

# The Thundering Tide

Contempt in the age of the internet

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Paper based on a lecture to the Government Legal Service on 19 June 2012<sup>1</sup>

**For Fools rush in where Angels fear to tread.  
Distrustful Sense with modest Caution speaks;  
It still looks home, and short Excursions makes;  
But ratling Nonsense in full Vollies breaks;  
And never shock'd, and never turn'd aside,  
Bursts out, resistless, with a thundering Tyde!**

*Alexander Pope, An Essay on Criticism (1711)*

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<sup>1</sup> Although I have appeared in some of the cases discussed, the views expressed in this talk are entirely my own, and not necessarily shared by those who have instructed me.

## INTRODUCTION

1. In this paper I am going to consider the particular challenges that the internet, and its associated 'thundering tyde' of information, misinformation, and comment available to anyone with access to a computer, has posed to the administration of justice.
2. The criminal justice system has traditionally sought to protect jurors from exposure to prejudicial material, and the law of contempt has played a key part in this endeavour. The law places restrictions on the publication of potentially prejudicial material through the strict liability rule. And, addressing the problem from the other end, judicial directions are routinely given to juries, and these are designed to limit the risk of them being exposed to such material.
3. The current law of contempt was developed in an age which had not anticipated the information and communication revolution that we are now living through. Material that is prejudicial to criminal proceedings may now be disseminated with extraordinary speed and to a potentially unlimited audience; indeed such material may have been reposing on the internet long before even the crime leading to those proceedings has been committed, but remains accessible to anyone caring to look for it.
4. Many have been bowled over by this gathering torrent of words. The columnist Matthew Parris, considering his position on the board of free speech organisation Index on Censorship, recently wrote in *The Spectator*:

"... we gave a considered submission to the parliamentary committee considering these draft reforms [to libel law], and I stand by it. But I do begin to wonder whether the careful little sea walls that lawyers and legislators are hoping to construct are all doomed to be swept away in a tsunami of cultural and technical change.

The point of the web is its near-instantaneous nature. Choruses of voices, approval, disapproval, complaint, support or dislike sweep across the internet in waves of tweets and blogs and readers' posts. Most voices are to all intents

and purposes anonymous; few can be held to account. The sheer volume and the speed of this traffic makes it impossible for any editor or mediator to make proper checks before comments are posted....I submit that this is intrinsically impossible to supervise or regulate.”<sup>2</sup>

5. Soon after this article was published The Spectator was charged with breaching a reporting restriction relating to the Stephen Lawrence murder retrial, by a blog written from commentator Rod Liddle<sup>3</sup>, providing not just a dose of irony, but perhaps some evidence to counter Mr Parris’s view that regulation is a lost cause, although of course his pessimism was in relation to the anonymous blogger rather than the established national magazine.
6. So does the internet really present a radically altered landscape for the law of contempt? The present Attorney General suggests that his view is that it does. He recently wrote the following on the topic, having asked whether “the Contempt of Court Act 1981 [is] enforceable, or even relevant, in the context of the worldwide rapid communication facilitated by the internet?”<sup>4</sup>

“There is no doubt that the characteristics of the internet, and of social media in particular, pose challenges for enforcement...what is published by one individual can "go viral" within hours, with obvious implications. Comments on the web can soon be published far beyond their original, limited audience...**Unlike major news organisations, which on the whole act in a responsible and measured manner, the inhabitants of the internet often feel themselves to be unconstrained by the laws of the land.**”

And answering his own question, he concludes:

“Of course, the [Contempt of Court Act 1981] was constructed when newspapers and broadcasters were the only media available, and a fairly small pool at that, but I believe it is a sound piece of legislation for the modern age.”

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<sup>2</sup> “The writing is on the wall for restrictions on free speech”, The Spectator 10 March 2012

<sup>3</sup> The magazine admitted the charge under s.82 Criminal Justice Act 2003 for breaching specific reporting restrictions and was ordered to pay the Lawrence family £2,000 and a fine of £3,000

<sup>4</sup> *Contempt laws are still valid in the internet age*, Dominic Grieve QC, The Guardian, 8 February 2012

<http://www.guardian.co.uk/commentisfree/2012/feb/08/contempt-of-court-act-internet>

7. I would respectfully tend to agree (although it could be suggested that he may have been somewhat charitable to ‘major news organisations’ in the light of his experience in cases that we shall look at in a moment). However, I do suggest that this is a potential answer to only one half of the problem. Not only is it necessary to consider the task of regulating online publication (and whether that is any longer possible): it also falls to be considered whether it is realistic to seek to prevent jurors from accessing material that is available on the internet, including material which may not have been published in breach of the Contempt of Court Act. Furthermore, I will be concluding that there is an identifiable tension between the approaches being adopted to address this problem from these opposite ends. These, and other, issues of the law of contempt are currently being considered by the Law Commission<sup>5</sup>, so whatever value my own tentative and subjective views may have will rapidly be rendered obsolete by what will no doubt be a thorough and authoritative treatment.
8. In what follows I will attempt the following:
- By way of a short run-up, I will look at the background to the law of contempt, leading to the Contempt of Court Act 1981 which now effectively constitutes the contempt regime for most of the purposes of this discussion<sup>6</sup> (even though contempt at common law retains a theoretical place in this context).
  - We will then look at the principal examples of contempt arising from the use of the internet in cases brought (a) against publishers under the strict liability rule; and (b) in relation to jury irregularity; as well as briefly considering the analogous areas of criminal appeals and defamation.

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<sup>5</sup> Contempt of court is part of the Law Commission’s 11th programme of Law Reform, see <http://lawcommission.justice.gov.uk/areas/contempt.htm>

<sup>6</sup> The exception being the law of contempt as it relates to restraints upon jurors performing their own research on the internet, which remains governed by the common law.

- Finally, I will try to draw some threads together from these cases, to see how effective the current regime is continuing to achieve its aim in the altered landscape in which it now operates, and the problems that remain to be resolved.

## BACKGROUND TO CONTEMPT

9. The law of contempt is, of course, about protecting legal proceedings. From earliest legal history the courts have assumed the power to coerce and punish those who obstruct legal proceedings<sup>7</sup>. Authors in the twelfth century refer to “contemptus curiae”, and by the 14<sup>th</sup> century it had been recognised as a contempt to draw a sword to strike a judge<sup>8</sup>, or to assault in open court the Attorney General<sup>9</sup> (not to mention one of the King's clerks, a juror, a witness, or an opposing party). It seems, however, that the element of assault was not regarded as essential, for sometimes it was simply alleged that the contemnor had hindered proceedings in court, and there are numerous early examples of contempts having been committed only by words, such as by insulting judges, abusing jurors, or speaking disrespectfully of the King’s writ.
10. Anyone who has seen Arthur Miller’s play, *The Crucible* (1952), will appreciate the severity of the sanctions that contempt of court has provoked. In the Salem witch trials in Massachusetts, Giles Corey (a real person) refused to plead to the accusation of witchcraft, thereby being held in contempt. He was subjected to being ‘pressed by stones’ when he refuses to plea “aye or nay” to the charge. The increasing weight of stones did not induce him to enter a plea before they caused his death.

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<sup>7</sup> *The History of Contempt of Court* (Oxford University Press, 1927) provides a detailed account, which is summarised in Arlidge & Eady 4<sup>th</sup> edition, chapter 1

<sup>8</sup> (1348) Y.B., 22 Edw. III p.13 pl. 26

<sup>9</sup> Coram Rege roll, M. 30 Edw. III m. 113 (Solly-Flood)

11. Thus the common law zealously (although not always quite as brutally as poor Giles Corey experienced) developed a restrictive protection of court proceedings, which formed the basis of the law of contempt for centuries. From the 1980s, there has been a rebalancing of contempt laws in favour of greater freedom of speech, influenced by the European Court of Human Rights, in particular by the passing of the Contempt of Court Act 1981. In the areas that I am going to focus on in this paper the common law has largely been superseded by statute and we can consider how suitable it remains as an instrument to protect the administration of justice in the modern age, in particular the age of the internet.
  
12. The 1981 Act followed an important report by a committee chaired by Lord Justice Phillimore, and the House of Lords decision in *AG v. Times Newspapers Ltd* [1974] AC 273 ('the Sunday Times case') that had been determined shortly before Phillimore reported and was considered by the committee. The Phillimore report was published in May 1974 and was critical of the House of Lords decision and made detailed recommendations for reform, although it was not for another 8 years that Parliament acted.
  
13. The underlying litigation in the Sunday Times case related to the thalidomide scandal and tragedy - whereby large numbers of women who took the anti-sickness drug while pregnant gave birth to children with severe birth defects. When the link between the drug and the defects became known, unsurprisingly many claims for compensation emerged. In 1972, the Attorney General obtained an injunction to prevent publication of one of a series of featured articles criticising the company that had released thalidomide, and promising to "trace how the tragedy occurred". The ground for the injunction was that the article would prejudice the civil proceedings for compensation, and ended up being heard by the House of Lords<sup>10</sup> in 1973. The injunction order was upheld. This

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<sup>10</sup> [1974] AC 273

case confirmed that any form of 'pre-judgment' of an active case (whether civil or criminal) in a publication could constitute contempt at common law.

14. In 1979 the European Court of Human Rights determined the Sunday Times' application to it, holding that the House of Lords decision affirming such 'technical contempts' constituted an unjustified restriction on Article 10 rights, where an intention to prejudice proceedings was not present and no serious risk of prejudice had been shown.
15. The Contempt of Court Act 1981 ("the CCA") can therefore be seen to have been passed against the backdrop of the Phillimore report's recommendations, and the Sunday Times case, as determined both in the House of Lords and in Strasbourg. The Act was intended to re-balance the law of contempt so as to provide a measure of certainty, greater acknowledgment of the right to free speech, with only a necessary and proportionate restriction on that right as required by the Strasbourg court and the Convention.<sup>11</sup>

## **THE CONTEMPT OF COURT ACT 1981**

16. At the heart of the CCA is the "strict liability" rule which provides that in certain circumstances, a statement would constitute a contempt regardless of the maker's intent. The rule is identified in section 1 of the Act:

"In this Act "the strict liability rule" means 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."

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<sup>11</sup> In this respect at least, the CCA 1981 has been, and remains, unarguably a success. Despite various attempts to challenge it in both domestic courts and Strasbourg, such challenges have all been dismissed, generally briskly.

17. Section 2 then sets out a number of limitations to this rule. The rule only applies to publications (s.2(1)), which include speech and writing, that are addressed to the public at large or a section of the public. 'Publication' is broadly defined and almost all information posted on the internet is liable to fall within the compass of this definition.

18. Most significantly, the strict liability rule only applies to a publication:

“which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.”

19. This is the crux of the statutory regime. It is in essence an attempt to confine the range of statements that can be found to be in contempt of court, and was set up to be a “permanent shift”<sup>12</sup> in the law of contempt in favour of free speech. There are three elements of the test provided by the strict liability rule that are worth briefly considering:

- (a) The size of the risk: 'substantial' has been held to mean more than remote, and does not impose a higher level of risk than that<sup>13</sup>. Thus this element of the test does not appear to have been set at too demanding a level.
- (b) The degree of prejudice required: the prejudice must be 'serious', if eventuating, and this issue is conceptually distinct from the risk. Sir John Donaldson MR in *AG v News Group Newspapers*<sup>14</sup> illustrated the difference between the size of the risk and the degree of prejudice:

“The 'risk' part of the test will usually be of importance in the context of the width of the publication. To declare in a speech at a public meeting in Cornwall that a man about to be tried in Durham is guilty of the offence charged and has many previous convictions for the same offence may well carry no substantial risk of affecting his trial, but, if it occurred, the prejudice would be most serious. By contrast, a nationwide television broadcast at peak viewing time of some far more innocuous statement would certainly involve a substantial risk of having some effect

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<sup>12</sup> This was the term used by Lloyd LJ in *AG v Newspaper Publishing Plc* [1988] Ch. 333 at 382D-E

<sup>13</sup> E.g. *AG v. English* [1983] AC 116

<sup>14</sup> [1987] 1 QB 1 at 15C-F

on a trial anywhere in the country and the sole effective question would arise under the 'seriousness' limb of the test. Proximity in time between the publication and the proceedings would probably have a greater bearing on the risk limb than on the seriousness limb, but could go to both."

(c) The timing of the publication: to fall within the prohibition of the strict liability rule, the publication must be when proceedings are 'active', as defined in Schedule 1 to the Act (essentially from the time of an arrest). The time of publication is reasonably easy to ascertain in relation to a broadcast or printed publication. However, the time of an internet publication is less easy to resolve: is it at the moment that the item is first posted on the internet, or does the publication continue for as long as the item is accessible? Although this was the subject of argument in the Ward case discussed later, the Divisional Court did not need to determine the point, given its other findings.

20. Various defences are available in the CCA:

- "Innocent publication or distribution", available to publishers if they did not know proceedings were active, and distributors if they did not know the publication contained the contempt.
- Contemporary reports of legal proceedings. With an increasing trend for important cases to be 'live-blogged' or even 'live-tweeted', this defence may be used by such publications in future, provided such reports are fair and accurate.<sup>15</sup>
- Discussion of public affairs in the public interest. Here, a potential contempt of court has a defence if it forms part of a discussion in good faith of matters in the public interest, provided the risk of impediment or prejudice to legal proceedings is merely incidental to the discussion.

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<sup>15</sup> This is of course subject to any specific orders that may have been made to restrict reporting of any proceedings.

21. I have an impression<sup>16</sup> that a pendulum swing in judicial approach to the strict liability rule can be detected in the authorities since the CCA came into force.

- In the 1980s the courts seemed much readier to find newspapers in contempt, perhaps still influenced by the culture of the pre-CCA common law approach.
- This was followed by a more restrictive approach, characterised by newspapers successfully establishing the power of the 'fade factor' (i.e. the assumption that the prejudicial effect on potential jurors of a publication may be expected to have faded with the passage of time between the date of publication and trial), and the near-omnipotence of the judicial direction to jurors to disregard anything other than evidence adduced and heard during the trial. Thus they were able to argue that the necessary degree of risk was not present, even having made potentially seriously prejudicial publications.
- In turn, this led successive Attorneys to be rather cautious about instituting proceedings against newspapers and no more than a trickle of contempt applications relying upon the strict liability rule being brought from the late 1990s until the present law officers assumed their offices.
- The present Attorney has shown a willingness to re-test the limits of press contempt, and been rewarded with a number of significant successes that will perhaps come to be viewed as part of a wider re-balancing of the power of the press to publish and act much as they please. At the time of writing, Lord Justice Leveson has completed the taking of evidence in his Inquiry<sup>17</sup>, and the report is awaited.

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<sup>16</sup> I should emphasise that the contents of this paragraph are no more than an impression of the trends in judicial approach: I have not attempted any analysis that would tend to confirm or disprove it.

<sup>17</sup> The Leveson Inquiry: Culture, Practice and Ethics of the Press. <http://www.levesoninquiry.org.uk/>

## CASES INVOLVING THE INTERNET

### (1) The Ryan Ward trial: *AG v Associated Newspapers Ltd*<sup>18</sup>.

22. This was the first case of contempt relating to online newspaper publications: the offending item in each case was a photograph of a defendant to a murder trial (Ward), published with him holding a gun, when the trial had just started.

- On Tuesday 3 November 2009 a murder trial started in Sheffield Crown Court. The jury were sworn and the prosecution opened the case. The principal defendant was Ryan Ward, who was being tried with two co-defendants. The case against Ward was that he had assaulted a young woman by head-butting her, thereby causing actual bodily harm, and minutes later murdered a 39 year old man (Mr Craig Wass) by striking him with a brick, causing skull fractures and consequent head injuries from which Mr Wass died.
- There was no suggestion in the prosecution's case that Ward had used a gun at any stage, and he had no previous convictions for firearms offences.
- It was anticipated by the judge that the defence to murder would be based on (i) self-defence; and (ii) a lack of the necessary intent. There was considerable publicity surrounding the trial.
- The judge had given conventional directions to the jury after they had been empanelled, which included warning them not to seek information about the case outside court, including not 'consulting' the internet for this purpose. There was no prohibition upon the use of the internet generally, or the reading of newspapers.
- After the jurors had left court, each newspaper published on its website an article which included a photograph of the principal defendant (Ward), in which he appears to be posing with a hand gun. In neither case did the photograph appear in the newspaper's printed newspaper.
- The Mail's article had been available on its site for some 5 hours, and the Sun's for about 19½ hours.

23. Clearly no argument based on any 'fade factor' was available to the newspapers, given the timing of their publication. Although the papers disavowed any suggestion that lower standards being applied to the legal review of online publications, it did seem a curious coincidence that in each case the photograph appeared on the newspaper's website, but not in the printed paper. Their defences were based on (a) the limited period of time that the photograph had

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<sup>18</sup> [2011] EWHC 418 (Admin)

been accessible on the website in each case, together with statistics from 'page hits', to seek to demonstrate the unlikelihood of any of the actual jurors actually having come across the photograph; and (b) the judicial direction to the jury which included an imprecation not to conduct internet research. The Court nevertheless concluded that the publication in each case did create a substantial risk that a juror would see the photograph, and hence of causing serious prejudice.

24. It is important to note that the fact that no juror actually saw the photograph – the investigations instituted by the trial judge established that to his satisfaction – that could not avail the newspapers. The test is prospective, judged at the time of publication. Whether or not the substantial risk created by a publication actually materialised is beside the point, for the purposes of the strict liability rule.

**(2) The Joanna Yeates murder investigation: *AG v MGN Ltd.*<sup>19</sup>**

25. This related to the reporting surrounding the murder of Joanna Yeates at the end of 2010. The articles concerned were both online, and in print, and can be seen as an unedifying example of a media feeding frenzy.

- The contempt proceedings arose from articles published in the Daily Mirror and the Sun newspapers about Mr Jefferies, after he had been arrested in connection with the murder. In fact, as was later established, he had nothing at all to do with the murder.
- The court found, variously, that the articles asserted that Mr Jefferies was linked with paedophile offences, that he was a suspect in a murder that occurred in 1974 and that he was in a particularly convenient position to gain access to Ms Yeates's flat, as her landlord.
- The case was decided after Mr Jefferies had been released and the true murderer (Vincent Tabak, who was subsequently tried and convicted) had

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<sup>19</sup> [2011] EWHC 2074 (Admin)

been charged. As with the Ryan Ward case above, there was no question of proceedings actually being prejudiced – that of course was “neither here nor there” for the purposes of establishing the contempt. What was important was that the articles would lead to questions of whether a fair trial was possible, which would delay (and hence impede) proceedings; and seriously affect the conduct of a defence.

26. I think that this case is potentially of broader significance in two respects:

- (i) Notwithstanding that Mr Jefferies had not even been charged at the time of publication, the ‘fade factor’ (hitherto having been such a strong tool in the newspapers’ defensive armoury) did not avail them here. The nature of information on the internet was relevant to this. The persistence and accessibility of online material may reduce the force of any publisher’s argument based on the ‘fade factor’ in the future.
- (ii) Unusually, it was held that the risk to the proceedings included impeding the course of justice, and not only prejudice to them. In my experience, courts up until this point had been reluctant to accede to arguments based on the ‘impediment’ limb of the strict liability test, rather than the more usual ‘prejudice’ one. However, at least on the facts of this case, no such reticence was shown. Although the Lord Chief Justice stated this was a path that has been “less well trodden”, it was noted that Mr Jefferies had been vilified to such an extent that potential witnesses might have been discouraged or deterred from coming forward and providing information helpful to him. Thus, despite all the protections provided by the trial process, it was found that the reporting created a substantial risk of seriously impeding evidence heard at trial, which ran the risk of being incomplete as a result.

### (3) The Facebook juror contempt: *AG v Fraill*<sup>20</sup>

27. Here, the issue was contact between a juror, Joanne Fraill, and a female defendant in the trial, Jamie Sewart, via Facebook's chat service. Ms Sewart was one of a number of people, including her partner, charged in a complex drugs conspiracy - the trial of which had already been aborted twice and at the third attempt lasted a month. The jury had acquitted Ms Sewart on all of charges that she was facing, but a number of verdicts, including on one count for Ms Sewart's partner, remained to be returned. At this point, Ms Fraill tracked down Ms Sewart through Facebook, and sent a message through Facebook that stated "you should know me, I cried with you enough" and a 'friend request' to Ms Sewart under a pseudonym. Ms Sewart accepted the request and even after she had realised it was actually one of the jurors in the case, chatted with Ms Fraill online, including as to the jury's ongoing deliberations. The juror, Ms Fraill, was committed to prison for 8 months, and Ms Sewart for 2 months (suspended in the latter's case).

28. The court's judgment is illuminating because it at once recognises the serious problems faced by the jury system in the face of internet communication, and yet affirms that there is no need for change to long-established principles of the law of contempt. The following statements (§29) are illustrative:

"Judges, no less than anyone else, are well aware of and use modern technology in the course of their work"

"...We are aware that reference to the internet is inculcated as a matter of habit into many members of the community, and no doubt that habit will grow."

"...The jury's deliberations, and ultimately their verdict, must be based – and exclusively based – on the evidence given in court, a principle which applies as much to communication with the internet as it does to discussions by members of the jury with individuals in and around, and sometimes outside the precincts of the court. **The revolution in methods of communication cannot change these essential principles. The problem therefore is not the**

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<sup>20</sup> [2011] EWHC 1629 (Admin)

**internet: the potential problems arise from the activities of jurors who disregard the long established principles which underpin the right of every citizen to a fair trial."**

29. The court acknowledges the role of the internet. However, it was steadfast in refusing to accept that this affected the legal principles in any way.

**(4) *AG v Dallas***<sup>21</sup>

30. Here, the judge had offered a specific direction not to research the case on the internet or discuss it online, mentioning the *Frail* case:

"The second consequence is a newer one: that you do not go on the Internet. You have probably read in the last few weeks about a juror who did go on the Internet; went on Facebook and severe problems followed for that juror. I am sure you will not want any of those. So, the rule is – and it is told to every jury – that not only do you not discuss it, but you do not go on the Internet; you do not try and do any research of your own; you do not discuss it on Facebook; you do not tweet about it; or anything of that nature. So, simply, once you leave this room you do not talk about it or deal with it in any way with anybody."

31. Despite this direction, one of the jurors, Ms Dallas - a Greek national but resident in the UK - had come upon an article describing a previous case involving the defendant in the trial for which she was on the jury. Although the defendant's previous conviction was admissible, the fact that the case had involved an allegation of rape was not. Ms Dallas raised her knowledge of the rape allegation during the jury's deliberation. Part of her defence to the committal proceedings involved the suggestion that her poor grasp of English meant that she had not fully understood the effect of the judge's direction (notwithstanding that she was a graduate of the University of Luton - now the University of Bedfordshire - had obtained a doctorate from that institution, and had also been a part-time lecturer there; all conducted in English).

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<sup>21</sup> [2012] EWHC 156 (Admin)

32. The Divisional Court found her to be in contempt of court, and considered cases involving misuse of the internet usually to attract a custodial sentence. Once again, the court was firm in recognising the impact of the internet on communication, but that the problem was not the internet itself.

“42 Judges are perfectly well aware of the value of modern technology, and the use of the Internet as a modern means of communication. Again, we repeat what was said in *R v Fraill* , at para 29: [the court quotes the statement above].

43 Misuse of the Internet by a juror is always a most serious irregularity, and an effective custodial sentence is virtually inevitable. The objective of such a sentence is to ensure that the integrity of the process of trial by jury is sustained.”

33. Ms Dallas received a penalty of 6 months imprisonment. The Divisional Court, presided over by the Lord Chief Justice has therefore, in both cases in which a juror has been in contempt of court through disobedience to a judicial direction not to use the internet has been firm. It seems likely that this approach has taken account of research evidence (that was before the Court in *Fraill*) that jurors’ use of the internet is far more widespread than the small number of cases that have been detected would suggest. Professor Cheryl Thomas, in an empirical research project commissioned by the Ministry of Justice published in February 2010 found that:

“More jurors said they saw information on the internet than admitted looking for it on the internet. In high profile cases 26% said they saw information on the internet compared to 12% who said they looked.”

#### (5) **The Levi Bellfield murder trial contempt**<sup>22</sup>

34. Strictly speaking, this contempt does not fall within the compass of this paper, since internet publication was not specifically relied upon: the relevant publications appeared in the printed copies of the newspapers. Nevertheless, it is a decision which tends to confirm the trend of the cases examined above. On

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<sup>22</sup> *AG v Associated Newspapers Ltd and MGN Limited* [2012] EWHC 2029 (Admin). This decision was handed down after this paper was originally delivered, but I have added it for completeness.

23 June 2011 a jury convicted Levi Bellfield of the kidnap and murder of a 13 year old girl, Milly Dowler. Their deliberations in relation to another count, the attempted kidnapping of another schoolgirl, Rachel Cowles, were continuing. The following morning all the main national newspapers carried reports of the convictions. The Daily Mail and the Daily Mirror set out information about Bellfield that had not been put before the jury, some of which had been broadcast on TV channels the previous evening. Following an application on behalf of Bellfield, the jury was discharged from returning a verdict on the remaining count on the basis that there had been:

*"... an avalanche of material which strayed far beyond either the facts of what happened yesterday or the facts of the offences for which he had been convicted, and in particular strays into territory of allegations being made ... of a hugely prejudicial nature."*

and that it was ...

*"... wholly unrealistic and quite hopeless [for the jury] to try to put that avalanche of material out of its mind, either individually or collectively."*

35. It was common ground that the discharge of the jury did not, of itself, establish the contempt. The newspapers defence was based on the following contentions: (i) that what had already been put before the jury about Bellfield in the course of the trial prevented the material published by the Mail and the Mirror from having any additional seriously prejudicial effect; and (ii) information included in the television broadcasts the previous evening meant that the newspapers' publications did not create any additional risk of prejudice. Both points were fairly briskly dismissed by the Divisional Court. Thus the decision tends to undermine any confidence that newspapers may have felt that once a 'cat was out of the bag', particularly in relation to a defendant who had already been committed of an especially vile crime, then open season may be declared notwithstanding pending criminal proceedings. As with the Ward decision above, the timing of the publications could hardly have been more prejudicial, coinciding as it did with the jury's consideration of the case.

## (6) Criminal appeals based on internet use by jurors

36. Whilst the 'Facebook case' (*AG v Fraill & Sewart*<sup>23</sup> - above) was the first contempt case against a juror involving the internet, the use of the internet, in particular its use by jurors to conduct research, has been a factor on appeal in criminal cases for a number of years. Although a different test is applicable, and a different jurisdiction, it is of course relevant, because the contempt provisions aim to prevent precisely this situation: criminal convictions being rendered unsafe because of prejudice or other impediment to the trial. Indeed the Divisional Court has for some time apparently struggled to reconcile the approaches that should be adopted in the contempt jurisdiction with that applied in criminal appeals.<sup>24</sup>

37. Three cases, each cited in *R v Thompson*<sup>25</sup>, provide examples. Each of these three cases involved a juror researching the case on the internet and then bringing extraneous material into the jury's deliberation. Two of the cases resulted in convictions being quashed, whereas in one (*Marshall*) it was held that the material was insufficient to have influenced the jury in its view. The case of *Thompson* itself was a joined appeal, one of which related to use of internet researches carried out by a juror.

38. The court in *Thompson* stated:

*"the use of the Internet is so common that some specific guidance must now be given to jurors. We agree with the approach adopted in the current JSB Crown Court Bench Book. Jurors need to understand that although the Internet is part of their daily lives,*

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<sup>23</sup> [2011] EWHC 1629 (Admin)

<sup>24</sup> Here is not the place to explore this, but the relevant authorities are: *AG v. Random House* [2009] EWHC 1727 at §25); Simon Brown LJ's judgments in *AG v. Birmingham Post and Mail Ltd* [1999] 1 WLR 361 and *AG v. Unger* [1998] 1 Cr App R 308 (see citations in *Random House* at §20-24). An alternative view appears in the judgment of Sedley LJ (but not Collins J, who was the other member of the Court) in *AG v. Guardian* [1999] EMLR 904 – see *Random House* at §25. See also paragraph 11 of the Divisional Court's decision in the *Levi Bellfield* contempt: *AG v. Associated Newspapers Ltd and MGN Ltd* [2012] EWHC 2029 (Admin)

<sup>25</sup> [2010] EWCA Crim 1623. The cases cited are *R v Karakaya* [2005] EWCA Crim 346: documents downloaded by a juror from the internet taken into the jury room; *R v Marshall* [2007] EWCA Crim 35: use of extraneous material downloaded from the internet did not render convictions unsafe; and *R v Thakrar* [2008] EWCA Crim 2359: the use of extraneous material downloaded from the internet rendered a conviction unsafe as there was a real risk the jury had formed an adverse view of the defendant.

*the case must not be researched there, or discussed there (for example, on social networking sites), any more than it can be researched with, or discussed amongst friends or family, and for the same reason."*

39. This paragraph reveals the impact of the internet. The concern - of quality of evidence and the jury only deciding a case on evidence before the court - has been around for centuries. But the means of defaulting on these rules have changed immeasurably. What is more, the behaviour that would result in a violation of the law is far easier to lapse into now. Against the background of Professor Thomas' research, noted above (and conducted at a time when a judicial direction to jurors not to research the case before them on the internet was given), it may be remarked that a judicial direction did not deter Joanne Frail. In turn, a more severe direction did not stop Theodora Dallas. Can these individuals be characterised as rare examples of disobedient jurors, or are they symptomatic of a more endemic problem that has not yet been confronted? Is it realistic to expect that the message sent out by the penalties of imprisonment in these cases will reverse the jurors' habits revealed by Prof Thomas?

## **(7) Twitter**

40. Even where the Attorney General has decided against pursuing contempt proceedings, the internet and social media have featured heavily. The footballer Joey Barton recently escaped further action following comments made on Twitter about ex-England captain John Terry's pending prosecution for a racially aggravated public order offence.<sup>26</sup> There were also serious questions raised about one journalist's tweets in the trial of Mr Tabak, the man eventually tried and convicted of Joanna Yeates' murder.<sup>27</sup>

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<sup>26</sup> Joey Barton not pursued on contempt charge (the Guardian) at

<http://www.guardian.co.uk/football/2012/feb/06/joey-barton-in-clear-contempt-court>

<sup>27</sup> See Attorney General investigates tweet about Vincent Tabak's interest in porn (the Guardian) at

<http://www.guardian.co.uk/uk/2011/oct/31/attorney-general-tweet-tabak-porn>

41. There would seem to be no reason in principle why tweets should not be capable of giving rise to contempt proceedings under the strict liability rule, and it can surely not be long before the first case emerges. Interesting questions will no doubt arise as to the respective liability of the original tweeter, and re-tweeters, and the relevance (if any) of the number of followers that a tweeter (or re-tweeter) has to the risk of prejudice to which the tweet may give rise.

#### **(8) Defamation – a contrasting approach**

42. There are obvious analogies between the law of contempt and defamation, and online publication has posed undoubted challenges for both.

43. The recent campaign for libel reform made the role of internet service providers, and protections available to online entities, central to its goals. The government has also responded. Its draft Defamation Bill contained little by way of protection for online entities, but this has changed with a specific defence in the Defamation Bill published in May for “operators” of websites. The media law blog Inform published a critical response to clauses in the Bill relating to the online world.<sup>28</sup> However, it may be said that at least in relation to defamation there is recognition of the potential for internet speech to require new legal approaches. This is in contrast to the conservative judicial and political approaches noted above in relation to contempt.

44. The reasons for this divergence necessarily involve some speculation. In part it must be that defamation is in a period of transition in general, which has created an opportunity for internet service providers to lobby for change.

45. However, there may also be a more substantive reason for the difference. Whereas contempt involves a restriction on free expression to protect fair trial

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<sup>28</sup> see What the Defamation Bill means for the internet, by Graham Smith at

<http://inform.wordpress.com/2012/05/17/what-the-defamation-bill-means-for-the-internet-graham-smith/>

rights (whether under the common law or Article 6), libel of course bridges the notorious crevasse between Articles 10 and 8, the right to respect for private and family life. Article 8 itself is protean; and it may be relevant that the roots of Article 8 are less well established in the English common law. By contrast, the right to a fair trial is about as entrenched a concept in the common law as exists.

46. Perhaps it is this juxtaposition that gives judges the confidence to brush aside the internet as merely a new method of interfering with the right to a fair trial. As Lord Judge CJ stated in the *Frail* case:

*"...this is familiar territory, reflective of long established common law principles, now universally understood, which underpin the jury system. In every case the defendant, and for that matter we add the prosecution, is entitled as a matter of elementary justice not to be subject to a verdict reached on the basis of material or information known to the jury but which was not in evidence at the trial."*

47. In contrast, in libel, there is recognised to be a very real possibility that our very concept of reputation and private life may need recalibrating in response to the internet.

## CONCLUSION

48. The courts, at least, seem unwilling to treat internet publication as justifying any exceptional treatment and are adhering to legal principle. With the proactive, but measured, approach that the current Law Officers have adopted to publication, including on the internet, I would venture that an acceptably practical degree of regulation, even if imperfect, may be achievable, even in the face of the challenges presented by the internet's 'thundering tyde'. No doubt there is scope for clarification of the CCA 1981 to improve the effectiveness of its operation in the world of the new media; for example in relation to the time at which a publication is made on the internet, and as to how archived material

should be treated by the law. But the basic mechanism of requiring both a substantial risk, and serious prejudice, in order to constitute a strict liability contempt would appear to remain a suitable instrument to meet the challenges. None of the cases that we have looked at convincingly indicates otherwise, and nor are trials routinely being derailed by 'ratling nonsense in full vollies' that may be put out by 'fools' with a very limited audience.

49. Nevertheless, more profound concerns may exist as to whether jurors can still be realistically expected to insulate themselves from material that impacts on the case they are trying. The current approach of the Law Officers and the courts, of prosecution when clear cases of abuse by jurors emerges, and firm sentencing (with the media playing an appropriate role in giving widespread publicity to such cases) would seem to represent the only chance of holding this pass.
50. There is also a potential tension, if not contradiction, between the solutions sought to address each end of the problem - the internet-consulting juror and the internet publisher. The sentences meted out to offending jurors suggest that their conduct is regarded as particularly exceptional and reprehensible, not symptomatic of a widespread venal habit. Yet on the other hand, the risk of prejudice required in order to establish a contempt by an internet publisher would indicate that the risk of a juror coming across such a piece is not as exceptional as all that.
51. If the courts really can maintain their asserted confidence that jurors will obey the letter and spirit of a judicial order not to consult the internet (and one can readily see the problems of acknowledging otherwise), then the irresponsible blogger or tweeter would be able to fend off contempt proceedings with the argument that no risk of prejudice could result from his or her activities, as jurors may be relied upon not to expose themselves to such material. I suspect it cannot be that simple.

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With the declaration of interest that I am an editor of it, I would encourage anyone interested in the subject of civil liberties and human rights law (including contempt and free speech) to visit the UK Human Rights Blog, which is run by members of 1 Crown Office Row: [www.ukhumanrightsblog.com](http://www.ukhumanrightsblog.com). It is part of the Guardian Legal Network and *“aims to provide a free, comprehensive and balanced legal update service. Our intention is not to campaign on any particular issue, but rather to present both sides of the argument on issues which are often highly controversial.”* You can sign up for free email updates on human rights cases and relevant news items.

Another valuable source of up to date information about media regulation is the Inform (International Forum for Responsible Media) blog: [www.inform.wordpress.com](http://www.inform.wordpress.com)



**Giles Corey, d. Massachusetts 19 September 1692, Pressed to Death**