Sixth edition

LAW FOR JOURNALISTS

A guide to media law

Pearson

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In connection with the proceedings

Section 11 orders only apply to publication of someone's name 'in connection with the proceedings' in which the order was made. This means that where a s11 order is in place, you can still write about the person concerned, provided you do not mention the court proceedings.

In ***Allen* v *Grimsby Telegraph*** (2011), the *Telegraph* was able to report a story about a man who had moved to the Grimsby area after being given a Sexual Offences Prevention Order (SOPO), despite a s11 order banning publication of his address in connection with the proceedings where the SOPO was made. The man, Gary Allen, had been charged with but acquitted of the murder of a prostitute in the Hull area, and had later been convicted of assaulting two prostitutes in Plymouth. When he moved to Grimsby, the police successfully requested that the local court make a SOPO against him, and a s11 order was made in connection with those proceedings. The *Grimsby Telegraph* reported that he had moved to the area, and his previous offences, and expressed the view that he was a danger to women. It also reported his later arrest in a nearby red light area. Neither of the stories stated his address, nor mentioned the SOPO proceedings. The High Court confirmed that they were not in contempt of court.

Risks to the person claiming anonymity

In some cases, a s11 order will be requested in order to protect someone (usually a witness) who fears for their own personal safety if their identity or address is revealed. Orders requested for this reason will only be granted in very exceptional cases. The 2016 Judicial College guidelines on criminal cases state that where a s11 order is sought on the grounds that identification would pose a threat to the witness's life, and therefore involve consideration of Article 2 of the Human Rights Act, the court should consider the extent to which the person's fears are objectively justified, and the person requiring the order should provide clear evidence that being identified would create or materially increase a risk of death or serious injury.

In ***R (Harper) and R (Johncox) v Aldershot Magistrates' Court with the Press Association, Surrey and Berks Media, and the CPS, Hampshire as interested parties*** (2010), the High Court supported a decision by magistrates to allow the home addresses of two police officers to be stated in open court and published by the media, despite the police officers' argument that publicity could affect their safety and/or deter them or other officers from doing their jobs. The police officers were before the court on charges of misconduct relating to speeding offences. They had both worked undercover during their careers, and one of them had, with his family, been put in a witness protection scheme for 18 months, after being involved in a serious crime investigation. They asked for a s11 order, preventing their addresses being disclosed. Lord Justice Pill said that the officers had to prove that there was a justification for interfering with the principle of open justice, and they had not done so. There was no evidence of a specific threat to them, and any threat which might occur because of their previous work was likely to be a targeted one which would not be prevented by the need to find out their addresses. (The Press Association had pointed out that keeping the addresses secret would not have any real effect, since both men were on the electoral roll, making it possible to find their addresses very easily.) Nor did he accept that publishing their addresses would be likely to deter them from doing their jobs.

In ***Re W (Children) (Care Proceedings: Witness Anonymity)*** (2002), a media challenge prevented a s11 order being used to protect the identity of a social worker in care proceedings. The case involved a woman whose children were under threat of being taken into care, but who had been told she might be allowed to keep them if she broke off contact with her husband, who had a history of extreme violence. She agreed, but before the care proceedings took place, a social worker happened to see her with her husband. The social worker agreed to give evidence in the proceedings, but given the possible risk to her from the husband (who had threatened that if he lost the children he would kill himself and, among others, the social

workers), she asked to do so anonymously; the judge agreed and made a s11 order. The mother, however, appealed, and the Court of Appeal upheld her claim, stating that it was generally recognised that social workers were routinely threatened with, and actually experienced, violence in their work, and had to regard this as part of their job. This was not an exceptional case, and so the s11 order could not be said to be necessary in the interests of justice.

In ***Re Belfast Telegraph Newspapers Application*** (1997), a man charged with indecent assault was granted a s11 order by magistrates, on the grounds that he feared attack if his address was published. The Queen's Bench Divisional Court overturned the order, stating that, while such a risk might well exist, it was not something that could prejudice the trial and therefore a s11 order was not appropriate.

In 2006, the *Oxford Mail* managed to overturn a s11 order banning identification of a man convicted of attempting to have sex with a 12-year-old girl. The order had been put in place at the request of the man's lawyer, because he was said to be a vulnerable individual who would be at risk of bullying in prison, and might even be a suicide risk. The *Oxford Mail* objected, arguing that the man had been sent to a normal prison, and his name was already in the public domain because it had been said in open court, and shown in court listings on the internet. The judge agreed that this was not an appropriate use of s11 powers.

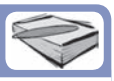
Notice of s4(2) and s11 orders

Practice Directions issued in 1982 and 1983 make it clear that both types of order should be put into writing, stating the purpose for which the order is being made, precisely what it covers and, if not permanent, when it ceases to apply. Courts should notify the press when such orders are made, and court staff should be willing to answer queries about such orders (Practice Direction (Sup Ct: Contempt: Reporting Restrictions) [1982] and Practice Direction (Contempt of Court Act: Report of Proceedings: Postponement Orders) (1983)).

Challenging s11 orders

The 2016 Judicial College guidelines say a court considering whether to apply a s11 order must invite representations from the media. If the case is urgent, it should make a temporary order and invite the media to attend on the next convenient date.

Law in practice Is an order in place?



If an order imposing reporting restrictions of any kind is in place, a notice will usually be posted up in the court complex. However, Tony Jaffa, Head of Media at solicitors Foot Anstey, points out that some courts are more careful about doing this than others. If this is not done, the responsibility for finding out whether an order exists and following it remains with the press, so the fact that a notice has not been put up will not help you if you break it because you did not know it existed. If you are reporting a case where you would expect that an order might be made, but there is no notice to that effect, always check with the court staff.

OTHER GENERAL REPORTING RESTRICTIONS

In addition to the restrictions on reporting court cases detailed so far, there are some miscellaneous statutory provisions which apply either generally or to specific types of case.

Anonymity orders in the High Court

Section 37 of the Senior Courts Act 1981 gives the High Court the power to order any injunction 'in all cases in which it appears to the court to be just and convenient to do so'. These orders then remain in place if the case goes to the Court of Appeal or Supreme Court, unless one of those courts decides to lift them. In recent years, this power has increasingly been used to grant anonymity to parties in a case, where they have claimed that to be identified would breach their rights under the Human Rights Act 1998, most often the Article 8 right to privacy or the right to life under Article 2, where revealing the person's identity could put them in serious danger. However, in 2010, the Supreme Court took a stand against overuse of these powers.

In ***Application by Guardian News and Media Ltd and others in HM Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants); HM Treasury (Respondent) v Mohammed Jabar Ahmed and others and another (FC); R (on the application of Hani El Sayed Sabaei Youssef (Respondent) v HM Treasury (Appellant))*** (2010), the *Guardian* and other media organisations challenged anonymity orders imposed to protect the identity of five men who were suspected of being involved in terrorism. The men had not been charged with terrorist offences, but because of the suspicions against them, the Treasury had got court orders denying them access to their financial assets. The court case in which the anonymity orders were imposed were brought by the five men to try to get the asset-freezing orders lifted. The men argued that they should be allowed anonymity because naming them in the press as terrorism suspects would have a serious impact on their private lives and their families. The Supreme Court rejected this argument. It confirmed the principle that, where possible, court proceedings should be published and those involved in them named, saying that anonymity orders should only be imposed in 'an extreme case', such as where identification posed a genuine threat to someone's life or safety. Even though identification of the men might well lead to 'outrageously hostile' reporting against them, that was not a strong enough reason to restrict press freedom. The court criticised the increase in anonymity orders and said that the courts appeared to be granting them without much consideration.

The High Court has also stated, in ***Re RA's Application for Judicial Review*** (2010), that magistrates' courts also have the power to make an anonymity order where necessary to protect someone's rights under Article 2, if they were under a 'real and immediate risk' of violence.

The High Court's inherent jurisdiction

The High Court has the power, known as its inherent jurisdiction, to order reporting restrictions in a particular case, where the court believes that the person's interests or welfare would be damaged by them being named in the press. The Court can also ban media organisations from even attempting to gather news about the case. This power can be used on behalf of both adults and children, and applies to cases heard in the county courts as well as the High Court. The Court of Appeal and House of Lords can also make these orders.

In 2008, a man was convicted of repeatedly raping his daughters throughout their childhood. By the time he was prosecuted, he had fathered several children with them, and the daughters were grown up. The automatic statutory ban on identifying victims of sex offences meant that the women could not, and had not been, named in the press, but there was concern that if the press were seen to be reporting from the area around their home, this might lead to the local community being able to identify the women and their children. At the request of their lawyers, the High Court imposed an order banning reporters from approaching the women, or being in the vicinity of any address where they lived or had lived.

In 2005, the Family Division issued a Practice Direction stating that where a party to a case wants the High Court to use its inherent jurisdiction to impose reporting restrictions, that party should notify the media about the application in advance, through the Press Association Copy Direct service.

TEST YOUR KNOWLEDGE

1 Explain the difference between a s4(2) order and a s11 order.

2 In which courts can these orders be made?

3 In what situations will a court be justified in granting a s11 order to spare embarrassment to someone involved in a case?

4 A local restaurant owner is on trial for fraud offences involving customers' credit cards. He asks the court for a s4(2) order banning publication of the name of his restaurant, on the grounds that publicity about the case could damage his business. What argument(s) could you use to persuade the court not to make such an order?

5 A police officer is on trial for fraud. Her lawyer asks for a s11 order, banning publication of her home address, on the grounds that she has previously appeared as a witness in trials of very dangerous criminals, and fears for her safety if her address is made public. What argument(s) could you put forward to convince the court not to grant the order?

6 You have been attending a shoplifting case in the magistrates' court, which has followed standard court procedure. After the defendant is convicted and given a community sentence, his lawyer asks the court for a s11 order, banning the press from mentioning his client's name in reports of the case. He says that his client is unemployed, and the publicity would affect his chances of getting a job. What argument(s) would you use to dissuade the court from making the order?

Chapter 9

Reporting restrictions in criminal cases

Of all the work done in the courts, criminal cases probably hold the most interest for journalists. They frequently make the national news, and although local news organisations now report court cases much less comprehensively than they used to, high profile or unusual cases will always be of local interest. This coverage not only sells papers, but also has a social value, in that the thought of being featured in the press is, in a sense, part of an offender's punishment (as any reporter who has been begged to keep a case out of the paper will know). One result of this, however, is that defence lawyers will often do their very best to persuade magistrates and judges to restrict reporting, so journalists need a good grasp of the reporting restrictions in order to challenge them where this is possible. It is also, of course, essential to know about those reporting restrictions which are mandatory in certain types of cases, particularly those involving sex offences, where publishing certain types of information is a criminal offence.

Most criminal cases involving adults can be freely reported (within the provisions of the law on contempt, explained in Chapter 6), but some types of case, or parts of a case, attract specific reporting restrictions. They fall into three main groups:

- restrictions on hearings which take place before a trial;
- restrictions on cases involving rape and sexual offences;
- restrictions on pleas in mitigation.

There are also reporting restrictions designed to protect witnesses in certain circumstances.

(Criminal cases involving children and young people are subject to separate rules, which are discussed in Chapter 10.)

RESTRICTIONS ON HEARINGS BEFORE TRIAL

Before a criminal trial begins, there are one or more hearings, depending on the type of case. In these hearings, there will often be discussion of the evidence, which may include details that, when the trial happens, cannot be put before the jury for legal reasons. The defendant's previous convictions may also be referred to, for example, where magistrates are deciding whether a case is too serious for them to try. If the case could then go on to be tried by a jury, publishing these details could prejudice them, so these hearings are subject to special restrictions on what can be reported. These restrictions support the general principle that when the trial begins, the jury members should be able to judge on what they hear and see during the trial, and not anything that may have happened before it.

Sending for trial and allocation hearings in a magistrates' court

These hearings can be quite newsworthy, especially in high-profile cases, because they are often the first time that precise details of the case are revealed. However, because of the risk of prejudice referred to above, both types of hearing, and any other pre-trial hearing which occurs before them in a magistrates' court, are covered by strict reporting restrictions under s 52a of the Crime and Disorder Act 1998. This provides that the only details you can report from these hearings are:

- the names of the court and of the magistrates;
- the name, age, home address and occupation of the defendant (this can include their address at the time of the offence, as well as their current one, but you must make it clear that they no longer live there, or you could face a libel claim from the person who does);
- the charges, either in full or summarised;
- the names of the barristers and/or solicitors representing the parties;
- if the proceedings are adjourned, the date and place they are adjourned to (including whether the case was sent to the Crown Court);
- any arrangements as to bail (but not details of why bail was opposed or refused, because these could be prejudicial);
- whether legal aid was granted;
- where the defendant is charged with a serious or complex fraud, 'relevant business information', which is defined as the following:
  - the address of any business the defendant runs or ran 'on his own account'
  - the name of any business carried on at the relevant time;
  - the name and address of any firm they were engaged by or a partner in at a relevant time;
  - the name and registered address of any company of which they were the director or otherwise engaged at any relevant time;
  - any working address they used in their capacity as a person engaged by that company.
  - These restrictions effectively mean that no details of what either side alleges, beyond the actual charges, can be reported at this stage.

Mentioning other details

Although the details listed above are the only ones which the Act specifically permits to be mentioned, it has become standard practice to also report that reporting restrictions prevent publication of further details, that the defendant denies the charges, and that the defendant has chosen a jury trial. None of these details carry a risk of prejudicing a jury in the trial. Reports also routinely contain a description of the court room scene, and what went on during the hearing, mentioning such details as what the defendant wore, the fact that the only time the defendant spoke was to confirm their name and address, or whether other family members were present at the hearing. Again, none of this material could prejudice a future trial.

Background material

In most cases, you will want to include some background material about the accused and the crime in a report of a committal or a sending for trial, particularly if the case has been in the news, and you want to let your readers know that this hearing relates to the crime they have