Contempt and Social Media: Update

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Summary

In our 2013 article "Social Media: how the net is closing in on cyber bullies",[1] we set out the circumstances in which social media users might find themselves in breach of the criminal and civil laws when using social media. In that article, we addressed the current contempt laws and their application to social media.

On December 9, 2013, the Law Commission published its long awaited first report on Contempt of Court: Juror Misconduct and Internet Publications. Here we examine how the recommended changes might address the issues highlighted in our earlier article.

The Law Commission Report

Publication of the first of three Law Commission reports on contempt came just over a year after the Law Commission's consultation paper on contempt of court was published in November 2012. The consultation focused on a number of areas:

- Contempt by publication;
- The impact of the new media;
- Contempts committed by jurors;
- Contempt in the face of the court; and
- Reporting restrictions.

The first report focused on juror misconduct and internet publication, expediting these areas in a stated attempt:

> "to maintain public 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."

The report made three key recommendations:

- The creation of a new criminal offence for jurors conducting prohibited research, triable on indictment, with a jury, and with a maximum penalty of two years' imprisonment and/or an unlimited fine.
- The creation of an exemption of contempt liability for publishers relating to archived online material first published before proceedings became active. The exemption would apply unless a publisher is put on notice by the Attorney General.
- The creation of a limited exception to the prohibition on jurors revealing their deliberations where, after the conclusion of the trial, a juror discloses the content of jury deliberations to a court official, the police or the Criminal Cases Review Commission in the genuine belief that they are exposing a miscarriage of justice.

Archive exemption

The report addresses the frequently voiced concerns as to the application of the Contempt of Court Act 1981 to the internet. Particularly pertinent has been the issue of online news archives, where content published prior to charge often remains available when the matter subsequently comes to trial.

The law must protect the right to a fair trial and particularly the principle enshrined in art.6 of the European Convention on Human Rights that those charged with a criminal offence shall be presumed innocent until proved guilty according to law. Balanced against this right is the need to protect the right to freedom of expression under art.10, the restriction of which may not be more than is necessary or proportionate.

As well as clarifying existing sections of the 1981 Act (and interestingly, concluding that many existing definitions such as "publication" and "addressed to the public at large or any section of the public", should remain unaltered, despite developments in internet and social media technology), the report recommends the creation of a new statutory exemption, where the publication in question was first published before proceedings became active. Under the exemption the person responsible for publication should be exempt from liability under s.2 unless put on formal notice by the Attorney General of (a) the existence and location of the publication; and (b) the fact that relevant proceedings have become active since publication; and (c) the offending contents of the publication. The notice requirement, not dissimilar to the hosting defence for intermediaries under reg.19 of the E-Commerce (EC Directive) Regulations,[2] is recommended for formalisation through a new Criminal Procedure Rule or statutory instrument.

[1] Jennifer Agate and Jocelyn Ledward, "Social Media: how the net is closing in on cyber bullies" [2013] Ent. L.R. 24(8), 263–268.
[2] The E-Commerce (EC Directive) Regulations 2002 (SI 2002/2013).

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The report recommends that the issues of place of publication and jurisdiction (arguably the most difficult areas to tackle) should be considered in more detail in a separate report on social media to be published at a later date.

Juror research

Jurors in criminal trials have long been warned about the dangers of researching the case they are about to try online. More recently, the usual practice has resulted in judges issuing an explicit prohibition, and in many cases, specific warnings are given about Twitter, Facebook and other social media, as well as the internet generally. In very high-profile trials, the issue of media coverage may be tackled head-on, although this is usually because of inaccurate reporting of proceedings rather than publication of extraneous prejudicial material.

Recent prosecutions[3] illustrate that occasionally, this is not enough. The Law Commission report also identifies inconsistencies in practice and highlights research that suggests that confusion about what is and is not permissible is relatively widespread among jurors, and that a large proportion are simply not aware of the recent criminal prosecutions. Against that background, the recommendation made by the Law Commission, that a new offence should be created, such that jurors who carry out deliberate internet searches about the cases they are trying, should face up to two years in prison, is a good one. It was widely supported by both media organisations, the judiciary and lawyers in the detailed consultation exercise.

At present searching for information online about a trial amounts to contempt of court, which is punishable by imprisonment, but the provisions and procedure are archaic and uncertain, and some clarification is welcome. The intention, as expressed by the Attorney General,[4] is that jurors would still be able to read the news online or in newspapers and use the internet normally, but that they must not seek out extraneous information about the case they have sworn to try. Codification of the restrictions placed on jurors is essential, if they are to work in harmony with the archive exemption recommendation, without routinely risking criminal proceedings becoming compromised.

The creation of a new offence also has one major advantage from the juror's point of view, in that it provide jurors with an additional layer of protection when they are accused of such misconduct: trial by jury of their own peers (rather than a judge alone) and all the advantages conferred by ECHR art.6 (e.g. the privilege against self-incrimination; legal representation), and other legislation enacted that protects defendants (e.g. the criminal disclosure regime, rather than the civil, as currently applies in contempt proceedings).

Juror deliberations

The Law Commission has also recommended the creation of a limited exception to the prohibition on jurors revealing their deliberations where, after the conclusion of the trial, a juror discloses the content of jury deliberations to a court official, the police or the Criminal Cases Review Commission in the genuine belief that they are exposing a miscarriage of justice. The proposals also suggest an exception for academic research, the importance of which has been highlighted by the ground-breaking and highly valued research of Professor Cheryl Baker in recent years.

The main criticism of s.8 of the Contempt of Court Act 1981 is that it goes beyond what is necessary to achieve its aim, namely the promotion of free and frank discussion amongst jurors, and of the finality of the verdict. Although found to be a proportionate interference with the juror's art.10 right to freedom of expression by the House of Lords and the ECtHR, observations in *Seckerson v United Kingdom (Admissibility)*[5] suggest this may not be so in relation to jury research and where disclosure could be said truly to be in the interests of justice, such as in relation to a miscarriage of justice. The proposals are intended to protect the administration of justice generally, in the same way as the two existing exceptions to s.8 do (permitted disclosure to the court with which juror is sitting, and where there is allegation of an offence in relation to the jury, e.g. jury tampering).

The aim of the proposals is laudable. They were supported by the majority in the consultation exercise, and address another identified area of juror uncertainty, namely who they can talk to and when about something that concerns them about their deliberations. But the support was not universal, particularly in relation to the area of jury research, with a number of high-profile academics in this area (who are responsible for successful jury research within the confines of s.8[6]) sounding notes of caution, and the Criminal Bar Association, the CPS, the Council of Circuit Judges and some senior judges all against the jury research proposal. This highlights that this is a much more controversial area, and one with real resource implications. As the report acknowledges, the miscarriage of justice exception has the potential to create a flood of unmeritorious disclosures leading to unnecessary investigations and appeals, however precisely the new statutory defence is worded. Amendment of s.8 for the purposes of research may be one step too far into the sanctum of the deliberating room, however much recent research has highlighted the need for a better understanding of how juries behave in criminal trials. It remains to be seen whether Parliament will be persuaded that either or both of these reforms are worthwhile and necessary legislative steps.

[3] Details in Jennifer Agate and Jocelyn Ledward, "Social Media: how the net is closing in on cyber bullies" [2013] Ent. L.R. 24(8), 263–268..
[4] Remarks made by the Attorney General Dominic Grieve QC MP to Politeia on the future of the jury system in England and Wales on December 11, 2013. Part of Politeia's 2013–14 Legal Series.
[5] *Seckerson v United Kingdom (Admissibility)* (32844/10) (2012) 54 E.H.R.R. SE19.
[6] See, e.g. C. Thomas, "Avoiding the perfect storm of juror contempt" [2013] *Criminal Law Review* 483.

Context of publication

The report comes in the wake of further reminders of the risks facing social media users. On November 27, 2013, James Baines became the third individual to receive a suspended prison sentence for purporting to identify one of the killers of James Bulger in photographs posted via his Twitter account.[7] He was further ordered to pay £3,000 in costs. The blatant breach was accompanied by a Twitter post clearly demonstrating awareness of the prohibition on identification, stating "Its on bbc news about the jon venables pic on twitter saying its been removed eerrm no it hasn't". The following month he posted on Facebook that he had complete contempt for the police if they were to take action against him.

Only a day later, high profile Twitter user Peaches Geldof tweeted the names of two mothers whose children were involved in a high profile sex trial of musician and former member of the rock band Lostprophets Ian Watkins, risking the identification of the children involved (who as the victims of sex offences are entitled to lifelong anonymity). This, despite a well-publicised warning by the South Wales Police as to the potential criminal liability of doing so hours earlier. The case also acted as a warning to picture editors, a US website publishing a photograph of the wrong Ian Watkins alongside coverage of the trial.

On December 4, 2013, it was reported that the case of Dr Theodora Dallas, the juror found to be in contempt of court after conducting online research and sentenced to six months imprisonment in 2012, was to be heard by the European Court of Human Rights.[8]

Also on December 4, it was announced that the Attorney General was to commence issuing advisory notices to help prevent social media users from committing contempt of court. Previously only issued to print and broadcast media outlets on a "not for publication" basis, the notices will now be published via not only the Attorney General's website, but also via the Attorney General's Office Twitter feed @AGO_UK. The advisory notes, combined with recent high profile prosecutions, make it unlikely that future defendants will be able to claim with any credibility that they were not aware of the basic contempt laws.

Predictions for 2014

Despite the other high profile cases in 2013, the end of the year also saw further evidence of the prevalence of social media abuse, with former footballer Stan Collymore reporting racial abuse received over Twitter to the police. On December 16, 2013, it was announced that two individuals were to be charged in the Caroline Criado-Perez case.[9]

The authorities are responding ever more rapidly to the reality of the modern phenomenon that is social media, in an effort to protect the ancient right to trial by jury, enshrined in King John's Magna Carta in 1215, a concept which is deeply "ingrained in our national DNA", according to the Attorney General Dominic Grieve QC; and to avoid undoing the legislative efforts of the last several years to protect victims of sexual offences.

The first Law Commission report also identifies a number of additional non-legislative measures which it proposes will improve the effectiveness of existing and proposed methods of preventing juror misconduct, particularly that related to the use of social media and the internet. It is to be hoped that the seeds of a campaign of public education and law reform as to the vulnerability of these rights will prevent them becoming mere collateral damage of the social media revolution. We anticipate many developments in this area in 2014, not least in relation to whether the Law Commission's recommendations will be enacted, and the remaining two parts of its work on contempt. The first report also highlights the intention of a separate project on social media, addressing the issues of place of publication and jurisdiction, which may have wide-ranging implications. In the meantime, high-profile tweeters beware: ill-advised Twitter and social media use is likely to be used as part of these efforts to educate the wider public.

[7] *Attorney General v Baines* unreported November 27, 2013.
[8] *Attorney General v Dallas* [2012] EWHC 156 (Admin).
[9] The two defendants pleaded guilty on January 7, 2014 and at the time of publication are due to be sentenced on January 24, 2014

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