Additional Material for Chapter 12: Court reporting – other restrictions

Section numbers from the book are used. Its content provides fuller explanations and context.

12.1.4 Broadcasting from highest courts allowed

The Constitutional Reform Act 2005 ensured that the Supreme Court could allow broadcasting of its proceedings.

Part of the Crime and Courts Act 2013 enables the Lord Chancellor by order and with the agreement of the Lord Chief Justice, to permit broadcasting from other courts by disapplying section 41 of the 1925 Criminal Justice Act and section 9 of the Contempt of Court Act. For detail of these sections, see 12.1 and 12.2 in *McNae's*.

An order made in 2013 under the 2013 Act permits the Court of Appeal to allow broadcasting of legal argument and judgments in its cases.

Supreme Court and the Court of Appeal retain discretion to approve arrangements for broadcasting and to ban it in particular cases.

Another order was made in 2016 to enable test recordings to be made of Crown court judges sentencing defendants.

12.11 Indefinite anonymity for convicted defendants and others

In a few exceptional cases the High Court has issued injunctions – court orders – banning the media from publishing the new identities and whereabouts of people who became notorious after committing, or being associated with, horrific crimes. The aim was to help rehabilitate them after their release from prison, and protect them from public hostility and possible vengeance attacks.

Mary Bell – This was first such case. In 1968, when she was 11, Mary Bell was convicted of the manslaughter of two boys, aged 4 and 3, and sentenced to detention for life. When she was released on licence in 1980, the Home Office gave her a new identity to help her rehabilitation and because the killings remained notorious. In 1984 the High Court made an order banning any publication of her new name and anything else which could identify her new-born daughter as being her child, or which could identify the child's father (*X County Council v A and another* [1985] 1 All ER 53). This order was made for the welfare of the daughter, to ensure a stable home environment, and was based in the court's **inherent jurisdiction** to protect the child as a ward of court - for information on wardship, see 14.4.3.1 in *McNae's* and the extended version of ch. 14 on www.mcnaes.com. By 2003 the daughter had ceased to be a ward, having reached the age of 18. But that year the High Court made a fresh order giving Bell and her daughter lifelong anonymity and banning any publication of where either of them lives. The judge, Dame Elizabeth Butler-Sloss, had heard evidence that Bell and her daughter had moved home five times because of press intrusion and hostility from the public. She said the women's privacy rights under the law of confidence and Article 8 of the European Convention on Human Rights overrode the media's rights to freedom of expression under Article 10

(*X (a woman formerly known as Mary Bell) and another v O'Brien and others* [2003] All ER (D) 282 (May)). These Articles are explained in 1.3 in *McNae's*.

Venables and Thompson – In 2001 Lady Butler-Sloss granted indefinite anonymity to Jon Venables and Robert Thompson, at their lawyers' request. In 1993 when they were aged 11, they were convicted of having murdered two-year-old James Bulger on a railway line in Merseyside after leading him from a shopping centre. Both were sentenced to detention 'during Her Majesty's pleasure' (the equivalent, for a juvenile, of a life sentence). In 2001 the Parole Board was due to make a decision about when the pair, then both 18, should be released and reintegrated into the outside world. Lady Butler-Sloss agreed to issue an injunction banning publication of their new identities, recent photos of them, and of anything likely to identify their 'present or future whereabouts' (*Venables v News Group Newspapers Ltd and others; Thompson v News Group Newspapers Ltd and others* [2001] 2 WLR 1038). She said that – because their crime had led to credible death threats – Venables and Thompson had, as well as Article 8 rights, a right to anonymity under Article 2, the right to life, and under Article 3, which bans torture – see 1.3.3 in *McNae's*. Later in 2001 the *Manchester Evening News* was fined £30,000 for contempt of court for publishing material which – the High Court ruled – included detail likely to identify, to someone with local knowledge, the secure units in which Venables and Thompson were then being held. The court accepted that the material was not published deliberately to identify them (*Attorney General v Greater Manchester Newspapers Ltd* [2001] All ER (D) 32 (Dec)). Venables and Thompson were released on licence in 2001. In 2010 Venables, aged 27, was returned to prison after he was discovered to have downloaded and distributed pornographic photos of children, for which he was sentenced to two years. The injunction banning the media from disclosing his (and Thompson's) whereabouts was not lifted. But the judge who sentenced Venables in 2010 allowed the media to report he had been living in Cheshire (*Media Lawyer*, July 30, 2010).

Maxine Carr – Anonymity was also granted to Maxine Carr, former girlfriend of Ian Huntley. In 2003 Huntley, a school caretaker, was convicted of murdering two schoolgirls in Soham. Carr was convicted at the same trial of conspiring to pervert the course of justice because she gave Huntley a false alibi during the police investigation of the murders. She was acquitted of having known, when she gave the alibi, that he had murdered the girls. In 2005 at the High Court Mr Justice Eady granted an injunction, indefinitely banning publication of her new identity and whereabouts, or the nature of her employment, after hearing that she received death threats and was harassed after serving her jail sentence (*Maxine Carr v. News Group Newspapers Limited* [2005] EWHC 971 (QB); *Media Lawyer*, 25 February 2005).

Kenneth Callaghan – In 2009 Mr Justice Stephen, in the High Court in Belfast, banned the publishers of *Sunday Life* newspaper, and all the media, from publishing any photograph which would identify Kenneth Henry Callaghan, then aged 39, and any information identifying his address, place of work, and any location he frequented or stayed at. Callaghan had become eligible for parole after serving 21 years for the 1987 murder of a woman whom he raped as she was dying or after she died. The newspaper took photographs of him in 2008 when he was on temporary release from a Northern Ireland Office (NIO) prisoner assessment unit. The judge said the newspaper's articles about Callaghan's possible release, which described him as an ongoing risk to the public, were likely to

incite hatred against him. They were also counter-productive, he said, as such hatred and the disclosure, through the photographs, of his future whereabouts would increase the risk that he would reoffend. The judge granted the injunction on the grounds of Callaghan's Article 8 privacy rights and to protect him from harassment. The judge also ordered, at the request of the Northern Ireland Office, that nobody should publish any photograph which identified any serving prisoner who was being assessed at the unit without giving the NIO 48 hours' notice of intention to publish it (*Callaghan v Independent News and Media Ltd* [2009] NIQB 1).

The Edlington case - In 2016 the High Court banned the media indefinitely from revealed the former and new names of two brothers responsible for notorious, sadistic attacks in 2009 on two other boys. The brothers, who were aged 10 and 11 at the time of these offences, inflicted around 90 minutes of violence on the victims, including stamping on them, hitting them with bricks, choking and burning them, and inflicting humiliations, some of them sexual. The older victim almost died from his injuries. In 2010 at Sheffield Crown court the brothers were sentenced to indefinite detention. In those proceedings anonymity was provided for them under section 39 of the Children and Young Persons Act 1933 (at that time a power used in criminal courts). But – as 10.9 in *McNae's* explains – section 39 anonymity expires when the person given it reaches the age of 18. In December 2016 High Court judge Sir Geoffrey Vos - who heard that the brothers had new identities and had been released from detention - said he was satisfied that making an indefinite anonymity order to cover them was in the public interest. He said neither the brothers' original names nor their new identities could be published. A barrister representing them had asked for this anonymity (*A and B v Persons Unknown* [2016] EWHC 3295 (Ch); *The Guardian*, 22 January 2010; *Media Lawyer*, 12 December 2016)

12.14 Postponed reporting of 'special measure' directions and other orders

Courts can make a 'special measure' direction (order) under section 19 of the Youth Justice and Criminal Evidence Act 1999 to help a 'vulnerable' or 'intimidated' witness (other than the defendant) give evidence in a criminal case. The 'special measures' which can be put into effect by a section 19 order are specified in other sections of the Act. For example, the witness may be allowed to give evidence from behind a screen or by live video link, or – as explained in 15.9 in *McNae's* and specified in the Act's section 25 – most reporters present may be ordered to leave the court during his/her testimony .

Section 47 of the 1999 Act contains an automatic reporting restriction which bans anyone from publishing from preliminary proceedings or during a trial the fact that a section 19 order has been made, varied or discharged; or anything from discussion or argument in court about whether such an order should made.

There is also an automatic ban in section 47 on anyone publishing from preliminary proceedings or during a trial that the court has made an order under section 36 of the 1999 Act to prohibit a defendant representing himself or herself from personally cross-examining a witness. Courts can use this power to protect a witness who is the alleged victim from intimidation by the defendant. In such circumstances, often the cross-examination of that witness will be done by a specially briefed lawyer, although such a defendant conducts the rest of the case him/herself. It is also illegal under

section 47 for anyone to publish from preliminary proceedings or during the trial a report of any discussion in court on whether a section 36 order should be made, or that it has been discharged.

Section 47 also automatically bans anyone from publishing from preliminary proceedings or during a trial that a section 33A order has been made under the Act to allow a defendant to give evidence via live video link to help ensure his or her effective participation in the trial. The order can be made for a defendant aged under 18 if his or her ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by his or her level of intellectual ability or social functioning. It can be made for an adult defendant if he or she suffers from a mental disorder or otherwise has a significant impairment of intelligence and social functioning. It is also illegal under section 47 for anyone to publish before or during the trial a report of any discussion in court on whether a section 33A order should be made, or that it has been discharged.

The section 47 reporting restrictions apply to proceedings in magistrates' courts as well as to jury trials. Their purpose is to stop jurors (who would not be in court when an order was made or discussed) being prejudiced against the defendant or a witness by learning, before they reach all verdicts in the case, why the court considered making or made the relevant order.

It will be safe to report, during a trial, anything that can be seen in court – for example, that a witness or defendant is giving evidence by live video link, and anything the judge says to the jury to explain the effect of a section 19, 33A or 36 order – for example, why a lawyer steps in to act for a defendant who is otherwise representing himself.

But it would, for example, be illegal to publish the fact, beyond any explanation the judge gives to the jury, that most reporters were ordered to leave the courtroom, or that a defendant has been banned from conducting cross-examination or why a witness or defendant has been allowed to give evidence via live video link.

These reporting restrictions automatically cease to have effect when the relevant case, against all defendants involved, is determined by acquittal, conviction, or otherwise, or is abandoned. Also, the court can lift any of these reporting restrictions at any earlier stage.

If the court does lift a section 47 restriction at an earlier stage, it is illegal under the section to publish – until the case is determined by acquittal, conviction, or otherwise, or is abandoned - the discussion in court which led to the lifting of the restriction (that is, any objection to or representations made about the lifting).

Liability for breaching any of the section 47 reporting restrictions is the same as for breaching a reporting restriction imposed by an order made under the same Act's section 46 – see the explanation in 12.9 in *McNae's* of that restriction (and it should be noted that an adult witness subject to a special measures direction under section 19 of the Act may also have been granted lifetime anonymity, in respect of media reports of the trial, under section 46).

It is a defence for a person charged with breaching a section 47 restriction to prove he/she was not aware and neither suspected nor had reason to suspect that such matter was included in what was published.

A court's decisions on 'special measures' and cross-examination issues are likely to be taken at pre-trial hearings, or when a jury is out of the court. Therefore other statute, or contempt law, will probably also be in effect – see 9.4, 19.11.2 and 19.11.3 in *McNae's* - to restrict contemporaneous reporting of what is decided and discussed in court before the jury is empanelled or when it is absent.

12.15 Postponing reports of 'derogatory' mitigation

A court can postpone a media report of an allegation made in a 'speech in mitigation', if it feels that someone's reputation may have been unfairly besmirched. If a defendant is convicted, the court will hear mitigation – a plea for leniency – before deciding what punishment to impose, as 7.6 and 9.7 in *McNae's* explain. Mitigation is usually pleaded by a defence lawyer, but a defendant may speak too. Mitigation speeches are also made in appeal hearings against the severity of sentences.

There may be controversy over mitigation pleas making allegations against another person, for example the victim of the crime. A defendant who admits attacking another man in a pub could claim that he provoked the violence by making an indecent remark to the defendant's girlfriend. There may be no truth in this, but the assault victim may not be in court to object to this smear. He cannot sue for defamation, because what is said during court proceedings - and what the media properly publishes when reporting court cases - is 'privileged', as explained in 22.5 and 22.7 in *McNae's*.

Reacting to such controversy, Parliament gave the courts the power, in section 58 of the Criminal Procedure and Investigations Act 1996, to impose a temporary reporting restriction on the media, postponing the reporting of an assertion made in a speech of mitigation for 12 months if the assertion is derogatory to a person's character, such as suggesting that the individual's conduct has been criminal, immoral, or improper.

The court may order the postponement if there are substantial grounds for believing that the assertion is false, or that it is irrelevant to the sentence.

A section 58 order makes it an offence to publish the assertion during the 12 months if the report contains enough information to make it likely that a member of the public will identify the person whose character was thus besmirched. But an order cannot be made if the derogatory assertion made in mitigation has already been made during in the relevant trial or 'during any other proceedings relating to the offence'. This means that a journalist aware that the assertion has already been aired during the trial can challenge, as invalid, a section 58 order made in respect of the same assertion repeated in a speech of mitigation. The media's right to challenge a court decision affecting reporting, and how to challenge it, are explained in 16.1 - 16.4 of *McNae's*.

A court can make, before its sentencing decision, an interim order postponing publication of the assertion, which automatically lapses when the sentence is decided. But the court can then make a full order postponing publication for 12 months, even if no interim order was made. It can revoke such an order at any time in the next year. But the order expires automatically after 12 months.

As Parliament realised when it made this the law, the news value of a derogatory assertion would, in most cases, be non-existent after 12 months, making it unlikely in such cases that the assertion would be published at all.

This reporting restriction is rarely used. Defence lawyers are required to give notice of any intention to make a derogatory assertion in mitigation, in case the prosecution choose to require the assertion be proved as true in a 'Newton hearing' – a term explained in the glossary in *McNae's.* This requirement generally discourages the making of untrue assertions.

Liability for any breach of a section 58 order is the same as for breach of section 1 of the Sexual Offences (Amendment) Act 1992, with the same maximum fine. This liability is explained in 11.7 in *McNae's*.

It is a defence for anyone accused of breaching a section 58 order to prove that he/she was not aware of the order or, did not know and had no reason to suspect that what was published contained the relevant assertion.