles a measure of speculation as to what was going on in closed court...and I wish to bring to the notice of the press that that is irregular and a potential contempt of court.’<sup>17</sup>

In *Re Times Newspapers Ltd*<sup>18</sup>, in the context of an order under s 11 of the

1981 Act, the Court of Appeal warned that publishing speculation as to matter the publication of which was prohibited would be considered as an attempt to flout the order and so a contempt of court.

- <sup>1</sup> *X v Dempster* [1999] 3 FCR 757, [1999] 1 FLR 894, 901–903; *Re B (A Child) (Disclosure)* [2004] 2 FLR 142 at [77]–[80].
- <sup>2</sup> *Re F (Otherwise A) (a minor) (Publication of Information)* [1977] Fam 58, [1976] 3 All ER 274, per Geoffrey Lane LJ at 105.
- <sup>3</sup> As summarised by Munby J in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 3 FCR 1, [2004] 2 FLR 142 at para [66].
- <sup>4</sup> *Official Solicitor v News Group Newspapers* [1994] 2 FCR 552, [1994] 2 FLR 174.
- <sup>5</sup> *X v Dempster* [1999] 1 FLR 894, 898.
- <sup>6</sup> By Munby J in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 3 FCR 1, [2004] 2 FLR 142 at [66].
- <sup>7</sup> Although note that depending on the circumstances, other provisions (such as s 97(2) of the Children Act 1989) may restrict the publication of such information: see para 9.48.
- <sup>8</sup> *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 3 FCR 1, [2004] 2 FLR 142 at [82] (a s 12(1)(a) case).
- <sup>8</sup> *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 3 FCR 1, [2004] 2 FLR 142 at [82] (a s 12(1)(a) case).
- <sup>9</sup> [1977] Fam 58, at 99, [1976] 3 All ER 274.
- <sup>10</sup> [2010] EWHC 16 (Fam) at [112], [114], [2010] 1 FLR 1497, [2010] Fam Law 353.
- <sup>11</sup> [1991] 2 AC 370, [1991] 1 All ER 622.
- <sup>12</sup> *Ibid* at 423 and 635.
- <sup>13</sup> [2001] Fam 59, [2001] 1 All ER 323.
- <sup>14</sup> [1999] 1 FLR 894.
- <sup>15</sup> [2004] EWHC 411 (Fam), [2004] 3 FCR 1, [2004] 2 FLR 142.
- <sup>16</sup> [1999] 1 FLR 894, at 901.
- <sup>17</sup> Expressed during the trial of Nicholas Prager (1971) Times, 17 June, (1971) 121 NLJ 548. See also the view of the Court of Appeal in *R v Times Newspapers Ltd and Others* [2008] 1 WLR 234, at [31]–[33].
- <sup>18</sup> [2007] EWCA Crim 1925, [2008] 1 All ER 343 at 353, CA, [2008] 1 WLR 234.

#### D Summary as regards s 12(1)(a)–(d)

8.7 The position with regard to the instances contained in s 12(1)(a)–(d) can be summarised as follows: (1) the court does not have to sit in private, and (2) if it does, the judge still has a discretion to allow publication of information, but (3) in absence of express authorisation, publication of information relating to such proceedings in private is a *prima facie* contempt, unless (4) the publisher can show that he has a defence.

#### E Express prohibitions under s 12(1)(e)

8.8 Unlike the cases referred to in s 12(1)(a)–(d), in the instances governed by s 12(1)(e), prohibition against publication of information is dependent upon an express court order to that effect. It is clear that such an order must be express rather than implicit in any other order, such as an order for a hearing to be in private under CPR r 39.2<sup>1</sup>. The court sitting in private is required specifically to direct itself to whether, and if so, to what extent, the publication of information relating to the proceedings should be prohibited<sup>2</sup>. The problem, however, is to determine in what circumstances such an order may be made, it being clear from the words ‘having power to do so’ that s 12(1)(e) does not itself confer the power.

As Viscount Kilmuir explained during the Parliamentary debate on the

provision<sup>3</sup>, the residual power to prohibit publication derives from three sources, namely statute, as for example under the Defence Contracts Act 1958, s 4(3); rules of procedure such as those under the Mental Health Act 1983, s 78(2)(e)<sup>4</sup>, or finally from a court’s own inherent powers as, for example, where publicity would defeat the object of the proceedings.

Although Viscount Kilmuir’s explanation is helpful, his Lordship was perhaps unduly sanguine when he said that the provision was ‘perfectly clear’. In particular, there was some dispute as to whether orders prohibiting publication could be made under the common law<sup>5</sup> although this inquiry is now largely academic since the enactment of the Contempt of Court Act 1981 (as by taking the decision to sit in private the court will have allowed ‘a name or other matter to be withheld from the public in proceedings before the court’ and as such can prohibit publication under s 11).

- <sup>1</sup> *AF Noonan (Architectural Practice) v Bournemouth and Boscombe Athletic Community Football Club Ltd* [2007] EWCA Civ 848, [2007] 1 WLR 2614, (2007) Times, 12 July.
- <sup>2</sup> *AF Noonan (Architectural Practice) v Bournemouth and Boscombe Athletic Community Football Club Ltd* [2006] EWHC 2113 (Ch), per Richards J at [28]; decision affirmed on appeal [2007] 1 WLR 2614.
- <sup>3</sup> HL Debs Vol 222 col 253.
- <sup>4</sup> Under the Mental Health Review Tribunal Rules 1983.
- <sup>5</sup> See the judgments of Viscount Dilhorne and Lord Scarman in *A-G v Leveller Magazine Ltd* [1979] AC 440 at 456 and 473 respectively.

#### F The effect of publication in breach of s 12

8.9 It is clear that a publication made in breach of s 12 amounts to contempt of court but the section fails to clarify whether it is a civil or criminal contempt. It is sometimes said<sup>1</sup> that such contempts are properly thought of as civil contempts, reliance being placed on *Scott v Scott*<sup>2</sup>. It is submitted, however, that if it is right that the publication is a contempt because it frustrates a court ruling designed to protect the administration of justice<sup>3</sup>, rather than being a breach of court order, then the contempt is properly regarded as *criminal*. The jurisdiction is sometimes referred to as ‘quasi-criminal’<sup>4</sup>.

- <sup>1</sup> See the first edition of this work at p 121 and Miller, (2nd edition) at p 347, n 24.
- <sup>2</sup> [1913] AC 417.
- <sup>3</sup> Following *A-G v Leveller Magazine Ltd* [1979] AC 440, [1979] 1 All ER 745 discussed on this point at para 1.2.
- <sup>4</sup> See eg *AF Noonan (Architectural Practice) v Bournemouth and Boscombe Athletic Community Football Club Ltd* [2007] 1 WLR 2614 per Sir Igor Judge at [16], [2009] All ER (D) 101 (Jan); *Bedeau v London Borough of Newham* [2009] EWHC 293 (QB) per Holroyde J at [23].

## IV RESTRICTIONS ON REPORTING PUBLIC HEARINGS

8.10 When information has been read to or by a court or referred to at a public hearing, its publication elsewhere will not generally be restrained<sup>1</sup>. The courts have no inherent power to restrict the reporting of what is said in open court, and any power to do so must be found in statute<sup>2</sup>. Further, any restriction on the right to ‘impart information and ideas’ gained by attendance at a public hearing will *prima facie* require justification under Article 10(2) of the European Convention on Human Rights.

generally speaking, be treated as orders in criminal cases, and leave to appeal against them should only be granted on the well-known principles on which leave to appeal in criminal cases is given.'

<sup>1</sup> Judicial Committee (Appellate Jurisdiction) Rules 2009, r 9(6).

<sup>2</sup> [1936] AC 322, [1936] 1 All ER 704, PC.

<sup>3</sup> The Privy Council's competence in such matters was regarded as beyond argument in *Maharaj v A-G for Trinidad and Tobago* [1977] 1 All ER 411 at 412.

<sup>4</sup> [1936] AC 322 at 329.

## V PARDONS

13.73 The prerogative of the Crown to pardon or remit sentences extends to criminal contempts<sup>1</sup>, and it is therefore still open to a person found guilty of such an offence to apply for a pardon or remission. The Crown's power to pardon does not in practice extend to cases of civil contempt, for 'though the Crown could interfere, it would be unconstitutional to do so'<sup>2</sup>.

Although the Crown enjoys the exclusive right of granting pardons, in England a pardon is usually granted on the advice of the Home Secretary<sup>3</sup> and accordingly an application should be made to that office<sup>4</sup>. In the Commonwealth, where applicable, the power to pardon is usually delegated to colonial governors and to governors-general<sup>5</sup>.

In practice, however, applications for pardon have never been very common<sup>6</sup>, even though until 1960 there was no right of appeal in cases of criminal contempt. Such applications are now even less likely to be made: in the first place there is a right of appeal in cases of a criminal contempt<sup>7</sup> and secondly, the Court of Appeal and High Court now have a general power to discharge a prisoner at any time upon the prisoner's application.

<sup>1</sup> *Re Special Reference from Bahama Islands* [1893] AC 138, PC; *Seaward v Paterson* [1897] 1 Ch 545 at 559, CA; *Phipps v Earl of Anglesea* (1721) 1 P Wms 696 which held the Crown's prerogative to pardon extended to contriving the marriage of a ward of court without authority.

<sup>2</sup> *Re Special Reference from Bahama Islands* [1893] AC 138 at 145, per Lord Hannen.

<sup>3</sup> See 8(2) Halsbury's Laws of England para 825.

<sup>4</sup> See eg *A-G v James* [1962] 2 QB 637 at 640 per Lord Parker CJ, [1962] 1 All ER 255, DC; *Sutherland v Sutherland* (1893) Times, 6 May.

<sup>5</sup> 8(2) Halsbury's Laws of England para 823. See also *Re Special Reference from Bahama Islands* [1893] AC 138.

<sup>6</sup> It was recommended to be exercised in *Rainy v Sierra Leone Justices* (1853) 8 Moo PCC 47 and *Re Ramsay* (1870) LR 3 PC 427 both cases involving contempt of colonial courts.

<sup>7</sup> Administration of Justice Act 1960, s 13.

# RESPONSIBILITY FOR CONTEMPT BY PUBLICATION

## I INTRODUCTION

14.1 It was not until the eighteenth century that the notion of contempt by publication was accepted and then firmly established by the courts. In what became the leading case of that era, *The St James's Evening Post*<sup>1</sup>, Lord Hardwicke observed that, 'Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there any thing of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard'<sup>2</sup>. As we have seen in earlier chapters, it was not until the Contempt of Court Act 1981 ('the CCA 1981') came into force that the law was clarified and the earlier rule of strict liability was, to a degree, tempered.

By way of a reminder, s 1 of the CCA 1981 provides that 'In this Act 'the strict liability rule' means the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so'. Section 2 limits the scope of this rule by providing, inter alia, that it applies only to 'a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced' and it also only applies 'if the proceedings in question are active'.

Contempt is not restricted to any particular medium of publication. For the purposes of the strict liability rule, 'publication' includes any speech, writing, broadcast, or indeed any other communication that is addressed to the public at large or to any section of the public. This is clearly very broad, and includes, for example, photographs: *HM Advocate v Caledonian Newspapers Ltd*<sup>3</sup>.

As a general rule, those responsible for a publication can be held to be liable for contempt of court. Therefore, the first question to be addressed must be who, if multiple individuals and/or companies are involved in publishing material which is in contempt of court, bears responsibility? The rapid development of new technologies and the commercial realities of the 'digital age' render this an ever-evolving area of the law. The liability of 'intermediaries' such as internet service providers and blogging sites, for example, is an area of much controversy. ECHR jurisprudence, too, has had a significant

influence on this, with the House of Lords in *A-G v Punch*<sup>4</sup> recognising that 'restraints on the freedom of expression are acceptable only to the extent they are necessary and justified by compelling reasons'.

In the light of this, it is necessary to examine not only who could possibly be said to be responsible for various types of publication, but also who can avail themselves of the statutory defences set out in sections 3 to 5 of the CCA 1981.

<sup>1</sup> (1742) 2 Atk 469, 26 ER 642.

<sup>2</sup> *St James's Evening Post* (1742) 2 Atk 469 at 469, 26 ER 683.

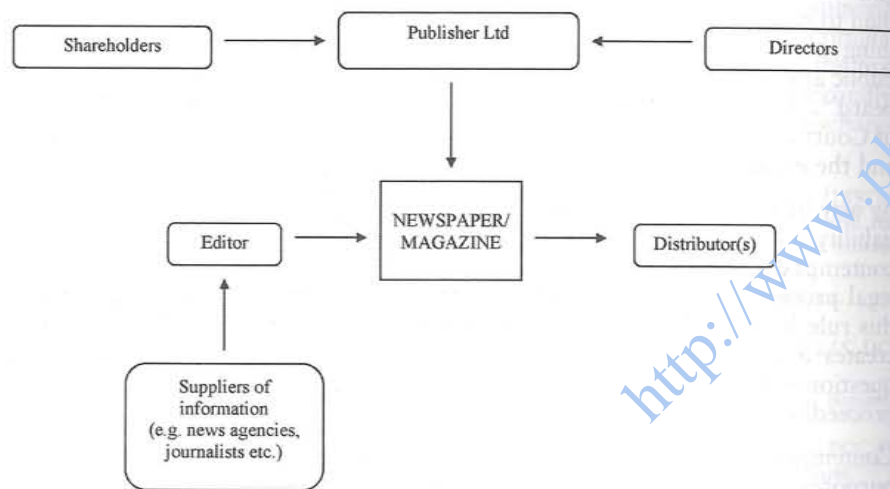
<sup>3</sup> 1995 SLT 926, HC. See also *Scottish Daily Record and Sunday Mail Ltd v Thomson* [2009] SLT 363 in relation to photographs of celebrities.

<sup>4</sup> [2002] UKHL 50, [2003] 1 AC 1046, [2003] 1 All ER 289.

## II TYPES OF PUBLICATION

### A Newspaper / magazine

14.2 The following diagram illustrates in simple terms those who could be said to bear responsibility for a newspaper, magazine or similar print publication and therefore who could in principle be liable for contempt:



#### 1 The editor

14.3 Any person held responsible for publication may be held guilty of contempt, although he has no personal knowledge of the contents of the article in question. As Lord Goddard CJ noted in *R v Odhams Press Ltd, ex p A-G*<sup>1</sup>: 'It has always been a tradition of English journalism that the editor takes responsibility for what is published in his paper, and this was held to be a rule of law in *R v Evening Standard Co Ltd, ex p A-G*<sup>2</sup>. The courts have, at times, been somewhat ruthless in applying this rule.

In *Re O'Connor, Chesshire v Strauss*<sup>3</sup>, the editor of the Sun was held liable for contempt of court even though he was not personally guilty of 'any very serious misbehaviour'. He had been shown a very short version of a proposed article, but did not have time to read it thoroughly. Despite warning his sub-editor to be 'very careful', the complete article was published without the editor's personal knowledge and was found to amount to contempt. The editor was nonetheless held liable for the article that was subsequently published.

In *R v Evening Standard Co Ltd*<sup>4</sup>, the editor of the Evening Standard was held liable for contempt having published a misreport of a case based on inaccurate information supplied by a reporter, despite the fact that the court accepted that the editor had every reason to believe (and in fact genuinely believed) that the information was accurate.

In *R v Thomson Newspapers, ex p A-G*<sup>5</sup>, the editor of the Times was held responsible for a publication even though '[i]t cannot be said that he acted recklessly or turned a blind eye' and 'in the opinion of the court he had devised, so far as is humanly possible, a system which would prevent this sort of thing'.

Although these decisions may seem harsh, particularly given the courts' acknowledgment of the difficult position of the editor and the undoubted difficulties involved in producing a newspaper, the courts have continued to adhere to the strict doctrine of holding the editor guilty. The rationale for this was expressed by Lord Hewart CJ in *R v Evening Standard, ex p DPP*<sup>6</sup>, as follows:

'nobody who knew anything of the organisation and management of a newspaper could be ignorant of the fact that the work of newspapers was very often done in circumstances of great hurry by many different minds not always fully aware of what others might be doing. The result was a composite thing, but there must be central responsibility. It was impossible to say that men occupying responsible positions should be excused because they themselves were not personally aware of what was being done.'

The principle of editorial responsibility has also been accepted in Scotland<sup>7</sup>, Australia<sup>8</sup>, and Canada<sup>9</sup>. In New Zealand, however, the Court of Appeal preferred to leave the question open<sup>10</sup>.

It should, however, be noted that although the editor will always be held responsible (when he is made a party) for the contents of his newspaper or magazine, he may not always be punished for it. Indeed, provided that he has taken all reasonable precautions and has not been negligent, a number of decisions suggest that an editor would be unlikely to be punished. Most newspapers have lawyers on hand to give advice – morning newspapers are usually 'night-lawyered' – and mistakes when they happen will not be visited upon the editor, especially if an apology is tendered. For example, in *R v Thomson Newspapers, ex p A-G*<sup>11</sup>, Lord Parker CJ observed:

'So far as Mr Harold Evans is concerned, he, of course, as editor takes full responsibility; on the other hand, when one is considering the question of penalty one must consider his personal culpability. It is quite clear that he knew nothing about this. It is also quite clear that an editor in his position could not possibly be expected to know everything that was happening. It cannot be said that he acted recklessly or turned a blind eye. Indeed, in the opinion of the court he had devised, so far as it is humanly possible, a system which would prevent this sort of thing.

In those circumstances, this court has come to the conclusion that it is quite unnecessary to impose a sentence of imprisonment or in the circumstances of this case any penalty whatever on him.<sup>7</sup>

Instead, a fine of £5,000 was imposed on Times Newspapers Ltd. Similarly, in *R v Evening Standard Co Ltd and Solicitor-General v Henry and News Group Newspapers Ltd*<sup>12</sup> fines of £1,000 and £15,000 respectively were imposed on the newspaper proprietors but the editors were not personally penalised.

In England and Wales the Attorney General sometimes does not bring an action against the editor at all but only against the proprietors of a given publication, although the practice on this appears inconsistent. For instance, the editor was not made a defendant in the leading common law case on disclosing the secrets of the jury room, *A-G v New Statesman and Nation Publishing Co Ltd*<sup>13</sup>, but was in the prosecution under section 8 of the CCA 1981 in *A-G v Associated Newspapers Ltd*<sup>14</sup>.

In Australia, on the other hand, the trend is to bring the action against the editor (and others involved in the publication including sub-editors) as well as the proprietor: see for example *DPP v John Fairfax and Sons Ltd*<sup>15</sup>, in which the action was brought against both the editor and sports editor (as well as against the publisher and the journalist who had written the story). Neither the editor nor the sports editor was ultimately punished, as they had relied upon in-house legal advice.

On occasion it is clear that the editor plays the central role in the decision to publish, for example in *A-G v Times Newspapers Ltd*<sup>16</sup>, which concerned the reporting of the thalidomide scandal, and in *A-G v Newspaper Publishing Plc and A-G v Times Newspapers Ltd*<sup>17</sup>, which concerned the publication of Peter Wright's memoirs in the 'Spycatcher' affair.

It is clear that the editor who intends to interfere with the course of justice, who recklessly ignores the possible consequences of publication, or who completely disregards the interests of the due administration of justice, may be punished severely: *R v Thomson Newspapers, ex p A-G*<sup>18</sup>. In this case, Lord Parker CJ observed: 'the seriousness of a contempt of court can be looked at from two angles: first, the seriousness of the contempt judged by the likely prejudice to the fair trial of an accused and, secondly, the seriousness of the contempt from the point of view of what I may call the culpability of those concerned'.

In *R v Bolam, ex p Haigh*<sup>19</sup>, the Daily Mirror, while a murder trial was pending, published a front-page article describing the accused as a 'vampire' and asserting not only that he was guilty of the murder with which he had been charged, but also that he had murdered five other named persons. The court held that the article had been published for the purpose of increasing the circulation of the newspaper, at the expense of paying regard to the due administration of justice, and for this aggravated contempt the editor was imprisoned for three months. The court found that '[w]hat had been done was not the result of an error of judgment but had been done as a matter of policy in pandering to sensationalism for the purpose of increasing the circulation of the newspaper'. It meted out punishment accordingly.

In *A-G v Hislop*<sup>20</sup>, the Attorney General sought the committal of Ian Hislop because of the degree of personal responsibility he bore for an offending

article in Private Eye. The Court of Appeal, however, decided that a fine of £10,000 would be more appropriate<sup>21</sup>. Mr Hislop took all responsibility for the article, saying in evidence 'I took advice, as I always do, and then come to my own decisions'. He declined, however, to say what the legal advice he was given was. In 1994 Kelvin MacKenzie, then editor of the Sun, was fined £20,000 for publishing the photograph of a suspect due to take part in an identity parade<sup>22</sup>. Mr MacKenzie was more fortunate in the earlier case of *A-G v News Group Newspapers Ltd*<sup>23</sup>. In that case, surprisingly, the Attorney General chose to bring the action against the proprietors and publishers alone, and not the editor, and the proprietors and publishers were found liable for contempt on the basis of the intentions of their editor.

The role of the editor has become more crucial in England and Wales since the Contempt of Court Act 1981 and the establishment of the strict liability rule by virtue of the fact that prosecutions outside the strict liability rule can still be brought at common law if there is an intention to impede or prejudice proceedings.

<sup>1</sup> [1956] 3 All ER 494 at 499, [1957] 1 QB 73 at 80.

<sup>2</sup> (1976) Times, 3 November, DC.

<sup>3</sup> (1896) 12 TLR 291.

<sup>4</sup> [1954] 1 QB 578, [1954] 1 All ER 1026.

<sup>5</sup> [1968] 1 All ER 268, [1968] 1 WLR 1.

<sup>6</sup> (1924) 40 TLR 833 at 836.

<sup>7</sup> *HM Advocate v George Outram and Co Ltd* (1980) SLT (Notes) 13.

<sup>8</sup> *R v David Syme and Co Ltd* [1982] VR 173 at 183 per Marks J relying on inter alia *A-G v New South Wales v Willesee* [1980] 2 NSWLR 143 and *Brambles Holdings Ltd v Trade Practices Commission* (1980) 32 ALR 328 at 341 (though both these cases were on different points): *R v Day and Thompson* [1985] VR 261; *R v Australian Broadcasting Corporation* [1983] Tas R 161; *Fitzgibbon v Barker* (1992) 111 FLR 191.

<sup>9</sup> *R v Western Printing and Publishing Ltd* (1954) 111 CCC 122 and *Steiner v Toronto Star Ltd* [1956] 1 DLR (2d) 297.

<sup>10</sup> *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 at 241. In fact the case was concerned with the responsibility for a broadcast. Cf *Macassey v Bell* (1875) 2 NZ Jur 59 and *R v McKinnon* (1911) 30 NZLR 884.

<sup>11</sup> [1968] 1 All ER 268, at 271, [1968] 1 WLR 1 Cf in Scotland, *HM Advocate v George Outram and Co Ltd* 1980 SLT (Notes) 13 – editor held liable and fined £750 though he was not on the spot when the critical decisions had to be made and when he went off duty he understood that legal advice would be sought and that it would be worth seeking. See also *R v Beaverbrook Newspapers Ltd, Associated newspaper Ltd* [1962] NI 15.

<sup>12</sup> 1990 COD 307.

<sup>13</sup> [1981] QB 1, [1980] 1 All ER 644. In *A-G v Seckerson* [2009] EMLR 20, too, the publisher of the newspaper was made a defendant, but not the editor.

<sup>14</sup> [1994] 2 AC 238, [1994] 1 All ER 556.

<sup>15</sup> (1987) 8 NSWLR 732 (NSW CA).

<sup>16</sup> [1974] AC 273, [1973] 3 All ER 54, HL.

<sup>17</sup> [1988] Ch 333 and [1992] 1 AC 191 respectively.

<sup>18</sup> [1968] 1 All ER 268, [1968] 1 WLR 1.

<sup>19</sup> (1949) 93 Sol Jo 220.

<sup>20</sup> [1991] 1 QB 514, [1991] 1 All ER 911.

<sup>21</sup> Despite McCowan LJ's remarking that he was not filled with great confidence that Mr Hislop's promises as to his future conduct would be kept.

<sup>22</sup> (1994) Independent, 6 July.

<sup>23</sup> [1989] QB 110, [1988] 2 All ER 906.

## (a) THE LEGAL BASIS FOR THE EDITOR'S RESPONSIBILITY — VICARIOUS RESPONSIBILITY V PRIMARY RESPONSIBILITY

14.4 There is some debate over whether the editor of a publication is primarily or vicariously liable for a publication that constitutes contempt of court. In *R v Evening Standard*<sup>1</sup>, Lord Goddard CJ held that an editor was vicariously liable for the mistake of a reporter. Lord Goddard CJ said:

'Sir Hartley Shawcross said that, while his clients desired to abide by the well understood rule of journalism that the editor and proprietors of papers must in a case such as this take responsibility, he would suggest to the court that vicarious liability, as it is called, ought not in law to be visited upon them and that they ought not to be made vicariously liable for the mistake or misconduct of the reporter. I do not think we can possibly agree with that submission...the principle of vicarious liability is well established in those cases and must be adhered to.'<sup>2</sup>

This was relied upon by the Ontario High Court in *Steiner v Toronto Star Ltd*<sup>3</sup> which found an editor liable for contempt on the basis of vicarious liability.

However, doubts have been expressed as to the application of this principle in this context, for example by the New Zealand Court of Appeal in *Solicitor-General v Radio Avon Ltd*<sup>4</sup>. Essentially, three main objections have been raised to the application of the principle of vicarious liability to an editor's responsibility:

- (1) As it operates in the law of tort vicarious liability applies only in situations where there is a relationship of master and servant; in the case of an editor, the relationship is essentially that of superior servant and inferior servant, not master and servant.
- (2) Contempt by publication is a common law crime, and the principle of vicarious liability is not generally applicable in respect of common law crimes. In *R v Huggins*<sup>5</sup> Raymond CJ said: 'in criminal cases the principal is not answerable for the act of the deputy as he is in civil cases: they must each answer for their own acts, and stand or fall by their own behaviour...to affect the superior by the act of his deputy, there must be the command of the superior...'  
The application of vicarious liability in respect of a common law crime is not, however, entirely unprecedented as it has been said to apply both to a common law public nuisance<sup>6</sup> and to a criminal libel<sup>7</sup>. This is discussed in more detail in relation to proprietors and corporate liability below.
- (3) It has been argued that Lord Goddard CJ was wrong to say that the editor was vicariously liable for the acts of the reporter, as the reporter cannot be said to have committed a contempt at all, because the essence of the offence is the publication of the material and publication is the act of the proprietors and the editor, not of the reporter who merely supplied the information to the newspaper. Lord Goddard CJ's statement in *R v Griffiths ex p A-G*<sup>8</sup> was that the offence 'is not the mere preparation of the article, but the publication of it during the proceedings'. On the other hand, one could argue that this is too narrow a view, to regard the reporter as bearing no responsibility at all for the final publication. The generally accepted view therefore is that this objection cannot be supported and that a reporter who supplies information, knowing that it is likely to be published, can be said to be guilty of contempt if it is in fact published.

Many consider a sounder basis for the editor's liability is that he is primarily

liable for the publication. It has long been suggested that the editor of a publication *can* properly be regarded as having 'published' it since he or she is the person who ultimately decides what should be published, in other words the person who exercises 'central responsibility' as per Lord Hewart CJ<sup>9</sup>. As regards the necessary mens rea there is little difficulty in finding that the editor intends to publish his or her publication. The editor may be regarded as having himself or herself committed the contempt, such liability being personal or 'original' rather than vicarious. Note that statutes such as the Judicial Proceedings (Regulation of Reports) Act 1926, the Magistrates' Courts Act 1980, and the Youth Justice and Criminal Evidence Act 1999 all expressly state that an editor can be held responsible for a publication that contravenes the relevant provisions of those statutes<sup>10</sup>.

The issue of classifying an editor's liability is not necessarily a purely academic exercise. It could be important in relation to, for example, section 3(1) of the CCA 1981, which gives the publisher a defence if, having taken all reasonable care, he did not know and had no reason to suspect that proceedings were active. As far as the editor is concerned, if he is vicariously liable for the act of a reporter, it could be argued that it would be a sufficient defence for him if the reporter had taken all reasonable care. In practice, however, it is more likely that the editor would be held personally liable, in which case he would have to show that he himself had taken all reasonable care. Thus one commentator has suggested:

'where an editor has relied entirely upon the investigations of a reporter the relevant question should not simply be that of whether the reporter has exercised reasonable care. It should rather be whether the editor's reliance upon the reporter was reasonable in all the circumstances of the case, having regard to, inter alia, the latter's experience and competence, the adequacy of the editor's communications with him and the reasonableness of the conclusions drawn from such circumstances.'<sup>11</sup>

In conclusion, while it may be argued that the doctrine of editorial responsibility is too strict to be applied in the context of a criminal offence such as contempt of court, it is clear that an editor who is not morally culpable is more likely to be treated leniently by the courts. Indeed, despite editorial responsibility being a specific question raised in a questionnaire circulated by the Phillimore Committee<sup>12</sup>, there was no pressure to reform the law. There is of course no guarantee of exoneration, however.

<sup>1</sup> [1954] 1 QB 578, [1954] 1 All ER 1026.

<sup>2</sup> Ibid at 585.

<sup>3</sup> (1956) 1 DLR (2d) 297. See also *Re A-G for Manitoba and Radio OB Ltd* (1977) 70 DLR (3d) 311 at 324 per Solomon J.

<sup>4</sup> [1978] 1 NZLR 225.

<sup>5</sup> (1730) 2 Stra 882 at 885.

<sup>6</sup> *R v Stephens* (1866) LR 1 QB 702.

<sup>7</sup> *R v Gutch* (1829) Mood and M 433, 173 ER 1214; *R v Walter* (1799) 3 Esp 21, 170 ER 524. For a discussion of the common law exceptions, see generally Glanville Williams, *Criminal Law - The General Part* (2nd edition, 1961) p 267 ff. In *R (Michael Craik, Chief Constable of Northumbria Police) v Newcastle Upon Tyne Magistrates' Court* [2010] EWHC 935 (Admin) the court noted that 'it has been settled law that there is, in general, no doctrine of criminal vicarious liability at common law. This is subject to only two (or possibly three) anomalous exceptions - public nuisance, criminal libel and (possibly) a particular form of contempt of court...'

<sup>8</sup> [1957] 2QB 192 at 202.

<sup>9</sup> *R v Evening Standard* (1924) 40 TLR 833.

<sup>10</sup> Section 1(2) Judicial Proceedings (Regulation of Reports) Act 1926, section 8A(11) Magistrates' Courts Act 1980, and section 4(5) Sexual Offences (Amendment) Act 1976.

<sup>11</sup> Miller [1968] Crim Law Rev 63, at 198.

<sup>12</sup> 1974, Cmnd 5794.

## 2 The proprietors

14.5 Most newspaper and magazine proprietors are limited companies, though clearly it is possible that ownership may be vested in an individual or a partnership. Subject to the defences in the CCA 1981, to be discussed below, proprietors are clearly responsible for the contents of their publications. We have seen that an absence of moral culpability may relieve the editor from punishment, but the proprietors can expect no such leniency. As mentioned above, for example, in *R v Thomson Newspapers, ex p A-G*<sup>1</sup>, where the editor was held to know nothing of the relevant circumstances and was therefore not punished, a fine of £5,000 was nonetheless imposed on Times Newspapers Ltd. The court stated 'that this newspaper, with a clean record of some 150 years had devised, and the editor...had ensured was operated, an elaborate and reasonable system to avoid contempts of this sort, or indeed any contempt of court. They were fully alive to their obligations as a responsible newspaper and devised this system'.

The potential fine may be reduced, however, if the proprietors have taken care to set up a system to guard against committing contempt. In *A-G v News Group Newspapers Ltd*<sup>2</sup>, a nominal fine of £500 was imposed on the News of the World as it was the newspaper's first such offence in 40 years, despite its publishing information on areas of life that naturally rendered it more at risk.

<sup>1</sup> [1968] 1 All ER 268, [1968] 1 WLR 1.

<sup>2</sup> [1982] 4 Cr App R (s) 182.

### (a) LEGAL BASIS FOR RESPONSIBILITY

14.6 Generally speaking, it will only be in very rare cases that the proprietor interferes in the running of a newspaper sufficiently for it to be *in fact* responsible for the contempt. Where such interference does occur it is likely to come through the agency of the directors or executives – who in such cases can be held personally liable. Such a situation occurred in *Re Lonrho Plc*<sup>1</sup>, where the chief executive and three directors of the company that owned the Observer were made parties to the action.

In most cases the proprietor will be held responsible for the contempt simply on the basis of the ownership of the newspaper or magazine in question. However, as in the case of editors, the precise legal basis of proprietors' responsibility remains unsettled.

<sup>1</sup> [1990] 2 AC 154, [1989] 2 All ER 1100.

### (b) VICARIOUS LIABILITY

14.7 In *R v Evening Standard*<sup>1</sup>, Lord Goddard CJ held that the proprietors of the Evening Standard were vicariously liable for an inaccurate report given

unintentionally by their reporter and fined them £1,000, but the question remains as to whether the principle of vicarious liability can correctly be said to apply to contempt of court. There appear to be stronger grounds for applying the principle with respect to proprietors since their relationship with the editor and reporters is one of master and servant. However, the objection that vicarious liability is inapplicable in respect of common law crimes is still a valid one. Analogies have been drawn between contempt and criminal libel, where vicarious liability is said to operate but it is at least arguable that vicarious liability should not apply to criminal libel either; as Glanville Williams has argued, the authorities for this are 'doubtful...for not only did they introduce an almost unprecedented principle of liability into the criminal law, but they were contrary to other judicial pronouncements'<sup>2</sup>. In any event, contempt is not necessarily analogous to criminal libel. It has no counterpart in tort, whereas criminal libel – and public nuisance, the other common law offence where vicarious liability may operate – does.

It could be argued that proprietors are liable for contempt on one of the other bases developed by the courts to deal with the problem of how far companies can be held criminally responsible. For example, liability of a corporate entity is well established in respect of strict liability offences where a statute imposes a duty on the entity itself as occupier of premises or operator of an industrial process<sup>3</sup>. The criminal law has long recognised vicarious liability in the 'delegation' situation, ie where a statutory duty is cast upon the owner, licensee or keeper of premises, who will then be liable for the acts of a person to whom he or she delegates the management of the premises. Further, the criminal law also recognises vicarious liability where the courts read the words of a statute such as 'sell' or 'supply' as applying to the employer where it is the employee who has actually performed the relevant act<sup>4</sup>. Such interpretations are deemed necessary if the purpose of certain statutes is not to be defeated.

Matters become more difficult, however, in the case of criminal offences requiring mens rea. Since a company cannot have a 'guilty mind' in the normal sense, the courts have developed the idea that the minds of certain senior company officers can be deemed to be that of the company itself. Thus in *HL Bolton (Engineering) Co Ltd v TJ Graham and Sons Ltd*<sup>5</sup>, Denning LJ commented: 'directors and managers...represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such'<sup>6</sup>.

As shown by the leading case of *Tesco Supermarkets Ltd v Natrass*<sup>7</sup>, the key point is to demonstrate that the person in question represents the 'brain' of the company and not merely a 'hand'. Once this is demonstrated, the person's acts are treated as if they were those of the company. The principle has limitations<sup>8</sup>, however, and the courts have slowly developed notions of corporate liability that do not depend upon the idea of a 'directing mind'<sup>9</sup>.

Such an 'alter ego' or 'identification' principle might be thought to be applicable to contempt of court. The principle has been held to be applicable to the common law crime of conspiracy where there was no problem of imputing the mens rea of the managing director of a two-director family firm to the company<sup>10</sup>. In a similar manner, it could be argued that the editor of a newspaper should be regarded as its 'brain' on a day-to-day basis, in being a superior officer who controls what is published – such power having been delegated by the proprietors. By regarding the editor as the 'alter ego' of the

company, it could be argued that the company should be held primarily liable for the publication.

Indeed, in cases on intentional contempt since the CCA 1981, proprietors have been held to have committed contempt on the basis of the mens rea of their editors: for example, *A-G v Hislop*<sup>11</sup>, *A-G v News Group Newspapers Ltd*<sup>12</sup>, and the 'Spycatcher' litigation<sup>13</sup>. In the latter of these, the Court of Appeal did not suggest that there was any difficulty in holding the proprietors liable for intentional contempt.

- <sup>1</sup> [1954] 1 QB 578, [1954] 1 All ER 1026. See also the Phillimore Committee's comments, at para 153, that proprietors' contempt liability is an example of ordinary vicarious liability.
- <sup>2</sup> Criminal Law – The General Part (2nd edition, 1961), p 68.
- <sup>3</sup> See for example *R v Birmingham and Gloucester Rly Co Ltd* (1842) 3 QB 223 and *Alphacell Ltd v Woodward* [1972] AC 824, [1972] 2 All ER 475, HL.
- <sup>4</sup> See *Coppen v Moore (No 2)* [1898] 2 QB 300.
- <sup>5</sup> [1957] 1 QB 159, [1956] 3 All ER 624, CA.
- <sup>6</sup> [1957] 1 QB 159 at 172.
- <sup>7</sup> [1972] AC 153, [1971] 2 All ER 127.
- <sup>8</sup> For example, see *P and O European Ferries (Dover) Ltd* (1990) 93 Cr App R 72, [1991] Crim LR 695.
- <sup>9</sup> See *Seaboard Offshore Ltd v Secretary of State for Transport, The Safe Carrier* [1994] 2 All ER 99, [1994] 1 WLR 541, HL.
- <sup>10</sup> *R v ICR Haulage Co Ltd* [1944] KB 551, [1944] 1 All ER 691.
- <sup>11</sup> [1991] 1 QB 514, [1991] 1 All ER 911.
- <sup>12</sup> [1982] 4 Cr App R (s) 182.
- <sup>13</sup> *A-G v Newspaper Publishing plc* [1988] Ch 333, [1987] 3 All ER 276 and *A-G v Times Newspapers Ltd* [1992] 1 AC 191, [1991] 2 All ER 398, HL.

### (c) PRIMARY LIABILITY

14.8 While the 'alter ego' principle outlined above would provide a clear basis for imputing a mental state to the proprietor of a publication, it is not entirely satisfactory. It clearly cannot apply to a proprietor who is a natural person rather than an incorporated body. It could be argued that a different ground should be used to found the liability of the proprietor: namely, primary liability. In this way it would be possible to regard proprietors as themselves having committed the offence and, therefore, as being originally liable.

The reasoning of Lord Tenterden CJ in *R v Gutch, Fisher and Alexander*<sup>1</sup> can be used to support this idea, namely that a person who furnishes the means to carry on the concern and who entrusts the publication to a person he or she selects, can himself or herself be said to have caused to be published what actually appears. The proprietor of a newspaper can be regarded as having published the newspaper since he or she has set up and ultimately run the business that produced it. It can hardly be argued that proprietors have no intention to publish as this is the purpose of their enterprise. Furthermore, as in the case of editors, there are numerous statutory provisions that expressly provide that proprietors may be held responsible for a publication that contravenes the relevant provisions of those statutes<sup>2</sup>.

Above all, it seems right to impose liability upon newspaper proprietors since they provide the means whereby publication is effected. The law of contempt as a deterrent instrument would be weakened if the proprietors did not have a strong incentive not only to choose a responsible editor but to take

appropriate action should the editor or another member of staff begin to make or allow comment that might fall foul of the CCA 1981. Subject to the reservation as to the proper legal basis of proprietors' liability (namely that it should be primary responsibility) the general view seems to be that the current law is satisfactory. This was the view taken by the Family Court of Australia in *Fitzgibbon v Barker*<sup>3</sup>.

As above in the context of the discussion on editors, the nature of proprietors' liability is an important one. If proprietors are primarily liable and hope to rely on the section 3(1) CCA 1981 defence, they would have to show not only that the editor had taken all reasonable care, but also that they (the proprietor) had taken reasonable care in appointing and retaining the services of the editor.

If the proprietor is a body corporate and the editor is deemed to be the alter ego thereof, it could be argued that it merely has to show that the editor had taken all reasonable care but it remains to be seen whether this would succeed.

Complications also arise in relation to publications outside the strict liability rule. If the responsibility is affixed to the proprietors under the alter ego principle, the mens rea of a reporter might not be sufficient to make the proprietors liable for contempt because he is in too junior a position to be a 'brain' within the *Tesco v Natrass* formulation. The outcome would therefore depend on whether the editor had taken all reasonable care. If he had, it is difficult to see how the proprietors could be held liable.

Such difficulties are avoided if the proprietor and editor are regarded as primarily liable.

- <sup>1</sup> See *R v Gutch, Fisher and Alexander* (1829) Mood and M 433.
- <sup>2</sup> Section 1(2) Judicial Proceedings (Regulation of Reports) Act 1926, section 8A(11) Magistrates' Courts Act 1980, and section 4(5) Sexual Offences (Amendment) Act 1976.
- <sup>3</sup> (1992) 111 FLR 191 at 202-203.

### 3 The directors

14.9 Closely allied to the question of proprietors' liability is the question of whether a director of a newspaper company could be held personally responsible for its publications. In *R v Mason, ex p DPP*<sup>1</sup>, the directors of a printing company were personally fined, but this is an unusual step that the courts will not take lightly. Nonetheless, in *R v Bolam, ex p Haigh*<sup>2</sup>, Lord Goddard CJ warned:

'Let the directors beware; they know now the conduct of which their employees were capable, and the view which the court took of the matter. If for the purpose of increasing the circulation of their paper they should again venture to publish such a matter as this, the directors themselves might find the arm of that court was long enough to reach them and to deal with them individually.'<sup>3</sup>

In other words, now that the directors were on notice of the actions of their staff, they might be held personally liable for future misdemeanours.

In *Lonrho Plc*<sup>4</sup>, the publication alleged to constitute a contempt was instigated by the chief executive of the proprietor company; unsurprisingly, the contempt