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

**Additional material for chapter 19: Contempt of Court**

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

**19.3. Contempt in Common Law**

**Case study:** In 1988 a 15-year-old schoolgirl Anna Humphries disappeared in Penley, Clwyd, on her way from school and it was feared she was abducted. A farm labourer, David Evans, then aged 31, was suspected by North Wales police of being the perpetrator. He had gone missing from a neighbouring village and had a record of sexual offending. In 1978 he had been sentenced to five years' jail for attempted rape, assault and indecent assault. In 1981 he had been sentenced to 10 years for the rape of a 17-year-old girl which he committed after being released from prison on parole from his earlier sentence, and which involved an abduction. Reporters covering Anna’s disappearance knew at least some of Evans’ criminal history. Police decided to appeal for the public’s help in tracing Evans and Anna. At a press conference, held on a Friday, police named him as a suspect and gave descriptions of his clothing and appearance. Before it began, a police spokesperson warned reporters not to publish anything about Evans’ criminal record, saying: ‘Can I warn you here and now that if anything is published or broadcast about these matters then it is likely to prejudice any future legal proceedings.' That weekend the North Wales force, through the Press Association, sent messages to newspapers, saying that it had heard that some intended to publish ‘what purports to be the convictions’ of Evans, and warning them of the police view that this might jeopardise ‘the safe return of Anna, the enquiry generally and also any possible proceedings which may follow'. The following Wednesday. November 16, the *Sport* newspaper published a front-page article labelled as an exclusive. This referred to Evans as being the man who police wanted to question about Anna’s disappearance, and revealed he was ‘a vicious, evil rapist’ who had ‘a horrific history of sex attacks’. It quoted the judge who sentenced Evans in 1981 for rape as saying in court: ‘He is an extremely dangerous man who could strike again.’ At the time the *Sport’*s article was published there was not a warrant for Evans’ arrest, so the case was not ‘active’ under the Contempt of Court Act 1981. But a warrant for his arrest was issued two days later. Three days after that, Evans was arrested in France, and later that month Anna's body was found in the River Severn. Evans was extradited to the UK and the following July was tried for her murder and convicted. No defence application was made at his trial to stop or delay it on the ground of prejudicial, pre-trial publicity. But Evans’ counsel asked that the *Sport’s* article which had revealed Evans’ criminal record before the arrest warrant was issued be referred to the Attorney General as a possible contempt of court, and the Attorney General, who was already considering the article’s contents, subsequently did instigate contempt proceedings in common law against the *Sport*, its editor Peter Grimsditch, and the reporter who wrote the article. This led to a High Court hearing in 1991, although the proceedings against the reporter were discontinued. The Attorney General’s allegation was, in essence, that the article’s publication had created a real risk of prejudice to the course of criminal proceedings against Evans, and had been intended to prejudice that administration of justice - in effect, the allegation was that Mr Grimsditch intended that the article would make it more likely that Evans would be found guilty by a jury of whatever crime he had committed against Anna, because the article created a real risk of the jury knowing of Evans’ record of sexual offending. To help ensure a trial is fair, jurors are not usually told in it of a defendant’s criminal record – see 19.6 in *McNae’s*. The Attorney General’s application to the High Court was for the *Sport* to be fined and Mr Grimsditch jailed, for such contempt. As indicated above, to establish in common law that such a contempt occurred, it must be proved that what was published created a real risk of prejudice to legal proceedings and that the publisher intended to create that prejudice. Lord Justice Bingham, the Lord Chief Justice, who presided at the High Court hearing, agreed with argument made on the Attorney General’s behalf that the *Sport’s* article has created a real risk of prejudice to the course of justice in Evans’ case, saying: ‘I do not doubt that most readers of the *Sport* would very quickly forget most of what they read in it. But the disappearance of Anna Humphries was an event of great notoriety, particularly in the area where it occurred. Very considerable publicity was given to the hunt for Evans. The fact that Evans had a record of serious sexual violence was simple, easy to grasp and likely to be remembered, or to be recalled, by anyone who read the paper (or was informed of its contents) and later came to try the case. It would of course be highly improbable that all the jurors, or even a majority, would have read the paper or learned of its revelation, but the risk would exist if only one had done so, because he or she would be very likely to pass on the information to other members of the jury. The applicant [the Attorney General] cannot, I accept, show a certainty of prejudice, and in the event there may have been none. But the law of contempt is concerned with a real risk of prejudice to the due administration of justice, and that such a real risk existed on the facts here I am in no doubt at all.’ Mr Grimsditch denied that he intended the article to create such prejudice, telling the court that his main aim in publishing it was to alert the public to the danger of Evans as a violent and habitual sexual predator, which - Mr Grimsditch said - he felt the police were wrong to hide from the public at that time, and he had hoped the article would increase the chance of Evans being caught. Lord Justice Bingham said he accepted that Mr Grimsditch gave consideration to the police request not to reveal Evans' previous convictions, and also that Mr Grimsditch had wondered whether the police were seeking to cover up their own failure to question a rather obvious local suspect before he ‘slipped through the net’. The judge said he also accepted that Mr Grimsditch had held the belief that there could be no liability, as regards contempt, before a warrant had been issued or an arrest made, though that belief was wrong [as regards the common law], and that at the time the article was published Mr Grimsditch had regarded the commencement of criminal proceedings against Evans as ‘speculative and remote’, because Evans’ whereabouts was not then known. Lord Justice Bingham said: ‘With the benefit of hindsight, of course, we know that a warrant was issued shortly after publication and an arrest made shortly after that. But these facts were not known when the newspaper was published. At that time all that was known was that Evans had disappeared, with some reason to think he had gone abroad. There was nothing to suggest that he had been sighted or that the police were on his scent or that his early apprehension was expected. It was wholly uncertain whether he would be found and, if so, where or when, and uncertain when, if at all, proceedings might follow.’ Lord Justice Bingham added that on balance he concluded that the Attorney General had not shown beyond reasonable doubt that by publishing the article Mr Grimsditch had intended to prejudice ‘the fair conduct of proceedings’ against Evans. Lord Justice Bingham also referred to another ‘test’, said to exist in case law, which was that for a publisher to be guilty of common law contempt, the criminal proceedings said to be at real risk of prejudice (because of what was published) had to be ‘imminent’. Lord Justice Bingham said that such a ‘test’ should not be that proceedings were ‘imminent’ but whether they were ‘apparently imminent’. He added that at the time of the publication of the *Sport’s* article, the issue of a warrant for Evans’ arrest was not ‘apparently imminent’, and so gave this as another reason why Mr Grimsditch was not guilty of contempt. Mr Justice Hodgson, who presided with Lord Justice Bingham at the High Court hearing, disagreed with some of his analysis of the common law of contempt, but agreed that the Attorney General had failed to prove that Mr Grimsditch had intended to create prejudice, and so the High Court’s decision was that the *Sport* and Mr Grimsditch were not guilty of contempt. Mr Justice Hodgson also said ‘taking into account the prejudice caused by the police-inspired publications and the length of time it takes nowadays for a charge of serious crime to reach a jury, I am not satisfied so that I am sure that a real risk was created by the publication of the [*Sport*] article’ (*Attorney General v Sport Newspapers and others* [1992] 1 All ER 503).

**Injunctions**

The Attorney General can ask the High Court to grant an injunction forbidding publication of material which it has been told is about to be published and which could in its view create a substantial risk of serious prejudice or impediment to a criminal case. Such an injunction could also be issued to restrain other media activity seen as capable of creating such a risk, for example, reporters’ attempts to interview witnesses before a trial**.** It has been ruled that a Crown court has some power to grant such injunctions (*Ex p HTV Cymru (Wales) Ltd, Crown court at Cardiff* (Aikens J) [2002] EMLR 184). For the contempt danger which could arise from a reporter interviewing or trying to interview a witness, see 19.3 in *McNae’s.*

**Case study:** In 2010 the Police Service of Northern Ireland sought a High Court injunction to stop the BBC broadcasting a documentary about the 1972 terrorist bombings in the village of Claudy which killed nine people and injured 30. Police argued that even though no proceedings were ‘active’ under the Contempt of Court Act 1981, the programme—which the BBC refused to allow an officer to see before it was broadcast—was a contempt in common law, would interfere with the administration of justice or could breach confidentiality. Mr Justice Seamus Treacy rejected the ‘unprecedented’ application, saying it was based on pure speculation, was not supported by any legal authority and, if allowed, would significantly extend the boundaries of the law (*Media Lawyer*, 3 November 2010).

**19.6 What type of material can cause a substantial risk of serious prejudice or impediment?**

Here is further detail about the case study in 19.6.2 in *McNae’s,* concerning Stephen Yaxley-Lennon, who uses the name Tommy Robinson for far-Right political purposes.

On 25 May 2018 he broke the law in three ways:

* he created a real risk of interference with the course of justice as regards a trial at Leeds Crown court because he harassed some defendants arriving at the courthouse by aggressively confronting and questioning them outside it and by filming these confrontations, and because they would have known that the footage was likely to end up on social media, and so that would have added to the upset and agitation which his actions caused them, and there was a real risk that upset and agitation would have impeded how well they could participate in the trial’s closing stages - so what he did was ‘molestation’ of defendants on their way to court, which is banned by the common law of contempt (see 19.3.2 in *McNae’s* for context)
* he breached of section 1 of the Contempt of Court Act 1981 by publishing (live-streaming) the footage which, because of what he said in its contents, created a substantial risk of serious impediment to the course of justice in that trial, because in effect he condemned the defendants as being guilty of sexual offences against girls, before any verdicts, and invited members of the public to harass the defendants, creating a substantial risk that they would be harassed on their way to court by his ‘followers’, which would have seriously impeded the defendants’ ability to participate properly in the trial (see 19.4 in *McNae’s* for context about section 1)
* because in some of what he said in the footage about that Leeds trial and because he live-streamed the footage, he breached a reporting restriction order made by a judge that no details of that trial should be reported until a later, linked trial had ended, to avoid a substantial risk of prejudice to the course of justice in it, and by this breach Yaxley-Lennon committed a contempt of court because he did not check what the reporting restriction order said, despite being aware that it existed

In the footage he shot on 25 May outside the Crown courthouse in Leeds, Yaxley-Lennon encouraged ‘vigilante action’ against defendants being tried there, two High Court judges said in July 2019 at the Old Bailey in London.

Dame Victoria Sharp and Mr Justice Warby heard evidence of how Yaxley-Lennon, who founded the English Defence League, filmed some of these defendants arriving at the courthouse entrance. In that trial, nine men were accused of the sexual exploitation of girls and women in the Huddersfield area.

In the footage Yaxley-Lennon named the defendants and listed charges they faced, gave further information about their alleged offending, and said that the jury was considering its verdicts. He referred in derogatory terms to the defendants’ ethnic background, referred to historical sexual crimes committed by other Muslim men, and suggested that Islam as a religion permitted the use of ‘sex slaves’.

The footage included him accosting some of the defendants, questioning them aggressively and provocatively. It showed him saying to one: ‘Got your prison bag with you?.....is there any guilt, is there any guilt, is there any guilt mate?’ Addressing viewers, Yaxley-Lennon then said: ‘So, as you can see there it doesn’t seem like much guilt, doesn’t seem like anyone’s ashamed.’

He live-streamed the footage on a Facebook account, saying in the footage that viewers should share it. They could do that because on Facebook it could be viewed as a recording. The footage lasted an hour-and-a-half and there was evidence that it had been viewed online by 250,000 people by about 10.50 am that day. Four days later it had been viewed 3.5 million times (it went ‘viral’ after the judge in the Leeds trial jailed Yaxley-Lennon for contempt, see below).

What Yaxley-Lennon stated in the footage would have left viewers in no doubt that he considered the defendants in that trial were guilty, the Old Bailey heard.

Yaxley-Lennon claimed his intention in shooting the footage was to address and ‘denounce the media’ for their behaviour towards him and others – he claimed the press had slandered and harassed him.

Yaxley-Lennon said in the footage: ‘You want to harass someone’s family? You see that man who was getting aggressive as he walked into court, the man who faces charges of child abduction, rape, prostitution – harass him, find him, go knock on his door, follow him, see where he works, see what he’s doing. You want to stick pictures online and call people and slander people, how about you do it to them?’

In the High Court’s written decisions explaining why she and Mr Justice Warby had ruled that Yaxley-Lennon had committed contempt, Dame Victoria said: ‘In our judgment, those words and the manner of their delivery were an encouragement to others to harass a defendant by finding him, knocking on his door, following him, and watching him, and this gave rise to a real risk that the course of justice would be seriously impeded.’

Dame Victoria said the dangers of using the ‘un-moderated platforms’ of social media, with its ‘unparalleled speed and reach’, were obvious and that Yaxley-Lennon's conduct created such a risk that the defendants would feel intimidated.

He was ‘was engaged in the agitation of members of the public in respect of what he presented as a serious threat to society’. She was referring to what Yaxley-Lennon suggested in the footage about the defendants being guilty of sexual abuse of girls.

‘His words had a clear tendency to encourage unlawful physical or verbal aggression towards identifiable targets.

‘Harassment of the kind he was describing could not be justified.’

She said of the risk created by the footage that defendants would be harassed: ‘It is not necessary to assess the level of risk that such conduct would in fact be engaged in, beyond concluding that it was real and substantial.’

She and Mr Justice Warby agreed with the argument put forward by the Attorney General’s barrister that Yaxley-Lennon’s confrontational behaviour in his shooting of the footage, and because the defendants would have realised it was likely to be aired on social media, created a substantial, real risk that the defendants would arrive at court in an upset and agitated state, unsuitable for their participation in those serious criminal proceedings.

Dame Victoria said: “…. there was plainly a real risk that the defendants awaiting jury verdicts would see themselves as at risk, feel intimidated, and that this would have a significant adverse impact on their ability to participate in the closing stages of the trial.’

‘That in itself would represent a serious impediment to the course of justice.’

The High Court judges also ruled that in the footage Yaxley-Lennon was ‘quite deliberately’ reporting on the case, and that some of what he said (for example, his naming of the defendants and his listing of the charges) breached a reporting restriction imposed in March 2018 by the judge who later presided at the Leeds trial. The High Court judges, pointing out that in the footage Yaxley-Lennon had told viewers that a reporting restriction existed in respect of that trial, rejected as ‘not credible’ his evidence that he had made checks in the Leeds courthouse to discover if there was a restriction.

The reporting restriction was an order made under section 4(2) of the Contempt of Court Act. The trial taking place on 25 May was the second in a series of three trials involving a total of 29 defendants. The order banned publication of any details of the second trial until the end of the third trial. The order, by banning contemporaneous reporting of the second trail, was intended to prevent the risk that such reporting would prejudice the jury’s verdicts in the third trial. For general information about why section 4(2) orders are made, see 19.11 in *McNae’s.*

At the Old Bailey trial, Yaxley-Lennon, 36, from Luton, Bedfordshire, denied any wrongdoing, saying he did not believe he was breaching reporting restrictions and that he had referred in the live-streamed footage to information that was already in the public domain.

But Dame Victoria and Mr Justice Warby ruled that he had breached the section 4(2) order.

The Old Bailey trial was the last of a series of court hearings about what Yaxley-Lennon did at Leeds. In the first - on 25 May 2018, a few hours after he shot the footage - he was jailed for 13 months at Leeds Crown court after the judge in the trial there ruled he had committed contempt of court by shooting the footage and live-streaming it. Three months of that sentence was from the activation of a suspended sentence imposed for a previous contempt which Yaxley-Lennon committed, arising from him filming himself on the front steps of and inside the courthouse of Canterbury Crown court, and from what he said in that footage, which he posted online, about defendants in a rape trial there - see 12.1.3 in *McNae’s*.

He served 10 weeks in jail but was then freed, because the ruling by the Leeds judge was overturned by the Court of Appeal on procedural and other grounds.

But the case was then referred back to the Attorney General, who announced in March 2019 that it was in the public interest to bring fresh proceedings against Yaxley-Lennon for what happened at Leeds, and that led to his trial at the Old Bailey.

Because Dame Victoria and Mr Justice Warby ruled that he had committed contempt, including by breaching the section 4(2) order, they jailed him for nine months.

The name of the Old Bailey case is *R v Stephen Yaxley-Lennon* [2019] EWHC 1791 (Admin)*.*It can be read online – see <https://www.bailii.org/ew/cases/EWHC/QB/2019/1791.html>

Contempt of court carries a maximum prison sentence of two years.

**When breaching a reporting restriction is contempt**

Anyone who publishes material which breaches a reporting restriction order will be committing a contempt if he or she does so having foreseen that they might be breaching such an order, the High Court judges ruled in the Yaxley-Lennon case, cited above.

It was not necessary for the individual to have knowledge of the actual terms of the order, said Dame Victoria Sharp, one of the judges.

Dame Victoria, who gave the court's judgment, said that in *Attorney General v News Group Newspapers* ((1984) 6 Cr App R 418, 420) Lord Justice Stephen Brown had observed that there was ‘a strict duty of care placed upon those who publish news items relating to trials to ensure that they do not run the risk of interfering with the course of justice’.

She went on: ‘That was in a different context, but we believe it is consistent with principle and with the gravamen of this form of contempt of court, which is culpable interference with the due administration of justice.’

The order under section 4(2) of the Contempt of Court Act 1981, made in respect of the relevant trials at Leeds, see above, was addressed to the public at large – and a rule that only those who published with actual knowledge of the terms of a reporting restriction order could be penalised for breaching it would pose the serious risk that such orders would be ineffectual, Dame Victoria said.

‘It would be impracticable to impose responsibility on the court to ensure that everybody who is intended to be bound had actual knowledge of the terms of an order, and it would create a perverse incentive for reporters to avoid acquiring actual knowledge.’

These practicalities are reflected in the Criminal Practice Directions 2015, which required court staff to help those who asked, but placed the duty of inquiry on those who wanted to report cases, she said.

(for that part of the Directions, see 16.4 in *McNae’s*)

The two High Court judges also rejected the argument put on Yaxley-Lennon's behalf that it would be ‘problematic’ to import the law of recklessness into the law on section 4(2) contempt when there was no central registry of such orders and no easy way to check on them, and that this had the potential for serious and important adverse consequences for media organisations generally.

Dame Victoria said: ‘We disagree. Breaches of these orders by media organisations are extremely rare. This is doubtless because professional journalists reporting on legal proceedings are generally well-informed, careful, and well-advised, and because the court is ready to provide copies of RROs (reporting restrictions orders) when asked.’

She went on: ‘A person who publishes material in breach of an RRO will be guilty of contempt if he or she foresees the possibility that the publication may be a breach of such an order, but proceeds with publication, taking an unreasonable risk.

‘Someone who knows or suspects that an order is in place but does not know its terms is clearly put on inquiry. If the person makes no inquiry, or fails to take reasonable steps to find out what the terms are, it will ordinarily be easy to infer subjective recklessness.’

The High Court was entirely satisfied that Yaxley-Lennon knew that there was an order restricting reporting of the trial, she added.

It was also unnecessary to establish a specific intent to interfere with the administration of justice in order to prove contempt as regards breach of a section 4(2) reporting restriction order, Dame Victoria said.

‘We do not see any principled basis for importing such a requirement, in a context in which the court has made an order addressed to anyone who might wish to report the proceedings, for the express purposes of avoiding a substantial risk of prejudice to the administration of justice in those proceedings.’

**Yaxley-Lennon case highlights what journalists should be aware of**

The case in which Stephen Yaxley-Lennon was jailed for contempt of court highlights what all journalists should be aware of when reporting on trials.

Dame Victoria Sharp and Mr Justice Warby, sitting in the High Court, said that contempt of court was principally a common law doctrine, the purpose of which was ‘to protect the integrity of civil and criminal proceedings by imposing appropriate penalties on those who interfere with, obstruct, impede or prejudice the due administration of justice, or expose the process to risk that these consequences will follow’.

They pointed out that creating and publishing images of people in the court, the court building, or its precincts was prohibited by section 41 of the Criminal Justice Act 1925, but if such offending was sufficiently serious it could also amount to a contempt of court, thereby incurring a stiffer penalty, including a jail sentence. For context about the 1925 Act and such contempt, see in 12.1 in *McNae’s.*

The High Court judges also took the opportunity to re-state the principle that court orders must be obeyed while they remain in force, even if it later emerges that they were wrongly made.

Yaxley-Lennon had sought at one point to argue that he could only be guilty of contempt if he was proven to have disobeyed an order which was ‘properly made’ and that in fact the section 4(2) order in the Leeds case was not ‘properly made’.

But the High Court judges rejected that argument.

Dame Victoria said: ‘It is a fundamental principle of long standing that orders of the court must be obeyed whilst they remain in force; disobedience to an order will therefore amount to a breach, capable of amounting to contempt, even if on later examination it proves to have been wrongly made: see *Woodward v Earl Lincoln* (1674) 3 Swan App 626, 36 ER 1000, and other authorities cited in *Arlidge, Eady & Smith* at 7-173 and 9-230 to 9-235."’

The argument made by Yaxley-Lennon was also ‘contrary to authority’, because in *R v Horsham Justices, ex p Farquharson* the majority of the Court of Appeal had rejected a submission put for the appellant journalists that a court facing application to commit people for contempt could and should reconsider the decision to make a section 4(2) order.

Dame Victoria added: ‘We agree with the conclusion of the editors of *Arlidge, Eady and Smith* (at 7-319) that “the validity of a s 4(2) order cannot be made the subject of challenge in contempt proceedings based upon a breach”.’

The initial argument made for Yaxley-Lennon that the section 4(2) order was wrongly made was also ‘based on a misconception’, Dame Victoria said, which had started with a passage in paragraph 4.5 of the Judicial College guidance, Reporting Restrictions in the Criminal Courts.

This read: ‘The subject matter of a postponement order under s 4(2) is fair, accurate, good faith and contemporaneous reports of the proceedings. Trial judges have no power under s 4(2) to postpone publication of any other reports, e.g. in relation to matters not admitted into evidence or prejudicial comment in relation to the proceedings. Likewise, courts have no power under s 4(2) to prevent publication of material that is already in the public domain. Such publications may incur liability for contempt of court under the strict liability rule and the media bear the responsibility for exercising its judgment in such cases.’ (Here ‘strict liability rule’ refers to the general, automatic reporting restriction in the Contempt of Court Act 1981 concerning ‘active’ cases – see in 19.4 in *McNae’s*)

Dame Victoria said of the College guidance: ‘As this passage correctly indicates, section 4(2) does not authorise the court to postpone reporting of material extraneous to the proceedings…..”

But that point had no bearing on this case as the section 4(2) order made at Leeds did not purport to postpone anything other than reports of that trial’s proceedings, she said.

It was argued on Yaxley-Lennon’s behalf that the passage from the College guidance meant that material which was already in the public domain could not be the subject of a section 4(2) order, and that therefore it was legitimate for Yaxley-Lennon - or anyone else - to repeat anything about the trial which had entered the public domain as a result of reporting by others. At the High Court he said that the names of the defendants in the Leeds trial, and the charges they faced (he was referring to the fact that in the live-streamed footage he had recited these names and charges) were on a news website – the High Court decided that this was an online report published by the *Huddersfield Examiner* of a preliminary hearing in the case.

But Dame Victoria said: ‘That is not how we read what the guidance says, nor is this the law.’

A section 4(2) order, she went on, operated to prohibit reporting of the proceedings to which it referred, from the time it was made until the end point identified in the order.

‘The fact that there has already been reporting, or that matters that are later given in evidence have previously been made public in some other context does not debar the court from making an order under section 4(2),’she said.

‘Nor is there any implied public domain proviso to orders of this kind, permitting reporting of aspects of the proceedings so long as the facts in question have been publicised before. Indeed, previous reporting may be a reason for making an order.’

She added: ‘We believe the point the Judicial College was striving to make was that a section 4(2) order cannot prevent the publication of information in the public domain which is not or does not purport to be a report of the relevant proceedings. That has no bearing on the issues arising in this part of the case.’