

Don't overestimate risk of prejudice, say appeal judges

The proper approach a court should take when dealing with application for orders under section 4(2) of the Contempt of Court Act 1981 postponing the publication of reports of proceedings was re-stated by the Court of Appeal.

It was detailed by Lord Justice Longmore in *R v Sherwood (ex parte Telegraph Group)* ([2001] 1 WLR 1983), which was itself approved by the Privy Council in *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* ([2005] 1 WLR 190), said the Lord Chief Justice, Lord Burnett.

He went on: "The first question is whether reporting would give rise to a substantial risk of prejudice to the administration of justice in the relevant proceedings ... If not, that will be the end of the matter.

"If such a risk is perceived to exist, then the second question arises: would a section 4(2) order eliminate it? If not, there could be no necessity to impose such a ban.

"On the other hand, even if the judge is satisfied that an order would achieve the objective, he or she would still have to consider whether the risk could satisfactorily be overcome by some less restrictive means. If so, it could not be said to be 'necessary' to take the more drastic approach."

But even if the judge was satisfied that there was no other way of eliminating the perceived risk of prejudice, it still did not necessarily follow that an order had to be made.

"The judge may still have to ask whether the degree of risk contemplated should be regarded as tolerable in the sense of being 'the lesser of two evils'," said Lord Burnett.

"It is at this stage that value judgments may have to be made as to the priority between the competing public interests; fair trial and freedom of expression/open justice."

On the issue of "substantial prejudice", he said the word "substantial" in section 4(2) did not mean "weighty", but did mean "not insubstantial" or "not minimal".

It was important to focus on what prejudice it was claimed reports would cause.

In most cases, no possible prejudice to a trial could arise from publishing contemporaneous reports of the proceedings in front of the jury, as the jurors would have seen and heard the evidence or submissions reported, and would have been directed by the judge - verbally and in writing - to try the case on the evidence presented during the trial; not to do any research themselves, and ignore any media reports of the case they might see.

The court also had to proceed on the basis that juries had "a passionate and profound belief in, and commitment to the right of a defendant to be given a fair trial" and their integrity "is an essential feature of our trial process", said Lord Burnett, quoting the words of Sir Igor Judge, the then President of the Queen's Bench Division, in *R v B* ([2007] EMLR 145).

Juries would follow the trial judge's directions not only because they were directions of law they had to follow, but because they would "appeal directly to their own instinctive and fundamental belief in the need for the trial process to be fair".

In addition, the court also had to proceed on the basis that media reports of the trial would be responsible, fair and accurate, and would not include - or link to - any prejudicial material which would be a breach of the strict liability rule under sections 1 and 2 of the Contempt of Court Act.

"This last point bears emphasising," said Lord Burnett.

"Journalists and their editors will strive to avoid any publication which risks putting them in breach of the strict liability rule. They are well used to ensuring that on-line reporting of a trial does not refer to earlier prejudicial material or contain links to that material."

He went on: "Judges may fear that publication on-line of fair and accurate contemporaneous reports will give rise to a risk of prejudice arising from third parties making prejudicial comments upon the reports of proceedings (or providing links to prejudicial material).

"We echo two points made by Sir Igor Judge PQBD in *R v B* at [24]-[25]):

"First, the risk of prejudicial third-party commentary in user-generated content should not be exaggerated.

"Media organisations are able to disable any facility allowing comments to be made on website reports of jury trials and for good reason: publication of prejudicial material like this would risk falling foul of the strict liability contempt regime and 'the responsibility for avoiding the publication of [such material] rests fairly and squarely on those responsible for the publication'.

"Secondly, and in any event, this sort of 'parasitic damage' is not a risk of prejudice arising from fair and accurate reporting and cannot justify the imposition of a reporting restriction order under section 4(2) of the 1981 Act."

But even in the more typical cases of sequential or linked trials, where a section 4(2) order was made in the first trial to protect the second trial or a re-trial, the judge still had to consider carefully the nature of the prejudice which was relied upon to justify the order.

"Where the following trial will take place some months after the first, it must be demonstrated convincingly that the risk of prejudice is substantial (or that an order is necessary), having well in mind (a) that the jury in the following trial must be taken to be willing and able faithfully to discharge their duty; and (b) the established 'fade factor' (the effect of the lapse of time between publication and trial) that applies in news cases.

"In terms of jurors remembering publicity about a trial or the people involved in it, the 'staying power of news reports is very limited'."

If it was thought that an order was required, the key question was whether a less restrictive order might avoid the risk of prejudice which was identified, said Lord Burnett.

He went on: "For example, in *R v F (ex parte BBC & Others)* [2016] 2 Cr App R 13, targeted orders under section 45(4) of the Senior Courts Act 1981 were made, essentially: (a) directing various publishers (including social media platforms) to remove prejudicial comments (described as an "avalanche of public outrage" [12]) and; (b) prohibiting further third-party commentary on reports of the re-trial.

"On that basis, the Court of Appeal was satisfied that a blanket section 4(2) order postponing reporting of the retrial could not be justified as necessary or proportionate."

Other restrictions which might be enough to avoid the identified prejudice, rather than a blanket postponement order, were orders limited to postponing the identification of certain persons involved in the first trial or to

particular aspects of the evidence in the first trial, said Lord Burnett, adding: "These are just examples, but they show that consideration must be given to whether an order stopping short of a total postponement of reporting of the proceedings can be fashioned."

Finally, the court had to face the ultimate balance.

"There is reference in some of the authorities to the final stage being one at which the court exercises a discretion to make an order, or not. That is not strictly accurate.

"The court is required to make a value judgment about the competing rights and interests."

A reporting restriction was an interference with the right of freedom of expression guaranteed by Article 10 of the European Convention on Human Rights.

"It must both be prescribed by law and 'necessary in a democratic society'," Lord Burnett said.

"This last stipulation requires any order to be proportionate, with a balance being struck between the competing interests of free speech and the risk of prejudice to a trial.

"The balance is similar to that performed by the court when two competing convention rights come into conflict. It requires 'an intense focus on the comparative importance of the specific rights being claimed in the individual case'."

The question at the third stage was whether the degree of risk contemplated should be regarded as tolerable as being the lesser of two evils - at which stage value judgments might have to be made as to the priority between the competing public interests of Article 10 and the right to a fair trial guaranteed by Article 6 of the Convention.

Media Lawyer, June 13, 2018