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## **‘Trial by the media’.**

**An examination of domestic contempt law in England, critiquing its various underpinning models and considering the potential for reform.**

**Thesis submitted for the degree of:**

**Master of Jurisprudence.**

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## **Chapter 1: Introduction**

This thesis will focus on contempt of court law under the English Legal system and in particular, on potentially prejudicial or impeding publications and their effect on the ability to have a fair trial. As Lord Diplock remarked: ‘Trial by newspaper or, as it should be more compendiously expressed today, trial by the media, is not to be permitted in this country’.<sup>1</sup> It will be assessed, primarily focusing on Article 6 and Article 10, as to whether the current system can be said to be compatible with the European Convention on Human Rights<sup>2</sup> and Strasbourg’s jurisprudence. It will be questioned whether, even if such compatibility is found; whether contempt law is continuing to fulfil its underlying purposes. Consequently, it will look at the potential for reform in this area; and will consider whether the most likely and satisfactory mechanism for change would arise in the form of abolition, new parliamentary legislation and/or via the Courts using s.2, s.3 and s.6 of the Human Rights Act<sup>3</sup> to reshape the current laws.

## **Models**

As Brandwood has explained, three theoretical models can be identified which form the basis of contempt of court law.<sup>4</sup> To fully understand and appreciate the legal approach, it must be fully understood what the underlying aims are, which can be done by acknowledging the theoretical basis it is founded upon. Therefore, details of the preventative model, the protective model and the neutralising model will now be explored. From this the thesis will

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<sup>1</sup> *Attorney General v English* [1983] A.C. 116.

<sup>2</sup> European Convention on Human Rights (1951).

<sup>3</sup> Human Rights Act (1998).

<sup>4</sup> J. Armstrong Brandwood, “You say ‘Fair Trial’ and I say ‘Free Press’: British and American approaches to protecting defendants’ rights in high profile trials” [2000] 75 NYLR 1412.

identify the most effective model, and shape the critiques of the current law and proposed recommendations from this approach.

### **Preventative Model**

Within the preventative model the state seeks to prevent material being promulgated which will affect the fairness of proceedings; prior restraints are used to do this.<sup>5</sup> Thus, this model relies heavily on intervention by the state, which is done through injunctions or court orders preventing specific publications before they have been published and imparted to the public. Consequently, it has the potential to fail to protect the media's Article 10 rights and to overprotect the court proceedings. As a result this creates an environment which could cause a chilling effect on the media, as publishers will be afraid to attempt to publish anything that may be censored by the state. Therefore, this would be seen as a clear violation of Article 10 ECHR, as the freedom of the press is viewed as a necessary pillar for upholding a democratic society,<sup>6</sup> a sentiment which was similarly stated in *Sunday Times v UK*<sup>7</sup> where the court remarked – ‘freedom of expression constitutes one of the essential foundations of a democratic society’. For that reason, any preventative approaches to the media could quash their ability to impart information and ideas, which the public have a right to receive.<sup>8</sup> As such, this model must be limited in its usage, as the total ban on any publication is a strong interference with Article 10 and would need to be shown to strongly meet the Article 10(2) exceptions.

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<sup>5</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) pp175-176.

<sup>6</sup> *Jersild v Denmark* (Application no. 15890/89) JUDGMENT STRASBOURG , 23 September 1994.

<sup>7</sup> [1979] 2 EHRR 245 at 280.

<sup>8</sup> *Ibid.*

However, Fenwick and Phillipson's analysis of this approach fails to mention the potential merit in this model, as if the regulations are very precise, prior restraints can be more effective than broad post-publication sanctions under the protective model.<sup>9</sup> This model is used widely across Europe and some elements can be seen in the current English law.<sup>10</sup> Nevertheless, the scope of this approach is too restrictive to Article 10 and would unlikely meet the proportionality threshold in the majority of cases; thus, basing the contempt law fundamentally on a preventive basis would not be the best approach for ensuring free speech within a democratic society. Therefore, other approaches must be more heavily relied on.

### **The Protective Model**

The protective model uses post-publication sanctions under the law of contempt to protect the administration of justice from media-created prejudice.<sup>11</sup> It is meant to act as a deterrent so that the media can report on proceedings, but in a non-prejudicial way. The law does not look at whether prejudice has in fact arisen; instead it relies on the trial judge to ensure the fairness of proceedings. The model leaves the media to publish whatever they want to on the proceedings; thus unlike the preventative model there is no strong reliance on prior restraints by the state. However they are at risk of attracting post-publication sanctions if they meet the relevant tests prescribed under the jurisdiction in question.

Nevertheless, although a more media-friendly method of upholding Article 10 rights than under the preventive approach, the test can under-protect the judicial process. If the tests create a very high test to prove prejudice, then it is unlikely to act as a deterrent, which is the

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<sup>9</sup> See I. Cram, "Automatic reporting restrictions in criminal proceedings and Article 10 of the ECHR" (1998) EHRLR 742.

<sup>10</sup> *Ibid.*

<sup>11</sup> Fenwick, n.5 above, p176-177.

very fundamental problem affecting the function of this model. Therefore, trials can in fact be prejudiced, which would mean the trial judges themselves would have to initiate neutralising measures to attempt to negate the effect of the prejudicial publications, which themselves can cause an impediment to the justice system.<sup>12</sup> If a trial appears to have been affected by such publications, this can be the foundation for a successful appeal.<sup>13</sup> Nevertheless, the effect of the publications can leave a (factually) guilty person free and an innocent in prison until such an appeal has been launched; in addition, a successful appeal is unlikely to deter the media from publishing prejudicial material in the future. There is an unpredictable nature to the use of the protective model, as it can under-protect trials and free speech, depending on the situation and outcome, which is only further enhanced if the media fails to use its freedom under this model to enhance fairness in trials.<sup>14</sup>

Conversely, the model has the ability to create a chilling effect on the media, if the scope of the law is left ambiguous and too far reaching, as this would suppress the media through fear of any publication attracting criminal liability. In this instance, the protective model can be seen to merge with the preventative model and there distinction left unclear, as broad post publication sanctions would stifle media bodies and prevent them from publishing any material. Consequently, in instances where the preventative and protective models seemingly merge the approaches are weakened, ineffective and would be incompatible with the ECHR Article 10. Thus, for the protective model to be effective, the law must be clear and

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<sup>12</sup> D. Corker & M. Levi, “Pre-trial Publicity and its Treatment in the English Courts” [1996] Crim LR 622.

<sup>13</sup> *Taylor* (1993) 98 Cr App R 361 (CA).

<sup>14</sup> T.M. Honess, “Empirical and Legal Perspectives on the Impact of Pre-Trial Publicity” [2002] Crim LR 719.

proportional, so as to be distinct from the preventive model, by not creating a chilling effect on the media.

Nonetheless, this model does have the potential to be the most effective model, as it fundamentally seeks to strike a fair balance between the two competing rights of free speech and a fair trial, which cannot be said for the other two approaches. Furthermore, Fenwick and Phillipson's analysis of this model supports the effective usage of this protective approach in conjunction with smaller elements from the preventative and neutralising models, which this work will be forwarding as the most workable solution.

### **The Neutralising Model**

The Neutralising Model aims at dealing with prejudicial material by using measures to ensure the impartiality of the jury.<sup>15</sup> Therefore, the model does not seek to censor, restrain or deter the media from publishing anything about the trial, instead it strongly upholds the notion of 'open judicial proceedings'.<sup>16</sup> Measures under the neutralising model to ensure fairness include: strong directions to the jury, jury challenges to select out of the panel those affected, changing the trial venue, stays and sequestration of jury. Final resorts could include acquittal or abandonment.<sup>17</sup> Thus, this approach can be seen as extremely Article 10 friendly, as the media is not deterred from publishing anything, nor are prior restraints used; consequently, the press is completely free to publish about the trial without any restrictions.

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<sup>15</sup> Fenwick, n.5 above, p177-178.

<sup>16</sup> I. Cram, 'Automatic reporting restrictions in criminal proceedings and Article 10 of the ECHR' (1998) EHRLR 742, p. 750.

<sup>17</sup> I. Cram, "Automatic Reporting Restrictions in Criminal Proceedings and Article 10 of the ECHR" [1998] EHRLR 742.

However, as Fenwick and Phillipson accurately note, such measures do not necessarily ensure the fairness of a trial and can be argued to be in fact counter-productive in ensuring the administration of justice (as will be discussed later on in this work when analysing the US approach). Furthermore, this model's strong focus on ensuring the freedom of media means that it fails to truly protect trials; consequently, it does not strike the right balance between the two competing interests. This is in stark contrast to the protective approach, which seeks to strike a fair balance between the two competing interests. The US adoption of this model has lead to some catastrophic miscarriages of justice, as was seen in the notable OJ Simpson case<sup>18</sup> (a critique of this case and the US approach is discussed later on in this work).

As has been illustrated there is no perfect model which can be used to develop contempt of court law. However, as has been discussed above and supported by Fenwick and Phillipson, the protective approach comes closest to ensuring that the two main competing rights of freedom of expression and a right to a fair trial are both weighed up against each other equally. Therefore, this thesis will be critiquing contempt of law from the view point that the protective model is the most preferable approach to be taken under English law. Nevertheless, it must be noted, that the work does not view the protective approach as what contempt laws should be conclusively based on. Instead, it will endorse the broader all-encompassing approach that Fenwick and Phillipson support, as the protective approach must be strengthened by using some of the neutralising and preventive approaches. Nonetheless, the fundamental approach for contempt law should be the protective approach, which will be argued throughout this work

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<sup>18</sup> M. Chesterman, "OJ and the Dingo: How media publicity for criminal jury trials is dealt with in Australia and America" (1997) 45 AM Jo Comp Law 109.

## **Research Questions**

The broad overarching questions which will drive this work will be:

How does the law in England currently deal with prejudicial publications and their impact on the fair trial process?

How have these law developed and been implemented in recent history?

How far can it be said that the current law is compatible with the ECHR and Strasbourg jurisprudence?

What is the theoretical basis of the English approach?

What theoretical basis or mixture of bases, would underpin an effective contempt law?

How does this basis differ from other jurisdictions' approaches?

How does the Law Commission view the current situation?

What can be done to improve the current law as it stands, taking account of the preferred theoretical model put forward in the thesis, and what is the most likely (and effective) form of action that will be taken?

## **Route Map of Chapters**

Chapter 1: Introduction.

Chapter 2: Overview of the current law.

Chapter 3: The US approach

Chapter 4: ‘Substantial Risk’

Chapter 5: ‘Seriously Prejudiced’ and The use of ‘Impeded’

Chapter 6: The use of s.5 (A discussion in good faith of public affairs)

Chapter 7: Common Law Contempt

Chapter 8: The future of English Contempt of Court Law

Chapter 9: Conclusion

## **Methodology**

Primarily the research will take the form of a close doctrinal analysis and comparison of related case law under English, Strasbourg and other ECHR nations' jurisprudence. Related case law in this area will include: contempt of court case law, Article 6 case law, Article 10 case law and case law which has a focus on new internet-based media, such as Facebook and Twitter.

The work will also conduct a comparison to other jurisdictions outside the ECHR system, taking a strong look at the US approach; as mentioned earlier this takes a strong neutralising approach. From this, assess what the English legal system can learn and adopt from this approach, as well as assessing the likelihood of whether this approach would be deemed compatible with the ECHR.

Finally, it will take an in depth look at the Law Commission's recent consultation paper into this area, the first of these reports was released at the end of October 2013.<sup>19</sup> From this the thesis will evaluate and critique the solutions they offer to the problems they have identified. It will assess what theoretical basis they are taking with their proposed reform, and how effective this is likely to be.

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<sup>19</sup> <http://lawcommission.justice.gov.uk/consultations/contempt.htm> accessed 12th October 2013.

## **Chapter 2: Overview of the current law.**

Prior to the 1981 legislation in this area of law, under *R v Bolam*<sup>20</sup> creating a real risk of prejudice (or prejudging proceedings) was sufficient to be found in contempt. However, the decision by the European Court of Human Rights in *Sunday Times v UK*<sup>21</sup> acted as a catalyst for new legislation, as it was asserted that more protection needed to be given to Article 10 rights: due to the potentially ‘chilling effect’ the law at the time placed on the media, and the need for a proportionality test.

Under the recommendations of The Phillimore Committee,<sup>22</sup> the 1981 Contempt of Court Act was enacted, which is the current legislation governing this area (when the publication happens during the active period). Nevertheless, it is important to note that a narrow body of the common law actions for contempt of court are still an alternative to the statute in certain situations (which will be discussed later on). Four key aspects to note from the legislation are: It is an offence of strict liability (Section 1); there must be a publication (Section 2(1)); the publication must be released in the active period (Section 2(3)), which is defined in Schedule 1; and finally the material must create a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced (Section 2(2)). In regards to this final point, it is important to note that in *AG v News Group Newspapers*<sup>23</sup> it was stated that these were two separate components separately assessed; thus, the court must assess the substantial risk and serious impediment or prejudice components separately.

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<sup>20</sup> (1949) 93 Solicitors Journal 220.

<sup>21</sup> (1979) 2 EHRR 245.

<sup>22</sup> Report of the Committee on Contempt of Court (1974) Cmnd 5794.

<sup>23</sup> (1988) 3 WLR 163.

Early case law in this area gave a very broad reading to Section 2(2), as *AG v English*<sup>24</sup> established that only risks which were remote would not be covered by the legislation. However, in the run up to the Human Rights Act 1998, which gave further effect in English law to the European Convention on Human Rights, there was a raising of the standard that needed to be met. In relation to the substantial risk element (*AG v MGN*)<sup>25</sup> the decision in *MGN* took account of the need to look at individual stories from individual newspapers and not to take into regard the blanket effect the media coverage could have had on the course of justice, while also emphasising the important effect of neutralising instructions from the judge and a juror's ability to focus on the actual evidence of the case. It also placed a strong emphasis on the 'fade factor' element which was further explained in *AG v Unger*<sup>26</sup> as the concept that media which may cause serious prejudice but a substantial risk may not be established due to the length of time between publication and the trial. Furthermore, jurors will read the coverage as part of an 'everyday media diet' which means it is unlikely to remain in their memory while they are still ignorant of the fact that they will be jurors in the relevant trial; hence, for the coverage to create a 'substantial risk' of serious prejudice it must in general arise during or just before the proceedings.

*AG v Guardian*<sup>27</sup> took this test even further as the publication was not deemed (by a very small margin) to create a substantial risk in this case even though it came out during the trial, due to the neutralising instructions of the judge and the fact that an appeal would be unlikely to succeed. This was similarly followed in *Attorney General v Times Newspapers Ltd*<sup>28</sup> in

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<sup>24</sup> (1983) 1 AC 116.

<sup>25</sup> (1997) 1 All ER 456.

<sup>26</sup> (1998) 1 CR App R 308.

<sup>27</sup> (1999) EMLR 904.

<sup>28</sup> [2012] EWHC 3195 (admin); [2013] ACD 42.

which considerable weight was given to the ‘fade factor’ argument and the effect of the judge’s neutralising instructions being able focus the jurors on the evidence in hand. However, *Attorney General v MGN Limited, News Group Newspapers Limited*<sup>29</sup> used ‘impediment’ as a way of bringing an action under Section 2(2), as the publications created a substantial risk of serious impediment to the proceedings. Thus, this finding created a means of avoiding the problem of the ‘fade factor’ barrier by arguing that the publications impeded the collection of key evidence from witnesses and the clearing of any suspicion on other key suspects. Therefore, it did not need to show that the publication would have a prejudicial potential effect on the case, just that the active period from arrest to charging the suspect was affected by the publications.

However, Strasbourg jurisprudence in this area refers to a ‘more likely than not test’ from *Worm v Austria*.<sup>30</sup> Similarly, the recent decision in *AG v MGN and News Group Newspapers*<sup>31</sup> criticised the decision in *Guardian* for drawing the law too close to the standard required for a criminal appeal and stated a need for a return to the *Unger* standard. The ECHR has been very strong in its protection of Article 6; as Cram has noted that ‘it ranks among the most fundamental guarantees for the individual in a democratic society’.<sup>32</sup> This view is supported in the jurisprudence, as a fair trial ‘holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) of the convention restrictively.’<sup>33</sup> Furthermore, the Commission before its removal used to take a very strict stance to the power of external publication influencing lay jurors when they had to

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<sup>29</sup> [2011] EWHC 2074 (Admin) [2011] EWHC 2074 (Admin).

<sup>30</sup> (1997) 25 EHRR 557.

<sup>31</sup> [2011] EWHC 2074.

<sup>32</sup> I Cram, *Borrie & Lowe: The Law of Contempt* (4<sup>th</sup> edition, 2010, Butterworths London) p.17.

<sup>33</sup> *Moreira de Azevedo v Portugal* (1990) 13 EHRR 721, 737.

determine issues of guilt and innocence,<sup>34</sup> as in many cases their decision could lead to the restriction of the defendant's liberty which is heavily protected under Article 5 ECHR. Furthermore, the ECtHR has noted that Article 10 will not override Article 6 when the publication is likely to prejudice the chances of a fair trial or public confidence in the courts.<sup>35</sup> However, when compared to the US approach, it is clear that the English case law adopts a far stricter approach to the media, as it allows intense, exaggerated, biased and over-hyped material to be published freely.<sup>36</sup> Nevertheless, this is due to the neutralising approach the US takes which allows the media to publish freely without restriction and then uses measures to stop the trial from becoming biased.

The second limb of serious impediment and prejudice has proved to be less of a contentious area in regards to Convention compliance. *Unger* made it clear that it must be more than a merely trivial claim to create prejudice, as it must be an actual assertion of guilt.

An action under the Act must also show that s.5 does not apply (where s.2(2) is satisfied), which is that the publication is 'a discussion in good faith of public affairs or other matters of general public interest' and 'is merely incidental to the discussion'. *AG v Random House*<sup>37</sup> fleshed this out by stating the case in question must be used as a passing example; the article must be able to exist without the mention of the case and the article must focus on a non-trivial public affairs discussion. What the statute or case law fails to do, as all Strasbourg

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<sup>34</sup> *X v Australia*, Coll. 11 (1963) 31, 43; *X v Norway Yearbook XIII* (1970) 302, 324.

<sup>35</sup> *News Verlags GmbH v Austria* (2000) 31 EHRR 246, 9 BHRC 625 ECtHR.

<sup>36</sup> I. Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (2002, Hart Publishing) p.95.

<sup>37</sup> [2009] EWHC 1727.

jurisprudence does in the area of Article 10 cases, is take into account the value of the speech.<sup>38</sup>

A small section of the old common law contempt remained after the 1981 Contempt of Court Act legislation through Section 6(c). To bring an action under this there must be imminence (note that the proceedings do not have to be active), specific intention (which is unlike the strict liability offence of the Act) and creation of a real risk of prejudice. The meaning of imminence in this area of law is anything but clear, as *R v Savundranayagan and Walker*<sup>39</sup> confirmed that proceedings do not need to be active, yet it gave no clear meaning of what would count as imminent. *AG v News Group Newspapers*<sup>40</sup> added further confusion with *obiter* comments that stated there was no need for imminence if specific intent was established. Whereas, in *AG v Sports Newspapers Ltd*<sup>41</sup> *obiter* comments from the judges clashed on the issue, as one said that imminence was not necessary while the other said it denoted the same period as the active period under the legislation.<sup>42</sup> Specific intent was inferred in *News group Newspapers*, as the newspaper was funding a private action against a defendant about whom it was publishing vilifying news stories.

The creation of a real risk of prejudice has developed into 3 subsections, which Fenwick has summed up as including: creating bias, pressuring litigants and frustrating the purpose of an injunction. Under the limb of creating bias, *News Group Newspaper* stands as the leading case in this area, which deemed the coverage was creating bias as it was an extremely hard

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<sup>38</sup> They should also take into account S.12(4) HRA and S.6 HRA.

<sup>39</sup> (1986) 3 All ER 641.

<sup>40</sup> (1988) 3 WLR 163.

<sup>41</sup> (1992) 1 All ER 503.

<sup>42</sup> See also: *Attorney-General v Punch Ltd and Another* [2001] QB 1028.

hitting article despite the potential fade factor (it is important to note, that in light of *Unger* it is unclear whether this decision would have the same result today). In *AG v Hislop and Pressdram Ltd*<sup>43</sup> Private Eye were found to be creating a real risk of prejudice by pressuring a litigant through threatening publications who was bringing libel actions against them for past defamatory articles. Finally, frustrating the purpose of an injunction has been the most readily used limb under the common law contempt of court action. In the *Spycatcher* case<sup>44</sup> an injunction had been placed on a newspaper from publishing extracts from a banned book; however, other newspapers published the extracts, yet this was found to have frustrated the injunction and created a real risk of prejudice in future actions. This was similarly followed by the House of Lords in the post HRA case of *AG v Punch*<sup>45</sup> which only took a very superficial look at Articles 6 and 10 of the European Convention on Human Rights.

## **Literature Review**

Literature in regards to the interpretation of Section 2(2) of the contempt of Court Act 1981 is vast, and in agreement that there is no rigid and consistent pattern that the Courts have followed.<sup>46</sup> Furthermore, there is a strong suggestion in the literature, as has been particularly noted by Cram<sup>47</sup> that since the introduction of the Human Rights Act 1998, the English courts have raised the bar of contempt too high. This view is similarly supported in the works of

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<sup>43</sup> (1991) 1 QB 514.

<sup>44</sup> *AG v Newspaper Publishing Plc* (1987) 3 All ER 276.

<sup>45</sup> (2003) 1 AC 1046.

<sup>46</sup> Sir John Laws (2000) 116 LQR 157; D Corker and M Levi ‘Pre-trial publicity and its Treatment in the English Courts’ (1996) Crim LR 622; C Walker ‘Fundamental Rights, Fair Trials and the Audio-visual Sector’ (1996) 59 MLR 517; ATH Smith ‘The Press, the Courts and the Constitution’ (1999) 52 CLP 126.

<sup>47</sup> I Cram, *Borrie & Lowe: The Law of Contempt* (4<sup>th</sup> edition, 2010, Butterworths London) p.17.

both Fenwick<sup>48</sup> and Phillipson,<sup>49</sup> as both suggest that the protection afforded to Article 10 may be too strong. However, there is strong agreement in the literature that the English approach is far stricter in its stance towards the media than that which is seen in the US approach.<sup>50</sup>

In relation to new media and a need for the law of contempt to catch up with this phenomenon, there has been much speculation from commentators. This has been seen in the widespread agreement that the law is currently ill-equipped to deal with the current situation: Agate,<sup>51</sup> Spencer,<sup>52</sup> Kervick,<sup>53</sup> Fitzpatrick,<sup>54</sup> Cram and Taylor<sup>55</sup> have all noted a need for reform, as the current approach is unable to appreciate the full force that the internet brings, as anybody can publish and the material never fades.<sup>56</sup> The widespread support for changes

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<sup>48</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP).

<sup>49</sup> G. Phillipson, “Trial by Media: The Betrayal of the First Amendment’s Purpose” <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1492&context=lcp> accessed 28<sup>th</sup> November 2013.

<sup>50</sup> I. Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (2002, Hart Publishing) p.95.

<sup>51</sup> Jennifer Agate, “Strict enforcement of strict liability contempt” (2012) *Ent. L.R. 12*.

<sup>52</sup> J.R. Spencer, ‘The Law Commission’s consultation paper on contempt of court’ (2013) *Crim. L.R.* 1.

<sup>53</sup> A.Kervick ‘Strict liability contempt in the age of the internet’ (2013) *Arch. Rev.* 5.

<sup>54</sup> P. Fitzpatrick, ‘The British Jury: an argument for the reconstruction of the little parliament’ (2010) *C.S.L.R.* 1.

<sup>55</sup> I.Cram & N. Taylor ‘The Law Commission’s contempt proposals – getting the balance right?’ (2013) *Crim. L.R.* 465.

<sup>56</sup> See also C. Hunt, ‘Contempt of court and the internet’, (2012) *CLJ* 24; K. Crosby, “Controlling Devlin’s jury: what the jury thinks, and what the jury sees online” (2012) *Crim. L.R.* 15; K. Murray, “An internet enabled jury of one’s peers” (2012) 17(2) *B.R.* 32; G. Resta, *Trying cases in the Media: A comparative overview*, 71 *LAW & CONTEMP. PROBS.* (2008); C. Murdoch, “The oath and the internet” (2010) *C.L. & J.* 176(11).

led to the Law Commission's Consultation Papers on the current contempt law,<sup>57</sup> which is the current leading research in this area, as part of the work was dedicated to the effect of new media on contempt law. The work itself admits that there is a lack of empirical evidence into the effect that the modern media has on jury members' ability to remain impartial.<sup>58</sup> Furthermore, although providing an extensive proposal of reforms, there is currently a lack of critique on the Law Commission's work; although, Cram and Taylor do provide some,<sup>59</sup> the literature in this area is far from comprehensive as to analysing the feasibility, likelihood and Convention-compatibility of the proposals.

Current academic literature has not had a strong focus on the ability of jurors to disregard prejudicial material, or their susceptibility to such publications. There is a lack of empirical research in this area, as the only main research is the research led by Professor Cheryl Thomas, which found that, of those jurors questioned who were sitting in high-profile cases, over one-third recalled some of the pre-trial media coverage, whilst one-fifth said they had found it hard to put such coverage out of their minds.<sup>60</sup> It was also noted in the Law Commissions recent consultation paper on contempt that some research has also been undertaken in other jurisdictions, although it reached conflicting conclusions and also often pre-dated the widespread use of the internet and social media (and of course jurors in other jurisdictions are differently instructed and restricted in what they can do, and the nature of publications also varies between jurisdictions).<sup>61</sup> However, Arlidge has questioned the need

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<sup>57</sup> Law Commission, 'Contempt of Court, A Consultation Paper' (2013) Consultation Paper No 209

<sup>58</sup> *Ibid*, p8.

<sup>59</sup> I.Cram & N. Taylor 'The Law Commission's contempt proposals – getting the balance right?' (2013) Crim. L.R. 465.

<sup>60</sup> Are Juries Fair? (Ministry of Justice Research Series 1/10, Feb 2010) pp 40 to 42.

<sup>61</sup> See T Honess, S Barker, E Charman and M Levi, "Empirical and Legal Perspectives on the Impact of Pre-trial Publicity" [2002] Criminal Law Review 719, 721 to 727; J Armstrong Brandwood, "You

for more research in this area, as it has been suggested that courts may be more trusting of jurors' ability to consider only the evidence heard in court, with the "drama of the trial" being a factor in focusing jurors' attention.<sup>62</sup> Nonetheless, research conducted into the area of neutralising instructions by judges has shown that they do not decrease the likelihood of a juror being influenced by the prejudicial material, and in some cases they actually increase the likelihood of an unsafe conviction rather than decreasing it.<sup>63</sup>

Literature in regards to the narrow band of common law contempt is unanimously heavily critical, as it creates 'messy' and uncertain law, which Miller has gone as far to say is incompatible with the ECHR.<sup>64</sup> This is similarly supported in the work of Fenwick and Phillipson,<sup>65</sup> who have both agreed that this area of law may, depending on its aspect and

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Say 'Fair Trial' and I Say 'Free Press': British and American Approaches to Protecting Defendants' Rights in High Profile Trials" (2000) 75 New York University Law Review 1412, 1417 to 1418; W Young, N Cameron and Y Tinsley, Law Juries in Criminal Trials, Part Two: A Summary of the Research Findings (Law Commission of New Zealand Preliminary Paper 37, Vol 2, 1999) pp 60 to 62,

[http://www.lawcom.govt.nz/sites/default/files/publications/1999/11/Publication\\_76\\_159\\_PP37Vol2.pdf](http://www.lawcom.govt.nz/sites/default/files/publications/1999/11/Publication_76_159_PP37Vol2.pdf) (last visited 1 Nov 2012); E Brickman, J Blackman, R Futterman and J Dinnerstein, "How Juror Internet Use Has Changed the American Jury" (2008) 1 Journal of Court Innovation 287, 289 to 291; and M Chesterman, J Chan and S Hampton, Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales (2001), [http://www.lawfoundation.net.au/ljf/site/articleIDs/F6283F64E9523039CA257060007D13C2/\\$file/mpp\\_rep.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/F6283F64E9523039CA257060007D13C2/$file/mpp_rep.pdf).

<sup>62</sup> Arlide, Eady and Smith *on Contempt* Sweet & Maxwell; 4th Revised edition edition (14 Dec 2011) paras 4-118 and 4-121.

<sup>63</sup> Tanford, 'The Law and Psychology of Jury Instructions' 69 (1990) *Nebraska Law Review* 71.

<sup>64</sup> C.J. Miller, "Some problems of contempt" (1992) Crim. L.R. 107.

<sup>65</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p302.

application, create breaches of Article 10. The uncertainty in this law and the need for this to be addressed is highlighted in the recent Law Commission consultation Paper.<sup>66</sup>

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<sup>66</sup> Law Commission, ‘Contempt of Court, A Consultation Paper’ (2013) Consultation Paper No 209, chp 2.

## **Chapter 3: The U.S. approach**

In order to offer a full critique of the current English approach to contempt of court law, it is important to appreciate an alternative approach which is not moulded by the European Convention on Human Rights. As has been touched on briefly, the U.S. approach adopts a neutralising stance which offers a stark contrast to the more protective English model. This chapter will lay out the basic principles of the U.S. approach, the reasoning behind it, finally highlighting the potential benefits and flaws in the U.S. approach. However, it is important to note that some aspects of English law are within this neutralizing model, such as judicial directions; nevertheless, contempt law itself is *prima facie* not within it.

### **Balancing the 1<sup>st</sup> and 6<sup>th</sup> Amendments**

An over-simplified look at the U.S. approach has concluded that ‘the balancing of the right to a fair trial and freedom of the press is uncomplicated in the U.S.’.<sup>67</sup> This is a result of the fact that ‘the need to balance these two fundamental rights means they do not need to conflict’<sup>68</sup> and that it ‘gives both freedoms equal weight’.<sup>69</sup> These observations are supported by the fact that fair trial guarantees are enshrined in the US Constitution’s Sixth Amendment – ‘In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury’;<sup>70</sup> similarly, the First Amendment protects freedom of speech and freedom of

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<sup>67</sup> POLIS Report, ‘Forum on Contempt of Court and Media Publicity’, (24 October 2008, LSE).

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> U.S. Const. amend. V ‘Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law’ ; U.S. Const. amend. VI ‘In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury’; U. S. Const. amend. XIV ‘Nor shall any State deprive any person of life, liberty, or property, without due process of law’.

the press – ‘Congress shall make no law... abridging the freedom of speech, or of the press’.<sup>71</sup>

Furthermore, the words of Justice Black that ‘free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them’,<sup>72</sup> thus highlighting the strong attempts to make sure both rights are treated equally and do not impinge on one another. In addition, the U.S. Constitution does not even acknowledge the potential tension between the two rights.<sup>73</sup>

Therefore, it can be ascertained that American law in theory endorses strategies that can safeguard both fair trial rights and freedom of the press.<sup>74</sup> However, this does not seem to be the situation in practice, as Furman has noted that when upholding the First Amendment for freedom of speech and freedom of the press, the US appears to neglect the right to a fair trial.<sup>75</sup> This suggests that the two rights do not balance equally without one being overridden by the other; this is an argument which is supported by Armstrong – ‘American courts often fail to protect the rights of criminal defendants against prejudicial media influence’.<sup>76</sup> However, in other cases the Supreme Court of the U.S. has referred to the Sixth Amendment as the ‘most fundamental of all freedoms’,<sup>77</sup> thus, illuminating a clear disparity and lack of consistency between the way that these two rights are treated. This unacknowledged priority

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<sup>71</sup> The First Amendment to the United States Constitution states that "Congress shall make no law... abridging the freedom of speech, or of the press..." U.S. Const. amend. I.

<sup>72</sup> *Bridges v. California*, 314 U.S. 252, 260 (1941).

<sup>73</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976) ‘The authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other’.

<sup>74</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 358-63 (1966).

<sup>75</sup> Patrick Furman, ‘Publicity in High Profile Criminal Cases’, 10 St. Thomas L. Rev. 507, 508 (1998).

<sup>76</sup> J. Armstrong Brandwood, “You say ‘Fair Trial’ and I say ‘Free Press’: British and American approaches to protecting defendants’ rights in high profile trials” [2000] 75 NYLR 1412. p1413.

<sup>77</sup> *Estes v. Texas*, 381 U.S. 532, 540 (1965); see also *Irvin v. Dowd*, 366 U.S. 717, 721 (1961).

given to the 1<sup>st</sup> Amendment is highlighted in the jurisprudence,<sup>78</sup> where the courts are particularly hostile to ‘prior restraints and to any attempts by courts or government authorities to dictate the content of media publications’.<sup>79</sup> This was similarly seen in *Near v Minnesota*<sup>80</sup> where the courts showed a strong commitment to the First Amendment and treated any restraints on the media with special hostility. Consequently, as Chesterman notes – ‘Just as the media may not be made criminally or civilly liable... so too they may not be restrained in advance from publishing such material’.<sup>81</sup> Therefore, this sustains Barendt’s assertion that the ‘courts in the United States adopt a radically different approach, apparently denying that the conflict of values is as acute as it appears’.<sup>82</sup>

### **Heavy reliance on the Neutralising model**

The lack of a protective approach to dealing with pre-trial prejudicial publications is claimed by Brandwood to be due to ‘large scepticism over the actual effect of pre-trial publicity on jurors in the U.S.’,<sup>83</sup> thus, causing trial judges to underrate the potential effects of pretrial publicity.<sup>84</sup> Furthermore, studies have shown that despite strong social evidence conducted

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<sup>78</sup> See: Chesterman, ‘OJ and the Dingo: How media publicity for criminal jury trials is dealt with in Australia and America’ (1997) 45 Am Jo Comp Law 109, p. 125 – ‘The First Amendment is taken virtually to rule out completely’.

<sup>79</sup> *Miami Herald Publishing Co. v Tornillo* 418 US 241 (1974).

<sup>80</sup> (1931) 283 US 697.

<sup>81</sup> Chesterman, ‘OJ and the Dingo: How media publicity for criminal jury trials is dealt with in Australia and America’ (1997) 45 Am Jo Comp Law 109, p129.

<sup>82</sup> E. Barendt *Freedom of Speech* 2<sup>nd</sup> edn (2005), p. 322.

<sup>83</sup> J. Armstrong Brandwood, “You say ‘Fair Trial’ and I say ‘Free Press’: British and American approaches to protecting defendants’ rights in high profile trials” [2000] 75 NYLR 1412. p1416.

<sup>84</sup> Joseph R. Mariniello, ‘The Death Penalty and Pre-Trial Publicity. Are Today’s Attempts at Guaranteeing a Fair Trial Adequate?’, 8 Notre Dame J.L Ethics & Pub Pol'y 371, 374 (1994).

throughout the U.S that is well publicised,<sup>85</sup> there is a substantial proportion of U.S. judges who doubt that publicity can prejudice criminal trials.<sup>86</sup> Sanford has noted that much of the scepticism comes from the deluded belief that neither right infringes on the other, and that they must be looked at separately, as ‘many in America remain sceptical that publicity can impinge on fair trial rights, as they do not view the two as competing rights’.<sup>87</sup> In addition, this is bolstered by the fact that mass media coverage before and during trials has often led to acquittals and not convictions, as was seen with William Kennedy Smith, Amadou Diallo and OJ Simpson.<sup>88</sup> These acquittals could be the result of a poorly prepared case or a change of location, as was seen in the Diallo case. Nevertheless, it could be argued that the media coverage still in fact impeded on the proceedings and affected the judicial process, therefore, clearly allowing the press to alter the judicial path.

Phillipson has taken this idea further by arguing that the problem is that courts seem presently to be ‘blindsided by the dazzle of the open-justice principle; the notion of robust and uninhibited reportage on the criminal-justice system carries with it such compelling overtones of a high and righteous purpose, that judges seem to shy away from looking more closely at the type of prejudicial media expression discussed here and from recognizing it for what it is:

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<sup>85</sup> Christina A. Studebaker & Steven D. Penrod, ‘Pretrial Publicity: The Media, the Law and Common Sense’, 3 *Psychol. Pub. Pol'y & L.* 428, 433 (1997).

<sup>86</sup> Robert E. Drechsel, ‘An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue’, 18 *Hofstra L. Rev.* 1, 16 (1989).

<sup>87</sup> Bruce W. Sanford, *Contest, in Covering the Courts: Free Press, Fair Trials & Journalistic Performance* (Robert Giles & Robert V. Snyder eds., 1999).

<sup>88</sup> J. Armstrong Brandwood, “You say ‘Fair Trial’ and I say ‘Free Press’: British and American approaches to protecting defendants’ rights in high profile trials” [2000] 75 *NYLR* 1412. p1418.

low value speech'.<sup>89</sup> Hence, the U.S. appears to put such a strong emphasis on the protection of the press as they supposedly keep the trial system open and fair, when in fact it would appear that ‘the uses the media makes of its freedom can often directly undermine the values underlying the right to free speech itself...foundations of a democratic society’.<sup>90</sup>

The strong upholding of the First Amendment also stems from the belief that it ‘embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structured role to play in securing and fostering our republican system of self-government’<sup>91</sup> Thus, forwarding the idea of democratic self-government, as to have a truly free and democratic society there must be a completely open arena for ideas to be shared. However, this does fail to acknowledge the possibility that publications can start to become detrimental and repressive on the ability to uphold this truly democratic society. Nonetheless, as Cram has noted it still remains that the ‘essential purpose of the first Amendment is to allow citizens to exercise informed political choices and thus participate in societal decision-making process’.<sup>92</sup> This is most aptly explained by The Justice Department as a ‘vital public interest in open judicial proceedings’,<sup>93</sup> yet the US system clearly fails to acknowledge that this unhindered approach can become detrimental to the judicial process.

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<sup>89</sup> G. Phillipson, “Trial by Media: The Betrayal of the First Amendment’s Purpose” <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1492&context=lcp> accessed 28<sup>th</sup> November 2013. p21.

<sup>90</sup> *Ibid*, p18.

<sup>91</sup> Justice Brennan in *Richmond Newspapers Inc v Virginia* (1980) 448 US 555,587.

<sup>92</sup> I. Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (2002, Hart Publishing), p45.

<sup>93</sup> The Justice Department’s Policy 28 CFR 50.9.

The relaxed approach to curbing prejudicial pre-trial material in the U.S. has led to some catastrophic miscarriages of justice. In *Sheppard v Maxwell*<sup>94</sup> the press saturated the community with highly inflammatory, inaccurate, and inadmissible information; furthermore, at times they were directing the police in their investigation. The decision was only overturned after the defendant had spent a decade in prison, having lost his family, medical license and way of life; he died 4 years after being released. Similarly, Louise Woodward, a young British au pair living in Massachusetts, was charged with murdering the baby she had been hired to care for; many in England felt that the overwhelming publicity surrounding the case made a fair trial all but impossible.<sup>95</sup> Sengupta referred to the media in this matter as a separate, parallel public trial with material which would have been considered grossly prejudicial in Britain.<sup>96</sup> Similarly Cruddace was critical of the fact that her verdict ‘could be decided by 30 minutes of prime time television’.<sup>97</sup> Ms. Woodward was eventually set free as the result of an extraordinary intervention by the trial judge; to English critics the fact remains that a seemingly innocent girl was convicted after a trial which, by English standards, was irreparably tainted by unrestricted publicity.<sup>98</sup> Therefore, Hoge’s sentiments appear

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<sup>94</sup> 384 U.S. 333 (1966).

<sup>95</sup> J. Armstrong Brandwood, “You say ‘Fair Trial’ and I say ‘Free Press’: British and American approaches to protecting defendants’ rights in high profile trials” [2000] 75 NYLR 1412.

<sup>96</sup> Kim Sengupta, Nanny Trial, Sharp Contrast in US Justice Style, Independent (London), Nov. 1, 1997, at 5.

<sup>97</sup> Martin Cruddace, Mirror Lawyer's Verdict: Mirror Lawyer Martin Cruddace Comments on Louise Woodward Guilty Verdict, Mirror (London), Oct. 31, 1997.

<sup>98</sup> J. Armstrong Brandwood, “You say ‘Fair Trial’ and I say ‘Free Press’: British and American approaches to protecting defendants’ rights in high profile trials” [2000] 75 NYLR 1413.

completely apt, that ‘The more you see of these trials, they show you what a shambles the American criminal justice system is’.<sup>99</sup>

In an attempt to curb the unhindered media ‘The U.S. adopts a neutralising approach to prejudicial publicity by: controlling the atmosphere of the courtroom, insulating witnesses from publicity, controlling leaks from law enforcement personnel, changing the venue, granting a continuance, and sequestering the jury’.<sup>100</sup> This neutralising approach is upheld in the U.S. as it does ‘not require interferences with free speech in the media; using such methods protects both rights and is therefore the plainly preferable approach’.<sup>101</sup> However, as Phillipson points out, this argument depends ‘upon it being clear that those other methods do reliably safeguard fair trials’.<sup>102</sup> Levi similarly notes that this approach relies on selecting a ‘jury panel of anyone who seems to have paid the remotest attention to the world around them’,<sup>103</sup> which is surely not a desirable situation; additionally, ‘is that it is difficult for anyone – legal professional or lay person – to assess bias accurately’, which could lead to a biased juror being allowed to serve in the trial.<sup>104</sup>

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<sup>99</sup> Warren Hoge, Never in England, Britons Say of Verdict, N.Y. Times, Nov. 1, 1997, at A10 (reporting headlines in British tabloids such as "Louise's Torture" and "Louise Was Treated Just Like a Slave").

<sup>100</sup> J. Armstrong Brandwood, “You say ‘Fair Trial’ and I say ‘Free Press’: British and American approaches to protecting defendants’ rights in high profile trials” [2000] 75 NYLR 1413. p1423.

<sup>101</sup> G. Phillipson, “Trial by Media: The Betrayal of the First Amendment’s Purpose” <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1492&context=lcp> accessed 28<sup>th</sup> November 2013. p23.

<sup>102</sup> *Ibid.*

<sup>103</sup> M. Levi & D. Corker, ‘Pre-trial publicity and its treatment in the English courts’ (1996) Crim. L.R. 624.

<sup>104</sup> J. Armstrong Brandwood, “You say ‘Fair Trial’ and I say ‘Free Press’: British and American approaches to protecting defendants’ rights in high profile trials” [2000] 75 NYLR 1412. p. 1412.

Furthermore, the law appears to be extremely unclear, as in *Murphy v Florida*<sup>105</sup> the Supreme Court set an extremely high threshold for challenging a trial judge's assessment of the detrimental effects of pretrial publicity, adopting a "totality of the circumstances" test that it did not fully explain.<sup>106</sup> The result is extremely confusing, as trial courts are encouraged to deploy protective mechanisms when publicity is reasonably likely to prevent a fair trial, but higher courts will only reverse trial court decisions if publicity has rendered a fair trial virtually impossible. Thus, it can be seen that the Supreme Court is willing to grant a wide discretion to trial courts in assessing the potentially prejudicial publicity,<sup>107</sup> which it must be argued, clearly fails to properly safeguard Sixth Amendment rights. Furthermore, in *Pennekamp v Florida* the contempt findings on a publication of cartoons and comments aimed at pending rape proceedings were deemed unconstitutional under the First Amendment.<sup>108</sup> This decision stemmed from the extremely high threshold test that 'the substantive evil must be extremely serious and the degree of imminence extremely high'.<sup>109</sup>

Therefore these decisions support Brandwood's conclusion that 'because of unrestrained publicity, certain criminal defendants simply do not receive fair trials in U.S. courts'.<sup>110</sup> As a consequence, the 'American media, being effectively free of restraints... regularly give so much wide-ranging publicity to cases that they believe will attract high public interest that

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<sup>105</sup> 421 U.S. 794 (1975).

<sup>106</sup> See also: *Bridges v California* 314 U.S. 252, *passim* (1941) at 263 - 'the substantive evil must be extremely serious and the degree of imminence extremely high'.

<sup>107</sup> *Patton v. Yount*, 467 U.S. 1025, 1040 (1984).

<sup>108</sup> *Pennekamp v Florida*(1946) 328 US 331.

<sup>109</sup> *Gitlow v New York* (1925) 268 US 652; *Whitney v California* (1927) 274 US 357.

<sup>110</sup> J. Armstrong Brandwood, "You say 'Fair Trial' and I say 'Free Press': British and American approaches to protecting defendants' rights in high profile trials" [2000] 75 NYLR 1412. p. 1442.

concerns about the fairness of the trial are much more often provoked'.<sup>111</sup> Consequently, on average there are over 300 reported incidents a year, of lawyers raising concerns over the fairness of the trial due to pre-trial publicity;<sup>112</sup> thus, it must be concluded that 'the freedom allowed to the media in America is much wider than this watchdog role requires'.<sup>113</sup>

Nonetheless, the US judiciary still uphold this rigorous approach on the strong belief that 'freedom to think as you will and to speak as you think are indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile'.<sup>114</sup> However, the aforementioned examples have clearly highlighted that a wholly unregulated media is in fact self-deprecating on the upholding of this ideal; thus, some regulation may be needed to truly achieve a society that is informed, open and democratic. Nevertheless, it is important to achieve balance in the approach taken, as if s.2(2) is applied to liberally under domestic law it has the ability to create a chilling effect on the media and silence them entirely, through fear of criminal liability. Thus, the approach taken to the application of s.2(2) must ensure that it achieves the right balance, and that the regulations placed on the media are not too stringent so as to avoid a chilling effect, yet not too relaxed so as to reflect the far too open US approach.

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<sup>111</sup> Chesterman, 'OJ and the Dingo: How media publicity for criminal jury trials is dealt with in Australia and America' (1997) 45 Am Jo Comp Law 109, p. 130.

<sup>112</sup> Minow & Gate, "Who is an Impartial Juror in an Age of Mass Media?", 40 Am. U. L. Rev. 631, 636 (1991).

<sup>113</sup> Chesterman, 'OJ and the Dingo: How media publicity for criminal jury trials is dealt with in Australia and America' (1997) 45 Am Jo Comp Law 109, p137. N.b. The 'watch dog' term has been heavily used in ECHR jurisprudence, such as *Jersild*, which will be discussed later in this work.

<sup>114</sup> Justice Branedis in *Whitney v California* (1927) 274 US 357, 374-377.

### **The rise of the internet under the US approach**

Further criticism has been levelled at the US's neutralising approach in light of the internet revolution, as 'the explosive growth of social networking has placed enormous pressure on one of the most fundamental of American institutions - the impartial jury'.<sup>115</sup> Hence, any potential juror has 'access to information on a scale never before seen in human history'; thus, the completely unrestrained US media is available to any internet enabled juror at any moment in the build-up or during the trial. Furthermore, 'the rise of web-based social networking services has wreaked havoc in the jury box',<sup>116</sup> as jurors... all use social media... to research and prepare their case'.<sup>117</sup> This position clearly flies in the face of the long standing principle of impartiality<sup>118</sup> held in U.S. jurisprudence that 'conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print'.<sup>119</sup>

Consequently, there is a 'large chance of encountering information and comment outside the evidence in the trial which could prejudice their decision'.<sup>120</sup> Accordingly, Barns has noted 'there is the element of social media. Facebook, Twitter and various other forms of social media are places where high-profile defendants in criminal trials, particularly involving

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<sup>115</sup> Hon. Amy J St. Eve & M. Zuckerman, 'Ensuring an Impartial Jury in the Age of Social Media' (2012) 11 Duke Law & Technology Review 1, p. 1.

<sup>116</sup> *Ibid*, p. 8.

<sup>117</sup> Nicole D. Galli et al., 'Litigation Considerations Involving Social Media', 81 PA. B.A. Q. 59, 59 (2010).

<sup>118</sup> This requirement of impartiality stems from the Sixth Amendment to the constitution. See: *Burr v US* 25 Fed Cas 49 (1807); *Reynolds v US* 98 US 145 (1887); *Holt v US* 218 US 245 (1910) and *Irving v Dowd* 366 US 717 (1961).

<sup>119</sup> *Patterson v. Colorado ex rel. Att'y Gen.*, 205 U.S. 454, 462 (1907).

<sup>120</sup> Hon. Amy J St. Eve & M. Zuckerman, 'Ensuring an Impartial Jury in the Age of Social Media' (2012) 11 Duke Law & Technology Review 1, p. 13.

allegations of sexual assault against children, often have their reputations trashed well before there is any finding of guilt made by a court'.<sup>121</sup> As such, the neutralising measures taken by the Courts are stretched even further in an attempt to stem the wave of potential bias from the internet. 60 percent of judges rely on strong neutralising instructions (CACM Model)<sup>122</sup> to deter jurors from using the internet and social media; however, most notably, six percent of judges have not addressed the issue at all.<sup>123</sup> The judges also use threats of contempt proceedings for any of those in breach of the CACM model guidelines.<sup>124</sup> However, research has suggested that 'social media instructions effectively mitigate the risk of juror misconduct associated with social media'.<sup>125</sup> The study found that of 140 jurors interviewed not a single juror actually used social media to research the cases as a result of the judge's instructions to not do so.<sup>126</sup> Nevertheless, their written responses were extremely defensive, as they wrote:

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<sup>121</sup> G. Barns, 'Fair trials at risk in age of social media' (2014) <http://www.abc.net.au/news/2014-04-10/barns-fair-trials-at-risk-in-age-of-social-media/5380302> accessed May 2014. Accessed May 2014.

<sup>122</sup>The instructions read as follows: 'Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube'.

<sup>123</sup> Hon. Amy J St. Eve & M. Zuckerman, 'Ensuring an Impartial Jury in the Age of Social Media' (2012) 11 Duke Law & Technology Review 1. p.18.

<sup>124</sup> *Ibid*, p. 19-20.

<sup>125</sup> Hon. Amy J St. Eve & M. Zuckerman, 'Ensuring an Impartial Jury in the Age of Social Media' (2012) 11 Duke Law & Technology Review 1. p. 24.

<sup>126</sup> *Ibid*.

‘NOTHING’ and ‘NO, NEVER’,<sup>127</sup> which could in fact suggest that misconduct had occurred, but there was a fear of contempt proceedings if they admitted to it. Thus, the research cannot be said to be conclusive either way; consequently ‘it is time for appeal courts to look again at whether a person can really get a fair trial in the age of media saturation’ when relying on purely neutralising measures under the U.S. approach.<sup>128</sup>

From the above discussion it can be seen that the U.S. upholds a strong belief in the separate and equal protection of both the free media and the right to fair trial. However, it fails to acknowledge that either should ever be impeded in an attempt to uphold the more vital right on the facts of the case; thus, this position clearly differs from that taken by the ECHR which states that Article 10 is a qualified right and Article 6 is a near-absolute right. The U.S. adopts a neutralising approach to safeguard both rights, rather than any preventative or protective approaches; although in theory it can be seen as desirable, left on its own it has allowed for some very concerning miscarriages of justice. From looking at the U.S. approach it is clear that a mere neutralising model would not be a sufficient safeguard for the English law to adopt, as Wilson put it – ‘the OJ Simpson fiasco of more recent times – few would wish to see justice conducted and corrupted – in the same manner in this country’.<sup>129</sup> However, elements of this model *may* be beneficial, as they would stop a protective approach from becoming too far reaching and preventative in nature by creating a chilling effect on the media. This approach will be explored and promoted as the most suitable option throughout this work.

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<sup>127</sup> *Ibid.*

<sup>128</sup> G. Barns, ‘Fair trials at risk in age of social media’ (2014) <http://www.abc.net.au/news/2014-04-10/barns-fair-trials-at-risk-in-age-of-social-media/5380302> accessed May 2014. Accessed May 2014.

<sup>129</sup> J. Wilson, ‘When the press oppress’, (2011) Crim L & J 175, 17.

## **Chapter 4: Substantial Risk**

This chapter will be examining the term ‘substantial risk’ as used in s. 2(2) of the Contempt of Court Act 1981. It will first look at its initial interpretation by the courts; yet, in the lead up, inception and usage of the Human Rights Act 1998 the meaning was distorted into creating a much stricter test. That therefore, created an ambiguity surrounding its meaning and usage, which led to the English model moving away from a protective approach and towards an over usage of the measures based on the neutralising model. Furthermore, it will be argued that the English law is now in the ironic position of having gone too far in its attempts to rectify the ECtHR’s decision in *Sunday Times*, as it clearly does not match the approaches taken in ECtHR jurisprudence. The chapter will then examine empirical research that has been done regarding pre-trial publicity, which will show that a lot of the arguments supporting the current English approach are based on judicial myths and do not match the results of the research. Additionally, attention will be paid to ‘modern social media’ and how it has impacted on the meaning and usage of ‘substantial risk’, and yet its effects have not been satisfactorily dealt with by the English judiciary or parliament. Finally, it will explore the potential for reforming and modifying the meaning of ‘substantial risk’, so that it can be ‘fit for purpose’.

### **English Case Law: inconsistencies and the inception of the Human Rights Act.**

In contrast to the US’s neutralising approach (as discussed in the previous chapter) the English system is *prima facie* based on the protective approach, since ‘although valuing free speech as a vital aspect of a healthy democracy and an important individual right, the English courts and Parliament have made it clear that such freedom does not extend to the prejudicing

of trials',<sup>130</sup> as 'trial by newspaper is wrong and should be prevented'.<sup>131</sup> However, in order for such publications to be prosecuted they must meet the tests laid out in s. 2 of the Contempt of Court Act 1981 (which this work has already conducted a brief overview of). It is important to note again that under s. 2(2) both limbs of the test have to be looked at separately and both must be fulfilled. s. 2(2) will not be satisfied if there was a slight risk of serious prejudice or a substantial risk of slight prejudice.<sup>132</sup> Thus, 'substantial risk' must be assessed separately from serious prejudice or impediment. Despite an apparently clear piece of legislation with separate tests to be met, there is a great deal of tension caused and (as will be seen) inconsistent applications. Cram argues that this is as a result of the fact that it attempts to reconcile two sometimes conflicting sets of interests, namely those concerned with the unimpeded functioning of the judicial system (including the right of the defendants to enjoy a fair trial) on the one hand and those of the general public in learning through the media about court proceedings.<sup>133</sup> This tension is most aptly shown when looking at the interpretation and usage of the 'substantial risk' test.

There is a strong academic support for the argument that the judicial interpretation of 'substantial risk' has been ambiguous and inconsistent.<sup>134</sup> The lack of clarity is argued to

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<sup>130</sup> G. Phillipson, "Trial by Media: The Betrayal of the First Amendment's Purpose" <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1492&context=lcp> accessed 28<sup>th</sup> November 2013. p 24. See also: I. Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (2002, Hart Publishing) p.95.

<sup>131</sup> Lord Reid in *AG v Times Newspapers* [1974] AC 273, 300.

<sup>132</sup> *A-G v News Group Newspapers* [1987] 1 QB 1; [1986] 3 WLR 65.

<sup>133</sup> I. Cram, 'Reconciling fair trial interests and the informed scrutiny of public power? An analysis of the United Kingdom's contempt of court laws' in G. Resta *Il rapporto tra giustizia e mass media: quali regole per quali soggetti* (2010, Editoriale Scientifica srl).

<sup>134</sup> Sir John Laws (2000) 116 LQR 157; D Corker and M Levi 'Pre-trial publicity and its Treatment in the English Courts' (1996) Crim LR 622; C Walker 'Fundamental Rights, Fair Trials and the Audi-

have been caused in the legislative stage; as Fenwick notes ‘the word "substantial" has perhaps introduced unnecessary ambiguity'.<sup>135</sup> This assertion can be sustained due to its rather late inclusion, as the word ‘substantial’ was introduced at the Bill’s committee stage by Lord Elwyn-Jones, despite Lord Hailsham’s arguments that the addition of ‘substantial’ added nothing, and the amendment was passed without opposition.<sup>136</sup> Cram similarly critiques the lack of clarity caused by the inclusion of ‘substantial’, as ‘does the word substantial add to the degree of risk required?’<sup>137</sup> This has led to Feldman claiming that ‘the terms in which this section is couched are vague and may be interpreted either expansively or narrowly’.<sup>138</sup>

Consequently, the case law has been inconsistent when setting the standard that must be met. Initially, the early case of *A-G v English*<sup>139</sup> stated that ‘substantial risk’ is excluding a risk which is only remote; thus, this would appear to be a fairly low standard that had to be met. This was followed by other similar interpretations that substantial means ‘not remote’ or ‘not insubstantial’ and the risk must be practical rather than theoretical;<sup>140</sup> similarly, the risk must

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visual Sector’ (1996) 59 MLR 517; ATH Smith ‘The Press, the Courts and the Constitution’ (1999) 52 CLP 126. However, see D. Goldberg, G. Sutter & I. Walden, *Media Law and Practice* OUP (2009) at 98: which argues that the act did bring some clarity to certain areas, as ‘its most immediate practical benefit was a better definition of when and how the publication contempt risk began’.

<sup>135</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p259.

<sup>136</sup> Hansard: (HL), vol 416, col 182 (January 15, 1981).

<sup>137</sup> Cram IG; Taylor NW (2013) “"The Law Commission's Contempt proposals - getting the balance right?”, Criminal Law Review. 2013.6: 465-482. p 469.

<sup>138</sup> D. Feldman, *Civil Liberties in England and Wales* 2<sup>nd</sup> edn (2002) OUP, p. 982.

<sup>139</sup> [1983] 1 AC 116.

<sup>140</sup> A-G v English [1983] 1 AC 116, 141 to 142; A-G v News Group Newspapers Plc [1987] QB 1, 15; A-G v Guardian Newspapers Ltd (No 3) [1992] 1 WLR 874, 881; A-G v British Broadcasting Corporation [1997] Entertainment and Media Law Reports 76, 80.

be ‘neither remote nor theoretical’.<sup>141</sup> Although similar in meaning, these terms are all rather nebulous and do not have a clear cut meaning, which as a result can cause vastly different interpretations. Nonetheless, ‘for a period during the 1990s, some judges were receptive to complaints of prejudice and were persuaded that a fair trial was no longer possible’.<sup>142</sup>

The judiciary attempted to add further clarity to the vague terms and interpretations surrounding ‘substantial risk’ when Schiemann L.J. provided practical guidance on what the relevant factors might be.<sup>143</sup> He laid out ten key principles for assessing the tests under s. 2(2);<sup>144</sup> unfortunately, he merely reinstated the nebulous notion in the legislation that the ‘risk’ must be ‘substantial’, although it did offer some areas which would be assessed when deciding if it met this test. These included: the likelihood of the publication coming to the attention of the juror, the likely impact on the reader and the residual impact on the juror

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<sup>141</sup> *Attorney General v Guardian Newspapers Ltd. (No.3) [1992] 1 W.L.R. 874 at 881.*

<sup>142</sup> D. Corker, ‘Threat to justice or tomorrow’s firelighter?’ 153 NLJ 1853. See also: *A-G v Hislop and Pressdram Ltd* (1991) 1 QB 514.

<sup>143</sup> *Attorney General v Mirror Group Newspapers Ltd* [1997] 1 All E.R. 456; [1997] E.M.L.R. 284.

<sup>144</sup> These were: each case must be decided on its own facts; the court will look at each publication separately; the publication in question must create some risk that the course of justice in the proceedings in question will be impeded or prejudiced; The risk must be substantial; the substantial risk must be that the course of justice in the proceedings in question will not only be impeded or prejudiced but seriously so; the court will not convict of contempt unless it is sure that the publication has created this substantial risk of that serious effect on the course of justice; the likelihood of the publication coming to the attention of a potential juror; the likely impact of the publication on the reader at the time of publication; and the residual impact on the juror at the time of the trial; on whether it came to the attention of the juror, they will look at whether the publication circulates in the area, and the circulation figures; on the likely impact, they will look at the prominence of the article in the publication, and the novelty of the content of the article in the context of likely readers of that publication; on the residual impact, they will look at the length of time between publication and the likely date of the trial, the focusing effect of listening over a prolonged period to evidence in a case, and the likely effect of the judge’s directions to a jury.

come the trial. However, what the guidelines fail to do is suggest whether these are equal considerations which must be met to the same equally high standards, or if one of these must be prioritised above the others; therefore his tests clearly allowed a lot of room for judicial discretion and inconsistencies. The recent Law Commission Consultation Paper has concluded that ‘The courts’ interpretation of this has been less than helpful’;<sup>145</sup> this clearly supports the reasoning that the terms are far too ambiguous and open to judicial discretion.

However, it must be noted that the case law is seemingly clear on its interpretation as to the likelihood of whether the publication would come to the attention of the juror. In *A-G v Hislop and Pressdram*<sup>146</sup> circulation viewing figures were found to be a relevant factor in determining substantial risk; furthermore, it was stated that it does not need to be a mass national circulation, a large readership in the area where the case will be held is sufficient. Additionally, the fact that no juror actually saw the material does not mean that no juror might have done, although the reaction of a juror who sees a publication may be relevant.<sup>147</sup> Therefore, it can be seen that judicial comment on the likelihood and the impact is fairly clear and straight forward; however, this is due to far greater weight being given to the residual impact, as these other factors are merely ‘relevant’<sup>148</sup> and not a determining factor.

Fenwick notes that ‘the key factor in determining the substantial risk of serious prejudice is that of proximity in time between publication and proceedings’,<sup>149</sup> hence, Schiemann L.J.’s ten principles are clearly not all of equal weight, as far greater judicial attention and debate is

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<sup>145</sup> Law Commission, ‘Contempt of Court, A Consultation Paper’ (2013) Consultation Paper No 209, 2.35 p. 13.

<sup>146</sup> [1991] 1 QB 514; [1991] 1 All ER 911; [1991] 2 WLR 219, CA.

<sup>147</sup> A-G v Guardian Newspapers Ltd [1999] Entertainment and Media Law Reports 90.

<sup>148</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p259.

<sup>149</sup> *Ibid.*

gifted to the residual impact. Which is not without good reason, as Arlidge notes that ‘naturally, a long gap between publication and an anticipated trial date may significantly reduce any risk of contamination’.<sup>150</sup> In *A-G v News Group Newspapers*<sup>151</sup> the judge made it clear that the proximity of the article to the trial is highly relevant; consequently, 10 months was deemed so long that jurors would have either forgotten it or it would have faded to insignificance. Therefore, it can be ascertained that a gap between the publication and the trial would negate the ‘risk’ from being ‘substantial’; however no accurate guidance was given as to what length of time would be short enough to reach the standard of ‘substantial’. Similarly, in *A-G v Independent TV News and Others*<sup>152</sup> the risk that any juror would remember the material in question was not ‘substantial’ due to the 9 month gap before the trial. However, in *A-G v Hislop and Pressdram*,<sup>153</sup> a gap of three months was not deemed long enough to negate the risk;<sup>154</sup> thus, could it be ascertained that a ‘substantial risk’ could potentially be created if the trial was less than half a year away, when considering these cases?<sup>155</sup>

The rather uncertain test was only muddled further in light of the Human Rights Act 1998, as it brought the ECHR into domestic law, which meant, as the Law Commission has noted, that

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<sup>150</sup> Arlidge, Eady and Smith *on Contempt* Sweet & Maxwell; 4th Revised edition edition (14 Dec 2011) 4-60.

<sup>151</sup> [1987] QB 1.

<sup>152</sup> [1995] 2 All ER 370.

<sup>153</sup> [1991] 1 QB 514; [1991] 1 All ER 911; [1991] 2 WLR 219, CA

<sup>154</sup> See also: Lindsay J in *MGN v Bank of America* [1995] 2 All ER 355: ‘Substantial does not mean weighty but rather means not insubstantial or not minimal’.

<sup>155</sup> As the law stands now, this is not correct when considered In light of more recent cases that are discussed later on in this chapter.

‘consideration of s. 2(2) requires account to be taken of Article 10’.<sup>156</sup> Thus, this led to a much more media-friendly approach, as ‘In the late 1990s judges began to show a readiness to assume that somewhat smaller time lapses would still diminish the risk in question to the point where it could be viewed as negligible or minimal’.<sup>157</sup> Consequently, the case law shows ‘a largely unacknowledged rise in the weight to be attributed to the term substantial’, which can ‘be traced to a group of cases decided at around the time of the inception of the HRA’.<sup>158</sup> This is similarly supported by Cram who argues that ‘the enactment of the HRA in the interim has seen a subtly different approach taken by the courts—one that is certainly more publication friendly—but this has not been clearly expressed in the cases’.<sup>159</sup>

### Raising the bar to merge with criminal appeals

The rising standard for that of meeting the ‘substantial risk’ test has been created by an even greater ‘emphasis on the fade factor’,<sup>160</sup> as ‘time lapses that will tend to be viewed as too significant to allow a finding of substantial risk to be made appear to be getting shorter’.<sup>161</sup> In *A-G v MGN* articles published three and a half months before trial with a large circulation were deemed *not* to meet the required threshold. The judges looked at their impact at the time of the publication and then at the time of the trial, thus stressing the importance of taking into accounts the residual impact on jurors. Consequently, they decided that the impact would

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<sup>156</sup> Law Commission, ‘Contempt of Court, A Consultation Paper’ (2013) Consultation Paper No 209. 2.44.

<sup>157</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p261.

<sup>158</sup> N. Lowe & S. Bufrin, *Borrie and Lowe The Law of Contempt* 4<sup>th</sup> edn (2010), p. 57.

<sup>159</sup> Cram IG; Taylor NW (2013) “"The Law Commission's Contempt proposals - getting the balance right?", Criminal Law Review. 2013.6: 465-482. p 469.

<sup>160</sup> D. Corker, ‘Threat to justice or tomorrow’s firelighter?’ 153 NLJ 1853.

<sup>161</sup> N. Lowe & S. Bufrin, *Borrie and Lowe The Law of Contempt* 4<sup>th</sup> edn (2010), p. 57.

have faded due to the ‘fade factor’.<sup>162</sup> Thus, a similar length of time between trial and publication with that of *Hislop* was deemed not to aid in creating a ‘substantial risk’; thus, the rising of the bar can clearly be seen.

In *A-G v Unger*<sup>163</sup> the publication made a clear implication of guilt (impact), but when considering the ‘crucial’ matter of the residual impact of the publication on a notional juror at the time of publication a great deal of importance was placed on the ‘fade factor’. The judges stated that a nine months gap between publication and trial would greatly diminish the recollections of any juror who read it. They went on to say, that publications are much more dangerous when published contemporaneously with the trial, because then the jurors read them with ‘particular interest rather than merely as part of an everyday diet’.<sup>164</sup> Furthermore, they stressed that the ‘fade factor’ was a well-established concept in the case law.<sup>165</sup> Thus, there was clearly a heavy reliance on the ‘fade factor’ for denying that the ‘substantial risk’ test had been met, which in turn raised the bar that bit higher. Additionally, Simon Brown LJ’s *obiter* comments marked a potential further rise in the ‘substantial risk’ test, as he stated: ‘It seems to me important that the courts do not speak with two voices, one used to dismiss criminal appeals with the court roundly rejecting any suggestion that prejudice resulted from media publications, the other holding comparable publications to be in contempt’.<sup>166</sup> Hence, this highlights judicial support for contempt law to be bought in line with that of a criminal appeal, which is a far higher standard that was initially envisaged by the legislators.

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<sup>162</sup> [1997] 1 All ER 456.

<sup>163</sup> (1998) EMLR 280.

<sup>164</sup> (1998) EMLR 280 at 319.

<sup>165</sup> *A-G v NGN* [1987] QB 1; *ex parte Telegraph plc* [1993] 1 WLR 980; *A-G v Independent TV News* [1995] 1 Cr App R 204.

<sup>166</sup> (1998) EMLR 280, at 319.

However, the ‘substantial risk’ test is one that can be still met, as was seen in *A-G v Newgroup Newspapers*.<sup>167</sup> The Sun published serious allegations about the defendant as the jury were retiring to decide their verdict; consequently, the murder charge was dropped and The Sun was prosecuted for contempt. This is a clear cut example of contempt by publication and a strong example of ‘tabloid newspapers’ using ‘sensationalist and frequently misleading reporting as a marketing tool’.<sup>168</sup> However, this is a fine example of the level that would need to be met if Simon Brown LJ’s *obiter* comments were to be absorbed into the judicial approach for ‘substantial risk’, creating a level which is clearly too high and misleading. Consequently, this would reduce the effectiveness of the protective model, as there would be little deterrent, which would place the law in a neutralising approach.

This misleading rising of the bar continued in *A-G v Guardian Newspapers*,<sup>169</sup> where The Observer published the headline - “This bust was cast from a decaying corpse. Whose work does it most resemble: Damien Hirst's or Jeffrey Dahmer's?” while the trial was still in progress. The headline clearly had a strong impact on the reader by asserting guilt and the ‘fade factor’ argument was not relevant, as it happened during the trial; thus, one could assume the ‘substantial risk’ test would be easily met. However, the inconsistencies continued, as Collins LJ stated that ‘to establish contempt it needs only to be shown that there was a substantial risk that serious prejudice, which must in my view mean such prejudice as would justify a stay or appeal against conviction’; additionally, he alluded to the importance of upholding Article 10 - ‘in applying s. 2(2) due weight must be given to the protection of freedom of speech’.<sup>170</sup> Thus, it was decided that the test for ‘substantial risk’ had not been

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<sup>167</sup> 16 April 1999 (unreported).

<sup>168</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p268.

<sup>169</sup> [1999] EMLR 904.

<sup>170</sup> *Ibid.* Collins LJ.

met, as Sedley LJ concluded ‘I doubt whether an appeal would have been allowed had the jury which convicted Mr Kelly read the article.’ Therefore, this test raised the test for substantial risk to a new high, as not even a prejudicial article during a trial would be sufficient to give rise to a s. 2(2) action, thus, seemingly making the law virtually redundant. Furthermore, ‘The stance undermines the role that s 2(2) seemed to be intended to have – that of setting the threshold before that stage would be likely to be reached, thus protecting the criminal justice system.<sup>171</sup> Moreover, it is highly questionable that this blatant sensationalist and prejudicial publication should have been afforded the strong weighting of Article 10 when it potentially undermines Article 6,

This imprecise standard has been observed by Fenwick, as she notes that ‘there has been uncertainty as to the relationship between s 2(2) and the tests used to make good an appeal against conviction or to found a stay’<sup>172</sup> This is upheld when compared to the remarks of Simon Brown LJ in *A-G v Birmingham Post and Mail*,<sup>173</sup> as he stated that ‘s. 2(2) postulates a lesser degree of prejudice than is required to make good an appeal against conviction. Similarly, it seems to me to postulate a lesser degree of prejudice than would justify an order for a stay.’ Additionally, he concluded that ‘In short, s 2(2) is designed to avoid (and where necessary punish) publications even if they merely risk prejudicing proceedings, whereas a stay will generally only be granted where it is recognised that any subsequent conviction would otherwise be imperilled, and a conviction will only be set aside...if it is actually unsafe.’ Thus, this highlights a clearly different approach from that in *Guardian*, as there is a clear separation between that of contempt law and that of a criminal appeal; furthermore, it shows an inconsistent approach to that of his *obiter* comments in *Unger*.

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<sup>171</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p266.

<sup>172</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p265.

<sup>173</sup> [1999] 1 WLR 361, at 369.

The reading down of *Guardian*'s approach has been similarly followed in *Attorney-General v Random House Group Ltd* and *Attorney-General v Associated Newspapers Lt* in which Moses LJ stated that 'The statutory question for this court . . . is whether the publication created a substantial risk that the course of justice will be substantially impeded or prejudiced. It is not the statutory question posed by section 2(1)(a) of the Criminal Appeal Act 1968, namely whether the conviction was unsafe . . . the trust which is placed on juries . . . cannot always be relied upon by those whose publications put the prospects of a fair trial at substantial risk.'<sup>174</sup> Therefore, a clear rejection of the *Guardian* approach can be read from this, as there is a clear separation between the standard needed to reach a 'substantial risk' and that of a criminal appeal. The removal of any ambiguity in this regard was further aided in *Attorney General v MGN Ltd and another*<sup>175</sup> when a strong reading down of the *Guardian* approach was given; thus signalling a return to the level stated in *Unger*.<sup>176</sup> Even with this extremely high bar removed and a return to *Unger*, 'the satisfaction of a substantial risk is a rather higher threshold than that described in *English*',<sup>177</sup> due to the heavy reliance on the 'fade factor'. Nonetheless, it can be safely assumed that Sedley LJ's approach in *Guardian* will no longer be treated as authoritative,<sup>178</sup> which has been further supported by the Law Commission, as they noted that: 'we would consider that it would be a mistake to align the

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<sup>174</sup> [2011] EWHC 1894 (Admin), [2011] EMLR 17.

<sup>175</sup> [2011] EWHC 2074 (Admin) para 28.

<sup>176</sup> *Ibid*, para 28.

<sup>177</sup> Cram IG; Taylor NW (2013) ""The Law Commission's Contempt proposals - getting the balance right?", *Criminal Law Review*. 2013.6: 465-482. p 469.

<sup>178</sup> *HM Attorney General v Associated Newspapers Ltd & News Group Newspapers Ltd* [2011] EWHC 418 (Admin), at 48: 'The statutory question for this court posed by s.2(2) of the 1981 Act is whether the publication created a substantial risk that the course of justice will be substantially impeded or prejudiced. It is not the statutory question posed by s.2 (1)(a) of the Criminal Appeal Act 1968'.

test for whether there has been an abuse of process because of prejudicial media coverage and whether there has been a breach of s. 2(2).<sup>179</sup>

Additionally, recent case law may hint to a further weakening of the high substantial risk test; however this is yet to be made clear by the judiciary. In *Attorney-General v Times Newspapers Ltd*<sup>180</sup> the defendant had been charged with murder and attempted murder. Six years previously she had pleaded guilty to manslaughter through diminished responsibility and was made the subject of a hospital order where she was released after three years. This information fuelled a sensationalist publication, as two days after being charged, the following headline was run: ‘alleged knife killer stabbed her elderly mother to death’; additionally, they gave details of her previous convictions, hospital order and release. The newspaper attempted to argue that it could not give rise to a substantial risk of serious prejudice as she would have been bound to plead guilty on the grounds of diminished responsibility. Nonetheless, the court noted that however hopeless a defence might appear, a defendant might ignore advice and plead not guilty. Consequently, it is invariably inappropriate for journalists to second guess this.<sup>181</sup> However, the court was quick to remember that if she pleaded not guilty it is likely that the trial would be many months away, ‘time had an effect on the continuing effect of the articles’.<sup>182</sup> Furthermore, the judge noted that the article was factual and not so iconic and original in its facts to stand out as ‘uniquely memorable to a person’ and that ‘the jury would focus on the evidence and pay heed to the

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<sup>179</sup> Law Commission, ‘Contempt of Court, A Consultation Paper’ (2013) Consultation Paper No 209, 2.49.

<sup>180</sup> 13 November 2012 [2012] EWHC 3195 (Admin); [2013] A.C.D. 42.

<sup>181</sup> Cited: *Attorney General v Unger* [1998] 1 Cr. App. R. 308 and *John v Rees* [1970] Ch. 345.

<sup>182</sup> 13 November 2012 [2012] EWHC 3195 (Admin); [2013] A.C.D. 42. At 35.

judge's directions'.<sup>183</sup> Therefore, a substantial risk was not shown, which would seem to suggest that the bar had not been significantly lowered.

Yet, comments made by the court in *Times* could suggest a willingness for the bar of substantial risk to be lowered, as the judge stated that: 'the case never acquired the general notoriety of (say) the allegations about Mr Christopher Jefferies, the Bristol landlord who was subjected to such massive and unfair coverage in connection with the murder of one of his tenants in December 2010 (this case's effect on s. 2(2) will be discussed at length in the next chapter); nor, to take an earlier example, of the coverage given to Mr Fagin, the intruder who found his way into the Queen's bedroom.<sup>184</sup> Therefore, this suggests that courts will be far more willing to find a substantial risk if the publications are of a similar sensationalist quality to those which the court cited. Furthermore, they gave a warning to media bodies by declaring that 'they should exercise great caution... If there is created a substantial risk of serious prejudice, the danger is that those most immediately concerned in the case, not only any accused person but also the victims and their families, may unnecessarily be deprived of access to justice. That should be a danger no editor wants to create.'<sup>185</sup> Thus, it can be seen that the courts are appearing to suggest that they are going to be more willing to find a substantial risk if the right case emerges. Nonetheless, this case only makes an ambiguous suggestion of the lowering of the standard, and does not make a clear declaration that the bar should be lowered to ensure the effective use of the protective model.

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<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*, at 36.

<sup>185</sup> *Ibid.* at 42.

## An over-reliance on the fade factor

As Fitzpatrick notes, ‘in determining what is ‘substantial’ the courts have placed great emphasis on the ‘fade factor’ and it would seem that the report has to be published contemporaneously with trial proceedings to create such a risk’.<sup>186</sup> Similarly, Feldman has noted how ‘the court has regard to the evanescent quality of most news reports’.<sup>187</sup> Corker argues this is due to two main judicial misconceptions: firstly, historically, judges have loftily dismissed the notion that an English jury might be so susceptible;<sup>188</sup> and secondly, they see today’s newspaper reportage as tomorrow’s firelighter.<sup>189</sup> Consequently, the test for ‘substantial risk’<sup>190</sup> ‘no longer seems capable of being satisfied’,<sup>191</sup> except if during or immediately before the trial. Thus, even with the courts returning to the *Unger* approach<sup>192</sup> it still appears that the level needed to reach ‘substantial risk’ makes the usage and effectiveness of contempt law almost redundant within the protective model.

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<sup>186</sup> P. Fitzpatrick, ‘The British Jury: an argument for the reconstruction of the little parliament’ (2010) C.S.L.R. 1, p9.

<sup>187</sup> D. Feldman, *Civil Liberties in England and Wales* 2<sup>nd</sup> edn (2002) OUP, p. 984.

<sup>188</sup> D. Corker, ‘Threat to justice or tomorrow’s firelighter?’ 153 NLJ 1853.

<sup>189</sup> Scott Baker J. in *Ex p. B* Unreported, February 17, 1994.

<sup>190</sup> It can be for serious impediment, which is a matter that will be discussed later on in this work.

<sup>191</sup> Cram IG; Taylor NW (2013) ““The Law Commission’s Contempt proposals - getting the balance right?”, Criminal Law Review. 2013.6: 465-482. p 471.

<sup>192</sup> See: *HM Attorney General v Associated Newspapers Ltd & News Group Newspapers Ltd* [2011] EWHC 418 (Admin). At 50 – ‘the photograph, published whilst the jury was hearing the case, created such prejudice that no juror, who saw it, could reasonably have been expected to put it out of his or her mind, however stringent the injunction to do so’. Also, at 54 – ‘This case demonstrates the need to recognise that instant news requires instant and effective protection for the integrity of a criminal trial’.

Consequently, publications such as those surrounding Rosemary West<sup>193</sup> and the Abu Hamza trial<sup>194</sup> were adverse to the fairness of the trial, yet resulted in no action from the Attorney General – warnings were issued, but no criminal action was brought. The lapse of time allows for newspapers to assert guilt in full knowledge that the lapse of time will protect them from any contempt action, which undermines the effectiveness of the protective model. This was also seen with The Sun’s coverage of the 7/7 bombings in London where the title read ‘Got the Bastards’.<sup>195</sup> Such aggressive reporting raises the question - should Article 10 be used to protect such dangerous expression where it clearly could be infringing on a right to a fair trial? This is supported by Fenwick who states that ‘it is questionable whether speech that undermines the presumption of innocence has a strong claim to protection’;<sup>196</sup> yet, currently the English courts appear to fear than any attempt to quash such reporting with the use of substantial risk of serious prejudice will be seen as violating Article 10.<sup>197</sup>

Additionally, there is wide spread speculation as to whether the period of time between publication and trial will cause a ‘fade factor’. Firstly, it can be argued that ‘once a substantial period of time has elapsed, it would be likely that a potential juror would merely remember an impression, rather than the specifics of the coverage of any one newspaper. But the impression – that the arrestees were guilty – might be deep-rooted and insidious’.<sup>198</sup> Furthermore, ‘some facts are so striking, even when published some time in advance of a hearing, as to render it impossible to be confident that the conscientiousness of jurors, or the

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<sup>193</sup> *R. v West (Rosemary Pauline)* [1996] 2 Cr. App. R. 374.

<sup>194</sup> *R. v Abu Hamza* [2006] EWCA Crim 2918; [2007] Q.B. 659; [2007] Crim. L.R. 320.

<sup>195</sup> M. Sullivan ‘Got the Bastards’ *The Sun* (20 July 2005, London).

<sup>196</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p270.

<sup>197</sup> Consequently, the courts seem more willing to use serious impediment, yet as will be discussed later, this does not have full reaching usage.

<sup>198</sup> *Ibid*, p268.

directions of a trial judge would prevent a substantial risk'.<sup>199</sup> Thus, this sustains the idea, that if an article is strongly impactful and prejudicial, its lasting impression will bias any potential juror regardless of the length of time. Therefore, it must be seen that far too much respect is given to a juror's ability to remain impartial when they have potentially been confronted with extremely prejudicial material. It must be seen that The Sunday Mirror's coverage of the Suffolk Ripper, (in which Tom Stephens, was virtually found guilty by the British popular press when he was only a police suspect at the time and had not been charged for any killings)<sup>200</sup> is a clear example of the sensationalist journalism which results in a lasting impact, leaving an impression which no 'fade factor' will diminish; thus, this current situation 'poses an unacceptable level of risk to the system'.<sup>201</sup>

Cram argues that the case law has resulted in 'a threshold that lacks precision and can be criticised as being both over and under inclusive in the same breath',<sup>202</sup> as the term 'substantial' as interpreted in *English* was given a rather weak and over inclusive meaning, yet in the face of judicial development it can be seen that 'the term substantial has been afforded *de facto* greater weight'.<sup>203</sup> Furthermore, it could be argued that as the law stands we are heading towards the US approach of 'a completely unregulated media market that would render it impossible to empanel a jury of people whose views had not been shaped by matters

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<sup>199</sup> Arlidge, Eady and Smith on *Contempt* Sweet & Maxwell; 4th Revised edition edition (14 Dec 2011) paras 4-61.

<sup>200</sup> U. Smartt, 'Who Still Observes the Law of Contempt?' (2007) 171 JPN 76.

<sup>201</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p266.

<sup>202</sup> Cram IG; Taylor NW (2013) ""The Law Commission's Contempt proposals - getting the balance right?", Criminal Law Review. 2013.6: 465-482. p 469.

<sup>203</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p275.

that are irrelevant to the legal inquiry they need to undertake and that may well predispose them to accepting that an accused is guilty'.<sup>204</sup>

### **Neutralising approach masquerading as a protective approach**

This argument can be sustained, because as the law stands in England ‘the protective approach, sets a high threshold, is unworkably imprecise and is therefore ineffective in operation’.<sup>205</sup> Thus, it can be seen that the protective model is not actually being used to sustain a fair trial, over fears of violating Article 10 (freedom of expression). This fact has been observed by Goldberg, as he notes there has been a ‘pronounced decline over the past couple of years (of s. 2(2) prosecutions), even in the teeth of some provocative reporting’.<sup>206</sup> Thus, as Smartt puts it ‘Britain seems to be edging towards the American style legal system, where freedom to publish takes precedence over all other considerations, and the press can put a suspect on trial before he has reached court or a single piece of evidence has been put in front of a jury’.<sup>207</sup> Consequently, although ‘the s. 2(2) test can be viewed as taking a protective stance since it is intended to deter media bodies from publishing prejudicial material’,<sup>208</sup> this is not what actually happens in practice due to the standard being set too high by the domestic judiciary.

Therefore, the judiciary have paid a lot of attention to the use of neutralising measures, like those used in the USA’s neutralising approach to contempt.<sup>209</sup> In *A-G v Unger*<sup>210</sup> Simon

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<sup>204</sup> Law Reform Commission of Western Australia, *Report on the Review of the Law of Contempt*, (2003) Project No.93, p.19.

<sup>205</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p. 266.

<sup>206</sup> D. Goldberg, G. Sutter & I. Walden, *Media Law and Practice* OUP (2009), p. 98.

<sup>207</sup> U. Smartt, ‘Who Still Observes the Law of Contempt?’ (2007) 171 JPN 76.

<sup>208</sup> H. Fenwick, *Civil Liberties and Human Rights* 4<sup>th</sup> edn (2007), p. 339.

<sup>209</sup> N. Lowe & S. Bufrin, *Borrie and Lowe The Law of Contempt* 4<sup>th</sup> edn (2010), p. 58.

Brown LJ found that a combination of the ‘fade factor’ coupled with a presumption that juries would decide cases solely according to the evidence put before them and would adhere to judicial directions they were given, would mean that a substantial risk could not be created. Thus, showing the judicial reliance on the neutralising measures as a way of making sure a ‘substantial risk’ is never created. Similar support was shown in *A-G v Guardian Newspapers*,<sup>211</sup> as Sedley LJ claimed that it was ‘simply not possible to be sure that the risk created by the publication was a substantial risk that a jury, properly directed to disregard its own sentiments and any media comment, would nevertheless have its own thoughts or value judgements...where they influenced the verdict’.<sup>212</sup> Furthermore, in *A-G v MGN*<sup>213</sup> a great deal of weight was afforded when looking at substantial risk to the likelihood that the jury will be strongly directed to ignore prejudicial coverage of the trial.

Consequently, it would appear that ‘the judiciary has given up attempting to compel the media to put their own house in order when reporting big crime stories’;<sup>214</sup> thus, although the English approach is *prima facie* based on a primarily protective model, it is strongly influenced by the neutralising model. As a result, this only adds further confusion to the meaning of ‘substantial risk’, as there is no clear direct judicial acceptance of what are acceptable neutralising measures to avoid contempt. Thus, must it be concluded that, what is deemed as effective, is purely limited to the judge’s own opinion on neutralising measures, which only adds to the ambiguity and inconsistencies surrounding the use of ‘substantial risk’. This is seemingly sustained when looking at Lord Phillips’ *obiter* remarks in *R v Abu*

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<sup>210</sup> (1998) EMLR 280, at 319.

<sup>211</sup> [1999] EMLR 904.

<sup>212</sup> *Ibid*, at 81.

<sup>213</sup> E.g. *A-G v MGN* [1997] EMLR 284.

<sup>214</sup> D. Corker, ‘Threat to justice or tomorrow’s firefighter?’ 153 NLJ 1853.

*Hamza*<sup>215</sup> - ‘the fact, however, that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding... if the judge concludes that with his assistance it will be possible to have a fair trial’. Therefore, it can be found that ‘substantial risk’ can be based purely on the judge’s discretion as to whether she/he thinks they are able to combat any prejudicial contempt with their neutralising instructions. This clearly supports Feldman’s conclusion that ‘When assessing whether a publication created a substantial risk of serious prejudice the court is prepared to credit jurors with... independence of mind and judgement, and with the will and ability to follow judge’s proper direction at the end of a trial, which by its nature, focuses the jurors’ attention on the evidence presented in court rather than on extraneous publications’.<sup>216</sup> Hence, this firmly places contempt law within the neutralising model.

Adding to the confusion created when the neutralising approach takes a central role alongside the protective model in English contempt law, is the strong disagreement within the judiciary surrounding its usage. There are two clear schools of thought as regards the use of neutralising measures in relation to a jury: those of juror susceptibility<sup>217</sup> and juror

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<sup>215</sup> [2006] EWCA Crim 2918.

<sup>216</sup> D. Feldman, *Civil Liberties in England and Wales* 2<sup>nd</sup> edn (2002) OUP, p. 983.

<sup>217</sup> See for example: *HM Attorney General v Associated Newspapers Ltd & News Group Newspapers Ltd* [2011] EWHC 418 (Admin) at 32 – ‘The jury was instructed not to consult the internet and not to seek information from outside the court. But the judge also told them, in his initial directions on 3 November (cited para. 4), that the press would report the case, that they were free to do so but that the jury’s view must be based on the evidence in court. These conventional and, we may add with respect, sensible instructions, created a blurring of the line between that which was, on the judge’s instruction, prohibited and that which was permissible. The jury was not instructed to avoid any newspaper report about the case they were trying. Indeed, the likelihood was that, if they were in the habit of reading a newspaper, they would look at any report of the case they were trying’.

invulnerability.<sup>218</sup> Moreover, in *A-G v BBC*<sup>219</sup> Staughton LJ expressed the view that he did not hold the same confidence as other judges in ‘the ability of jurors to disregard matters which they do remember but which they are not entitled to take into account’. To a lesser extent, in *A-G v Guardian Newspapers*<sup>220</sup> Collins LJ commented that he found it difficult to believe that once serious prejudice had arisen that neutralising instructions would be enough to dispel the prejudice. Phillipson is similarly in agreement with this judicial doubt, as he notes that it would be too great a step to state that juries are able to ignore *any* pre-trial comment such that the law should have no place; furthermore, he finds that an unbiased reading of the effectiveness of neutralising measures suggests they do not have the believed effect.<sup>221</sup>

In addition to this doubt over the efficacy of neutralising measures, is the strong critique of their effect on the English legal system as it stands currently. Levi has argued that ‘the adoption of such measures can create, in itself, unfairness in the system’,<sup>222</sup> as the moving away from the protective approach ‘allows too much strain to be placed on the criminal

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<sup>218</sup> National Heritage Committee Second Report (1997) *Press Affecting Court Cases*, pp33-4. See also: D. Corker & M. Levi, ‘Pre-trial publicity and its Treatment in the English Courts’ (1996) Crim LR 622, p. 623: ‘historically, the English courts have normally taken the view that “the English jury” is robust enough to withstand any interference with its objectivity’ and *Ex. p. The Telegraph plc* [1993] 1 W.L.R. 980 at 987 – ‘In determining whether publication of matter would cause a substantial risk of prejudice to a future trial, a court should credit the jury with the will and ability to abide by the judge’s direction to decide the case only on the evidence before them’.

<sup>219</sup> 1 December 1995 (unreported).

<sup>220</sup> [1999] EMLR 904.

<sup>221</sup> G. Phillipson, “Trial by Media: The Betrayal of the First Amendment’s Purpose” <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1492&context=lcp> accessed 28<sup>th</sup> November 2013. p. 25.

<sup>222</sup> D. Corker and M. Levi, ‘Pre-trial Publicity and its Treatment in the English Courts’ [1996] Crim LR 622.

justice system...which has to seek to combat the effects of prejudicial publicity by taking neutralising measures'.<sup>223</sup> Therefore, there has been a clear shift from the protective to the neutralising stance; thus, the Contempt of Court Act 1981, which was initially meant to place a responsibility on the media, has now placed it on the judges and jury to be neutralized rather than protected. Hence, it could be argued that the current approach does not match with Article 10 ECHR, in the sense that this right conveys 'duties and responsibilities',<sup>224</sup> upon the media; yet the stance taken removes such responsibilities from the media by placing the emphasis on a neutralising approach.

### **Compatibility with ECHR jurisprudence**

Cram has rightly observed that 'since October 2000, the courts as public authorities under the Human Rights Act have had to give effect to the provisions of the European Convention on Human Rights whose enumerated rights include the right to a fair trial (art.6), the right to respect for private life (art.8) and the right to freedom of expression (art.10)'.<sup>225</sup> Furthermore, with the use of s. 2 HRA the judiciary is now obliged to take into account any relevant Strasbourg jurisprudence; therefore, it is important to assess whether the nebulous and inconsistent English law matches that of the ECHR.

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<sup>223</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p276.

<sup>224</sup> Article 10(2) ECHR.

<sup>225</sup> I Cram & N Taylor, 'The Law Commission's contempt proposals – getting the balance right?' (2013) Crim. L.R. 465.

The domestic courts themselves have held that the current s. 2(2) test ‘falls comfortably within the limitations acknowledged in the Convention itself’.<sup>226</sup> However, this is grossly misleading; as Fenwick has pointed out, there is a ‘difference of emphasis between the domestic and Strasbourg tests’ when it comes to assessing ‘substantial risk’.<sup>227</sup> Furthermore, the s. 2(2) test, on its face, differs from that accepted at Strasbourg in *Worm v Austria*,<sup>228</sup> *News Verlags*,<sup>229</sup> and *BBC Scotland v UK*.<sup>230</sup> Therefore, this highlights that the English courts have been incorrect in their claims that the current law falls comfortably within the Convention, as the wording of the law and the case law is clearly not matching that of Strasbourg jurisprudence, which is strongly relevant under s. 2 HRA. Furthermore, this has been endorsed most recently by the Law Commission, as they stated that ‘it is, therefore not clear that the degree of risk, and the severity of the impact required under s. 2(2) are currently ECHR compliant’.<sup>231</sup>

In *News Verlags*<sup>232</sup> the ECHR were strong in their upholding of Article 6 rights to a fair trial through a protective model approach. They stated that ‘the limits of permissible comment on pending criminal proceedings may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of justice’;<sup>233</sup>

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<sup>226</sup> *A-G v MGN* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408 at [33]; see also *A-G v Guardian Newspapers Ltd* [1999] Entertainment and Media Law Reports 904, 918.

<sup>227</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p276.

<sup>228</sup> (1998) 25 EHRR 454.

<sup>229</sup> (2001) 31 EHRR 8.

<sup>230</sup> (1998) 25 EHRR CD179.

<sup>231</sup> Law Commission, ‘Contempt of Court, A Consultation Paper’ (2013) Consultation Paper No 209, p. 14.

<sup>232</sup> (2001) 31 EHRR 8.

<sup>233</sup> (2001) 31 EHRR 8. At 56.

furthermore, the judges went as far to say that Article 6 is of relevance when balancing up the competing interests.<sup>234</sup> Hence, it can be seen that Strasbourg jurisprudence upholds a strong protective model for dealing with prejudicial contempt, as there is a weighty upholding of the Article 6 absolute right to a fair trial.

Equally, this is seen in *Worm v Austria*<sup>235</sup> in which an article published during the trial proceedings that clearly evinced guilt, was held to create prejudice by the Austrian courts. The ECtHR held that although there had been an interference with Article 10, they had proportionately pursued a legitimate aim by preserving the authority and impartiality of the judiciary.<sup>236</sup> The decision strongly upheld Article 6 rights, as it proclaimed that ‘Article 6 reflects the fundamental principle of the rule of law’ and that ‘what is at stake in maintaining the impartiality of the judiciary is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and also in the public at large’.<sup>237</sup> Nevertheless, it strongly upheld the principles of Article 10 as well, by stating that ‘not only do the media have the task of imparting such information and ideas: the public also has a right to receive them’.<sup>238</sup> Additionally, the ECtHR took a very reasoned approach to pre-trial publications by stating ‘whilst the courts are the forum for the determination of a person’s guilt or innocence on a criminal charge, this does not mean that there can be no prior or contemporaneous discussion of the subject matter of criminal trials elsewhere, be it in specialised journals, in the general press or amongst the public at large’.<sup>239</sup> Therefore, this decision confirmed that pre-trial publicity is strongly protected under Article

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<sup>234</sup> *Ibid.*

<sup>235</sup> (1998) 25 EHRR 454.

<sup>236</sup> Article 10(2) ECHR.

<sup>237</sup> *Ibid.* para 40.

<sup>238</sup> *Ibid.* para 46.

<sup>239</sup> *Ibid.*

10, as a form of political discussion; thus, a similarity with the English approach can be seen here.

However, the harmonisation between the two stops here, as Strasbourg is far more ready to use a protective approach in order to uphold Article 6 rights. The Court stated that Article 6 rights ‘must be borne in mind by journalists when commenting on pending criminal proceedings since the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice’.<sup>240</sup> Hence, it clearly sets the test as a ‘more likely than not’ test, which *prima facie* is a stricter test than the domestic ‘substantial’ test, as it should only be more than insubstantial. However, as has been seen with the domestic case law, this ‘does not represent the current test’,<sup>241</sup> due to cases such as *Guardian* and *Unger* raising the bar so high, as to go far beyond the level intended by the legislators and that of the standard in *Worm*.<sup>242</sup> Consequently the judges have, as argued, made the protective model partly redundant and instead have replaced it with a gross over-reliance on a neutralising approach. Thus, the English law is now in the ironic situation of having gone too far in its attempts to avoid an Article 10 violation, as was seen in *Sunday Times* and which spurred the Contempt of Court Act 1981. Consequently, the meaning of ‘substantial risk’ needs to be read down, in order to be harmonised with the stance of Strasbourg, as currently the ‘law in this area is unclear, impractical or at risk of breaching the ECHR’.<sup>243</sup>

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<sup>240</sup> *Ibid.* para 50.

<sup>241</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p276.

<sup>242</sup> The *Jefferies* case and *Random House* have lowered the bar to a degree, but not enough to reduce the damage caused to the protective model by earlier case law.

<sup>243</sup> A. Kervick, ‘Strict liability contempt in the age of the internet’ (2013) Arch. Rev. 5.

## **Empirical research into pre-trial publicity**

Cram observes in regards to the current English approach – ‘the fade factor coupled with the ability of jurors to remain focused on the events before them at trial meant that the “at risk” period was in practice concurrent with the trial or its immediate lead in’.<sup>244</sup> Thus, the judiciary’s strong belief in the fade factor has pushed the bar for ‘substantial risk’ so high as to force the use of a far more neutralising approach than was ever intended by the legislators. Furthermore, as Fenwick has noted, ‘UK research into the experiences of actual jurors in the jury room is impossible due to the provision of the 1981 Act’;<sup>245</sup> hence, there is a strong reliance in the effectiveness of neutralising measures without any actual proof.

However, there is empirical research from other jurisdictions which reveals a lot of misconceptions the English judiciary has when they assess ‘substantial risk’. A New Zealand research project<sup>246</sup> investigated 48 cases where there had been pre-trial publicity; of those cases there was one clear case where pre-trial publicity prejudiced the verdict. More strikingly, 19% of jurors recalled seeing some pre-trial publicity; thus, the ‘fade factor’ is clearly not as influential as the English judiciary believe it to be. An even more damning research project by Chesterman found that exposure to negative publicity tended to produce a higher proportion of guilty verdicts.<sup>247</sup> Furthermore, although neutralising measures were used, they did not appear to be successful in preventing prejudice.<sup>248</sup> Thus, this clearly places

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<sup>244</sup> I Cram & N Taylor, ‘The Law Commission’s contempt proposals – getting the balance right?’ (2013) Crim. L.R. 465. p. 469.

<sup>245</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p273.

<sup>246</sup> W. Young, N. Cameron and Y. Tinsley, *Law Juries in Criminal Trials, Part Two: A Summary of the Research Findings*, Law Commission of New Zealand Prelim Paper 37, Vol 2, 1999.

<sup>247</sup> M. Chesterman, ‘OJ and the Dingo: How Media Publicity for Criminal Jury Trials is Dealt With in Australia and America’ (1997) 45 *Am Jo Comp Law* 109.

<sup>248</sup> *Ibid.*

an extreme amount of doubt on the current English approach, as both the ‘fade factor’ and neutralising measures are shown not to be as robust and effective as the judiciary would seem to believe.

Honess has been equally critical of the English approach, as there are no well-established criteria that can enable the courts to identify when such opinions make it difficult or impossible for the notional juror to “set aside” such prejudices.<sup>249</sup> Additionally, he casts further doubt over the reliance on the ‘fade factor’, due to it being ‘well recognised that delay in a trial (or retrial) will not necessarily be sufficient to eliminate the risk of prejudice’.<sup>250</sup> Moreover, this is similarly supported in New Zealand jurisprudence, as the court in *Gisborne Herald Co. Ltd v. Solicitor General*<sup>251</sup> forwarded the idea that statements made just after the crime are when they will have the most impact, and that although ‘the sheer lapse of time may dim memory. But in some cases mud may stick’.<sup>252</sup>

Therefore, it can be concluded that ‘it would be wrong simply to assume that prejudice will necessarily disappear with the lapse of time, the process of the trial or with judicial directions’.<sup>253</sup> Honess’ research found that any information with a high emotional content is far less likely to be forgotten, as it becomes embedded within the juror’s memory in a story structure.<sup>254</sup> Furthermore, when mock jurors were presented with such material; it affected

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<sup>249</sup> T.M. Honess ‘Empirical and legal perspectives on the impact of pre-trial publicity’ [2002] Crim LR 719.

<sup>250</sup> *Ibid.*

<sup>251</sup> [1995] 3 N.Z.L.R. 563.

<sup>252</sup> *Ibid.*

<sup>253</sup> T.M. Honess ‘Empirical and legal perspectives on the impact of pre-trial publicity’ [2002] Crim LR 719. p. 721.

<sup>254</sup> *Ibid.*, p723.

the way they considered evidence and in turn their final verdicts.<sup>255</sup> This research was similarly supported by the findings of Simon, where of 130 people surveyed (two months between crime and survey, 25 articles appeared in local newspapers) 59 percent had heard or read about the crime, and of this group 65 percent described pro-prosecution feelings when asked merely to recall facts.<sup>256</sup> Additionally, of this group they all expressed concerns that they jury would not be in a fair frame of mind, yet rather worryingly, they all stated they could hear the case in a fair frame of mind.<sup>257</sup> Thus, it is clear that the issue of the ‘fade factor’ is yet to be satisfactorily resolved, despite what the English judiciary believe and base their judgements on.

Furthermore, research by Kerr has shown that ‘common remedies may not be very effective in overcoming such bias’;<sup>258</sup> thus, ‘extensive prejudicial pre-trial publicity can be associated with pre-judgement of a defendant’.<sup>259</sup> It was shown that there is ‘considerable evidence that prejudicial publicity can and does bias verdicts’, as during mock trials exposure to prejudicial material led to a 20-40 percent increase in jurors favouring a guilty verdict.<sup>260</sup> Similarly, Kerr found that in cases receiving extensive and intensive pre-trial publicity, where jurors were asked the qualification question of - ‘can you, in view of the publicity you have seen, judge the defendant in a fair and unbiased manner? Those who answered yes to this question were

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<sup>255</sup> *Ibid*, p724.

<sup>256</sup> Simon and Eimermann, The jury finds not guilty: Another look at media influence on the jury, 48 JOURNALISM Q. 343-344 (1971).

<sup>257</sup> *Ibid*. see also: DeLuca, "Tipping the scales of justice: The effects of pretrial publicity." Unpublished master's thesis, Iowa State University (1979).

<sup>258</sup> N. L. Kerr, 'The effects of pre-trial publicity on jurors' 78 (1994) 3 *Judicature* 120.

<sup>259</sup> *Ibid*, p122.

<sup>260</sup> *Ibid*, p124.

twice as likely to return a guilty verdict,<sup>261</sup> thus, clearly throwing doubt on jury integrity. Hence, this clearly highlights a lack of ability from the courts to assess whether a juror is biased or not, which is supported by a test that Kerr ran, where only 45.4 percent of lawyers could correctly assess if a jury member was biased or not.<sup>262</sup> Additionally, his research highlighted, like that of the research already discussed in this section, that ‘instructions to disregard such factors as inadmissible or a prior criminal record seem to do little to reduce the impact of such extra-legal information’. Consequently, clearly placing doubt on the effectiveness of the neutralising model’s ability to ensure a fair trial, as instructions designed to reduce bias actually increased it.<sup>263</sup> Similarly, social psychological research indicates that telling someone not to think of something may well increase attention to it,<sup>264</sup> which clearly negates the purpose of any neutralising judicial measures.

Thomas’ research has also cast doubt on the naïve judicial concept of jury integrity,<sup>265</sup> as she found that in standard cases five percent of jurors completed their own additional research on the trial by looking at past publications, despite the judges neutralising instructions.

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<sup>261</sup> Kramer, Kerr and Carroll, *Pretrial publicity, judicial remedies, and jury bias*, 14 LAW AND HUM. BEHAV. 409-438 (1990).

<sup>262</sup> N. L. Kerr, ‘The effects of pre-trial publicity on jurors’ 78 (1994) 3 *Judicature* 120, p. 126.

<sup>263</sup> Wolf and Montgomery, *Effects of inadmissible evidence and level of judicial admonishment to disregard on the judgments of mock jurors*, 7 J. OF APPLIED SOC. PSYCHOLOGY 205-219 (1977); Tanford and Cox, *Decision processes in civil cases: The impact of impeachment evidence on liability and credibility judgments*, 2 Soc. BEHAV. 1-19 (1987); and Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744-761 (1958).

<sup>264</sup> Wegner, ‘White Bears And Other Unwanted Thoughts: Suppression, Obsession, And The Psychology Of Mental Control’ (New York: Viking, 1989).

<sup>265</sup> Are Juries Fair?, Ministry of Justice Research Series 1/10, February 2010, Professor Cheryl Thomas, University College London, [www.justice.gov.uk/publications/docs/are-juries-fair-research.pdf](http://www.justice.gov.uk/publications/docs/are-juries-fair-research.pdf) (accessed 20 December 2013).

Additionally, in high profile cases 12 percent of jurors said they had looked for information about their case while it was going on. From these results it is also important to consider that although all jurors who took part in the study were guaranteed anonymity, it should be borne in mind that they were being asked to admit to doing something that they may have remembered being told not to do by the judge. As a result the report may have understated the numbers of jurors who looked for information during cases. Thus, if a substantial amount of jurors are evidently ignoring the judge's neutralising instructions, it is clear that a stronger protective approach needs to be adopted, that does not depend on the 'fade factor' pushing the bar too high for reaching a 'substantial risk'.

## **Modern social Media**

It would be rather an understatement to state that since the Contempt of Court Act 1981 'the media has changed profoundly', as 'there is now widespread access to the internet'.<sup>266</sup> Furthermore, 'in the internet age, the tension between freedom of expression and the right to a fair trial by jury can be acute',<sup>267</sup> thus, the ambiguities, tensions and inconsistencies that were already present in contempt law, have only been further exacerbated by the growing use of modern media. Yet, with these grave concerns, 'they have not yet, it seems, taken into account of the fact that the use of the internet means that it is much less (publications) ephemeral than it used to be'.<sup>268</sup>

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<sup>266</sup>H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p. 272.

<sup>267</sup>P. Humpherson, 'Contempt of Court and internet publications – the Law Commission's recommendations and the Criminal Justice and Courts Bill' (2014) Arch. Rev. 4. p. 6.

<sup>268</sup>Ibid. see also: D. Goldberg, G. Sutter & I. Walden, *Media Law and Practice* OUP (2009), p. 143 – 'The impact of the internet on contempt law remains to be developed, but clearly the existence of a vast amount of readily traceable, internationally available, ultimately ineradicable material about (among others) people accused of crime will affect the practicability of keeping information from jurors and witnesses'.

The emergence of the internet visibly has a bolstering effect on the ability of a publication to pose a ‘substantial risk’, as ‘the existence of the internet clearly increases the circulation figures of both newspapers and broadcasts’.<sup>269</sup> Additionally, ‘it is clear that the question of whether a publication is likely to come to the attention of a juror has changed considerably in light of the widespread use of the internet and social networking and the consequent ease and speed with which one can search for and disseminate relevant information about cases or individuals’.<sup>270</sup> Therefore, the likelihood of a juror reading an article, or even noticing the developing story on Facebook or Twitter has greatly increased. Additionally, ‘online newspapers... are often more expansive than their print equivalents and also encourage comment and discussion from all-corners’;<sup>271</sup> thus, a potential juror could be met with a series of prejudicial comments surrounding the publication, which could just as easily influence them as much as the publication itself. Furthermore, Grey has argued that the existence of ‘citizen journalism’, which is often sensationalist and prejudicial, has meant the regulated media have had to push the boundaries of acceptable reporting in order to remain competitive.<sup>272</sup> This is similarly supported by Cram, who notes that the modern media’s selective and sensationalist journalism is causing a much a greater impact on the reader,<sup>273</sup> thus, further fulfilling Schieman LJ’s guidelines for ‘substantial risk’.

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<sup>269</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p. 260.

<sup>270</sup> I Cram & N Taylor, ‘The Law Commission’s contempt proposals – getting the balance right?’ (2013) Crim. L.R. 465.

<sup>271</sup> S. Grey, ‘The world wide web: life blood for the public or poison for the jury?’ (2011) 3(2) Journal of Media Law 199-210.

<sup>272</sup> *Ibid.*

<sup>273</sup> I. Cram, ‘Reconciling fair trial interests and the informed scrutiny of public power? An analysis of the United Kingdom’s contempt of court laws’ in G. Resta *Il rapporto tra giustizia e mass media: quali regole per quali soggetti* (2010, Editoriale Scientifica srl). p. 64.

The heavy judicial reliance on the ‘fade factor’, as a way of showing that a substantial risk was not present, has to be seriously questioned in light of modern media. The judicial belief that publications are gone after a day and start fading in the juror’s memory from then is not the case anymore, as no longer is news comment so swiftly outdated but instead forms part of an easily searchable database that might more easily produce a jigsaw of prejudicial material.<sup>274</sup> Hence, it must be accepted by the English judiciary that ‘the existence of the internet is highly relevant to temporal proximity’;<sup>275</sup> consequently, ‘accessibility of the web-based material, should be taken into account when assessing the risk created by press material that has been published some time before the trial’.<sup>276</sup> Counter arguments from the judiciary suggest that the chance of this is remote, but the rapidly increasing use of the internet is negating the existence of such an argument - in 2013, 36 million adults (73 percent) in Great Britain accessed the Internet every day.<sup>277</sup>

The negating effect that modern media has had on the ‘fade factor’ is equally sustained by Grey, who argues that it must to some extent be undermined by the continuing availability of prejudicial material on readily accessible archives.<sup>278</sup> This approach has been upheld in the Scottish courts, as in Scottish *HMA v Beggs*<sup>279</sup> they noted that ‘the situation affecting the website may be compared with the situation in which a book or other printed material is continuously on sale and available to the public. During that whole period, I consider that it

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<sup>274</sup> I Cram & N Taylor, ‘The Law Commission’s contempt proposals – getting the balance right?’ (2013) Crim. L.R. 465.

<sup>275</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p.262.

<sup>276</sup> *Ibid.*

<sup>277</sup> <http://www.ons.gov.uk/ons/rel/rdit2/internet-access---households-and-individuals/2013/stb-ia-2013.html> accessed February 2014.

<sup>278</sup> S. Grey, ‘The world wide web: life blood for the public or poison for the jury?’ (2011) 3(2) Journal of Media Law 199-210. p. 204.

<sup>279</sup> Lord Osborne, Opinion (No 2) 21 September 2001, 2002 SLT 139, 2001 SCCR 879.

would be proper to conclude that that material was being published'.<sup>280</sup> This is clearly a far more progressive approach to the internet under contempt law than has been seen by any of the British judiciary, which is clearly something that needs to be addressed, as 'information on an internet archive was, in effect, continuously republished'.<sup>281</sup> Furthermore, the effectiveness and impact of Facebook and Twitter has not been given sufficient consideration by the Attorney General or the judiciary. A strong example of this came when, although established media did not breach contempt law during the Baby P case, Facebook campaigns clearly did, and had 6,600 supporters within the first 48 hours.<sup>282</sup> Therefore, there is clearly a 'pressing issue facing the law of contempt',<sup>283</sup> as the judiciary need to maintain public

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<sup>280</sup> See also: *Angus Sinclair v HMA* (Scottish) 15 April 2007 [2007] HCJ AC 27, para 14: 'The availability of the internet and its increasingly wide use by members of the public, including potential and serving jurors, presents a challenge for the administration of justice. While news reported and opinions expressed in the press or broadcasting media on a daily basis are themselves ephemeral, the internet provides ready access to historical material, including media items. At one time a person seeking reported information about a past event or about a particular individual would require to spend significant time, and possibly expense, in retrieving it from a public library or similar institution; now such information can be accessed by the pressing at home of a few controls on a computer. Moreover, persons with interests in particular fields, including criminal investigations and criminal histories, may choose to set up websites which provide links to historical and other materials. Such materials, if accessed by a juror or jurors, may in some circumstances be potentially highly prejudicial to the fairness of the trial of an accused'. And, *Coia v HMA* (Scottish) 18 December 2007, [2007] HCJ 17 IN 219/06 – 'Innumerable difficulties in connection with controlling information accessible on the internet... In our opinion, criminal trials in our jurisdiction are not and cannot be concluded in a prophylactic vacuum. They are, and must be, conducted in the real world, of which...the internet are parts'.

<sup>281</sup> D. Goldberg, G. Sutter & I. Walden, *Media Law and Practice* OUP (2009), p. 144.

<sup>282</sup> Daily Telegraph Online, 11 August 2009.

<sup>283</sup> P. Humpherson, 'Contempt of Court and internet publications – the Law Commission's recommendations and the Criminal Justice and Courts Bill' (2014) Arch. Rev. 4.

confidence that jury trials are, and continue to be, conducted on the evidence in the case and not by consideration of extraneous material, particularly material available on the internet.<sup>284</sup>

Walker has also alluded to another major issue in regards to the internet, which affects the approach that needs to be taken towards ‘substantial risk’, as it is ‘fairly accessible for internet enabled jurors to search the internet and find old reports relating to the case.’<sup>285</sup> Furthermore, Grey has noted that there is a significant amount of jurors that ‘conduct their own web research to aid their decision making, or simply out of curiosity’.<sup>286</sup> This was seen when a Newcastle juror conducted his own internet research into a case during the trial and created a list of 37 additional questions.<sup>287</sup> Similarly, in *Attorney General v Beard & Davey*,<sup>288</sup> a juror used social media to research and relay information regarding a case, while also seeking opinions from others on Facebook. Therefore showing, that not only are juror’s ignoring judge’s neutralising instructions, they are also accessing prejudicial publications which had been published long before the trial. Grey finds that this research stems from a fear ‘of taking on the ultimate responsibility of contributing to a verdict in a difficult- or even not so difficult- case’;<sup>289</sup> thus, they ‘may be tempted to go to judicially forbidden lengths to

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<sup>284</sup> *Ibid.*

<sup>285</sup> C. Walker, ‘Fundamental Rights, Fair Trials and the New Audio-Visual Sector’ 1996, 59 *MLR* 517.

<sup>286</sup> S. Grey, ‘The world wide web: life blood for the public or poison for the jury?’ (2011) 3(2) *Journal of Media Law* 199-210. p. 201.

<sup>287</sup> Manslaughter Trial Collapses after “Sleuth” Juror Carries Out his Own Investigation into the Case’ *MailOnline*, 20 August 2008.

<sup>288</sup> [2013] EWHC 2317 (Admin); [2014] 1 Cr. App. R. 1; [2014].

<sup>289</sup> S. Grey, ‘The world wide web: life blood for the public or poison for the jury?’ (2011) 3(2) *Journal of Media Law* 199-210. p. 201.

bolster their confidence, seeing the internet as a source of impeccable insider information that they should exploit in their quest for the truth'.<sup>290</sup>

This trend has been well documented: a New Zealand Law Commission study conducted in 1997<sup>291</sup> found that around 8-15 percent of jurors consulted the internet for additional research during trials; furthermore, it is important to remember that these studies were conducted at a time when internet usage was a small fraction of what it is today.<sup>292</sup> Therefore, this clearly highlights that the English reliance on jury integrity,<sup>293</sup> the fade factor and neutralising instructions raise the bar for ‘substantial risk’ too far compared to the actual reality. Furthermore, Wilson has similarly followed this criticism when looking at the recent *MGN Jefferies* case, as ‘it is surprising that the judgement did not consider the effect of the Internet. One of the central planks of the publishers’ defence was that the articles would have faded from jurors’ memories by the time of the trial. The articles would however still have been readily obtainable online’.<sup>294</sup> Although the case was able to use serious impediment (which will be discussed in the next chapter), the case failed to acknowledge the power of online media and its effect on any jury member accessing it, which as has been shown frequently happens.

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<sup>290</sup> *Ibid.*

<sup>291</sup> *Ibid*, p202.

<sup>292</sup> <http://news.bbc.co.uk/1/hi/8552410.stm>, accessed January 2014.

<sup>293</sup> See also *Attorney-General v Joanne Fraill and Jamie Stewart* [2011] EWHC 1629 (Admin), (2011) 2 Cr App R 21. Where the defendant contacted an acquitted co-defendant on Facebook and carried out her own internet research.

<sup>294</sup> J. Wilson, ‘When the press oppress’, (2011) Crim L & J 175, 17.

Cram has gone as far to say that a preventive and protective approach to new media will never work, as ‘in the electronic era of web-based comment uploaded from beyond but accessible within the jurisdiction, it could be plausibly argued that attempts to limit media speculation in high profile trials such as the Kercher trial are almost certainly doomed to be circumvented and law enforcement consequently made to look foolish’.<sup>295</sup> Taylor has also supported this by referring to the unregulated ‘citizen journalism’ which is selective and sensationalist,<sup>296</sup> as a prejudicial Tweet or Facebook campaign can have just as many viewers as a regulated official online published article. Grey further endorses this stance by questioning: ‘in an age of Facebook, Twitter and Wikipedia, can legislation still protect the accused from publications that create a substantial risk of serious prejudice to the proceedings?’<sup>297</sup> Therefore, does this leave the law in a situation where the ‘substantial risk’ test is no longer needed and the protective approach should be abandoned all together in favour of a neutralising approach which looks to combat the prejudice at the trial stage?

This radical abandonment of the protective approach in favour of the neutralising approach has been similarly supported by Brandwood, as he concludes that ‘the nature of global media

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<sup>295</sup> I. Cram, ‘Reconciling fair trial interests and the informed scrutiny of public power? An analysis of the United Kingdom’s contempt of court laws’ in G. Resta *Il rapporto tra giustizia e mass media: quali regole per quali soggetti* (2010, Editoriale Scientifica srl). p. 66. See also: D. Goldberg, G. Sutter & I. Walden, *Media Law and Practice* OUP (2009), p. 147 – ‘It is difficult to see how any jurisdiction could attempt to control potentially prejudicial publicity which is built up either over a long time’.

<sup>296</sup> I Cram & N Taylor, ‘The Law Commission’s contempt proposals – getting the balance right?’ (2013) Crim. L.R. 465.

<sup>297</sup> S. Grey, ‘The world wide web: life blood for the public or poison for the jury?’ (2011) 3(2) Journal of Media Law 199-210. p. 210.

technology undermines even vigorous efforts to contain prejudicial information'.<sup>298</sup> Thus, with 'the rise of online media, England likely will have to adopt American-style jury controls';<sup>299</sup> this would include such measures as 'questioning prospective jurors to determine the extent of their exposure' which 'could avoid staying prosecutions wherever there is widespread exposure by the media of information that would prejudice a criminal trial'.<sup>300</sup> Nevertheless, as has already been shown, these US neutralising tools are not necessarily effective. Furthermore, Grey's conclusion takes a more measured approach, and states that 'we can control what the traditional press does online, but not what is said about a case on Facebook or Twitter'.<sup>301</sup> Thus, there is still room in the modern media world for lowering the bar and making full use of the 'substantial risk' test, accordingly endorsing the protective model. Nevertheless, the citizen journalism which comes from Facebook and Twitter may need to be dealt with in a more neutralising approach, or with re-defining what constitutes a publication in the modern media era.

## **Reform**

The chapter thus far has highlighted that the law surrounding 'substantial risk' is nebulous and inconsistent; accordingly, reform of this area is something that should be seriously considered. This sentiment is similarly held by Fenwick who notes 'it is arguable that the inefficiency of s. 2(2) considered here...might be addressed to an extent by adopting a

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<sup>298</sup> J. Armstrong Brandwood, "You say 'Fair Trial' and I say 'Free Press': British and American approaches to protecting defendants' rights in high profile trials" [2000] 75 NYLR 1412. p. 1451.

<sup>299</sup> *Ibid.* See also: J. Agate, 'Strict enforcement of strict liability contempt' (2012) Ent. L.R. 12 - 'in the internet age existing contempt laws are out of date and should be amended, perhaps moving to a system more akin the American system, with lawyers for the parties able to examine potential jurors'.

<sup>300</sup> *Ibid.*, p. 1444.

<sup>301</sup> S. Grey, 'The world wide web: life blood for the public or poison for the jury?' (2011) 3(2) Journal of Media Law 199-210. p. 210.

change of interpretation under s. 3(1) HRA'.<sup>302</sup> However, Taylor has been strong to enforce a caution that all reform must be extremely measured, as 'in the *post-Leveson* climate, justifiable criticism of the excesses of invasive tabloid journalism would align with demands for greater restrictions upon media's ability to comment upon pending court cases. In the face of such pressures, it is essential to recall the principled basis of the media's freedom to report'.<sup>303</sup> Nevertheless, as has been seen, there is a strong argument for lowering the standard of 'substantial risk' so as to harmonise it with ECHR jurisprudence and reinstate the protective method in English contempt law.

The Attorney-General has been similarly supportive of re-enforcing the protective method; he stated that 'without the sanction of prosecution the danger is that breaches will occur and in turn cause greater disruption to criminal trials. Prosecution does concentrate the mind. As a practitioner in the fields of health and safety law it seemed to be effective in raising and maintaining standards. I see the sanctions for Contempt of Court in a similar light'.<sup>304</sup> Thus, it can be inferred that he is calling for a reading down of the 'substantial risk' so as to allow for more prosecutions, as a way of strengthening the protective model.

The Law Commission has similarly argued that there is a disparity between the English and Strasbourg approach and called for a lowering of this standard, as they conclude that 'any degree of prejudice to a fair trial must be prevented'.<sup>305</sup> Fenwick in light of *Worm* has called for a reading down and clarifying of the term 'substantial' so as to add further certainty to the

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<sup>302</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p.276.

<sup>303</sup> I Cram & N Taylor, 'The Law Commission's contempt proposals – getting the balance right?' (2013) Crim. L.R. 465.

<sup>304</sup> Attorney General, Kalisher Lecture, 'Contempt of Court: Why it Still Matters', 12 October 2010.

<sup>305</sup> Law Commission, 'Contempt of Court, A Consultation Paper' (2013) Consultation Paper No 209, 2.45.

threshold reached under s. 2(2),<sup>306</sup> thus, adopting a stance similar to that of a 'likelier than not test'. Confusingly, this would lower the test in practice, yet in terms of wording would actually be a literal rising of the standard. Consequently, she has also called for a change in the wording, as 'a "significant" or "real" risk might be more workable',<sup>307</sup> and in practice a lot clearer. Furthermore, any lowering of the substantial risk test would not be (as the judiciary appear to fear) a violation of Article 10, as although it would weaken the standard it would not reach the levels of those criticised in *Sunday Times*; it would merely be in accordance with Strasbourg jurisprudence. This development could be achieved by a s. 3 HRA interpretation by the courts, so as to harmonise the two approaches, which in turn would reinstate the stronger protective approach. However, this is unlikely given that any change is now likely to come as a result of the Law Commission proposals through parliamentary legislation. Furthermore, the courts have appeared to show a willingness to lower the bar in the most recent cases of *MGN* and *Times*, although still ambiguous as to what extent they are willing to lower it, support from the Law Commission would help to endorse this lowering by the judiciary.

Smartt has taken the radical stance that in light of modern media's effect on the substantial risk test that 'the Contempt of Court Act 1981, be done away with, since this statute was being shamelessly ignored'.<sup>308</sup> Although modern media does pose a large risk to the use and meaning of 'substantial risk', as 'what is clear is the motion of publication contempt will have to adapt or die in the teeth or the... internet';<sup>309</sup> a far more measured approach can be

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<sup>306</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p.277.

<sup>307</sup> *Ibid*, p278.

<sup>308</sup> U. Smartt, 'Who Still Observes the Law of Contempt?' (2007) 171 JPN 76.

<sup>309</sup> D. Goldberg, G. Sutter & I. Walden, *Media Law and Practice* OUP (2009), p147.

seen in New Zealand case law. In *Police v PIK*<sup>310</sup> the Court acknowledged that ‘Once information is available on the internet it is potentially there indefinitely. Information takes on a viral quality. It has a tendency to spread’. However, injunctions could be placed on said material, or removed from the internet so as not to cause prejudice to any jurors who attempt to search for material during the trials. This practical approach has been similarly endorsed by Bell; as she explained ‘the prosecution carry out internet searches; if prejudicial material was identified, the prosecution should request that the Australian website remove it until the trial was over’.<sup>311</sup> Therefore, this would help decrease the chance of the internet removing any potential fade factor on earlier prejudicial publications which were published outside of the ‘at risk’ period.

The Law Commission have appeared to potentially support such an approach, as they state that ‘section 2(3) of the 1981 Act should be amended, the courts be provided with a power to make an order when proceedings are active to remove temporarily an identified publication that was first published before proceedings became active. The power would only be available where the publication creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. Such an order would be capable of being made against any person who is a publisher within the meaning of the 1981 Act and a failure to comply with such an order expeditiously without reasonable excuse

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<sup>310</sup> Youth Court, Manukau [2008] DCR 853; 2008 NZDCR Lexis 39, 25 and 26 August 2008 (New Zealand).

<sup>311</sup> ‘How to Preserve the Integrity of Jury Trials in a Mass Media Age’, lecture given by Virginia Bell, Justice of the High Court of Australia, at the Supreme and Federal Court Judges Conference, January 2005, [www.ipc.nsw.gov.au/lawlink/supreme\\_court/l1\\_sc.nsf/pages/SCO\\_speech\\_bell\\_270105](http://www.ipc.nsw.gov.au/lawlink/supreme_court/l1_sc.nsf/pages/SCO_speech_bell_270105) (accessed 20 December 2013).

would be a contempt of court'.<sup>312</sup> This would provide a protective tool to deal with internet based prejudicial publications, which would make Smartt's claims far too radical, as this reform would allow for a far more practical and measured approach. However, Cram has critiqued this proposal, as it 'ignores the practical problem that arises when those deemed to have 'sufficient control' are physically located outside the jurisdiction and that if those outside the jurisdiction ignore UK court orders this would lead to the courts' authority being undermined'.<sup>313</sup>

The Law Commission has also followed the Australian approach 'that a person who has been sworn as a juror in a criminal trial must not inquire about the defendant until the trial is over. "Inquire" is defined as including "(a) search an electronic database for information, for example, by using the internet; and (b) cause someone else to inquire". The prohibition is backed by criminal sanctions, including the possibility of imprisonment'.<sup>314</sup> The Law Commission have recommended 'the introduction of a new statutory offence of sworn jurors in a case deliberately searching for extraneous information related to the case',<sup>315</sup> 'as there is a limit to how far restrictions on the media can legitimately address a problem such as this. There also needs to be clear restrictions on jurors' conduct'.<sup>316</sup> The Law Commission 'recommend that this offence should be triable in indictment, with a jury in the usual manner. The maximum penalty for the offence should be 2 years imprisonment and/or an unlimited

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<sup>312</sup> The Law Commission, 'Contempt of Court (1): Juror misconduct and internet publications' (2014) Law Com No 340, p.29, para 94.

<sup>313</sup> N Taylor and I Cram, 'The Law Commission's Contempt Proposals – Getting the balance right?' [2013] *Criminal Law Review* 465 at 481.

<sup>314</sup> D. Goldberg, G. Sutter & I. Walden, *Media Law and Practice* OUP (2009), p. 145.

<sup>315</sup> The Law Commission, 'Contempt of Court (1): Juror misconduct and internet publications' (2014) Law Com No 340, p.3, para 21.

<sup>316</sup> *Ibid*, p. 71, para 36.

fine'.<sup>317</sup> Thus, the domestic approach is clearly adopting a neutralising stance to tackling prejudicial or impeding internet publications, as any prosecution will be focused on the juror rather than that of the offending publisher. Therefore, this can be seen as a further movement towards the US approach which as discussed earlier, focuses entirely on a neutralising approach to contempt, which is not as strong as the protective approach.

These recommendations have seen Parliamentary support in s.71 and s.72 of the Criminal Justice and Courts Bill which criminalises ‘research by jurors’ and ‘sharing research with other jurors’. Both sections are amendments to the current Juries Act 1974, and add in the additional offence ‘a member of the jury that tries an issue in a case before a court to research the case during the trial period’,<sup>318</sup> with the *mens rea* requiring intent or reasonableness in their knowledge of its relevance.<sup>319</sup> Additionally, s.72 makes it an offence to share this information with other jurors; with both offences being punishable with imprisonment of up to two years. Thus, these amendments clearly uphold the Commission’s proposals on how to best tackle the thus far unacknowledged private research conducted by jurors,<sup>320</sup> as ‘private research by jurors poses a threat to the fairness of our adversarial system of criminal jury trial by admitting into jurors’ deliberations material whose relevance to proceedings has been neither judicially determined nor subject to examination by counsel’.<sup>321</sup> Consequently, this ‘will impress upon jurors the seriousness of trying the case solely upon the evidence presented in court’<sup>322</sup> and as such they should be less likely to encounter any prejudicial or

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<sup>317</sup> *Ibid*, p.3, para 21.

<sup>318</sup> Criminal Justice and Courts Bill s.72(1).

<sup>319</sup> Criminal Justice and Courts Bill s.71(2) and (3).

<sup>320</sup> I. Cram, ‘Dealing with the googling juror: a commentary on Part 3 of the Criminal Justice and Courts Bill’ (2014) Comm. L.

<sup>321</sup> *Ibid*.

<sup>322</sup> *Ibid*.

impeding publications. Thus, it could be a logical conclusion, that this new offence will be used as a further tool to increasing the standard required to show that a publication has caused a substantial risk of serious prejudice under s.2(2), as a juror member is even less likely to have encountered the publication in question due to this neutralising tool.

However, this neutralising approach must be met with heavy criticism, as Thomas argues that the ‘proposed new statutory offences and powers are ill-judged, unnecessary and likely to be un-workable in practice’.<sup>323</sup> This argument can be sustained by the fact that in terms of dealing with contempt of court through prejudicial publications, it is wholly unreasonable to criminalise the juror member that reads the article, when the publisher is most likely to escape any liability at all. This approach moves the law strongly away from the protective approach and into a neutralising approach, which this work cannot support, as it is not the most effective theoretical model for dealing with contempt. Furthermore, Thomas points to the lack of any empirical support, as ‘there is no evidence that merely establishing these statutory offences will have any discernible impact on juror behaviour’,<sup>324</sup> thus highlighting that the perceived benefit of a neutralising approach is often overstated. This argument is supported by Cram, as he forwards the potential situation ‘that jurors 1, 2, 3, 4 and 8 have all done private research that they dare not acknowledge for fear of prosecution but which affects their respective approaches to the evidence. In this scenario, not only will the reasoning process in the jury room appear decidedly bizarre to other, law-abiding jurors, over time the offence may be thought likely to fall into disrepute because of its regular breach (and knowledge of this fact)’.<sup>325</sup> Therefore, there is a real risk that this proposed law will fail to

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<sup>323</sup> C. Thomas, ‘Does the internet mean the end of trial by jury?’ S.J. (2014) 158(48).

<sup>324</sup> C. Thomas, ‘Does the internet mean the end of trial by jury?’ S.J. (2014) 158(48).

<sup>325</sup> I. Cram, ‘Dealing with the googling juror: a commentary on Part 3 of the Criminal Justice and Courts Bill’ (2014) Comm. L.

actually neutralise any prejudicial publications from having an effect on a juror that has read the material. Yet, this law may be used by the judiciary to make the standard for s.2(2) even harder to reach, by claims that the jury integrity will be that much stronger, as the proposed laws will reduce the likelihood of them reading the publication in question. However, in reality, it will allow prejudicial publications to escape liability and place too higher burden on a flawed neutralising approach;<sup>326</sup> therefore a far stronger protective approach needs to be developed.

Nonetheless, tackling internet based prejudicial publications with a purely protective approach has been shown by this work to be an almost impossible task, due to its vast uncontrollable breadth. Thus the Law Commission's recommendations provide a practical approach to the issue of the internet and encompass a mix of preventive and neutralising strategies as well: 'the recommendations include greater education in schools about the role and importance of jury service; improving the information provided to jurors about their obligations during jury service; changes to the wording of the juror oath to include an agreement to base the verdict only on the evidence heard in court; requiring jurors to sign a written declaration; informing jurors about asking questions during the trial; a statutory power for judges to remove internet-enabled devices from jurors where necessary and effective systems for jurors to report concerns'.<sup>327</sup> Therefore, in regards to tackling new media, any change will come predominantly in neutralising and preventive approaches, which is likely to be the most effective combination.

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<sup>326</sup> N. Taylor, 'Judicial management of juror impropriety' (2014) L. Crim. L. 43.

<sup>327</sup> *Ibid*, p. 4 para 22.

Furthermore, the Law Commission has been extremely reasoned in acknowledging that ‘there is the risk that, despite a new criminal offence being created and made known to every juror, some sworn jurors will fail to comply’.<sup>328</sup> Therefore, this shows a marked acceptance, that jury integrity is not fool proof,<sup>329</sup> which this work has already shown. Consequently, they accept that ‘in some cases temporary removal of material may be necessary’,<sup>330</sup> in support of this they cite the extreme case of Maninder Pal Singh Kohli who faced charges in England of rape and murder but fled to India. When in India awaiting extradition he confessed to the crimes in a TV interview. At his trial in England, Mr Kohli claimed that his confession was unreliable as it was obtained by oppression in India. The trial judge excluded the confession and it was not presented as evidence to the jury. However, a curious juror searching for information about the trial would have immediately discovered this most prejudicial material in the form of the YouTube video of his confession.<sup>331</sup> Accordingly, The Law Commission has taken a fairly balanced approach to dealing with modern media, by taking approaches from all three models of contempt law; however, Spencer has criticised the laws tackling the jurors themselves, as ‘it would discourage disclosure by jurors of their own or others misconduct’.<sup>332</sup> Therefore, this would result in any prejudicial or impeding influences from

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<sup>328</sup> *Ibid*, p. 37 para 124.

<sup>329</sup> See: C Thomas, “Avoiding the perfect storm of juror contempt” [2013] *Criminal Law Review* 483, 491 – ‘23% of jurors questioned were “confused about the rule on internet use”; 62% of jurors questioned had not heard of recent prosecutions of jurors for misconduct and up to 7% of jurors admitted to having used the internet to look for information which may be prohibited; for example 7% admitted to looking for information about the legal teams in their trial, whilst 6% admitted to looking for definitions of legal terms’.

<sup>330</sup> The Law Commission, ‘Contempt of Court (1): Juror misconduct and internet publications’ (2014) Law Com No 340, p. 37, para 124.

<sup>331</sup> The video is still available: [http://www.youtube.com/watch?v=rF9m\\_H5UkEA](http://www.youtube.com/watch?v=rF9m_H5UkEA) (last visited 1 October 2013).

<sup>332</sup> JR Spencer, “The Law Commission’s consultation paper on contempt of court” [2013] *Criminal Law Review* 1, 2.

being exposed, thus damaging the fair trial process, which the laws were there to uphold. Furthermore, they failed to fully define the scope of the effect that social media is having on this area of contempt, and instead have left the law to be developed and fleshed out by the judiciary;<sup>333</sup> which seems rather dangerous considering the lack of appreciation an aging judiciary will have for these modern developments. Nevertheless, this can be viewed as heading in the right direction, yet a full conclusion cannot be made regarding The Law Commission's proposals on 'substantial risk', as their full findings and proposals have yet to be published.<sup>334</sup>

Finally, concern has also been raised over the ability of the Attorney General to determine which publication has individually caused the 'substantial risk', as 'in reality, the risk of prejudice arises most frequently from the cumulative (whether "snowball" or "drip-feed") effect of publicity decisions taken by editors over a period of time, possible in a number of independent newspapers, not typically from single articles or broadcasts which are unlikely to be recalled specifically by jurors several months later'.<sup>335</sup> As Fenwick points out, 'amidst a mass of sensationalist, partial reporting, it is very difficult to ascribe responsibility to individual newspapers'.<sup>336</sup> Furthermore, Miller notes that 'the combined effect of such coverage has created a substantial prejudice and yet, when judged at the time of publication, be unclear that any single publication has done so'.<sup>337</sup> Yet, 'it is difficult to see how contempt

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<sup>333</sup> The Law Commission, 'Contempt of Court (1): Juror misconduct and internet publications' (2014) Law Com No 340, p. 15.

<sup>334</sup> <http://lawcommission.justice.gov.uk/areas/contempt.htm> accessed July 2014.

<sup>335</sup> D. Corker and M. Levi, 'Pre-trial Publicity and its Treatment in the English Courts", (1996), Criminal Law Review, 627.

<sup>336</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) p.270.

<sup>337</sup> C. Miller, *Contempt of Court* (2000, Oxford), p. 249.

laws can, or should, be adjusted so as to impose liability';<sup>338</sup> this could be achieved through a collective prosecution of publications which equally contribute to the substantial risk. However, the Commission at present are not willing to move forward with this development, as 'liability cannot be founded on the collective impact of publicity, that is to say, where different publishers cumulatively create a substantial risk of serious prejudice or impediment, but where no individual publisher, taken alone, does so'.<sup>339</sup>

## Conclusion

This chapter has explored the term 'substantial risk' as used in s. 2(2) of the Contempt of Court Act 1981. It has looked at its initial interpretation by the court; yet, in the lead up, inception and usage of the Human Rights Act 1998 the meaning has been distorted into creation of a much higher test. Therefore, an ambiguity has been created surrounding its meaning and usage; this has led to the English model moving away from a protective approach and towards an over- usage of the neutralising model. Furthermore, the English law is now in the ironic position of having gone too far in its attempts to adhere to the ECHR's decision in *Sunday Times*, as it clearly does not match the approaches taken in ECHR jurisprudence. The chapter has also explored the empirical research that has been done regarding pre-trial publicity, which has shown that a lot of the arguments supporting the current English approach are based on judicial myths and do not match the results of the research. Additionally, attention was paid to 'modern media' and how this has impacted on the meaning and usage of 'substantial risk'; yet its effects have not been satisfactorily dealt with by the English judiciary or Parliament.

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<sup>338</sup> *Ibid.*

<sup>339</sup> Law Commission, 'Contempt of Court, A Consultation Paper' (2013) Consultation Paper No 209, chp 2. See case: A-G v MGN Ltd [1997] 1 All ER 456.

Finally, it explored the potential areas of reform, which currently are unlikely to be achieved through a s.3 HRA reinterpretation of the current English law, so that the ‘substantial risk’ test can be read down to be in line with *Worm*; which would firmly place English contempt law back into the protective model. This is the preferred option of this thesis, as it would strengthen the existing laws and make sure the approach was firmly within the remit of the protective model, which would ensure an equal balance between freedom of expression and the right to a fair trial. Instead, reform is likely to come from legislative reform as a result of the Law Commission Proposals, yet it is doubtful whether these reforms will move contempt law back into the protective model and in line with Strasbourg’s jurisprudence. It is more likely to be a heavier reliance on neutralising models rather than the protective model, as the Law Commission’s proposals are filled with neutralising approaches (which have been discussed in this chapter). Nonetheless, such an approach is unlikely to fully tackle the problem and will leave the right to a fair trial under protected, as is a common problem with a heavy reliance on a neutralising approach; consequently, a far more protective approach would be favoured with a reduced reliance on neutralising measures when tackling the new/social media.

## **Chapter 5: ‘Seriously Prejudiced’ and the use of ‘Impeded’**

This chapter will explore the judicial interpretation and usage of ‘seriously impeded or prejudiced’, which as has already been noted must be proven alongside ‘substantial risk’ as part of a two limbed test.<sup>340</sup> The chapter will explore the following matters: firstly, the judicial interpretation of serious prejudice and the lack of clear separation from the meaning of impediment. Secondly, it will consider the extent to which more recent case law has shown a clear shift towards the separate use of serious impediment, and will consider how this will impact on the use and application of the s. 2(2) test. Finally, with the aid of the Commission’s recent consultation paper, it will assess the potential reform of the ‘seriously impeded or prejudiced’ test.

### **Judicial interpretations of ‘seriously impeded or prejudiced’**

Miller has noted that prejudice and its seriousness are concerned with the effect it would have on the outcome of a trial,<sup>341</sup> which Fenwick has observed ‘can be established in a number of ways’.<sup>342</sup> Thus, in sharp contrast to the unclear case law for the ‘substantial risk’ test, there are some clear standards, as Goldberg states that ‘the revelation of previous convictions is probably the classic teaching example to journalists about what one must not do’<sup>343</sup> if they want to avoid creating a ‘substantial prejudice’ under s. 2(2). Furthermore, this assertion is clearly supported in the English case law, as in *Attorney General v Independent Television News Ltd*<sup>344</sup> a publication of the defendants previous convictions were enough to give rise to serious prejudice. In support, Buxton J stated that ‘in this case, if even one juror at Mr

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<sup>340</sup> *A-G v News Group Newspapers* [1987] 1 QB 1; [1986] 3 WLR 65.

<sup>341</sup> C. Miller, *Contempt of Court* (2000, Oxford), p232.

<sup>342</sup> H. Fenwick, *Civil Liberties and Human Rights* 4<sup>th</sup> edn (2007), p349.

<sup>343</sup> D. Goldberg, G. Sutter & I. Walden, *Media Law and Practice* OUP (2009), p117.

<sup>344</sup> [1995] 2 All E.R. 370; [1995] 1 Cr. App. R. 204.

Magee's trial for a terrorist murder had in mind Mr Magee's criminal record, and more particularly his previous conviction for an IRA terrorist murder, the effect on the course of justice in those proceedings would without doubt be serious'.<sup>345</sup> Therefore, there is a clear standard that an inclusion of a previous conviction in a publication will give rise to a substantial prejudice; however, Cram is doubtful over what the word 'serious' adds to the standard, as 'the word serious adds little if the test is taken as whole. If there is a risk of prejudice then it must be neutralised, and if it cannot be neutralised by standard directions then that risk becomes real or significant'.<sup>346</sup>

Despite these apprehensions, the judicial standards for serious prejudice have remained on the whole clear and consistent, as 'the potential prejudice must be serious, an ordinary English word which must be given its proper weight'.<sup>347</sup> Thus, in *A-G v Unger* Simon Brown LJ found that articles which clearly imputed guilt would give rise to serious prejudice, as they could influence the jurors.<sup>348</sup> Similarly, Quinn has supported this as an unambiguous and steady area of the law, as suggesting someone's guilt is an 'obvious area over which care must be taken'.<sup>349</sup> In addition, this was similarly reasoned in *A-G v Guardian* as the article made claims that 'there is a conspicuous hint of the necrophilia about this defendant',<sup>350</sup> they went on to draw links between the defendant and the notorious serial killers of Dennis Nilsen and Rosemary West. Thus, the court noted that there had been clear assertions that he had

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<sup>345</sup> *Ibid.* Buxton J at 384.

<sup>346</sup> I Cram & N Taylor, 'The Law Commission's contempt proposals – getting the balance right?' (2013) Crim. L.R. 465. p 473.

<sup>347</sup> *A-G v Guardian* [1999] EMLR 904.

<sup>348</sup> *A-G v Unger* (1998) 1 Cr App R 308. N.b. although the articles did give rise to a serious prejudice, they failed to meet the S. 2(2) test as they did not cause a substantial risk.

<sup>349</sup> F. Quinn, *Law for Journalists*, 2nd edn (London: Pearson, 2009), p.71.

<sup>350</sup> [1999] EMLR 904.

instincts of a serial killer; consequently, the suggestion of his guilt was clearly seriously prejudicial.<sup>351</sup> Therefore, Goldberg has noted from these cases it can be ascertained that an article which is ‘inaccurate, inflammatory, attributed motives to the defendants which formed part of the proper deliberation of the case’<sup>352</sup> would give rise to ‘serious prejudice’.<sup>353</sup>

Equally, case law has been comprehensible and followed for publications that have descriptions or photographs of a defendant where identity is likely to be an issue at trial, as this will give rise to serious prejudice. In *Attorney General v Express Newspapers Ltd*<sup>354</sup> there was an alleged gang rape by a group of footballers, where the victim did not know the names of the accused. The police and the Attorney General issued guidelines on a number of occasions, making clear that identity was an issue in the criminal proceedings and suspects should not be named or photographs of them published. On 10 October 2003, the Daily Star published an article giving the names of two of the accused and the clubs for which they played; thus, this was sufficient to meet the test for ‘serious prejudice’. More recently, photographs of the defendant in online publications have met the ‘serious prejudice’ standard, as it was noted that ‘visual images are designed for impact; that is why any editor would be keen to use them to add to the impact of the news story.... The image of the accused brandishing the pistol and apparently doing so in a brazen manner could not have failed to create an adverse impression of a young man who enjoyed demonstrating a propensity for

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<sup>351</sup> Although serious prejudice was shown, the case failed to meet the S. 2(2) test as it did not meet the substantial risk standard.

<sup>352</sup> D. Goldberg, G. Sutter & I. Walden, *Media Law and Practice* OUP (2009), p119.

<sup>353</sup> See also: D. Eady & A.T.H. Smith, *Arlidge, Eady & Smith on Contempt* (2<sup>nd</sup> edition, Sweet & Maxwell, London, 1999) at 4.87. Argues that the publication must give rise to a pre-judgement.

<sup>354</sup> [2004] EWHC 2859; [2005] E.M.L.R. 13.

violence. It was prejudicial in a manner directly relevant to the issues in the case.<sup>355</sup> Thus, the fact that these photos were ‘improperly affecting the course of proceedings’<sup>356</sup> equated to serious prejudice. Therefore, it can be concluded that the case law surrounding serious prejudice holds some clear standards: that referring to previous convictions, imputing guilt, releasing identities of the accused, and the use of photographs can all give rise to serious prejudice.

However, there is an apparent merging of the concepts of prejudice and impediment, as the Law Commission has noted that<sup>357</sup> - ‘it has been held that impeding and prejudice are neither mutually exclusive nor synonymous concepts, although they overlap’.<sup>358</sup> Therefore, having the potential to blur the lines between the two concepts which would lead to inconsistent case law, as (has been discussed earlier in this work) the test for substantial risk for serious impediment is *prima facie* lower than that for serious prejudice. Furthermore, confusion can be created by the judges mistaking serious prejudice for a serious impediment and vice versa: an early example of this can be seen in *Attorney General v Times Newspapers Ltd and Others*.<sup>359</sup> The case was a clear example of smearing the defendant’s character to cast

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<sup>355</sup> *HM Attorney General v Associated Newspapers Ltd & News Group Newspapers Ltd* [2011] EWHC 418 (Admin), at 41.

<sup>356</sup> Law Commission, ‘Contempt of Court, A Consultation Paper’ (2013) Consultation Paper No 209, at 2.34.

<sup>357</sup> Law Commission, ‘Contempt of Court, A Consultation Paper’ (2013) Consultation Paper No 209, at 2.42.

<sup>358</sup> See also *A-G v BBC* [1992] Crown Office Digest 264; *A-G v MGN Ltd* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408; *A-G v Random House Group Ltd* [2009] EWHC 1727 (QB), [2010] Entertainment and Media Law Reports 9; *A-G v MGN Ltd (No 2)* [2011] EWHC 2383 (Admin), [2012] Entertainment and Media Law Reports 10.

<sup>359</sup> Times, 12 February 1983.

aspersions of guilt, as there was a ‘huge wave of media publicity’,<sup>360</sup> in which they showed the defendant to be feckless, a drug addict and involved in a homosexual affair. Oliver LJ observed that the publication ‘was fortissimo and it was lurid as the pettiness of the material permitted. Any idea that while a man has a criminal charge outstanding against him his character is in baulk was thrown to the wind’.<sup>361</sup> Therefore, this shows that defamatory remarks which questioned the moral character of a defendant could give rise to serious prejudice.

Nevertheless, confusion is created by his remarks that stated ‘the course of justice is not just concerned with the outcome of proceedings. It is concerned with the whole process of the law, including the freedom of a person accused of a crime to elect, so far as the law permits him to do so, the mode of trial which he prefers and to conduct his defence in the way which seems best to him and to his advisers. Any extraneous factor or external pressure which impedes or restricts that election or that conduct, or which impels a person so accused to adopt the course in the conduct of his own defence which he does not wish to adopt, deprives him to an extent of the freedom of choice which the law confers upon him and is, in my judgement, not only prejudice but a serious prejudice.’<sup>362</sup> Thus, although his remarks refer to instances of serious prejudice, they are clearly instances of impediment, as they involve ‘matters affecting the conduct of the trial, including options open to the parties’.<sup>363</sup> Consequently, there is a clear confusion within the judiciary as to where the line is between the concepts, which is

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<sup>360</sup> M. Zander, *Cases and Materials on the English Legal System* (Butterworths, London 1996).

<sup>361</sup> *Attorney General v Times Newspapers Ltd and Others* Times, 12 February 1983.

<sup>362</sup> *Attorney General v Times Newspapers Ltd and Others* Times, 12 February 1983.

<sup>363</sup> C. Miller, *Contempt of Court* (2000, Oxford), p232.

unsatisfactory, as ‘although there is considerable overlap between the ‘impediment’ and ‘prejudice’ aspects of s. 2(2), their focus is somewhat different’.<sup>364</sup>

### **Recent usage of serious impediment: removing the blurred lines?**

The ambiguous blurred line between impediment and prejudice is a view similarly shared by Sutter, as he notes that ‘in practice, the boundary between impediment and prejudice seems fluid’.<sup>365</sup> Furthermore, these concerns were reiterated by the Law Commission as they stated their ‘concern that there is a lack of clarity generally about the meanings of “prejudice” and “impede” and the relationship between the two terms. The case law often refers to both prejudice and impediment in the same breath, without differentiating between the two’.<sup>366</sup> Thus, it can be ascertained that there is some confusion within the judiciary over the interpretation and implementation of prejudice and impediment.

However, more recent case law has shown a clear movement by the judiciary to keep impediment and prejudice as two separate concepts and remove the blurred lines. In *Attorney General v Random House Group Ltd*<sup>367</sup> the case concerned the retrial of those suspected of attempting to blow up planes using explosives in concealed soft drinks. A book had been published shortly before the trial which covered the case over 5 pages, yet an injunction was sought; consequently, the book was withdrawn. It was noted that ‘the passing of time would fade memories of the coverage, and the judicial instructions would actively stop any juror

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<sup>364</sup> *Ibid.*

<sup>365</sup> D. Goldberg, G. Sutter & I. Walden, *Media Law and Practice* OUP (2009), p118.

<sup>366</sup> Law Commission, ‘Contempt of Court, A Consultation Paper’ (2013) Consultation Paper No 209, p16.

<sup>367</sup> [2009] EWHC 1727 (QB).

going out of their way to read the book; thus not a substantial risk for serious prejudice'.<sup>368</sup> Nonetheless, although it failed the s. 2(2) tests in this regard, an alternative approach could be taken, as 'If the book were put back on sale the trial would be seriously impeded , as there would be multiple applications for a stay in the proceedings, and the trial judge would be distracted from his summing up'.<sup>369</sup> Thus, in this case, it could be shown that the publication would have impeded the smooth running of the trial process, and thus could meet the test for serious impediment. Although, this is clearly a major restriction on freedom of expression, the court stressed that 'the public interest in the trial being fair could not be higher. If they are innocent and found guilty the scale of injustice would be difficult to exaggerate. If they are guilty and have their proceedings set aside and not retried again then the injustice and risk to the public can not be exaggerated'.<sup>370</sup> Therefore, the findings in the case can clearly be seen to separate prejudice and impediment into two distinct categories, as impediment will look at whether the build up to the trial or the trial itself has been impeded. Consequently, it is distinct from serious prejudice, and will not be as hard to meet, due to the fade factor having little effect on impediment.

Eady J has defined the use of the word impeded as making 'it clear that if a publication is likely to have the effect of slowing down the stream of justice, or of diverting its flow even temporarily, that may in itself be treated as 'undesirable' as a matter of public policy and punishable as contempt. It does not appear to be necessary to go so far as to demonstrate that the conduct is likely to affect the outcome of the proceedings'.<sup>371</sup> Thus, (as has been stated

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<sup>368</sup> *Attorney General v Random House Group Ltd* [2009] EWHC 1727 (QB). At 71-77.

<sup>369</sup> *Attorney General v Random House Group Ltd* [2009] EWHC 1727 (QB). At 84.

<sup>370</sup> *Attorney General v Random House Group Ltd* [2009] EWHC 1727 (QB). At 107.

<sup>371</sup> D. Eady & A.T.H. Smith, *Arlidge, Eady & Smith on Contempt* (2<sup>nd</sup> edition, Sweet & Maxwell, London, 1999), at 4.93.

already in this work) serious impediment does not need to reach such a higher test under substantial risk as the one needed for showing that the serious prejudice is a substantial risk. This approach is clearly taken<sup>372</sup> in *Attorney General v MGN*<sup>373</sup> in which ‘they (the media) systemically deconstructed his (the defendant’s) personality and imbued it with all manner of sinister and lurid undertones that were not only entirely false but deflected attention away from the real killer’.<sup>374</sup>

The case involved Mr Jefferies, who on the 30 December 2010 was arrested on suspicion of murder; as a matter of fact he was innocent, yet this was not known at the time. A publication by the Daily Mirror a day after his arrest contained coverage of: ‘Jo suspect is a peeping Tom’; ‘friends in jail for paedophile crimes’; ‘cops now probe 36 – years old murder’;<sup>375</sup> ‘fellow teacher abused boys in flat’; ‘he was strange, always hanging about’; ‘1974 strangler never caught’; ‘haunting similarities to the unsolved killing of a student teacher nearby in 1974’; ‘police refused to rule out a link between the two killings’.<sup>376</sup> Thus, this clearly created the impression that he was guilty of additional crimes, which undoubtedly smeared his character similar to the instances seen in *Times* and *Guardian*. Equally lurid coverage was reported in The Sun on the 1<sup>st</sup> January 2011: ‘obsessed by death – Mr Jefferies scared kids by a macabre fascination’; ‘academic obsession with death’; ‘he let himself into the flat whenever he wanted as he had a key’; ‘murdered Jo suspect followed me says woman’; ‘I didn’t think his behaviour was normal’; ‘Hannibal Lecter – posh and a little bit creepy’.<sup>377</sup>

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<sup>372</sup> Case Comment, ‘Contempt and serious impediment’ (2011) Comms. L. 155

<sup>373</sup> [2011] EWHC 2074 (Admin).

<sup>374</sup> P. Wragg, ‘Time to end the tyranny: Leveson and the failure of the fourth estate’ (2010) Comms. L. 11.

<sup>375</sup> *A-G v MGN* [2011] EWHC 2074 (Admin) at 5.

<sup>376</sup> *A-G v MGN* [2011] EWHC 2074 (Admin) at 6.

<sup>377</sup> *A-G v MGN* [2011] EWHC 2074 (Admin) at 8.

The Daily Mirror's coverage on the 1<sup>st</sup> January 2001 went as far as saying: that the killer must have been waiting inside the flat; there were no signs of a break in; Mr Jefferies had access to her flat; Miss Yeates may have been killed after finding an intruder in her flat who did not want to be identified later.<sup>378</sup> Therefore, it can be observed that there was clear inference of guilt, similar to that of the damning publication in *Unger*.

However, as has been the case for many other publications in regards to the unworkable and extremely high substantial risk test for serious prejudice, it failed to meet the high bar set, as 'anything read at the time by anyone who would in due course become a member of the jury which would try Mr Jefferies (assuming that the case had proceeded to trial) would have faded from the memory, and that taken with the appropriate judicial directions, the trial would have proceeded in the usual way and the jury would have returned unbiased verdicts'.<sup>379</sup> Thus, there was not enough of a substantial risk to show that serious prejudice could happen, despite the articles vilifying Mr Jefferies.<sup>380</sup> Nevertheless, the judiciary were willing to use impediment as a separate tool for bringing an action under s. 2(2), despite them admitting it themselves that 'the use of impeding the course of justice outside the trial process has been less well trodden'.<sup>381</sup> In support they cited Oliver LJ sentiments in *Times Newspapers*; although 'at the end of the passage, (he) referred to prejudice, these are examples, but not a comprehensive list, of occasions when the course of justice would be impeded'. Thus, examples when serious impediment can be shown include: when the

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<sup>378</sup> *A-G v MGN* [2011] EWHC 2074 (Admin) at 9-10.

<sup>379</sup> *A-G v MGN* [2011] EWHC 2074 (Admin) at 16.

<sup>380</sup> Case Comment, 'Contempt and serious impediment' (2011) Comms. L. 155.

<sup>381</sup> *A-G v MGN* [2011] EWHC 2074 (Admin) at 29.

publication influences the defendant or litigant to act in a particular way,<sup>382</sup> or when the material would deter a witness from coming forward to give evidence.<sup>383</sup>

Thus, in terms of Mr Jefferies, the court stated that the ‘vilification of a suspect under arrest readily falls within the protective ambit of s. 2(2) of the Act as a potential impediment to the course of justice’.<sup>384</sup> Therefore, the judges were not looking if the trial would be prejudiced and jury would not be able to reach a fair decision;<sup>385</sup> instead, they were assessing if the evidence at the trial may be incomplete as witnesses were less likely to come forward. Consequently, the court found that this did amount to serious impediment, which Cram has praised for being a novel application of the law,<sup>386</sup> as it clearly defines impediment under s. 2(2) as being ‘established where an effective defence cannot be made out by the suspect because the nature of the publicity has the result that witnesses might be reluctant to come forward with relevant information’.<sup>387</sup> However, it would seem that instances of this will be

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<sup>382</sup> D. Eady and A.T.H. Smith, *Arlidge, Eady and Smith on Contempt*, 4th edn (2011), paras 4-105–4-106..

<sup>383</sup> See: Lord Bridge’s remarks in *Re Lonrho plc* [1990] 2 AC: ‘must depend primarily on whether the publication will bring influence to bear which is likely to divert the proceedings in some way from the course which they would otherwise have followed. The influence may affect the conduct of witnesses, the parties or the court. Before proceedings have come to trial and before the facts have been found, it is easy to see how critical public discussion of the issues and criticism of the conducts of the parties, particularly If a party is held up to public obloquy, may impede or prejudice the course of the proceedings by influencing the conduct of witnesses or parties in relation to the proceedings; ’*Greenwood v The Leather Shod Wheel Co Limited* [1898] 14 TLR 241.

<sup>384</sup> *A-G v MGN* [2011] EWHC 2074 (Admin) at 31.

<sup>385</sup> See: *A-G v MGN* [2011] EWHC 2074 (Admin) at 34. The argument would have failed to meet the substantial risk element for serious prejudice under the familiar grounds of jury integrity and the fade factor.

<sup>386</sup> I Cram & N Taylor, ‘The Law Commission’s contempt proposals – getting the balance right?’ (2013) Crim. L.R. 465. P468.

<sup>387</sup> *Ibid*, p473.

rare and it is yet to be seen whether this will be followed by the judiciary; nonetheless, Agate has heralded the decision for clearly defining impediment and for making it clear to the press that the ‘Attorney General is quite prepared to bring proceedings, turning what has always been a serious consideration for publishers into a very live risk’.<sup>388</sup> Therefore, it can be concluded that the English courts more recently have made a marked attempt to remove the blurred line between prejudice and impediment, in an attempt to create two separate and workable tests under s. 2(2).

### **Reform: creating two distinct standards**

In light of the Jefferies case, Grey has argued for the need of reform, as ‘the coverage illustrated just how inconsequential the media believed the contempt laws to be’.<sup>389</sup> Further support has been given to this argument by Agate, as it ‘may well be time to see changes to the contempt regime’ in light of recent lurid news coverage. The Law Commission in their recent consultation paper have raised concerns over the recent Jefferies decision, as ‘the issue of whether the publications created a substantial risk of serious impediments appears to have emerged mainly at the hearing, with the respondents having previously proceeded on the basis that they were being accused of creating a substantial risk of serious prejudice. This meant it was harder for those media organisations to understand the case against them. We, therefore, consider that there is a risk that media organisations may be disadvantaged by the confusion between the two tests’.<sup>390</sup> Therefore, there is still a grave concern that the line between impediment and prejudice is still too blurred and fluid, as to create confusion under s.

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<sup>388</sup> J. Agate, ‘Strict enforcement of strict liability contempt’ (2012) Ent. L.R. 12.

<sup>389</sup> S. Grey, ‘The World Wide Web: Life Blood for the Public or Poison for the Jury?’ (2011) 3 J.M.L. 199, p207.

<sup>390</sup> Law Commission, ‘Contempt of Court, A Consultation Paper’ (2013) Consultation Paper No 209, p17.

2(2). Furthermore, there is the suggestion that as the law currently stands you could be accused of a serious impediment or prejudice in the same breath, which leads to ambiguous precedents, as well as not allowing the media to build a defence; hence, this is clearly an unsatisfactory situation.

The court itself in *Jefferies* did admit that ‘impeding the course of justice and prejudicing the course of justice are not synonymous concepts. If they were, they would have been identified as distinct features of the strict liability’.<sup>391</sup> Thus, there is still apparent confusion between the two concepts as to whether they are separate or not, even though the decision in *Jefferies* did *prima facie* separate the two concepts. Consequently, The Commission suggests that for the sake of clarity they should be represented as distinct issues in the law, allowing the publisher greater clarity as to what his/her liability might be and therefore allowing for a more effective response.<sup>392</sup> Accordingly, this would create two distinct areas of jurisprudence for impediment and prejudice, which would aid in making the law less ambiguous and strengthening the protective approach that the English laws are meant to propagate.

Grey has also called for reform in regards to whether the negative publicity might increase the chances that the guilty person might escape justice, as the notion does not fall within the current Act; consequently, this would require further legislation.<sup>393</sup> Furthermore, Agate has supported this line of reform by claiming ‘the legislature may wish to consider amending the current contempt laws to prevent a defendant using earlier publicity surrounding another

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<sup>391</sup> *A-G v MGN [2011] EWHC 2074 (Admin)* at 16.

<sup>392</sup> Law Commission, ‘Contempt of Court: A Consultation Paper’ (2012) Consultation Paper No.209, para.2.47.

<sup>393</sup> S. Grey, ‘The World Wide Web: Life Blood for the Public or Poison for the Jury?’ (2011) 3 J.M.L. 199, p208.

individual to create reasonable doubt at trial'.<sup>394</sup> Despite the academic support for reform in regards to this, as of yet, the Law Commission Report has not addressed these issues despite the apparently undesirable situation they cause.

## **Conclusion**

This chapter has explored the judicial interpretation and usage of ‘seriously impeded or prejudiced’. Firstly, it looked at the judicial interpretation of serious prejudice and that although there are some clear established principles, there is a lack of apparent separation from the meaning of impediment. Secondly, it considered the way that more recent case law has shown a clear shift towards the separate use of serious impediment; which has impacted on the use and application of the s. 2(2) test, in an attempt to make it more workable in light of the extremely high substantial risk standard for serious prejudice. Finally, it considered the way that reform in this area is primarily looking at separating prejudice and impediment into creating two separate distinct areas of jurisprudence in an attempt to strengthen the protective model. This is the favoured approach, as ensuring that the laws are still applicable and workable is a fundamental of the protective approach, as the law must work as a deterrent to ensure the protective model is effective. Thus by ensuring that impediment and prejudice are kept as two distinct and workable tests would ensure that the law is firmly within the protective approach, which is the best way of ensuring a strong balance between the right to a fair trial and freedom of expression.

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<sup>394</sup> J. Agate, ‘Strict enforcement of strict liability contempt’ (2012) Ent. L.R. 12.

## **Chapter 6: The use of s.5 (A discussion in good faith of public affairs)**

This chapter will assess the use of s. 5 under the Contempt of Court Act 1981, which provides a qualification to the strict liability rule under s. 2. Firstly, the chapter will explore the way the court's liberal interpretation and usage of the terms 'discussion in good faith' and 'merely incidental' in certain cases has allowed some unclear standards to develop. Secondly, it will be argued that as the law currently stands under the protective model, it is not fit for purpose, nor can it be conclusively stated that it is compliant with the ECHR. Finally, the chapter will weigh up the potential for reform with the aid of the Law Commission's recent consultation paper.

### **Interpretation and usage of s. 5**

Lowe has claimed that 'the most striking aspect of s. 5 is that it allows publications that create a substantial risk of serious prejudice to escape liability'.<sup>395</sup> However, the use of s. 5 is viewed as extremely important, as it ensures 'that there can be a discussion of a matter of public interest despite the fact there are active proceedings';<sup>396</sup> thus, s. 5 is seen as a 'significant safeguard for freedom of expression under ECHR Article 10'.<sup>397</sup> Hence, s. 5 appears to be a further safeguard by the legislators to ensure that the act is convention compliant and that there is not a repeat of the *Times* case. Accordingly, if the Attorney General can show that the extremely high standard of s. 2(2) is fulfilled, he/she must next

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<sup>395</sup> N. Lowe & B. Sufrin *Borrie and Lowe The Law of Contempt* 4<sup>th</sup> edn (2010), p.62.

<sup>396</sup> N. Lowe & B. Sufrin *Borrie and Lowe The Law of Contempt* 4<sup>th</sup> edn (2010), p. 60

<sup>397</sup> D. Feldman, *Civil Liberties in England and Wales* 2<sup>nd</sup> edn (2002), p986.

seek to establish that s. 5 does not apply;<sup>398</sup> therefore, the burden is on the prosecution to show that the section does not apply once the respondent has met the evidential burden.<sup>399</sup>

S. 5 states that ‘a publication made as or part of a discussion in good faith 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’. The section contains several nebulous and subjective terms such as: ‘public interest’, ‘discussion’, and ‘merely incidental’; which the Law Commission claims have been interpreted liberally, from assessing the case law under s. 5.<sup>400</sup> Similarly, Goldberg has also reached this conclusion, which he argues is due to the wide and broad definitions being afforded by the domestic judiciary.<sup>401</sup> Thus, it can be clearly ascertained that s. 5 has been liberally used in practice, as a way of further upholding and safeguarding Article 10 rights.

Furthermore, this argument is clearly sustained when close attention is paid to the case law under s. 5. The term ‘discussion’ has been given a fairly wide definition,<sup>402</sup> as Lord Diplock noted in *English* (this case is generally considered to provide a good example of the kind of case for which s. 5 was framed)<sup>403</sup> that an article which referred to a doctor charged with murdering a baby, would be ‘emasculated into a mere contribution to a purely hypothetical

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<sup>398</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP), p280.

<sup>399</sup> *A-G v Random House Group Ltd* [2009] EWHC 1727 (QB), [2010] Entertainment and Media Law Reports 9.

<sup>400</sup> Law Commission, ‘Contempt of Court, A Consultation Paper’ (2013) Consultation Paper No 209, p18 2.52.

<sup>401</sup> D. Goldberg, G. Sutter, I. Walden *Media Law and Practice* OUP (2009); see also, N. Lowe & B. Sufrin *Borrie and Lowe The Law of Contempt* 4<sup>th</sup> edn (2010), p62.

<sup>402</sup> *Attorney-General v English* [1983] AC 116, 143.

<sup>403</sup> H. Fenwick, *Civil Liberties and Human Rights* 4<sup>th</sup> edn (2007), p. 357.

debate' if it didn't contain said reference. Thus, it can be concluded that a 'discussion' can contain direct references to an active case; furthermore, 'the discussion can be triggered off by the cases itself.<sup>404</sup> Although a liberal interpretation of the law, Roberts has praised the decision, as had a narrow interpretation been given, all debate in the media surrounding the subject matter of the article in *English* (mercy killings) would have been stifled during the active period (which in this case would have been over a year).<sup>405</sup>

In *Attorney General v Times Newspapers*<sup>406</sup> the meaning of 'public affairs' had to be something that was a matter of general public concern; thus a discussion on the queen's safety was sufficient, even if it did include extremely defamatory remarks about Fagin (the accused). However, in contrast, the Sunday Time's allegation that Fagin had stabbed his stepson could not fall within in s. 5, as it was irrelevant to the question of the Queen's safety, yet had been considered throughout the article. Therefore, it can be seen that the term 'public affair' can be used quite broadly and will protect fairly damaging remarks; nonetheless, those remarks must be relevant to the matter of the general public concern that is being discussed. Similarly, where a piece merely discusses a particular case and makes no attempt to address a wider public issue, s. 5 will clearly be inapplicable.<sup>407</sup> Nevertheless, it must be concluded that the term a "discussion in good faith of public affairs or other matters of general public interest" has received quite a broad interpretation in the courts.<sup>408</sup>

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<sup>404</sup> D. Goldberg, G. Sutter, I. Walden *Media Law and Practice* OUP (2009).

<sup>405</sup> Robertson, *Media Law*, 3<sup>rd</sup> edn, London: Penguin, 1999, p216.

<sup>406</sup> *A-G v Times Newspapers*, *The Times* 12 February 1983.

<sup>407</sup> *Daily Express* case *The Times*, 19 December 1981. See also: *A-G v Times Newspapers* [1974] AC 273.

<sup>408</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP), p.281.

Secondly, the court must ascertain: ‘is the risk of impediment to the trial which they create merely incidental to that discussion?’<sup>409</sup> Aldridge similarly follows this test by stating it is ‘whether the risk created was merely an incidental consequence to the expounding of the main theme of the publication’.<sup>410</sup> Thus, it does not need to be ascertained whether ‘the article could have been written without the potentially prejudicial parts’,<sup>411</sup> hence, allowing for a more liberal reading. Nonetheless, in *Attorney-General v TVS Television Ltd*<sup>412</sup> it was held necessary to look at the subject matter of the discussion and to see how closely it related to the proceedings; consequently, the closer the relationship, the greater the risk. In this case the s. 5 defence failed because it was held that the risk of prejudice to the impending trial was not merely incidental to the public discussion, as the programme focused solely on the specific area and topic of the case (Landlords in Reading involved in fraudulent activities). However, in *A-G v Guardian Newspapers* the example was no more than ‘an incidental consequence of expounding the main theme of the article’;<sup>413</sup> thus, s. 5 was satisfied. Therefore, it can be seen that this element of s. 5 is fairly subjective, in that it allows a lot of discretion to be given to the judiciary on the particular facts of the case, as ‘the law must make assumptions about its likely impact’.<sup>414</sup> Thus, in an attempt to remain ECHR-compliant and quash a repeat of *Sunday Times* the judiciary have been fairly liberal with their interpretation and usage of s. 5. Consequently, it cannot be said that s. 5 is entirely clear in its wording or usage; nor is it applied consistently.

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<sup>409</sup> *Attorney-General v Random House* [2009] EWHC 1727, at 88.

<sup>410</sup> *Arlidge, Eady and Smith on Contempt* (Sweet & Maxwell, 3<sup>rd</sup> edn, 2005) para 4-320.

<sup>411</sup> D. Feldman, *Civil Liberties in England and Wales* 2<sup>nd</sup> edn (2002), p. 986.

<sup>412</sup> DC 6 July 1989, *Independent*, 7 July 1989.

<sup>413</sup> [1992] 3 All ER 38, p.49.

<sup>414</sup> E. Barendt *Freedom of Speech* 2<sup>nd</sup> edn (2005), p.323.

### **ECHR-Compatibility and ineffectiveness.**

Fenwick has noted that s. 5 is extremely out of place under the supposed domestic protective model for contempt, as s. 5 may be viewed as based impliedly on the assumption that the prejudice would have to be dealt with by the adoption of neutralising measures in relation to trials, and it is only by taking that possibility into account that s. 5 can be viewed as compatible with Article 6.<sup>415</sup> Thus, s. 5 implies an acceptance of the neutralising approach to contempt, as it allows for a substantial risk of serious prejudice or impediment to occur. Hence, the only way to then ensure a fair trial is for neutralising measures to be imposed. Consequently, it is shown again that although masquerading as a protective model approach, the 1981 Contempt of Court Act is filled with neutralising elements. Furthermore, given that the s. 2(2) test requires such a high threshold to be met, it seems difficult to comprehend that the risk of prejudice is merely incidental to the article. Fenwick argues it is not impossible, as ‘where the thrust of the discussion could not be said to cause prejudice, while the part which could was capable of being viewed as incidental to the rest’.<sup>416</sup> However, this does leave an extremely ambiguous and unclear situation, which would not be consistently applied by the judiciary due to its subjective nature.

Fenwick has further critiqued s. 5, ‘as a measure intended to protect media freedom, it might be expected to be capable of differentiating between two types of prejudicial publications – those consisting of inaccurate, misleading coverage of forthcoming proceedings and those that concern a general issue of public interest where the proceedings are generally used as an example.’<sup>417</sup> However, in light of *TVS Television* it can be seen that this is not the case, as no regard was paid to the public interest value of the speech in question. Cram is similarly

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<sup>415</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP), P279.

<sup>416</sup> *Ibid*, p282.

<sup>417</sup> *Ibid*.

critical of this issue, as he notes that the court ‘must make a determination as to the contribution of the publication to the public interest, which may involve some analysis as to the value of the speech in question.<sup>418</sup> However, at present, s. 5 clearly fails to do this, as it does not provide an opportunity for the weighing up of the seriousness of the prejudice against the significance of the speech in question; thus, ‘the courts are being asked to engage in literary as opposed to legal analysis’.<sup>419</sup> The value of the speech in question plays a large role in Strasbourg jurisprudence, with political expression being given the highest protection (*Jersild v Denmark*),<sup>420</sup> followed by artistic expression (*Otto-Preminger v Austria*),<sup>421</sup> then entertainment expression (*Scherer v Switzerland*),<sup>422</sup> and finally the lowest value is given to advertising expression (*X and Church of Scientology v Sweden*).<sup>423</sup> Nevertheless, at present Strasbourg appears to have had little influence in the interpretation and usage of s. 5, which is troubling considering that s. 5 is a measure intended to further strengthen Article 10 rights and thus avoid any conflict with Strasbourg.

Phillipson is also critical of the stance that s. 5 allows, as ‘although media freedom should be strongly upheld when the media is carrying out its proper function in a democracy, when it is not doing so, and particularly when it is attacking the basic freedoms of others, courts should not hesitate to rein it in’.<sup>424</sup> Thus, this argument would suggest that s. 5 has no place in English contempt law, as it allows for publications that prejudice and impede the right to a

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<sup>418</sup> I.Cram & N. Taylor ‘The Law Commission’s contempt proposals – getting the balance right?’ (2013) Crim. L.R. 465.

<sup>419</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP), P282.

<sup>420</sup> (Application no. 15890/89) JUDGMENT STRASBOURG , 23 September 1994.

<sup>421</sup> (Application no. 13470/87) JUDGMENT STRASBOURG , 20 September 1994.

<sup>422</sup> (Application no. 17116/90) JUDGEMENT COMMISSION, 25 March 1994.

<sup>423</sup> (Application no. 7805/77) JUDGEMENT COMMISSION, 1979.

<sup>424</sup> G. Phillipson, "Trial by Media: The Betrayal of the First Amendment Purpose", (2008) 71 Law & Contemp. Probs. 15, 18.

fair trial in the name of upholding freedom of expression, yet clearly in these situations this Article 10 right need not be upheld (Worm). However, Dworkin's moral autonomy argument 'supports the right to freedom of speech in order to prevent unpopular points of view from being silenced because state actors or majorities find them distasteful or offensive'.<sup>425</sup> Nevertheless, this theoretical approach is not valid for this situation as 'a prohibition upon the reporting of highly prejudicial facts... is not premised upon governmental dislike or contempt for certain viewpoints, nor is it an attempt to suppress the development of certain ideologies, or to deprive the citizen of information about the justice system'.<sup>426</sup> Thus, any suppression is based on the protective model approach to upholding the right to a fair trial; hence, any use of s. 5 undermines this, and as mentioned previously – places the law into a neutralising approach, which is far less effective. Therefore, in order to uphold Dworkin's argument for 'equal concern and respect' s. 5 usage appears highly problematic. Consequently, s. 5 may not be in line with the ECHR, because a public interest defence cannot operate where a publication imperils the right to a fair trial.<sup>427</sup> Furthermore, article 6 must necessarily take primacy over the exercise of article 10 rights.<sup>428</sup> Thus, the current interpretation and usage of s. 5 does not fall within the remit of the protective model.

## **Reform**

Despite these concerns, the Law Commission have taken the stance that s. 5 'strikes the appropriate balance between ensuring the right to a fair trial, whilst also permitting the media

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<sup>425</sup> R. Dworkin, 'Taking Rights Seriously' 82-130 (1977).

<sup>426</sup> G. Phillipson, "Trial by Media: The Betrayal of the First Amendment Purpose", (2008) 71 Law & Contemp. Probs. 15, 19.

<sup>427</sup> H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 279 to 284.

<sup>428</sup> Borrie and Lowe: The Law of Contempt para 4.15.

to report on important matters of public concern'.<sup>429</sup> However, Cram argues that s. 5 'should be revisited with a view, at least, to offering some clarification as to its ambit';<sup>430</sup> thus, in the most basic of clarifications, there should be a judicial acceptance that the measure is reliant on neutralising measures, and as such they should be considered when s. 5 is being applied. However, the Law Commission has instead focused on the importance that the courts 'weigh up Article 6 and Article 10 when deciding whether the risk of impeding or prejudiced proceedings is incidental to the public interest value of the discussion.'<sup>431</sup> Thus, the Law Commission seems less concerned with the need for drastic reform to s. 5.

Nevertheless, Fenwick has been much more vocal about the opportunities to reform s. 5, in order to make it fit for purpose under a protective approach for contempt of court law. Firstly, she has argued that 'the problematic term incidental could only be stretched so far, and if the courts were to seek to adopt a proportionality test within the terms of s. 5, they would have to be prepared to depart from the literal meaning of the section and read words into it.'<sup>432</sup> Thus, the reading into the law of a proportionality test would allow for the merit of the speech to be assessed, which would draw the case law much closer to that of the Strasbourg jurisprudence. In light of post-HRA judicial decisions, it may very well be the case<sup>433</sup> that the judiciary could and would read such a test into the statute in order to make it more ECHR-complaint. Fenwick states that this would be achieved by a court reading in the words – 'if the

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<sup>429</sup> Law Commission, 'Contempt of Court, A Consultation Paper' (2013) Consultation Paper No 209, p19 2.54.

<sup>430</sup> I.Cram & N. Taylor 'The Law Commission's contempt proposals – getting the balance right?' (2013) Crim. L.R. 465.

<sup>431</sup> Law Commission, 'Contempt of Court, A Consultation Paper' (2013) Consultation Paper No 209, p19 2.54.

<sup>432</sup> H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 283.

<sup>433</sup> See: *R v A* [2001] 2 Cr App R 21; [2002] 1 AC 45; A. Kavanagh, 'The elusive divide between interpretation and legislation under the HRA' (2004) 24(2) OJLS 259.

proportionality test under Article 10(2) is not satisfied, or – after the word if<sup>434</sup>. Therefore, if there was a judicial acceptance that as the law stands parliament had failed in its attempts to achieve Convention compliance, then this could be possible, as such a reform is a matter of interpretation rather than implying a new provision, which the judiciary are far more comfortable doing.<sup>435</sup> Furthermore, the matter in question is one of protecting the judicial process, which the judiciary appear to be far more willing to use their s. 3 HRA right for.<sup>436</sup> However, in light of the Law Commission's consultation paper, the law is currently in more of a *Bellinger*<sup>437</sup> situation, where the judiciary will wait for parliament to legislate and reform this area, even if suitable changes do not happen to s. 5, as the judiciary have shown no inclination to use s. 3 in this way.

Consequently, it would appear that any potential reform in this area will be a lot more restrictive than the radical re-interpretation that Fenwick has called for. Instead, the Law Commission has taken a far more generalised approach to the concerns expressed, as ‘cases involving section 5 are relatively rare, perhaps because the Attorney General chooses not to proceed in cases where there is a reasonable argument that the section would apply. Greater clarity in respect of this could be gleaned if the Attorney General were to publish a prosecution policy’.<sup>438</sup> Cram has supported this move, as ‘It would also provide much needed clarity as to the scope of s. 5 and the factors relevant to the public interest, providing publishers with greater certainty as to when it would apply. The absence of clarity is likely to

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<sup>434</sup> H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 283.

<sup>435</sup> See: *Re S and Re W (Care Orders)* [2002] 2 AC 291.

<sup>436</sup> See: *R v Offen* [2001] 1 WLR 253.

<sup>437</sup> [2003] 2 ALL ER 513.

<sup>438</sup> Law Commission, ‘Contempt of Court, A Consultation Paper’ (2013) Consultation Paper No 209, p19 2.55.

produce a chill on comment'.<sup>439</sup> Thus, it is apparent, that reform is far more likely to come in the form of clearer guidelines on how and when s. 5 will be used in an attempt to remove ambiguity and improve transparency to the public, while also increasing consistency between the Attorney General, and the judges.

## **Conclusion**

This chapter has assessed the use of s. 5 under the Contempt of Court Act 1981, which provides a qualification to the strict liability rule under s. 2. Firstly, the chapter explored the way that the court's liberal interpretation and usage of the terms 'discussion in good faith' and 'merely incidental' in certain cases has allowed some unclear standards to develop, as the tests are far too subjective. Secondly, it has shown that as the law currently stands under the protective model, it is not fit for purpose, nor can it be conclusively stated that it is compliant with the ECHR. This is due to the over reliance on neutralising measures and a lack of willingness to do a proportionality test while assessing the value of the speech. This over reliance on the neutralising approach is not favourable and must be addressed through reform so that it has a far heavier reliance on the protective model. Finally, the chapter explored the potential for radical reform in this area, to make it fit for purpose under a protective model approach, which is the favoured approach of this thesis. However, in light of the recent Law Commission consultation paper, it would seem that a far more restrictive approach to reform is likely to be taken in this area. Thus, the law under s. 5 is likely to remain more heavily within the neutralising approach, yet instead s. 5 should encompass a proportionality test and be more readily used by the courts so as to ensure that it is firmly placed within the protective model.

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<sup>439</sup> I.Cram & N. Taylor 'The Law Commission's contempt proposals – getting the balance right?' (2013) Crim. L.R. 465.

## **Chapter 7: Common Law Contempt**

This chapter will explore the jurisprudence on common law contempt under English law, and its usage alongside the statutory provisions under the Contempt of Court Act 1981. Firstly, the chapter will give a brief overview of common law contempt as it currently stands under English law. Secondly, it will evaluate the meaning of imminence under common law contempt, while contrasting this to the active period seen in the Contempt of Court Act 1981: it will highlight some key areas of concern with its definition. Thirdly, it will assess its usage for bringing actions under: creating prejudice, pressuring litigants, and frustrating the aim of an injunction. From this it will note compatibility issues common law contempt has with the European Convention on Human Rights. Finally, it will look at the potential for reform in this area, and what form this will most likely take.

### **Overview of Common Law Contempt**

Under the Contempt of Court Act 1981 a narrow area of the common law contempt was left by s. 6(c), thus ‘the act does not render the common law irrelevant’.<sup>440</sup> The remaining narrow area made it that it is now a crime of specific intent, rather than basic or general intent, as per the recommendations of the Phillimore Committee.<sup>441</sup> Consequently, as Lord Donaldson notes - ‘I am quite satisfied that... what is saved by s. 6(c) of the 1981 Act is the power of the court to commit for contempt where the conduct complained of is specifically intended to impeded or prejudice the administration of justice. Such an intent need not be expressly avowed or admitted, but can be inferred from all the circumstances, including the foreseeability of the consequences of the conduct’.<sup>442</sup> Therefore, the conduct element of the

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<sup>440</sup> I. Cram, *Borrie and Lowe: The Law of Contempt* (2010, 4<sup>th</sup> edition, Lexis Nexis), 4.15 p. 62.

<sup>441</sup> *Report of the Committee on Contempt of Court*, Cmnd. 5794 (1974), discussed by Dhavan, ‘Contempt of Court and Phillimore’, 186-253.

<sup>442</sup> Lord Donaldson MR A-G v *Newspaper Publishing plc* [1988] Ch. 333 at 374-5.

offence is concerned with the interference of the administration of justice,<sup>443</sup> and the *mens rea* element is concerned with whether the defendant ‘intended to impede or prejudice the administration of justice’.<sup>444</sup> Thus, Common law contempt by publication requires proof of intention to prejudice proceedings, although there are ambiguities about this<sup>445</sup> and other aspects of the law<sup>446</sup> (which will be discussed throughout this chapter). Additionally, from a theoretical approach, it is important to note that ‘Common law contempt – like strict liability contempt – is not based on the preventive approach since it is unconcerned with the question whether prejudice has actually been caused’;<sup>447</sup> furthermore, ‘the need to show intent precludes the emergence of the incidental preventive effect’.<sup>448</sup> Thus, common law contempt is firmly attempting to be within the protective model.

Moreover, Arlidge has hypothesised that ‘common law contempt is more expansive than statutory contempt on the basis that it could apply’<sup>449</sup> to: private communications, for example a letter to a witness pressuring them to give evidence; to creating a risk of serious

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<sup>443</sup> Arlidge, Eady and Smith on Contempt para 5-7. Hooper LJ in *In the Matter of A Contempt: Yousaf, Akhtar v Luton Crown Court* [2006] EWCA Crim 469, [2006] All ER (D) 106 takes a similar view at [13], citing Lord Diplock in *A-G v Leveller Magazine Ltd* [1979] AC 440, 449. See also: I. Cram, *Borrie and Lowe: The Law of Contempt* (2010, 4<sup>th</sup> edition, Lexis Nexis), 4.6 p. 50 - ‘the question of establishing intent has been problematic’.

<sup>444</sup> C. Miller, *Contempt of Court* (2000, Oxford), 5.21, p217. See also *Times Newspapers* [1992] 1 AC 191: specific intent is required and therefore it clearly does not include reckless; D. Goldberg, G. Sutter & I. Walden, *Media Law and Practice* OUP (2009), p123 – ‘intent is not motive or desire’.

<sup>445</sup> Arlidge, Eady and Smith on Contempt para 5-138 to 5-139.

<sup>446</sup> Arlidge, Eady and Smith on Contempt, who at para 5-200 try to distil the key features of the law.

<sup>447</sup> H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 284.

<sup>448</sup> *Ibid.*

<sup>449</sup> Arlidge, Eady and Smith on Contempt paras 5-12 to 5-13; 5-61; 5-65 to 5-66; 5-67 and following; 5-76; 5-96 to 5-99; and 5-100 to 5-101. See also: D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2002, 2<sup>nd</sup> edn, OUP), p. 974 - ‘the *actus reus* of the common law offence may be wider than that for statutory contempts’.

prejudice which is less than substantial but more than minimal;<sup>450</sup> to creating a risk of prejudice which is less than serious, although not to technical contempt as this would be ECHR compliant;<sup>451</sup> to proceedings which are inactive within the terms of the 1981 Act but which are pending;<sup>452</sup> to proceedings which can be said to be imminent in that they are virtually certain to take place but have not yet begun,<sup>453</sup> although this may be difficult to reconcile with the ECHR requirements of articles 7 and 10. It is unclear whether contempt can occur in respect of proceedings which are ‘on the cards’ but not yet virtually certain to happen; and finally, to potential appeal proceedings in the period between trial and appeal. Thus, it can be ascertained that common law contempt can be applied to a plethora of situations; nonetheless, the Law Commission has noted that ‘it is rarely invoked’,<sup>454</sup> and Goldberg has concluded that ‘common law contempt is famously protean’.<sup>455</sup> Similarly, this has been supported by Fenwick, as she notes that ‘its role... is now far more limited than the role of the strict liability rule due to the requirement of intent’.<sup>456</sup>

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<sup>450</sup> See *A-G v English* [1983] 1 AC 116 and *In the Matter of A Contempt: Yousaf, Akhtar v Luton Crown Court* [2006] EWCA Crim 469, [2006] All ER (D) 106 at [13].

<sup>451</sup> One example of a “technical” contempt would be that referred to in the *Sunday Times* case [1974] AC 273, where, as Arlidge, Eady and Smith on Contempt note, “the House of Lords held that *any* pre-judgment of the issues in a pending case was a contempt even if it only created a small risk (excluding *de minimis*) that the proceedings would be prejudiced” para 5-20.

<sup>452</sup> *In the Matter of A Contempt: Yousaf, Akhtar v Luton Crown Court* [2006] EWCA Crim 469, [2006] All ER (D) 106 at [13].

<sup>453</sup> Arlidge, Eady and Smith on Contempt para 5-12; *A-G v News Group Newspapers Ltd* [1989] QB 110; *A-G v Sport Newspapers Ltd* [1991] 1 WLR 1194. See J N Spencer, “Caught in Contempt of Court” (1992) 56 *Journal of Criminal Law* 73.

<sup>454</sup> Law Commission, ‘Contempt of Court, A Consultation Paper’ (2013) Consultation Paper No 209, p19 2.56.

<sup>455</sup> D. Goldberg, G. Sutter & I. Walden, *Media Law and Practice* OUP (2009), p125.

<sup>456</sup> H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 285.

## The meaning of imminence

However, ‘if the requirement of intent can be satisfied, it is then easier to establish contempt at common law rather than under the Act since it is only necessary to show ‘a real risk of prejudice’, and proceedings need only be imminent, not ‘active’. There is also no common law equivalent of s. 5’.<sup>457</sup> Nonetheless, the meaning of ‘imminence’ is riddled with ambiguities and clashing approaches from the judiciary, which has left the jurisprudence in an unsatisfactory position. The original position was that the sub judice period began when proceedings could be said to be imminent;<sup>458</sup> yet this is clearly less well defined than the clear guidelines presented in Schedule 2 of the Contempt of Court Act 1981. Miller has been similarly critical of the position, as it ‘seems at best unsatisfactory... because of the doubts as to the stage in the criminal process at which the residual common law of contempt begins to bite’.<sup>459</sup>

This ambiguity is only further added to when account is taken of the judge’s *obiter* comments in *A-G v News Group Newspapers plc*.<sup>460</sup> It was noted in the *obiter* comments that where it established that the defendant intended to prejudice proceedings, it is not necessary to show that the proceedings are imminent, as Watkins LJ stated that: ‘no authority states that common law contempt cannot be committed where proceedings cannot be said to be imminent but where there is specific intent to impede a fair trial, the occurrence of which is in

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<sup>457</sup> *Ibid*, p. 286. See also: D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2002, 2<sup>nd</sup> edn, OUP), p. 974 - ‘whereas the 1981 Applies only where proceedings are active... it is possible that common law contempt by prejudicing or impeding proceedings applies to publications even before any proceedings are active or pending’.

<sup>458</sup> *R v Savundranayagan* [1968] 3 All ER 439.

<sup>459</sup> C. Miller, *Contempt of Court* (2000, Oxford), 5.27, p220.

<sup>460</sup> [1989] QB 110; [1988] 3 WLR 163.

contemplation'.<sup>461</sup> Whereas, in *A-G v Sport*<sup>462</sup> Hodgson J considered that proceedings must be pending. He interpreted pending as synonymous with active, despite Bingham LJ agreeing with the previous dilution of the imminence test. Thus, this leaves the 'imminence' test with two contradicting approaches, which is clearly not a satisfactory situation. Miller has gone as far to say that 'the overall position may be found to conflict with Article 10 of the European Convention on Human Rights in as much as doubts as to its scope may mean that it is not 'prescribed by law'.<sup>463</sup> This argument can be sustained, as Strasbourg will find a violation where the law is too 'unclear' and 'vague', as was seen in *Hashman and Harrup v UK*<sup>464</sup> where the measure in question failed the 'prescribed by law' test. Therefore, considering that the media is without a clear guide as to when a publication may be at risk during the 'imminence' period, such a violation could logically be found by Strasbourg, as the 'test of imminence is itself too wide and uncertain'.<sup>465</sup>

### **Creating Prejudice and Pressuring Litigants**

Despite the concerns regarding the lack of clarity around 'imminence', common law contempt can be used when cases fall outside of the scope of the 1981 Act, as they do not fall within the active period. This is aptly shown by *A-G v News Group Newspapers plc*<sup>466</sup> where Dr B was questioned regarding a rape allegation by an 8 year old girl; however, due to insufficient evidence, they were unable to prosecute him. *The Sun* obtained the story and decided that they would offer the mother financial support to fund a private prosecution. They published several vilifying articles: 'Rape Case Doc: Sun acts', 'Beast must be named,

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<sup>461</sup> *Ibid*, at 128-129.

<sup>462</sup> [1991] 1 WLR 1194.

<sup>463</sup> C. Miller, *Contempt of Court* (2000, Oxford), 5.27, p220.

<sup>464</sup> (2000) EHRR 24.

<sup>465</sup> H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 286.

<sup>466</sup> [1989] QB 110; [1988] 3 WLR 163.

says MO', yet as he was not under arrest anymore, there was no active period. Nonetheless, common law intention for contempt can be established, as it's foreseeable that these articles would bias the upcoming trial they were funding. Notwithstanding its usefulness in this matter, Miller has been heavily critical of the decision, as 'it is at best messy and may also be dangerous to use the common law to outflank the Act. Certainly, the decision introduces an element of uncertainty into what is already an area of the law which causes considerable problems for editors and their legal advisors'.<sup>467</sup>

Thus, as was seen with the imminence test, there is also a large amount of doubt over the clarity of this standard, and as to whether it would meet the 'prescribed by law' standard at Strasbourg. However, this could be an unnecessary point to be concerned with, as Fenwick has heavily questioned its application any more, due to no other cases having happened since 1991 on the reliance of this strand of common law contempt; thus, it can be seen as a 'dead letter'.<sup>468</sup> This is due to it now being hard to satisfy s. 2(2) of the 1981 Act unless a publication occurs close to or during the trial, which makes it hard to imagine an instance in which it would be useful to invoke the test of imminence – if a publication was merely imminent as opposed to active it would not satisfy the 'real risk of prejudice' test under the more recent s. 2(2) rulings on the creation of risk.<sup>469</sup> This has been similarly supported by Cram, who has concluded that 'In reality, such a scenario is unlikely to arise – if it's not captured by the Act as it's not active, it is unlikely to satisfy substantial risk'.<sup>470</sup> Therefore, it can be concluded that this area of common law contempt is almost completely redundant and should not be viewed as a usable avenue under common law contempt.

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<sup>467</sup> C.J. Miller, 'Some problems of contempt' (1992) Crim. L.R. 107, p. 112.

<sup>468</sup> H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 289.

<sup>469</sup> *Ibid.*

<sup>470</sup> I. Cram, *Borrie and Lowe: The Law of Contempt* (2010, 4<sup>th</sup> edition, Lexis Nexis), 4.19 p67.

However, a more useful strand of common law contempt can be classed as that of pressuring a litigant,<sup>471</sup> as it was stated in *Sunday Times*<sup>472</sup> that ‘to seek to dissuade a litigant from prosecuting or defending proceedings by threats of unlawful action, by abuse, by misrepresentation of the nature of the proceedings or the circumstances out of which they arose and such like – is no doubt a contempt of court’.<sup>473</sup> Similar issues to this arose in *Hislop*<sup>474</sup> where defamation proceedings had been instituted by Mrs Sutcliffe, wife of the notorious ‘Yorkshire Ripper’, against the satirical magazine, *Private Eye*. In response to this they published further articles alleging that Mrs Sutcliffe had lied to the police to protect her husband and defrauded the social security authorities. Additionally, they suggested that she would be cross-examined on these matters if she carried on pursuing the defamation proceedings against them. The court upheld the contempt action on the basis that ‘when parliament addressed the question of contempt of court in 1981, it expressly preserved liability for contempt in respect of conduct which was intended to prejudice the administration of justice, irrespective of whether the proceedings were active or not: s. 6(c) of the Contempt of Court Act 1981. The fact that Mr Hislop believed the allegations he made against Mrs Sutcliffe were true, and the further fact that if sued for libel he intended to plead justification as a defence, cannot justify publication of the allegations when the purpose was to put pressure on Mrs Sutcliffe and deter her from pursuing her existing action to trial’.<sup>475</sup>

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<sup>471</sup> See: D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2002, 2<sup>nd</sup> edn, OUP), p. 975 - ‘the common law offence covers other types of conduct as well, such as bringing improper pressure to bear on a party to litigation to discontinue it’.

<sup>472</sup> [1974] AC 273, 326, [1973] 3 All ER 54.

<sup>473</sup> *Ibid.* at 87.

<sup>474</sup> [1991] 1 QB 514, [1991] 1 All ER 911.

<sup>475</sup> *Ibid.* at 923.

Consequently, ‘by publishing libels, intending to deter another party to litigation from pursuing her claim, they had given rise to a substantial risk that the course of justice would be impeded, as it was likely that a litigant might be put off’.<sup>476</sup> Fenwick has approved of the decision and its future application, as ‘it represents a clear and quite precisely defined area of liability targeted at a particular mischief’.<sup>477</sup> Therefore, unlike much of the other case law discussed thus far, this sets a clear standard and would meet the ‘prescribed by law’ test at Strasbourg. Consequently, it is an area of common law contempt that is both ECHR compliant and one that could still be used readily today.

### **Frustrating the Aim of an Injunction**

Attention must be given to a ‘very significant special form of common law contempt’,<sup>478</sup> which ‘can arise if part of the media frustrates a court order (including orders made under s. 4(2) of the 1981 Act)’.<sup>479</sup> ‘A controversial example is accorded by the liability of the *Sunday Times* and *Independent* newspapers in the famous *Spycatcher* case’.<sup>480</sup> *A-G v Newspaper Publishing Plc (Spycatcher case)*<sup>481</sup> involved the Attorney General in 1985 commencing proceedings in Australia in an attempt to restrain the publication of *Spycatcher* by Peter Wright. The book included allegations of illegal activity engaged in by MI5. The *Guardian* and *The Observer* had published a report of the forthcoming hearing with extracts from the book. Consequently, the Attorney General obtained temporary injunctions based on breach of confidence. However, during the time leading up to the injunction hearing *The Independent* and two other publishers released material covered by them. As a result they were liable for

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<sup>476</sup> D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2002, 2<sup>nd</sup> edn, OUP), p. 973.

<sup>477</sup> H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 289.

<sup>478</sup> *Ibid.*

<sup>479</sup> *Ibid.*

<sup>480</sup> C.J. Miller, ‘Some problems of contempt’ (1992) Crim. L.R. 107, p. 111.

<sup>481</sup> (1987) 3 All ER 276, 3 WLR 942.

common law contempt, as they frustrated the aim of the injunction. Furthermore, this was confirmed by the House of Lords (*A-G v Times Newspapers Ltd*),<sup>482</sup> as it concluded that such publications constituted the *actus reus* of common law contempt on the basis that publication of confidential material, the subject matter of a pending action, damaging its confidentiality and thereby probably rendering the action pointless, created an interference with the administration of justice.

Therefore, ‘the House of Lords ruled that a non-party who knowingly frustrates an injunction may be punished for interference with the administration of justice’.<sup>483</sup> Although the case is seemingly logical and clear law, it undoubtedly ‘created an inroad into the general principle that a court order should only affect the party to which it is directed at’.<sup>484</sup> This is similarly supported by Feldman who noted that *Spycatcher* has ‘the effect of extending the effect of an injunction far beyond the people to whom the injunction is addressed’.<sup>485</sup> Furthermore, he concludes that it should be ‘a cause for concern, as third parties who are liable to be punished for contempt for breaching the injunction would not have been able to appear before the court to oppose the grant of the injunction’.<sup>486</sup> Therefore, it can be said to have the effect of creating a ‘chilling effect’ on the media, as an injunction against one publisher, is actually a ban on all publications, which clearly runs against the grain of the *Strasbourg* decision in *Sunday Times*.<sup>487</sup>

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<sup>482</sup> [1992] 1 AC 191.

<sup>483</sup> P. Devonshire, ‘Spycatcher returns to the House of Lords’ (2003) L.Q.R. 384.

<sup>484</sup> H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 290.

<sup>485</sup> D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2002, 2<sup>nd</sup> edn, OUP) p. 974.

<sup>486</sup> *Ibid.*

<sup>487</sup> (1979) 2 EHRR 245.

However, the decision in *A-G v Newspaper Publishing plc and Others*<sup>488</sup> seemed to represent an attempt to narrow down the area of liability created by the decision in *Spycatcher*. The court noted that they ‘should be slow to extend the law any further since any extension represented a further encroachment on freedom of expression and inhibited the media in its function of informing the public’.<sup>489</sup> Furthermore, they went as far to say that they ‘did not accept that any conduct by a third party inconsistent with a court order was sufficient to amount to the *actus reus* of contempt – it was found necessary to show that a significant and adverse effect on the administration of justice in the relevant proceedings had occurred’.<sup>490</sup> Therefore, this highlights a marked attempt by the court to make sure that the common law does not infringe too far upon Article 10 rights, by clearly making sure that any restriction is necessary and proportionate. This is echoed by their statement that ‘restraints upon freedom of expression should be no wider than are truly necessary in a democratic society, we do not accept that conduct by a third party which is inconsistent with a court order in only a trivial or technical way should expose a party to conviction for contempt’.<sup>491</sup> Consequently, this aided in drawing this strand of common law contempt into line with Strasbourg principles.

Nevertheless, this narrowing and appreciation of Strasbourg principles was seemingly short lived, as *A-G v Punch*<sup>492</sup> re-affirmed in *Spycatcher*. The case involved a former MI5 worker who had confidential information published in the *Mail on Sunday* and *Evening Standard* in 1997. There was an interim injunction bought against this material in 1997 on breach of confidence, which was to last until the trial for this action. However, the MI5 worker wrote

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<sup>488</sup> [1997] 3 All ER 159; *The Times*, 2 May 1997, CA.

<sup>489</sup> *Ibid.* at 167.

<sup>490</sup> *Ibid.* at 168.

<sup>491</sup> *Ibid.*

<sup>492</sup> [2003] 1 AC 1046; [2003] WLR 49.

an article for *Punch* disclosing some of this information, which the editor was fully aware of. The Court of Appeal<sup>493</sup> concluded that the purpose in granting the injunctions was for national security – the injunction was ‘to prevent the disclosure of any matter that arguably risked harming the national interest’.<sup>494</sup> Therefore, as the material published in *Punch* did not do this, no common law contempt could be found, as they did not frustrate the purpose of the injunction. They noted that any other approach would allow the Attorney General to censor newspapers and that it would be disproportionate to any public interest and thus in violation of Article 10.<sup>495</sup> Therefore, the Court of Appeal was taking a strong regard for the principles of necessity and proportionality, so as to align the position with a Strasbourg approach.

Conversely, the House of Lords rejected this approach.<sup>496</sup> They noted that the underlying purpose was irrelevant (which is a complete reversal to what the Court of Appeal stated), as ‘the purpose the court seeks to achieve by granting the interlocutory injunction is that, pending a decision by the court on the claims in the proceedings, the restrained acts shall not be done. Third parties are in contempt of court if they wilfully interfere with the administration of justice by thwarting the achievement of this purpose in the proceedings. This is so, even if in the particular case, the injunction is drawn in seemingly over-wide terms’.<sup>497</sup> Therefore, the Lords clearly endorsed the far wider approach taken by *Punch*, which is clearly less Article 10 friendly. Furthermore, they went on to say that ‘the purpose of the judge making such an order was to preserve the confidentiality of the information specified in the order pending the trial so as to enable the court at trial to adjudicate

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<sup>493</sup> [2001] QB 1028; [2001] 2 All ER 655.

<sup>494</sup> *Ibid*, para 100.

<sup>495</sup> *Ibid*.

<sup>496</sup> [2003] 1 AC 1046; [2003] WLR 49.

<sup>497</sup> *Ibid*, para 114.

effectively on the disputed issues of confidentiality arising in the action' and that 'he must have been aware that this information would precisely breach the confidentiality of this information'.<sup>498</sup> Consequently, they were found liable for common law contempt, as they had frustrated the aim of an injunction.

This decision has been met with fierce criticism, as the 'consideration of the impact of the HRA was brief and superficial'.<sup>499</sup> The closest the House of Lords came to appreciating the influence of the HRA was when they stated that 'sanctions are necessary to maintain the rule of law; in the language of the Convention, to maintain the authority of the judiciary'.<sup>500</sup> As such, Fenwick's critique appears fully justified, as she notes that 'the analysis did not address the questions of necessity and proportionality; it implied that once a court had decided that material should be kept confidential before the trial of a permanent injunction and had imposed an interim injunction with that object in mind, it would always be justifiable to restrict freedom of expression by way of common law contempt in order to provide a sanction against publication of the material by third parties where publication would have a significant and adverse effect on the administration of justice in the trial'.<sup>501</sup> Consequently, the court clearly failed to appreciate proportionality, as breach of the interim injunction addressed to the specific publisher would only result in a civil action, whereas the mass of other publishers would be criminally liable; thus, the doctrine clearly creates a chilling effect on the media, which is grossly disproportionate to the aim pursued. Furthermore, the court clearly failed to take regard of the HRA and in particular s. 12(4) HRA, which is wholly

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<sup>498</sup> *Ibid.*

<sup>499</sup> H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 295.

<sup>500</sup> [2003] 1 AC 1046; [2003] WLR 49, para 32.

<sup>501</sup> H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 295.

misjudged considering the impact these pieces of legislation have had on the interpretation of s. 2(2) of the Contempt of Court Act 1981.

Additionally, the House of Lords implied that assessing proportionality was not necessary at all, when they stated that ‘National security is one of the reasons, set out in the familiar list in article 10(2) of the Convention, which may justify a restraint on freedom of expression. The interests of national security may furnish a compelling reason for preventing disclosure of information about the work of the Security Service’.<sup>502</sup> This is clearly a ‘Superficial approach to Article 10’,<sup>503</sup> as they have taken the exceptions under Article 10(2) to mean that they have free will to impinge this right. Thus, the House of Lords clearly failed to uphold s. 2 HRA and acknowledge Strasbourg jurisprudence, as there was no mention of the value of the speech in question, which plays a pivotal role in the ECtHR’s decision making process.<sup>504</sup>

These concerns have been similarly shared by Devonshire, as he notes that ‘Obviously this revives concerns as to a form of liability that extends to non-parties and its implications for freedom of expression in general, and freedom of the press in particular’.<sup>505</sup> Furthermore, it ‘creates an element of uncertainty as to when the *actus reus* of contempt has been committed. How can parties be expected to assess the legality of their conduct short of seeking directions from the court’?<sup>506</sup> Therefore, the law is clearly in a position where it does not uphold the

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<sup>502</sup> [2003] 1 AC 1046; [2003] WLR 49, para 28.

<sup>503</sup> H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 299.

<sup>504</sup> The value of the speech in question plays a large role in Strasbourg jurisprudence: with political expression being given the highest protection (*Jersild v Denmark*), followed by artistic expression (*Otto-Preminger v Austria*), then entertainment expression (*Scherer v Switzerland*), and finally the least value is given to advertising expression (*X and Church of Scientology v Sweden*).

<sup>505</sup> P. Devonshire, ‘Spycatcher returns to the House of Lords’ (2003) L.Q.R. 384, p. 386.

<sup>506</sup> *Ibid*, p. 387.

rights of Article 10 strongly enough, as the whole area is cast with an air of uncertainty as to when an action would be bought. Feldman is also critical of this, as ‘such an extension of the effect of injunctions beyond their proper limits by the procedural sideway of contempt proceedings against a third party should not be permitted’.<sup>507</sup> Therefore, it must be concluded that ‘*Punch* is one of the most disappointing rulings there has been so far under the HRA: it represents a judicial acquiescence to executive’s predilection for secrecy, coupled with a determination to cling to anti-speech values reflected in common law doctrine even when they fly in the face of Convention principles’.<sup>508</sup> Consequently, this area of common law contempt is in great need of reform.

## **Reform**

This chapter has clearly highlighted that there are several concerns surrounding Common Law contempt; as Miller notes, ‘In English law there is a continuing role for the common law in the area of sub judice contempts. However, this still leaves a number of difficult issues to be resolved’.<sup>509</sup> Furthermore, ‘the more uncertain the test becomes, the more, it is argued, common law contempt is divorced from a focus on such fairness’;<sup>510</sup> as it fails to uphold either Article 6 or Article 10 rights. As such it is in need of radical reform, to guarantee its effective use under the protective model and to ensure that it is ECHR compliant.

Firstly, Fenwick has called for the abolition of creating bias under common law contempt, as it ‘seems to be serving no useful purpose, since it overlaps with the use of the strict liability

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<sup>507</sup> D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2002, 2<sup>nd</sup> edn, OUP), p. 974.

<sup>508</sup> H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 301.

<sup>509</sup> C. Miller, *Contempt of Court* (2000, Oxford), p. 287.

<sup>510</sup> *Ibid.*

rule, and should be abolished'.<sup>511</sup> Whereas, in contrast, the limb that deals with pressuring a litigant should 'be viewed as a special form of contempt and placed on a new statutory basis'.<sup>512</sup> Both these recommendations are extremely plausible, as the creating bias form of common law contempt has become nebulous and unworkable, yet pressuring a litigant has allowed for a niche area of protection when certain special facts arise. Therefore, the limb of creating bias should be officially abolished to clear up any ambiguity, and the law regarding pressuring a litigant should be fully endorsed and placed on a statutory footing alongside the Contempt of Court Act 1981. This has been similarly supported by Feldman, as he has argued that 'reform by statute would be welcome'.<sup>513</sup> However, in light of the more recent developments surrounding the use of 'impediment' (which have been previously discussed), it could be argued that the pressuring of a litigant during the active period would be covered under s. 2(2). Nonetheless, this would only cover the active period, yet the decision in *Hislop* expressly concluded that any impediment to the administration of justice should be prosecuted. As such this stream of common law should be placed on a statutory footing as per Fenwick and Feldman's recommendations.

Miller has also called for this, as 'development in line with the statute would ensure ECHR compliance',<sup>514</sup> thus, ensuring that the 'imminence test' is drawn into a much clearer statutory definition, so that it can be said to be 'prescribed by law'. It could be argued that if a suitable post-HRA case ever arises, it is possible that reinterpretation of this common law

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<sup>511</sup> H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 289.

<sup>512</sup> *Ibid.*

<sup>513</sup> D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2002, 2<sup>nd</sup> edn, OUP), p. 977.

<sup>514</sup> C. Miller, *Contempt of Court* (2000, Oxford), p. 287.

doctrine as an aspect of the court's duty under s. 6 HRA,<sup>515</sup> might reintroduce certainty into the timing test. However, much greater certainty would be achieved by bringing the common law into the statutory framework, which would remove any ambiguity. This has been supported by Cram: he concluded that 'for reasons of clarity... contempt might be placed on a statutory footing'.<sup>516</sup> Furthermore, by doing this, it would ensure that any further cases involving frustrating the aim of an injunction would have to take full appreciation of the HRA and the ECHR, thus ensuring that standards of necessity and proportionality are met. Additionally, this is the most likely path for reform, as although only touched on briefly in the Law Commission's Consultation paper, they do note that they are considering whether the common law of intentional contempt by publication should be defined in statute;<sup>517</sup> consequently, this would address all of the aforementioned issues and ensure its effective usage under the domestic protective model for contempt.

## Conclusion

This chapter has explored the jurisprudence on common law contempt under English law, and its usage alongside the statutory provisions under the Contempt of Court Act 1981. Firstly, the chapter gave a brief overview of common law contempt as it currently stands under English law, which showed that there are several key issues surrounding nebulous terms and inconsistent applications of the law by the judiciary. Secondly, it evaluated the meaning of imminence under common law contempt, while contrasting this to the active period seen in the Contempt of Court Act 1981, which highlighted some key areas of concern with its

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<sup>515</sup> See: *Douglas v Hello!* [2001] QB 967.

<sup>516</sup> <sup>516</sup> I.Cram & N. Taylor 'The Law Commission's contempt proposals – getting the balance right?' (2013) Crim. L.R. 465.

<sup>517</sup> Law Commission, 'Contempt of Court, A Consultation Paper' (2013) Consultation Paper No 209, p20 2.57.

definition, as it is far too ambiguous and as a consequence unlikely to pass the ‘prescribed by law test’ at Strasbourg. Thirdly, it assessed its usage for bringing actions under: creating prejudice, pressuring litigants, and frustrating the aim of an injunction. It highlighted that creating prejudice is now a redundant limb and is in need of abolition, as it is far too restrictive on Article 10 and as is unusable. Whereas, pressuring a litigant is highly useful and should be drawn into the statutory framework, to ensure that it can be prosecuted both inside and outside the active period, as no publication should have the de facto right to alter the administration of justice. This is also the case with frustrating the aim of an injunction, as the case law currently fails to appreciate the HRA and ECHR, which would be done if placed on a statutory footing. Finally, it concluded that the most effective and most likely reform will come in the way of abolition and statutory legislation. Such reform would ensure that the law becomes far more defined and usable, which would place the law firmly within the protective model. Currently the law in this area is far too nebulous, and as such does not work as a deterrent which is a key fundamental for the success of the protective model. Thus, through abolition and precisely worded new legislation, a much more protective approach would be achieved, which is the favourable approach for contempt law, as it will ensure a fair balance between freedom of expression and the right to a fair trial.

## **Chapter 8: The Future of English Contempt of Court Law**

As the Philimore Committee concluded back in the 1970s, ‘the law relating to contempt of court has developed over the centuries as a means whereby the courts may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular case or generally’.<sup>518</sup> This conclusion is something that the domestic law has endeavoured to maintain under a predominantly protective model, yet as the law currently stands it is in need of further reform to ensure it remains within the protective model, effective in an era of modern media, and ECHR-compliant. Furthermore, as this work has extensively looked at, the Law Commission’s recent consultation paper is to a certain extent attempting to address these matters.

However, as this thesis has argued, the preferred model for contempt is a protective one, and as such reform in this area needs to ensure this. Yet many of the Commission’s proposals have left the law as it is or suggested minor changes which will leave the law more within a neutralising approach. This is sustained by Cram’s claim that the threshold test under s. 2(2) as it currently stands is ‘largely unworkable’;<sup>519</sup> consequently, the law does not effectively maintain the media under a protective model, and leaves matters to be dealt with under a more neutralising approach. As such, ‘robust and nuanced jury directions have been, and continue to be developed to cater for developments in technology’;<sup>520</sup> which the Commission and Parliament is clearly looking to continue with their strong focus on the criminalisation of

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<sup>518</sup> Phillipmore Committee, Report of the Committee on Contempt of Court (1974) Cmnd 5794, para 1.

<sup>519</sup> I.Cram & N. Taylor ‘The Law Commission’s contempt proposals – getting the balance right?’ (2013) Crim. L.R. 465.

<sup>520</sup> *Ibid*, p. 472.

juror misconduct<sup>521</sup> under s.71 and s.72 of the Criminal Justice and Courts Bill. Nonetheless, as Cram has noted ‘whilst such measures might ensure the safety of the trial they do not prevent the risk arising’,<sup>522</sup> which should be the fundamental foundation of the English approach to contempt law, so that it remains strongly within the effective protective model. Therefore, for the English protective approach to become effective, s. 2(2) must be brought in line with the standards set by Strasbourg jurisprudence, and in particular *Worm*.

As has been said throughout this thesis, this can be achieved through a combination of reforms from the judiciary and parliament. The judiciary need to use their power under the HRA to read down s. 2(2) of the Contempt of Court Act, so that it is in line with Strasbourg in *Worm*, and thereby create a more protective approach. This judicial reform needs to be carried through into their creation of two distinct standards for impediment and prejudice, which will consequently ensure that the law is far more effective and usable. This separation has been endorsed by the Law Commission,<sup>523</sup> as by doing this the courts will ensure the Contempt of Court Act can work as a deterrent, which is fundamental for a protective model approach.

Similarly, if a suitable case arises, the judges need to read a Strasbourg test of proportionality in to s. 5 of the Act, so that it remains usable and Convention compliant. Parliamentary reform would also provide a means of making these changes, which would be more satisfactory. However, disappointingly the Commission are less reluctant to read in such

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<sup>521</sup> The Law Commission, ‘Contempt of Court (1): Juror misconduct and internet publications’ (2014) Law Com No 340.

<sup>522</sup> *Ibid.*

<sup>523</sup> Law Commission, Contempt of Court: A Consultation Paper (2012) Consultation Paper No.209, para.2.47.

radical reforms to the standard;<sup>524</sup> instead opting for a clarification approach, where clear guidelines are issued as to its ambit. However, this will fail to take account of proportionality and it will not properly assess the competing Article 10 and Article 6 rights. Therefore, s. 5 can be seen as too broad as it has the potential to stifle free speech, but also too narrow as the ambiguity to its scope makes it not readily usable by the judiciary.

As mentioned previously in this work, reform also needs to come in the form of abolition of common law contempt, so as to remove the nebulous and unworkable tests which distort this area of contempt law. Thus, by ensuring clear and usable laws, common law contempt of court law will be firmly within the remits of the protective model. Many of these recommendations and others made throughout this work, have not been endorsed by the Law Commission themselves, thus, it unlikely that such a strong protective approach will be achieved within English law. Which Cram has argued is ‘essential’,<sup>525</sup> as primacy must be given to the Article 6 rights for a fair trial over Article 10; thus ensuring an effective protective model for English contempt law.

Furthermore, the Commission have still left some ambiguities in regards to the approach to be taken towards modern media, which this work has briefly touched on. They note that ‘in respect of contempt by publication and the impact of the modern media, we recommend that the definition of a publication “addressed to the public at large or any section of the public” under section 2(1) of the 1981 Act should not be amended. Although the definition is vague, particularly in relation to publications over social media (for instance those which are

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<sup>524</sup> I.Cram & N. Taylor ‘The Law Commission’s contempt proposals – getting the balance right?’ (2013) Crim. L.R. 465.

<sup>525</sup> I.Cram & N. Taylor ‘The Law Commission’s contempt proposals – getting the balance right?’ (2013) Crim. L.R. 465, p. 482.

available to only a limited number of “friends” or “followers”), we do not consider that a statutory or other definition would be practicable. We instead recommend that the law should be left to develop on a case-by-case basis, allowing for future changes to online means of communication’.<sup>526</sup> Thus, the Law Commission has seemingly left the courts to decide this, which as has been mentioned previously, is wholly unreasonable, as a predominantly aging, white, middle class, and male filled judiciary is not equipped to deal with development in social media and the internet. Consequently, this will result in neutralising measures having to be deployed whenever there is a strong risk to the fair trial process, which will heavily detract from the far more effective protective approach. A much more reasonable approach would have been the recommendation of some practical guidelines, which are updated regularly. However, it is important to remember that these guidelines would not replace the need of judicial decisions; instead they must be seen a supplement that would help guide the judiciary as the modern media rapidly develops. Consequently, the media do not have to second guess what is, and what is not at risk of contempt; thus, the law could act as a true deterrent, which would ensure it encompassed a key element of the protective model.

This issue is similarly bought up when they conclude that ‘assessing whether a person’s use of new media constitutes a communication to the public or a section of it will vary significantly both between the various media available and depending on how the particular service is used. Email, for example, would generally seem analogous to private correspondence. Social networking sites, such as Facebook and Twitter, can involve communications to the world at large or to a limited number of “friends” or “followers” by the use of privacy settings. In such cases, it appears that whether a communication was to the

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<sup>526</sup> The Law Commission, ‘Contempt of Court (1): Juror misconduct and internet publications’ (2014) Law Com No 340, p. 3, para 18.

public or a section of it would need to be decided on a case-by-case basis'.<sup>527</sup> Again this leaves the judiciary in charge of developing the law in an era of modern media. Therefore, considering they still place all the importance on the printed media and have thus far failed to acknowledge the monumental power of online media, it is an unsatisfactory position to be in. This argument has been similarly endorsed by Cram, as he notes that 'without doubt... the current law relating to contempt... are ill-equipped for the demands of the new media landscape';<sup>528</sup> as such, reform needs to go above what the Law Commission has suggested thus far.

Hence, as has been acknowledged in the previous chapters, the Law Commission has addressed some of the major issues, but it really seems to have failed to fully stamp down on the power of modern media. Instead the Commission is leaving the judiciary to develop the law, which is an unsatisfactory position for the law to be in, as it weakens the effectiveness of the protective model and places too much reliance on a neutralising stance. Nonetheless, the full findings from the Law Commission have yet to be published, which makes it difficult to fully assess the future of contempt law domestically. It can be said that the future of Contempt Law is moving in the right direction since the government has acknowledged that it needs to be reformed, yet it seems not to be doing quite enough to fully ensure that it remains within the protective model, effective in an era of modern media, and ECHR compliant.

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<sup>527</sup> The Law Commission, 'Contempt of Court (1): Juror misconduct and internet publications' (2014) Law Com No 340, p. 13, para 33.

<sup>528</sup> I.Cram & N. Taylor 'The Law Commission's contempt proposals – getting the balance right?' (2013) Crim. L.R. 465, p482.

## **Summary of Key Reforms that should be introduced**

The following reforms should be introduced to ensure that contempt of court law remains strongly within the effective protective model:

1. The judiciary should use s. 3(1) HRA to change the interpretation of s. 2(2) to be more in line with that of the standard set by Strasbourg jurisprudence in *Worm* (likelier than not test). This would allow for more prosecutions, which would strengthen the protective model and detract from the need to rely on the neutralising model. However, if a suitable case does not arise for this to happen in the immediate future, this must then come in the form of legislative reform.
2. Legislative reform is needed to give the judiciary the power to effectively raise injunctions against any online material which may alter the fair trial process. This would only be during the active period and would not be a permanent injunction. A more neutralising stance would have to be used when dealing with any material that falls outside the remit of the English jurisdiction. This would come in the form of strong judicial directions, juror interviews, and delaying the trial. Although not desirable under the protective model, these neutralising approaches will help support the overall protective approach.
3. Legislative reform that will result in greater education in schools about the role and importance of jury service; improving the information provided to jurors about their obligations during jury service; changes to the wording of the juror oath to include an agreement to base the verdict only on the evidence heard in court; requiring jurors to sign a written declaration; informing jurors about asking questions during the trial; a statutory power for judges to remove internet-enabled devices from jurors where necessary; and effective systems for jurors to report concerns.

4. Legislative reform to allow for collective prosecution of publications where the combined contribution has achieved a substantial risk to the fair trial process. This would strengthen the protective approach, and demand far more responsible publications from the publishers.
5. The judiciary should create two distinct areas of jurisprudence for impediment and prejudice, so as to create a clear set of standards which can be easily followed which would enable the law to be much more protective. If a suitable case does not arise to clearly define this in the immediate future, this must then come in the form of legislative reform.
6. The judiciary should read a proportionality test into s. 5 so as to allow for an effective weighing up of the competing rights. If a suitable case does not arise to read in this proportionality test in the immediate future, this must then come in the form of legislative reform.
7. The Attorney General should publish guidelines to the media as to the use of s. 5 and a clear set of definitions and standards as to when it will be used.
8. Legislative abolition of common law contempt of court for creating bias and the legislative writing in of common law contempt for pressuring a litigant.
9. The legislative removal of the imminence test under common law contempt and the introduction of a much clearer and workable word/definition.
10. The Attorney General should publish guidelines to the judiciary about new social media and which forms are likely to be considered a publication, and what size the viewing figures will need to be, to be deemed a substantial risk.

These recommendations would place English contempt of court law firmly within the protective model, which is the most effective model for ensuring that freedom of expression and the right to a fair trial are given equal consideration.

## **Chapter 9: Conclusion**

The basis of this thesis was Lord Diplock's statement that 'Trial by newspaper or, as it should be more compendiously expressed today, trial by the media, is not to be permitted in this country'.<sup>529</sup> From this, the work has shown the three main theoretical models that can be applied to do this, and shown that a combination of all three with a focus on the protective approach would be the most effective. This is the current approach that the English legal system has attempted to adopt within the Contempt of Court Act 1981, with the aim to uphold both Article 6 and Article 10 ECHR rights, to ensure Strasbourg compatibility.

The strength of the protective approach was shown when contrasted to the purely neutralising model of the USA in which the right to fair trial and freedom of expression are not even acknowledged as clashing rights; consequently, nothing is done to curtail the media in any way. Subsequently, there is a heavy reliance on the judge's ability ensure a fair trial with other measures, yet as was highlighted, this less desirable approach has led to some catastrophic cases of miscarriages of justice. Therefore, a far more protective approach must be seen as the suitable approach for domestic contempt law, especially in the internet era.

However, the domestic reality has been shown to be far from this idealistic theoretical approach. The meaning of 'substantial risk' under s. 2(2) of the Contempt of Court Act 1981 has been driven to an extremely high threshold through a judicial fear of Strasbourg incompatibility and the inception of the HRA, when in fact the Strasbourg test is one of a lower standard. Resultantly, the protective model is weakened due to the Act not really posing a threat, which places a greater burden on the neutralising measures, which are far from fool proof. Furthermore, reform is likely to come from legislative reform, as a result of

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<sup>529</sup> *Attorney General v English* [1983] A.C. 116.

the Law Commission proposals, yet it is doubtful whether these reforms will move contempt law sufficiently back into the protective model and in line with Strasbourg's jurisprudence. As such, the current trajectory of s. 2(2) is not going far enough into the desired protective model, which would also ensure its compatibility with Strasbourg.

Following on, this work looked at the judicial interpretation of serious prejudice and argued that although there are some clear established principles, there is a lack of apparent separation from the meaning of impediment. However, more recent case law has shown a clear shift towards the separate use of serious impediment, which has impacted on the use and application of the s. 2(2) test, in an attempt to make it more workable in light of the extremely high substantial risk standard for serious prejudice. Consequently, reform in this area is primarily looking at separating prejudice and impediment into creating two separate distinct areas of jurisprudence in an attempt to strengthen the protective model. The support from the Law Commission has shown that a clearly defined test for impediment would definitely help in moving English contempt law far more within the protective model, as the law could be more readily used and as such would act as a deterrent to publishers.

Additionally, it assessed the use of s. 5 under the Contempt of Court Act 1981, which provides a qualification to the strict liability rule under s. 2. However, as the law currently stands under the protective model, it is not fit for purpose, nor can it be conclusively stated that it is compliant with the ECHR. This is due to the over-reliance on neutralising measures and a lack of willingness to do a proportionality test while assessing the value of the speech. Disappointingly, in light of the recent Law Commission consultation paper, it would seem that a far more restrictive approach to reform will be taken in this area, which will not fully address the issues. As such, it fails to meet the demands of the protective model, as s. 5

should be there to safeguard against the protective model going too far with its curtailing of the media, to the point of creating a chilling effect. Thus, for s. 5 to be effective within the protective ambit, it must be reformed to encompass the Strasbourg standards.

Finally, the work looked at the narrow category of common law contempt, which still serves an important purpose under the protective model for domestic contempt law. There are three key distinct areas to the common law, which include: creating prejudice, pressuring litigants, and frustrating the aim of an injunction. However, creating prejudice is now a redundant limb and is in need of abolition, whereas pressuring a litigant is highly useful and should be drawn into the statutory framework. This is also the case with frustrating the aim of an injunction, as the case law currently fails to appreciate the HRA and ECHR, which would be done if placed on a statutory footing. Therefore, the most effective and most likely reform will come in the way of abolition and new legislation. Consequently, this would meet the protective model standards, as it would create a clear set of laws and guidelines for the publishers to follow, which would act as a true deterrent.

Consequently, the thesis has explored from a theoretical approach, the key areas of contempt law that aim to restrict the media from altering the fair trial process. There are clearly several issues with the law as it stands currently, and rapid reform needs to occur in order to ensure that modern media and the internet do not destroy the protective model to the point where the domestic law can only function with a heavy reliance on neutralising measures. The work has appreciated the Law Commission's proposals which do go some way to addressing these issues, and it is hoped that the remaining proposals, which are yet to be published, match the recommendations given by this work, as this would ensure that domestic contempt law

remains predominantly within the protective model, becomes effective in an era of modern media, and is compatible with Strasbourg.

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