

Contempt –reporting crime

1. Introduction

There are a number of issues to be aware of when reporting criminal cases and this is a brief note outlining these and how to deal with them. There are two main issues in a crime story:

(1) the risk of contempt –if proceedings are active (an arrest has been made or a warrant issued); and

(2) reporting restrictions both the standing automatic ones and bespoke orders made in individual cases (generally as to anonymity and reporting of pre-trial hearings).

There may also be libel risk/issues if the individual is eventually acquitted.

2. The 1981 Act

Under the Contempt of Court Act 1981 (CCA), there are two key general rules.

(A) Strict liability contempt under §1 CCA. The strict liability (no intent required) rule applies only to a publication which creates *a substantial risk* that the course of justice in the proceedings in question will be *seriously impeded or prejudiced*. This applies to a publication only if the proceedings in question are active within the meaning of this section at the time of the publication.

(B) Open justice in §4(1) CCA. Subject to this section, a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith (unless an order under §4(2) is made delaying reports).

There are serious penalties for reporting that results in a mistrial but understanding and applying the rules is not that easy and we attempt below to show a simple path through them.

3. The Rules

Most journalists know that there is a rule that you should always say: “A” man – never ‘the’ man --is helping the police with their enquiries --or it can be contempt if proceedings are active as it suggests the individual is guilty. They also know that reporting evidence before a trial has risks.

Strict liability contempt kicks in from arrest, issue of warrant or summons or charge when proceedings become active but usually impacts mainly the reporting of pre-trial hearings and appearances ---as once the case is into trial, the proceedings can be fully reported under the open justice rule in §4(1) CCA.

Contempt bites on very prejudicial material –usually *Convictions, Character, Evidence and Guilt* (CEG) or guilty pleas to some offences while still being tried on others. If identification is in issue –it also applies to photos and names. However, although it is now recognized there is a ‘Fade Factor’ so there can be some room for flexibility as the jury may forget early reports --but the closer the report is to the trial –the greater the risk. Some draw a line at vilification and front page reporting but the CEG approach should also be kept in mind. Some ‘evidence’ is so prejudicial that it could never be safely reported pre-trial as a juror would be unable to forget. Articles known as “backgrounders” are a particular risk.

Automatic statutory reporting restrictions also apply from the first appearance and restrict what can be reported from pre-trial

hearings (and so limit the scope of open justice and CCA §4.1). These apply in all courts including the Youth, Crown & Magistrates courts¹ and limit reports to the six or so enumerated items such as: name of court, judge, names of accused and witnesses, the offence or charge, names of lawyers, bail, legal aid (granted or not) and (sometimes) outcome. Other, non-prejudicial information and background can also be reported-*with care*. Note that it is almost never possible to identify anyone under 18 (either because an automatic restriction or a court ordered restriction usually applicable through proceedings and after unless expressly lifted at end of trial) and this also now applies to young victims and witnesses.

4. Naming

Naming is also very often an issue. Between the arrest and/or first reports of the crime and the point of charge is where there is most risk. When the Police charge, they have decided that they have got the right individual and there is enough evidence for a conviction. While it is common after an arrest to use the formula “named locally as,” there is a defamation (and privacy) risk that when naming prior to charge, if the Police never charge them and/or the wrong person is named. There will also always be a libel risk on acquittal or release also.

It is now common to wait until charge before naming (unless on very sure ground as to identification)—when CPS have reviewed the case and think it is viable. Further, when the Police name, they can be quoted and the publisher can then rely on

Statutory Qualified Privilege (a defence to libel).

Once the person charged has their first appearance (and thereafter) the Automatic Reporting Restrictions apply (and they can be named but the report must be limited to the six or so items of information permitted). Again, once into open trial, CCA §4.1 and principles of open justice protects reports subject to particular orders.

5. Special reporting rules

Note that Teachers are protected until charged –and should not be named or identified (see §13 of the Education Act 2011). There is also lifetime anonymity for victims of sexual offences. The Sexual Offences (Amendment) Act 1992 makes provision for lifetime anonymity of victims

§1. “Where an allegation has been made that an offence to which this Act applies has been committed against a person, neither the name nor address, and no still or moving picture, of that person shall during that person’s lifetime—

(a) be published in England and Wales in a written publication available to the public; or

(b) be included in a relevant programme for reception in England and Wales,

if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed.

It also creates a criminal offence whether by naming or enabling a ‘jigsaw’ identification to be made. Note that these anonymity provisions can be waived but the statutes require a precise and written

¹ See the guide

<http://www.judiciary.gov.uk/publications/reporting-restrictions-in-the-criminal-courts/>

waiver addresses to the particular publication.

6. Defamatory meanings and reporting crime

There are four levels of meanings (relevant to proving the defence of Truth in the context of crime). See *Chase v. News Group Newspapers Limited* [2002] EWCA Civ 1772 :

1. Accusing someone of committing a crime—ie guilt.
2. Suggesting that there are reasonable grounds to suspect they have committed a crime; and/or
3. Suggesting there are reasonable grounds to investigate whether they have been responsible for a crime;
4. The fact of investigation.

There are also special rules governing what a defendant must prove for each of the levels. Guilt needs a conviction. Level two suggests that the conduct of the defendant has given rise to the grounds. Three and four may be justified by Police investigation or statement. Two and three are the most difficult and the most relevant in practice and the difference between reasonable grounds to suspect versus reasonable grounds for investigating is a fine one. See *Miller v Associated* [2014] EWCA Civ 39 [the question is] “*whether, viewed at the date of publication, the claimant had behaved in a way that would give a reasonable person grounds for suspecting him of the wrongdoing in question.*” It is not necessary to prove actual misconduct. The following rules should also be kept in mind.

- (1) The “repetition rule” means that the defendant must prove the truth of the underlying allegation – not merely the fact that the allegation has been made.
- (2) The test is of a hypothetical reasonable person is taken to be aware of all primary facts and matters at date of publication.
- (3) It is necessary to prove the primary facts and matters giving rise to reasonable grounds of suspicion objectively judged. This is determined against the overall factual position as it stood at the material time (including any true explanation the claimant may have given for the apparently suspicious circumstances).
- (4) It is impermissible to plead as a primary fact the proposition that some person or persons (e.g. law enforcement authorities) announced, suspected or believed the claimant to be guilty.
- (5) It is necessary to plead facts tending to show that it was some conduct on the claimant’s part that gave rise to the grounds of suspicion (the so-called “conduct rule” but not absolute and strong circumstantial evidence can do).
- (6) The defendant cannot rely on post-publication events in order to establish the existence of reasonable grounds –facts must exist at the time of publication



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(even if the publisher was unaware
of them at that point).