The Law Reform Commission

CONTEMPT OF COURT- THE SUB JUDICE RULE

DISCUSSION PAPER

Friday, March 21, 2014

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Introduction

1. On 10 January 2014 the Law Reform Commission submitted for public comment a Consultation Paper on the law of contempt. The object of the paper, which was in response to an earlier referral by the Attorney General, was to generate debate on the extent to which the law of contempt should be reformed or codified so as to reflect the conditions in which it may currently fall to be applied in the Islands. So far as we are aware, this is the first time possible amendment or codification of the common law of contempt has been considered in the Islands and accordingly our Consultation paper attempted a comprehensive review of the subject. However, unsurprisingly, the initial reactions were principally from the media and concerned an issue which is central to any law of contempt, namely, how to achieve a proper balance between freedom of expression and the right to a fair trial. Accordingly, this paper principally discusses the rule commonly referred to as the "sub judice" rule, that is, the rule restricting (or, more accurately, postponing) publications commenting on pending court proceedings until after those proceedings are concluded.

2. We should stress that any views expressed in this paper are subject to the outcome of the process initiated by the Consultation Paper and the views of stakeholders generally including the media.

The context

3. There are certain common situations where the sub judice rule is likely to be relevant. These arise principally in connection with criminal proceedings. This is because in the Islands, as in the UK, juries are rarely used in civil cases. One of the principal objects of the rule is to ensure that the jury reaches its verdict on the basis of the evidence it hears in court and on that evidence alone.[1] On the other hand, judges, who would generally only decide questions of fact in civil cases, are assumed to be immune from external pressures by virtue of their legal training and experience. In civil cases the emphasis is in protecting the parties and their witnesses from the kind of pressure which may deter them from asserting or resisting a claim or from giving evidence whether on their own behalf or on behalf of a party. We shall confine our remarks to criminal cases.

4. In criminal cases the most obvious infringement of the rule is the publication of details of the accused's criminal record. Publications which reflect adversely on the accused's character may equally constitute contempt even where his criminal record, if any, is not mentioned. The reporting of parts of the trial which are conducted in the absence of the jury, for instance,

[1] See the recently recommended direction to the jury in Practice Direction 3 of 2014 (G02, S3).

arguments concerning the admissibility of evidence which is, in the event, determined to be inadmissible, is another example. Apart from instances where the jury may be prejudiced by a particular publication, any publication which brings improper pressure to bear on witnesses, whether for the prosecution or the defence, or the accused himself may fall foul of the sub judice rule as will assertions of guilt or innocence. The message clearly is that, subject to the right of the media to publish a fair and accurate report of those parts of the trial which are conducted in the presence of the jury, comment should be reserved until after the proceedings are concluded.

The common law position

5. As good a definition of the sub judice rule as any is to be found in section 1 of the UK Contempt of Court Act 1981 ("the 1981 Act")[2] as follows:

> "…… the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so."

Although this definition refers to "conduct" the sub judice rule invariably falls to be applied in the context of a publication of some kind, a newspaper article, a radio or television programme, a speech, a photograph[3]. One of the restrictions introduced by the 1981 Act was to limit the application of the rule to publications as defined by the 1981 Act[4]. Our discussion of the rule is similarly limited. Even so, the definition requires some further elaboration as a necessary prelude to a discussion of possible reform.

6. For a publication to constitute a contempt by virtue of the sub judice rule, the following conditions must be satisfied:

(1) The publication must have a tendency to interfere with particular proceedings: it does not have to be established that it has in fact interfered with them by, for example, influencing the judge or the jury;
(2) Subject to (3) below, the publication must create a real risk of prejudice to the due administration of justice and not just a remote possibility;
(3) The publication in good faith and contemporaneously of fair and accurate reports of proceedings in open court does not constitute contempt notwithstanding that it may create a real risk of prejudice to those or other proceedings;
(4) The publication must occur at a time when the proceedings in question, whether criminal or civil, are pending or imminent.

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[2] Although the 1981 Act refers to the rule as "the strict liability rule".
[3] Particularly if identification is in issue
[4] Section 2(1) of the 1981 Act, as amended by the Broadcasting Act 1990, defines "publication" as "any speech, writing, programme included in a programme service or other communication in whatever form, which is addressed to the public at large or any section of the public".

7. If the above conditions are satisfied, any person responsible for the offending publication will be guilty of contempt notwithstanding that:

   (1) The publication was not intended to interfere with the conduct of the relevant proceedings;
   (2) The publisher[5] is unaware that proceedings are pending or imminent at the time of publication;
   (3) The publisher is unaware of the publication's offending content;
   (4) The publication is in the public interest;

Tendency to interfere, etc.

8. It may seem odd that a publication which does not in fact prejudice the conduct of a trial but which, objectively viewed, might have that effect should be treated as a contempt. But the distinction between the innocence or guilt of the accused and the liability of an alleged contemnor is well established. If the accused, having been convicted, alleges that the conduct of the trial was prejudiced by adverse publicity, he may appeal and if the allegation of prejudice is made out his conviction will be quashed. Nor is there any inconsistency between the acquittal of the accused and a successful prosecution for contempt. The justification for this approach is the deterrent role of contempt. The greater the number of publications which have a tendency to prejudice, the greater the likelihood of actual prejudice. It should also be borne in mind that the application of this test cuts both ways. If a publication does not at the time of publication have the requisite tendency, there will be no contempt notwithstanding that by reason of subsequent events outside the control of the publisher the trial is in fact prejudiced.

9. We are not currently minded to recommend any changes to the test referred to above. If, however, there is to be a codification of the sub judice rule, the test will need to be incorporated as part of that exercise.

Real risk of prejudice

10. Even if, objectively viewed, the publication in question has a tendency to interfere with the conduct of the trial, there will be no contempt unless the risk of prejudice is real as opposed to remote or fanciful. In the UK, the test is now statutory and requires proof of "a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced".[6] This two-fold test can only be regarded as a relaxation, albeit slight, of the sub judice rule. Previously – and, in the Islands, still – the emphasis was on assessing the risk. It may be that the change is little more than a matter of semantics although it may have the effect of excluding from the criminal arena so-called 'technical contempts', that is, where the risk of serious prejudice is so minimal as not to justify punishment. Conduct which does not justify punishment should not be treated as criminal. But, that apart, it is difficult to imagine any factual circumstances which would have attracted a finding of contempt prior to the 1981 Act but which we not also do so since. However, the two-fold test does at least emphasise that,

[5] We use this word for convenience to cover all those persons who play a part in the dissemination of the publication: see paragraph 17 below.
[6] 1981 Act, section 2(2).

before making a finding of contempt, the court should consider not only the degree of risk but also, should that risk materialise, the seriousness of any prejudice to those having an interest in the outcome of the proceedings in question.

11. We have no objection to the incorporation of the UK two-fold test in to the law of the Islands.

Reporting proceedings held in public

12. There is no doubt that the publication in good faith of a fair and accurate report of proceedings held in open court does not constitute contempt.[7] In this context, "open court" must be understood not only as a reference to the entitlement of the public (and therefore the media) to attend but also to that part of the proceedings which takes place in the presence of the jury.[8] But subject to that and other minor exceptions, the publication of such reports is permissible notwithstanding that prejudice may be caused to the current or future proceedings. In so far as the current proceedings are concerned, any prejudice will result from the evidence that the jury has already heard: it is difficult to see how any additional prejudice is caused by the reporting of that evidence. In so far as future (invariably related) proceedings are concerned, the media's entitlement to publish fair and accurate reports is well-established at common law[9] subject, however, to a somewhat ill-defined power of the court to direct postponement of publication until after the conclusion of the subsequent proceedings. In the UK, this topic, including the making of postponement orders and suppression orders, is dealt with in the 1981 Act.[10] We have discussed the topic in the Consultation Paper[11] and have nothing to add here.

13. We consider that the reporting of proceedings, and, in particular, the circumstances in which a court can direct postponement of publication, should be put on a statutory footing. If the sub judice rule is to be codified, this would be necessary in any event.

Proceedings pending or imminent

14. The 'timing question' and, in particular, determining when the law of contempt kicks in relation to criminal proceedings, is a vexed one. What is at issue is attempting to identify the times, before which and after which, a publication, however prejudicial its content, will not be amenable to the law of contempt. A publication within that time frame will not amount to a contempt unless it also satisfies the other conditions referred to in paragraph 6 above. It is now generally accepted that the relevant period starts not later than the time when an individual is arrested, with or without a warrant. It may start earlier where, for example, a warrant has been issued but not executed or, even earlier, where it becomes known to the media that the police are hunting for a particular individual in connection with a particular crime but no warrant has

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[7] The general principle is recognized in the recently issued Practice Guidance 2014, paragraph 4 (G02,S1).
[8] Which would not include the reporting of evidence given during the course of a voir dire where evidence of the accused's alleged confession is held to be inadmissible.
[9] Before committal proceedings became subject to statutory reporting restrictions, it was accepted that fair and accurate reports of such proceedings were permissible notwithstanding possible prejudice to the accused at the subsequent trial.
[10] Sections 4, 11.
[11] Paragraphs 41-45.

yet been issued. The media may be able to assist in the apprehension of the suspect or in the protection of the general public but is it necessary for that purpose to reveal the suspect's previous convictions? There are general statements to the effect that proceedings do not have to be "pending": it suffices that they are "imminent". But the word "imminent" is, if anything, more uncertain than the word "pending". In the UK, the 'timing question' is now comprehensively dealt with in Schedule 1 to the 1981 Act which at least provides the media with an element of certainty.[12] We have summarized and commented on the relevant provisions in the Consultation Paper.[13]

15. This is an area where we consider that reform is necessary if only because there is uncertainty, both practically and conceptually, as to the ambit of the offence. This uncertainty produces the so-called "chilling effect", that is, that editors are afraid to publish simply because they do not know whether or not what they are publishing will be viewed as a contempt. Again, if there is to be any codification in this area, the 'timing question' will need to be covered in any event.

16. In paragraph 31 of the Consultation Paper we discussed a different although related kind of timing question, namely, that which arises from the fact that material electronically archived but readily accessible to the public is treated as being continually published so long as it remains accessible. The UK Law Commission[14] has now recommended that where a communication was first published before proceedings became active, the person responsible for the publication should be exempt from liability under section 2 of the 1981 Act unless first put on formal notice by the Attorney General of a) the existence and location of the publication which first appeared before were proceedings were active, b) the fact that relevant proceedings have become active since that publication and c) the offending contents of the publication. They also recommend the sending of a second notice by the Attorney General once the proceedings are no longer active.

Strict liability

17. The offence committed by a breach of the sub judice rule is an offence of strict liability, that is, it is not necessary for the prosecution to establish that the publisher intended to interfere with the conduct of the proceedings in question nor is it a defence for the publisher to establish that he had no such intention. It is sufficient that, objectively viewed, there is a risk that the publication will have that effect. It follows from this that it is no defence for a publisher to establish that he did not know that any relevant proceedings were pending or imminent or for a distributor to establish that he was unaware that the publication contained offending material. There is no doubt that this represents the law of the Islands. Even in the UK, the principle of

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[12] The UK position on this - and related matters – is confused by the fact that the common law position still applies in respect of intentional contempts, that is, those where the publisher intends to interfere with the conduct of the particular proceedings: see Consultation Paper, paragraph 57. This is another issue. One view might be that intention should be relevant only to penalty and not to liability.

[13] Paragraphs 28-29.

[14] Law Com No 340, paragraph 2.152.

strict liability was retained by the 1981 Act although, as indicated in the Consultation Paper, the scope of the sub judice rule was restricted in certain respects.

18. We deal with the respective liabilities of publishers, distributors, etc., below. But subject to that, to the possibility of restricting the ambit of the sub judice rule as in the 1981 Act or in some other way, we are not currently minded to recommend that the principle of strict liability should be abandoned. Although some law reform commissions from other jurisdictions have recommended its abandonment, we are not aware that any such recommendations have found their way on to the statute book. To require proof of an intention to interfere with the conduct of particular proceedings would seem to be inconsistent with the 'tendency test' referred to above.[15] If the publication in question has the requisite tendency, we do not see that it matters whether or not an intention to interfere is established. Intention will undoubtedly be relevant to punishment but should not, in our view, be relevant to liability.[16]

Innocent publication or distribution

19. Assuming that a publication contains offending material, who are the person or persons liable for contempt in respect of that publication? At common law, liability for contempt consisting of, say, an offending newspaper article extends, in theory at least, to the publisher, the editor, the writer of the article, the printer and the distributor. In one case, an attempt was made to fix liability on a purchaser of the newspaper who had, in ignorance of its contents, given it to his local librarian, the library not having received their usual copy. The attempt failed not because the purchaser was unaware of the offending article, which as we have seen would be no defence, but because it could not be said that the purchaser intended, in any meaningful sense of the word, to *publish* the newspaper. Of the persons listed, the publisher, the editor, the writer of the article and the printer[17] cannot be heard to say that they were unaware of the offending material or, if strict liability is to be preserved, that it was offending. However, in the UK the harshness of the strict liability rule has been softened in one respect. There it is now a defence for a publisher[18] to show that at the time of publication (having taken all reasonable care) he does not know and has no reason to suspect that relevant proceedings are active.[19] The burden of proof of the facts relevant to the defence is on the defendant.[20] The 1981 Act also introduced a more far-reaching defence for distributors.[21] In the UK it is a defence for a

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[15] See paragraph 7.

[16] Similarly, if the ambit of the sub judice rule is to be restricted, we do not see the justification for leaving intentional contempts to be dealt with at common law: see FN12 above.

[17] The continued treatment of a printer as part of the publication, as opposed to distribution, process is highly questionable given that for some time now printers have been able to produce the printed work without seeing the contents in written form at all.

[18] The word is not defined but presumably includes, in the case of a newspaper, the proprietor, the editor and the writer but not the printer or distributor and, in the case of a broadcast, their respective equivalents.

[19] Section 3(1). The word "active", which is defined by the 1981 Act replaces, at all events, in the case of non-intentional contempts, the common law concepts of "pending" and "imminent".

[20] Ibid., section 3(3). The standard of proof is presumably on the balance of probabilities as with other statutory defences.

[21] This would include retailers – in the Islands, principally gas stations and grocery stores – and the young people who, during the morning rush hour, can be seen selling newspapers at busy road junctions.

distributor to show that at the time of distribution (having taken all reasonable care) he does not know that the publication in question contains offending material and has no reason to suspect that it is likely to do so.[22] Again the burden of proof is on the defendant.

20. We would favour the introduction of similar defences in the Islands. How to deal with the position of printers must await responses to the Consultation Paper. It may be that some local publications are printed outside the Islands or that the proprietors and the printers are the same in which case no separate problem arises.

21. We have reserved the question of "bloggers" for separate consideration.[23] The personal liability of the blogger for the contents of his blog is beyond question. There is no difference in principle between the blogger and the ordinary letter writer. There are three difficulties in pursuing the blogger which arise less frequently in the case of the letter writer. First, the blog is invariably anonymous or posted using an assumed name.[24] Secondly, he or she may not be within the jurisdiction. Thirdly, and most significantly, why pursue the blogger, who may not have the resources even to pay the costs of a contempt application let alone a fine, when there is a clear case against the publisher? That there is a clear case against the publisher is apparent from the decision of the Grand Court (Smellie CJ) in R v Stewart [2003] CILR 8. In that case, the respondent to the contempt application was a local service provider who permitted postings to his company's website which referred to legal arguments raised during the course of a voir dire and which the Court has specifically ordered should not be published.[25] There was evidence that the respondent could not prevent postings in the first instance (other than by closing down the site) but he could monitor and suspend offending postings "within minutes". The Court found that the respondent made only limited attempts to ensure that any offending postings were immediately deleted and was accordingly guilty of contempt.[26].

Public interest

22. It is not a defence to a charge of contempt by virtue of an infringement of the sub judice rule that the publication in question is in the public interest. If a particular publication carries with it the risk that a pending criminal trial will be prejudiced in the sense that it contains information which, for whatever reason, was not put before the jury during the course of the trial and is likely to influence[27] the juror who becomes aware of that information, it cannot be in the public interest that the law should countenance such publications. Within the parameters of

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[22] 1981 Act, section 3(2).

[23] Similar considerations will apply to broadcasters who provide "phone-in" facilities.

[24] We cannot conceive of a case where the Attorney General or the court acting of its own motion would wish to pursue the publisher simply with a view to obtaining the identity of the blogger even assuming that the information which the publisher could provide would in fact establish the identity of the blogger and that he was within the jurisdiction.

[25] It may well be that the only significance of the order was to enable the Court to treat the contempt as having been committed "in the face of the court". It should not be assumed that the respondent would have been found not guilty of contempt but for the order.

[26] The report does not reveal what penalty was imposed.

[27] Either for or against the accused.

admissibility, the evidence to be placed before the jury is a matter for the prosecution and the defence not the media. However, regard has been had to the public interest in a slightly different connection best expressed in the following passage in the judgment of Jordan CJ in the leading Australian case on the topic:

"The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant".[28]

In the UK, section 5 of the 1981 Act provides as follows:

"A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion".

This represents a relaxation of the sub judice rule particularly since section 5 does not operate by way of a defence: it is for the prosecution to establish that it does not apply not for the defence to establish that it does. Nonetheless, the provision does not introduce a general defence of public interest. Clearly, the crucial words are "merely incidental". If, as the passage from the judgment of Jordan CJ assumes, the public discussion is on-going at the time the proceedings in question first become active, the easier it will be to conclude that the risk of prejudice to those proceedings is merely incidental to that discussion although it is not a requirement of section 5 that the discussion should precede the proceedings. On the other hand, a public discussion which arises out of, and concerns, the proceedings in question will not be protected albeit it that the discussion concerns matters of general public interest.

23. We would have no difficulty in recommending the introduction of a provision similar to section 5 of the 1981 Act.

Certainty and the sub judice rule

24. It is self-evident that the criminal law, of which contempt of court is a branch, should be as certain as the conduct which it seeks to deter permits. In so far as the sub judice rule is concerned, that is of particular concern to the media. Freedom of expression is fundamental to a democratic society and it should only be curtailed in the cause of some greater good. In certain circumstances, the right of the accused to a fair trial or of the civil litigant to have his rights determined according to law may justify a temporary curtailment of freedom of expression not because of the circumstances of the particular accused or civil litigant but because we all have an interest in the due administration of justice which is equally fundamental to a democratic society and, in some instances, more so. The balancing of these competing interests is such that absolute certainty cannot be achieved without unduly

[28] Re Truth Sportsman Ltd, ex p Bread Manufacturers Ltd (1937) 37 SR (NSW) 242, 249.

prejudicing either freedom of expression or the due administration of justice. This should be apparent from the issues discussed in the Consultation Paper and above. We believe that the current law is unduly restrictive of the right of the media to report and comment on particular legal proceedings and may very well not be compliant with the Bill of Rights. The object of the current exercise is to consider to what extent and in what manner a proper balance between these competing interests can be achieved.

Miscellaneous matters

25. There are three other matters which, although not strictly forming part of the sub judice rule, we should mention since they will be of equal interest to the media.

(1) The use of recording equipment in and around the courts is now regulated by Practice Direction No 1 of 2014 and Practice Guidance.[29] The Practice Guidance was issued after consultation with representatives of the media and with the public. In those circumstances, we do not consider it appropriate to deal further with this topic as part of our review of the law of contempt.

(2) In the Islands, journalists and other representatives of the media have no privilege from answering relevant questions on the ground that they will thereby reveal their sources of information. As indicated in paragraph 19 of the Consultation Paper, section 10 of the 1981 Act has introduced a qualified privilege in the UK. Although we would have no objection to the introduction of a similar provision in the Islands, we are not aware that there is any particular need for it. However, we would welcome the views of stakeholders.

(3) That part of the law of contempt usually referred to as "scandalizing the court" is not part of the sub judice rule as it is not concerned with prejudice to the conduct of particular proceedings but to the administration of justice as a continuing process. In the UK, the offence has recently been abolished and has not been replaced by any other statutory offence. We have serious reservations as to whether it would be appropriate to adopt a similar approach here but would welcome the views of stakeholders.[30]

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[29] G02,S1.

[30] This topic is discussed in paragraphs 73 – 75 of the Consultation Paper.