

PROTECTING THE ADMINISTRATION OF JUSTICE IN A SMALL JURISDICTION

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This article considers the effect of social media on confidence in the judiciary of a small jurisdiction, where the limited number of judges means their judgments are subject to the most public of scrutiny. The article considers whether more can, or should, be done to ensure that confidence in the judiciary is retained at its very highest.

A. Introduction

1 In his recent article, Matthew Maletroit¹ addressed the issue of cyberbullying and the existing offences that may be applied to the same.

2 Another issue that arises from the use of social media platforms is when social networks such as Facebook are used to make disparaging comments about officers of the court—whether or not with a view to disrupting or influencing proceedings. In this regard, judges and other officers of the court in small jurisdictions face any number of challenges and issues that might not be encountered in larger jurisdictions such as England & Wales.

3 In a small jurisdiction such as Guernsey, where confidence in the court, the judiciary and other officers of the court is essential, and where those officers are well known to the majority of the population both by name and sight, the ability to ensure a judge's reputation is not besmirched might be considered to be paramount.

4 It goes without saying that there should be no attempt to interfere with the right to comment on the courts and the judiciary. Equally, however, officers of the court must be allowed to fulfil their duties without fear of unwarranted reprisal through social media.

5 This article considers what remedy there may be when comment on social media turns from fair to malicious.

¹ "Being Anti-Social on Social Media", (2015) 19 Jersey and Guernsey Law Rev 159.

B. The issue

6 It seems that there are, perhaps, three scenarios that require consideration, namely the dissatisfied member of the public who—

- (a) attempts to disrupt court proceedings;
- (b) makes disparaging remarks outside of court, intending to prejudice or disrupt specific proceedings; or
- (c) makes disparaging remarks generally.

C. Disrupting proceedings—contempt of court

7 Contempt might be criminal or civil. Civil contempt is contempt of the court's procedure—disobedience of a court order or undertaking by a person involved in litigation—while criminal contempt consists of an act which so threatens the administration of justice that it requires punishment from the public point of view. This category includes contempt both “in the face of the court”—such as wilful interruption of court proceedings—and also “publication contempt”—such as the publication of a newspaper article that prejudices a forthcoming trial.

8 Contempt maintains both a statutory and customary law basis.

9 Some attempt appears to have been made, in particular circumstances, to set out a legislative framework for civil contempt by way of contravening court orders, see for example the Domestic Proceedings and Magistrate's Court (Guernsey) Law 1988, s 31(5) and s 31(6).

10 Specific provision for, effectively, publication contempt in relation to children exists: the Children (Guernsey and Alderney) Law 2008 (as amended), s 115(5) sets out that any person who publishes any matter in contravention of that section (which effectively prohibits the publishing of any report which might identify a child concerned in proceedings, be that child the subject of proceedings or a witness), is guilty of an offence and liable to imprisonment and a fine.

11 Contempt “in the face of the court” for those courts that are, or have become, creatures of statute exists—see for example the Magistrate's Court (Guernsey) Law 2008 (as amended), s 28, which sets out that the Magistrate's Court has jurisdiction to deal with any person who wilfully insults or threatens the judge, a witness or any other person having business in the court during his sitting or attendance in court or in going to or returning from court, or wilfully interrupts the proceedings of the court or otherwise misbehaves in court. Broadly similar powers to those set out under the Magistrate's Court (Guernsey) Law 2008 exist pursuant to s 10 of the Government

of Alderney Law 2004 (as amended), and s 13 of the Reform (Sark) Law 2008 (as amended).

12 Interestingly, the Royal Court (Reform) (Guernsey) Law 2008 (as amended), s 32 provides for the States to make provision in relation to contempt of any and/or all of the Guernsey courts. No such ordinances appear to have been made.

D. Disrupting proceedings—contempt under the customary law

13 The leading case in Guernsey on contempt remains *BBC v Law Officers*, a judgment handed down by the Guernsey Court of Appeal on 18 November 1988.

14 It is important to note (at 5) that “it was not contended . . . that this was an [intentional] and deliberate contempt”, and accordingly that the Court’s—

“observations later in this judgment have no application in cases where it is alleged that the contemnor acted with the deliberate intention of prejudicing current proceedings.”

15 The Court of Appeal set out (at 6) that—

“Although Contempt of Court has long been a part of the law of the Island of Guernsey, there has been no authoritative definition . . . of the constituent parts of the offence.”

The Court of Appeal endorsed the Deputy Bailiff’s decision to—

“look for guidance primarily to the Law of England . . . [having] regard not so much to the common law . . . as to the provisions of section 2 of the Contempt of Court Act 1981”,

apparently implying that it was appropriate to use the 1981 Act for guidance, notwithstanding that it had (at 9) “effected substantial changes in the [previously common] Law of Contempt in the United Kingdom”. The reasons cited for this were that—

(a) the Contempt of Court Act 1981 had ensured the UK’s compliance with the European Convention on Human Rights (specifically art 10);

(b) that Convention extends to Guernsey; and (at 8)—

“there would be less room for differences between one jurisdiction and another in the case of interference with the authority of the judiciary than in the case for example of the ‘protection of morals’ which may vary with differences in time and place.”

16 The Court of Appeal held (at 11) that—

“the test to be applied . . . can properly be derived by way of analogy from the terms of section 2 [of the Contempt of Court Act 1981] . . . the section, in its application applies a double test . . . First there has to be some risk that the proceedings will be affected at all. Second there has to be a prospect that, if affected the effect will be serious.”

17 While the judgment appears expressly to leave open the question of the law that applies where the alleged contemnor *did* act with the deliberate intention of prejudicing current proceedings, and whether an action in contempt lies more broadly in this situation, it seems that contempt would almost certainly also then lie.

E. Publications intended to interfere with or impede the administration of justice

18 There may also be situations where a publication is not punishable as a contempt pursuant to the ruling in *BBC*. The most obvious is the situation where proceedings are not active at the time of publication, and so some intent to interfere with the administration of justice might need to be found.

19 Taking up the mantle of the Deputy Bailiff in the above case, and bearing in mind the endorsement of his approach by the Court of Appeal, it seems to this writer that one should turn, first, and by analogy, in such a circumstance, back to the Contempt of Court Act 1981. Section 6(c) sets out that—

“Nothing in the foregoing provisions of this Act—. . . (c) restricts liability for contempt of court in respect of conduct *intended* to impede or prejudice the administration of justice.” [Emphasis added.]

20 Thus, publications which are *intended* to impede or prejudice the administration of justice remain punishable as contempt of court at common law in England & Wales, and, one might argue, pursuant to the customary law in Guernsey.

21 It is clear that a publication which is not punishable as a contempt under the strict liability rule may nevertheless be punishable as a contempt at common (and so arguably customary) law—see *Att Gen v Times Newspapers Ltd.*²

22 Publication contempt, when not falling within the strict liability rule, consists of the usual two elements, *actus reus* and *mens rea*.

² [1992] 1 AC 191; [1991] 2 All ER 398, HL.

23 The *actus reus* of this contempt is the impedance of or interference with the administration of justice by the court—*Att Gen v Times Newspapers Ltd.*³ There must be a real risk of prejudice to the administration of justice—*Att Gen v Hislop*;⁴ and it seems that, in order for this to be the case, proceedings must be pending or imminent at the time of publication.

24 The required *mens rea* is an intention to interfere with or impede the administration of justice; it seems that recklessness is not sufficient—*Att Gen v Times Newspaper Publishing plc.*⁵ The intention may be inferred.

25 The standard of proof which applies to contempts under this head is the criminal standard.

F. Defamation

26 While there is no equivalent to the Defamation Act 1996, and the writer was unable to find any relevant cases regarding defamation, it appears tolerably clear that an action in defamation exists pursuant to Guernsey's customary law. As far back as 1846, "The Answers of John De Havilland, Esq., Her Majesty's Contrôle at Guernsey to the First Series of Questions on the State of the Criminal Law" set out (at para 33), that—

"All cases of recovery of damages in minor assault, defamation, libel, or slander must be entered as a mixed criminal action, on the assumption that the peace of our lady the Queen has been broken and that part of the damages are due to the Crown."

27 Defamation is, of course, of limited assistance, providing as it does a mere remedy in damages. It is sufficiently interesting, however, to note at least in passing. In England, of course, public authorities cannot bring an action in defamation.⁶

G. The current position in Guernsey—summary

28 It is tolerably clear that the law of contempt should apply in Guernsey where there was, behind any publication (which would include electronic publication on, for example, Facebook or Twitter), the intention to interfere with the *administration of justice* as well as with specific proceedings. This was very carefully left alone by the

³ *Ibid* at 405.

⁴ [1991] 1 QB 514, at 526.

⁵ [1988] Ch 333, at 374–375.

⁶ *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534.

Guernsey Court of Appeal in *BBC* and there is, in this writer's view, scope to argue that the ambit of "intentional" contempt goes some considerable way beyond the "unintentional" contempt that was the subject of that case.

H. The position in Jersey

29 It is interesting to note that there seems to be no statutory basis for any contempt of court in Jersey. Certainly, as in Guernsey, there is no equivalent to the Contempt of Court Act 1981. Moreover, it would appear that the courts in Jersey have not applied, by analogy or otherwise, the provisions of the 1981 Act.

30 On the other hand, the Jersey courts have been far more ready to find that a contempt of court exists. Any number of contempts in the face of the court arising out of criminal proceedings have been prosecuted. For example in *Att Gen v Power & Oliver*,⁷ the contempt of court count arose when the Magistrate requested Power to stand at the end of the proceedings. Power refused and swore at the Magistrate and then walked out of the court into the cell block.

31 Furthermore, civil contempts appear fairly routinely to be punished—see for example *Mayo Associates SA v Anagram (Bermuda) Ltd*⁸ (failure to comply with the terms of a *Mareva* injunction). A parish which fails to elect a *centenier* to fill a vacancy is in contempt of the Royal Court and the parish is liable to be fined—see e.g. *In re St John (Centenier)*⁹ (a £5,000 fine for failure of the parish to elect a *centenier* on three occasions).

32 In *AB v Syvret*,¹⁰ Mr Syvret was found guilty of contempt of court as a result of his posting on, or in another way adding to, his blog or any other blog website or similar media of any material relating in any way to the representors or any of them. Mr Syvret was sentenced to 3 months' imprisonment.

33 It is to be noted, of course, that this was again in effect a civil contempt. It was that Mr Syvret "has determined to disregard orders made by the court" that caused him to be punished rather than a charge of criminal, publication contempt. Injunctions and orders had previously been made against Mr Syvret that he had ignored, and it is this that was punishable.

⁷ [2014] JRC 009.

⁸ 1995 JLR N-15c.

⁹ [2005] JRC 020B; 2005 JLR N [7].

¹⁰ [2013] JRC 219; 2013 (1) JLR N [37].

34 In *United Capital Corp Ltd v Bender*¹¹ a criminal contempt appears to have been considered, and in *Hall v Att Gen*,¹² criminal contempt appears to have resulted from an abusive remark to a judge. There is no report of the basis for or consideration of the principles to be applied to such contempt in either of the above cases however.

I. Cayman Islands

35 It is extremely interesting to note that another small jurisdiction, the Cayman Islands, a British Overseas Territory with a population of some 56,000, has very recently submitted for public comment a consultation paper on the law of contempt (Contempt of Court Consultation Paper, Friday, 10 January 2014). The Introduction to that paper suggests that consideration of the possible reform of the law of contempt is timely (para 2)—

“The second relatively recent development is the growth of electronic means of communication which are instantaneous and unconstrained by geographical considerations. The emergence of websites such as Google Search and YouTube and social websites such as Facebook and Twitter have facilitated this growth.”

36 The paper goes on to set out (at para 7) that—

“Despite its name it is not the function of the law of contempt of court to uphold the dignity of judges. Rather it is to protect the interests of those who are likely to be affected by the outcome of the proceedings in question . . . We would suggest that both the existing law and any proposals for reform should be judged against this touchstone: is the risk of interfering with the proper interests in the stakeholders in the due administration of justice such as to justify and, if so, what, restrictions on freedom of expression?”

37 The paper devotes a section to “Scandalising the court”—a statutory offence in the Caymans pursuant to s 111 of the Penal Code (from para 73)—

“Despite the use of the phrase . . . this branch of the law of contempt is not concerned to preserve the dignity of judges or to protect them from criticism but to maintain public confidence in the administration of justice as a continuing process . . . The most common examples are scurrilous abuse or unfounded accusations

¹¹ 2007 JLR N [1].

¹² 2002 JLR N [4].

of impartiality. Criticism of a judge or court is not contempt and nor does it become so for being expressed in strong language. It seems to be accepted that the offending material must be such as to create a real risk that public confidence in the administration of justice will be undermined. It is tolerably clear that this kind of contempt is an offence of strict liability . . .

75 We do not favour the wholesale abolition of the offences, statutory and at common law, of scandalising the court. We do not consider the fact of its abolition in the UK has much relevance in the Islands. Here, the Grand Court consists of six permanent judges . . . in the UK, there are presently 92 Crown Court Centres . . . [I]n the Islands the local media will report in detail on cases . . . which in the UK, even in local newspapers, would merit at best a few lines. These differences indicate to us that in the Islands judicial officers are more exposed not just to public criticism, which is permissible, but to public abuse which is not. Some recent online comments from anonymous sentences for sexual offences have come very close to the red line if they have not actually crossed it. We do not believe the UK argument that the judges need no greater protection than other public figures, such as MPs, and that the defamation laws are sufficient for that purpose necessarily holds good in the Islands.”

J. Scandalising the court—an appropriate tool for a small jurisdiction?

38 This writer can do no better than refer to the Law Commission of England and Wales Consultation Paper No 207, “Contempt of Court: Scandalising the Court. A Consultation Paper” (“UKLCCP207”), the recommendations of which led to the abolition of the offence in England & Wales¹³—

“2. The rationale for an offence of scandalising the court derives from the need to uphold public confidence in the administration of justice. In many ways, this need is particularly acute in a democracy, where the power and legitimacy of the judicial branch of government derives from the willingness of the people to be subject to the rule of law. In consequence, the public must have faith in the judicial system.” [Emphasis added.]

39 It is important to note, given the context and basis for this paper, that the offence of scandalising the court is directed not at contempt

¹³ See Crime and Courts Act 2013.

during the course of specific proceedings but, rather, at publishing material generally that will undermine the administration of justice.

“3. Yet, in a democracy, *the public also has the right to speak freely about the exercise of power, which must include the freedom to criticise the judicial system and the judiciary.* To this end, such criticism is regarded as ‘political speech’ under the European Convention on Human Rights and therefore subject to the highest degree of protection, although such protection is not absolute. Furthermore, *in a democracy where the judicial system enjoys high levels of public confidence, there might be greater room for criticism (whether unfounded or otherwise) because displacing that confidence by such criticism is less likely.* Balancing this right to freedom of expression with the importance of upholding public confidence in the administration of justice is at the heart of the debate about the offence of scandalising the court.

4. The issue of principle is whether, because of the judiciary’s special role in society, there is a need for special rules to control those who unjustifiably attack and undermine either the institution generally or particular individual judges.

5. In England and Wales this branch of contempt was described almost 40 years ago as “virtually obsolescent”, and the last recorded successful prosecutions were in 1930 and 1931.

6. There have been unsuccessful prosecutions since, but most of the cases reported in England and Wales since the 1930s have been appeals to the Privy Council from Commonwealth countries. It appears that the offence of scandalising the court has been used more frequently in Asia and the Pacific Rim than in England and Wales. It has been argued that the offence may be necessary as a means of preserving the dignity of and respect for the courts in jurisdictions where political conditions are less stable than in England and Wales. On the other hand, it has been argued that prosecutions for this offence may be counterproductive, as they may be perceived, rightly or wrongly, as attempts to suppress political dissent.” [Emphasis added.]

40 Privy Council decisions include *Ambard v Att Gen (Trinidad & Tobago)*;¹⁴ *Perera v R*;¹⁵ *Maharaj v Att Gen (Trinidad & Tobago)*;¹⁶ *Badry v DPP (Mauritius)*;¹⁷ *Ahnee v DPP*.¹⁸

¹⁴ [1936] AC 322.

¹⁵ [1951] AC 482 (PC).

¹⁶ [1977] 1 All ER 411.

41 First mentioned in a draft judgment of 1765, the leading case in England & Wales on scandalising the court is *Gray*¹⁹ where a journalist was found to be in contempt by scandalising the court for describing Mr Justice Darling as an “impudent little man in horsehair, a microcosm of conceit and empty-headedness”. Lord Russell of Killowen CJ described the offence (at 40) as—

“Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court. That is one class of contempt [which] belongs to the category which Lord Hardwicke LC characterised as ‘scandalising a court or a judge’ (*In re Read and Huggonson* [(1742) 2 Atk 469]). That description of that class of contempt is to be taken subject to one and an important qualification. Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court.”

K. Other jurisdictions

42 It would appear that the concept of scandalising the court retains some vitality in Scotland, where it is referred to as “slandering” or “murmuring” judges. Formerly a statutory offence under the Judges Act 1540, it remains a form of common law contempt. The UKLCCP207 paper makes reference to a relatively recent attempt in Scotland to bring proceedings—

“16. In the case of *Anwar* [2008] HCJAC 36, 2008 SLT 710 a solicitor made a broadcast outside the court at the conclusion of a case attacking the prosecution and the trial process. Proceedings were brought against him for contempt, and he was acquitted: this shows that excessive public criticism of judicial institutions is still capable of being treated as contempt, even if the specific charge of slandering or murmuring is not used.”

43 The offence of scandalising the court continues to exist in the Australian state jurisdictions, see *Smith*²⁰—

¹⁷ [1983] 2 AC 297 (PC).

¹⁸ [1999] 2 AC 294 (PC).

¹⁹ [1900] 2 QB 36.

²⁰ ATH Smith, “Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper (2011)”, available at www.crownlaw.govt.nz/uploads/contempt_of_court.pdf.

3.15 . . . [*In re Colina; ex p Torney* [1999] HCA 57, (1999) 200 CLR 386, counsel at first instance abandoned the point that the law might be obsolete, and it was not pursued in the High Court of Australia. See Kirby J at [54].] In *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443, attacks were made upon the partiality of two judges in a book, allegations being made of both bias and corruption, and the claim was made that one of the judges had accepted bribes. The statements were treated as contempt, the charge was upheld by the Supreme Court of Appeal of Victoria, and the High Court of Australia refused leave to appeal.”

44 A recent appeal to the Privy Council from the Supreme Court of Mauritius (population c1.3m) handed down on 16 April 2014, *Dhooharika v DPP*²¹ “centres on the existence and scope of a criminal offence known as scandalising the court or, in Scotland, murmuring judges”.

45 The offence was found by the Board of the Privy Council not only still to exist in Mauritius, but found it to be reasonably justifiable within a democratic society under the Mauritian Constitution.

46 There have been relatively recent cases in Hong Kong, while an offence of this nature has been held to be unconstitutional in the United States, it being described as “English foolishness”.²² In *Pennekamp v Florida*²³ it was observed that “weak characters ought not to be judges”.

47 The French Criminal Code contains offences of abuse of courts and tribunals, introduced in 1958: art 434(24) (abuse by sending materials to court or judge) and art 434(25) (discrediting decision of court).

L. Consideration by the European Court of Human Rights

48 Smith suggests that the impact of the enactment of the Human Rights Act 1998 may have affected the position, since art 10 of the European Convention on Human Rights has been interpreted in ways that accord a higher degree of protection for freedom of speech than did the common law. Equally, however, the Convention specifically permits restrictions upon the freedom of speech where this is necessary for “maintaining the authority and impartiality of the judiciary”—

²¹ [2014] UKPC 11.

²² *Bridges v California* (1941), 314 US 252, 287.

²³ (1946), 328 US 331.

“3.10 That the application of the contempt law can nevertheless sometimes be justified is demonstrated by several cases, including *De Haes and Gijssels v Belgium* (1997) 25 EHRR. [Other cases that might be cited include *Barford v Denmark*, Series A No 149, (1989) 11 EHRR 493 and *Prager and Oberschlik v Austria* (Application 15974/90) (1995) 21 EHRR 1]. The European Court acknowledged that the domestic courts, as guarantors of justice whose role is fundamental in a state based upon the rule of law, must enjoy public confidence. They must accordingly be protected from unfounded and destructive attacks. [This was thought by the court to be especially important in view of the fact that judges are subject to a need for discretion, which may inhibit them from replying to criticism: at [36]–[37]]. It may be concluded, therefore, that if the law is sufficiently clearly defined, and there are proper procedural protections, the common law would still pass muster under European law.”

M. Existence in the Crown Dependencies

49 It does not appear that the question of the existence of the offence of contempt by way of scandalising the court or the judiciary in any of the Crown Dependencies has ever been tested. As far as the Bailiwicks of Jersey and Guernsey at least are concerned, this is perhaps unsurprising, given that contempt by scandalising the court first appeared as a common law offence in England and Wales in 1765, long after the relevant statements of crystallisation of the customary law were made in the Channel Islands.

50 However, with social media potentially enabling the mass publication of comment that might well scandalise the court, it may yet be that consideration should be given to whether the offence can be said already to exist, or whether it might be appropriate to introduce the offence by way of legislation.

N. Arguments for and against the offence

51 Much of the discussion as to whether or not an offence of contempt by way of scandalising the court has effectively been set out above, but it is helpful to summarise the arguments.

52 In support—

- (a) the offence is aimed at safeguarding the authority of the judiciary, which is a legitimate aim under the European Convention on Human Rights;
- (b) if one of the purposes of the law of contempt is to create a sanction for publications which interfere with the administration

of justice, this should apply equally whether or not the interference impinges on particular proceedings;

- (c) while the point was made by the UK Law Commission that—

“The law is not enforced at present; for example, there exists a great deal of scurrilous internet material attacking judges in family cases. This does not appear to have significant adverse consequences, except for promoting the impression that the law can be flouted with impunity: in general, a law should be either enforced or abolished.”

it is for precisely that reason that such an offence might be introduced. In a small jurisdiction such as Guernsey, there are, demonstrably, adverse consequences of having no such law;

- (d) indeed, as the Cayman Islands paper recognised, small jurisdictions are faced with their own particular problems. The handful of judges are well known to the population. Judgments that might, in the UK, be of negligible interest to anyone, are pored over in the local media;
- (e) it is important to the determination of legal disputes that those deciding them should not be cowed or subjected to unjustified ridicule by a sometimes hostile (and possibly misinformed) press;
- (f) judges are in a unique position in which their ability to answer back is limited

53 On the other hand—

- (a) the offence would limit the right to free speech;
- (b) prosecutions for scandalising are counterproductive, as they give the impression that the judicial establishment is trying to stifle criticism, and risk being perceived as self-serving. As Lord Pannick said in the House of Lords debate of 2 July 2012 on this issue—

“The irony is that public confidence in the judiciary is undermined far more by legal proceedings that suggest that the judiciary is a delicate flower that will wilt and die without protection from criticism than by a hostile book or newspaper comment that would otherwise have been ignored.”

- (c) there is no need for judges to have a special protection that is not extended to other persons of prominence such as Government ministers.

54 Which of these considerations should take precedence is a matter for careful consideration.

O. Conclusion

55 It is, it goes without saying, of note that the offence of contempt by way of scandalising the courts has a history in common law jurisdictions, and notably in England and Wales.

56 Furthermore, it is of course interesting that, notwithstanding that the large jurisdiction of England and Wales has taken the decision to abolish the offence, the Law Commission of another small jurisdiction—the Cayman Islands—recommends retaining the offence there.

57 It is this writer's view that, if it proves necessary to assist the judiciary or other Officers of the Court of the Bailiwick of Guernsey in ensuring that public confidence in the administration of justice is not undermined, there is a healthy seam of cross-jurisdictional jurisprudence into which the Bailiwick of Guernsey could tap in order to introduce the offence of contempt by way of scandalising the court. Whether or not legislation would be necessary—or desirable—for such an offence is open to question.

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