Law for Journalists Conference

Keynote address by the Attorney General

28 November 2003

I thank the organisers of this conference for the invitation to speak to you today.

I am very pleased to have been able to accept because it gives me an opportunity to talk to you about my functions in relation to contempt of court and the responsibilities of the press in relation to the administration of justice. I know that for at least some in the media world my activities in this field have not been welcomed. I hope that what I say today will enable me to dispel some of the ideas I have seen suggested and for you to understand the concerns I have from time to time.

On the principles that apply in this field I doubt there will be much between us. The area of contempt brings together three very powerful and important rights: the freedom of the press; the defendant's right to a fair trial and the right of the public to be informed and to have an effective and fair system of justice. But it is the application of these principles, the interaction between them, and the need to strike an appropriate balance, that makes this area so difficult. I am bound to say as well that how that balance is struck in the press does on occasion cause me a good deal of concern. I believe that I am not alone in that - some lawyers are concerned for example that these days we may see reporting about the background of the suspect at the time of the arrest that in previous years was usually only seen after a conviction. I hope to explain why it is important to continue to exercise a degree of restraint in the practice of responsible journalism which I know is the objective of all here today.

Let me start by saying a little about each of the three rights I mentioned.

Freedom of the press
Lord Windlesham once said that periodic rows between governments and broadcasters were the genuine marks of a free society. I agree wholeheartedly. No-one wants to live in a country where the press meekly repeat the words put into their mouths by the government of the day. It is right that journalists take Ministers, and others in positions of power and leadership, to task about what they've done, and what they said they would do. This is vital. The press, on behalf of the public, have a key role in scrutinising government actions and inaction. They are able to place information and analysis before the public; assisting them in acquiring and sifting the information necessary for the public to hold the government to account in the ballot box. A democracy worthy of the name needs an informed electorate. A free and active media therefore is essential to democracy. We have a media of high quality; envied across the world for its professionalism and independence.

And the media make a positive contribution to the administration of justice. They do this by the fair reporting of the trial process, and by disseminating to the public information and critical analysis about the operation of the criminal justice system. And the press also provide valuable assistance in connection with investigations by prompting witnesses to come forward or, in the case of a "man-hunt" situation, helping the police to apprehend a suspect.

Court reporting gives practical effect to the legal principle that, in the determination of his civil rights and obligations or of a criminal charge against him, an individual is entitled to a public hearing. In this sense the media are, in the words of the then Master of the Rolls, Sir John Donaldson, in 1988 *"the eyes and ears of the public"***.** Or as more graphically put by Bentham *"In the darkness of secrecy, sinister interest and evil shape have full swing….Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."* (see note 1)

So the media have an important role, in the public interest, in relation to the administration of justice.

The value of this is recognised by the right to freedom of speech. Of course this exists for the benefit of all and can be exercised by all. But it has a particular resonance for the work of journalists.

This right is enshrined, as you don't need me to tell you, in article 10 of the European Convention on Human Rights. This has been accorded particular importance by the Strasbourg court. And the right is of course recognised by the common law.

But freedom of speech - while of vital importance - is not always paramount. It is not a trump card. Like other freedoms, it may be subject to certain legitimate restrictions. There will be occasions when it must yield to competing public interests of various kinds - among them national security, the maintenance of public order, the restriction of obscene or offensive material, or the protection of the rights of others. Even in a democracy the boundaries of the right to free speech are often tested in relation to journalistic freedom.

The right to a fair trial

The second right I mentioned was the defendant's right to a fair trial. Again you are all well aware of the centrality of this right to our system of justice. It is difficult to overstate its importance. It is the bedrock on which our system stands. It has long been a fundamental principle of our criminal law that "the court is under a duty to ensure the accused a fair trial" (see note 2). This common law principle is mirrored in the provisions of article 6 of the Convention.

This right goes to the heart of the judicial process and the chief object of the courts. That is, to secure that justice is done in the case before them. To secure that on occasions it will be necessary to curtail the rights of others to be present in court or to be informed of the proceedings.

Right of society

That leads me to the third right I mentioned. The right of society to be both informed of court proceedings and to have an effective system of justice; to have crimes punished properly and fairly.

I have already referred to the role of journalists in relation to ensuring the necessary publicity and openness of court proceedings. But the corollary of that is the responsibility of journalists to ensure that their reporting of investigations or cases does not frustrate the public's equal right to have crimes punished; to have the guilty brought to justice as well as the innocent acquitted. Cases where a journalist goes out to report a crime or investigation with this intent are rare. But unfortunately cases where this is the effect do occur. In those cases, the public is denied the right to an effective system of justice - something which in any decent society they are entitled to expect. It also denies the rights of the victims of crime to justice. Paradoxically, often it is the victims of crime on whose behalf journalists claim to be speaking when these problems arise.

It is crucial that a balance be struck between these rights. It is the law of contempt of court, including the Contempt of Court Act 1981, by which our legal system principally seeks to hold the ring between these rights. This is not the only mechanism of course. The Press Complaints Commission's Code also has a role to play.

I don't pretend that striking the correct balance is easy. And I am aware of the commercial context in which you are operating. We now live in a world of 24-hour media; with multiple competing outlets. Thanks to the web, news stories can travel the globe with the click of a button. And, fed by the huge media industry, the public's desire to know as much as possible, as soon as possible has grown - including where there is any suggestion that criminal offences have been committed by a celebrity. The commercial pressure to secure the story rather than let a competitor do so must be intense.

But these difficulties and pressures notwithstanding it is vital that the balance is struck correctly. The law on contempt of court is not a mere technicality dreamt up by lawyers with no relevance to the real world. Where prejudicial reporting causes a judge to delay a trial this affects victims, witnesses, defendants and professionals in the criminal justice system and the court system itself, both in terms of delay and cost to the public purse. There is also a real human cost to witnesses such as victims of serious sexual or physical abuse including children when they are asked to give evidence for a second time caused by the need to move a trial or wait for a re-trial. In the worst instances a judge may conclude the publicity has been so prejudicial that no fair trial is possible. In such cases justice is denied to victims and the public.

Role of Attorney General

Let me turn to my role. As Attorney General my function in this area is to act in the public interest to ensure the fair administration of justice. Before looking at how I exercise this function it is important to be clear on a number of points.

First, when exercising this function I am not acting as a member of the Government. I am not taking a Government decision nor acting for it. I remain accountable to Parliament for the exercise of these functions. But my role in relation to contempt is not about the Government taking action against the media. It is vital that in exercising this function the Law Officers act, and are seen to be acting, with absolute adherence to the principle of independence and of fairness. Nothing could be more damaging to public confidence in the administration of justice than a suspicion that my powers in relation to it were exercised on political grounds. So what I do in this field is entirely a matter for me in the exercise of my public interest responsibilities. I do not discuss with ministerial colleagues whether a particular publication causes concern; nor whether to take any, and if so, what action. They bear no responsibility for what I do in this field. So I reject any suggestion, for example, that when I do take action it is the Government acting to suppress the media.

Second, my role is not to act as a censor, nor as an arbiter of taste and decency. My personal views on such matters are irrelevant to the matters I must consider.

Third, it is no part of my function to consider whether to take action to protect the reputation or privacy of individuals, however famous. My actions recently in seeking to prevent the publication of the identities of the Premiership footballers accused of rape in a London hotel were not taken to protect their reputations. They were taken because identity was, as I was advised by the police and the prosecutors, an issue in the case. It was highly likely that an identification procedure would be necessary since the alleged victim did not know the identities of any of the men but might recognise them again. An identification procedure was held only recently. Were the alleged victim to have seen photographs of the men allegedly involved before the identification procedure had been held, the reliability of any identification she may have made at the procedure could have been seriously affected, if not fatally undermined. But now that the identification procedure had been completed I have been able to confirm that I have no continuing objection to the identification of the suspects.

I interject that the Government has recently commented on the policy issue of the anonymity of defendants in rape cases. This came up in the Sexual Offences Bill. The Government was not convinced that legislating now was the right course. But on Third Reading the Home Secretary made it clear that he hoped that the steps announced by others, including the Association of Chief Police Officers stiffening of their guidance, will make a difference. If it doesn't, he was clear that the attitude of Parliament was such that legislative steps would be taken.

So, having said what my role does not entail, let me say what is does involve. In taking any decision in relation to the instigation of proceedings for contempt, I am acting to ensure that justice takes it proper course. My task is to identify where the public interest lies. This may mean doing what is necessary to prevent distortion of the trial process in criminal cases, by preventing publication of material that might prejudice a fair trial or commencing proceedings where the prejudicial publication has already occurred.

Let me give you a feel for the volume of cases I am talking about. This year over 70 new matters sufficiently serious to justify my office investigating them further have been referred to me. And this is not 70 reports or articles, some of these matters will concern more than one report, more than one outlet. I consider that a disturbingly high number. These come from all quarters - from the judge hearing the case, from the defence or CPS or other party to the action, from 3rd parties directly affected or from members of the public.

What kind of reporting can prejudice a trial?
What I would like to do is to give you some indication of what it is that causes me concern in relation to these reports. It's not my intention to provide an exhaustive list of all situations in which reports may amount to a contempt. Apart from anything else, no such exhaustive list could be compiled. What is more in setting out these issues I am giving instances of what I believe the law is concerned about. It will, it is a truism to say, always be in the final analysis for the Courts to say what is contempt and what is not, even though I would expect them to have regard, at the least, to my views.

First, reporting that asserts or assumes, expressly or implicitly, the guilt of the defendant. This might be read in no more than a single headline or alternatively in a lengthy, detailed rehearsal of the evidence followed by prejudicial or biased commentary before or during the trial. Courts have warned that no matter how obvious the facts or how inexplicable the conduct of the defendant may appear, no assumptions can be made as to the course a trial may take or the defences that may be advanced. As has been noted, the law books are full of cases which appeared at one time open and shut but turned out to be anything but. They have also noted that the risk that the strict liability rule may be breached is heightened the more high profile the case.

Second, reporting that asserts or assumes, expressly or implicitly, the outcome of a preliminary issue in the criminal proceedings to be determined by the jury, such as the fitness of a defendant to stand trial.

Both of these issues are of great concern to me in the trials of Ian Huntley and Maxine Carr. I do not want to say too much about this trial as it still on-going and I am still actively monitoring the reporting of it. At times some of the reporting of the investigation and trial has been quite frankly unacceptable. I am sure it is right to remind ourselves that the consequences of prejudicial reporting may not only be to the process of justice or to the legitimate interests of the defendants in a criminal trial but of the victims of crime too.

To return to examples of reports which are a cause of concern, I would identify thirdly those that contain information which may hamper or prejudice the police investigation, for example with regard to the gathering of evidence, or prejudice subsequent proceedings, such as the publication of a photograph, drawing or likeness of a suspect or defendant before it has become absolutely clear that identification is not and will not be an issue in the proceedings.

For example, if a suspect's photograph is published he might justifiably refuse to stand on an identification parade, which in turn may prejudice the police investigation and may weaken the prosecution case. Alternatively, even if the defendant does stand on a parade, there might still be a defence application that the evidence should be ruled inadmissible as the court could not be sure if the witness identified the defendant from a memory of the incident or a recollection of the photograph, article or television report. I have already mentioned my action in relation to the Premiership footballers' rape allegation.

Another example would be information and/or images published as part of an appeal issued by the police, which are repeated after arrest and/or charge, where they can no longer be said to be of use in finding a wanted suspect. The repeated printing or showing of such images once the need for assistance has passed could lead to a risk of prejudice.

Fourth, reports which contain a detailed account of the circumstances leading to the criminal charge(s) in question. These may amount to a rehearsal of the evidence, the defence(s) that

the Defendant may raise and the issues which the jury may have to decide. Juries should decide the guilt or innocence of a defendant on the evidence they see and hear in court and not on the basis of what they might have seen or read in the media.

Fifth, statements and comments presented as or based upon assertions of fact in advance of the evidence and any legal submissions to be presented by Counsel for the parties to the proceedings. For example, a statement in an article that describes the individual as, for example, a rapist or a murderer.

Six, material which would be likely to be inadmissible in a criminal case but which may be retained in the memory of a potential jury member, such as the fact that a suspect or a person arrested and/or charged has a previous conviction. Often this is can give rise to the most serious prejudice. This category would include reports of the previous criminal activities of such a person, alleged or proven, especially if they have similarities with the matters in respect of which he is a suspect or a person arrested and/or charged.

The contempt action following the collapse of the first trial of the Leeds footballers is a good example of the very real harm that can be caused to the trial process by this sort of comment in the press. As you may recall after the jury had retired to consider its verdict, after hearing all the evidence, the Sunday Mirror published an interview with the victim's father which included information and comments not considered by the jury. The article ultimately led to the collapse of the first trial. The re-trial was held several months later, thereby increasing the traumatic effect on the victim, his family, witnesses and defendants. The court ordered MGN Ltd to pay a £75,000 fine and costs.

Seven, reports containing details of other proceedings in which a defendant or witness is or has been involved. This can influence a juror's view of the evidence on key issues in a trial as well as his view as to the credibility of the defendant or witness.

An example of this arose in the course of a rape trial in October 2001. The defendant was charged with two separate charges of rape, one of which went to trial that October. The jury had retired on Friday, but could not reach a verdict by the end of the day. The members were sent home until Monday.

Over the weekend, a local radio station broadcast a very short item indicating that the jury would shortly return its verdict in the case, and went on to indicate that the defendant had also been charged with a second rape, after a incident two years earlier. What the broadcaster did not make clear was that there were separate trials. Up until this point, the jury would have thought the defendant was only facing one allegation. They would not have been told during the course of the trial that the defendant faced a similar but completely separate allegation and there was every chance that this information could prejudice their view of the defendant's character.

When the matter was brought to the judge's attention on the Monday morning, he asked the jury whether members had heard any broadcasts about the case. One juror had, and when she was further questioned it was clear she believed the defendant had committed a rape before. Given the obvious prejudice, she was discharged from the jury. The judge allowed the case to continue and eventually the remaining jury members reached a 10-1 guilty verdict.

This is a good example of how a short, local broadcast could have had quite serious consequences. As it happens, after investigation I was satisfied that the radio station had made an inadvertent mistake and had not foreseen the possible consequences. As a result of strong assurances from the radio station concerned that they had taken positive steps to ensure this sort of mistake did not happen again, I decided that it was not in the public interest to commence contempt proceedings.

Eighth, reports containing comment or information about witnesses, which may undermine their integrity and the credibility of their evidence. The assessment of witnesses is the function of the jury.

And finally, I would like to mention reports which straightforwardly breach an order restricting what may be published. I consider such breaches occur too frequently. Over the past year, I have received a dozen complaints involving breaches or alleged breaches of reporting restriction orders. Of course, the statutory restrictions which apply in relation to the anonymity of victims of particular types of offence are there not only to protect the privacy of individuals who have been victims, but also to reassure other victims that they can come forward safe in the knowledge that their identity will remain secret.

Let me tell you of a graphic example of a breach of a restriction of this sort. A man was watching television at home, with his wife, when a reporter on a BBC regional television programme broadcast, in clear breach of the law, the name and age of a victim in an historic sex abuse case, details of his complaint and details of the evidence he had given. Specific reference was made to the fact that it had been suggested to the victim in cross-examination that he had made up the allegations in order to get compensation. The man watching the broadcast was the victim. He had never told his wife of what had happened to him many years before and she did not know that he was giving evidence in any such trial. The broadcast had a devastating effect on his life, revealing to his wife and children the secrets he had until then kept to himself. It not only put intolerable strains on his marriage but also threatened the completion of the trial as he hesitated over returning to complete in court his evidence now that his promised anonymity had been taken away. The BBC pleaded guilty and in December 2001 was fined £25,000. The journalist responsible was also fined.

Put simply, this was a case of human error. Despite her experience and training, the journalist forgot that a victim in this type of case is entitled to life-long anonymity. In addition, the broadcast was not checked by either the programme editor or producer and internal systems broke down.

That is an example. There are others. I can accept that breach can be without any deliberate intent to do so and that it is simply a mistake. I can also accept that steps are taken to "legal" such reporting. If the methods of checking whether court orders have been made is not working well, no doubt some discussion on that issue might be helpful. But at the end of the day I believe that the onus is on the media to be sure that no relevant order is in place, rather than for the courts. I would urge greater vigilance in this area.

In extreme cases, restrictions on what may be reported concerning court cases are necessary in order to protect an offender whose life would be at risk were his identity and whereabouts known.

You will of course be familiar with the contempt action against the publishers of the *Manchester Evening News*, for breach of the High Court injunction prohibiting the publication of information relating to the whereabouts of Robert Thompson and Jon Venables. On the very day the Parole Board decision as to the young men's release was announced last June, the paper published information which was sufficient to lead anyone with local knowledge to identify one or both of the secure units where they were being held.

Dame Elizabeth Butler-Sloss found the publishers of MEN guilty of a "significant" contempt of court and fined them £30,000. The President emphasised that observance of the injunction was of the highest importance. She noted - *"Any breach could have disastrous consequences, and I don't use those words lightly."*

The President accepted the newspaper's assertion that it was a "sad blunder" and not a case of taking a calculated risk to increase circulation. The editor had been on a day's leave when the mistake occurred. He had made clear in an editorial conference that geographical pointers were not to be used. However, his instructions were not followed. While the President

recognised that the contempt was not at the most serious end of the scale, she emphasised that it could not be overlooked or treated as of no consequence. I hope that provides some insight into the reasons why certain kinds of reporting is of particular concern to me. The examples demonstrate not only the seriousness of the consequences of striking the balance incorrectly, but also in whose interests I am acting: that of victims, witnesses, defendants, the public, the trial process itself. Not in the interests of Government.

Before turning to what I as Attorney General and you as journalists can do to ensure that the administration of justice is not prejudiced, I want to deal with three particular issues: first, what is called the "fade factor"; second, the time at which prejudicial material appears and thirdly, the issue of payments to witnesses.

Fade factor
The closer to the trial reports appear, the higher the risk of serious prejudice arising. Common sense tells us reports close to the trial date are more likely to stick in the mind of jurors. It would be unrealistic not to recognise that there has been an important shift of emphasis by the court in this field. Now the court will recognise, rather more than I believe it did some years ago, that the passage of time may dent the recollection of otherwise prejudicial reporting to the point where it no longer puts in jeopardy the fairness of the trial especially when combined with appropriate directions to the jury.

But recognition that there is a "fade factor" should not be taken to be a green light for publication of prejudicial reporting when the trial date is still some way off. There are no hard and fast rules. Bear in mind that the risk of prejudice will depend on the nature and weight of the publication, the identity of the accused and the facts of the case. Sensational reporting of high profile cases, or of offences alleged against celebrities is likely to stay in the mind of potential jurors for much longer than more mundane events.

The time of the report
This leads to the second point I wanted to make. That is that simply because a report will appear before a person has been arrested or charged with the offence does not mean there can be no risk of prejudice. The Contempt of Court Act only provides for strict liability from that point. But prejudice can arise from publications before then. Responsible journalists and editors should have regard to the risk of prejudice and to the matters I have mentioned whenever reporting on criminal investigations, in particular high profile cases involving celebrities or sport stars where the interest, even at an early stage, is likely to be high and the risk of prejudicing jurors and witnesses self-evident.

Payments to witnesses
Finally, I wanted to mention the issue of payment to witnesses. It is widely accepted that this particular practice is deeply damaging to the criminal process. This has been a problem in a number of high profile cases over recent years. In the Rosemary West trial 19 witnesses are believed to have received money for, or signed contracts with, the media. It was a major issue in the prosecution of Paul Gadd (Gary Glitter) in 1999. An individual, whose allegations formed the basis of that prosecution, was paid for stories in 1987, 1993 and 1997 in which she discussed her sexual relations with Mr Gadd. The stories included allegations of sexual abuse. The newspaper then contacted the police and put them in touch with the individual. This led to the prosecution. Mr Gadd was acquitted. The judge said that the payment of money had been "highly reprehensible". It was a significant factor, although not the only one, in the collapse of the recent prosecution relating to plot to kidnap the Beckham's. Even the offer of payments can have a corrosive effect on the credibility of witnesses, as we saw in the case of witness Bromely in the Damilola Taylor trial.

As you know, the Government decided not to legislate on this issue in light of the strengthening of the PCC Code. I welcome that strengthening. This now bans such payments once proceedings are active and only allows them before that point when in the public interest. It is too early to form a view on the effectiveness of that Code. But I do want to make it clear that I consider any payment to witnesses in a criminal case a serious matter, at whatever stage it arises. It undermines the credibility of witnesses. It has the potential to lead

to the acquittal of the guilty as well as the conviction of the innocent. I for one will be watching closely to see if the new Code delivers the strengthening we need.

Concluding remarks
My comments should not be taken to be an exhaustive list of all instances where publication may amount to a contempt. But I hope what I have said will be of assistance to you in considering whether a publication is likely to be prejudicial and will given you an insight into the issues which are of concern to me as guardian of the public interest.

At the end of the day the responsibility is that of the media to comply with the law. That is so whatever guidance I do or do not seek to offer. So too it is their responsibility to prevent prejudicial reporting (I use that expression as shorthand for the statutory test) whatever the source of the factual information they choose to report. I will continue to draw the media's attention to potential pitfalls in particular cases by means of the continued use of Attorney General's "Guidance to Editors" or where I think a warning is desirable. I have adopted this course in a number of cases, including the allegations of rape involving premiership footballers, when specific issues such as identification or reference to a defendant's previous convictions are likely to lead to prejudice in a police investigation or a criminal trial.

I seek to be open and accessible. The same goes for the departments I oversee. I urge the Crown Prosecution Service, for which I have Ministerial responsibility, to engage in two-way dialogue with the media. Often it is the CPS lawyer on the ground who is best placed to advise on how to protect the course of justice and to advise on what can be properly reported before a trial.

I am aware that there are practical issues faced by responsible journalists in seeking to report criminal cases without being in contempt - how is a journalist to know if a particular order has been made in a case? How is he to know if an issue (say identification) is still in issue or not? In part I seek to meet these concerns in the ways I have outlined. But I recognise in some cases more may be needed. I would welcome a constructive dialogue with journalists and newspapers as to how we can together best address these and other practical problems.

The responsibilities of journalists
Let me conclude. As I said earlier, journalists have a vital function in the administration of justice. This is supported by the right to freedom of speech. But with this function - and the power and influence it brings - come responsibilities. Journalists must bear in mind that the consequences of a prejudicial report can be high. These consequences are not dry abstractions only for lawyers to worry about. The consequences are felt by individuals, often those who are particularly vulnerable, such as victims, witnesses and defendants. And it is the public interest in a fair, decent and effective system of justice which often suffers.

Responsible journalism requires self-restraint. It requires vigilance to ensure the traps I have outlined are not walked-into. It requires proactive consideration of the risk of prejudice, including making contact with the court to ask if any relevant orders have been made and speaking to the CPS. It requires the journalist to have in mind the 1981 Act, but not to treat it as the be all and end all. They must think beyond its terms and consider the consequences of their reports on likely trials. I am prepared to work constructively with journalists in dealing with practical issues; in providing what guidance I can to assist editors in relation to particular cases and by taking what action I can to clarify and of course where appropriate enforce the law. But the press is ultimately responsible for what it prints. I call on you and your colleagues to embrace that responsibility, without in any way compromising the professionalism and independence of which you are rightly proud.

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Note 1: Quoted by Lord Shaw of Dunferminline in Scott v Scott [1913] AC 417 at 477.
Note 2: R v Sang [1980] AC 402.