**Hanna and Dodd: McNae's Essential Law for Journalists 25th edition**

**Additional material for chapter 12: Court reporting – other restrictions**

*Section numbers from the book are used. The book should be read too. Its content provides fuller explanations and context.*

12.1.3 Photography and filming could be contempt of court

**Case study:** On 20 February 2017 a member of the public, David William Davies, 39, sitting in Cardiff Crown court’s public gallery, began using his mobile phone to film a person giving evidence in a trial of another man for dangerous driving. Davies streamed the footage live on Facebook. More than 650 people saw it, some commenting on it online. Davies, of Llanwit Fardre, Rhondda Cynon Taff, posted an invitation for people to ‘tune in’ for further footage. Someone alerted police to the streaming. Davies was arrested the next day when he returned to the court. Judge Greg Bull QC jailed him for 28 days for contempt. PC Richard Sellek said: ‘Unfortunately, cases such as this are becoming more and more commonplace’ (*Wales Online, BBC online and South Wales police press release,* 22 February 2017).

**Case study:** In 2009 Mr Justice Keith warned photographers to stop taking pictures of two young brothers as they arrived at Sheffield Crown court in cars, under blankets, saying he would take action if he thought a contempt had taken place. The brothers had admitted inflicting, when aged 10 and 11, horrific violence on two boys in Edlington, near Doncaster (*Press Gazette,* 7 September 2009). For background on that case, see 12.11 below

**12.1.4** **Some broadcasting 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.

**Broadcasting of Crown Court judges’ sentencing remarks**

In January 2020 the Government announced it would create new law to allow the broadcasting of sentencing remarks made by High Court and senior circuit judges when they sit as Crown court judges, including at the Old Bailey. So, this would include the pronouncement of sentence. That month the Crown Court (Recording and Broadcasting) Order 2020 was placed in draft form before Parliament to implement this reform.

The announcement followed a three-month pilot project to film judges when sentencing, although pilot footage was not broadcast. The draft Order makes clear that its use of the term ‘broadcasting’ includes webcasting, so broadcasters and the press can benefit from this law, when it takes effect. But the draft Order makes clear too that media organisations wanting to shoot and broadcast footage of a judge sentencing must first have in writing from the Lord Chancellor a general permission to do this, will also need written permission from the judge in the particular case, and are required to obey any conditions imposed by the judge.

The Ministry of Justice (MoJ) said such footage will be ‘appropriately edited before leaving the courtroom’, and that if the broadcast is to be live there will be a short delay before broadcast to avoid any breach of reporting restrictions ‘or any other error’.

The restriction that only the most senior judges can be filmed when sentencing means the footage will be from the most serious cases, such as murder. The new law will not permit anyone else in the court or any earlier stage of the proceedings to be filmed, but the reform is a breakthrough.

John Battle, Head of Compliance at ITN, who campaigned for it, said after the Government announced it: ‘This is a landmark moment and an important day for open justice and transparency of our legal system. For the first time the public will see images of proceedings in the Crown Court on television news.’

Her Majesty’s Courts and Tribunals Service, the MoJ and the Judicial Office will have the right to access any of the footage shot in court. The draft order specifies that copyright in the footage is automatically assigned to the Lord Chancellor. The MoJ said that the full sentencing remarks of any case in which they are broadcast will be hosted on a website to which the public has access.

The draft Order says too that a report or presentation of court proceedings that includes a broadcast of sentencing remarks must be fair and accurate having regard to the overall content of the report or presentation, and the context in which the broadcast is presented. The draft Order includes a ban on use of the footage in a party political broadcast or for ‘light entertainment’ or satire. The draft Order also contains a ban on use of the footage in any advertisement or promotion, except where the advertisement or promotion relates to a report of or presentation of the relevant court case that includes a broadcast of the sentencing remarks- so this would permit, for example, some of the footage to be used in a ‘trailer’ for a TV programme about the case, as long as the programme too included the footage.

The wording of the draft Order also means that a person who fails to comply with this law or conditions set by a judge as regards the shooting of or use of the footage could be punished under section 41 of the Criminal Justice Act 1925 or, in respect of the audio recording element, section 9 of the Contempt of Court Act 1981 – see *McNae’s* 12.1 and 12.2. This could mean a jail term of up to two years and/or a fine unlimited by statute, if punishment was under the 1981 Act.

12.4 Confidentiality of jury deliberations

Case study: In 2009 the High Court fined *The Times* £15,000 and ordered it to pay £27,426 costs for breaching the confidentiality of jury deliberations. The newspaper had published an article about the 10–2 majority verdict with which a Crown court jury convicted a childminder of a child’s manslaughter. It did not name the jury foreman, who had approached the newspaper, but quoted him expressing doubt about the medical evidence, and as saying that, early in its deliberations, the jury voted 10–2 in an initial indication of its consensus and that the majority of jurors—because of what he called ‘common sense’ rather than ‘logical thinking’—held to their initial view that the defendant was guilty. *The Times* denied contempt, but the High Court ruled that, by using these quotes, it had breached the law banning disclosure of ‘votes cast’, ‘opinions expressed’ and ‘statements made’ during the jury’s deliberations, even though jurors’ identities were not disclosed, and the foreman’s descriptions of the deliberations were brief and possibly inaccurate (*Attorney General v Michael Alexander Seckerson and Times Newspapers Ltd* [2009] EWHC 1023 (Admin)). The jury foreman was fined £5,000 for his part in the breach (*Media Lawyer,* 20 December 2009).

**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](http://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)](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWHC/QB/2005/971.html); *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 10.5 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)

*RXG –* In 2015 at Manchester Crown court a 14-year-old boy from Blackburn, Lancashire, admitted two charges under section 59 of the Terrorism Act 2000 of inciting terrorism overseas. He is the youngest person to be convicted in the UK of any terrorism offence. In thousands of encrypted, internet messages he had incited Sevdet Ramadan Besim, a teenage jihadi who lived in Melbourne, Australia, to murder police officers during what was planned to be an attack on an ANZAC parade in that city. The boy incited Besim to murder one such officer by beheading. British police discovered the messages about the plot, and there were no such attacks. Besim, aged 19, was subsequently jailed in Australia for his involvement in the plot. The judge at Manchester - who sentenced the boy to life imprisonment, with a minimum term of five years, for the incitement - accepted that he had been groomed over the internet by extremist propagandists who either worked for or supported the proscribed terrorist group ISIS - for ‘proscribed’ groups see 40.2.1 in chapter 40 on terrorism law on [www.mcnaes.com](http://www.mcnaes.com). The boy’s identity could not be reported, because the court had imposed an anonymity order under section 45 of the Youth Justice and Criminal Evidence Act 1999. But as explained in 10.4 of the *McNae’s* book, section 45 anonymity expires when the juvenile for whom it was provided reaches the age of 18. In 2019 his barrister asked the High Court to use its powers under the European Convention to make an injunction to give the boy – who at that time was in a secure home for children – lifelong anonymity as regards coverage of the criminal proceedings against him for the incitement. The barrister argued that if it became known that the boy was a convicted terrorist he would be at risk of attack in the adult prison he was due to be transferred to; that he was not ‘streetwise’ and so the transfer would be traumatic in any event; that a psychologist had said that it was probable that allowing the boy to be identified, and so suffer the stigma and shame of being known as a terrorist, would have a profound impact on his psychological well-being and would undo progress he had already made in rehabilitation. The barrister argued too that the boy had been diagnosed as having ‘high functioning autism’, and that his autism made him vulnerable to further exploitation by extremists. The argument was that allowing him to be identified would mean prisoners who shared the extremist ideology of ISIS would, knowing of his past crimes, seek to re-radicalise him, particularly in view of his ‘poster boy’ propaganda value to them of being the youngest such offender, and that would increase a risk to the public by making him more likely to commit further terrorism offences. The barrister said that coverage of the criminal proceedings against the boy in 2015 had already generated a public reaction to him which was overwhelmingly negative, including death threats, and that if he was identified as having such convictions, that would be embedded via the internet in the public domain and make him globally infamous. However, in a submission to the Hugh Court the Ministry of Justice adopted a neutral position on whether the boy should have continued anonymity, saying that its experience of managing other terrorists and young offenders was that reporting of an offender’s identity rarely manifested itself in any increase of any risk of threat or violence to the offender; that there was no current assessed threat of real or immediate risk to the boy’s life either from his current secure setting or the wider public; and that it felt that management strategies could be effectively deployed to support his rehabilitation were the media to be allowed to identify him. For the ‘real and immediate risk’ criterion- see *McNae’s* 16.9. The Press Association, arguing against the boy being given anonymity beyond the age of 18, pointed out that when Parliament created section 45A of the 1999 Act as a means of giving some juveniles lifetime anonymity in respect of criminal cases in which they were witnesses, it had decided against section 45A providing that for juvenile defendants. For context, see *McNae’s* 10.4.2. In the High Court’s judgment - in which the boy is referred to as RXG - Mr Justice Nicklin and Dame Victoria Sharp PQBD ruled that it had not been convincingly established that allowing RXG to be identified would put him at real and immediate risk of serious harm, and that therefore his rights under Articles 2 and 3 of the Convention were not engaged. They said - of the evidence of threats made against RXG online after his conviction- that it is ‘a feature of modern life that individuals are prepared to use language online that they would never use in person, and make threats of a kind they would never carry out.’ But these judges ruled that it was ‘necessary and proportionate’ that RXG should have the lifelong anonymity requested, because his privacy rights under Article 8 were engaged to protect his chances of rehabilitation, and because in his ‘exceptional’ case these rights outweighed the Article 10 rights of the public in open justice. If RXG was identified to the public as having committed the incitement crimes, there would be a risk of him becoming socially ostracised and an associated risk of him committing further offences, risks exacerbated by his autism. They said too that if he was identified there would be an indelible record of on the internet that he committed that crimes, with his notoriety enhanced by the fact that he was the youngest person to be convicted in the UK of a terrorism offence. The High Court judges also said that most juvenile offenders whose section 45 anonymity lapsed at the age of 18 would not have anything like the notoriety which RXG would have if he were identified. ‘For them, the coming of their 18th birthday is likely to go unremarked and the discharge of the reporting restrictions is unlikely to lead to media reports publicly associating them with their previous offending.’ Mr Justice Nicklin and Dame Victoria Sharp also ruled that the High Court’s power to grant such anonymity was not curtailed by how Parliament had limited section 45A anonymity to witnesses (*RXG v Ministry of Justice and persons unknown* [2019] EWHC 2026 (QB)); *Media Lawyer*, 29 July 2019; *The Guardian*, 5 September 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 - 16.6 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 49 of the Children and Young Person’s Act 1993 – see 10.3.4 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.