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By Colin Wakefield*

Trial and Pretrial Publicity In English Criminal Justice

I. INTRODUCTION

This article aims to provide a statement of the law relating to trial and pretrial publicity in England. The discussion is limited to criminal cases, because it is in this area that there has been the greatest controversy in the United States—and Nebraska in particular. English courts are not bound by entrenched constitutional principles, and it may appear to the American reader that when the English courts balance conflicting interests of a free press and a fair trial, they are rather arbitrary in their preference for the latter. The rights of the individual defendant are afforded the greatest protection—a premise more often tacitly accepted than explicitly justified. Yet the law is not all one-sided. The following account is designed to show where the line is drawn.

There are few statutory provisions governing the issue of trial and pretrial publicity. These mainly relate to restrictions on the reporting of proceedings in court, are encroachments upon the common law freedom to report everything, and are justified by the need for protection of the individual or by interest in public decency. The law relating to pretrial and posttrial publicity, largely still governed by the common law, is discussed in the latter part of the article, along with a discussion of when information relating to a trial becomes *sub judice*. First, an examination of what may be published during a trial will be helpful.

II. REPORTING COURT PROCEEDINGS

In 1924, Lord Hewart, C.J., stated that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."¹ His statement illustrates the guiding principle that in England both criminal and civil proceedings should be in open court.

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The author thanks Professor Graham Zellick of the University of London, Queen Mary College, Faculty of Laws, for his assistance.

1. *The King v. Sussex Justices*, [1924] 1 K.B. 256, 259 (1923).

The basis of this principal is historical. In early days, the jury were neighbours, and were supposed to know the facts even before the case came to court. As the system developed, and juries were expected to decide on the evidence presented to them in court, the open nature of the proceedings was not diminished, for the result of a case was still taken to represent a public decision.

The history of matrimonial proceedings is different. These cases came before the ecclesiastical courts and the facts were ascertained in private, although judgment would be given in open court. When jurisdiction passed to the Court for Divorce and Matrimonial Causes in the nineteenth century,² the evidence still sometimes was taken *in camera*. The legality of such a procedure was examined by the House of Lords in 1913 in *Scott v. Scott*,³ where it was decided that no court had power to hear any matrimonial cause *in camera* merely in the interests of public decency. Viscount Haldane, L.C., held that the effect of the Divorce and Matrimonial Causes Act of 1857 was to provide that the new Divorce Court should conduct its business according to the general principles regarding publicity which regulated the other courts in the country. The most important of these was that all cases must be conducted in open court. Any limitation on this principle did not depend on the exercise of judicial discretion, but had to be based on the application of some other overriding principle. Any exception was supposed to be "the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done."⁴ When the subject matter of the action would be destroyed by a hearing in open court, as in the case of some secret process of manufacture, the hearing might be *in camera*.⁵ The same result would follow when tumult or disorder would make a public hearing impracticable, or when it was impossible to force an unwilling witness to give evidence in public.⁶ But the interests of public decency alone would not merit such exclusion at common law, and the House of Lords stressed that the

2. Divorce and Matrimonial Causes Act, 1857, 20 & 21 Vict., c. 85.

3. [1913] A.C. 417.

4. *Id.* at 437.

5. *Badische Anilin und Soda Fabrik v. Levinstein*, [1883] 24 Ch. D. 156 (secret process); *Andrew v. Raeburn*, [1874] L.R. 9 Ch. 522 (publication of certain letters in open court would entirely destroy the matter in dispute).

6. See, e.g., *Moosrucker v. Moosrucker*, 29 T.L.R. 658 (1913) (decided four months after *Scott v. Scott*). In *Moosrucker*, a divorce case, the wife's evidence was "so horrible" that her voice was scarcely audible. Because of her unwillingness to testify, Evans, P., decided that notwithstanding *Scott v. Scott* he had power to hear the witness *in camera*, and the court and gallery were cleared.

proceedings should be in private only if essential in the interests of justice. The examples given are not exclusive.⁷ When necessary for public safety or the defence of the realm, neither press nor public may be admitted to trial proceedings.⁸

Any hearing *in camera* must be justified either at common law according to the principles in *Scott* or by statute. The general rule is that there should be an open hearing in all cases. Coupled with this is the principle that, generally, court proceedings to which the public are admitted can be publicised, because an accurate report of the proceedings really only serves to enlarge the courtroom and admit more spectators.

The common law thus recognised free reporting as the natural extension of open hearings. The most striking statements have been taken from civil cases, but the principle in English law is pervasive. Reporting restrictions however, have been imposed by Parliament in certain areas. Reporters may be present as members of the public in the cases covered, but they may not report any matter outside the limits determined by the legislature.

A. Statutory Restrictions

1. Committal Proceedings

The most important and most recent restriction on the reporting of court proceedings is contained in section 3 of the Criminal Justice Act of 1967, and limits the reporting of committal proceedings. A committal hearing before magistrates determines whether there is a *prima facie* case against an accused charged with an indictable offence and whether he should be sent for trial by jury in the Crown Court. The prosecution evidence therefore must be presented to establish whether there is a sufficiently strong case to answer; but in practice the accused normally reserves his defence, and usually even consents to the committal on the basis of written depositions alone. Unrestricted reporting of these proceedings clearly can be prejudicial to the accused, for potential jurors will be presented with only one side of the case in the press. Yet such

7. In *Scott v. Scott*, Earl Loreburn stated:

It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety, the underlying principle . . . is that the administration of justice would be rendered impractical by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court.

[1913] A.C. at 446.

8. *The King v. Governor of Lewis Prison*, [1917] 2 K.B. 254.

reporting was allowed before 1967.⁹ Although it was not possible to prove that trials were prejudiced by full reports of committal proceedings—and before 1967 there was no alternative to a full hearing—it was generally believed that prejudice resulted from unbridled publicity.

The Criminal Justice Act of 1967 did not require that evidence be heard *in camera*, but that publication of the evidence be restricted. By section 3(4), a report of committal proceedings may be published or broadcast only with respect to limited subjects.¹⁰ Contravention of the section carries a fine of up to £500,¹¹ and reporting is stripped to the bare bones of the case.¹²

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9. It was a "rule" at common law that, where evidence of a person's previous convictions was given in a magistrates' court in committal proceedings, that evidence should not be referred to by a newspaper in its report of the proceedings. *The King v. Sanderson*, 31 T.L.R. 447 (1915). But the court apparently had no power to prevent such reports: "So far as the publication of that information is concerned, this court has no power to compel the press, but this court agrees that it is very undesirable that such information should be given." *The King v. Armstrong*, [1951] 2 All E.R. 219 (Lynskey, J.). This common law rule is now subsumed by the Criminal Justice Act, 1967, c. 80, § 3.
 10. The subjects which may be reported under the Criminal Justice Act, 1967, c. 80, § 3(4), are:
 - (a) the identity of the court and the names of the examining justices;
 - (b) the names, addresses and occupations of the parties and witnesses and the ages of the defendant or defendants and witnesses;
 - (c) the offence or offences, or a summary of them, with which the defendant or defendants is or are charged;
 - (d) the names of counsel and solicitors engaged in the proceedings;
 - (e) any decision of the court to commit the defendant or defendants for trial, and any decision of the court on the disposal of the case of any defendants not committed;
 - (f) where the court commits the defendant or any of the defendants for trial, the charge or charges, or a summary of them, on which he is committed and the court to which he is committed;
 - (g) where the committal proceedings are adjourned, the date and place to which they are adjourned;
 - (h) any arrangements as to bail on committal or adjournment;
 - (i) whether legal aid was granted to the defendant or any of the defendants.
 11. Criminal Justice Act, 1967, c. 80, § 3(5). Proceedings can only be instituted by or with the consent of the Attorney-General. *Id.* § 3(6).
 12. The press noted that with such restrictions it would be no longer worthwhile in most cases to send reporters to cover committal proceedings, and that therefore even these facts would not be reported. The Criminal Justice Act of 1967 therefore requires the justices' clerk to give notice of the most basic facts, *e.g.*, the defendant's name and

The restrictions do not apply, and the magistrates have no discretion, where the defendant, or any one of the defendants, asks that they be lifted.¹³ It has been held that an order made under section 3(2) applies to the totality of the committal proceedings and that a magistrate has no jurisdiction to make a limited order.¹⁴ This is so even if the proceedings concern several defendants and one of them obtains an order lifting the restrictions—the order then will apply to all the defendants, including those joined later.¹⁵

The restrictions apply only if the defendant, or any defendant, is committed, and then only until the conclusion of the trial. So a full report of the proceedings may be made where the magistrates determine not to commit any of the defendants or, if there is a committal, at the end of the trial of the last to be tried.¹⁶

The provisions of section 3 were criticised in the press as legalising "secret trials." The proceedings themselves are not secret, however, but open to press and public. There are other safeguards: if the accused is committed for trial, the proceedings may be reported at the end of the trial; and if there is no committal the press may report in full immediately. The fact that the accused may waive the restrictions is also important. There may, for example, have been great press publicity concerning police investigations prior to the committal proceedings. In such a case a detailed account of the less sensational prosecution evidence, even without defence evidence, can help to put the matter in perspective. It is also possible that witnesses will come forward as a result of this publicity.¹⁷

2. *Juvenile Court*

The reporting of proceedings that concern children is severely limited. The Children and Young Persons Act of 1933¹⁸ prohibits the publication of any newspaper report of proceedings in a juvenile court which reveals the name, address or school, or includes any particulars calculated to lead to the identification of any child

address, whether he has been committed and if so, upon what charges and to which court. *Id.* § 4.

13. *Id.* § 3(2).

14. *The Queen v. Russell*, [1969] 1 Q.B. 342 (1968).

15. *The Queen v. Blackpool Justices*, [1972] 1 All E.R. 388 (1971).

16. Criminal Justice Act, 1967, c. 80, §§ 3(3) (a), (b).

17. This, of course, is an argument against the imposition of any restrictions at all. The Tucker Committee found very slender evidence that witnesses would come forward as a result of publicity.

18. Children and Young Persons Act, 1933, 23 Geo. 5, c. 12, § 49(1).

or young person¹⁹ concerned in those proceedings, either as being the person against whom or in respect of whom the proceedings are taken or as being a witness therein, unless the court permits it. The section thus covers any information which might lead to the identification of the child, and has been extended to apply to sound and television broadcasts as well as to newspaper reports.²⁰ The Secretary of State may by order dispense with the requirements of the section if he is satisfied that such is in the interests of justice. The Children and Young Persons Act of 1933²¹ also gives the juvenile court power to direct that any or all of the above restrictions shall apply to proceedings in any other court. Under this provision the juvenile court must expressly limit the publication.

3. *Indecent Evidence*

One final statutory restriction applies in all proceedings in any court, and all the above statutory provisions are impliedly²² subject to it. Section 1(1) (a) of the Judicial Proceedings (Regulation of Reports) Act of 1926 provides that it shall be unlawful to print or publish in relation to any judicial proceedings any indecent matter or indecent medical, surgical, or physiological details which would be calculated to injure public morals. An exception is made in respect of the publication of any material in a *bona fide* set of law reports which does not form part of any other publication and consists solely of reports of court proceedings, or of any material in any publication of a technical character *bona fide* intended for circulation among members of the legal or medical professions.²³

4. *Possible Extensions*

The above provisions represent the full extent to which the legislature has imposed restrictions on reporting. The most likely area of reform is in rape cases. The Sexual Offences Bill currently before Parliament would restrict the publication, after an accusation of rape has been made, of particulars identifying the com-

19. For Juvenile Court purposes, a child or young person is defined as one under the age of 17. *Id.* § 46(1).

20. Children and Young Persons Act, 1963, c. 37, § 57(4).

21. Children and Young Persons Act, 1933, 23 Geo. 5, c. 12, § 39(1), *as amended by* Children and Young Persons Act, 1963, c. 37, § 57(4).

22. The Judicial Proceedings (Regulation of Reports) Act, 1926, 16 & 17 Geo. 5, c. 61, § 1, provides that "nothing in this part of this subsection shall be held to permit the publication of anything contrary to the provisions of paragraph (a) of this subsection."

23. *Id.* § 1(4).

plainant. The restrictions could be lifted where publicity is necessary for the collection of evidence.²⁴

B. Common Law Restrictions

The statutory restrictions outlined above are fetters on the factual content of reports of certain court proceedings. They are exceptions to the general rule that proceedings in open court can be reported in full. A fair and accurate report is privileged against any action for defamation by, for example, a witness or a third party who may have no connection with the case beyond being the subject of some defamatory allegation by a defendant or a witness.²⁵ A fair and accurate report also cannot amount to a contempt of court even if it is likely to prejudice a party to any future litigation.²⁶

Thus in *The Queen v. Kray*²⁷ further charges were pending against the defendant when newspaper reports were published concerning Kray's conviction for murder in a trial which had just ended. At the second trial, defence counsel sought to challenge prospective jurors for cause, on the ground that the murder conviction had been so extensively reported in the press as to be likely to influence jurors. Lawton, J., rejected this argument regarding most of the reports:

24. The House of Commons committee considering the Bill has accepted an amendment which would extend anonymity to defendants. There is no sign, however, that Parliament is considering legislation, such as that adopted in New Zealand, which suppresses automatically the names of those charged with any criminal offense unless or until there is a conviction. It is interesting to note that the New Zealand legislation began with reference only to victims in sex cases.

25. See *Lewis v. Levy*, 120 Eng. Rep. 610 (K.B. 1958). Lord Campbell, C.J., delivered the judgment of the court: "In *Curry v. Walter* (1 B. & P. 525) it was decided, above sixty years ago, that an action cannot be maintained for publishing a true account of the proceedings in a Court of justice, however injurious such publication may be to the character of an individual." *Id.* at 617.

The Law of Libel Amendment Act, 1888, 51 & 52 Vict., c. 64, § 3, states: "A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter."

26. "So long as any account so published is fair and accurate and is published in good faith and without malice, no one can complain that its publication is defamatory of him . . . notwithstanding that it may in fact be likely to create prejudice against a party to civil or criminal litigation." *In re Consolidated Press*, [1937] N.S.W. 255, 257-58 (Jordan, C.J.).

27. [1969] Crim. App. 412.

I can see no reason why a newspaper should not report what happens in court, even though there may be other charges pending. The reporting of trials which take place in open courts is an important part of the function of a newspaper, and it would not be in the public interest, in my judgment, if newspapers desisted from reporting trials, and from reporting verdicts and sentences in these trials, merely because there was some indictment still to be dealt with. What is more, the mere fact that a newspaper has reported a trial and a verdict which was adverse to a person subsequently accused ought not in the ordinary way to produce a case of probable bias against jurors empanelled in a later case. I have enough confidence in my fellow-countrymen to think that they have got newspapers sized up just as they have got other public institutions sized up, and they are capable in normal circumstances of looking at a matter fairly and without prejudice even though they have to disregard what they may have read in a newspaper. So, the mere fact that an earlier trial had been reported in the Press would not, in my judgment, amount to establishing a *prima facie* case of the probability of bias or prejudice in anyone summoned to attend as a juror for a later trial. A number of newspapers commented on the evidence in the earlier trial. I can see nothing wrong in that, provided the comment was fair.²⁸

But the court did allow counsel to challenge the jurors, for two newspapers had dredged up certain discreditable facts which were not evidence at the trial. The question of contempt was not raised, but Lawton, J., concluded his judgment with a strong warning:

Having called the attention of the Press to the difficulty which has been created by newspapers bringing into public view facts which were not established at the first trial, the mere occasion of this judgment will, I hope, result in a similar situation never arising again in the foreseeable future.²⁹

The reports of the two offending newspapers went beyond fairness and accuracy and could not have been protected from the law of contempt if a fair trial on the further counts could be shown to have been prejudiced. The other reports, however, *were* fair and accurate, and could not have been in contempt even if prejudice had in fact been occasioned.

A report is fair and accurate if the correct meaning of the proceedings or statement is conveyed. The report need not be word-perfect. In *The King v. Evening News*,³⁰ the Recorder, in his summing-up to the jury, had said:

The evidence in this case is of an extraordinary character, and there can be no doubt, I should say—it is for you to judge—that Hobbs was a party to a gigantic fraud, as monumental and perhaps as

28. *Id.* at 414.

29. *Id.* at 416.

30. [1925] 2 K.B. 158.

impudent a fraud as has ever been perpetrated in the course of our law.³¹

The newspaper report omitted the words "it is for you to judge." It was held that this omission did not materially alter the meaning of the Recorder's words, which may have prejudiced the defendant's case. Lord Hewart said: "It would not be right to punish a newspaper for reporting a charge where the real sting of the criticism is directed against the charge itself."³² The omission of a single word, however, clearly could constitute a grave inaccuracy. In an Australian case³³ the defendant to a charge of murder was reported to have confessed to murder, when he had in fact only admitted to killing. This report was held in contempt of court.

A report which is fair and accurate still may be in contempt if it is not made in good faith, for a publication made with intent to prejudice court proceedings will always be in contempt even if no prejudice is in fact occasioned.

III. PRETRIAL PUBLICITY

The restrictions on the reporting of court proceedings so far considered are curbs on the freedom of the press in the interest of a fair trial, i.e., in the interest of the individual. There is a direct clash of interests, but neither is specifically protected by any constitutional guarantee in England. It is perhaps for this reason that the conflict rarely manifests itself as a burning English social or political issue. Despite the fears and protests of the press at the restrictions imposed by the Criminal Justice Act of 1967 on the reporting of committal proceedings, and isolated examples of concern over specific issues,³⁴ it is not possible to phrase the argument in terms of two sacred principles at odds. The British "constitution"³⁵ contains no first or sixth amendment to pose the logically irreconcilable problems which have arisen from recent "gag orders" in the United States. The English common law, and the

31. *Id.* at 160.

32. *Id.* at 170.

33. *The Queen v. West Australian Newspapers*, 60 W. Austl. L.R. 108 (1958).

34. *E.g.*, *Attorney-General v. Times Newspapers Ltd.*, [1974] A.C. 273, where the House of Lords ruled that *The Sunday Times* would be in contempt of court to publish an article which in effect charged the Distillers Company (Biochemicals) Ltd., with negligence for marketing the drug thalidomide. Negligence was one of the issues in pending litigation against the company and publication, it was held, would prejudice that issue.

35. The British "constitution" is sometimes said to be "unwritten" or a collection of many documents and principles.

legislature in the case of committal proceedings, simply has cast its vote in favour of a fair trial whenever it has conflicted with the freedom of the press.

The conflict of interests frequently has been recognised. In *The King v. Blumenfeld*,³⁶ for example, Phillimore, J., said that "the court had to reconcile two things—the right of free speech and the public advantage that a knave should be exposed, and the right of an individual suitor to have his case fairly tried."³⁷ Phillimore, J., recognised that in order to reconcile the two there had to be limits to both:

[T]here were limits to the right of free speech, and no doubt articles or statements made near the time of the trial, especially on the eve of the trial or made at a place near in point of locality, were calculated to create an atmosphere unfavourable to one of the parties by deterring witnesses from coming forward and speaking their minds freely or by warping the minds of jurymen, and these should be deemed an interference with the course of justice, and should be restrained by the wholesome exercise of the jurisdiction of the court.³⁸

The right to a fair trial is favoured not merely for the sake of the individual defendant but for the sake of society at large by protecting the unprejudiced administration of justice. A statement tending to bias a potential juror in favour of the accused is as much a contempt of court as a statement in favour of the prosecution, and the privilege of free expression is curtailed only so far as necessary to exclude prejudice. Subject to the restriction noted above it is permissible to make a fair and accurate report of any court proceeding.

Neither does the law of contempt limit pretrial publicity of the circumstances and the police investigations of a crime, although the sensationalisation of these events clearly could prejudice the person ultimately arrested and tried.³⁹ But this freedom to report criminal investigations exists only before proceedings are pending or imminent. This field now will be explored in more detail.

The governing principle underlying restrictions on pretrial publicity is, like that behind coverage of the trial itself, the defendant's

36. 28 T.L.R. 308 (1912).

37. *Id.* at 311.

38. *Id.*

39. But if such a report is published *mala fide* in order to prejudice a suspect or defendant this surely would be contempt.

It may make little difference whether a report says that police are hunting for the murderer of X and later that they have arrested Y, and are charging him with murder, or whether the report says that the police have arrested Y, the murderer of X. Yet the latter will be in contempt of court and the former, in most cases, will not.

right to a fair trial. Most of the complex laws of evidence are designed to protect the defendant and to enable determination of the true facts by the exclusion of unreliable or irrelevant data. The ways in which this protection could be destroyed by free-ranging press reporting are numerous. For example, the publication of an involuntary confession by the accused, inadmissible as evidence, would be unreliable and highly prejudicial. English law has been set against trials by the media, because, in the words of Wills, J.:

[T]heir tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned. It is difficult to conceive an apter description of such conduct than is conveyed by the expression “contempt of court.”⁴⁰

Any attempt to usurp the function of the court to the prejudice of the safeguards provided by the rules of evidence and procedure is severely punished by English law. A contempt is committed if there is a real risk of prejudice, even if no prejudice is in fact caused.

The two essential ingredients of a “fair trial” are absence of bias, and freedom to determine facts. Publications which induce bias or prejudice the accurate determination of facts are likely to constitute contempt in England.

A. Publications Inducing Bias

It is of primary importance that the court or jury approach the issue of guilt with complete impartiality. This was forcefully stated by Lord Alvestone, C.J., in *The King v. Tibbits*:⁴¹

A person accused of a crime in this country can properly be convicted in a court of justice only upon evidence which is legally admissible and which is adduced at his trial in legal form and shape. Though the accused be really guilty of the offence charged against him; the due course of law and justice is nevertheless perverted and obstructed if those who have to try him are induced to approach the question of his guilt or innocence with minds into which prejudice has been instilled by published assertions of his guilt or imputations against his life and character to which the laws of the land refuse admissibility as evidence.⁴²

There are many ways in which the impartiality of the court can be impaired. An opinion on the merits or the outcome of a case

40. *The King v. Parke*, [1903] 2 K.B. 432, 437.

41. [1902] 1 K.B. 77 (1901).

42. *Id.* at 88.

clearly will amount to a contempt. This is the very issue which has to be determined by the court on the strength or weakness of the admissible evidence. If a newspaper expresses such an opinion either during or before a trial there is a clear risk of a prejudicial effect on impanelled or potential jurors. A clear assertion of guilt, or innocence, is the most obvious example. Such cases are rare but not unknown. In *The Queen v. Odhams Press Ltd.*,⁴³ the publishers of *The People* newspaper were held in contempt for the publication of an article which was one of a series dealing with prostitution and brothel-keeping in London. The banner headline read "Arrest this beast,"⁴⁴ and a photograph of one Micallef was displayed. It was alleged that he was "up to his eyes in this foul business of purveying vice and managing street women."⁴⁵ At the time of publication, Micallef was under arrest awaiting committal for trial for brothel-keeping. Lord Goddard, C.J., delivering the judgment of the Queen's Bench Division of the High Court, said:

With the truth or falsity of the various allegations in the article this court is not concerned, for it is not and could not be disputed that anything more calculated to prejudice a fair trial could not well be imagined, and considering that the proprietors claim a circulation of over four million copies a week, there is a strong possibility that it would be read by at least some of those summoned as jurors to the sessions.⁴⁶

Less direct opinions of guilt also have been held to constitute contempt. In *The King v. Williams*⁴⁷ a play was staged in which one John Thretwell was presented as a murderer. At the time, Thretwell was charged with murder. In *The Queen v. Balfour*,⁴⁸ while Balfour was awaiting trial on a charge unspecified in the report, the *Review of Reviews* published an article which contained the following statement: "Another rare rogue in the shape of Jabez Balfour was a good deal before the courts last month. He will reappear at the Old Bailey, and then we may expect to hear no more of him for some time to come. Nemesis has leaden feet, but even justice comes to him who knows how to wait."⁴⁹ Wright, J., asked in argument: "How can it be fair comment that a man who is on his trial will be convicted?"⁵⁰ It was held that the article was in contempt. Wills, J., said that the principle to be applied in such cases was clear:

43. [1957] 1 Q.B. 73 (1956).

44. *Id.* at 74.

45. *Id.* at 77.

46. *Id.* at 78.

47. [1824] 2 L.J.K.B. 30 (1823).

48. 11 T.L.R. 492 (1895).

49. *Id.* at 492.

50. *Id.*

It was not because the comments might damage the accused person that the court would interfere, but on a broader and higher ground —namely, that it was the province of the tribunal before whom the charge was tried to determine as to his guilt or innocence. The fact that jurors could be trusted not to let their minds be prejudiced was no answer to this application. The writer here had thrown his contribution into the stream of prejudice against the person to be tried and was anticipating the result of the trial, which was an illegal and improper thing to do.⁵¹

The media also must take care in describing the nature of the charge. In one case,⁵² a widely distributed newsfilm featured an "Attempt on King's life" and showed the arrest of the alleged suspect. In fact the latter was charged with a less serious offence than attempted murder, and, because the film tended to create prejudice against the accused, it was held to amount to a contempt of court.

Because attempts to prejudice the issue are in contempt due to their tendency to upset the impartial administration of justice, an imputation of innocence is as much in contempt as an imputation of guilt.⁵³

Any comment on the character of the accused which is calculated to excite hostility will amount to a contempt, for its prejudicial effect is obvious. At the trial, evidence of the accused's bad character is inadmissible except in limited circumstances.⁵⁴ It is

51. *Id.* at 493.

52. *The King v. Hutchinson*, [1936] 2 All E.R. 1514.

53. *The Queen v. Castro*, [1873] L.R. 9 Q.B. 219.

If it is open to those who take the part of the accused to discuss in public meetings the merits of the prosecution in the interest of the accused, it is obvious that it must be equally open to those who believe in the guilt of the party accused and the propriety of the prosecution, and believe a conviction is necessary to the ends of justice, to collect meetings and to hold language of the opposite tendency; and thus the course of justice might be interfered with and disturbed by discussions taking place outside the walls of a court of justice but which might in the end influence proceedings within it.

Id. at 226.

54. Evidence of the misconduct of the accused on other occasions must not be given if its only relevance is to show a disposition towards wrongdoing in general, or a disposition to commit the particular crime with which he is charged. It is only admissible if it is of very high probative value. "The basic principle must be that the admission of similar fact evidence . . . is exceptional and requires a strong degree of probative force." *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421, 444 (1974) (Lord Wilberforce).

When the accused does not give evidence (he is not a compellable witness), the prosecution can only give evidence of his bad character if the defense raises the issue, *e.g.*, by calling witnesses to speak of

important therefore that those who have a part to play in the trial should not be exposed to information which is excluded by these rules. It may be very easy for a newspaper to comment unfavourably on the character of the accused, and a thorough exploration of his perhaps murky past may have considerable popular news value. Any publication which brings to the notice of the public, and therefore potential jurors, facts of this nature will be in contempt because of their obvious tendency to prejudice the issue.

Thus the publication of an accused's criminal record is forbidden. In *The King v. Parke*⁵⁵ the *Star* newspaper revealed that one Dougal, then awaiting trial on a charge of forgery, had been convicted of forgery eight years previously, and had been sentenced to twelve months' imprisonment with hard labour. The editor was held in contempt of court, for the article was "unquestionably calculated to produce the impression that, apart from the charges then under inquiry, he was a man of bad . . . character."⁵⁶

Similarly, any suggestion that the accused is of disreputable character apart from having past convictions will be in contempt if it is likely to prejudice his defence. In *The Queen v. Thomson*

his good character, or by cross-examining witnesses for the prosecution with a view to inducing them to do so.

When the accused gives evidence himself he is immune from questions concerning his past conduct or his bad character by virtue of the Criminal Evidence Act, 1898, 61 & 62 Vict., c. 36, § 1(f):

A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

- (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
- (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecution or the witnesses for the prosecution; or
- (iii) he has given evidence against any other person charged with the same offence.

Id. The very complexity and detail of these rules, which have given rise to some very nice problems of interpretation in practice, show the extent to which they will be undermined if allowed to be ignored outside the courtroom.

55. [1903] 2 K.B. 432.

56. *Id.* at 435 (Wills, J.).

Newspapers Ltd.,⁵⁷ Michael Malik was awaiting trial for an offence under the Race Relations Act of 1965.⁵⁸ *The Times* published a photograph of Malik with the caption: "Michael Abdul Malik, 34, West Indian. Came to UK 1950, took to politics after an unedifying career as brothel keeper, procurer, and property racketeer. Muddled thinker, but natural flair for self-advertisement."⁵⁹ This was a blatant contempt because "except in special circumstances, a jury is not entitled to know anything of the prisoner's bad character"⁶⁰

The publication of a confession by the accused, whether admissible or not, is also a threat to the impartiality of the court. A pretrial confession is no proof of guilt because the accused may repudiate the confession at his trial, or it may be inadmissible because involuntary.

The danger of publishing alleged confessions is clear from the case of *The King v. Clarke*.⁶¹ The *Daily Chronicle* reported that after his arrest in Canada, Crippen, the accused, admitted, in the presence of witnesses, to killing his wife, but denied murdering her. This report was held to be in contempt. Darling, J., stated that:

[A]nything more calculated than that to prejudice the defence of a man can hardly be conceived. This statement is circulated among those who will be jurors at the trial . . . because the jurors are drawn from the whole body of the county of Middlesex, in which this paper is widely circulated. No one can suppose that the jurymen entered the jury box in this case without ever having heard of it; but the less they hear of a case before they come to listen to the evidence the better, and newspapers do not help in the administration of justice by publishing what one can only describe as idle gossip It is most important that the administration of justice in this country should not be hampered as it is hampered in some other countries, and . . . we are determined while we are here to do nothing to substitute in this country trial by newspaper for trial by jury.⁶²

B. Publications Which Prejudice Accurate Determination of Facts

Any interference with the administration of justice which results in the suppression of facts clearly can be as prejudicial to a fair trial as a biased assessment of the true facts. A publication can have the effect of deterring witnesses from coming forward while not

57. [1968] 1 All E.R. 268 (Q.B. 1967).

58. Race Relations Act, 1965, c. 73.

59. [1968] All E.R. at 269.

60. *Id.*

61. 103 L.T.R. (n.s.) 636 (K.B. 1910).

62. *Id.* at 640.

necessarily being directed at any particular witness. Although this has occurred more frequently in civil cases, there have been examples in criminal trials.⁶³ Any publication which tends to induce the court to treat with scepticism the evidence of a witness by attempting to discredit that witness will also constitute a contempt.⁶⁴

Any publication of private investigation by a newspaper will amount to contempt if it interferes with the court's own determination of the facts. The published facts may bear no resemblance to the evidence which is admissible, and in fact admitted, at the trial. In *The King v. Editor & Printers & Publishers of the Evening Standard*,⁶⁵ the *Evening Standard* had embarked upon and published details of an independent investigation into a crime for which a suspect had been arrested and charged. This was held in contempt. Lord Hewart, C.J., made clear in strong terms that it was no part of the duty of a newspaper to elucidate the facts of a case while the trial was pending:

Those who had to judge by the results could see what a perilous enterprise this sort of publication was. It was not possible even for the most ingenious mind to anticipate with certainty what were to be the real issues . . . in a trial which was about to take place. It might be that a date, a place, or a letter, or some other thing which, considered in itself, looked trivial, might prove in the end to be a matter of paramount importance. It was impossible to foresee what was important.⁶⁶

The publication of interviews with witnesses may also be in contempt, for this anticipates the evidence which may be given in court, and may be different from it. An item of hearsay evidence,

63. For example in *The Queen v. Socialist Worker*, [1975] 1 Q.B. 637 (1974), the publishers of an article were held in contempt of court for revealing the names of black-mail victims who had been referred to at the trial as Mr. X and Mr. Y and whose identity the judge ordered to be kept secret. This was out of no feeling of tenderness towards the victims, but so as not to discourage such witnesses in the future. Lord Widgery, C.J., said that "by destroying the confidence of witnesses in potential black-mail proceedings in the protection which they would get, there was an act calculated to interfere with the due course of justice." *Id.* at 652.

64. See, e.g., *In re Labouchere*, 17 T.L.R. 578 (K.B. 1901), where the testimony of a witness was described as "this masterstroke of ingenious impudence." *Id.* at 578. The article containing this comment was held by Bruce, J., to be "calculated to imply that Cowen was not a witness to be relied upon, that it held him up as a person whose conduct was to be condemned and that it might prejudice the mind of any jurymen against Cowen, who happened to read it." *Id.* at 579.

65. 40 T.L.R. 833 (K.B. 1924).

66. *Id.* at 835.

for example, might feature prominently in any such interview, but would be inadmissible at the trial. Similarly, an interview with a leading suspect should not be published. In *The Queen v. Savundranayagan*⁶⁷ Savundranayagan appealed against his conviction for fraud because of pretrial publicity which had been given to his case. At a time when, according to Salmon, L.J., "[i]t must surely have been obvious to everyone that Savundranayagan was about to be arrested and tried on charges of gross fraud,"⁶⁸ he was interviewed on television. Although no charges for contempt were brought, Salmon, L.J., made it clear that similar interviews in the future would attract such charges.⁶⁹

Where identification is likely to be an issue at the trial the publication of photographs of the accused will also be in contempt, because such a publication might induce a witness to identify the accused from a recollection of the photographs. In *The King v. Daily Mirror*⁷⁰ Lord Hewart, C.J., commenting on the publication of a photograph where identity was in issue said:

The unfairness of that course is manifest, because the witness approaches the difficulty and it may be the crucial task of identification with his mind prejudiced by the knowledge that this particular person has been arrested and is in the hands of the police.⁷¹

In all the above cases the major consideration was the potential effect of the publication upon jurors. A jury is more likely to be prejudiced by such publications than a judge, who is aware of the

67. [1968] 3 All E.R. 439 (C.A.).

68. *Id.* at 441.

69. No-one should imagine that he is safe from committal for contempt of court if, knowing or having good reason to believe that criminal proceedings are imminent, he chooses to publish matters calculated to prejudice a fair trial. On any view the television interview with the appellant Savundranayagan was deplorable. With no experience of television, he was faced with a skilled interviewer whose clear object was to establish his guilt before an audience of millions of people. None of the ordinary safeguards that exist in a court of law were observed, no doubt because they were not understood. They may seem prosaic to those employed in the entertainment business, but they are the rocks on which freedom from oppression and tyranny have been established in this country for centuries This court hopes that no interview of this kind will ever again be televised. The court has no doubt that the television authorities and all those producing and appearing in televised programmes are conscious of their public responsibility and know also of the peril in which they would all stand if any such interviews were ever to be televised in the future. Trial by television is not to be tolerated in a civilized society.

Id.

70. [1927] 1 K.B. 845.

71. *Id.* at 849.

rules of evidence and so should be able to distinguish the admissible from the inadmissible. The very reason why some character evidence and hearsay statements are inadmissible at the trial is that the jury is thought not to have this capacity. The only way to overcome the difficulty is to ensure that the public are not exposed to prejudicial publications at all. Their minds must be blank at the start of a trial. Lord Ellenborough made this clear in 1811:

If anything is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. Is it possible they should do so, after having read for weeks and months before *ex parte* statements of the evidence against the accused, which the latter had no opportunity to disprove or controvert?⁷²

It is not necessary that the publication actually prejudice the trial. It is sufficient that it be calculated⁷³ to do so. In *The Queen v. Savundranayagan*,⁷⁴ for example, Savundranayagan's appeal was dismissed because in the particular circumstances of the case no prejudice had been occasioned by the pretrial publicity. Yet the television interview was undoubtedly in contempt. The courts, however, are conscious of their arbitrary powers in relation to contempt and will not punish a contempt which has in fact caused no prejudice unless there was a real risk of prejudice or an intention by the publishers to prejudice proceedings. To satisfy the "real risk of prejudice" test the publication must represent a substantial threat to a fair trial. There must be "a real risk as opposed to a remote possibility that the article was calculated to prejudice a fair hearing,"⁷⁵ and "a finding of contempt of court must be based on a solid view of the likelihood of such interference and not on fanciful notions."⁷⁶

An intention to prejudice proceedings will be a contempt of court if no prejudice has been occasioned and even if there was no risk of such prejudice. Most of the cases under this heading concern attempts to bribe or threaten judges,⁷⁷ but a newspaper

72. *The King v. Fisher*, 170 Eng. Rep. 1253, 1255 (K.B. 1811).

73. "Calculated" is used in the cases to convey an objective meaning. The publication must have the tendency, objectively considered, to prejudice the case.

74. [1968] 3 All E.R. 439 (C.A.)

75. *The Queen v. Duffy*, [1960] 2 Q.B. 188, 200 (Lord Parker, C.J.).

76. *Carl-Zeiss Stiftung v. Rayner & Keeler Ltd.*, [1960] 3 All E.R. 289, 293 (Ch.) (Russell, J.).

77. *E.g.*, *Martin's Case*, 39 Eng. Rep. 551 (Ch. 1747), where Thomas Martin sent a private letter to the Lord Chancellor concerning a threatened suit against him, and was unwise enough to enclose a £20 note. The

campaign designed to prejudice the outcome of an appeal would constitute a contempt even if it were held that there was no real risk of the appellate tribunal being influenced.⁷⁸

The discussion above has concerned the types of publications which may amount to contempt. But there arise stages before and after which the law of contempt will not operate at all, whatever the nature of the publication, unless there is an intention to prejudice the proceedings. Lord Parker, C.J., has said that the first question must always be whether, when the publication was made, the proceedings "were still *sub judice* or pending, so that the publication of improper matter might amount to contempt of court."⁷⁹ There is no conclusive authority on the question of when the law of contempt begins in relation to criminal proceedings. There is a line of cases which shows that the law is operative when criminal proceedings are "pending." The best illustration is a statement of Cockburn, C.J., in 1873: "It is clear that this Court has always held that comments made on a criminal trial or other proceedings, when pending, is an offence against the administration of justice and a contempt on the authority of this Court."⁸⁰ This was from a clear case—proceedings were held to be pending, and so subject to the law of contempt, where committal proceedings had taken place, but the trial had not yet begun.⁸¹ The point was more fully explored in *The King v. Clarke*.⁸² Crippen, the accused, was arrested on warrant on July 31st on board ship, but was not returned to England and formally charged until August 27th. On August 5th a newspaper report appeared in England containing an alleged confession by Crippen. One of the questions in the case was whether the law of contempt operated at all. The defence contended that it could not operate until the accused formally had been charged. This was rejected by the court. Darling, J., said: "We see no authority nor do we see any reason which can be deduced from any authority which obliges us to hold that there are no pending proceedings until the person has actually been put in the dock and charged with the offence."⁸³ To do so would be a damaging limitation on the powers of the court:

head of the judiciary was, of course, incorruptable, but Martin's action amounted to a contempt.

78. See *The Queen v. Duffy*, [1960] 2 Q.B. 188, 194 (Lord Parker, C.J.).

79. *Id.* at 195.

80. *The Queen v. Castro*, [1873] L.R. 9 Q.B. 219, 227.

81. The principle was extended in *The King v. Parke*, [1903] 2 K.B. 432, where proceedings were "pending" for contempt purposes where a suspect had been remanded in custody but not yet committed for trial.

82. 103 L.T.R. (n.s.) 636 (K.B. 1910).

83. *Id.* at 639.

[W]e are asked to say that after the magistrate has performed a judicial act upon sworn information laid before him there are no proceedings against an accused person, and where the person has been arrested upon a warrant and is in custody, that there are no proceedings against the accused person in the sense that anybody is at liberty to say whatever he pleases concerning the case, which has got as far as an information on oath, has got as far as the issue of a warrant after judicial consideration by a magistrate, and has got as far as the execution of that warrant by the arrest of the accused person. In my opinion it would be gravely to narrow the jurisdiction of this court to lay down any such rule as that.⁸⁴

Although this case concerned arrest by warrant, it is likely that proceedings also would be considered to be pending after an arrest without warrant. This view has been adopted in Australia.⁸⁵ There is *dicta* in *The King v. Clarke* from all three members of the court that the law of contempt begins to operate after the issue of a warrant, and not just after the arrest: "There is ample authority for holding that the prosecution has begun, at any rate, when the warrant is issued."⁸⁶

Although it is clear that the law catches publications after proceedings are pending, there is no clear authority to support the proposition that proceedings must be pending. There is a hint that the judicial machinery need not necessarily have been set in motion in the judgment of Wills, J., in *The King v. Parke*⁸⁷ where he said: "It is possible very effectually to poison the fountain of justice before it begins to flow."⁸⁸

In *The Queen v. Odhams Press Ltd.*,⁸⁹ Lord Goddard, C.J., quoted Wills, J., and was of the opinion that the law of contempt could begin earlier than an arrest or the issue of a warrant. The

84. *Id.* Darling, J., gave an example of what might happen if such were the law:

Suppose a man to have been accused by information, to have been arrested upon warrant, and to be about to be tried before the magistrate, then . . . anyone, without the slightest danger, in any newspaper or elsewhere, might say what he pleased about that matter in the way of comment, give any kind of opinion as to what the evidence was which was likely to be brought against the man, and, if that were so, it is perfectly obvious that the prisoner or his friends might easily take steps, not by conspiracy with the person giving the information, but in consequence of the information so given, to bring the whole prosecution to a futile end.

Id.

85. *James v. Robinson*, 109 C.L.R. 593 (Austl. 1963).

86. 103 L.T.R. (n.s.) at 640 (Pickford, J.). See also *id.* at 639 (Darling, J.); *id.* at 641 (Lord Coleridge, J.).

87. [1903] 2 K.B. 432.

88. *Id.* at 438.

89. [1957] 1 Q.B. 73 (1956).

word "imminent" was first used in relation to this prejudicial stage by Lord Hewart, C.J., in 1927⁹⁰ but, although the authority is only *obiter*, the strongest support comes from the judgment of Salmon, L.J., in *The Queen v. Savundranayagan*⁹¹ where he said: "No-one should imagine that he is safe from committal for contempt of court if, knowing or having good reason to believe that criminal proceedings are imminent, he chooses to publish matter calculated to prejudice a fair trial."⁹² But there is direct authority in Australia against this view.⁹³

While it is unclear whether the "imminent" test will be accepted in English law, it is still less clear what "imminent" means. In the Northern Irish case of *The Queen v. Beaverbrook Newspapers Ltd.*,⁹⁴ Sheil, J., thought it meant "impending" or "threatening," and in *The Queen v. Savundranayagan*,⁹⁵ Salmon, L.J., pointed out that at the time of the television interview with Savundranayagan that "it must surely be obvious to everyone that he was about to be arrested and tried on charges of gross fraud."⁹⁶ It must be clear that an arrest is to be expected in the near or immediate future. It is impossible to be more precise than that.

The determination of when the ambit of the law of contempt ceases is an easier question. There is no postjudicial twilight zone as there is before a trial when proceedings are merely imminent. Wills, J., expressed the matter succinctly in *The King v. Parke*:⁹⁷ "It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream

90. *The King v. Daily Mirror*, [1927] 1 K.B. 845, 851.

91. [1968] 3 All E.R. 439 (C.A.).

92. *Id.* at 441. There is also support for a distinction between proceedings which are "pending" and those which are "imminent," both caught by the law of contempt, in the Administration of Justice Act, 1960, 8 & 9 Eliz., c. 65, § 11(1):

A person shall not be guilty of contempt of court on the ground that he has published any matter calculated to interfere with the course of justice in connection with any proceedings pending or imminent at the time of publication if at that time (having taken all reasonable care) he did not know and had no reason to suspect that proceedings were pending, or that such proceedings were imminent, as the case may be.

Commenting on this subsection in *The Queen v. Beaverbrook Newspapers Ltd.*, [1962] N.I. 15, Sheil, J., said: "Whatever may be said of the distinction between 'proceedings pending' and 'proceedings imminent,' it is clear from the use of the words 'as the case may be' that a distinction was intended." *Id.* at 21.

93. *James v. Robinson*, 109 C.L.R. 593 (Austl. 1963).

94. [1962] N.I. 15.

95. [1968] 3 All E.R. 439 (C.A.).

96. *Id.* at 441.

97. [1903] 2 K.B. 432.

has ceased.”⁹⁸ A case will remain *sub judice* until any appeal has been determined in the defendant’s favour, or the time in which any possible appeal may be made has expired. It must be remembered that we are here concerned only with the time during which the law of contempt operates. Because appeals are heard by judges alone it is far less likely that a contempt would be found at this stage, for there is less likelihood of influencing the tribunal, and the facts of the case rarely will be in dispute. The extension of the operative period, is, however, relevant, for there may be cases where a publication is held to discourage a convicted defendant from appealing.

IV. CONCLUSION

The “bare facts” of a case always may be reported. Such facts were described in an Australian case⁹⁹ as including “extrinsic ascertained facts to which any eye-witness could bear testimony, such as the finding of a body and its condition, the place in which it is found, the person by whom it was found, the arrest of a person accused, and so on.”¹⁰⁰ But in the same case a warning was sounded which permeates the whole law on this subject:

But as to the alleged facts depending on the testimony of some particular person which may or may not be true, and may or may not be admissible in a Court of Justice, other considerations arise. The lawfulness of the publication in such cases is conditional and depends, for present purposes, upon whether the publication is likely to interfere with a fair trial of the charge against the accused person.¹⁰¹

It is vital that the publication not prejudice any issue in the case, such as the accused’s defence or the question of his guilt.

It is legitimate to publish accounts of police investigations leading up to an arrest. Even though the publication of photographs of an accused where identity is in issue will amount to contempt, it is not contempt for the media to publish photographs or other information at the request of the police in order to help them with inquiries. The risk of prejudice may be outweighed by the public interest in bringing offenders to justice, but may not be outweighed by mere public curiosity.

98. *Id.* at 438.

99. *Packer v. Peacock*, 13 C.L.R. 577 (Austl. 1912).

100. *Id.* at 588 (Griffith, C.J.).

101. *Id.*