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SPICe Briefing

Role of the Media in Criminal Trials

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This briefing has been prepared in advance of a forthcoming debate in the Scottish Parliament on the role of the media in criminal trials. The debate has been secured by the Parliament's Justice Committee and is due to take place in October 2012. The briefing examines a number of relevant issues including contempt of court, the use of live text-based communications from courts and the televising of court proceedings.

The Scottish Parliament
Pàrlamaid na h-Alba

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CONTEMPT OF COURT

The principal piece of legislation in Scotland relating to contempt of court is the Contempt of Court Act 1981 ("the 1981 Act"). In relation to criminal proceedings, these are defined as active in Scotland as follows: occurring on arrest without warrant; the grant of a warrant for arrest; the grant of a warrant to cite; or service of an indictment or other document specifying the charge. Criminal proceedings cease to be active when they are concluded with a verdict and sentence or discontinuance.

There are two forms of contempt of court:

- statutory contempt of court under the 1981 Act which criminalises the publication of material which creates a substantial risk that the course of justice in the relevant proceedings would be seriously impeded or prejudiced

- common law contempt which targets any other action which is intended to interfere with the administration of justice, including interfering with pending or imminent court proceedings

Any of the following activities could be considered to be contempt:

- obtaining or publishing details of jury deliberations

- filming or recording within court buildings

- publishing information obtained from confidential court documents

- reporting on an accused's previous convictions

- reporting on court proceedings in breach of a court order or reporting restriction

- anticipating the course of a trial or predicting the outcome

- revealing the identity of child defendants, witnesses or victims

With regard to statutory contempt of court, the 1981 Act provides for "strict liability". This means that a publisher cannot escape liability by arguing that they had no intention of prejudicing on-going legal proceedings. A limited number of defences to statutory contempt are available to publishers, namely that the material comprised a fair and accurate contemporary report or discussion of public affairs, or that the publication of the potentially prejudicial material was made innocently. This last defence applies only where the publisher did not know and had no reason to suspect that the proceedings which featured in the material were active.

With regard to common law contempt, intention is necessary to commit the offence. The material must have been published with the intention of prejudicing criminal proceedings that are on-going, pending or imminent. This definition can introduce a fine line, for example, between pressing for a prosecution, which is acceptable, and seeking to influence public perception of an individual who is about to be prosecuted, which is forbidden.

As noted above, it is not an offence under the 1981 Act to publish material as part of a discussion of public affairs or as a contemporary report of legal proceedings held in public. The 1981 Act provides that a publication made as (or as part of) a discussion of public affairs or other matters of general public interest, is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.

In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be restricted or postponed for such a period as the court thinks necessary for that purpose. Publication of material which has been restricted or postponed by the court would be considered to be contempt of court.

As pointed out above, reporting on an accused's previous convictions would also be considered to be contempt but there have been examples recently in high profile criminal cases where such information has been published on the internet while proceedings were on-going. For example, in November 2007, the Crown Office issued a guidance note to editors in relation to material which had been published in the case of Peter Tobin who had been charged with the murder of Vicky Hamilton. At that time, Tobin was serving a sentence of life imprisonment for the rape and murder of Angelika Kluk. The guidance note made clear that proceedings in the Vicky Hamilton case were active for contempt of court purposes and that editors should be aware that any further publication or broadcast in relation to Tobin's character and/or previous convictions could give rise to a substantial risk of prejudicing future proceedings. The guidance does not appear to have been published by the Crown Office, but was sent to mainstream media outlets and also to Scott Douglas, the writer of a blog, Black and White and Read All Over who had previously posted information about Peter Tobin and the Contempt of Court Act 1981[1]. It appears that online newspaper forums and websites such as Wikipedia had also posted material discussing Tobin's previous conviction in the Angelika Kluk case which, unless that material had been removed, would have been accessible to everyone including potential jurors in the Vicky Hamilton case.

The development of the internet has massively increased access to historic online material through the ability to carry out searches either using web search engines such as Google or, for example, a newspaper's own online search facility. This can have significant implications in relation to current court cases. For example, historical articles and reports published online by newspapers may contain information which is potentially prejudicial to subsequent court proceedings. Questions arise as to whether, in such circumstances, access to such material should be controlled and, if so, how and by whom? Of course, publishers such as newspapers, often have little or no control over material which has been 'picked-up' by others, disseminated through various social media or archived by web search engines, often in countries not subject to our laws. Current contempt of court legislation which, as noted above, provides that strict liability contempt applies to 'any publication' related to active proceedings, which "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced"[2], sits uneasily with the unregulated access and dissemination of historic electronic material.

THE USE OF LIVE TEXT-BASED COMMUNICATION FROM COURT

In relation to England and Wales, guidance on live, text-based communications using lap-tops and hand-held devices to communicate directly from courts was recently issued by the Lord Chief Justice, Lord Judge (following a consultation). The guidance makes clear that representatives of the media and legal commentators may use such text-based devices to communicate from courts without having to apply to the courts to do so, whereas members of the public should make a formal or informal application if they wish to use such devices. The guidance emphasises that anyone using electronic text is still strictly bound by the existing

[1] It is not known whether the guidance note was issued to other bloggers or to social media hosts.
[2] S2(2) Contempt of Court Act 1981.

restrictions on reporting court proceedings under the 1981 Act and acknowledges that there may be concerns with regard to the administration of justice:

> "Without being exhaustive, the danger to the administration of justice is likely to be at its most acute in the context of criminal trials e.g., where witnesses who are out of court may be informed of what has already happened in court and so coached or briefed before they then give evidence, or where information posted on, for instance, Twitter about inadmissible evidence may influence members of a jury. However, the danger is not confined to criminal proceedings; in civil and sometimes family proceedings, simultaneous reporting from the courtroom may create pressure on witnesses, distracting or worrying them." (Lord Chief Justice of England and Wales 2011)

The guidance goes on to say that it may also be necessary for a judge to limit live text-based communications to representatives of the media for journalistic purposes, disallowing its use by the wider public in court. It suggests that this may be necessary where, for example, it is thought that a large number of electronic devices in use at any given time may interfere with the court's own sound recording equipment, or that widespread use of such devices will cause a distraction in the proceedings.

Currently in Scotland, the permission of the court is required to use devices that allow live text-based communication from court. Live updating on Twitter from a Scottish court was allowed for the first time for the sentencing of former MSP Tommy Sheridan in 2011. Trial judge Lord Bracadale ruled that journalists could send tweets from the hearing at the High Court in Glasgow. The previous Lord President, Lord Hamilton, issued a statement following the publication of the guidance for England and Wales stating that full consideration would be given to that guidance with a view to formulating suitable guidance in Scotland (Judicial Office of Scotland 2011). The use of social media in courts by members of the public and/or jurors is discussed further below.

TELEVISING COURT PROCEEDINGS

In April 2012, television cameras were allowed inside the High Court to record the sentencing of David Gilroy, following his conviction for murder. The footage, which was later broadcast by Scottish Television, concentrated solely on the judge, Lord Bracadale, as he handed down the sentence. This was not the first time that television cameras had been allowed in Scotland's courts. Since 1992 cameras have, on application to the courts and only if all parties to the case give their consent, been allowed to film footage for documentaries, subject to vetting by the court and broadcast at a later date. The final decision on whether to allow filming inside the court rests with the trial judge. The Scottish Court Service has confirmed that, where an application to film has been lodged, each case is assessed on its merits and it must be established that there is no risk to the administration of justice.

It should be noted that the presence of cameras in criminal trials has been rare and, in the main, restricted to high profile appeal cases. For example, the appeal of Abdelbaset al-Megrahi against his conviction for the Lockerbie bombing was televised in 2002. However, in 1996, Lord Ross allowed a BBC news programme into the High Court for the sentencing of two armed robbers. The senior judge had branded the sentencing system in Scottish courts a "charade" because prisoners did not serve the full term of their sentence and allowed the cameras in to the court to witness the sentences being handed down.

Filming has been banned in English courts since 1925 but in the recent Queen's Speech, the UK Government announced its intention to bring forward legislation which would allow certain aspects of court proceedings to be televised. In a recent article in the Guardian (2011), the UK Justice Secretary, Ken Clarke, stated:

> “The government and the judiciary are determined to improve transparency and public understanding of courts through allowing court broadcasting. We believe television has a role in increasing public confidence in the justice system.”

There will, of course, be differing opinions on whether televising court proceedings will lead to a greater understanding of, and increased confidence in, the justice system. For example, it is reasonable to assume that broadcasters and viewers are not likely to be interested in the vast majority of cases which proceed through the courts but that they will be much more interested in high-profile cases dealing with more serious crimes.

FILMING WITNESSES ARRIVING AND LEAVING COURT

In general, there is nothing to stop television news coverage of witnesses arriving at or leaving court. This is subject to the following.

Courts have the power, even in relation to proceedings in open court, to order that certain material (including the names of parties) be kept secret from the public sitting in court and, where that is the case, also from any media reporting of the case. However, such orders tend to be rare and reserved for cases where publication of the material would frustrate or render impracticable the administration of justice, rather than where a witness or defendant simply prefers to remain anonymous. It would appear that such restrictions with regard to identification of witnesses could extend to a prohibition on filming witnesses outside the court.

Section 46 of the Children and Young Persons (Scotland) Act 1937 provides courts with the power to prohibit the identification of children and young persons under the age of seventeen in relation to any court proceedings.

Although there is no specific statutory provision in Scotland in relation to anonymity for victims of sexual offences, in practice newspapers and broadcasters maintain anonymity for such victims.

NEWSPAPER COMMENTARY ON WITNESSES’ CHARACTER, ETC

It has been suggested that some newspaper editors have become increasingly frustrated at the apparent ease with which bloggers and social media websites appear to successfully circumvent contempt laws. Some commentators believe that this has led to a general diminution of standards in relation to the 1981 Act. Writing in his blog in the Guardian (2011), Roy Greenslade commented:

> Clearly, the media no longer take seriously the contempt of court act. Peter Wilby, writing in the New Statesman, argued that in recent years "the police, the government, the courts and the Press Complaints Commission have allowed and even colluded in what amounts to a complete rewriting of legal convention."

A recent high profile murder case in England highlighted the difficulties in this area for both the print media and the legal profession. Following the murder of Jo Yeates in December 2011, contempt proceedings were brought against two tabloid newspapers which had published stories and photographs about Ms Yeates’ landlord, Christopher Jeffries, whom the police had detained as a suspect. The newspapers’ coverage referred to Mr Jeffries as “creepy”, “weird”, “a loner” and “an eccentric”. The Attorney General took both the Mirror and the Sun newspapers to court for being in contempt. He argued that the articles would have made a fair trial impossible as there was a substantial risk of serious prejudice. Mr Jeffries was eventually released without

charge and the High Court found both newspapers guilty of contempt and fined the Mirror £50,000 and the Sun £18,000. Mr Jeffries also received substantial damages from a number of other newspapers following a successful defamation action.

The Defamation Act 1996 (the principal piece of legislation which governs defamation) applies throughout the United Kingdom. Defamation is a civil wrong which grounds an action for damages or an interdict against publication or repetition. Defamation consists of a false statement or idea which is defamatory to a pursuer. To be actionable the statement must be untrue. Amongst other things, the types of statement which might be considered to be defamatory include accusations of criminality or accusations against public character.

Those agencies who are involved in the dissemination of information will also have to have regard to the law in respect of breach of privacy and the commensurate article 8 of the European Convention on Human Rights ("right to respect for private and family life"). Currently, there is no statutory basis for breach of privacy in the UK and historically, the law in this area has developed to a greater extent in England and Wales, there having been very few "privacy" actions in Scotland.

MEDIA REPRODUCTION OF MATERIAL RELATING TO TRIALS

Some issues relating to the reproduction in the media of photographs, evidence and other material relating to criminal trials are covered above. However, there has recently been particular interest in the broadcasting of filmed police interviews with suspects.

The copyright of any images recorded for policing purposes is owned by the Chief Constable of the relevant force. Other images in the control or possession of the police are the copyright of the organisation or individual who recorded them. The consent of the owner of the copyright is required prior to the images being published. The disclosure of certain categories of material is considered inappropriate. This includes distressing material; material depicting any person other than the accused without the consent of that person; material depicting children; and material depicting crimes which may lead to copycat activity.

In another high profile case, police video tapes of interviews with former MSP Tommy Sheridan and his wife Gail were broadcast by the BBC in BBC Scotland Investigates: The Rise and Lies of Tommy Sheridan. According to a news article in the Scotsman in 2011, following an internal investigation, Lothian and Borders Police Board determined that the tapes were not leaked by the police. It was also stated that Crown Office had not leaked the tapes and that the only other people who had access to the tapes were the defence agents for Mr and Mrs Sheridan. The Sheridans' lawyer, Aamer Anwar, stated that it was not in the Sheridans' interest to release the tapes.

It is clear that if tapes of interviews with suspects are leaked and broadcast prior to a trial, this would fall within current contempt provisions.

POLICE COMMENT IN THE MEDIA DURING AND AFTER TRIALS

It may be argued that the police should seek to maintain a close working relationship with the media. For example, there will be occasions when the police deem it necessary to release certain information in the press and broadcast media to assist with an investigation. However, with regard to that relationship when suspects have been identified and charged, the police are subject to the constraints of contempt of court outlined above.

In her report The Ethical Issues Arising from the Relationship Between Police and Media, Elizabeth Filkin states that although the police are constrained by, amongst other things, contempt of court legislation, it is clear that those constraints are not always adhered to (page 6). In cases of contempt, the fact that the source of the offending material was the police is not allowed as an excuse or mitigating factor. This would suggest that the police must be extremely careful when commenting in the media during trials.

It has to be assumed that following a criminal trial, the police would still require to be cautious as to information which is released about a case or an investigation should it hamper future investigations. However, it may also be thought to be advantageous to comment on topics such as the thoroughness and success of an operation or the support which the police received from the public during an investigation.

JURY DELIBERATIONS, THE INTERNET AND SOCIAL MEDIA

As outlined above, in Scotland the permission of the court is still required to use devices that allow live text-based communication from court. Given the recent guidance issued in England and Wales, it would appear that the courts are becoming more relaxed about the use of such devices, notwithstanding that anyone using electronic text is still strictly bound by the existing restrictions on reporting court proceedings under the 1981 Act. However, a recent case in England has shown that the use of social media in courts may have potential consequences for the administration of justice. In a case in which nine men were convicted for their part in a child sex ring, a tweet from BNP leader Nick Griffin allegedly pre-empted the decision of the jury in the case. The message was apparently posted two and a half days into the jury's deliberations and stated that seven of the accused had been convicted. A BBC news release (2012) stated that investigations revealed the comment to be a completely accurate reflection of the jury's deliberations at that time. Defence lawyers called on the judge to discharge the jury but this was rejected. However, one of the nine men convicted in the case is currently appealing his conviction claiming a breach in jury confidentiality.

In the case involving Tommy Sheridan (see above), someone claiming to be a juror in the case posted comments on Facebook following the trial in which she discussed the decision made by jurors[3]. Under Section 8 of the 1981 Act, it is an offence to "disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings".

It should be noted that jury deliberations are carried out in private and that electronic devices are not permitted within jury rooms. Jurors are also instructed not to discuss the details of a case with anyone except fellow jury members and it is a criminal offence for anyone to try and obtain information from a juror about any of the matters discussed. Jurors are also instructed at the start of trials not to look in the media for any information about the case in question, but with the advance of the internet and ever-evolving social media, it is becoming increasingly difficult to control information which is accessible to almost everyone, including jurors in criminal cases.

In 2010, the UK Ministry of Justice published a research report "Are Juries Fair?". The research, which involved examining 62 cases involving 688 jurors at various Crown Courts in England, concluded that juries were fair, efficient and effective. However, it did find evidence of jurors using the internet to access information on their cases. More jurors admitted to having seen information on the internet than admitted actually searching it out, but all jurors who admitted looking for information said they had done so online. While only five per cent of jurors in standard cases (those lasting less than two weeks with little media coverage) admitted looking for information online, the rate amongst those hearing high-profile cases (those lasting two

[3] See 'Tommy Sheridan faces Facebook leak probe'. Daily Record 10 January 2011.

weeks or more with substantial pre-trial and in-trial media coverage) was almost three times higher. The research report stated that, perhaps unsurprisingly, jurors serving on longer, high profile cases were almost seven times more likely (70%) to recall media coverage of their case than jurors serving on standard cases (11%).

On juries and media coverage of criminal trials, the above research concluded that:

> "As part of a wider study of jury decision-making, this research could only provide an initial look at jurors and media coverage of cases. The findings point to a number of questions that should be explored further. The findings on media reporting in general show that in reality most cases tried by most juries (standard cases) will not have any substantial media coverage. But in high profile cases almost three-quarters of all jurors will be aware of some media coverage of their case. It would be helpful to know how jurors perceive coverage of high profile cases and what particular types of media coverage jurors find difficult to put out of their minds. And while it is true that the fade factor[4] exists for most jurors in high profile cases, a third of jurors on these cases did recall some pre-trial coverage. It would be useful to know the nature of pre-trial coverage jurors are most likely to recall.
>
> The findings on juror use of the internet also raise a number of important questions. First of all, did jurors realise they were not supposed to use the internet? Secondly, how did jurors use the internet?: did they simply "Google" the defendant or did they look for information on the law or evidence presented in the trial, did they look for information about other participants (legal counsel, judge, witnesses) or use social networking sites to discuss the case? Similar concerns over juror use of the internet exist in other jurisdictions (Brickman *et al*., 2008) and indicate that the issue is one of growing importance and complexity." (Ministry of Justice 2010)

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[4] The further away in time media reports are from a trial, the more likely they are to fade from jurors' memories.

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