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Contempt of Court

This supporting material relates to:

Chapter 2, questions 5 to 8

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SUBSTANTIAL RISK OF SERIOUS PREJUDICE OR IMPEDIMENT UNDER THE 1981 ACT

Who can be prejudiced?

- 2.25 Reliable empirical research in England and Wales about the impact of publicity on jury and judicial decision-making is relatively scarce. One exception is research led by Professor Cheryl Thomas, which found that, of those jurors questioned who were sitting in high-profile cases, over one-third recalled some of the pre-trial media coverage, whilst one-fifth said they had found it hard to put such coverage out of their minds.²⁸ Some research has also been undertaken in other jurisdictions, although it reached conflicting conclusions and also often predated the widespread use of the internet and social media (and of course jurors in other jurisdictions are differently instructed and restricted in what they can do, and the nature of publications also varies between jurisdictions).²⁹
- 2.26 Until recently, the courts considered that jurors were particularly vulnerable to media influence. However, it has been suggested that courts may be more trusting of jurors' ability to consider only the evidence heard in court, with the "drama of the trial" being a factor in focusing jurors' attention.³⁰ We recognise, however, that judicial opinion on the vulnerability of jurors "cannot be given the status of legal principles, and in truth they are no more than the reflections of individual judges based upon experience and common sense".³¹
- 2.27 The courts have taken differing views on the potential for professional judges to be influenced by publicity relating to a case, whether consciously or

²⁸ *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) pp 40 to 42.

²⁹ See T Honess, S Barker, E Charman and M Levi, "Empirical and Legal Perspectives on the Impact of Pre-trial Publicity" [2002] *Criminal Law Review* 719, 721 to 727; J Armstrong Brandwood, "You Say 'Fair Trial' and I Say 'Free Press': British and American Approaches to Protecting Defendants' Rights in High Profile Trials" (2000) 75 *New York University Law Review* 1412, 1417 to 1418; W Young, N Cameron and Y Tinsley, *Law Juries in Criminal Trials, Part Two: A Summary of the Research Findings* (Law Commission of New Zealand Preliminary Paper 37, Vol 2, 1999) pp 60 to 62, http://www.lawcom.govt.nz/sites/default/files/publications/1999/11/Publication_76_159_PP_37Vol2.pdf (last visited 1 Nov 2012); E Brickman, J Blackman, R Futterman and J Dinnerstein, "How Juror Internet Use Has Changed the American Jury" (2008) 1 *Journal of Court Innovation* 287, 289 to 291; and M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (2001), [http://www.lawfoundation.net.au/ljf/site/articleIDs/F6283F64E9523039CA257060007D13C2/\\$file/mpp_rep.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/F6283F64E9523039CA257060007D13C2/$file/mpp_rep.pdf) (last visited 1 Nov 2012).

³⁰ Arlidge, Eady and Smith on Contempt paras 4-118 and 4-121. Consider also the research findings that knowledge of a defendant's previous conviction has a prejudicial effect on jurors, as detailed in Evidence in Criminal Proceedings: Previous Misconduct of a Defendant (1996) Law Commission Consultation Paper No 141, Appendices C and D.

³¹ Arlidge, Eady and Smith on Contempt para 4-72.

subconsciously.³² However, they have identified the risk that the public will *perceive* that judges are prejudiced by publicity, even if, in fact, they are not.³³

- 2.28 Historically, the courts appear to have taken the view that lay magistrates should be treated akin to jurors, although more recently it has been held that a lay bench's training and experience makes it less susceptible than jurors to prejudice.³⁴ Witnesses and parties to proceedings may also be susceptible to influence by prejudicial publication.³⁵

Present law

- 2.29 Section 2(2) of the 1981 Act establishes that:

The strict liability rule 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.

Substantial risk of serious prejudice

- 2.30 In *Attorney General v MGN Ltd*,³⁶ Lord Justice Schiemann set out ten key principles "governing the application of the strict liability rule":³⁷

Principle (1) Each case must be decided on its own facts.

- 2.31 There are no hard and fast rules about what categories of material can or cannot be published once proceedings are active. For example, the following may amount to contempt, but will not always do so: publishing the previous convictions or other bad character of a defendant; revealing that a defendant

³² See, eg, *R v Davies ex p Delbert-Evans* [1945] KB 435, 442 to 443; *R v Duffy ex p Nash* [1960] 2 QB 188, 200; *A-G v Times Newspapers Ltd* [1974] AC 273, 301; *Re Lonrho Plc* [1990] 2 AC 154, 209; and *A-G v BBC* [1981] AC 303, 335 and 343. Compare the position in Scotland: B Pillans, "Publication Contempt in Scotland: A Step Backwards?" [2009] *Communications Law* 90.

³³ *A-G v Channel Four Television Co Ltd* [1988] *Criminal Law Review* 237.

³⁴ Compare *A-G v Times Newspapers Ltd* [1974] AC 273, 309 and *R (Mahfouz) v Professional Conduct Committee of the General Medical Council* [2004] EWCA Civ 233, [2004] All ER 114 at [23]. Consider also the findings of the research into the prejudicial effect on magistrates of a defendant's previous convictions, detailed in Evidence of Bad Character in Criminal Proceedings, (2001) Law Com No 273, Appendix A.

³⁵ *A-G v MGN Ltd* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408 and *A-G v Times Newspapers Ltd* [1974] AC 273, 296, although see also *Vine Products Ltd v Green* [1966] Ch 484, 496 and *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370, 425.

³⁶ [1997] Entertainment and Media Law Reports 284.

³⁷ [1997] Entertainment and Media Law Reports 284, 289 to 291 (footnotes omitted), cited in *A-G v Random House Group Ltd* [2009] EWHC 1727 (QB), [2010] Entertainment and Media Law Reports 9 at [17].

faces other charges; direct or indirect assertions of guilt or innocence; or publishing confessions or admissions.³⁸

Principle (2) The court will look at each publication separately and test matters as at the time of publication ... nevertheless, the mere fact that, by reason of earlier publications, there is already some risk of prejudice does not prevent a finding that the latest publication has created a further risk

2.32 Likewise, there may be contempt where the latest publication has “exacerbated or increased that risk” created by the earlier publications.³⁹ Whether there is a contempt is not determined by the outcome of the active proceedings: the question is what is in issue in the proceedings at the time of publication.⁴⁰ For example, in a case where identity is in issue, publication of photographs of the defendant is likely to constitute a contempt.⁴¹ The fact that the jury in the active proceedings had to be discharged is also not determinative. However, the section 2(2) test will be satisfied where “the publication would have given rise to a seriously arguable ground of appeal if the trial had been allowed to continue and proceeded to conviction”.⁴²

Principle (3) The publication in question must create some risk that the course of justice in the proceedings in question will be impeded or prejudiced by that publication.

2.33 Liability cannot be founded on the collective impact of publicity, that is to say, where different publishers cumulatively create a substantial risk of serious prejudice or impediment, but where no individual publisher, taken alone, does so.⁴³ This is because each individual publisher must be found to have created the substantial risk of serious prejudice. That approach conforms to orthodox criminal law doctrines on liability and ensures article 10 compliance.⁴⁴

³⁸ See, eg, *A-G v Associated Newspapers Ltd and MGN Ltd* [2012] EWHC 2029 (Admin) at [29], [2012] All ER (D) 185 (Jul); *A-G v Associated Newspapers* [1998] Entertainment and Media Law Reports 711; *A-G v ITV Central Ltd* [2008] EWHC 1984 (Admin), [2008] All ER (D) 192 (Jul); *A-G v MGN Ltd* [2009] EWHC 1645 (Admin); *A-G v MGN Ltd* [2002] EWHC 907 (Admin); *A-G v News Group Newspapers Ltd* (1984) 6 Cr App R (S) 418; *A-G v Associated Newspapers Ltd* [2011] EWHC 418 (Admin), [2011] 1 WLR 2097; *R v Bolam ex p Haigh* (1949) 93 Solicitors Journal 220; *Thorpe v Waugh* [1979] CA Transcript Nos 282 and 313 and *Borrie and Lowe: The Law of Contempt* para 5.10.

³⁹ *A-G v Associated Newspapers Ltd and MGN Ltd* [2012] EWHC 2029 (Admin) at [11], [2012] All ER (D) 185 (Jul).

⁴⁰ See Ch 3 at paras 3.42 and 3.71.

⁴¹ See, eg, *A-G v Express Newspapers* [2004] EWHC 2859 (Admin); [2005] Entertainment and Media Law Reports 13. See also *Scottish Daily Record and Sunday Mail Ltd v Thomson* (2009) HCJAC 24.

⁴² *A-G v Associated Newspapers Ltd and MGN Ltd* [2012] EWHC 2029 (Admin) at [11], [2012] All ER (D) 185 (Jul), citing Simon Brown LJ in *A-G v Birmingham Post and Mail Ltd* [1999] 1 WLR 361, 371.

⁴³ *A-G v MGN Ltd* [1997] 1 All ER 456. This is unlike the position at common law before the 1981 Act: see Appendix A.

⁴⁴ *A-G v MGN Ltd* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408 at [17] to [20], although the Lord Chief Justice noted in that case at [19] that proposals to reform the law to allow for collective liability have been made. Also, see para 2.49 below .

- 2.34 Prejudice or impediment can be caused to either the prosecution or the defence. It has been suggested that “‘prejudice’ ... equates to ‘improperly affecting’ the course of proceedings”.⁴⁵

Principle (4) That risk must be substantial.

- 2.35 The courts’ interpretation of this has been less helpful than it might be: substantial means “not remote” or “not insubstantial” and the risk must be practical rather than theoretical.⁴⁶

Principle (5) The substantial risk must be that the course of justice in the proceedings in question will not only be impeded or prejudiced but *seriously* so.

- 2.36 The courts have, again not very helpfully, held that the term “serious” should be given its ordinary English meaning.⁴⁷

Principle (6) The court will not convict of contempt unless it is *sure* that the publication has created this substantial risk of that serious effect on the course of justice.

- 2.37 The criminal burden and standard of proof applies.

Principle (7) In making an assessment of whether the publication does create this substantial risk of that serious effect on the course of justice the following amongst other matters arise for consideration: (a) the likelihood of the publication coming to the attention of a potential juror; (b) the likely impact of the publication on an ordinary reader at the time of publication; and (c) the residual impact of the publication on a notional juror at the time of trial. It is this last matter which is crucial

Principle (8) In making an assessment of the likelihood of the publication coming to the attention of a potential juror the court will consider amongst other matters: (a) whether the publication circulates in the area from which the jurors are likely to be drawn, and (b) how many copies circulated.

- 2.38 Thus, relevant factors when assessing the degree of risk and gravity of the prejudice would include a newspaper’s circulation in the locality of the trial, or the length of any television broadcast and its repetition. This principle obviously requires modification when considering its application to the new media, for example, the number of times an online publication is accessed will be a relevant factor.⁴⁸ The fact that no juror actually saw the material does not mean that no

⁴⁵ Arlidge, Eady and Smith on Contempt para 4-99.

⁴⁶ *A-G v English* [1983] 1 AC 116, 141 to 142; *A-G v News Group Newspapers Plc* [1987] QB 1, 15; *A-G v Guardian Newspapers Ltd (No 3)* [1992] 1 WLR 874, 881; *A-G v British Broadcasting Corporation* [1997] Entertainment and Media Law Reports 76, 80.

⁴⁷ *A-G v English* [1983] 1 AC 116, 142.

⁴⁸ *A-G v ITN Ltd* [1995] 2 All ER 370; *A-G v Associated Newspapers Ltd* [2011] EWHC 418 (Admin).

juror might have done, although the reaction of a juror who sees a publication may be relevant.⁴⁹

Principle (9) In making an assessment of the likely impact of the publication on an ordinary reader at the time of publication the court will consider amongst other matters: (a) the prominence of the article in the publication, and (b) the novelty of the content of the article in the context of likely readers of that publication.

- 2.39 The style of the publication, for example, particularly sensationalist reporting, is relevant.⁵⁰

Principle (10) In making an assessment of the residual impact of the publication on a notional juror at the time of trial the court will consider amongst other matters: (a) the length of time between publication and the likely date of the trial, (b) the focusing effect of listening over a prolonged period to evidence in a case, and (c) the likely effect of the judge's directions to a jury.

- 2.40 The court, therefore, has to consider the fade factor, although a long delay between publication and trial will not preclude a finding of contempt where the case or publication is memorable.⁵¹ A court will, however, also take into account the focus that jurors have on the evidence presented in the courtroom and the obligation on the judge to give them appropriate warnings and directions.⁵²

- 2.41 Whilst the principles summarised by Lord Justice Schiemann relate predominantly to the risk of prejudicing or impeding criminal proceedings, many of the same issues, including the location of the proceedings, the nature of the publication, and the period of time between publication and trial, are relevant to civil proceedings.⁵³

Substantial risk of serious impediment

- 2.42 It has been held that "impeding" and "prejudice" are neither mutually exclusive nor synonymous concepts, although they overlap.⁵⁴ There are limited authorities on what amounts to "impeding" the course of justice under section 2(2).

⁴⁹ *A-G v Guardian Newspapers Ltd* [1999] Entertainment and Media Law Reports 904.

⁵⁰ *A-G v Morgan* [1998] Entertainment and Media Law Reports 294. See also *A-G v British Broadcasting Corporation* [1997] Entertainment and Media Law Reports 76.

⁵¹ See *A-G v ITN Ltd* [1995] 2 All ER 370; *A-G v Morgan* [1998] Entertainment and Media Law Reports 294; *A-G v MGN Ltd* [2009] EWHC 1645 (Admin).

⁵² *A-G v Unger* [1998] 1 Cr App R 308; *A-G v Guardian Newspapers Ltd* [1999] Entertainment and Media Law Reports 904. Compare *A-G v BBC* [1992] Crown Office Digest 264.

⁵³ *A-G v News Group Newspapers Ltd* [1987] QB 1.

⁵⁴ *A-G v BBC* [1992] Crown Office Digest 264; *A-G v MGN Ltd* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408; *A-G v Random House Group Ltd* [2009] EWHC 1727 (QB), [2010] Entertainment and Media Law Reports 9; *A-G v MGN Ltd (No 2)* [2011] EWHC 2383 (Admin), [2012] Entertainment and Media Law Reports 10.

2.43 The course of justice relates to the “whole process of the law”⁵⁵ and, therefore, it is necessary to consider the impact that the publication may have on the process of the case in question. The authors of Arlidge, Eady and Smith suggest that influencing a defendant or litigant to act in a particular way, for example, to opt for a certain mode of trial, will amount to impediment.⁵⁶ In *Attorney General v Random House Group Ltd*⁵⁷ it was held that a publication which gives rise to applications by the defence to discharge the jury, causing delays and the risk that the judge would discharge the jury, creates a substantial risk of serious impediment. However, just because a court needs to take time to consider the impact of publicity or give the jury a direction does not necessarily mean that justice has been impeded.⁵⁸ The vilification of an individual which could prevent defence witnesses from coming forward amounts to impediment.⁵⁹ Likewise, disclosure of a (confidential) Part 36 offer made in civil proceedings is likely to cause the trial to be abandoned and, therefore, will amount to impediment.⁶⁰

Problems and potential solutions

2.44 As noted, consideration of section 2(2) requires account to be taken of article 10. The domestic courts have held that the current section 2(2) test “falls comfortably within the limitations acknowledged in the Convention itself”⁶¹ under article 10(2). The compatibility of a finding of contempt with the ECHR cannot, however, be weighed solely in terms of the section 2(2) test, since it requires consideration of all the circumstances going to proportionality, such as the identity of the alleged contemnor and the sanction imposed. It must, therefore, be assessed on a case-by-case basis.

2.45 At present, section 2 involves a test with two benchmarks: the level of risk must be substantial; the degree of prejudice or impediment likely to be caused must be serious. Some commentators take the view that, following *Worm v Austria*,⁶² the threshold of *serious* prejudice or impediment is too high and that *any* prejudice or impediment caused by a publication should be sufficient to be in contempt. Some have suggested that *substantial* risk is too low a threshold, with *likelihood* of risk preferable.⁶³ It is certainly arguable that any degree of prejudice to a fair trial must be prevented (even prejudice which is less than serious). However, it is also arguable that the courts and the media must be able to predict with a greater degree of certainty whether that prejudice or impediment will in fact come about

⁵⁵ *A-G v Times Newspapers Ltd*, *The Times* 12 Feb 1983 by Oliver LJ.

⁵⁶ Arlidge, Eady and Smith on Contempt paras 4-105 to 4-106.

⁵⁷ [2009] EWHC 1727 (QB), [2010] Entertainment and Media Law Reports 9.

⁵⁸ *A-G v Birmingham Post and Mail Ltd* [1999] 1 WLR 361, although, of course, the test under s 2(2) merely requires *substantial risk* of *serious impediment*, not actual impediment.

⁵⁹ *A-G v MGN Ltd* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408, although compare *Chief Constable of Greater Manchester Police v Channel 5 Broadcast Ltd* [2005] EWCA Civ 739, [2005] Police Law Reports 183.

⁶⁰ Arlidge, Eady and Smith on Contempt para 4-135.

⁶¹ *A-G v MGN* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408 at [33]; see also *A-G v Guardian Newspapers Ltd* [1999] Entertainment and Media Law Reports 904, 918.

⁶² (1997) 25 EHRR 454 (App No 22714/93).

⁶³ H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) pp 275 to 279.

(so there should be more than merely a substantial risk). It is, therefore, not clear that the *degree* of risk, “and the *severity* of impact”⁶⁴ required under section 2(2) are currently ECHR compliant. **Do consultees consider that the right relationship between the degree of prejudice or impediment and the degree of risk is achieved in the current section 2(2) test?**

- 2.46 Additionally, some stakeholders voiced concern that there is a lack of clarity generally about the meanings of “prejudice” and “impede” and the relationship between the two terms. The case law often refers to both prejudice and impediment in the same breath, without differentiating between the two. Concerns were also raised that in *Attorney General v MGN Ltd*,⁶⁵ the issue of whether the publications created a substantial risk of serious *impediment* appears to have emerged mainly at the hearing, with the respondents having previously proceeded on the basis that they were being accused of creating a substantial risk of serious prejudice. This meant it was harder for those media organisations to understand the case against them. We, therefore, consider that there is a risk that media organisations may be disadvantaged by the confusion between the two tests. **Do consultees consider that the relationship between the terms “prejudice” and “impede” warrants clarification?**
- 2.47 If there is a need for clarification, we consider that the law could be made easier to follow and potentially fairer to publishers if the test under section 2(2) were split into two, one relating to prejudice and the other to impediment. The Attorney General would be required to specify the basis on which the respondent was in contempt – whether under one of the tests or perhaps both - to ensure that the respondent understood the case to answer. This would lead to the development of a body of jurisprudence on what amounts to impediment, and how it differs from or overlaps with prejudice, which would allow publishers and the Attorney General to predict with greater certainty the likely outcome of a case. **Do consultees think that section 2(2) should be split into two provisions, one dealing with prejudice, and the other with impediment?**
- 2.48 Some stakeholders also questioned whether there should be an alignment between (i) the test applied by the courts to determine an application to stay proceedings as an abuse of the process of the court on the ground of prejudicial publicity and (ii) the test under section 2(2). The test applied when considering an application for an abuse of process is whether it is possible for the defendant to have a fair trial. The court must consider what measures can be taken to reduce the impact of prejudicial publicity – for example, by giving warnings to jurors. However, the court will be required to stay the proceedings where “the risk of

⁶⁴ J Jaconelli, “Defences to Speech Crimes” [2007] *European Human Rights Law Review* 27, 39 (emphasis in original).

⁶⁵ [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408 at [15].

prejudice is so grave that no direction by a trial judge, however careful, could reasonably be expected to remove it".⁶⁶

- 2.49 Obviously, the two tests occur in different contexts and are focused on different bodies (the defendant and the publisher respectively).⁶⁷ Contempt and an abuse of process have different standards of proof (contempt beyond reasonable doubt, abuse of process on the balance of probabilities).⁶⁸ The abuse of process test needs to account for the cumulative effect of publicity, given that the issue is whether a fair trial is possible in all the circumstances and the effect that media coverage has had on the independence and impartiality of the tribunal. In contrast, the contempt test is necessarily focused on individual publications,⁶⁹ because to hold media organisations in contempt for contributing to a climate of "trial by media", where their individual publications would not give rise to a substantial risk of serious prejudice, could contravene article 10. In consequence, we consider that it would be a mistake to align the tests for whether there has been an abuse of process because of prejudicial media coverage and whether there has been a breach of section 2(2). **Do consultees agree that the tests for whether there has been an abuse of process because of prejudicial media coverage and whether there has been a breach of section 2(2) should remain distinct?**

⁶⁶ See *Montgomery v HM Advocate* [2003] 1 AC 641, 667 and *Abu Hamza* [2006] EWCA Crim 2918, [2007] QB 659. See also D Young, M Summers and D Corker, *Abuse of Process in Criminal Proceedings* (3rd ed 2009); A L-T Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (2nd ed 2008); and J Oliveira, "Speaking with Two Voices: The Tension between Strict Liability Contempt and Abuse of Process in the Context of Adverse Pre-Trial Publicity" (2001) 31 *Hong Kong Law Journal* 459.

⁶⁷ See *A-G v Birmingham Post and Mail Ltd* [1999] 1 WLR 361.

⁶⁸ J Oliveira, "Speaking with Two Voices: The Tension between Strict Liability Contempt and Abuse of Process in the Context of Adverse Pre-Trial Publicity" (2001) 31 *Hong Kong Law Journal* 459, 479.

⁶⁹ *A-G v MGN Ltd* [1997] 1 All ER 456. See also the discussion in B Naylor, "Fair Trial or Free Press: Legal Responses to Media Reports of Criminal Trials (1994) 53(3) *Cambridge Law Journal* 492.