20th International Conference
International Society for The Reform Of Criminal Law
2nd-6th July 2006**,** Brisbane, Queensland, Australia

Conference: Justice for All – Victims, Defendants, Prisoners and the Community
Day Theme: Pre-trial Issues

Plenary 4: Pre-Trial Publicity: Guilty Until Proven Innocent

PRE-TRIAL PUBLICITY: SOME UK EXAMPLES

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This paper considers issues surrounding prejudicial discussion of criminal proceedings in the media and the way in which the courts in the United Kingdom have addressed these.

Introduction

> "The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints on publications, and not in freedom from censure from criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." *Sir William Blackstone, Commentaries 4:151-152 (1769)*

This statement, almost 250 years ago, illustrates that the conflict between the demands of a fair trial and a free press is by no means a new dilemma. There has always been a delicate balance between freedom of speech and the capacity of the courts to administer justice freely and impartially. Judge and the jury are entrusted to reach impartial decisions in what are often anxious and high profile criminal cases and there has long been concern about the effect of outside influence on their deliberations, but particularly those of jurors and on the ability of witnesses to give evidence free of the pressure which may come from prejudicial reporting.

Pre-trial publicity is a controversial area and in a society which can be said to be media saturated as a result of the penetration of the internet, satellite broadcasting and a renaissance of newspaper publishing, the potential for prejudicial pre-trial publicity is greater than ever. The material available to the media is also more publishable than ever: in the past courts may have railed against pre-trial publication of interviews with eye witnesses, but nowadays the media are as likely to have access to CCTV footage of the crime or the suspected offender at a stage before proceedings are active and any

[1] views expressed in this paper are the personal views of the author alone and not of the Crown Office and Procurator Fiscal Service

statutory protections apply. It is essential that the legal system is equipped to deal with this challenge, while respecting the liberty which Blackstone acknowledged.

The freedom of expression and the right to a fair trial are both fundamental rights guaranteed by the European Convention on Human Rights, Articles 6 and 10. Clearly there is potential for these respective rights to conflict. United Kingdom experience is scarcely alone in demonstrating the scope for media reporting to conflict with the interests of those parties involved in the judicial process, be they the public prosecutor, the accused person, the victim or witnesses - or the court itself. The criminal trial is an adversarial process. The burden of proving guilt rests upon the prosecution, which must prove the case to the criminal standard of proof beyond reasonable doubt. The prosecution and the defence present their respective cases to a Judge sitting alone or on a Bench or to a Judge and jury made up of members of the public selected by ballot, who determine the guilt or the innocence of the accused.

While the courts have generally accepted that judges sitting without a jury, including lay magistrates[2] can be assumed to be capable of putting from their mind potentially prejudicial pre-trial publicity, this is not absolute[3] and is certainly not automatically assumed to be the case where the trial proceeds before a jury.[4] In cases proceeding before a jury issues of potentially prejudicial pre-trial publicity are usually dealt with by the judge giving appropriate direction to the jury both before the evidence is given and at the point at which the jury retire for their deliberations. Substantial reliance is placed upon the effectiveness of such directions. As Lord Hope said in the Privy Council in *Montgomery v HMA (2000)*:

> "the entire system of trial by jury is based upon the assumption that the jury will follow the instructions which they receive from the trial judge and that they will return a true verdict in accordance with the evidence"[5].

Contempt Of Court: Active Proceedings

> "Contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during litigation"[6]

In the United Kingdom, the law on contempt of court derives from the common law and statute. There are 5 main categories of offending behaviour:

(i) disobedience of a court order;
(ii) contempt in the face of the court;
(iii) interference with participants in the proceedings;

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[2] *Aitchison v Bernardi 1984 SLT 343, 344*; *R v Croydon Magistrates' Court ex parte Simmons (unreported) Divisional Court, 26 January 1996*

[3] *Megrahi v Times Newspapers Ltd 2000 JC 22, 33F*

[4] while it is impossible to tell what effect prejudicial publicity has in fact, there is some empirical evidence to suggest that it does distort evaluation of evidence: Hope, L., Memon, A. and McGeorge, P. (2004). Understanding Pretrial Publicity: Predecisional Distortion of Evidence by Mock Jurors. *Journal of Experimental Psychology: Applied, 10, 111-119.*

[5] *Montgomery v HMA* 2001 SC (PC) 1, 30G

[6] Oswald, J. F., *Contempt of Court: Committal, Attachment and Arrest upon Civil Procedure*, (3rd ed 1910)

(iv) insulting or "scandalising the court"; and
(v) prejudicing particular proceedings.

The last form is the most important in the context of criminal proceedings. It has been justified by the need to ensure fairness of trial and the courts have traditionally exercised special vigilance over criminal proceedings.

The fear of trial by media reached a high point when British courts prevented publication of editorial criticism by the Sunday Times of the moral position of Distillers, the corporation that had marketed the drug Thalidomide, in relation to its offer of financial settlement to parents of the children who were affected by the drug. In 1973, the House of Lords held[7] that contempt law prohibited the publication of material that pre-judged the issue whether Distillers had been negligent in marketing the drug. Two of the Law Lords also said that editorial comment designed to exert moral pressure on Distillers to abandon its legal defence and negotiate a higher settlement was contempt of court.

However, in *Sunday Times v UK (1979)* the European Court on Human Rights held that the absolute rule formulated in the Sunday Times case was incompatible with the right to freedom of expression provided by Article 10 of the European Convention on Human Rights[8]. The Freedom of Expression enshrined in Article 10[9] of the Convention is qualified and those exercising freedom of expression have "duties and responsibilities". Article 10 recognises that restrictions or penalties may be imposed for a variety of reasons, including "for the protection of the …rights of others" and "for maintaining the authority and impartiality of the judiciary".

Following the judgment in *Sunday Times v UK*, in order to bring British Law into conformity with the European Convention, the UK Government was obliged to legislate. In addition, the Phillimore Committee[10] recommended reforms to narrow the law. These two causes - and a wish to harmonise the laws of Contempt in the United Kingdom - formed the background to the passing of the Contempt of Court Act 1981.

Contempt of Court Act 1981

The Contempt of Court Act 1981 introduced "the strict liability rule", whereby conduct may be treated as contempt of court as tending to interfere with the course of justice in particular legal proceedings, regardless of intent to do so.

[7] *Attorney-General v Times Newspapers* [1974] AC 273
[8] *Sunday Times v UK* (1979) 2 EHRR 245
[9] (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.
[10] *Report of the Committee on Contempt of Court*, (Cmnd. 5974, 1974)

Contempt is committed by

> "any publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced"[11].

The term "publication" is broadly defined[12]. A defence is provided in Section 3 of the Act, providing for a defence of innocent publication, but only where the publisher has taken reasonable care and did not know and had no reason to suspect that relevant proceedings were active. And Section 5 excludes from the application of the strict liability rule publication in good faith of public affairs or other general matters of public interest, if the risk to particular proceedings is merely incidental to the discussion.

The 1981 Act was designed to harmonise the law throughout the United Kingdom, but experience has shown some divergence of interpretation and the Scottish and English have on occasion interpreted the same Contempt of Court Act in different ways. In part, this may be attributed to the fundamental differences in the legal systems of the two jurisdictions and the different pre-trial procedures between Scotland and England and Wales.

Raising Contempt of Court Proceedings

The 1981 Act provides that in England and Wales proceedings for contempt of court under the strict liability rule can only be raised by or with the consent of the Attorney General or on the motion of a court dealing with it[13]. This is not the position in Scotland. Although all criminal proceedings in Scotland are conducted in the name or on behalf of the Lord Advocate, proceedings under the 1981 Act can be brought by any person having a legal interest and there is no requirement for the Lord Advocate to concur in the proceedings. In that regard, Contempt jurisdiction is perhaps out of step with general criminal jurisdiction in Scotland, where private prosecution is so exceptional as to have become almost a centennial event. But the right of any interested party to intervene is significant as affording a very real protection to those who have been or are at risk of being affected by prejudicial reporting.

It remains open to the courts in both jurisdictions to take action on their own instigation (*ex proprio motu*) where the contempt is committed in the face of the court or in the course of continuing proceedings, such as a trial.

Pre-trial Publicity: the common law

The protections provided by the Contempt of Court Act 1981 apply only to **active proceedings.** The risk of being caught by the strict liability rule starts when a person has been arrested, a warrant has been issued for his or her arrest, an indictment has been served or a summons issued, or, in England and Wales only, when a person has

[11] *Contempt of Court Act 1981 section 2(2)*
[12] Section 2(1) "any speech, writing, programme included in a cable programme service or other communication in whatever form, which is addressed to the public at large or any section of the public."
[13] Section 7

been charged -- whichever comes first. The risk ends when the accused is acquitted or sentenced or with the return of any other verdict or decision which puts an end to proceedings. Appeal proceedings are also considered to be active proceedings.

Where a crime has occurred but proceedings are not yet "active", there may nevertheless be a real concern over the content of media coverage and the potentially prejudicial affect that that may have on any future proceedings. In England and Wales, remedies may be available at common law, even where proceedings are not yet imminent, but the strict liability rule will not apply[14]. In Scotland, there is little that the authorities can do other than to alert editors to the risk of prejudicing a trial and in extreme cases committing the offence of attempt to pervert the course of justice. Even in the robust Common Law jurisdiction that Scotland was before the 1981 Act, the Court would not, certainly latterly, act against publications at a stage before there were any proceedings[15].

In Scottish practice, where the Crown has reason to be concerned about reporting or broadcasting which has taken place or which the Crown has reason to believe is planned to take place in the near future, in relation to either an ongoing criminal investigation, live prosecution case or live appeal case, the Crown will issue an Operational Note to all media. By its very nature this is usually only required in high profile cases. The Operational Note provides guidance to editors on the status of the case in question, highlights the type of reporting which the Crown has cause to be concerned about and reminds editors of the view the court may take of such reporting. They are ultimately invited to act responsibly. Where appropriate they are reminded that the Contempt of Court Act applies[16].

The test as to whether there has been contempt in terms of the strict liability rule within the 1981 Act is whether there is a substantial risk that the course of justice in proceedings would be seriously impeded or prejudiced by the publication, thus excluding any risk which is merely remote or minimal.

Even if the courts do not find that strict liability Contempt applies, they may retain powers to prohibit publication at common law. The case of *Muir v BBC*[17] considered the broader duty that the courts in Scotland assert in order to ensure a fair trial. In this case the court exercised its power at common law to prevent the broadcast of a television programme and specifically held that if the court

> "considers that if a publication or broadcast creates a risk of prejudice to the trial of .... a person [who has been charged by the public prosecutor] then there is a power to prevent such prejudice from occurring by such means as are appropriate."

The Court specifically held that it did not require to consider whether the publication would constitute contempt of court after consideration of Section 5 (the good faith publication exception); that it is

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[14] *R v Savundra (1968) 52 Cr App R 637*

[15] *Hall v Associated Newspapers Ltd 1978 SLT 241*

[16] the Attorney General has a similar practice in England and Wales, by the issue of "Guidance to Editors" (Lord Goldsmith: Law for Journalists Conference, Keynote Address, 28 November 2003)

[17] *Muir v BBC* 1996 SCCR 584

> "immaterial if it is a matter which would otherwise fall within the provisions of the Act, namely a matter which will be likely to cause not less than minimal risk of serious prejudice to the proceedings of any particular accused"[18]

The jurisdiction exercised by the Scottish Court in *Muir* was endorsed by the European Commission on Human Rights in *BBC Scotland v UK (1997).*[19]

In Scotland, it may be easier to establish title to bring Contempt proceedings, although it may be more difficult than it is in England and Wales to deal with publications in the twilight period between offence and arrest, but the Scottish courts have been much more reluctant than those in England and Wales to prevent a trial proceeding because of prejudicial pre-trial publicity.

The Scottish Courts may be more inclined to punish Contempt, whereas in England and Wales those responsible for prejudicial publications may in some cases have been more likely escape liability for contempt where the content of a publication has led directly to the abandonment of a trial or quashing of a conviction.

The Court of Appeal in *R* v *Taylor (1994)*[20] – a highly charged case where two sisters were charged with murder - described the publicity as "unremitting, extensive, sensational, inaccurate and misleading" and found it "quite impossible to say that the jury were not influenced in their decision by what they read in the press". The Court referred to the principle, as enunciated in the case of *R* v *McCann (1990)*[21], that if the media coverage at trial has created a real risk of prejudice against the defendants, the convictions should be regarded as unsafe and unsatisfactory. The court was satisfied that the press coverage of this trial created a real risk of prejudice against the defendants and held the convictions to be unsafe and unsatisfactory. The Court refused to order a retrial. There were, however, no contempt proceedings arising from *Taylor*.

In *R v Knights (1995)* [22] the accused was the boyfriend of a television soap star and the subject of reporting which the trial judge described as "scandalous". The Court stayed proceedings on the ground that a fair trial would be impossible, even if the trial were adjourned and special directions given, but contempt proceedings were unsuccessful.

During the closing speeches of the case in *R* v *McCann*, where the charges included conspiracy to murder the Secretary of State for Northern Ireland, the Home Secretary announced the Government's intention to change the right to silence. Considerable publicity followed that announcement, including radio and television broadcasts. An application to discharge the jury was refused and in summing up to the jury the judge warned them to disregard any broadcasts on the right to silence. On appeal it was held the impact of the media coverage on the fairness of the trial could not be

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[18] p427 K-L
[19] *BBC Scotland v UK (App 34324/96) (October 23, 1997)*
[20] *R* v *Taylor* (1994) 98 Cr. App. R. 361
[21] *R* v *McCann* (1990) 92 Cr App R 239
[22] *R v Knights* (unreported) *Harrow Crown Court, 4 October 1995*

overcome by any direction to the jury and that the judge ought to have discharged the jury and ordered a re-trial. Accordingly, the convictions were held to be unsafe and the convictions were quashed.

A more robust approach was taken by the court in the case of *R v West (1996)*[23]. Rosemary West was convicted of 10 murders, the bodies having been buried beneath the house she shared with her husband (the notorious Fred West, who committed suicide in prison). She applied for leave to appeal against conviction on the ground of abuse of process, including that the treatment of the case by the press prior to the jury being sworn was so extensive and hostile that it precluded a fair trial being held. The court held that:

> "however lurid the reporting, there can scarcely ever have been a case more calculated to shock the public who were entitled to know the facts. The question raised on behalf of the defence is whether a fair trial could be held after such intensive publicity adverse to the accused. In our view it could. To hold otherwise would mean that if allegations of murder are sufficiently horrendous so as inevitably to shock the nation, the accused cannot be tried. That would be absurd. Moreover, providing the judge effectively warns the jury to act only on the evidence given in court, there is no reason to suppose that they would do otherwise."

The equivalent plea to abuse of process in Scotland is a plea in bar of trial on the ground of oppression. Oppression is the only ground on which the court can interfere with the Crown's right to prosecute.

Stuurman v HMA (1980),[24] illustrates the reluctance of the Court in Scotland to uphold a plea in bar of trial on the basis of oppression. The Court stated that:

> "this power will only be exercised in special circumstances which are likely to be rare. The special circumstances must indeed be such as to satisfy the Court that, having regard to the principles of substantial justice and of a fair trial, to require an accused to face trial would be oppressive. Each trial will depend on its own merits, and where the alleged oppression is said to arise from events alleged to be prejudicial to the prospects of fair trial, the question for the Court is whether the risk of prejudice is so grave that no direction of the trial judge, however careful, could reasonably be expected to remove it."

Atkins v London Weekend Television (1978)[25] is a rare example of the High Court in Scotland indicating that a case should not proceed because of prejudicial publicity. The case related to a television documentary screened nationally the day before the trial of Atkins, a nursing sister who was charged with assaulting a 13 year old patient by blocking her air supply. The documentary was concerned with broad issues of withdrawal of treatment from patients, but made very specific references to Atkins and the case against her. Since the matter had been raised by way of freestanding Contempt proceedings, the Court was not able to prevent the trial proceeding in that process but stated:

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[23] *R v West* [1996] 2 Cr. App. R. 374
[24] *Stuurman v HMA* 1980 JC 111
[25] *Atkins v London Weekend Television* 1978 JC 48

> "We entertain the gravest doubt whether fair and impartial trial of the petitioner on the charges of assaulting Elizabeth Semple is now possible, however carefully the trial Judge may direct the jury. … We are sure that the Lord Advocate will consider the question of further prosecution of the petitioner with anxious care"

The Lord Advocate took the hint and abandoned proceedings against Atkins.

In deciding whether media coverage in a particular case would render a prosecution oppressive or abuse of process, the Courts will have regard to a number of issues.

(i) Fair administration of justice

The Court will be bound to pay regard to the public interest in ensuring that justice is done, particularly in cases involving allegations of serious crime. In the case of *X v Sweeney and others (1982)*,[26] Lord Justice-General Emslie stated that:

> "while the public interest in securing fair trial of accused persons is of the highest importance, so too is the public interest in the fair administration of justice and the detection and trial of alleged perpetrators of crime".

(ii) Possibility of change of venue

The Court will also consider whether by transferring the case to another court, the risk of prejudice to the accused can be reduced[27]. Clearly, where there has been national coverage of a particular issue, this is less likely to be a relevant option, but feelings may run higher and longer close to the scene of the crime.

The case against Ian Huntley and Maxine Carr in England involved the murder of two schoolgirls and was the subject of sustained and intense media attention throughout the investigation which ultimately led to the arrest of the defendants. At a pre-trial hearing the trial judge was asked to examine a bundle of newspaper cuttings and excerpts from television programmes. After hearing arguments the Judge was of the opinion that almost every person in Britain would know something about the case. However, this was only general knowledge and would not prejudice a fair trial and, accordingly, there would be no requirement to move the court to another venue nor a need to question the jury as to their exposure to the media.

(iii) Lapse of time

The Court will require to place appropriate weight on the period of time that has elapsed between the publication of the material and the criminal trial. Clearly such cases will be considered on the basis of their individual facts and circumstances but case law would tend to suggest that the Courts apply a presumption that the public memory of the detailed content of news broadcasts, newspaper articles is notoriously

[26] *X v Sweeney and others* 1982 SCCR 161 (the "Glasgow Rape case" - the second of only two private prosecutions in Scotland in the 20th Century)
[27] *McLeod v HMA 1998 SLT 60*

short. In the case of *Beggs v HMA (2001)*[28] the "limbs in the loch murderer" or "Gay Ripper" there had been extensive sensational reporting of the detail of his alleged crime and criminal record, much of it at a stage prior to proceedings becoming active and the strict liability rule applying, but that had to be balanced against the lapse of time (including a lengthy extradition process) and the process of the trial; the Court made it clear that it would have been unlikely to have allowed a trial to proceed within ordinary time limits, which might have required the release of a highly dangerous individual.

Nevertheless, however short the public memory is deemed to be, once proceedings have been initiated there are normally very definite time limits within which an accused person must be brought to trial. Where custody time limits are running, there may be less likelihood that a substantial period of time will elapse between the publication complained of and the commencement of the trial, with the risk that the Court may order the release of the accused, as was contemplated in *Beggs*.

(iv) Is the publicity actually prejudicial?

The Court will also consider whether the material could be said to be actually and directly prejudicial as regards the accused. To a great extent this will depend upon the message conveyed by the material and whether, for example, the material is clearly suggesting that the accused is guilty of the charges brought. In extreme cases this will override other considerations. *R v Taylor* was such a case, as was *R v Knights.*

(v) Effect on witnesses

The Court is entitled to have regard to the principle that the evidence of witnesses should not be improperly influenced[29]

The case of *HMA v The Scotsman Publications Ltd (1999)*[30] considered a number of similar issues in the context of Contempt of Court proceedings.

On 17th December 1997 Mohammed Sarwar, M.P. for Govan in Glasgow appeared at court on charges of electoral fraud and attempting to pervert the course of justice, allegedly committed in the course of his campaign in the May 1997 General Election. On 2nd February 1998 an article was published in *The Scotsman (*a newspaper published in Edinburgh, circulating throughout Scotland, but with a circulation of about 12,000 copies in the Glasgow area). The article stated that two key witnesses had asked for police protection because they feared intimidation and attempts to persuade them to change their evidence. The Lord Advocate raised proceedings for contempt of court. The newspaper argued that because it was an Edinburgh based paper there was little risk of prejudice to jurors in the Glasgow. The court held that there was contempt.

[28] *Beggs v HMA 2001 SCCR 836; Cf R v Savundra (1968) 52 Cr App R 637; R v Bow Street Metropolitan Stipendiary Magistrate ex parte DPP (1992) 95 Cr App R 9*
[29] *Beggs v HMA 2001 SCCR 836*; and this is also the basis for rules against witnesses viewing a trial before they give evidence: *BBC, Petitioners 2000 JC 419,*
[30] *HMA v The Scotsman Publications Ltd 1999 SLT 466*

In delivering the judgment of the High Court, Lord Marnoch said

> "there could hardly be a more prejudicial suggestion in advance of trial than the one in question"[31].

The judge felt that the allegation was of such significance that it would stick in the minds of potential jurors for many months. He therefore rejected the submission from the newspaper's counsel that the delay between the publication of the article and the date of trial would have the effect of lessening the prejudice to such a degree that the test of substantial prejudice laid down by the 1981 Act was not met.

Further, Lord Marnoch rejected the submission from the newspaper's counsel that directions from the trial judge could remove any potential prejudice. He made it clear that, when considering a contempt case, it was proper for the court to proceed on the basis that the trial judge would only give "ordinary directions" to the jury. Lord Marnoch took the view that the assessment of risk was by reference to time of publication. He also rejected the submission made on behalf of the respondents to the effect that their circulation in the West of Scotland was so low that the story, even if prejudicial, would be unlikely to cause substantial risk as so few were likely to read it. The publishers, the newspaper editor and the authors of the report were fined £10,000, £3,000 and £1,000 respectively. The trial eventually proceeded against Mohammed Sarwar at the High Court at Edinburgh and he was acquitted on 25th March 1999.

Courts have been generally reluctant to find that the degree of pre-trial publicity is such as to render any subsequent trial unfair, although they are willing to do so in the most extreme cases. Courts traditionally place substantial reliance upon the trial proceedings, and upon any warnings or directions given to the jury by the trial judge. The Privy Council in dismissing an order for a retrial by a Scottish court said:

> "The principal safeguards of the objective impartiality of the tribunal lie in the trial process itself and the conduct of the trial by the trial judge. On the one hand there is the discipline to which the jury will be subjected of listening to and thinking about the evidence. The actions of seeing and hearing the witnesses may be expected to have a far greater impact on their minds than such residual recollections as may exist about reports about the case in the media. This impact can be expected to be reinforced on the other hand by such warnings and directions as the trial judge may think it appropriate to give them as the trial proceeds, in particular when he delivers his charge before they retire to consider their verdict."[32]

It could be argued that this approach adopted by the courts has, over the years, been endorsed by acquittals by juries following sustained and prejudicial publicity. Kevin and Robert Maxwell were acquitted on charges of conspiracy to defraud trustees and beneficiaries of pension funds despite prejudicial publicity and the notorious Kray twins were acquitted of a second murder charge a matter of weeks after their convictions for murder had taken place amongst frenzied media attention.

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[31] p469J

[32] *Montgomery v HMA* 2001 SC (PC) 1, 30 D-E, per Lord Hope

Protection of Children

In common with other jurisdictions, the United Kingdom takes additional steps to protect the identification of children and young persons as the subject of criminal proceedings, whether as victims, witnesses or accused, although there are also provisions to enable such restrictions to be lifted[33]. In Scotland there is no protection once a child reaches the age of 16, regardless of the fact that his or her identity would have been protected at the point of conviction. These provisions are limited in scope: in England and Wales there is no protection until proceedings have commenced[34] and in Scotland the protection is limited to proceedings in court[35]. There is, however, in England and Wales, an established inherent jurisdiction to grant orders for the protection of vulnerable persons and this can extend to protection of the identity of serious offenders who were children at the time of conviction - such as Thompson and Venables, the killers of a two year old boy[36]. More controversially, the same jurisdiction can be used to protect notorious adult offenders, such as Maxine Carr[37].

Changing conditions

The Internet

One of the most obviously relevant developments in publishing has been the internet, which provides a number of challenges: it has instant and almost comprehensive penetration; it allows highly efficient archiving and retrieval of data, at the command of the reader; and it is very difficult in practice to restrain material once it has been replicated across websites, which themselves may cross many countries and be managed to a greater or lesser degree of responsibility.

The Scottish Courts have begun to grapple with these issues, again in the *Beggs* case: in *HMA v Beggs (No. 2)(2000)*[38] Lord Osborne considered material which appeared to have been published some considerable time earlier and when proceedings were not active, but was, of course, still accessible on the internet. Counsel for Beggs argued that the material was published every day that it appeared on the relevant websites. Lord Osborne concluded that publication was a continuing process in relation to web material[39]. On the other hand, he took the view that the availability of material as part of an archive, as opposed to part of a current publication,

> "renders it less likely that it may come to the attention of a juror than would be the case if it formed part of a contemporaneous publication"[40]

Accordingly, he held that there had not been a prima facie contempt of court.

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[33] Children and Young Persons Act 1933, Section 49 (as amended), for England and Wales; Criminal Procedure (Scotland) Act 1995, Section 47, for Scotland

[34] see discussion of a particular case in Arlidge, Eady and Smith on Contempt, 3rd ed (2005), Thomson, Sweet and Maxwell, 8-29

[35] *Frame v Aberdeen Journals Ltd 2005 SCCR 579*

[36] *Venables and Thomson v News Group Newspapers Ltd [2001] Fam 430*

[37] *Carr (Maxine) v News Group Newspapers [2005] EWHC 971 (QB)*

[38] *HMA v Beggs (No. 2) 2002 SLT 139*

[39] p145 [22]

[40] p146 [24]

This decision has potentially far-reaching consequences and it remains to be seen what other courts will make of the approach which has been taken in the application to their own cases. Internet publishers are very different from - and obviously less susceptible to – national jurisdictions than domestic print and broadcasting media, which still represent the bulk of the news media which will be viewed by witnesses; but the growth of the internet as a source of primary news media will clearly present further challenges for the courts.

Cold Cases

Another development which is relevant to Contempt and prejudicial publicity jurisdiction relates to cold case investigation. Advances in forensic science and in technical and other policing skills mean that cases which have long been regarded as unsolvable can often be brought to trial, sometimes decades after the event. These are often sensational cases and will have been the subject of intense media interest - again possibly reflected in archived internet material - and in some cases broader literature. The material when published would have been more innocuous than that in *Beggs*, where it was at least known that he was a suspect. In such cases it may be necessary for prosecutors to trace and contact primary publishers – print and web – and distributors and encourage them to withdraw material from publication. There are, however, real issues for web publishers in terms of disrupting a legitimate archive, although in some cases that may be necessary on a temporary basis.

Broadcasting

The United Kingdom continues to be cautious in relation to filming, let alone broadcasting of courts and this is to a degree based on concerns about undue influence on jurors and witnesses, as well as undue pressure on witnesses and, indeed, pleaders. In England and Wales a consultation exercise and not-for-broadcast pilot has been somewhat inconclusive, with the Lord Chancellor stating in June 2005 that he was not announcing any further conclusions or proposals at that stage, but confirming his

> "very strong view that victims, witnesses and jurors should not be filmed"[41]

In Scotland, as long ago as 1992 the Lord President of the Court of Session issued a Practice Direction on Television in the Courts, which provides a framework for courts to authorise filming and broadcasting under very controlled circumstances, which essentially require consent of all participants and only permit first instance recording for subsequent documentary purposes. There have been a small number of documentary productions over the years. The approach was tested in *BBC, Petitioners (No. 1) (2000)*[42] when the BBC sought authority for televising the trial of the two Libyans accused of the Lockerbie bombing, on the back of limited permission which the Court had given for closed circuit broadcasting to sites controlled by the court for the exclusive benefit of accredited relatives of victims. The restricted approach of the Practice Direction was upheld at first instance and on appeal[43]. The

[41] News Release, Department for Constitutional Affairs, 30 June 2005
[42] *BBC, Petitioners (No. 1) 2000 JC 419*
[43] *BBC, Petitioners (No. 2) 2000 JC 521*

BBC were, however, permitted to broadcast the appeal against conviction in the Lockerbie case, in accordance with the Practice Direction.

Conclusion

The test for establishing that a trial should not proceed on the grounds of abuse of process or oppression following prejudicial pre-trial publicity is a high one. The accused must satisfy the court that there is a risk of prejudice so grave that no direction of the trial judge, however careful, could reasonably be expected to remove it. In general, courts deal robustly with issues of prejudicial publicity and will balance the arguments of prejudice with the public interest in ensuring justice is done.

There is however a fundamental public interest in ensuring that criminal proceedings are permitted to proceed fairly and impartially and are not placed in jeopardy by irresponsible or prejudicial publicity. The power of the courts to hold to account those who publish or broadcast prejudicial material is an important safeguard for the criminal justice system, but prosecutors also need to ensure that they act to draw the attention of media to potentially prejudicial reporting.

Although the highest profile cases can attract sensational reporting, the greatest restraint on the press is self restraint.