



# LAW ANSWERED

## SAMPLE CHAPTER FROM OUR MEDIA & ENTERTAINMENT LAW ELECTIVE GUIDE

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# CONTEMPT OF COURT

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All references in this section are to the **Contempt of Court Act 1981 ("CCA")** unless otherwise stated.

The law on contempt of court is designed to prevent acts that interfere with the administration of justice. In the context of criminal litigation, one of its primary uses is to regulate media reporting of criminal investigations and proceedings, in order to prevent jurors from being prejudiced by publicity either before or during a trial. To protect the integrity of the judicial system, it is important that the jury do not consider information from sources outside the courtroom, for example on television, in newspapers or on the radio. There should not be a trial by media – there must be a fair trial in accordance with **Art. 6 ECHR**.

The rights of the defendant under **Art. 6 ECHR** must be balanced against the rights of the press under **art. 10 ECHR**. The press must be allowed to report, but only in a way that does not infringe the defendant's right to a fair trial.

Contempt of court is a strict liability offence (under **s. 1 CCA**). This means that there is no mens rea. In order to be in contempt under the **CCA**, the conduct must relate to active proceedings (**defined in Schedule 1**), for example where a defendant has been arrested or a warrant has been issued for their arrest. A prosecution under the **CCA** can only be brought by or with the consent of the Attorney General, or on the motion of a court with jurisdiction (**s. 7**). If the conduct does not relate to active proceedings, it may be possible to bring a prosecution for common law contempt if proceedings are imminent or pending. However, common law contempt requires the proof of intent (although if there was a real possibility of prejudice, intent can sometimes be imputed from the circumstances).

To determine whether a publication will be considered to be contempt of court, the court will look at a number of factors, including:

## THE PROMINENCE OF THE STORY

The more prominent the story (in a newspaper, for example), the more likely it is that it would come to the attention of a juror. The position and layout of the story also needs to be considered.

## The likely readership of the publication

## TIMING OF THE PUBLICATION

This relates to both the initial and residual impact of publication.

- If the publication is released in the early stages of the trial, it is more likely to come to the attention of the jurors and therefore amount to contempt.

**THE CONTENT OF  
THE ARTICLE**

Content which can be especially likely to be prejudicial includes:

- **Details of criminal records or unusual characteristics** – if these are available to a juror before or during the trial, they will likely cause that juror to become prejudiced. Further, it needs to be considered whether criminal records have any relevance in the current case.
- **Details of the defendant’s background** – again, this information may cause the juror to become prejudiced against the defendant in the case.

**Photographs of the defendant** – this can cause serious prejudice if it is a photograph which does not paint the defendant in a good light.

**LIKELIHOOD OF  
THE  
PUBLICATION  
COMING TO THE  
ATTENTION OF A  
POSSIBLE JUROR.**

The more likely it is that the publication will come to the attention of the juror, the more likely it is that it will amount to contempt.

The scope of the offence is limited under **s. 2(2)**. A juror may not have seen the publication but if the publication is written in such a way as to create a substantial risk of it coming to a juror’s attention, contempt can still be found.

The fact that the publication does not ultimately affect the outcome of proceedings is not relevant (**R v Evening Standard**).

The key point is the level of risk that the publication may have done so.

## WHAT IS A SUBSTANTIAL RISK?

A substantial risk is a risk that is “not remote” or “not insubstantial”. It need not be a high risk.

### KEY CASE - AG v MGN

In the leading case on **s. 2(2)**, **Schiemann LJ** set out 10 principles which should be used to assess the risk that a publication might prejudice the defendant’s right to a fair trial:

1:	Each case must be decided <b>on its own facts</b> .
2:	<b>The Court will look at each publication separately</b> and test matters as at the time of publication. Nevertheless, the fact that earlier publications may have already created some risk of prejudice does not prevent a finding that the latest publication has created a further risk.

3:	The publication must create some risk that the course of justice in the proceedings will be <b>impeded or prejudiced</b> by that publication.
4:	<b>That risk must be substantial.</b>
5:	The substantial risk must be that the course of justice in the proceedings in question will not only be impeded or prejudiced, but <b>seriously</b> so.
6:	The Court will not convict for contempt unless it is <b>the publication</b> that has created the substantial risk of a serious effect on the course of justice.
7:	<p>In making an assessment of whether the publication creates a substantial risk of a serious effect on the course of justice, the court will consider the following, amongst others:</p> <ul style="list-style-type: none"> <li>a) the <b>likelihood</b> of the publication coming to the attention of a potential juror;</li> <li>b) the likely <b>impact of the publication on an ordinary reader</b> at the time of the publication; and</li> <li>c) the <b>residual impact</b> of the publication on a <b>notional juror</b> at the time of trial.</li> </ul>
8:	<p>In making an assessment of the likelihood of the publication coming to the attention of a potential juror the Court will consider amongst other matters:</p> <ul style="list-style-type: none"> <li>a) whether the publication circulates in the area from which jurors are likely to be drawn; and</li> <li>b) how many copies circulated.</li> </ul>
9:	<p>In making an assessment of the likely impact of the publication on an ordinary reader at the time of publication, the Court will consider amongst other matters:</p> <ul style="list-style-type: none"> <li>a) the prominence of the article in the publication; and</li> <li>b) the novelty of the content of the article in the context of likely readers of that publication.</li> </ul>
10:	<p>In making an assessment of the residual impact of the publication on a notional juror at the time of the trial, the Court will consider amongst other matters:</p> <ul style="list-style-type: none"> <li>a) the length of time between publication and the likely date of trial;</li> <li>b) the focusing effect of listening over a prolonged period to evidence in a case; and</li> <li>c) the likely effect of the judge's directions to a jury.</li> </ul>

## DEFENCES TO A CHARGE OF STRICT LIABILITY CONTEMPT

1:	<p><b>Innocent Publication or Distribution (s. 3)</b></p> <ul style="list-style-type: none"> <li>A publisher or distributor will have a defence if they can prove that they took <u>all reasonable care</u> at the time of publication and <u>had no reason to suspect that proceedings were active</u>. This could include the publisher making enquires with the police or the CPS about the status of proceedings (<b>s. 3(1)</b>).</li> <li>The burden is on the distributor to prove that it took all reasonable care over the content of the publication (<b>ss. 3(2) &amp; (3)</b>).</li> </ul>
2:	<p><b>Contemporary report of proceedings (s. 4)</b></p> <ul style="list-style-type: none"> <li>A person will have a defence if they have published a <u>fair and accurate report of legal proceedings</u> held in public, published <u>contemporaneously</u> and in <u>good faith</u> (<b>s. 4(1)</b>). Care must be taken as to what is being published. Care must be taken not to disclose information that has not been revealed to the jury or make comment on the trial or evidence that are not 'called for'.</li> <li>A <b>Postponement Order</b> can be made to postpone the publication of any report of the proceedings for such period as the court thinks necessary for that purpose (<b>s. 4(2)</b>). This is a useful tool to help the judge control what type of information is allowed to be published. Most importantly, it helps to prevent the jury from being influenced by outside evidence.</li> </ul>
3:	<p><b>Discussion of public affairs (s. 5)</b></p> <p>This defence primarily relates to the media's <b>Article 10 ECHR</b> right to freedom of expression. This defence allows a publication that is made as part of a discussion in <u>good faith</u> of public affairs and is <u>merely incidental</u> not to be treated as a contempt of court under the strict liability rule.</p>

<p><b>AG v English</b></p>	<p>In this case the <b>s. 5</b> defence was successfully applied to an article published by the <i>Daily Mail</i> on the third day of the trial of a doctor who was accused of allowing a seriously handicapped baby to die. The article was about a 'Pro-Life' election candidate who was born without arms.</p> <p>It was held that the article was published in good faith, as it related to an election candidate who was standing for election on a pro-life platform. It appeared that it was by chance that the subject matter of the trial and the article coincided. The article was therefore held to be merely incidental to the trial.</p>
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## COURT REPORTING RESTRICTIONS

Various restrictions are imposed on the reporting of court proceedings to ensure that journalists do not fall foul of the laws of contempt.

Under the **ECHR**, the following articles are particularly relevant to considerations of open justice. Which articles prevail will always depend on the specific circumstances of the case:

<b>Article 2</b>	the right to life;
<b>Article 6</b>	the right to a fair and public trial;
<b>Article 8</b>	the right to respect for private and family life; and
<b>Article 10</b>	the right to freedom of expression.

## PROTECTION OF JOURNALISTIC SOURCES

Journalists have a moral obligation not to disclose their sources of information, as it is often received confidentially from third parties (*see also* the **Editors' Code of Practice clause 14**). **s. 10** provides immunity from contempt of court in relation to the refusal to disclose the identity of a source. However, the same section gives the judge discretion to require disclosure if it is found to be necessary in the interests of justice or national security, or for the prevention of disorder or crime. Failure of the journalist to comply with the order will amount to contempt of court.

## SUMMARY FLOWCHART

