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December 2009

Directorate of Legal Research
LL File No. 2010-003602

ENGLAND AND WALES

LEGAL STANDARDS FOR SECURING IMPARTIAL JURY TRIALS

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Executive Summary

There are a variety of methods in place to secure fair and impartial trials in England and Wales. These include the random selection of jurors, disqualification of jurors where there is cause, and the quashing of cases if the jury has not acted impartially.

I. Introduction

The right to a fair trial is enshrined in both the common law and statute, notably through the incorporation of the European Convention on Human Rights into national law, which provides the right to a fair trial in Article 6.¹ Many mechanisms are present in England and Wales to ensure that a defendant gets a fair trial. This report focuses on those applying to jury trials. Emphasis is also placed upon the importance of a fair trial over the freedom of the press through strict contempt of court laws that are provided for by statute and common law.² Jurors are selected randomly, and are presumed to be impartial and to follow instructions that their verdict be based solely on the evidence heard in court.³

II. Contempt of Court Act and Media Publishing

The Contempt of Court Act 1981 is the main statute that governs reporting procedures of trials. This Act serves to prohibit the media from publishing or broadcasting materials that may seriously prejudice the administration of justice and applies to active cases from the moment of arrest to the time of conviction.⁴ Contempt of court under this Act is punishable with up to two years imprisonment and/or a fine.⁵

The Act does have exemptions and does not prohibit the publication or broadcasting of materials that are “a fair and accurate report of legal proceedings held in public, published

¹ Human Rights Act 1998, c. 42.

² Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, 62 LAW & CONTEMP. PROBS. 141 (Spring 1999).

³ R v. Mirza [2004] UKHL 2.

⁴ Contempt of Court Act 1981, c. 49 §4.

⁵ *Id.* §14.

contemporaneously and in good faith.”⁶ Nor does it prohibit “publication(s) made as or as part of a discussion in good faith of public affairs or other matters of general public interest ... if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.”⁷

In certain cases, typically those that are high profile or involve individuals whose identity may need to be withheld for public protection, the Contempt of Court Act permits the court to order a media “black out.”⁸ This order prohibits the publication of any report of the proceedings, or any *part* of the proceedings, for trials that are occurring, pending or imminent, “for avoiding a substantial risk of prejudice in the administration of justice ... for such period as the court thinks necessary for that purpose.”⁹ The Consolidated Criminal Practice Direction provides that orders under this section must include the “precise scope of the order; the time at which it shall cease to have effect; and the specific purpose for which it was made [and] must be put into writing.”¹⁰ When determining whether to make an order the court must balance and “have regard to the competing public considerations of ensuring a fair trial and of open justice.”¹¹ In a 2008 case the Court of Appeal stated that it is “impossible to over-emphasise the importance to be attached to the ability of the media to report criminal trials. In simple terms this represents the embodiment of the principle of open justice in a free country.”¹² However, this need is balanced against ensuring a fair trial by using the test in the Contempt of Court Act 1981, mentioned above, which is whether the publication of the story would create a substantial risk of serious prejudice to active judicial proceedings.¹³

III. Impaneling a Jury

Juries in England are presumed to be impartial unless there is evidence to the contrary¹⁴ and the principle that jurors be selected randomly has been rigorously defended with limits on questions that may be asked of them prior to them being sworn in.¹⁵ When jurors are selected for a case¹⁶ they must take the juror’s oath in open court, which is as follows: “I swear by

⁶ *Id.* §4 (1).

⁷ *Id.* §5.

⁸ *Id.* §§4, 11.

⁹ *Id.* §4(2).

¹⁰ Consolidated Criminal Practice Direction ¶ I.3.3, *cited in* BLACKSTONE’S CRIMINAL PRACTICE ¶ D3.80 (Hooper L.J. et al. eds., 2009) (citing *R v. Horshal Justices, ex parte Farquharson* [1982] QB 762).

¹¹ BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 10, ¶ D3.81 (citing Lord Taylor of Gosforth CJ in *Ex party The Telegraph plc* [1993] 1 WLR 980).

¹² *Re Trinity Mirror plc* [2008] 2 All ER 1159.

¹³ Contempt of Court Act 1981, c. 49 §4.

¹⁴ *R v. Mirza* [2004] UKHL 2, [2004] 1 AC 1118 at [152], per Lord Rodger of Earlsferry.

¹⁵ *Id.*

¹⁶ This is done in accordance with the procedures set forth in the Juries Act 1974, c. 23, §11 which states: “The jury to try and issue before the court shall be selected by ballot in open court from the panel, or part of the panel, of jurors summoned to attend at the place and time in question.”

almighty God that I will faithfully try the defendant[s] and give [a] true verdict[s] according to the evidence.”¹⁷

There are circumstances in which a juror, or the entire jury, may be challenged, and they may be replaced in cases where the:

- Prosecution or defence challenge for cause;
- prosecution asks a juror to stand by; or the
- Judge exercises his discretionary power to remove a juror.¹⁸

A. Challenging Juries

The judge has discretion to stand jurors down and during their impaneling it is common practice to provide the names of the parties to the case and any key witnesses to ensure that any connections between them and the jurors are determined prior to the commencement of proceedings.¹⁹ Both the prosecution and defense may also challenge a single juror (known as a challenge to the polls) or the entire panel of jurors (known as a challenge to the array) in certain circumstances.²⁰

B. Challenge to the Array

Grounds for challenging the array are provided for by the Juries Act 1974 and may be exercised on the grounds that the person summoning the jury acted improperly or was biased.²¹ This section was based upon the common law, which was commonly exercised when the person responsible for summoning the jury had an interest in the outcome of the trial.²² In the 1970s there were successful challenges based upon “the racial or religious composition of the jury,”²³ although there is a lack of recent cases based upon this section, which some commentators contribute to the Lord Chancellor assuming the role for summoning jurors.²⁴

¹⁷ Consolidated Criminal Practice Direction ¶ IV.42.4, in BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 10, App. 7.

¹⁸ BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 10, ¶ D13.19. *See also* the Juries Act 1974 §16; *Mansell v. The Queen* (1857) 8 E & B 54; & *Mason* [1981] QB 881. In *Mason*, the judge noted that judges “have a right to intervene to ensure that a competent jury is empanelled. The most common form of judicial intervention is when a judge notices that a member of the panel is infirm or has difficulty in reading or hearing; and nowadays jurors for whom taking part in a long trial would be unusually burdensome are often excluded from the jury by the judge.” *Mason* [1981] QB 881.

¹⁹ *R v. Khan* [2008] 3 All ER 502 (CA), *cited in* ARCHBOLD CRIMINAL PLEADING, EVIDENCE AND PRACTICE ¶ 4.233a (P.J. Richardson et al. eds., 2009).

²⁰ BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 10, ¶ D13.20.

²¹ Juries Act 1974, c. 23, §12.

²² BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 10, ¶ D13.21.

²³ *Id.* ¶ D13.21, *referring to* *Danvers* [1982] Crim. LR 680; *Broderick* [1970] Crim. LR 155; & *Ford* [1989] QB 868.

²⁴ BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 10, ¶ D13.22.

C. Challenge to the Polls

As noted above, individual jurors may also be challenged if they are not eligible to sit as a juror. Those ineligible to serve on a jury include those that do not meet age or residency requirements; those not on the electoral role; and those that have been convicted of certain crimes. It is now accepted practice that in certain cases criminal background checks may be run on jurors to determine that they are not disqualified by reason of having certain criminal convictions.²⁵ Any challenge to the polls must occur before the jurors are sworn in and not during the course of the trial.²⁶ A major contrast between the English system and U.S. system of challenging and subsequently removing a juror for cause is that the English system only allows questioning of the juror *after* the challenge has been made.²⁷ Thus, the challenging party must show prima facie evidence of the grounds of the challenge before juror questioning is permitted—“the challenger must lay a foundation of fact.”²⁸

Jurors that are qualified can be challenged *propter affectum*, “on the ground of some presumed or actual bias which would make him unsuitable to try the case.”²⁹ Historically this was held to mean that the juror had expressed hostility to either side of the case or had some connection to the party in the case. More recently, though, jurors have been challenged under this provision where their mind is considered “so prejudiced that [they are] unable to try the case impartially.”³⁰ This principle arose in a case where the defense objected to jurors that had read newspaper articles reporting that the two accused had been convicted previously of murder and to a number of other facts that were not in evidence at the trial. The judge in the case stated:

This does, in my judgment, lead to a prima facie presumption that anybody who may have read that kind of information might find it difficult to reach a verdict in a fair-minded way. It is, however, a matter of human experience ... first, that the public’s recollection is short, and, secondly, that the drama ... of a trial almost always has the effect of excluding from recollection that which went before. A person summoned for this case would not ... disqualify himself merely because he had read any of the newspapers containing allegations of the kind ... but the position would be different if, as a result of reading what he had, his mind had become so clogged with prejudice that he was unable to try the case impartially.³¹

²⁵ A complete list of those that are ineligible to sit as jurors is contained in the Juries Act 1974, c. 23 § 12(4) & sched. 1. Guidance regarding the use of criminal background checks on potential jurors is contained in the Attorney General’s Guidelines on Jury Checks, 88 Cr App R 123.

²⁶ Juries Act 1974, c. 23 §12(3); Morris (1991) 93 Cr. App. R 102.

²⁷ Dowling (1848) 7 St. Tr. NS 382 & Chandler (No. 2) [1964] 2 QB 322, *cited in* BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 10, ¶ D13.29.

²⁸ Kray (1969) 53 Cr App R 412.

²⁹ BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 10, ¶ D13.25 (citing the Juries Act 1974, c. 23 § 12 (4)).

³⁰ *Id.*

³¹ Kray (1969) 53 Cr. App. R 412.

Thus “awareness of adverse press reporting ... should not be the subject of enquiries of the jury panel; such enquiries might produce the result sought to be avoided by reminding the jury of the adverse publicity.”³²

As always, there are exceptions to the rule, both that jurors cannot be questioned prior to being sworn in and that certain adverse newspaper articles cannot disqualify a juror from sitting. A judge in one particular case stated that the production of the offending articles was in itself sufficient to raise a prima facie ground of challenge; however, he emphasized that it would be:

...regrettable if our courts got into the position of the courts in some countries where every time a juror comes into the jury box to be sworn he is likely to be cross-examined at length about his views and beliefs. Such a practice would be foreign to the spirit of the administration of justice in this country. No one must leave this court thinking that my judgement on this point amounts to a licence for counsel to examine and cross-examine prospective jurors as to what they believe or do not believe. Indeed, I want to stress – and I cannot stress too strongly – that the combination of facts which have brought about the situation with which I have had to deal in this case is, in my view, wholly exceptional.³³

IV. **Jury Instructions**

When a jury is impaneled the trial judge provides jurors with directions to remind them that they must:

- Try the case solely on the evidence heard in court;
- Refrain from discussing the case with other people, including family,³⁴ and,
- Refrain from conducting private research, for example using the Internet.³⁵

There is a rebuttable presumption that jurors follow the directions they have been given.³⁶ If it can be determined that there is a real possibility that the jury has not followed these instructions, the conviction may be declared to be unsafe. If the conviction is declared unsafe, the conviction can be quashed.³⁷

³² ARCHBOLD CRIMINAL PLEADING, EVIDENCE AND PRACTICE, *supra* note 19, ¶ 4-233a (citing R v. Andrews [1999] Cr. LR 156 (CA)).

³³ Kray (1969) 53 Cr. App. R 412.

³⁴ Prime (1973) 57 Cr. App. R 632. In this case Lord Widgery C.J. stated: “It is important in all criminal cases that the judge should on the first occasion when the jury separate [adjourn] warn them not to talk about the case to anybody who is not one of their number.” *See also* Consolidated Criminal Practice Direction ¶ IV.42.7, *in* BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 10, App. 7.

³⁵ R v. Marshall and Crump [2007] EWCA Crim. 35.

³⁶ Montgomery v. HM Advocate [2003] 1 AC 641 & Paris and others (1993) 97 Cr App R 99.

³⁷ R v. Thakrar [2008] EWCA Crim. 2359, available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Crim/2008/2359.html&query=thakrar&method=boolean> (last visited Dec. 16, 2009).

V. Appeals Process and Cases Involving Quashed Convictions Due to Jury Impartiality

Various processes in the English court may be used to appeal judgments where the jury has been deemed biased. An appeals process that involves the questioning of jurors is limited, however, as the Juries Act 1974 prevents “verdicts from being challenged unless the irregularity complained of was raised but not remedied at trial.”³⁸

There have been several cases where convictions were quashed due to concerns that the impartiality of the jury was compromised by the use of outside materials and media reports. The number of these cases has increased as a result of media reporting, particularly involving individuals charged with terrorist offenses, for which the judiciary has been strongly criticized for not taking action to prevent reporting.³⁹

The method used to determine whether the conviction should be quashed as being unsafe is currently swaying towards considering the type of external materials the jury has looked at, and a test of bias or prejudice has also developed through the common law, which is: “whether the jury which tried the accused can be shown to be biased, [and] also whether “there were sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the court.”⁴⁰

In *R v. Karakaya*⁴¹ the court quashed a conviction for rape and indecent assault because the jury accessed unauthorized materials that were considered to be “of a campaigning nature.”⁴² In *R v. Marshall* and *R v. Crump*⁴³ the appellants based their appeal on the fact that the jury had consulted extraneous materials obtained off the Internet. The court dismissed the appeal, holding that while the use of additional material could in principle render the decision unsafe, in this instance the material that was used did not resolve the issues of the trial and the jury had sought clarification from the judge, indicating they had turned to him for guidance rather than to the extraneous materials. This case shows that the court now looks to whether the use or access to the materials renders the conviction unsafe rather than quashing a conviction simply because extraneous material has been used.⁴⁴

In the high profile case of now convicted terrorist Abu Hamza, the Court of Appeal dismissed an appeal by Hamza in which he claimed that his trial had been prejudiced by media reports. The Court of Appeal held: “the fact ... that adverse publicity may have risked

³⁸ Juries Act 1974, c. 23 §18; BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 10, ¶ D13.42; & *Mirza* [2004] 1 AC 1118.

³⁹ Tanveer Qureshi, *Adverse Publicity*, 157 NEW LAW JOURNAL 969.

⁴⁰ *Sander v. UK* [2000] Crim. LR 767, *cited in* BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 10, ¶ D13.51. This approach has developed in part as the Contempt of Court Act 1981 prohibits the jury from disclosing how they reached their decision. Contempt of Court Act 1981, c. 49, §8.

⁴¹ *R v. Karakaya* [2005] 2 Cr. App R 77.

⁴² *R v. Karakaya* [2005] 2 Cr. App R 77 *referred to in* *R v. Marshall et al*, [2007] EWCA Crim. 35.

⁴³ *R v. Marshall* and *R v. Crump* [2007] EWCA Crim. 35.

⁴⁴ Inquiries into how the jury reached their decision is prohibited under the Contempt of Court Act 1981.

prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance, it will be possible to have a fair trial.”⁴⁵

In *R v. Woodgate et al* (commonly referred to as the “Leeds Footballers Case”) a trial was abandoned following the publication of a highly prejudicial news article in the *Sunday Mirror*, for which the newspaper admitted contempt and was fined.⁴⁶ This case was an extremely high-profile case involving several premiership football (soccer) players charged with affray (the use or threat of unlawful violence towards another person) and causing grievous bodily harm. The Attorney General was so concerned by the effect that media reporting would have on the trial both pre- and post-arrest that he issued three separate guidance notes to editors.⁴⁷ These notes did not have legal authority, and were intended as guidance to editors to help them in determining the material they could lawfully publish. In the first note the Attorney General issued prior to any arrests he noted that he was “very concerned that evidence is not distorted by potentially prejudicial reporting.”⁴⁸ After the arrest of the footballers, the Attorney General issued a second notice calling on editors to exercise restraint, particularly with regard to the publication of pictures and names, which was a key issue in the case. In the third note, sent after a newspaper had published the names of two of the accused, he called on editors not to publish this information again. As noted above, the publication of an article in the *Sunday Mirror*, which included an interview with the victim’s father, resulted in the dismissal of the jury after the judge considered the article caused a substantial risk of seriously prejudicing the jury. The trial costs were estimated to be at £1 million (approximately US\$1.65 million) and led to the introduction of an amendment that now allows the court to recover “wasted” costs from third parties where there has been serious misconduct by that party.⁴⁹

VI. Sequestration of Juries

It is now standard practice to not sequester juries, although ultimately the decision rests with the court. The Juries Act 1974 provides the judge with the discretion to allow a jury to adjourn⁵⁰ and it is currently common practice to allow juries to adjourn for lunch, overnight, and even after the jury has retired to consider their verdict. The trial judge typically provides a warning to the jury on the first occasion that they adjourn of the importance of not discussing the case with other people. In one case a judge held that if the directions are issued correctly and the jury is warned of the dangers of discussing the case with others “and brings that home to them, then it is to be assumed that they will follow the warning and only if it can be shown that they have misbehaved themselves does the opportunity of an application [for discharge] arise.”⁵¹

⁴⁵ Tanveer Qureshi, *supra* note 39, at 969.

⁴⁶ Attorney-General v. Mirror Group Newspapers Ltd, [2002] EWHC 907 (Admin).

⁴⁷ Philip Houlst, *Contempt of Court Act: Restraining Influence*, LAW SOCIETY GAZETTE 100.43(24) (Nov. 2003).

⁴⁸ *Id.* quoting Attorney General’s Guidelines on Jury Checks, 88 Cr App R 123.

⁴⁹ Costs in Criminal Cases (General) (Amendment) Regulations 2004, SI 2004/2408.

⁵⁰ Juries Act 1974, c. 23, §13 provides, “If, on the trial of any person for an offence on indictment, the court thinks fit, it may at any time (whether before or after the jury have been directed to consider their verdict) permit the jury to separate.”

⁵¹ Prime (1973) 57 Cr. App. R. 632.

VII. Independence of the Prosecution

Crown Prosecutors in England and Wales that act on behalf of the Crown Prosecution Service (the main prosecution service for England and Wales) are bound to follow the Code for Crown Prosecutors.⁵² This provides that prosecutors should be:

...fair, independent and objective. They must not let any personal views about ethnic or national origin, disability, sex, religious beliefs, political views or the sexual orientation of the suspect, victim or witness influence their decisions. They must not be affected by improper or undue pressure from any source.⁵³

Individuals qualified as Solicitors may have their practicing certificate suspended if they have been convicted of an offense that involves dishonesty or deception or an indictable offense if approved by the Solicitors Disciplinary Tribunal.⁵⁴ Solicitors are also not permitted to commence or proceed with any legal action while in prison.⁵⁵

Individuals qualified as Barristers in England and Wales charged with an indictable offense may be suspended by a Suspension Panel of the Bar Council if it is considered that the charges will lead to a conviction that would “warrant a charge of professional misconduct and referral to a Disciplinary Tribunal.”⁵⁶

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March 2010

⁵² Crown Prosecution Service, Code for Crown Prosecutors (2004), available at <http://www.cps.gov.uk/publications/docs/code2004english.pdf> (last visited Dec. 16, 2009).

⁵³ *Id.* ¶ 2.2.

⁵⁴ Solicitors Act 1974, c. 47, §13B.

⁵⁵ *Id.* §40.

⁵⁶ Bar of England and Wales, Code of Conduct, Annex N, ¶ 6, available at <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/> (last visited Dec. 16, 2009).