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**Reviving common law media contempt- Attorney-General's intervention in the Russell Brand scandal September 2023**

On 22nd September The Attorney General for England and Wales issued a media release titled 'Media Advisory Notice: Russell Brand' which 'confirms the requirement not to publish material which could prejudice any potential criminal investigation or prosecutions.'

It stated:

'Following the airing of "Russell Brand: In Plain Sight: Dispatches" on 16 September 2023, there has been extensive reporting about Russell Brand. The Attorney General, the Rt Hon Victoria Prentis KC MP, wishes to amplify the importance of not publishing any material where there is a risk that it could prejudice any potential criminal investigation or prosecutions.

Publishing this material could amount to contempt of court.

Editors, publishers, and social media users should take legal advice to ensure they are in a position to fully comply with the obligations to which they are subject under the common law and Contempt of Court Act 1981. The Attorney General's Office is monitoring the coverage of these allegations.'

This advisory precipitated what can be described as a furious reaction from newspapers, journalism bodies and commentators.

On 25th September 2023, Sean O'Neill of the *Times* wrote a 'Thunderer' editorial in the paper headlined: 'Attorney-general is showing contempt for press freedom.' He said: 'The Attorney General is either poorly informed about the law of contempt or has taken it upon herself to issue a thinly veiled threat intended to have a chilling effect on reporting of the Brand allegations.'

He added: 'As a journalist for more than 35 years, I have always understood that contempt of court "bites" when proceedings are active (i.e. there has been a summons, an arrest or a

charge). There have been no arrests in this case. No one has been interviewed by detectives. There are no active proceedings that can be prejudiced.'

The editorial continued: 'Prentis's intervention is a shocking overreach. It is not her job to tell reporters to stop reporting on issues where there is merely the "potential" for criminal proceedings.'

He concluded: 'The attorney-general's censorious warning has no basis in law. She should withdraw it immediately.'

On the same day the *Telegraph* reported "Contempt of court warning on Russell Brand coverage 'worrying and unnecessary.' Society of Editors questions advice from Victoria Prentis, the attorney general, not to publish material that could prejudice investigations.'

Dawn Alford, executive director of the Society of Editors told the paper 'journalists were "well versed" in contempt of court laws.' The article also quoted media law expert and consultant David Banks 'I expect that newspapers and their lawyers will be treating this advice with a pinch of salt.'

And the very influential law journalist and qualified solicitor Joshua Rozenberg, who is an honorary KC and honorary bencher of Gray's Inn, said of the Attorney General's warning: 'some very strange things being said about contempt of court' and 'For the time being, we can surely put common-law contempt back in its box.'

Press Gazette waded in with the article 25th September 2023: 'Attorney General makes Russell Brand contempt warning despite no active proceeding.s Russell Brand has not been arrested, nor is any criminal investigation currently taking place.'
See: https://pressgazette.co.uk/media_law/attorney-general-russell-brand-contempt-warning/

And on the following day Press Gazette's editor Dominic Ponsford published a further article seeking to clarify the media law surrounding the Russell Brand developing story: 'Russell Brand investigation: Why Met Police issued statement to media despite privacy rules.'
See: https://pressgazette.co.uk/comment-analysis/russell-brand-met-police-statement-privacy-rules/

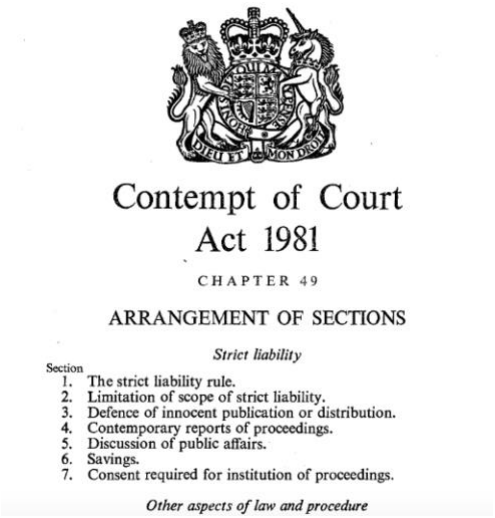
What the media coverage demonstrates is that the journalism profession does have an excellent command and understanding of the 1981 Contempt of Court Act.

This introduced a statutory regime for media contempt which between sections 1 and 5 sets out the rudiments of a strict liability rule that operates from the time a case is active.

Schedule 1 of the act sets out the times when criminal proceedings are active: 'The initial steps of criminal proceedings are:— (a)arrest without warrant; (b)the issue, or in Scotland the grant, of a warrant for arrest; (c)the issue of a summons to appear, or in Scotland the grant of a warrant to cite; (d)the service of an indictment or other document specifying the charge; (e)except in Scotland, oral charge;'

And at (f) there are some very rare further circumstances where a criminal case becomes active again 'the making of an application under section 2(2) (tainted acquittals), 3(3)(b) (admission made or becoming known after acquittal), 4(3)(b) (new evidence), 11(3) (eventual death of injured person) or 12(3) (nullity of previous proceedings) of the Double Jeopardy (Scotland) Act 2011 (asp 16).' This just goes to show how complicated statutory and indeed common law contempt law can be.

There are specialist law books on contempt law. The latest fourth edition of *Borrie and Lowe on Contempt* (2010) is 778 pages long and costs £736.00.



Contempt of Court
Act 1981

CHAPTER 49

ARRANGEMENT OF SECTIONS

*Strict liability*

Section
1. The strict liability rule.
2. Limitation of scope of strict liability.
3. Defence of innocent publication or distribution.
4. Contemporary reports of proceedings.
5. Discussion of public affairs.
6. Savings.
7. Consent required for institution of proceedings.

*Other aspects of law and procedure*

Strict liability means that intention is no defence and media contempt is defined as a publication which 'creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.'

If Parliament intended this legislation to abolish the common law of contempt, it would say so.

But, it does not.

Common law contempt still applies. See Section 6 'Savings' of the 1981 Contempt of Court Act:

'Nothing in the foregoing provisions of this Act—(a) prejudices any defence available at common law to a charge of contempt of court under the strict liability rule; (b)implies that any publication is punishable as contempt of court under that rule which would not be so punishable apart from those provisions; **(c)restricts liability for contempt of court in respect of conduct intended to impede or prejudice the administration of justice.'**

Mainstream media publications and their editors like to refer to *McNae's Essential Law for Journalists* as 'the media law bible.' But even the bible of media law still has sections and references on common law contempt. See pages 306-7, 164, 169 and 330 of the 26th edition (2022) and pages 262-3, 148 and 153 of the 25th (2020) edition.

And the *UK Media Law Pocketguide* 2nd edition at pages 11, 17, 35, 57 and 78 deals with common law contempt matters though much more briefly.

One purpose in retaining common law media contempt would be to deal with situations where there is a campaign to make allegations against somebody in order to apply pressure for the authorities to arrest and prosecute and with the campaign intending to generate so much prejudice that a future fair trial is in doubt.

If it can be proved a journalist or media publisher intended to create as much prejudice to achieve this purpose, there could be common law contempt liability.

The Attorney General would have to be able to prove intent at the criminal standard of proof. A future court trying the journalist/publisher would be a panel of judges and not a jury.

The key test cases on common law contempt prosecutions of journalists and news publications are more than 30 years old. But that does not mean the law has changed in any way.

The AG would have to prove specific intent where the accusation is that of interference with particular legal proceedings. Any potential prosecution for media law contempt will depend on the circumstances. For example, has a legal process already begun with the announcement of an actual police investigation? Can it be shown that journalists and news publishers have been heedless or reckless to the obvious risk of prejudice and can this be equated with intent.

It can be argued that a journalist could be in contempt at common law if (a) they desired to interfere with the due process of justice or (b) they did not desire it but must have realised it was highly probable or (c) they neither desired it nor realised it was highly probable, but recognised it was a possibility and deliberately took a risk or, possibly (d) they were heedless of a perfectly obvious risk. These possibilities were actually set out at page 92 in the 11th edition of *McNae's Essential Law for Journalists* (1990).

The *Sun* was fined £75,000 in 1988 for contempt at common law when during 1986 they offered to fund a private prosecution of a doctor on a charge of raping an eight-year-old girl, and then published two articles with details of the allegation.

In one of the articles the newspaper had identified the doctor and accused him of other indecencies. Two of the Sun's articles had been headlined: 'He's a real swine' and 'Beast must be named, says MP.'

The proceedings were not active under the 1981 Contempt of Court Act, but the court decided criminal proceedings were imminent at common law.

During the private prosecution, the doctor was accorded anonymity and evidence and information previously published about him was legally inadmissible.

The Divisional Court decided when the Sun published its articles, a criminal prosecution was virtually certain to begin in the near future and an intention to prejudice the future trial had been established.

The doctor was in fact acquitted after a trial at Chelmsford Crown Court.

Lord Justice Watkins said: 'The need for a free press is axiomatic, but the press cannot be allowed to charge about like a wild unbridled horse.'

He continued: 'It has, to a necessary degree, in the public interest to be curbed. The curb is in no circumstance more necessary than when the principle that every man accused of crime shall have a fair trial is at stake. It is a principle which, in my experience, newspaper proprietors and editors are usually as alert as anyone to avoid violating.

There may not have been in fact, as was suggested, another case quite like this, but the kind of threat which the articles complained of posed to the proper administration of justice is by no means novel, as reports of previous cases of criminal contempt committed by publishers of newspaper articles show.

The respondents here had very much in mind particular proceedings which they were determined, as far as it lay within their power and influence, to ensure took place. '

To those who might argue now that the common law of media contempt is redundant and has been supplanted by statutory law, it might be useful to call in mind the observations of Lord Justice Watkins in his 1988 ruling:

'The common law surely does not tolerate conduct which involves the giving of encouragement and practical assistance to a person to bring about a private prosecution accompanied by an intention to interfere with the court of justice by publishing material about the person to be prosecuted which could only serve to and was so intended to prejudice the fair trial of that person. This is especially so where the publisher of them makes it plain that he believes the person referred to in the articles is guilty of serious crime, that he is deserving of punishment for that, and that he has committed some other similar crime.

The common law is not a worn-out jurisprudence rendered incapable of further development by the ever increasing incursion of parliamentary legislation. It is a lively body of law capable of adaptation and expansion to meet fresh needs calling for the exertion of the discipline of law.'

This precedent indicates that the circumstances in which a criminal contempt at common law could be committed were not necessarily confined to those in which proceedings were either pending or imminent.

**See: Attorney General v News Group Newspapers Ltd - [1988] 2 All ER 906**

In 1987 the *Independent*, *Evening Standard*, and *London Daily News* were held in contempt of court at common law and each later fined £50,000 for publishing material from Peter Wright's book *Spycatcher*. In 1990 the fines were discharged, but convictions confirmed.

At the time of their publication interim injunctions were in force preventing the *Observer* and *Guardian* from publishing the material.

The Court of Appeal held there could be contempt of court at common law if there was an attempt to impede or prejudice the administration of justice. It was well established that an act which interfered with the course of justice was capable of constituting a contempt of court.

Furthermore, the court's power to commit for contempt where the conduct complained of was intended to impede or prejudice the administration of justice was saved by Section 6(c) of the 1981 Act, and accordingly, where the court had made orders to preserve the subject matter of an action pending trial, a third party who knew of those orders but who nevertheless destroyed or seriously damaged that subject matter would be guilty of criminal contempt if in doing so he intended to impede or prejudice the administration of justice.

**See: Attorney General v Newspaper Publishing plc and others — [1987] 3 All ER 276**

In 1991 the *Sport* newspaper and its editor were found not guilty of contempt after they published the previous convictions of a rapist being sought by the police abroad for questioning about a missing schoolgirl.

The case was not active and no warrant for arrest had been issued, though the police had specifically asked the media not to publish the suspect's previous convictions.

The editor justified his actions and defiance of police advice on the basis that the rapist was 'on the run and a danger to other women.' Publisher and editor were acquitted because the court held the AG had not proved intent beyond reasonable doubt.

There was no specific knowledge of the whereabouts of the suspect at the time of the publication and it was argued that his arrest and the criminal proceedings arising could not be said to be apparently imminent.

**See: *Attorney General v Sport Newspapers and others* [1992] 1 All ER 503.**

In a largely forgotten contempt of court prosecution by the Attorney General against *Private Eye* magazine and its editor Ian Hislop in 1990, the Court of Appeal eventually ruled that both respondents had committed contempt by common law and the statutory provisions of the 1981 Contempt of Court Act.

In 1989 Sonja Sutcliffe had been suing the magazine for libel over allegations about her dealings with newspapers covering the arrest and prosecution of her husband Peter Sutcliffe for multiple murders. He was known as 'The Yorkshire Ripper.' The libel case was to be tried by jury and the magazine had published articles in February 1989 about the impending case.

The Court of appeal judges ruled the articles went beyond fair and temperate criticism or a private warning before trial of possible cross-examination.

They held Mrs Sutcliffe up to public obloquy, were untrue, defamatory and designed to deter her from proceeding with her action by what amounted to threats to expose her to cross-examination on her alleged knowledge of her husband's murderous activities and her alleged fraud on the social security authorities.

The court decided they accordingly amounted to improper pressure on Mrs Sutcliffe to abandon her claim against the defendants, notwithstanding the defendants' belief at the time of publication that the articles were true or that they would be entitled to cross-examine her on the matters contained in them by way of justification.

The court ruled there was also a risk that potential jurors at the trial of the action might be prejudiced by the articles.

In these circumstances the court decided the articles gave rise to a substantial risk that the course of the proceedings would be seriously impeded or prejudiced and amounted to a contempt both at common law and under the Contempt of Court Act 1981.

The Attorney General's appeal was accordingly allowed and the defendants each fined £10,000.

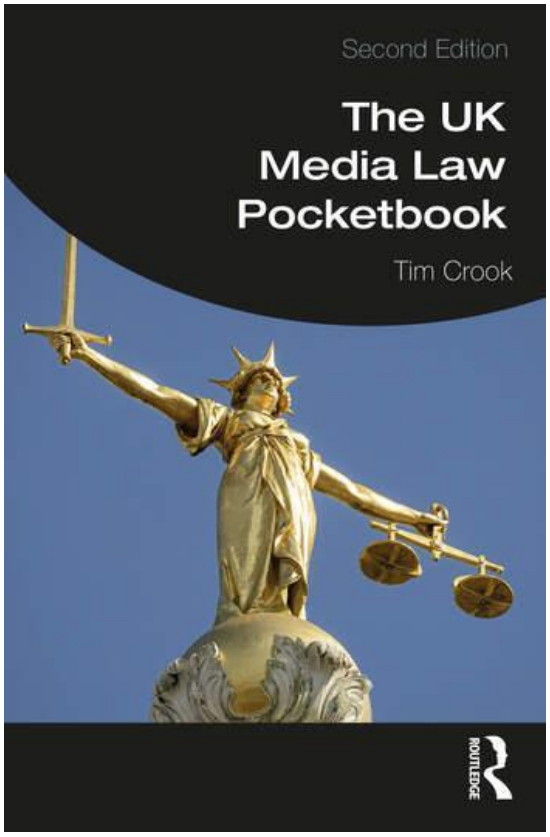
Lord Justice Nicholls in his ruling observed: 'I do not understand how a responsible editor came to do this. This is not an instance of fair and temperate criticism. A journal was using its own columns to publish highly defamatory material, and make threats, with the view thereby of putting pressure on a plaintiff to abandon a claim—against itself—which was in the warned list and due to be heard within two or three months. Such conduct does no service to the cause of the freedom of the press. It was, I much regret to have to say, an abuse of that freedom.'

On the subject of the boundaries of the 1981 Contempt of Court Act and media contempt at common law, Lord Justice Nicolls said: '…the 1981 Act left untouched, and outside the strict boundaries set for the strict liability rule, cases such as the present one, where the conduct was intended to impede or prejudice the administration of justice … in my view publication of these two articles by Private Eye was a serious contempt of court at common law.'

See: **Attorney General v Hislop and another [1991] 1 All ER 911**

In the light of these old test cases and precedents, there is no reason why new circumstances could arise where the Attorney General may wish to respond with a move to protect the administration of justice where it was felt that the media had become by their investigations some kind of proxy police, prosecutor, and then judge and jury.

It is a long time since the last media contempt common law case, but we cannot rule out the development of a new more contemporary precedent which is not something any journalist or news publisher would like be at the centre of.




The second edition of *The UK Media Law Pocketbook* presents updated and extended practical guidance on everyday legal issues for working journalists and media professionals. This book covers traditional print and broadcast as well as digital multimedia, such as blogging and instant messaging, with clear explanations of new legal cases, legislation and regulation, and new chapters on freedom of information and social media law. Links to seven new online chapters allow readers to access all the most up-to-date laws and guidance around data protection, covering inquests, courts-martial, public inquiries, family courts, local government, and the media law of the Channel Islands and the Isle of Man. Tim Crook critically explores emerging global issues and proposals for reform with concise summaries of recent cases illustrating media law in action, as well as tips on pitfalls to avoid.

*The UK Media Law Pocketbook* is a key reference for journalists and media workers across England, Wales, Scotland, and Northern Ireland. The book's companion website provides downloadable sound files, video summaries, and updates all the developments in one of the most dynamic and rapidly changing fields of law. Visit https://ukmedialawpocketbook.com.

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