Judiciary of England and Wales

In the Southwark Crown Court

Mr Justice Fulford **20th July 2012**

Between:

Regina
-v-
Simon Harwood

Judgment

Background and submissions

1. This decision concerns two reports on the Mail's Online website concerning inadmissible material relating to alleged earlier incidents of violence on the part of the defendant.

2. On 22 May 2012 I decided in a Ruling (handed down in writing) that the prosecution was not entitled to introduce evidence of two alleged previous incidents of bad character, namely:

   FIRST: Material relating to an event on 25th May 2005 when the defendant was allegedly involved with a number of other officers in the arrest of Mr. Owusu-Afriye. It is alleged he used unnecessary force by delivering a knee strike to the left side of Mr. Owusu-Afriye's torso, in the area of his kidneys.

   SECOND: Evidence relating to an incident on 24th November 2008 when the defendant was involved with 5 other officers in stopping and searching the vehicle of Mr. Junior Samms, an AA patrolman. The conduct of the defendant is said to have been the worst of the policemen who had dealings with Mr. Samms in that it is alleged he twisted Mr. Samms' arm when he was handcuffed and repeatedly told him to "shut up".

3. I noted that:

> “[…] in support of the two incidents the prosecution have limited their application to calling two witnesses only: Mr Ward (a passing member of the public) as regards the incident on 25th May 2005 and Mr. Samms for the events on 24th November 2008. The Prosecution does not propose to call Mr. Owusu-Afriye, Police Constables Calver, Jury, Leung and Wilson, Police Sergeant Paul and a doctor for the incident concerning Mr Owusu-Afriye and Police Constables Walker, Mitchell and Jackaman and Police Sergeant Bowman and a further officer for the incident concerning Mr Samms. The various police constables were present at both events (Police Sergeant Paul was also present when Mr Owusu-Afriye was detained) and their statements in varying degrees significantly contradict the accounts of the two complainants.

4. Against that background, I concluded:

> “[…] I have no doubt that pursuant to section 101 (3) this material would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. The jury would in effect have to conduct three trials, the first relating to the index offence and the other two concerning the accused’s alleged propensity to act in the manner alleged against him on 1st April 2009. The mixed factual and legal issues would become excessively complex, in that the jury would need to ensure that their approach to the legal elements of the index offence was only properly influenced by their factual findings reached to the criminal standard in relation to all three incidents. Given the facts on the central incident are not necessarily at all straightforward, to add two strongly disputed additional allegations for the purposes advanced by the prosecution would undoubtedly put the fairness of these proceedings in jeopardy.”

5. Notwithstanding that Ruling, prior to the commencement of this trial it was brought to my attention by the parties that a number of websites run by various newspapers and at least one broadcaster contained articles that were readily available and dated back to 2010, in which unproven allegations made against PC Harwood were rehearsed (these included the Mail, the Telegraph, the Mirror and Channel 4 News). By way of example, there continued to be readily available on the Mail’s Online website (certainly until late in the trial)
the following extract that is taken from a longer article entitled “’Cover-up’ storm over G20 death: Fury as DPP rules policeman who hit news vendor won’t be charged” (dated 23 July 2010):

The PC who left under a cloud
PC Simon Harwood, the officer who was accused of killing Ian Tomlinson, left the Met in controversial circumstances several years ago while facing misconduct proceedings over an alleged off-duty road rage incident.

The 43-year-old was allowed to retire on ill health grounds because of a leg or shoulder injury before the disciplinary case, which is said to have involved allegations of violence, it is said.

But after surgery on his injury, he rejoined the force as a civilian operator, dispatching officers to calls, and then after being declared medically fit, was accepted to join Surrey Police as a PC.

Later, despite the outstanding disciplinary proceedings, he transferred back to the Met and was deployed in the riot squad.

Last night Scotland Yard refused to comment on the apparent vetting bungle. It said: "It is not appropriate to comment on the officer's employment history-until the completion of any criminal or misconduct proceedings."

But a source told a Sunday newspaper last year: 'No former officer with an outstanding disciplinary matter should ever be given his job back."

6. In addition, other websites such as "Facebook", "You Tube" and "38 degree" published 'posts' which shortly before the commencement of the trial contained details of, or referred to, various disciplinary allegations. There were also websites or blogs run by particular individuals in which a variety of contributors expressed their personal opinions on these issues.

7. In order to address these concerns, a letter I sent to the parties on 31 May 2012 was forwarded by the Crown Prosecution Service to those responsible for the main websites that contain this material, in the following terms:

    I am the trial judge in this case. The defendant, a metropolitan police officer, is charged with the manslaughter of Ian Tomlinson during an event on 1 April 2009, namely the violent protest in the City of London that coincided with the meeting of the G20 group of finance ministers and central bank governors from 19 countries and the European Union.

    A ruling under the Contempt of Court Act 1981 is in force, and I have attached the terms of the order to this letter.

I am concerned about press reports and other material that remain available on the internet relating to accusations of bad behaviour that have been levelled against the accused that are separate from the incident on 1 April 2009 for which he will stand trial, and which are inadmissible. The relevant publications include (but this list is not exhaustive) i) press reports which were originally published in 2010 and which are accessible via various websites; ii) items on "Facebook", "You Tube" and "38 degree" that include "posts" concerning disciplinary (and possibly other) allegations; and iii) material on websites (such as Wikipedia) or "blogs" on which individuals express their opinion (including the Ian Bone blog site, "Raewald" and "Unforgiven"). The websites run by newspapers and broadcasters include those hosted by The Telegraph, The Mirror, The Mail, The Guardian and Channel 4 News, although it is highly likely that this extends to other sources.

Internet service providers, Bulletin Board Operators, Web Hosting Services and search engines (such as Google) will need to consider whether they are enabling the publication of this material.

None of these separate allegations of bad behaviour will feature in the evidence in this case, in part because of a ruling that I handed down on 22 May 2012 at Southwark Crown Court.

The continued publication of this material on the internet, or elsewhere, prima facie constitutes a contempt of court within section 1 of the Contempt of Court Act 1981 and it is critical – particularly given the impending trial – the Order of the Court is complied with and the publication of this information ceases immediately.

Although this material should be removed from the internet forthwith, I will hear submissions from any individual or body affected by the Contempt of Court Order who wishes to raise any relevant issues during the morning of the first day of the trial on 18 June 2012.

8. The order referred to in the letter was made on 17 October 2011 by Mr Justice Cooke, in the following terms:

    1. *The order made, under section 4(2) of the Contempt of Court Act 1981, by the Coroner on 26 April 2011, in the inquest proceedings, is to be continued until further order of this Court. The order of 26 April is as follows:*

        Further to the order made orally by the Coroner on 21 March 2011, and for the avoidance of doubt, it is ordered that by virtue

of Section 4(2) of the Contempt of Court Act 1981 the publication of the Coroner's ruling of 31 March 2011 and any legal argument in the absence of the jury on the topic with which the ruling is concerned and this order itself be postponed until further order within the proceedings of the inquest, on the ground that it is necessary for avoiding substantial risk of prejudice to the administration of justice in these proceedings.

2. *Additional to that order, and for the avoidance of doubt, it is ordered that publication of any information about PC Harwood's personnel record is postponed until further order of this Court. This order is made on the ground that is necessary to do so to avoid a substantial risk of prejudice to the administration of justice in these proceedings pursuant to Section 4(2) of the Contempt of Court Act 1981.*

9. At a hearing I convened on 15 June 2012 to hear submissions from the parties and the media as to any further steps that should be taken by the court to address the continued availability of the inadmissible evidence on the internet, one of the issues that arose was whether articles and comments in this category constituted the material publication of information that had been lawfully prohibited by Cooke J's order. Mr Millar Q.C., who represented a number of media organisations, submitted the order was unlawful and needed to be revised because it related to past reporting rather than relating to the proceedings themselves. I acceded to that submission, given that previous reports of earlier alleged misbehaviour cannot properly fall within the ambit of a power to postpone reports of the proceedings (namely, the trial), and in consequence, I revoked paragraph 2 of Cooke J's Order.

10. Thereafter, I set out in open court a short rehearsal of my views on this issue. I had concluded that two principal questions had arisen. The first was whether these publications came within the strict liability rule of section 1 of the Contempt of Court Act 1981 – namely, 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" – because they are publications addressed to the public at large or to a section of the public, and because they will "create a substantial risk that the course of justice in the proceedings in question will be seriously […] prejudiced" (see section 1 and section 2 Contempt of Court Act 1981). And, second, whether these publications constituted a contempt in the face of the court.

11. As to the first of those questions, without attempting finally to determine the issue for the purposes of these proceedings, I expressed the view that the internet articles are "publications" for the reasons set out by Lord Osborne in

Her Majesty's Advocate against William Frederick Ian Beggs (No2) 2001 Scot (D) 30/10; 2002 S.L.T. 139. At paragraph 22, the judge in that case observed:

> *It appears to me unrealistic to make a distinction between the moment when the material is first published on the web site and the succeeding period of time when it is available for access on demand by members of the public. It appears to me that the better view is that the situation affecting the web site may be compared with a situation in which a book or other printed material is continuously on sale and available to the public. During that whole period, I consider that it would be proper to conclude that the material was being published.*

12. Addressing whether these publications created a substantial risk that the proceedings would be seriously prejudiced, I indicated my view that although judicial directions to the jury are usually effective in ensuring the fair trial of the accused – in this instance by way of an absolute prohibition on any researches into the case or the accused, particularly on the internet – the court should nonetheless take all sensible steps to diminish the risk that jurors may read inadmissible and prejudicial material. In this context, I noted that it is undisputed that the details of the previous allegations levelled at PC Harwood were markedly prejudicial. I intended to give (and I gave) the jury a strong warning not to use the internet in this regard – a warning that the court is entitled to expect will be followed – but applying the approach of Moses LJ in *Her Majesty's Attorney General and Associated Newspapers Ltd and News Group Newspapers Ltd* [2011] EWHC 418 (Admin), I concluded that if this material remained on the web and it reached the attention of one or more jurors, it would create a seriously arguable ground of appeal. Although the law assumes that a judge, by making effective orders, thereby secures a safe verdict (in the circumstances of a conviction) that does not negate the contempt caused by the (continued) publication of material that created a substantial risk of seriously prejudicing the proceedings.

13. I highlighted on 15 June 2012 that it was clear, therefore, that this was not a case in which the court was postponing publication of a report of proceedings under section 4 of the Contempt of Court Act 1981. Instead, as I viewed the matter at that stage on the basis of the submissions of the parties and Mr Millar, the court was confronting the kind of rare situation contemplated by Lawton LJ in *Balogh v St.Albans Crown Court* 1975 QB 73, at page 93 when he observed that a trial judge should only resort to the summary and – as he described it – draconian jurisdiction of summary contempt proceedings "for the purpose of ensuring that a trial in progress or about to start can be brought to a proper and dignified end without disturbance and with a fair chance of a just verdict or judgment" (page 93 letter A). Lawton LJ gave a series of examples, as follows:

The exercise of judicial discretion in this way can be illustrated by reference to the kinds of contempt which are most frequently witnessed by or reported to judges: witnesses and jurors duly summoned who refuse to attend court; witnesses duly sworn who refuse to answer proper questions; persons in court who interrupt the proceedings by insulting the judge, shouting or otherwise making a disturbance; persons in court who assault or attempt to assault or threaten the judge or any officers of the court whose presence is necessary; persons in or out of court who threaten those about to give evidence or who have given evidence; persons in or out of court who threaten or bribe or attempt to bribe jurors or interfere with their coming to court; persons out of court who publish comments about a trial going on by revealing a defendant's criminal record when the rules of evidence exclude it.

14. I indicated that the last example – revealing a defendant's criminal record – closely matched the situation in the present trial, even allowing for the obvious difference as to whether there had been a concluded criminal trial. In the context of the violence alleged against Mr Harwood in this trial, these previous allegations of violent behaviour leading to misconduct proceedings in the late 1990s and in 2004 would have had a like effect as the jury reading about previous criminal convictions for violence. At that stage, by way of example, material on the Telegraph's website referred to these as two previous inquiries into allegations of aggression, and one of them is widely reported to have concerned an incident of "road rage" on the part of the defendant. Although the second allegation was in some instances reported as not having been substantiated by the investigating body, the cumulative reporting of the allegations of previous violence on his part created an impression that, in my judgment, was not dissimilar to the situation that arises when an accused's previous convictions are improperly revealed.

15. Mr Millar submitted that numerous issues of principle may arise if I were to seek to use the Court's summary powers in this context, but I nonetheless expressed the view on 15 June 2012 that as regards publishers within the jurisdiction (such as domestic newspapers, broadcasters, bloggers *etc*.) the position is clear, for the reasons just rehearsed. As a result, I stated that if this material was not removed by 8.00 am on Monday 18 June 2012 when the jurors who may serve on this trial were expected to begin arriving at Southwark Crown Court, those responsible were at risk of being in contempt of court.

16. Additionally, I raised on 15 June 2012 the issue of other individuals who are responsible for publishing this material from outside the jurisdiction, along with those who provide "caching", "hosting" or search facilities. I indicated to counsel that I needed careful assistance (including possibly expert evidence) as to what,

if any, steps are available to a judge in these circumstances and I asked the prosecution and defence to collaborate as a matter of urgency in order to put me in a position of being able to deal with this aspect of the prejudicial publishing.

17. As an additional step, I asked the prosecution to use every effort to secure voluntary compliance on the part of all concerned, whether within or without the jurisdiction. I invited the Attorney General to assist in the process of inviting Wikipedia to amend the entry on the relevant web page (given internet searches on this subject usually place the Wikipedia entry as one of the first, and at that stage it contained references to the disciplinary proceedings).

18. Finally, on 15 June 2012 I expressed my hope that those responsible for these articles – certainly within the jurisdiction – would comply voluntarily with the spirit of the views that I expressed, given, in the main, they are major broadcasters or publishers.

19. Once the trial began on Monday 18 June 2012, save for some slight delays in removing a small number references to the inadmissible material, broadly speaking the press, Wikipedia, the broadcasters and most "bloggers" had complied with my request. However, two exceptions were later brought to my attention. The Mail Online maintained two articles (certainly for a period during the trial), dated 23 July 2010 [5] and 4 September 2010, as follows:

    4 September 2010
    PC Harwood, a member of Scotland Yard's Territorial Support Group, left the Metropolitan Police a decade ago, after an alleged off-duty road-rage incident for which he was due to face a misconduct hearing, before instead retiring on medical grounds.

    In 2003 he won a job with Surrey Police, where he was accused of using excessive force. He returned to the Met in 2004.

20. It followed that the only outstanding issue that I needed to address in the closing stages of the trial was what steps, if any, should the court take as regards the stance adopted by Associated Newspapers Limited in failing to comply with the observations I made on 15 June 2012 and the letter that was circulated. Mr Caplan Q.C. submitted that it would be of assistance if the matter could be resolved by way of a formal order.

21. On 16 July 2012 I ordered the removal of the two articles in open court, and I indicated that these reasons would follow.

22. Mr Caplan, who appeared to argue the matter on 5 July 2012, and by reference to his written submissions that principally addressed the application of the strict liability rule, advanced the following principal propositions:

    i) The Contempt of Court Act 1981 ("CCA") is concerned with material that is published on a contemporary basis and offered to readers, and this does not cover items that are stored in "an online archive" and which can only be accessed following a specific search.

    ii) The remarks of Lord Osborne, set out above [11], when he concluded that material in an online archive was continuously being published for the purposes of the CCA from the moment of publication were obiter and are wrong.

    iii) The summary procedure envisaged in *Balogh v St Albans Crown Court* [13] does not have "any application to the strict liability rule". It was noted that this authority antedates the Contempt of Court Act and the Human Rights Act 1998, and it was argued that proceedings under the strict liability rule can only be brought by the Attorney General pursuant to section 7. Thereafter, the issue of whether there has been a breach is a value judgment for the Administrative Court. Mr Caplan highlighted that the breach of the strict liability rule (unlike contempts in the face of the court) does not involve an intention to interfere with the course of the trial or the deliberate breach of a court order.

    iv) Our system of criminal justice depends on trusting jurors to abide by their oath and any judicial directions. Any interference with freedom expression must be proportionate and necessary (Article 10(2) ECHR). In this regard it was argued that it is neither proportionate nor necessary to require online archives to be sanitised because disobedient jurors might choose to access prejudicial material. Such a requirement would not be practical and it would have a damaging effect on the future of such archives, which are, *inter alia*, a valuable tool for researchers and academics. Mr Caplan relied on the Law Commission's Scoping Study No 2 (December 2002) on defamation and the internet in which it was indicated "that it is not practically possible to monitor all criminal trials in the country and subsequently to remove from internet archives any potentially prejudicial material" (para 5.25). It was suggested that the proportionate response is to direct the jurors not to conduct internet research

regarding the case which they are trying in the same way that they are directed not to discuss the case outside of the jury room.

v) The CCA does not proscribe the publication of prejudicial material *simpliciter* but only the publication of material that creates a substantial risk of prejudice. The point was made that contemporary publications are to be distinguished from online archives because of the need with the latter to apply search criteria.

vi) The Court's summary powers are not engaged on the facts of this case.

23. On the issue of the steps, if any, that the court should take as regards any material that it considers necessary to diminish the risk that jurors may read inadmissible and prejudicial reports, Mr Caplan submitted that:

> […] either the material in question constitutes an anticipated contempt (in which case an application for an injunction to the High Court may be appropriate) or it constitutes an arguable breach of the strict liability rule (in which case it is for the AG to decide whether to institute proceedings and to apply to the High Court). With regard to applications for an injunction, Arlidge Eady and Smith on "Contempt" 4th Ed at paras 6.1 and 6.2 state that it "will generally be inappropriate for trial judges of the Crown Court to entertain applications of this kind … It could rarely be said to be necessary, through pressure of time, to take such a step for the purpose of protecting the integrity of the trial".

24. Ms Michalos was instructed by the CPS to assist the court on the approach to be taken to the various sources of information that have remained available on the internet, and she highlighted that, for the purposes of the CCA, the main issues are whether any particular site classes as a "publisher" (section 2(1)) and the extent to which the publication creates a substantial risk that the course of justice in question will be seriously impeded or prejudiced (section 2(2)). Additionally, it was pointed out that under section 3(3) it is necessary, for the purposes of strict liability, for the proceedings to have been active at the time of publication.

25. With social networking sites, she expressed the view that those that simply provide a platform for other users (such as Google) are unlikely to be regarded as publishers (but this general statement was somewhat qualified, as set out below). She argued that all sites that are essentially facilitators, such as Facebook and YouTube, are likely to be treated in the same way. Similarly, with search engines and internet service providers (ISPs), she submitted that "the current

state of the law strongly suggests that search engines and mere service providers" (*e.g.* BT and Tiscali who provide access to the internet) "would not be held liable for strict liability contempt because they would not be regarded as publishers". In the context of defamation, Ms Michalos suggested that at common law if bodies of this kind provide no more than a passive role in facilitating postings on the internet, they are not deemed to be a publisher (*Bunt v Tilley* [2006] EWHC 407 (QB); [2006] 3 AER 336).

26. By way of at least a partial qualification to this general submission, Ms Michalos argued that if the ISP is on notice of the material in question then it is possible it will be held to be a publisher, in that in determining responsibility the state of a defendant's knowledge could be an important factor. My attention was drawn to developing jurisprudence involving Google. In *Metropolitan International Schools (t/as Train2Game) v Designtechnica & Google* [2009] EWHC 1765 Eady J held that Google was a mere facilitator rather than a publisher, and that "publication" involves a mental element, and this was the case even though Google had taken steps to ensure that certain URLs were blocked: the court held that it was unrealistic to attribute responsibility for publication to Google ([57] and [64]). However, in *Davison v Habeeb & others* [2011] EWHC 3031, it was decided (HHJ Parkes, sitting as a High Court judge) that it was arguable that Google was a publisher, rather than a mere facilitator, if it was notified that particular material was appearing on a virtual noticeboard for which it was responsible [42]. Eady J returned to this general area in *Tamiz v Google Inc* [2012] EWHC 449 (QB) when he held that Google Inc. was not a publisher at common law in respect of Google blogs because it was a provider or facilitator. Whilst he held that the mere fact that it had been notified of a complaint did not immediately convert its status or role into that of a publisher ([38]), he indicated that a decision in this area may be fact sensitive ([33]). Eady J set out that liability may turn on the extent to which the relevant ISP has knowledge of the words complained of, their illegality or potential illegality or the extent to which it has control over publication ([33]).

27. On the basis of this material, it was submitted by Ms Michalos that unless there is a reasonably high degree of "active moderation" operated by the site, "it is unlikely that an individual social media site would be held to be a publisher for strict liability purposes. This is because in most cases there will be an absence of the mental element that the authorities suggest is required to render someone a publisher." However, Ms Michalos suggested that it is arguable that once specific objectionable material has been drawn to the website's attention, it becomes a publisher for the purposes of strict liability, particularly if – possibly only if – specific material on identified web pages are drawn to the company's attention.

28. In a similar vein, Ms Michalos argued that a similar approach is likely to apply to any alleged breaches of a section 4(2) order. Her argument is that "(o)nce express knowledge of a court order could be established and attributed to the

website, it seems to be that there are better prospects of establishing that a social networking site like Facebook has made a publication in breach of s. 4(2) than for a search engine". This, it is suggested, is subject to a final determination as to whether a social networking site is to be regarded as a publisher. It is argued that this may be resolved by way of a finding that they are publishers on the basis that the site is providing the means of publication and it has the power to stop it.

29. As to "blogs" and other similar content providers, Ms Michalos drew my attention to certain practical difficulties, which include identifying individual users and the large number that the court would need to deal with. That said, it is suggested that it is clear that an individual user who places material on a webpage or blog plainly publishes the material (see *AG v Pelling* [2005] EWCH 414 (Admin); [2005] Fam Law 854).

30. Ms Michalos contended that under Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002, most providers of services such as Google blogs will have a defence to criminal sanctions for contempt unless there has been effective – meaning highly specific – notification of the objectionable material.

31. Ms Michalos suggested that material published by the general media or in blog publications do not fall within the normal understanding of contempt in the face of the court as they are removed in terms of time and physical proximity. Whilst Ms Michalos accepted in argument that there may be examples of publications that could amount to a contempt of this kind – "for example, media publications in flagrant disregard of court order or during a trial, publication of past convictions in a national newspaper" – she did not accept that the publications here qualify, on the grounds that they are "more removed and historic" and they in many instances would require a search to find the prohibited material.

32. In any event, Ms Michalos contended that in this area it would be preferable, first, to summon the publisher to the Crown Court to explain its stance, and, if the answer is unsatisfactory, thereafter to refer the matter to the Attorney General for prosecution. In particular, she argued that given the difficulties in establishing strict liability contempt as against the various categories of potential contemnor, "it would be unwise to proceed on a summary basis".

33. As to the powers of the Crown Court, Ms Michalos reminded me that by section 45(4) of the Senior Courts Act 1981:

> […] the Crown Court shall, in relation to […] any contempt of court, the enforcement of its orders and all other matters incidental to its jurisdiction, have the like powers, rights, privileges and authority as the High Court.

34. Aikens J used this provision when he granted an injunction to restrain a threatened contempt (*Ex p. HTV Cymru (Wales) Ltd* [2002] EMLR 184).

35. Given the comprehensive research and assistance provided by Ms Michalos, it is useful to set out her overarching conclusion:

> In my opinion, if the Court considers that continuing internet publication of historic material is likely to interfere with the administration of justice or cause prejudice to an ongoing trial, the proper course is for an application to be made for an injunction against the relevant media organisations in the High Court that specifically identifies the material to be enjoined and is not unnecessarily wide. If an injunction were granted and served, this brings with it a potential advantage of being able to bring overseas publishers within the realm of civil contempt if they disobey. It may remain to some extent a theoretical advantage as there would still be practical difficulties with enforcement. However, in my experience, reputable corporations beyond the jurisdiction do tend to co-operate and take down material that is prohibited by a court order.

Discussion and conclusions

36. Although a number of important questions in this general area have been canvassed in the submissions of counsel, I have avoided the temptation of attempting to resolve issues which are, or have become, irrelevant or which have been resolved without the need for any, or any additional, indication or order from the court. As set out above, given the cooperative stance of the media, the only items that I need to address are the two articles that remained on the Mail's Online website after 18 June 2012. Although one "blog" continued to rehearse elements of the inadmissible material, I have not been provided with any further details about this suggested publication and I have not received any submissions as to how the court should approach the continued availability of this prejudicial information.

Are the two articles in the Mail On line "publications" for the purposes of CCA section 2(1)?

37. Publication is defined in section 2(1) CCA as including "any speech, writing, programme included in a cable programme service or other communication in whatever form, which is addressed to the public at large or any section of the public". I remain of the view that the words "at the time of the publication" in section 2(3) encompasses the entire period during which the material is available on a website from the moment of its first appearance through to when it was withdrawn (see *Her Majesty's Advocate against William Frederick Ian Beggs* supra and *Godfrey v Demon Internet Ltd* [2001] QB 201 at 208 – 209). The

distinction Mr Caplan sought to draw between current and archived reports is less clear than he suggested in argument. Anyone looking for contemporary reports of an ongoing trial will often do so by typing in search terms that are likely to reveal a mix of contemporary and earlier information. The "archived" material, certainly on the Mail's Online site, remained readily available, and it was revealed by a general search for reports involving PC Harwood or Ian Tomlinson. A juror seeking contemporary information could easily have ended up viewing the reports that included references to the earlier allegations, without necessarily having set out to defy the court's direction not to conduct research. Accordingly, in my judgment the two articles provided by the Mail Online continued to be "published" whilst the proceedings were active.

Do the two articles in the Mail Online create a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced?

38. As one of the two central questions in the case (the second was causation), the jury were directed to consider – when determining whether the push was a reasonable use of force – the defendant's state of mind at the time, and whether his actions were guided by his genuine belief as to what was necessary. At the heart of that question self-evidently lay the jury's assessment of the defendant's honesty (he gave evidence during the trial) and whether his description of only taking such steps as he believed were necessary was truthful. If jurors had accidentally discovered (in the circumstances I have described above) that he had an alleged history of violent and irrational behaviour, their judgment on the issue of his honest belief was likely to have been prejudiced. This was highly damaging material that went directly to one of the two cardinal issues in the case.

39. As I have already indicated, both articles were extremely easy to find on the newspaper's website, and I have been guided by the line of authority that it is sufficient for a finding of contempt that the court makes the assumption that if the offending publication reached the attention of a juror, this would have created a seriously arguable ground of appeal (see *Her Majesty's Attorney General and Associated Newspapers Ltd and News Group Newspapers Ltd* above). As just indicated, a juror looking for contemporary articles on the trial (which is entirely permissible) could, with little effort or by accident, have come across either of these articles, and accordingly I am of the view that their publication constituted a substantial risk of impeding or prejudicing the course of justice.

What steps should the court take?

40. The approach to be taken by the court will always depend on the circumstances. It may be appropriate to refer the matter to the Attorney General for a possible prosecution or to suggest to the party that is troubled by the continuing publication that it should consider making an application to the High Court for an

injunction. The circumstances will be infinitely various, but if the Crown Court is to resolve the issue, its ability to deal with matter effectively and fairly is critical. The Crown Court judge will usually have a good understanding of the issues in the case and the likely impact of the information if read by a juror; there may be time constraints, with an impending trial that would be prejudiced if delayed; and this issue will usually be of greatest concern to the defendant who, particularly if funded by the Legal Services Commission, may not be able to meet the costs of an approach to the High Court.

41. The circumstances relating to these two publications were straightforward. The publisher is based in the UK and was readily identifiable; the material complained about was equally clear (two on-line news articles); I reached conclusions without difficulty, on the basis of my involvement in the case, as to its potential to cause prejudice; and this debate originally occurred in the context of a trial that was about to start, and this particular issue only crystallised whilst it was ongoing. In these circumstances, as trial judge I considered that I was well placed to deal with the problem, and any other remedy was likely to cause delay, expense and prejudice to the defendant and the witnesses (*viz.* an application to the High Court), or it may be ineffective to prevent prejudice to the trial (*viz.* a prosecution by the Attorney General).

42. Section 45 of the Supreme Court Act 1981 gives the Crown Court the same power and authority as the High Court as regards any contempt of court. Aikens J in *Ex p. HTV Cymru (Wales) Ltd* indicated at [23]:

> There is no general power in the Crown Court to grant injunctions. But I am satisfied that the Crown Court has the power to grant an injunction to restrain a threatened contempt of court in relation to a matter that is before the Crown Court in question. Whether an injunction should be granted will depend, of course, on whether all the conditions are fulfilled in the case at issue.

43. I am satisfied to the criminal standard that the two publications constitute a contempt of court under the strict liability rule. I am equally certain that issuing an injunction for the relatively short period of this trial was necessary and proportionate, and that in taking this step I was not acting in a way that is incompatible with the right of freedom of expression under Article 10(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms. This order, in my judgment, was necessary under Article 10(2). The means employed (ordering the removal of two articles for a short period of time) was proportionate to the need I have identified (ensuring the fair trial of the accused by avoiding serious prejudice). I had in mind that injunctions of this kind are rarely appropriate, but in the instant case the threat was specific and could be satisfactorily defined, and the failure to grant this injunction ran the risk of far

greater prejudice than if I granted the injunction (to paraphrase Aikens J in *Ex p. HTV Cymru (Wales) Ltd* [35]).

44. In all the circumstances, on 16 July 2012 I ordered the removal of the two articles. Since the trial is now at a close, it is clearly unnecessary for the Court to consider resorting to its summary contempt powers.