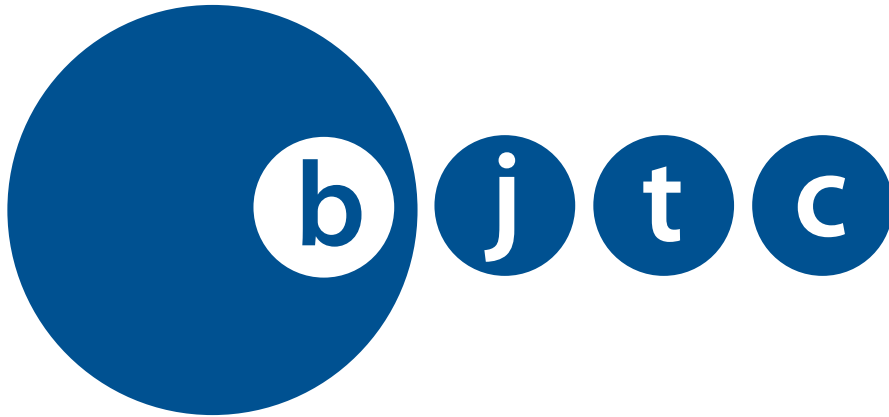


The BJTC
Media Law, Regulation & Ethics
Student PocketGuide 2018
In association with Goldsmiths, University of London.

By Tim Crook



Broadcast Journalism Training Council



Above Logo for UK Broadcast Journalism Training Council <http://www.bjtc.org.uk> and
Royal Courts of Justice in the Strand, London. Image by Tim Crook.

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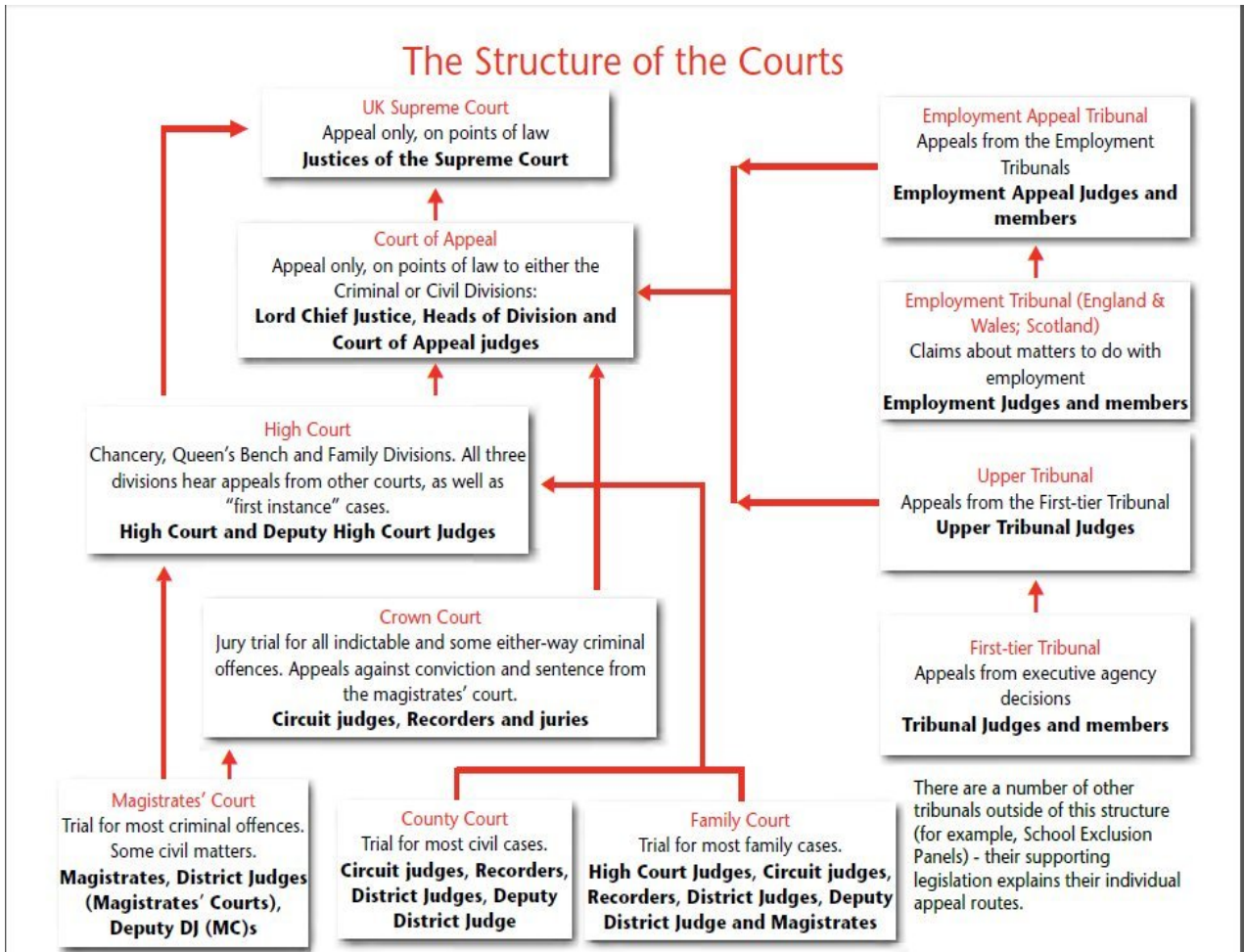
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Key Principles on a Page. Avoiding the six media law sins.

Key notes

<p>1. Libel 2. Privacy 3. Contempt 4. Copyright 5. Criminal 6. Damnum Sine Injuria (ethics/regulation)</p>
<p>1. Libel = serious harm to reputation by online/radio/tv publication including implication and innuendo where meaning is constructed by victim and authorial intention no defence/commentary/picture juxtaposition always a risk BUT defended through privilege: court/government proceeding = Absolute/high qualified. Public meeting/press conference and release at low qualified level, fairness and accuracy paramount and gist of alleged person's side when demanded required at the low qualified level. Innocent dissemination/Truth (in substance and fact)/Honest Opinion based on true facts or privileged material/Public Interest through neutral reportage (not adopting allegations) editorial decision-making conditions considered/Web operator's system/defence for user generated comments moderated or not moderated- complaints need to be addressed within 48 hours/qualified privilege for academic conferences and papers that are peer-reviewed.</p>
<p>2. Privacy = publishing and intrusive conduct about private information and situations- matters of public interest trumping on balance with intense focus of circumstances including confidential information where there is a reasonable/legitimate expectation of privacy and right to family life/filming & sound recording in private geography without permission.</p>
<p>3. Contempt = publishing in any way to third party (including by social media) creating a substantial risk of serious prejudice to administration of justice when cases are active after arrest/warrant/opening inquest hearing or impeding process of justice by monsterring and thereby intimidating witnesses/suspects.</p>
<p>4. Criminal = committing crimes through conduct and publication (intention sometimes is not required to be proved) like contempt, disobeying court orders even when wrong (max 2 years jail/unlimited fine/prosecution by attorney general), but more particularly anything that can lead to identification of sexual offence complainants/young people juveniles (17 & under)/harassing by causing distress on at least 2 occasions/computer and phone interception/bribing/and agreeing to incite a civil servant (police officer/service-person etc.) to commit misconduct in public office. Since 2010 Bribery Act paying sources for information likely to be an offence (no public interest defence). Media have to consider risk of people who know victims doing their own detective work to put two and two together. This means pixilation, silhouetting and electronic voice distortion is not enough. Actors have to be used. Individual journalists not just editors can be held liable for criminal offences.</p>
<p>5. Copyright = publishing substantial part of image, script, publication, table, database of person/organization without permission unless there is a defence of fair dealing by criticism/review, parody, 'quotation or otherwise', or use in reporting current event BUT photographs excluded from current event defence, rare public interest defence available where image is something so awful/outrageous/depicting wrong and no other way of reporting. Also defence of public domain 70 years after death of author/70 years after death of director/producer/composer/original production (but beware of other layered copyright interests. Only photographs/images put into public domain prior July 1912 safe from copyright liability.</p>
<p>6. Damnum Sine Injuria (ethics/regulation) = being nasty/unpleasant/discourteous/using people instrumentally instead of intrinsically/being on the wrong side of prevailing 'public interest'/breaching IPSO Editors' Code/Ofcom Code/IMPRESS Code/BBC Editorial Guidelines, employer's contract/professional trade union's code of honour/not treating other people as you would yourself.</p>

Brief Over-view of Legal System England & Wales.
The diagram 'The Structure of the Courts' features on page 6 of the excellent guide on the Judicial System of England and Wales at <https://www.judiciary.gov.uk/wp-content/uploads/2016/05/international-visitors-guide-10a.pdf>





Some basic information about the nature of the legal system in England and Wales.

There are three legal jurisdictions in the United Kingdom. Scotland has its own legal system and so does Northern Ireland though that is more similar to the system in England and Wales.

The English and Welsh system affects the vast majority of the UK population; that's 57 million. Scotland has a population of 5.3 million and Northern Ireland 1.8 million.

There are two spheres of law: criminal law and civil law.

Criminal System.

Crimes are mostly investigated by the police and prosecuted by the independent Crown Prosecution Service (CPS) whose head is the Director of Public Prosecutions. (DPP)

The police process involves either an on the spot fine, or reporting an offence for minor motoring crimes, or arrest for the more serious offences. After an arrest suspects will be questioned, there will be the collection of evidence and a decision will be made to charge or not by the CPS.

Most crimes are dealt with in Magistrates Courts that can sit with full-time District Judges or panels of lay magistrates. These courts can sentence to a maximum of 6 months for a single offence and up to one year for two offences. If they think a crime with a high maximum penalty requires harsher punishment they can refer the case to the Crown Court. In March 2015, the cap of £5,000 on fines by Magistrates Courts was lifted.

When people are arrested for very serious crimes, known as indictable offences, they appear first at the Magistrates Court and the case is then immediately transferred to the Crown Court for trial.

Trial at the Crown Court takes place in front of a jury of 12 people which decides the facts in terms of a guilty or not guilty verdict. A single judge decides matters of law and imposes the sentence.

The Prosecution have to prove the cases so that the jury are sure- used to be known as beyond reasonable doubt.

Appeals against sentence and verdict go the Court of Appeal- Criminal Division.

Civil System.

Civil wrongs in law are litigated by private parties known as the claimant and defendant. Small disputes involving property and services of less than £5,000 are dealt with in the Small Claims Court. The parties usually represent themselves. Disputes and claims for larger amounts are sued

over in the County Courts with single judges deciding the facts on the balance of probabilities and making any decision concerning damages, or injunction.

Disputes involving larger potential claims (over £15,000) are heard before the High Court that mainly sits in London, but also sits in regional centres such as Birmingham, and Manchester.

The High Court has several divisions: Chancery, Queen's Bench Division, Family and Administrative which can deal with first instance cases for judicial review or appeals on points of law from County and Magistrates courts.

It is very rare for civil actions to be decided by juries. It is now only known to happen in actions for malicious prosecution or unlawful imprisonment.

There is an Appeal Court Civil Division and further appeals on points of law of general public importance can be heard at the UK Supreme Court. If there are human rights' issues there is recourse to the European Court of Human Rights in Strasbourg and if there are European Union law issues appeals can be made to the European Court of Justice in Luxembourg.

While the UK remains a member of the EU, the rulings of the ECJ are binding. After 'Brexit', the government has not yet decided on the status of EU law before or after the UK's official departure. Under section 2 of the 1998 Human Rights Act, UK courts are supposed to 'take into account' ECtHR rulings. Under section 3 the interpretation of UK legislation 'must be read and given effect in a way which is compatible with the Convention rights'.

There are 3 dimensions to the subject:

- | |
|--|
| 1) Primary Media Law- statute (acts of Parliament/legislation) and case law/precedent-rulings of courts/judiciary. (In the UK we work in a European context with the statutory influence via Human Rights Act 1998 of the European Convention on Human Rights judgments from Strasbourg and the European Union Court of Justice at Luxembourg whose rulings are binding on the UK jurisdictions until the resolution of Brexit negotiations in 2019. |
| 2) Secondary Media Law- regulation by statutory and industry bodies enforcing codes of ethics/editorial guidelines such as: Ofcom (tv & radio); the Independent Press Standards Organisation (IPSO) for print and online media, and the case law and guidance of its predecessor body The Press Complaints Commission (PCC); BBC for BBC employees and independent production companies making programmes for the BBC). [The Royal Charter on the Press established after the Leveson Inquiry Report of 2012, has set up a Press Recognition Panel that in late 2016 approved IMPRESS as an independent 'Leveson compliant' regulator of print and online media. From April, 2017 most BBC content became subject to regulation by Ofcom. |
| 3) Professional moral values and ethics- Your employer, peers, professional trade union/institute/association, personal conscience, social community and religion. |

But we start with an:

Introduction to main themes of Media Law

It is important to understand that any journalist publishing in the United Kingdom is operating in a country that was ranked 40 for media freedom in 2018. This is down 21 places from 2010 in the World Press Freedom Index of 180 countries published by the NGO Reporters Without Borders. The current ranking is below Chile, Trinidad and Tobago and just above Burkina Faso. There is no constitutional guarantee of media freedom in UK legislation. Article 10 freedom of expression from the European Convention on Human Rights is highly qualified with conditions,

restrictions and penalties, and equally balanced with other rights, and the interests of 'national security or public safety'.

Conduct and publication is controlled by primary media law in the form of acts of Parliament and case law made by the courts, and secondary media law from a range of regulators:

Ofcom stands for the Office of Communications. It is a statutory regulator for licenced broadcasters and can fine, suspend and remove the licence of broadcasting publishers. Ofcom is a large and complex government funded body constituted by legislation. It has a direct responsibility and impact on the regulation of the content of broadcast radio, television and 'on demand' bulletin services. Video-on-demand services include TV catch-up, online film services and those providing a library of archive content. The main home page of Ofcom is at: <http://www.ofcom.org.uk/> . However, your main interest will be in the regular publications of adjudications on investigations into complaints about radio, television and on demand services at <https://www.ofcom.org.uk/tv-radio-and-on-demand> . Ofcom enforces a Broadcasting Code that contains rules which TV and radio broadcasters must follow, and includes the rules for video-on-demand service providers. This is set out at <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code> . The nature of full BBC regulation by Ofcom from 3rd April 2017 is set out at <https://www.ofcom.org.uk/consultations-and-statements/ofcom-and-the-bbc>

IPSO is a regulator refusing to be recognised by the statutory Press Regulation Panel. It describes itself as 'the independent regulator for the newspaper and magazine industry in the UK'. Most of the country's print and online media groups contract into its content regulation including the publishers of the *Sun*, *Times*, *Sunday Times*, *Daily/Sunday Telegraph*, *Daily Mail/Mail on Sunday*, *Daily/Sunday Mirror*, *Sunday People*, *Daily/Sunday Express*, the *I* newspaper, and regional/local newspaper groups. It has the power to fine for breaches of the Editor's Code and can order corrections. It has started an arbitration scheme for media law disputes where claimants can pay a fee that is capped at £100 and potentially achieve damages of up to £60,000 and recover costs up to £25,000. The details are set out at:

<https://www.ipso.co.uk/arbitration/> IPSO argues that its arbitration scheme is an excellent alternative to media law litigation because it's low cost with a one-off fee of £100, it helps to keep other costs down, it's quicker than taking a matter to court, and it reduces inequality as it puts you and the newspaper on an equal footing.

IPSO adjudicates on the largest number of complaints made against journalists in the UK and its rulings are regularly published at: <https://www.ipso.co.uk/rulings-and-resolution-statements/>

IMPRESS is a regulator recognised by the PRP and is being substantially funded by the family trust of Max Mosley- a media standards campaigner. It describes itself as 'the first truly independent press regulator in the UK'.

It has established through consultation its own code of standards and ethics which can be downloaded and examined online at <https://www.impress.press/standards/impress-standards-code.html> . IMPRESS has also written a detailed guidance on the interpretation of its Standards' Code which it describes as 'a modern Code that aims to assist journalists by promoting and supporting their work. It also aims to protect the public from invasive journalistic practices and unethical news reporting. The Code is practical and responsive to emerging challenges in the

digital era including issues like verifying the authenticity of sources and information and using content from social media.’

IMPRESS is running a low-cost arbitration scheme, and has the advantage that those media publishers agreeing to be regulated by IMPRESS will not be subject to exemplary (punitive) damages in media law cases, or the risk of having to pay the legal costs of all sides even if successful. Micro publishing businesses that do not turn over more than £2 million per year, or do not have more than 10 employees, will not be subject to these penalties under the 2013 Crime and Courts Act.

<http://www.impress.press/>

IMPRESS has also began to investigate complaints and issue adjudications.

See: <https://www.impress.press/regulation/complaint-adjudications.html>

The *Guardian and Observer*, *Independent online*, *London Evening Standard*, and *Financial Times* are significant publishers who have not yet agreed to be regulated by any external body. Should any of them join IMPRESS, then the UK newspaper and magazine industry is likely to have the confusing situation of two active and rival regulators with separate codes of ethics and standards.

The BBC employs the largest number of journalists of any publishing organisation in the UK, and although subject to full future Ofcom content regulation from 2017, still obliges its employees to comply with BBC Editorial Guidelines.

<http://www.bbc.co.uk/editorialguidelines/>

The Information Commissioner’s Office regulates the Data Protection Acts, the EU’s General Data Protection Regulation, known as GDPR, and Freedom of Information Act. In particular if you process digital information about other individuals for journalistic purposes your employing publisher or you yourself as a freelance will be obliged to register with the ICO: ‘The Data Protection Act 1998 requires every data controller (e.g. organisation, sole trader) who is processing personal information to register with the ICO, unless they are exempt’. For most individuals and organisations, the annual registration fee as at 2018 is £35.

<https://ico.org.uk/>

The Information Commissioner fined the Daily Telegraph £30,000 for misusing the data it had collected from its subscribers so that it could send hundreds of thousands of emails on the day of the general election urging readers to vote Conservative.

See: <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/12/ico-fines-telegraph-media-group-for-election-day-email-campaign/>

From the 25th May 2018, the ICO became responsible for enforcing a new data protection regime in the UK combining GDPR with the new Data Protection Act 2018 (DPA 2018).

See: <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/>

More detail on the GDPR implications for journalists is explored later on in the guide. The Information Commissioner does provide a guide for journalist/media bodies setting out their legal duties as data controllers. See: <https://ico.org.uk/for-organisations/media/>

In particular journalists should make sure any of their working personal data, particularly of contacts and sources, is kept securely and that would require the encryption of information being transported on USB keys/memory sticks that are easily lost and misplaced.

These short summaries and guidance on media law must not be regarded as constituting professional and qualified legal advice. Media law is in many parts an extremely complicated specialism of the law and should you have the misfortune of finding yourself in difficulties it is important you receive professional and qualified advice.

In our teaching of journalists at Goldsmiths we would suggest a media law survival strategy represented by the acronym, **SPECTACULAR**, with the letters standing for the following principles. This also features in the chapter on media law in the second edition of Paul Bradshaw's *The Online Journalism Handbook: Skills to Survive and Thrive in the Digital Age*: at <https://www.routledge.com/The-Online-Journalism-Handbook-Skills-to-Survive-and-Thrive-in-the-Digital/Bradshaw/p/book/9781138791565>

S is for Serious implications if you transgress media law. Not only can you be financially ruined if sued- you could be criminally prosecuted, fined or even jailed.

The basic detail- key information and points you need to understand:

Civil litigation is pursued by a privatised profit led legal profession in the United Kingdom that operates with very high costs, reward fees for success, and high after the event insurance premiums collected from the losing side. Changes to the legal costs regime for defamation and privacy actions in England and Wales have still not been implemented. Legal fees charged by English media lawyers have been researched and surveyed as being in the region of well over 100 times that charged in European countries. Damages awarded and agreed are generally seen in Europe as disproportionate, but in this country lawyers think they are fair and justly remedying.

Most media law crimes are strict liability, which usually means that the prosecution does not have to prove intention, with construction of meaning by subjective interpretation of the alleged victim, or objective interpretation by judges. The UK judiciary has been observed by sociologists as being majority male, white, privately and Oxbridge educated and operating as a self-perpetuating elite. The size of audience (i.e. how many Twitter followers you have and your Facebook privacy setting), traditional readers, listeners, viewers, and number of Internet site visitors will be mitigation on damages and criminal penalty, but not a defence. If defamatory comments streaming under your web postings (damaging to reputation- generally known as libel) have not been moderated (i.e. not checked editorially or legally prior to going live), this does not guarantee you are immune from legal problems. European case law is beginning to be ambiguous about whether it makes any difference to have moderation or not; particularly if the trolling verges on hate crime abuse.

See: <http://www.bailii.org/eu/cases/ECHR/2015/586.html> And a recent English case has confirmed that the criminal courts can order the banning of social media reporting of sensitive criminal trials because Tweeting and Facebook postings cannot be detached from comments and replies.

In theory, there may be defences for what you do, but the power of the state/private claimant and their lawyers' costs are so great, 'the chilling effect' (in the USA it is called SLAPP- strategic lawsuits against public participation) means it is easier, less risky, and cheaper to surrender, settle and apologise for trying to tell the truth (well what you think is the truth). The alternative is to remain silent- generally seen as self-censorship and compliance in a climate of fear. In England and Wales, where the legal profession is well over 90% privatised and there is less eligibility for legal aid than at any time since the Second World War, if you were courageous (and/or foolish?) enough to defend and represent yourself, Citizens Advice Bureaux are over-stretched and if you are lucky you might have volunteer pro bono lawyers to advise you, but most of these are likely to be law students or the newly qualified.

It is also very important to understand that anything you do and publish in the cyber-digital sphere is subject to another dimension of control and liability. This is the private contract you have with the private corporation that hosts your communications. The terms and conditions of global Internet businesses such as Twitter, Google, Facebook and Wordpress offer additional legal duties and liabilities. Your service could be withdrawn with devastating consequences when your work and archives have not been backed up. In July 2016, the *Guardian* reported that writer and artist Dennis Cooper learned that his Gmail account had been deactivated – along with the blog that he had maintained for 14 years. He complained that the decision meant two of his transgressive novels had been taken off the Internet along with what was described as censorious 'erasing of an unfinished book.'

See: <https://www.theguardian.com/books/2016/jul/14/dennis-cooper-google-censorship-dc-blog>

P is for Privacy- have you invaded somebody's reasonable expectation of privacy without public interest justification? If you expose private intimacies to do with sexuality, education, and family matters, then you could be breaking the law.

The basic detail- key information and points you need to understand:

Privacy is also about intrusive conduct about private information and situations. The UK courts measure the principle of freedom of expression in terms of public interest against privacy rights. This is an equal balancing exercise with an intense focus on the circumstances of each case. Questions that will be asked will include whether there was a duty and entitlement to confidentiality. Article 8 of the ECHR convention talks about the right to home, family and correspondence. The concept of media privacy is so wide-ranging it can include filming digital video on a smartphone at a private location without permission. The recent victory by Sir Cliff Richard against the BBC indicates the privacy rights extend to the anonymity of individuals subject to police investigation. See: <http://www.bailii.org/ew/cases/EWHC/Ch/2018/1837.html>

E is for Ethics- the Editors' Code set for IPSO is regarded as a benchmark on ethical and legal communication.

The basic detail- key information and points you need to understand:

There is no harm studying and respecting the IPSO code at: <https://www.ipso.co.uk/editors-code-of-practice/> For broadcasters it is very important to respect and understand Ofcom's Broadcasting Code at:

http://stakeholders.ofcom.org.uk/binaries/broadcast/code-may16/Ofcom_Broadcast_Code_May_2016.pdf.

The BBC's Editorial Guidelines at <http://www.bbc.co.uk/editorialguidelines/> are also very influential. They are the first base for standards and duties for anyone working for the BBC. You need to bear in mind that by 2017 all of the BBC's content regulation will be covered by Ofcom. Outside any legal obligations in law and regulation, you should also consider moral and ethical values. Professional reputation and audience loyalty will be jeopardised by a publication policy and behaviour that is unpleasant and unfair and only just stops short of breaching law and regulation. It is known by the Latin expression *damnum sine injuria*. This is about being nasty, discourteous, unpleasant, using people instrumentally instead of intrinsically, and not treating other people as you would yourself. Professional associations such as the National Union of Journalists and Chartered Institute of Journalists have a separate code of ethics that sets standards that are in addition to law and regulation.

You might like to consider alternative codes of ethics from the English-speaking world that are influential beyond the narrow prism of British journalism. The US Society of Professional Journalists approves and publishes a code that is much more grounded on moral and ethical principles than the mere pragmatism of staying on the right side of existing law. An example of an ethical maxim not normally emphasised in UK journalism codes is: 'Boldly tell the story of the diversity and magnitude of the human experience. Seek sources whose voices we seldom heard'. See: <https://www.spj.org/pdf/spj-code-of-ethics-bookmark.pdf>

The US Radio, Television, Digital News Association updated its code of ethics in 2015 to take into account the 21st century ecology of digital online journalism, and a specific standard unique to online communications is: "Trending," "going viral" or "exploding on social media" may increase urgency, but these phenomena only heighten the need for strict standards of accuracy'. See: http://www.rtdna.org/content/rtdna_code_of_ethics

C is for Contempt of court- protecting the right to a fair trial without prejudice from media coverage or as a former Attorney General once said: 'trial by Google'.

The basic detail- key information and points you need to understand:

The key question to ask is have you created a substantial risk of serious prejudice, or impeded a fair trial, or breached court orders postponing or prohibiting publication? If you have- it is likely to be the jail spot on the Monopoly board.

Contempt of court is a specific criminal offence in the UK with a maximum jail sentence of two years and unlimited fine. It involves publishing in any way to a third party, including by social media, seriously prejudicial information when criminal cases are active after an arrest, warrant for arrest, or opening of an inquest hearing. It can also be impeding the process of justice by monsterring an arrested suspect and any form of threatening or intimidation of witnesses.

It is, therefore, very important to avoid using online media to comment on any ongoing legal case; whether civil or criminal after arrests, or warrant for arrests have been issued or when litigation is being heard in court. As an individual, you may be unlikely to be aware of any special and additional reporting restrictions that are only known at editor or media lawyer level. Although there are defences to some media law crimes of 'unintentional publication' case law has indicated that the legal system shows little sign of compassion or interest in your 'ignorance of the law,' or indeed that you were not directly informed, or had knowledge of a reporting restriction. It will be assumed that you should have shown 'good faith' in finding out, and your professional status should be such that you had been properly trained about the risks.

'C' is also for criminal behaviour by committing crimes through conduct and research leading up to your online publication. This could be harassing anyone by causing distress on at least two occasions, computer and phone interception, and bribing people for information through treating, or promising favours. This is covered by two criminal offences in the UK: agreeing to incite a civil servant, including police officers, or members of the armed forces, to commit misconduct in public office, and since 2010, the Bribery Act means that in some circumstances paying sources for information could be a crime with no public interest defence. The Computer Misuse Act 1990 is another piece of legislation making it a crime, for example, to use somebody's computer without their permission to obtain information, or to 'hack' into another person's computer, smartphone or digital tablet having guessed, or obtained their password without their knowledge.

T is for Testing your copy rigorously for any possible breach of media law and ethics before publication. Read, re-read and re-read again. If in doubt, leave it out, seek advice and never, ever take anything for granted. Professional decision making in any form of journalism requires legal checking. You need to be risk averse. You need to be defensive. You need to be professional. The risks in media law come from all directions and are often unexpected. If you have an instinct that something is wrong- trust it and act on it.

A is for Anonymity- in the UK there are many classes of persons who have anonymity for life because of their involvement in criminal processes or legal proceedings. They are often victims or witnesses.

The basic detail- key information and points you need to understand:

All sexual offence complainants have anonymity for life, so do victims of people trafficking, female genital mutilation, known as FGM, blackmail victims where the menaces are embarrassing, children (aged 17 and under) in court cases, and teachers accused of offences against their students prior to being charged. The list is not exhaustive. It includes the identity of jurors in criminal trials and anything concerning their verdict deliberations. Victims of people trafficking criminal offences were given statutory anonymity in 2016 and there is a growing lobby to ensure that victims of 'revenge porn' have the same legal protection. The anonymity applies as soon as the complaint about the crime is made.

All media publishers have to carefully consider the risk of people who know the victims doing their own detective work to put two and two together. This means pixilation, silhouetting and electronic voice distortion are not enough. Actors have to be used. Individual journalists not just editors can be held liable for criminal offences. It is very important to avoid including any kind of specific detail that could enable anyone to make the identification.

What was in the public domain and not subject to a reporting restriction last week or yesterday may not be the case today or tomorrow, and you may not know about it. The English legal system sometimes somersaults between identification and anonymity; for example, in the search for missing youths who could be the victims of sexual offences. The investigating authorities may release names and images in the public interest to secure their safety. As soon as this is done, and the arrest of the suspect has been made, all forms of media must then delete and remove anything identifying the victims previously made public. What is public knowledge yesterday, may be contempt of court and a serious criminal offence today.

C is for Copyright or Intellectual property. This is a legal protection for the creation of work and includes a large range of media content.

The basic detail- key information and points you need to understand:

You should not steal other people's intellectual property; particularly in words, images and music. The best defence is to always get permission for using other people's creative work. Breach of copyright is publishing the substantial part of image, script, publication, table, database belonging to another person or organization without permission unless there is a defence of fair dealing by criticism or review, parody, 'quotation or otherwise', or use in reporting a current event.

However, you must always remember that digital images and photographs are excluded from the reporting current event defence. You might have a very rare public interest defence where an image discloses something so awful, outrageous, and wrong there is no other way of reporting it. You may also have the defence that the material is now in the public domain because the publication is 70 years after the death of the author, 50 years after the date of a broadcast, 70 years after the public release of a sound recording (from 1st January 1963), and 70 years after the death of the director, screenplay author and composer of an original film production. Media publications such as films and online websites often have multiple layered copyright interests where the duration varies. Only photographs and images put into the public domain prior to July 1912 are absolutely safe from copyright liability. Computer programmes, coding, and software are also copyright protected.

The Creative Commons license is a vital defence and enabling facility for the use of in copyright images and multimedia in online publications. For more detail on the different categories of license available see: <https://creativecommons.org/licenses/>

You need to be cautious about siphoning information from online databases for the purposes of using infographic style software to produce data journalistic designs and lay-outs. In the UK database owners are entitled to 'database rights' under an EU 1996 Database directive that was implemented in English law a year later.

U is for Unreasonable- if your language is, then there is a risk you are ringing media law alarm bells.

The basic detail- key information and points you need to understand:

Communications on electronic networks such as on the Internet or social media like Twitter make you liable under section 127 of the 2003 Communications Act to criminal prosecution for messages that are 'grossly offensive or of an indecent, obscene or menacing character'. That could mean up to 6 months of imprisonment and a fine of up to £5,000. In 2011, over 1,200 people were prosecuted under this law. By 2014 the figure had risen to over 1,500 with 55 individuals jailed. Examples have included tweeting jokes at airports that have been misunderstood. What you think is a strong opinion could be seen as 'grossly offensive' by the police, Crown Prosecution Service and Director of Public Prosecutions.

Section 127 can also be used for 'message stalking' that you might regard as protesting or a campaign if it can be proved that your electronic utterances are 'for the purpose of causing annoyance, inconvenience or needless anxiety to another.'

Section 1 of the Malicious Communications Act 1988, that applies to old mail as well as electronic communication, makes it a criminal offence with the same penalties as above, to 'threaten', message indecently, grossly offensively, or with false, or believed to be false information on the part of sender.

In 2013 the DPP finalised guidelines on when it is not in the public interest to prosecute menacing messaging. Prosecutions are likely if social media communication contains 'a credible threat of violence, a targeted campaign of harassment against an individual or which breaches court orders'. The 'grossly offensive' category is expected to be reserved for racial/gendered orientation or hate crime abuse.

See: http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/index.html

L is for Libel- attacking anyone's reputation in a serious and inaccurate way can lead to litigation.

The basic detail- key information and points you need to understand:

Libel is anything said by image or words that causes serious harm to the reputation of anyone or indeed a business and company by any form of media publication- even an email.

Tweets, re-tweets, blogs, Facebook, Instagram images or digital video, WhatsApp messaging, YouTube, Vimeo, text messaging & 'status' notices and emails 'copied' and 'distributed' to more than a second party i.e. beyond the traditional single mail correspondent can be libellous and represent publications in terms of English law. The old rule was the letter seen by one person was not a libel publication unless opened by a butler or secretary. You should bear in mind that libel in Scotland, which has a separate legal system, includes a damage to reputation communication to one person only.

The libel can be committed by implication, innuendo and jigsaw juxtaposition identification e.g. any reader connects a fragment of information online to something said on the radio, television or in a newspaper. You do not even have to name people to get into trouble or even explicitly state or repeat an allegation. The House of Commons Speaker's wife, Sally Bercow, was successfully sued for libel for one tweet when she asked why a former Tory politician was 'trending' and added 'innocent face.' This was deemed to be libel by jigsaw identification/implication because allegations of child abuse had been broadcast by the BBC, and on the Internet, and somebody the BBC did not name was being identified in blogs and social media.

The libellous meaning is constructed by the victim and your authorial intention is no defence. In multimedia you have to watch out for something general and libellous being said in commentary being connected to illustrative 'wallpaper' still or moving images with specifically identifiable people in the *mise en scène* of the imagery.

But there are defences. For example, there are privileged shields where your information and reporting is derived from court or government proceedings. This gives you absolute or high qualified privilege. Public meetings, press conference and press releases have a privilege at a lower qualified level. Fairness and accuracy are paramount and you must publish the gist of a person subject to defamatory allegations if they demand it. Other defences include innocent dissemination, truth in substance and fact, honest opinion based on true facts, or publication in the public interest. You could have the defence of neutral reportage provided the language of the reporting is balanced and you are not shown to adopt and agree with the libellous allegations

being reported. Editorial decision-making conditions are considered in the evaluation of the public interest defence. There is also a specific web operator's defence for user generated comments whether they are moderated or not. Complaints need to be addressed within 48 hours. The Defamation Act 2013 introduced a qualified privilege for academic conferences and papers that are peer-reviewed. It is very important to appreciate that malice on your part will probably defeat many of these defences. Malice means deliberately setting out to harm somebody usually to an unlawful extent.

A is for Attitude- keep it professional and cautious. It does not mean you have to 'self-censor' and sacrifice your freedom of expression. You can write in an angry way, but your anger needs to be channeled through truthful and lawful writing that is in the public interest. The interest needs to be more than just what interests the public. And being abusive, menacing and threatening is likely to be unlawful.

R is for Rights- other people's, which under the Human Rights Act 1998 are protected in so many ways. Article 10 Freedom of Expression as a right is equally balanced with Article 8 right to privacy and Article 6 right to a fair trial. At its extreme digital, analogue printed, and digital online communications could threaten somebody's right to life under Article 2 and right not to be subject to inhuman and degrading treatment under Article 3. Read them and understand them at: <http://www.legislation.gov.uk/ukpga/1998/42/schedule/1>

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The added Online dimension of media law makes the subject asymmetrical. This means that it intersects myriad dimensions of private, public, analogue, digital, UK and international forms of law and regulation. It also means it is dynamic, complex, and changing.

For the past thirty to forty years UK media law has been substantially influenced by European law and the rulings of the European Court of Human Rights in Strasbourg and the European Court of Justice at Luxembourg. UK courts have to 'take into account' rulings of the ECHR derived from the European Convention on Human Rights and Fundamental Freedoms which became statutory UK law with the passing of the 1998 Human Rights Act and came into force from October 2000. Since the UK joined what was then the European Common Market in 1972, all rulings of the ECJ (the European Union Court) have been binding on UK courts. However, the referendum vote to leave the EU in June 2016 clearly means that the situation may well change in the future.

Another unstable and ambiguous aspect of media law is that there are often no clear right and wrong decisions on publication. They are merely arguable in law and not certain. Lawyers will be happy to be paid to argue the issues in courtrooms, but you personally, and your employing publisher, may not care to pay for the huge costs involved. In the digital online information age, we are also experiencing an intense transition and combination of production between analogue printed media and online digital media. The law does not necessarily have an answer and clear policy for both dimensions of publication.

It can also be argued that media law is a very political subject. The development of media laws and the impact of civil litigation can be construed as the result of social and political activism. The son of Britain's Fascist leader during the 1930s, Max Mosley, has performed a major role in funding legal action by 'media victims' and tabloid news coverage perceived as 'ruining people's lives.' He has been a significant funder of the media victim campaigning body 'Hacked Off' and his family foundation has provided most of the funding (reported to be up to £3 million) to the alternative press and online regulator IMPRESS.

See: <http://www.newsmediak.org/Latest/nma-why-impress-should-not-be-grantedrecognition-as-an-approved-press-regulator> Mr. Mosley is a controversial figure. He is a former racing driver, Parachute Regiment territorial, qualified barrister specializing in intellectual property law, based in Monaco, former head of Formula One Racing and successful claimant against the *News of the World* Newspaper in 2008 after it had published surreptitious footage of his involvement in an S&M party he had paid £30,000 to take part in. He has been pursuing litigation at the European Court of Human Rights to establish a legal obligation for news publishers to inform potential media privacy victims prior to publication. The ECtHR ruled that this would be detrimental to freedom of expression, though Mr. Mosley is pursuing an appeal on the issue to the Grand Chamber. See: <http://www.lawgazette.co.uk/analysis/max-mosley-the-media-and-uk-privacy-laws/60541.fullarticle>

And: MOSLEY v. THE UNITED KINGDOM - 48009/08 [2011] ECHR 774 (10 May 2011) at: <http://www.bailii.org/eu/cases/ECHR/2011/774.html>

Other aspects to his controversial identity relate to his family history. His father, Sir Oswald Mosley, married Diana Mitford, in a ceremony in Germany attended by Joseph Goebbels and Adolf Hitler. Sir Oswald was detained for several years during World War Two. As a young man in the late 1950s and early 60s, Max Mosley, was involved in his father's Union Movement, though he has distanced himself from the politics of his youth. Thus, a multi-millionaire has taken a significant role campaigning against media abuse of power that has led to the closing down of what was the UK's most successful and largest circulation Sunday newspaper, the establishment of the Leveson Inquiry, high profile and expensive police inquiries into journalistic behaviour, and legislation curtailing and controlling what have been described as 'the excesses' of media publication and conduct.

Similar action by wealthy donors has impacted on the role of sensationalist and media privacy harming media publishers in the USA. In 2016, the online site, Gawker, shut down after 13 years following an award of damages against it of \$140 million for breaching the privacy of Hulk Hogan whose real name is Terry Bollea. Former *Guardian* editor, Peter Preston, has argued: 'The collapse of the libertarian, scandalous news site has secretly relieved some less aggressive media companies. But the implications are truly ominous.' See: <https://www.theguardian.com/media/2016/aug/28/gawker-gone-cant-look-other-way-press-freedom> . As New York Times writer, Farhad Manjoo, explains Gawker's demise is due to the fact that 'Nine years ago, Peter Thiel, a wealthy and secretive Silicon Valley investor, read something about himself online that he didn't appreciate. He apparently vowed revenge, eventually carrying out a plan to fund lawsuits against Gawker Media, the publisher that upset him, culminating this week with the shuttering of the flagship Gawker.com.' See: http://www.nytimes.com/2016/08/25/technology/gawkers-gone-long-live-gawker.html?_r=1

Peter Thiel is the billionaire co-founder of PayPal. Thiel secretly funded Hulk Hogan's legal case in Florida with around \$10m. He was motivated by the fact that in 2007 Gawker had published a story revealing that he was gay. Thiel told the *New York Times* 'it's less about revenge and more about specific deterrence.' He said the story about his own sexuality was one of many that had 'ruined people's lives for no reason'. And like Max Mosley in England, he decided to help fund 'victims' of the site to mount legal cases against Gawker. See: <https://www.theguardian.com/media/2016/may/26/paypal-co-founder-peter-thiel-admits-bankrolling-hulk-hogan-gawker-lawsuit>

Recommended specialist media law books:

The latest editions of:

McNae's Essential Law For Journalists, edited by Mark Hanna and Mike Dodd, 24th Edition in 2016, Oxford University Press.

Media & Entertainment Law by Ursula Smartt, 3rd Edition 2017, Routledge.

Online Law For Journalists by Cleland Thom, 2nd Edition 2017, clelandthom.co.uk.

UK Media Law Pocketbook by Tim Crook, 1st Edition 2013, Routledge. [New edition planned for 2019].

Law for Journalists by Frances Quinn, 6th Edition 2018, Pearson.

Comparative Media Law and Ethics by Tim Crook, 1st Edition 2009, Routledge [New edition planned for 2019].

The Editors' Codebook by Jonathan Grun, Edition 2018, an electronic book downloadable from <http://www.editorscode.org.uk/downloads/codebook/codebook-2018.pdf>

The more detailed briefings begin with 3) **Professional moral values and ethics**

As journalists and media communicators we are expected to:

- 1: Understand that media communication involves the exercise of **power and responsibility**;
- 2: Our conduct and communication has **consequences** and we have a duty to consider **the impact** of what we do and how we communicate in relation to the people we interview and meet, and our audience. Our fellow human beings should be treated **intrinsically** rather than **instrumentally**. This means **respecting** people **for who they are** rather than how **useful they can be for us**.
- 3: In our relationship of communication we are expected to **show respect** for other individuals and carefully evaluate any **justification** we may have to cause **harm and offence**. We should strive to be **fair** in our behaviour and publishing;
- 4: As we live and work in a **democratic society** with an **independent judiciary** we are expected to abide by and respect **the rule of law** even if we disagree with the nature of any existing laws;
- 5: In news reporting we are expected to avoid allowing our **personal opinions and politics** to influence our construction of stories and representation of opinion;
- 6: In news reporting we are expected to aspire to **impartiality** with an acknowledgement that **objectivity** is rarely achievable in its absolute degree;
- 7: We are expected to be **transparent** about any **conflict of interest** in our journalism and **accountable** for our behaviour and communication;

8: We are expected to develop our **professional skills** to do our job to a **high standard** so that our audience can **trust** our ability, judgment and the content we produce in all the different media in which we work.

It is very difficult to apply in **absolutely positive and negative terms** the values of **right and wrong** and **good and bad** in journalistic conduct and communication. Human life teaches us the reality of having to negotiate **ambiguities**. This means that the values 1 to 8 are aims that we strive for. There is nothing original in these concepts.

For example, the BBC pledges to uphold the following **values** to its audience at <http://www.bbcmundo.com/academy/journalism/values>

<p>Truth and accuracy Accuracy means not only getting the objective, verifiable 'facts' right but accurately reporting opinions expressed by those who you report.</p>	<p>Independence The BBC's obligation to its audiences means journalists have to be able to show the independence of their decision-making and do all they can to eliminate doubt about it.</p>	<p>The public interest In the public interest or what the public's interested in - the difference is crucial. And, of course, there are many different audiences with variable interests.</p>
<p>Accountability Being accountable to BBC audiences means being able to show good reasons for your decisions. Why you must listen to your audience and acknowledge your mistakes.</p>	<p>Impartiality The BBC's Charter and Agreement requires BBC journalism to be impartial - it's part of the contract with audiences. Find out what this means to journalists in their daily decision-making.</p>	<p>BBC values The BBC's ethics and values are non-negotiable for every journalist; from the most junior to the most experienced.</p>

Understanding and applying principle and aim number 4: **respecting the rule of law**. What does that mean and what are the potential ambiguities?

It is a professional necessity that journalists learn about media law to the highest standard possible. It is a requirement of all industry/professional accreditation, and no media publisher is going to employ a journalist without accomplished and reliable applied legal knowledge. However, journalists rarely have the power to make the laws they have to comply with. Legislation and court rulings sometimes leave **uncertainty** about the application of law and how to comply with it.

This was the case with the phone hacking law- the Regulation of Investigatory Powers Act of 2000. When the first prosecution of a journalist and private investigator was being decided in 2006, there was argument amongst lawyers that the statute did not make it a criminal offence to listen to a mobile phone message stored on an account after it had been heard by the

subscriber without his/her permission. The situation was not clarified by the Appeal Court until 2013.

However, it would appear a number of journalists eavesdropped on phone messages believing that they were not committing an actual criminal offence.

In the legal profession, this is seen as *damnum sine injuria* meaning the worst conduct in moral terms and causing damage just short of breaking an actual law.

In terms of ethics, it is clear that such activity is **immoral**, an **intrusion into somebody else's privacy**, and there would need to be a very strong **public interest** to justify such behaviour if it were not a criminal offence.

It is the equivalent of opening a cabinet in a stranger's house and reading a file of intimate letters or opening somebody's mail without their permission. Everyone knows that such actions are immoral, unethical and unacceptable.

Here is an example of interpretation of the law being **ambiguous**, but the ethical position is certainly not.

Can you think of a situation when phone hacking might be morally justified?

An example might be when a mailbox message contains information that is a matter of life and death to a subscriber who is unconscious or in a coma. The action would still be a criminal offence, but it is hoped that the Crown Prosecution Service/Director of Public Prosecutions would choose not to prosecute since to do so would not be in the **public interest**.

Understanding and applying principle and aim number 6: **impartiality**. What does that mean and what are the potential ambiguities?

The BBC has spent much money, time and anguish defining, developing and debating the concept. It can be understood as avoiding the intention and appearance of bias, trying to be balanced, or fair and proportionate in representing all sides to an issue. It can also be perceived as avoiding the alienation and marginalizing of minorities. It can mean verifying the assertion of facts, seeking the point of view and opinion of somebody or an organization facing allegations, and fairly reporting the reply.

It can also be seen as part of a process of achieving trust with your audience that you are not propagandizing rather than reporting; that you are not deliberately, or through laziness, omitting important and relevant facts, and opinions.

Since it is now accepted that philosophically it is very difficult to achieve an absolute notion of objectivity in journalism on the basis we are all socially influenced and conditioned subjects, it is more than likely that applying the principle of impartiality presents many potential ambiguities. Here are two examples.

1. It has been argued that global warming and its evolved theory of climate change enjoys a near consensus among the world's scientists and conclusions of peer-reviewed papers. More recently the balance was said to have been 95% supporting the theory and only 5% dissenting. It follows that a news report or feature could be misleading the audience by representing the argument in terms of a balanced debate with an equal amount of space and significance given to both sides of the argument. It might even be argued that the dissenting view may not have any place in a broadcast programme on the subject. A similar line of thinking could be applied to the controversy over the MMR vaccine that is said to have discouraged parents immunizing their children and creating the conditions for the resumption of measles and whooping cough in young children;

sometimes leading to death from these diseases. However, an adherent to the writings of the 19th century political theorist and philosopher John Stuart Mill would argue that the tyranny of majority opinion should not silence minority voices because truths can be postulated in the form of half-truths and history informs us that a lone voice such as Galileo, asserting that the world was not flat, turned out to be correct. It may well be the case that majority truths should collide with what are seen as minority 'errors'. This is a time-honoured debate in media/journalism ethics. There are no guaranteed formulas and solutions, but the value of proportionality, fairness and open-mindedness combined with social responsibility are all values to bring to bear in the argument and discussion.

2. At election time what are our ethical duties in reporting and representing extremist and minority parties? The vast majority of professional journalists in a liberal democratic society would not be enthusiastic about reporting the opinions of political groups advocating racist and bigoted ideology. But ignoring, suppressing and censoring this facet of political life would challenge, would it not, the pledge to report and communicate impartially? In fact, UK broadcasters, under statutory Ofcom regulation, have a duty to identify that such politicians are candidates standing in an election. How does the journalist and its publication determine the extent of such coverage? The practice in Britain is to ensure a proportion of balanced coverage to political parties which is equal to the support they received in the previous election. But this has led to complaints of exclusion and discrimination from parties enjoying a major boost/improvement in opinion polls. This has also hindered 'Independents' in Mayoral elections who had no previous electoral candidature and therefore no previous results to found a calculation for coverage. The print and online media in the UK have no legal obligations to provide fair and balanced coverage of all the parties standing in elections. The ethical position becomes more awkward and ambiguous in situations where minority extremist parties spouting an ideology that was previously offensive (e.g. racist or xenophobic) become supported by the mainstream in opinion polls. What should the journalist and media do? Maintain or heighten critical and questioning coverage, or ignore the extent of popularity? The former might be seen discriminatory and biased if the style of coverage was more critical for one party and less for another. The latter can be seen as unethical and unprofessional in not only being biased, but also failing to report factually the extent of public support for a political group.
3. At any time and in any social, political and cultural context there is consensus that some opinions and values are not expected to be communicated with in terms of impartiality. For example, what moral justification has anyone to be impartial about violent crime? Nobody would be expected to have an impartial attitude to genocide or rape. But these taboos may not necessarily endure as universalizable or immutable values. Prior to 1967 homosexuality was a crime in the United Kingdom and so was abortion. Prior to 1991 rape in marriage was not a crime. And prior to these legal changes for centuries social attitudes tolerated and encouraged the exercise of what has now become regarded as unconscionable actions, attitudes, prejudices and discrimination. Abortion remains a subject where the arguments for and against are part of a legitimate debate. Anyone arguing that men or women have a right to rape their partners in marriage is likely to be greeted with contempt and outrage. Discrimination on the grounds of gender or sexual orientation is now unlawful. In non-Muslim countries, hostile and satirical visual depictions of the prophet Mohammed may be regarded as discourteous, and rude, but

not unlawful. In Islamic states, such expression is not tolerated and regarded as insulting and unlawful. Denying the Holocaust in the USA is protected by the free speech First Amendment of the country's written constitution. In France and Austria, countries where so many of its citizens were victims of the Final Solution during the Second World War, such communication is regarded as a hate crime and meriting criminal prosecution. Impartiality, therefore, shifts its parameters and boundaries, sometimes referred to as 'red lines' or 'crossing the Rubicon', across time in terms of history and place in terms of geographical location and cultures.

Understanding and applying principle and aim number 8: Duty to develop **Professional skills** to do our job to a **high standard**. What does this mean and what are the potential ambiguities?

The professional journalist has a duty to develop a high standard of skills in order to fulfill the duties of effective, reliable and trustworthy communication to the audience. This is an ethical dimension not usually highlighted in standard media and journalism ethics books. Acquiring an operational skill in shorthand is an example of the professional ethic in achieving a high accomplishment of a practice skills portfolio. Shorthand contributes towards accuracy. It is essential when reporting in environments where electronic recording devices are not permitted and its use extends from accuracy to fairness and then to complying with legal obligations.

The accurate shorthand note is the evidence that your version of the truth is reliable. It is the typography of the first draft to witnessing history. Being seen to use shorthand is also an advertisement to interviewees that you are committed to a professional standard of accuracy and aide-mémoire note-taking.

Further key media journalist skills that build trust and confidence and show respect to the audience include writing, presentation, appropriate and sensitive editorial decision-making and operational skills with media technology.

The radio journalist who is not competent in operating the hand-held digital recording device or multi-media smart-phone could be said to be disrespecting people interviewed. Their time is wasted if sound, video and images are unusable. Their representation is flawed and undermined by poor quality.

Presentation in voice and appearance contributes authority and clarity as well as a positive disposition to any audience.

This means that the professional journalist has an ethical obligation to hone, polish, practice, and improve every aspect of essential practice skills. Precision, good style, scansion, euphony, appropriate use of adjectives and adverbs (if at all) narrative exposition, intro/lead-in and headline writing, writing that avoids under-estimating or over-estimating the intelligence of the audience are important factors in consolidating an ethical relationship with employer, colleagues, contributors in research and interviewees. If the communication is obscure, confused, slapdash, illiterate, incoherent, patronizing and over-simplistic journalists and media communicators risk jeopardizing the trust and loyalty of their reading, listening and viewing audiences.

The paradox and ambiguity of this realm of ethics emerges when journalists are subjected to social and employment conditions to hinder the development of skills through lack of training and investment in new technology. Rationalization, cutbacks and exploitative employment practices can leave professional journalists over-stressed, exhausted

through over-work and surrounded by colleagues who have been employed without the necessary experience and qualifications. Professionalism in skills and value can also be undermined by an employing culture within a media institution that is overwhelmed by competitive pressures to 'cut corners' and legitimize unethical and potentially unlawful practices. This is where it is argued that professional journalists should be supported by the ethic of a conscience opt-out to enable them to reject instructions without reprisal in employment and the law should support those who insist in refusing to comply with unethical and illegal newsroom cultures.

We now move onto 1) **Primary Media Law-**

Journalists need to be aware of four major areas of the law when reporting and writing articles:

1. **The Law of Media Contempt:** Ensuring people have a fair trial
2. **Defamation (Libel):** Ensuring that people's reputations are not unfairly damaged by inaccurate and malicious information.
3. **Privacy.** Demonstrating respect for the right to privacy (family, home and correspondence and private information)
4. **Copyright and Intellectual Property.** Avoiding infringing other people's rights of property in information and publication.

There are many criminal sanctions for journalists who break media law and draconian punishment and embarrassment through secondary media law and ethics regulation, for example, by IPSO and Ofcom.

Contempt

As previously explained media contempt law in the UK is designed to prevent lay jurors being exposed to serious prejudice after criminal or inquest cases become active. The substantial risk period is live after any suspect has been arrested, or in the case of a coroner's inquiry, an inquest has been formally opened. Publications that have been found by the courts to be contempt include: publishing previous convictions; suggesting the defendant has confessed; suggesting accusations of more serious crimes or crimes they are not facing; suggesting arrested suspects are guilty; saying something so bad about them that you could seriously prejudice the mind of any potential juror against them; joining in a media crowd mentality of libelling and demonizing somebody arrested in a police inquiry or wanted by warrant for arrest.

The size of an online audience can be quite small to trigger a media contempt conviction. This was the case in 2011 when the *Daily Mail* and *Sun* newspapers were fined for publishing online photographs of a man on trial for murder and pictured him holding a handgun. The prosecution determined that there had been 190 unique visitors to the images in Sheffield where the trial was being held before the papers removed them. See:

<http://www.bailii.org/ew/cases/EWHC/Admin/2011/418.html>

The Divisional Court observed: 'The criminal courts have been troubled by the dangers to the integrity of a criminal trial, where juries can obtain such easy access

to the internet and to other forms of instant communication. Once information is published on the internet, it is difficult if not impossible completely to remove it.'

There are many other case law examples of media contempt convictions. A more recent one is that of the Attorney General's successful prosecution of the Condé Nast GQ magazine that published an article by Michael Wolff during the phone hacking trial of former *News of the World* editors Andy Coulson and Rebecca Brooks. See: <http://www.bailii.org/ew/cases/EWHC/Admin/2015/3322.html>

The Lord Chief Justice ruled that the article 'implied that Mr. Rupert Murdoch was a participant in the phone hacking, that the defendants must have been aware of the phone hacking, that the defence was being funded by him and conducted on the defendants' instructions so as to protect his interests, but in a way that might also secure their acquittal.' He imposed a fine of £10,000 with £50,000 to pay in legal costs.

Contempt

Contempt carries criminal sanctions such as an unlimited fine and maximum jail sentence of two year's imprisonment on conviction at the High Court. Prosecutions can also be taken at Magistrates Court level. So, it is always worth remembering that once someone has been arrested for a crime, or a warrant has been issued for their arrest, and until proceedings are over, you may not 'create a substantial risk of serious prejudice' for example by:

- a. publishing previous convictions;
- b. suggesting the defendant has confessed;
- c. suggesting accusations of more serious crimes or crimes they are not facing;
- d. suggesting they are guilty;
- e. saying something so bad about them that you could prejudice a potential juror against them;
- f. joining in a media crowd mentality of libelling and demonizing somebody arrested in a police inquiry or wanted by warrant for arrest.

New case-law has expanded the duty set out in f., already present in the 1981 Contempt of Court Act statute, to avoid 'impeding' the administration of justice by demonising or 'monstering' a suspect through critical depiction of a suspect's character/personality such that other equally significant suspects will not be investigated and the police enquiry will be diverted/undermined or adversely affected.

Essentially media contempt is no longer observed in its breach with a much more severe policy of prosecutions by the former Tory/LibDem coalition government Attorney General Dominic Grieve QC and the DPP- this has included prejudicial coverage after arrest and where nobody was even charged, publication of a prejudicial image online only that was taken down soon after the complaint, prejudicial coverage after the return of part-verdicts with the jury still deliberating on lesser charges, and prejudicial commentary behind a paywall after a trial had begun. There has also been a clampdown on non-professional media publication in social media by jurors- many have been jailed. Failure to observe reporting restrictions at the Magistrates Court has also led to successful prosecution.

Most of the newsworthy cases you are likely to cover will be at the Crown Court,

or High Court of Justiciary in Scotland where lay juries (12 in England & Wales and 15 in Scotland) will decide the facts in terms of the verdict (guilty or not guilty in England & Wales/guilty, not guilty, or not proven in Scotland).

Where the accused has admitted the offence(s) and there is not going to be a trial, you will be attending a sentencing hearing for which there are unlikely to be many restrictions.

But where a not guilty verdict has been declared, the presence of a jury will mean you have to take great care in observing media contempt law until **all** the verdicts have been returned.

Most sensational criminal cases begin with a **first and only appearance at the Magistrates court**. This is likely to be a journalistic assignment when you are a general reporter and unless reporting restrictions are lifted (all defendants have to agree) you must comply with these very specific rules. You can only report the following from **what you see and hear of the proceedings in front of you**:

- (a) the identity of the court and the name of the justice or justices;
- (b) the name, age, home address and occupation of the accused;
- (c) in the case of an accused charged with serious or complex fraud cases, any relevant business information which includes:

- (i) any address used by the accused for carrying on a business on his own account;
- (ii) the name of any business which he was carrying on his own account at any relevant time;
- (iii) the name of any firm in which he was a partner at any relevant time or by which he was engaged at any such time;
- (iv) the address of any such firm;
- (v) the name of any company of which he was a director at any relevant time or by which he was otherwise engaged at any such time;
- (vi) the address of the registered or principal office of any such company;
- (vii) any working address of the accused in his capacity as a person engaged by any such company; and here "engaged" means engaged under a contract of service or a contract for services.

(d) the offence or offences, or a summary of them, with which the accused is or are charged;

(e) the names of counsel and solicitors engaged in the proceedings;

(f) where the proceedings are adjourned, the date and place to which they are adjourned;

[This is usually to a Crown Court]

(g) the arrangements as to bail; [Note- like with previous restrictions NOT the objections or any arguments about bail]

(h) whether a right to representation funded by the Legal Services Commission [used to be called legal aid] as part of the Criminal Defence Service was granted to the accused or any of the accused.

In most first hearing serious crime cases being transferred to the Crown Court you will **NOT be allowed to publish the names or addresses of witnesses, which was allowed previously.** You can report what goes on outside the court, but what you report from beyond the proceedings **is subject to the Contempt of Court Act- meaning nothing that creates a substantial risk of serious prejudice or impedance to the administration of justice.**

Reporting court cases: some simple ground rules

- a. Never report anything said in the absence of the jury until after all the verdicts have been returned.
- b. Stick to reporting accurately what is said in court and do not paraphrase using exaggerated, dramatic and sensationalist language, avoid comment, and never present allegations as fact.
- c. Make sure your reports are fair and accurate. To be fair involves putting the other side of the story. Make sure you state that the defendant(s) has pleaded not guilty, and the trial is continuing at the end of the day.
- d. Always comply with reporting restrictions, reporting prohibitions and postponements. For a detailed briefing on the comprehensive details of these restrictions, download, read and follow the Judicial College's guide to reporting restrictions in the criminal courts (England and Wales). See: <https://www.judiciary.gov.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf>
Check and update the guide every year so you are briefed on the latest extension of restrictions, which at the time of publication have included anonymity for alleged victims of people trafficking, and victims of FGM (female genital mutilation).
It also important to appreciate that anonymity provisions controlling the reporting of the British legal systems are continually expanding. In the civil arena, the higher courts have begun sustaining anonymity for people who have died. This included the identity of a 50 year- old woman who was reported as saying she had lost her 'sparkle' and no longer wished to have life-sustaining medical treatment. In April 2016, the Court of Protection agreed to a continuation of the court order banning identification in order to protect the privacy interests of surviving relatives. See: <http://www.bailii.org/ew/cases/EWCOP/2016/21.html>
In another Court of Protection case in June 2016, a high court judge came to a similar decision in respect of any reporting of the identity of a woman in a minimally conscious state (MCS) after she had died. See: <http://www.bailii.org/ew/cases/EWCOP/2016/34.html>
Anonymity was also continued in the case of a three-and-a-half-month-old baby who had died following civil litigation over his treatment. See: <https://www.societyofeditors.org/soe-news/24-august-2016/baby-death-case-reporting-restrictions-stay-in-place> . Another court sustained anonymity for a 14-year-old teenage girl from London who wished to be preserved in a cryogenic state in America after her death from cancer. See the case of JS (Disposal of Body), Re [2016] EWHC 2859 (Fam) (10 November 2016) at: <http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Fam/2016/2859.html> The judge postponed reporting of the case until one month after her death to give time for her family to grieve. An indefinite court injunction prevents any identification of the girl, her family, or the hospital trust and staff involved in the case.
- e. Never ever publish anything that can lead to the identification of somebody involved in legal proceedings who is aged 17 and under unless the court specifically allows it. (Scotland used to have a bar of 15 and under, but in 2015 they raised it to 17 for young people who are the accused, victim or witness in criminal proceedings to make it the same as in England and Wales. See: <https://www.scotcourts.gov.uk/current-business/court-notices/contempt-of-court-orders/reporting-restrictions-children-under-18>)
- f. Never ever publish anything that is likely to lead to the identification of anyone complaining of a sexual offence unless they agree to be identified and that agreement is in writing [range

of sexual offences includes voyeurism, indecent exposure, 'flashing' and has substantially expanded]

g. You also need to watch out for special court orders banning identification of frightened witnesses, and undercover police, intelligence and customs officers. Blackmail victims (where the menaces are embarrassing) have common law anonymity for life as soon as they make the complaint.

h. Go out of your way to check if there are any special reporting bans/orders relating to the legal case and/or proceedings that you are covering. Keep proof of any emails and contacts demonstrating your efforts to carry out this checking.

Publishing anything that identifies anyone complaining of a sexual offence is a criminal offence if only one person can identify that individual from what you have reported. You will have no defence even when the person making the connection has been playing at private detective.

For reporting restrictions in Northern Ireland consult the online guide provided by the Judicial Studies Board of the province at: <http://www.jsbni.com/Publications/reporting-restrictions/Pages/default.aspx>

You can reference Scottish statutory reporting restrictions and privileges at an online outline provided by the Scottish government at: <http://www.gov.scot/resource/0041/00416261.pdf> and <http://www.gov.scot/Resource/0041/00416260.pdf>

You need to be accredited when visiting court complexes to cover cases. It is advisable to join a professional journalists' association such as the NUJ, CloJ or BAJ and be in possession of a press/media card. At the very least have a letter of accreditation from your editor, or tutor (if still a journalism student).

You should be able to use smartphone devices, tablets and laptop computers to make notes, email or text reports and Tweet live reports, but always remember that it would be a criminal offence if you were to use your device to record sound or digital video. Broadcast facilities are being slowly introduced in some courtrooms, but they are organised by complex installation and processes of approval and control. Download, study and keep the Lord Chief Justice of England's guidelines on courtroom tweeting at: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/ltbc-guidance-dec-2011.pdf>

The right to take notes in a courtroom is essential for any reporter and you should have a polite reference point confirming this, should a judge or court service staff try to stop you. The 2016 case of *Ewing v Cardiff Crown Court* determined that courts should have a very good reason to make orders preventing note-taking in the public gallery. The case involved a non-journalist, but asserted note-taking as part of the open justice principle. See: <http://www.bailii.org/ew/cases/EWHC/Admin/2016/183.html>

Social Media Controls

Unlike in the USA, which has a constitutional First Amendment, the British Courts have greater powers to prohibit and ban the reporting of legal proceedings in all kinds of digital and analogue media. In 2016 the Court of Appeal became so concerned about the overwhelming

abuse and prejudice being communicated in comments on social media sites during a murder trial, it decided to halt reporting on those platforms. This was because the mainstream media were unable to disable the comment streams of their reports communicated on social media platforms such as Facebook and Twitter. The first trial of the two 14 year-old-girls, accused of torturing and murdering a 39-year-old woman called Angela Wrightson, had been stopped, and a retrial ordered in another city.

See: <http://www.bailii.org/ew/cases/EWCA/Crim/2016/12.html>

The court approved a court order made by the trial judge to media publishers not to place any report of the trial of the girls on their respective Facebook profile page or pages, to refrain from issuing or forwarding tweets relating to the trial, and to disable the ability for users to post comments on their respective news websites.

The identification of children tried in the adult courts will always be a matter of discretion on the part of the trial judge who has a statutory duty to balance Open Justice with the interests of the welfare of the child. The most recent dispute over whether child killers could be named after conviction and sentence concerned the prosecution of 15-year-old Stan Markham and Kim Edwards for the murder of Kim's mother and 13-year-old sister in Spalding. See:

<http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Crim/2017/739.html>

The trial judge decided this was an exceptional case and there was a strong public interest in full and unrestricted reporting. The decision was challenged by the defendants' lawyers and the organization Just Kids for Law. In a ruling of the Court of Appeal Criminal Division in June 2017, Sir Brian Leveson said there was: 'no evidence before us that reporting their identities would adversely affect the future rehabilitation of the appellants, and, thus, be contrary to the welfare of a child, which would give rise to a weighty consideration in the balancing of competing considerations in the assessment that we must make. The reality is that anonymity lasts only until 18 years of age and both appellants face a very considerable term of detention that will stretch long into their adult life.'

Defamation also usually known as libel

Libel in England & Wales has been reformed by the Defamation Act 2013, and expected to be enacted (come into force) in the autumn of this year. A libellous statement is defined as being '**words, pictures, visual images, gestures or any other method of signifying meaning.**' Damage will be presumed rather than materially evaluated in terms of financial harm (apart from bodies operating for profit) The 2013 Defamation Act also gives courts a general power to order a summary of its judgment to be published, (a kind of right of reply or correction after winning an action) and order the removal of a libellous statement or the cessation of its distribution. 'Libel tourism' by persons not domiciled in the UK or an EU member State is being discouraged so that where a publication has 5,000 copies distributed in Britain but 100,000 in Australia, the law encourages Australia to be the appropriate jurisdiction to hear the action.

Prior restraint by court injunction- courts preventing the first publication of libellous articles and statements is rare in Britain. The 1891 court case of *Bonnard v Perryman* established the principle that when a publisher defendant declares they intend to defend the libel on the basis that it is true and can be

justified, prior restraint should not be given in order to respect freedom of expression. If the publisher subsequently loses the libel trial, they are at risk of being ordered to pay aggravated and quite possibly exemplary (punitive) damages. Lord Chief Justice Coleridge said: 'the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions.'

Defamation carries civil law sanctions such as being sued for huge amounts of money and having to pay lawyers huge amounts in fees. [As already mentioned a research study in 2008 demonstrated that lawyers in England charge 140 times more than in other European countries.] Despite recent reforms libel is an extremely vulnerable risk factor in journalism and media communication. Unlike in any other form of civil proceedings, **the burden of proof is on the media defendant.** Furthermore, reform of the claimant friendly costs regime has been delayed by the UK government in the light of the Leveson Inquiry and proposed changes are not expected until after April 2014. At the time of writing Conditional fee agreements operate in the form of 'no win no fee', or more accurately 'win and lawyers hit the jackpot'. This means that lawyers representing successful claimants can still claim a 100% bonus on all their fees (they call it an 'uplift') and as an unsuccessful media defendant you will also have to pay for the 'after event insurance premium.' This is a very expensive one-off premium payment for an insurance policy guaranteeing the payment of a claimant's costs in the event of losing the case. Government reforms involve a complex system of cost protection orders, 'qualified one way costs shifting', and the lawyers' success fees being taken as a proportion of damages. These reforms could leave media companies unable to retrieve the costs of defending their cases from claimants of 'modest means.'

In a proposed system of arbitral regulation for libel and privacy disputes (not finalized at the time of writing and opposed by the majority of UK publishers) the media defendants will have to pay the costs of both claimant and defendant. Legislation has been passed leaving media defendants at risk of punitive (called 'exemplary') damages in high court actions if they refuse to use the regulatory arbitral process.

Defamation: **four basic definitions in common law:**

- a. what you write exposes someone to hatred, ridicule and contempt
- b. what you write lowers the estimation of right thinking people generally
- c. what you write damages someone in their trade, profession or office
- d. what you write causes people to shun and avoid your subject

The Defamation Act 2013 states 'a statement is not defamatory unless its publication **has caused or is likely to cause serious harm to the reputation of the claimant,**' and 'harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body **serious financial loss.**' Bodies that trade for profit are usually companies and corporations. There has been some legal nuancing of the significance and meaning of the expression 'serious harm.' An early High Court case suggested that it might favour media defendants in giving the meaning of 'serious' a high threshold. See: *Cooke & Anor v MGN Ltd & Anor* [2014] EWHC 2831 (QB) (13 August 2014) at: <http://www.bailii.org/ew/cases/EWHC/QB/2014/2831.html> Mr Justice Bean said the new serious harm requirement 'raises the bar over which a claimant must jump'. The serious harm can be obvious in relation to the words when, for example, calling

somebody a paedophile, or terrorist. Claimants are now expected to demonstrate damage to reputation as perceived by others. But an Appeal Court ruling in September 2017 suggested that the threshold may not have been raised so far. In *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334 (12 September 2017) available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2017/1334.html> Lord Justice Davies said a libel claimant need only demonstrate that a libelous publication had a tendency to cause serious harm to the Claimant's reputation, rather than it being more likely than not that the publication would cause serious harm. It could be said these interpretations do not help journalists and media publishers fully understand the difference between harm and serious harm when evaluating their copy for potential libel risks.

It is clear then that Judges, not you, decide what is capable of being defamatory. This is the approach they take:

The legal principles relevant to meaning ... may be summarised in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any 'bane and antidote' taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation...'... (8) It follows that 'it is not enough to say that by some person or another the words might be understood in a defamatory sense.' (taken from Sir Anthony Clarke MR in *Jeynes v News Magazines Limited* [2008] EWCA Civ 130 at [14])

See: <http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2008/130.html>

Identification: even if you do not name someone explicitly, if it is possible to work out who you are talking about, you are in trouble. In other words, the construction of understanding a libel can be achieved by jigsaw identification between different media platforms and publications making one liable with the other.

The most famous 'Twibel' in recent years involved the wife of the House of Commons speaker, Sally Bercow, who in 2012 had tweeted 'Why is Lord McAlpine trending? *Innocent Face*'. The late Lord McAlpine had been wrongly accused of historic sexual abuse. The court decided Ms Bercow had libelled by innuendo in the context of multimedia coverage elsewhere.

See: <http://www.bailii.org/ew/cases/EHWC/QB/2013/1342.html>

The implications of Twibel have been brought home to the journalist and broadcaster Katie Hopkins who refused an invitation to apologize after wrongly defaming food writer

Jack Monroe. She applied for an insolvency agreement to avoid bankruptcy in order to deal with hundreds of thousands of pounds in damages and legal costs arising from two Tweets she published in 2015.

See: <https://www.theguardian.com/media/2018/sep/16/katie-hopkins-applies-for-insolvency-to-avoid-bankruptcy-after-jack-monroe-twitter-costly-libel-case>

See also the ruling in the case: <http://www.bailii.org/ew/cases/EWHC/QB/2017/433.html> & <http://www.bailii.org/ew/cases/EWHC/QB/2017/645.html>

Publication to a third party; not just a newspaper or magazine, sending a postcard with a defamatory comment is good enough.

A golden rule of testing your copy: Imagine you are the most sensitive person being criticized and think the very worst interpretation of what could be misunderstood by the language you have used in your copy.

Bane and antidote: When evaluating your copy consider the worst possible 'reading' of your material (known as the bane), make your assessment on one quick and immediate reading (the natural and ordinary meaning expected of your audience), then look for any antidote in terms of putting the other side, indicating that the bane is ridiculous, meaningless satire that nobody would believe, and contextualisation which would ensure that any reasonable reader would not derive any defamatory meaning.

Separating fact from comment: Facts have to be proved and if defamatory are the most dangerous parts of your copy. Comment should be opinion, honestly held and based on true facts or allegations made in legally privileged contexts.

Avoid alleging and/or imputing defamatory motive: Not even the prosecution has to prove motive in a criminal trial. It is almost impossible to prove unless admitted. There is a famous legal quotation about how impossible it is to guess the state of man's mind as it would be to guess the state of his digestion.

Examples of libel:

Saying somebody has lied about something means you are saying they have deliberately been untruthful. The verb 'lie' implies an intention which it is very difficult to prove in law and in libel the burden of proof is on you. The claimant does not have to prove they did not lie. So you might be able to prove that they were mistaken in what they said, but how could you prove that they intended to say something they knew to be wrong?

Reporting somebody saying that somebody else lied about something is the same as you're saying the other person lied. Repeating or reporting a libel by attribution still makes you liable to libel.

This means that the old sayings 'think before you open your mouth' or in the 21st century 'think before you tweet or text, 'talk with your brain and not your heart', 'when in doubt leave it out', 'never take anything for granted', are wise counsels and can save your career as well as your financial wellbeing. A former editor of the *Guardian* (when it was based in Manchester) was C.P. Scott and his famous maxim 'Comment is free, facts are

sacred', is widely quoted. In media law you should remember that in libel 'facts when substantially true are free, comment when not honest opinion is expensive.'

Online Libels

Online libels are now taking up much more of the business of the courts. *Easeman v Ford* is an example of a case where a filmmaker had successfully sued an activist and blogger for 'a long-running and extensive campaign of online vilification and harassment.'

See: <http://www.bailii.org/ew/cases/EWHC/QB/2016/1576.html>

There are a number of libel risks peculiar to online production and communication. When tweeting be careful about any juxtapositions with hashtags. If you are reporting about an identifiable individual you should avoid any association of that person with #murder, #crooks etc. When you are producing online postings be very cautious about labelling files with language that is potentially defamatory. Such information is readable in some browsers when activated by the curser, and file properties are usually discoverable by right clicking.

The same is true when embedding information in cascading stylesheet online platforms that you might think is hidden. In reality, the inclusion of such linkage in 'alternative text', or click through urls could generate defamatory meaning. If you have an apparently innocent image of somebody that clicks through to a visual image communicating something despicable or scandalous then it could be argued that you are constructing an online defamation.

Hyperlinks to libelous web-pages on their own should not constitute a repetition of a libelous posting unless the libel is summarized and stated in the phrase encapsulated in the link, or it is quite clear there is a context of encouraging people online to visit the libelous page with the intention of damaging somebody's reputation.

Libel Defences

You may be able to avoid getting sued if any of the following apply:

1. It has come from a senior police officer or government department –you may have qualified privilege [subject to explanation or contradiction] Conditions include fairness & accuracy without malice. The qualified privilege under 2013 Defamation Act now applies to governments anywhere in the world; authorities anywhere in the world performing governmental functions, and international organisations or international conferences.
2. It was said in open court, or in the Houses of Parliament –you should have absolute privilege for court reports and high qualified privilege for parliamentary reports. High qualified privilege means it can only be defeated by malice. Key conditions include fairness and accuracy. Absolute privilege enables you to report malicious statements made in evidence and requires that the reports are 'contemporaneous'- i.e. published to nearest deadline in respect of court reports. The absolute privilege in court reporting also applies to foreign courts and international courts and tribunals. Qualified privilege also applies to legislatures anywhere in the world.
3. It was said at a public meeting [held for a lawful purpose] –you should have qualified privilege (fair, accurate, and in the public interest) but you need to get or at least be

receptive to the side of the person being attacked and report the gist of that if provided. This is what being subject to contradiction or explanation means. Again, the conditions of fairness and accuracy are required. This defence has been extended to public meetings abroad.

4. It was said at a press/media conference provided this satisfied the recognized conditions of a public meeting above. This means that any member of the media had access to the conference. This could be in the street or on private premises. This excludes one to one interviews. Press/media releases accompanying the conference attract the privilege provided the content is not substantially different from what was said at the conference. Your report has to be fair and accurate. The defence has been extended to press conferences abroad.

5. The statement you are reporting is substantially true. The defence will succeed if your report contains substantially untrue imputations that 'do not seriously harm the claimant's reputation.' Remember **you have to prove this defence.**

6. You are reporting an 'honest opinion' such as in a review or editorial. The defence needs the following conditions: i **it is opinion**; ii report/publication **includes 'in general or specific terms, the basis of the opinion'**; iii 'an honest person could have held the opinion' **based on a 'fact which existed at the time the statement complained of was published'**, or **'anything asserted to be a fact in a privileged statement published before the statement complained of.'** This means the opinion could be based on allegations made in a court case, in Parliament, in a peer-reviewed statement in a scientific or academic journal, or in a publication satisfying the new public interest defence under section 4 of the Defamation Act 2013. What does the 'honest' part of the defence mean? It means the defence **fails if the author of the statement did not hold the opinion**, or if the **reporter/publisher 'knew or ought to have known that the author did not hold the opinion.'**

Get all this right, then you might be let off the hook.

7. You might have a **public interest defence** under section 4 of the Defamation Act 2013. Public interest is not defined in the Act, but the courts have set out ideas in case histories and they include:

"What it is in the public interest that the public should know and what the publisher could properly consider that he was under a public duty to tell the public";

"In a simpler and more direct way, whether the public was entitled to know the particular information";

"The interest is that of the public in a modern democracy in free expression and, more particularly, in the promotion of a free and vigorous press to keep the public informed";

"The general obligation of the press, media and other publishers to communicate important information upon matters of general public interest and the general right of the public to receive such information... there must be some real public interest in having this information in the public domain." This last quotation was from Baroness Hale in *Jameel v Wall Street Journal* in 2006 and she added: "This is, as we all know, very different from saying that it is information which interests the public - the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it."

This defence is available to the **publication of facts and opinions.**

For the defence to succeed you need to prove that you **'reasonably believed that publishing the statement complained of was in the public interest.'** In doing that you will be entitled to argue **'allowance for editorial judgement.'** This is likely to be informed by previous court definitions of 'responsible journalism', which was known as the 'Reynolds' defence and had been developed by 3 key case histories: Reynolds v. Times Newspapers Ltd and Others [1999] UKHL 45 (28th October, 1999)

See: <http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/1999/45.html>

Jameel & Ors v. Wall Street Journal Europe Sprl [2006] UKHL 44 (11 October 2006) and

See: <http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/2006/44.html>

Flood v Times Newspapers Ltd [2012] UKSC 11 (21 March 2012)

See: <http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2012/11.html>

The criteria for responsible journalism included: giving fair opportunity for people criticized to give their side of the story, reporting a gist of this; evaluating the reliability of your source who might have an axe to grind, and avoiding sensationalist language and bias.

The critical thing in the field of defamation is if in doubt get professional legal advice before publication.

8. Qualified privilege in being a statement published in a scientific or academic journal, The conditions are: i statement must relate to scientific or academic matter; ii statement was peer-reviewed by editor and one or more persons with academic expertise relating to the scientific/academic matter/issue; iii malice will defeat the defence.

9. Innocent defamation. This is available under section 1 of the 1996 Defamation Act and applies when as the journalist/publisher you had no warning or reasonable anticipation that the libel would be communicated on your media platform- this could be a live broadcast or website. The conditions will be developed by case law, but at the time of writing there is little of it available. The defence hinges on the concept of responsibility for publication and will be satisfied if in defence you can show that **you took reasonable care in relation to the publication**, and you did not know, and had no reason to believe, that what you did caused or contributed to the publication of a defamatory statement.

The defence has to square with the statute stating that it is necessary that you are 'not the author, editor or publisher of the statement complained of.' In practice if you are responsible for an internet publication you should have a "notice and take down policy." You need to remove potentially defamatory material from public access as soon as you have been given notice of the complaint. This is both European and UK law. The Internet Service Provider is usually not regarded as liable as long as the 'take down' is engaged promptly to remove libellous material when notified. Furthermore, the defence is likely to be unavailable if comments and user generated material is editorially moderated prior to publication.

10. Operator of Website Defence (enacted by Section 5 of 2013 Defamation Act in January 2014) This is a new defence for the operators of websites where a defamation action is brought against them in respect anything posted on their websites, which they were not responsible for. Website operators no longer have to pre-moderate reader comments. This is a 'report and remove' system that people can use if they believe they have been defamed on a website message board.

The system enables website operators to deal with all initial correspondence in-house. This will save legal fees.

As a result of the new guidelines, website operators should:

- Have a robust, written complaints policy
- Designate and train staff to deal with complaints correctly, and within the new timescales. Timing is critical
- Acknowledge and deal with complaints promptly – preferably by email, in order to comply with the 48-hour deadline

- Give website users clear instructions on how to complain, and who to. This may mean providing a Report Abuse button
- Update their website terms and conditions to reflect the new arrangements
- A website operator providing message boards is advised to register users before they are allowed to make a post
- Registration should include taking their names and contact details
- Users should be told, before they accept site terms and conditions, that the operator may divulge their details if they post anything defamatory
- Keep proper written records of complaints, with the dates and times of actions taken.

This looks like a complicated defence, needing the involvement and interpretation by media lawyers, and it may be best to evaluate web publication defence strategies for libel in terms of 1996 Defamation Act innocent dissemination. However the rules for this defence say it will not be necessarily lost when Internet postings are moderated.

See the full detail of the guidelines that website operators need to comply with in order to engage this defence: <http://www.legislation.gov.uk/ukdsi/2013/9780111104620>

11. Neutral Reportage. This has been codified in the Defamation Act 2013 within the public interest defence. Essentially this is neutral reporting of a row/dispute where the sides are libelling each other. Your reporting has to remain neutral by avoiding any explicit or implicit language indicating that you agree or support the defamatory statements. For example, an investigative journalist writing a book about allegations of corruption against police detectives cannot have the defence if he entitles his book 'Bent Coppers.' Section 4(3) of the Defamation Act 2013 gives the defence further statutory underwriting: '(3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.' This means when impartially and accurately reporting a spat where libels are being spun, you are not obliged to investigate and confirm the truth of what is being said.

Successful media libel defence case histories

Although very expensive to defend- usually in terms of risking over a million pounds in damages and costs, the post 2013 Defamation Act climate has not always been 'claimant friendly.'

Two Conservative Party politicians have been defeated in high profile libel litigation.

In November 2014 Mr Justice Mitting ruled against the Tory Chief Whip, Andrew Mitchell who had denied calling police officer Toby Rowland 'a pleb' when stopping him from riding through Downing Street security gates without getting off his bicycle. Mitchell had sued the *Sun* for publishing the allegation and PC Rowland had sued Mr Mitchell for accusing him of lying. See:

<http://www.bailii.org/ew/cases/EWHC/QB/2014/4015.html>

In November 2015 Mr Justice Warby ruled in favour of the *Sunday Times* after the former Suffolk South MP Tim Yeo sued the paper for the allegation that he was prepared and had offered to act in breach of the MPs' Code of Conduct by acting as a paid Parliamentary advocate for a foreign energy company, while chair of the Commons Energy and Climate Change Select Committee.

See: <http://www.bailii.org/ew/cases/EWHC/QB/2015/3375.html>

One of the more difficult cases the *Sunday Times* successfully defended involved property developer and an alleged figure in organized crime, David Hunt. In July 2013, Mr Justice Simon found in favour of the newspaper which had described Mr Hunt as 'a crime lord' in a ruling that turned on the prior Defamation Act 2013 Reynolds defence of responsible journalism. See: <http://www.5rb.com/wp-content/uploads/2013/07/david-hunt-v-times-newspapers-ltd-5.pdf>

Being sued for publishing false but not libellous information: Malicious Falsehood

1. Publications that cause **material financial harm to businesses** through the communication of knowingly false, though not necessarily defamatory information can be sued for using the law of 'Malicious Falsehood.' The civil wrong of malicious falsehood operates on the basis that it is substantially different to libel, and some journalists would argue that freedom of expression would be improved by some of its criteria applying to libel.
2. Malicious falsehoods are statements which themselves are not defamatory but are untrue and cause damage. An example would be to say that a rival expert in your field has retired when you know this not to be the case. He/she would lose business and be harmed financially, but there is nothing intrinsically defamatory about saying somebody has retired. Malicious falsehoods often arise when trade/business competitors make false claims about each other's services and products. For example, deliberately and falsely stating your competitor's prices are more expensive than your own could be a malicious falsehood.
3. Necessary ingredients for malicious falsehood include:
 - 1) **Burden of proof is on the claimant**, not on the defendant in terms of establishing that the **allegation is untrue**;
 - 2) Allegation must have been '**calculated to cause pecuniary damage**' to the claimant's 'office, profession, calling, trade or business.'
 - 3) Allegation must have been **published maliciously**.
4. In many respects, malicious falsehood mirrors the position of libel in the USA in terms of public interest claimants: it can only succeed when the claimant proves financial damage, falsity and either reckless disregard for the truth, or actuation by malice. It is also similar to the US tort of 'false light'- where there is a remedy for damages over non-defamatory information that is wrong and damaging.
5. Its existence and operation in the English legal system can leave media defendants subject to the double jeopardy of being sued for libel and malicious falsehood.
6. Useful precedents:

Spring v Guardian Assurance [1994] UKHL 7 (07 July 1994)
See: <http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/1994/7.html>

The key legal issue related to 'is whether one who supplies a defamatory reference about a person in response to a request from a concern with which that person is seeking employment is liable in negligence to the subject of the reference if it has been compiled without reasonable care.' Effect of the House of Lords ruling is that it would not be legally malicious to be negligent without an intention to cause harm, but it would be legally malicious to combine negligence with an intention to injure.

Kaye v Robertson from the English Court of Appeal in 1991 is probably the most famous malicious falsehood action of modern times; largely for reasons beyond

malicious falsehood and being the seed for media respect for the right to privacy. The remedy allowed by the courts was the damage to the actor Gordon Kaye's commercial/professional office in it being posited by the Sunday Sport that he would have agreed to an interview with a tabloid reporter while recovering from a catastrophic brain injury in his hospital bed.

See: <http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/1990/21.html>

Privacy

1. The Human Rights Act 1998 means freedom of expression is balanced with the right to respect for privacy. The English and European courts recognize that private information cannot be reported unless it is in the public interest.
2. No go areas include the nature of health treatment and state of health, education, sexuality, and personal relationships.
3. It now means that people who do not give permission to be photographed in public, and are not the subject of a public interest story, are entitled to privacy protection.
4. The principle of when media privacy law applies is when any individual has 'a reasonable expectation of privacy.'
5. Privacy as an European legal concept means dignity, honour, reputation (overlapping with libel) identity, family life, home space, and privacy communications (correspondence, email, mobile, Skype, palm computer devices etc.)
6. It goes without saying the privacy concept underpins the fact that intercepting anyone's mobile, mail, email and communications devices is a criminal offence and so is giving bribes or impersonating anyone to unlawfully obtain private information. It is also a criminal offence and civil wrong to 'harass' anyone on the basis of causing distress on at least two separate occasions.
7. This means that any journalist and media body committing a criminal offence can also be sued in the civil courts for the invasion of their privacy.
8. The European Court of Justice ruled in 2014 that EU citizens are entitled under a 'right to be forgotten' to ask data processing Internet search engines to remove links to pages that contain old, inaccurate or even just irrelevant data about them. Any legal obligation to remove such information does not apply to online journalistic publishers and their archives.
9. It needs to be remembered that in the UK privacy and freedom of expression are balanced equally. This can lead to the May 2015 Supreme Court case of pianist James Rhodes whose autobiography was blocked by publication because of concern about the impact of his revelations about being abused as a child on his own children. Although he won the case, the fact that his book had been subject to prior restraint through such a long and complex process of litigation indicates how freedom of expression can be held in abeyance until the courts decide the issue. See: <http://www.bailii.org/uk/cases/UKSC/2015/32.html>

Public Interest

The most extensive definition of public interest that can be used to defend against media law actions can be found in the IPSO Editors' Code of Practice:

'The public interest includes, but is not confined to:

Detecting or exposing crime, or the threat of crime, or serious impropriety.

Protecting public health or safety.

Protecting the public from being misled by an action or statement of an individual or organisation.

Disclosing a person or organisation's failure or likely failure to comply with any obligation to which they are subject.

Disclosing a miscarriage of justice.

Raising or contributing to a matter of public debate, including serious cases of impropriety, unethical conduct or incompetence concerning the public.

Disclosing concealment, or likely concealment, of any of the above.

There is a public interest in freedom of expression itself.

The regulator will consider the extent to which material is already in the public domain or will or will become so.

Editors invoking the public interest will need to demonstrate that they reasonably believed publication - or journalistic activity taken with a view to publication – would both serve, and be proportionate to, the public interest and explain how they reached that decision at the time.

An exceptional public interest would need to be demonstrated to over-ride the normally paramount interests of children under 16.'

This definition is very significant for UK journalists because their statutory defence for the purposes of journalism under section 32 of the 1998 Data Protection Act is dependent on any processing of private data being in the public interest.

There is a possibility there could be an increase in litigation against journalists and publishers for processing data for the purposes of journalism that could be argued to be private information. Actions could be successful where it can be shown that the data process controllers could not reasonably believe the information being processed is in the public interest.

See: <http://www.pressgazette.co.uk/top-media-law-qc-says-sun-could-face-action-under-data-protection-act-over-front-page-pic-of-six-year-old-kai-rooney/>

Academics and media lawyers are beginning to call this 'the new libel' meaning that where libel litigation is more difficult to succeed when harm to reputation has to be serious, actions based on data processing of private information which harms personal dignity is more likely to succeed.

Two Conflicting Privacy Standards

In an information age that is understood to be globalized, it has to be accepted that there is no single globalized standard for what is permissible in communicating private information.

UK and European law ordinarily allows legal prohibition of communicating truthful information if it is 'private'. This is not the situation in the US where such legal censorship would be unconstitutional under the First Amendment. This resulted in the 2016 Supreme Court ruling sustaining a court injunction against the English and Welsh media publishing anything that could identify a celebrity connected to a US publication revealing gossip about his private relationships. See: <http://www.bailii.org/uk/cases/UKSC/2016/26.html>

The difficulty of this division in the exercise of information rights is that it is not even possible to identify in this guide the name of the US publication regularly revealing scandals concerning public figures that it would be unlawful to publish in England and Wales. It also means that in the English and European context digital online publishers will be subject to a stricter control on content that their visitors and readers will be easily able to access elsewhere.

Another division has emerged in relation to what is known as the 'right to be forgotten' through the data processing of Internet search engines. The European Court of Justice ruled in 2014 that EU citizens are entitled under a 'right to be forgotten' to ask Internet search engines to remove links to pages that contain old, inaccurate or even just irrelevant data about them. Any legal obligation to remove such information does not apply to online journalistic publishers and their archives. It applied specifically to Google in terms of it being seen as a 'data processor' rather than publisher.

See: <http://www.bailii.org/eu/cases/EUECJ/2014/C13112.html>

Google has been forced to set up a system of receiving and deciding requests. See: <https://support.google.com/legal/answer/3110420?rd=2>

The right to be forgotten does not extend to search engine operations beyond the European Union, but efforts are being made to prevent EU Internet users by-passing right to be forgotten removals, and in England, the Information Commissioner has directed Google to sever links to professional media sites that report successful right to be forgotten decisions.

The 'right to be forgotten' principle has been substantially extended in English privacy law with the ruling against Google in April 2018 in which a businessman was given the right to have his past criminal wrong-doing concealed by anyone using the search engine. His right of anonymity even extended to his litigation to achieve this aim. Mr Justice Warby gave the businessman known as 'NT2' full anonymity and ordered Google to de-list published news reports about his conviction by its Internet Search Engine. The judge said: 'In short, anonymity is required to ensure that these claims do not give the information at issue the very publicity which the claimants wish to limit. Other individuals and organisations have been given false names in this judgment for the same reason: to protect the identities of the claimants.' The ruling explained what NT2 wished to have covered up: 'NT2 was involved in a controversial business that was the subject of public opposition over its environmental practices. Rather more than ten years ago he pleaded guilty to two counts of conspiracy in connection with that business, and received a short custodial sentence. The conviction and sentence were the subject of reports in the national and local media at the time. NT2 served some six weeks in custody before being released on licence. The sentence came to an end over ten years ago. The conviction became "spent" several years ago. The original reports remained online, and links continued to be returned by Google Search. NT2's conviction and sentence have also been mentioned in some more recent publications about other matters, two of them being reports of interviews given by NT2. In due course, NT2 asked Google to remove such links.'

See: <http://www.bailii.org/ew/cases/EWHC/QB/2018/799.html>

Recent Cast Histories Turn on the Interests of Children

In January 2013, the third husband of the Oscar winning British actress Kate Winslet won a privacy action against the Sun over the publication of images taken of him at a private party that had previously been posted on Facebook. Mr Justice Briggs said: 'The question is whether the publication of the Photographs, or of a more detailed description of their contents than the fact that the claimant is depicted partially naked, would add anything beyond mere titillation. In my judgment it would not'. He said the threat to publish them 'comes very shortly after the belated discovery by the media of the claimant and Miss Winslet's recent marriage, at a time when the claimant finds himself in a temporary blaze of largely reflected publicity'. The judge

also engaged the issue of there being no possible reason for exposing Kate Winslet's 'children to a real risk to additional embarrassment or upset from the nationwide publication of photographs (or their contents) depicting their other carer behaving in a foolish and immature manner when half naked'. See: <http://www.bailii.org/ew/cases/EWHC/Ch/2013/24.html>

This case highlights the sensitivity of the English courts to any matters that concern the interests of children. Hence the 2014 ruling in favour of singer Paul Weller who objected to the Mail online publishing a photograph of him with his three children taken in a public place in Los Angeles. See: <http://www.bailii.org/ew/cases/EWHC/QB/2014/1163.html>

The 2016 UK Supreme Court case of PSJ v The Sun on Sunday also concerned itself with the potential harm to the claimant's children of any media exposure of the celebrity's personal sexual relationships being made public. See: <https://www.supremecourt.uk/cases/uksc-2016-0080.html>

The tension between Open Justice and Privacy

In July 2017, the UK Supreme Court ruled that a man previously known as PNM and 'a prominent figure in the Oxford area' could be identified by the media as having been arrested by the police in a 2012 child grooming enquiry known as Operation Bullfinch. Five years before he had been given police bail, released, told that his case would be kept under review and never charged. A Magistrates court had prevented his identification when named in court proceedings for nine other men charged and he continued to be referred to during their Old Bailey trial. PNM did not feel it was right that he should become collateral damage as a result of being named and associated in a criminal trial arising from an enquiry where he been effectively cleared of any wrongdoing. PNM and his lawyers fought for his right to be protected from exposure through the privacy laws from 2012 to 2017. Five out of the seven Supreme Justices decided that the right to Open Justice prevailed in these circumstances. Lord Sumption said: 'The material is there to be seen and heard, but may not be reported. This is direct press censorship.'

The ruling in PNM v Times Newspapers Ltd & Ors [2017] UKSC 49 (19 July 2017) at <http://www.bailii.org/uk/cases/UKSC/2017/49.html> revealed for the first time that PNM's actual name was Tariq Khuja. He always protested his innocence. A victim who had told police detectives that she had been raped by somebody called Tariq had not picked him out in an identity parade, and she did not believe her rapist was in the line-up. It remains to be seen whether this Supreme Court ruling will halt an increasing trend for privacy injunctions in criminal proceedings. In one case the media had been prevented from reporting a criminal investigation into financial crime where the owner of the company had been interviewed under caution and in another, a court order prevents the media identifying a witness in a criminal investigation.'

Case History Sir Cliff Richard v BBC July 2018- A critical analysis published in The Journal, CloJ online

See: <http://cioj.org/thejournal/the-sir-cliff-richard-v-bbc-ruling-is-a-significant-precedent-and-damaging-to-media-freedom/>

High Court ruling at: <http://www.bailii.org/ew/cases/EWHC/Ch/2018/1837.html>

The political fall-out from Mr Justice Mann's ruling in Sir Cliff Richard's successful privacy action against the BBC over their naming of him as a suspect in a sexual assault inquiry has had the flavour of the Brexit debate. Partiality, polemicism, win or lose, right or wrong, good and evil. It's either one way, or the other.

There are many who say the BBC **deserved to lose the case**, should never have defended it, and the judge's ruling **poses no threat whatsoever to press freedom**. In short: **'Shame on the BBC!'** The judge's reasoning and interpretation of the law is fully supported and so is his assertion that **'It is simply wrong to suggest** there is now some blanket restriction on reporting investigations.'**'** The BBC had been **strongly urged not to appeal**.

On the other hand there has been **consensus among mainstream media publishers** in press and broadcasting that the ruling does set a disturbing precedent, **is a significant blow to media freedom**, and **needs to be resisted**.

The ruling and its consequences require analysis attended by some measure of even-handedness and proportionality.

Why professional journalists disagree with the judge's ruling



BBC Headquarter in London. Image: Tim Crook.

Professional journalists at the BBC and elsewhere are aggrieved it has been ordered to pay £210,000 in damages and much more in legal costs for reporting accurately that Sir Cliff Richard had been investigated by the police for historical child sexual assault claims. They had repeatedly reported his side of the story and **only said they were allegations**. They reported that the police interviewed him, did not arrest him, and later fully exonerated him. They always reported his position that there was no truth whatsoever in the allegations.

They think it unfair that damages have to be paid for a story that was true and when they consistently and repeatedly reported his denials, expressions of innocence, and final exoneration. They do not understand why it was not in the public interest to name him when there was an intensive and widespread political and public debate about well-known celebrities being subject to historical child sexual allegations some of whom were later tried, convicted and jailed, and others later cleared but complaining their reputations had been unfairly destroyed. There have been significant judge led inquiries into the issue and multimillion pound police investigations. They honestly cannot understand or accept why it was not in the public interest to publish the truthful information that the police were investigating Sir Cliff Richard- one of Britain's pre-eminent and powerfully influential entertainers whose public interest status *par excellence* has always been heavily defined by his avowed Christianity.

In this context, even if it was accepted he had a reasonable expectation of privacy when suspected of crime, professional journalists believe they had a public interest duty to report that the police were investigating Sir Cliff Richard for sexually assaulting a child at a Billy Graham meeting in Sheffield in 1985.

The BBC were truly shocked by the ruling largely because they considered it as a retrospective penalty for doing something at the time that custom, practice and law had always permitted.

Privacy law and culture



Royal Courts of Justice in the Strand. Image: Tim Crook.

The professional news and journalistic culture of this country has not come to terms with how the law on media privacy has been developed by the courts and apparently supported by public and political opinion over the last 18 years. There is a severe dislocation in values and understanding between journalistic culture and the legal, public and political spheres.

Sir Cliff Richard v BBC was a contested media privacy case involving two of the most powerful parties you could ever find in British public life. It is an action that would not have been possible prior to the year 2000, the year the 1998 Human Rights Act came into force, and which introduced into English primary law **Article 8 of the European Convention on Human Rights**: 'Everyone has the right to respect for his private and family life, his home and his correspondence.' Parliament decided **under section 12(4) of the Act** that 'The court must have particular regard to the importance of the Convention right to freedom of expression' when litigation related to journalistic matters. In this situation the court must consider the extent to which it was 'in the public interest for the material to be published.'

Most professional journalists understood from this that Parliament required that the courts should give pragmatic priority and consideration to freedom of expression particularly when there was public interest in the material.

Source of Sir Cliff Richard's reasonable expectation of privacy



Parliament at Westminster. Image: Tim Crook

The view that Parliament instructed the courts to give pragmatic priority or 'particular regard' to freedom of expression in litigation over journalism said to be in the public interest was not shared by the UK courts when they began hearing media privacy litigation. 2004 was the year that supermodel Naomi Campbell had established in the **UK's then highest court, the judicial committee of the House of Lords**, that a respect for the right to media privacy did exist in law as a result of the Human Rights Act.

The approach of the majority of the Law Lords in her case was to adopt a balancing exercise between Article 8 privacy and Article 10 freedom of expression. It was recognised that there was a right to a reasonable expectation of privacy in a wide range of situations that could only be defeated by public interest in publication.

The right to media privacy also included protection from damage to reputation caused by the publication of truthful though private information. In the same year [Lord Steyn in Re S\(FC\) \(A Child\) \(Appellant\) \[2004\]](#) set a binding precedent that neither respect for privacy nor freedom of expression ‘has as such precedence over the other.’

He set out the way judges in future would approach litigation of this kind: ‘...where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.’ Lord Steyn and his fellow judges would deny that this is judicial activism on their part and a rejection of Parliament’s intentions. They would say the Human Rights Act gives them the power to take into account European Court of Human Rights case law that also advocates ‘the ultimate balancing test.’

Long ago in the early 1960s there was case law making it clear that reporting that somebody had been helping the police with their enquiries when they were subsequently neither arrested nor charged was not libellous. The media had always recognised that they had a public duty to publish stories about individuals who were suspected of crime, had had their home and premises searched as a result of a police enquiry, and when they were being interviewed by the police whether or not they had been formally arrested. The public interest intensified where an individual was well-known, powerful, had public figure status, or was part of a public interest set of circumstances and narrative. The law protected publication if the facts were accurate.

But the developing law of privacy as evidenced by Mr Justice Mann’s ruling fundamentally changed this situation. Most of the commentary on the Sir Cliff Richard case has failed to acknowledge that Parliament [in the 2011 Education Act](#) provided statutory life-long anonymity for teachers accused of criminal conduct against the students they teach unless and until such time they were formally charged by the police. Teachers became [the first group of professional people in British legal history](#) to be given automatic anonymity when they are accused of a criminal offence at work. There was a short period between 1976 and 1988 when men accused of rape offences had statutory anonymity unless and until they were convicted by the jury in a crown court trial.

Mr Justice Mann confirmed that the Sir Cliff Richard and BBC case was legally significant in advancing a reasonable expectation of privacy for criminal suspects. It was not something which been ‘clearly judicially determined, though it has been the subject of judicial assumption and concession in other cases.’ (Judge’s ruling at paragraph 234). Four rulings at High Court and Appeal Court level in 2014, 2015, 2016, and 2017 had developed the case law: [PNM v Times Newspapers Ltd](#), [Hannon v News Group Newspapers Ltd](#), [ERY v Associated Newspapers Ltd](#), and [ZXC v Bloomberg LP](#). He also strongly drew on the pronouncements of [Sir Brian Leveson in his inquiry report into the Culture, Practices and Ethics of the Press in 2012](#). He cited the importance of Leveson’s view ‘...that it should be made abundantly clear that save in exceptional and clearly identified circumstances (for example, where there may

be an immediate risk to the public), the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public.'

The [Judicial Response to the Law Commission Consultation Paper on Contempt of Court](#) in 2013 fully endorsed Leveson's view. Mr Justice Mann called upon the 2013 [College of Policing's Guidance on Relationships with the Media](#) which appears to repeat word for word Sir Brian Leveson's prescription: '... save in clearly identified circumstances, or where legal restrictions apply, the names or identifying details of those who are arrested or suspected of crime should not be released by police forces to the press or public.' He took on the observations of Sir Richard Henriques in his '[Independent review of the Metropolitan Police Service's handling of non-recent sexual offence investigations alleged against persons of public prominence.](#)'

Sir Richard had been discussing the position of prominent and well known entertainers who 'are all victims of false allegations and yet they remain treated as men against whom there was insufficient evidence to prosecute them. The presumption of innocence appears to have been set aside.'

Critical analysis of Mr Justice Mann's ruling



Entrance to High Court in London. Image: Tim Crook.

It can be argued that Mr Justice Mann has cherry-picked from extra-judicial sources and, indeed dissenting views in case law that question the capacity of the public to accept legal exoneration and not guilty verdicts. This is an astonishing jurisprudential position to take. It

questions the very impact of the rule of law and treats the media and its general public audience as a malicious, prejudiced, uncontrollable, rabid and witch-hunting mob incapable of respecting and acknowledging the very justice inherent in the due process of the law.

Mr Justice Mann's **reasoning in paragraph 248 of his ruling** is contentious: 'If the presumption of innocence were perfectly understood and given effect to, and if the general public was universally capable of adopting a completely open- and broad-minded view of the fact of an investigation so that there was no risk of taint either during the investigation or afterwards (assuming no charge) then the position might be different. But neither of those things is true. The fact of an investigation, as a general rule, will of itself carry some stigma, no matter how often one says it should not.' It can also be argued the judge made a fundamental mistake in law in making the risk of some stigma as justification for reasonable expectation of privacy in these circumstances to take precedence. He was wrong to decide that the inevitability of some stigma residing in some people should trump the public interest of a media publication reporting the criminal justice process and identifying an individual suspected of a criminal offence.

Perhaps Mr Justice Mann would have benefited from being referred to **Lord Devlin's words in Lewis v Telegraph 1964**: 'Suspicion of guilt is something very different from proof of guilt [...] A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done.' No evidence has been produced showing that anything in the BBC's coverage implicitly or explicitly suggested there was fire behind the smoke. If that had been the case Sir Cliff Richard could have sued the BBC and any other media publication responsible for such coverage for libel.

Sir Cliff Richard said in interviews after his High Court victory that he believed the BBC 'took it upon themselves to be judge, jury, and executioner.' But Sir Cliff Richard was not being tried by the BBC. He was simply the subject of reporting about a police enquiry investigating an allegation against him that the police eventually decided did not merit arrest, charge and criminal proceedings.

Failure to give weight to UK Supreme Court Precedent



UK Supreme Court. Image: Tim Crook

It could be argued that Mr Justice Mann does not give sufficient weight to the powerful authority in the UK Supreme Court rulings of *In re Guardian News and Media Ltd in 2010* and *PNM v Times Newspapers Ltd in 2017*. In the Guardian 2010 case Lord Rodger, in a unanimous ruling, specifically referred to the publication of the names of defendants in advance of criminal trials and observed: 'In allowing this, the law proceeds on the basis that most members of the public understand that, even when charged with an offence, you are innocent unless and until proved guilty in a court of law. That understanding can be expected to apply, a fortiori, if you are someone whom the prosecuting authorities are not even in a position to charge with an offence and bring to court.' The general principle on public interest in these circumstances established by the UK Supreme Court is the default position of most members of the public accepting innocence until proved guilty; not the risk that some may not.

In *PNM in 2017* Lord Sumption in the majority ruling 5-2 said: 'The sexual abuse of children, [...] is a subject of great public concern. The processes by which such cases are investigated and brought to trial are matters of legitimate public interest. The criticisms made of the police and social services inevitably reinforce the public interest in this particular case.'

Yes, this case can be distinguished from that of Sir Cliff Richard, but its similarity and relevance is that PNM was arrested but not charged and sought anonymity by injunction when mentioned peripherally in the criminal proceedings of other men. Lord Sumption said the public interest in the identity of individuals involved in the criminal justice process 'depends on (i) the right of the public to be informed about a significant public act of the state, and (ii) the law's recognition that, within the limits imposed by the law of defamation, the way in which the story is presented is a matter of editorial judgment, in which the desire to increase the interest of the story by giving it a human face is a legitimate consideration.' Both Supreme Court rulings acknowledged and respected the competitive and commercial nature of public interest journalism.

Lord Rodger explained in 2010: 'The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.' The BBC would not be able to justify its income from the license fee if its news programmes did not successfully compete for audiences.

In journalism the pursuit of the scoop, with what Mr Justice Mann and no doubt most members of the public would regard as a sensationalist style of coverage, has been fully recognized as a valid part of the public interest role of media publication. That is why Lord Nicholls in *Reynolds v. Times Newspapers in 1999* said: 'it should always be remembered that journalists act without the benefit of the clear light of hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment. Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know,

especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.'

It can be argued that this is a significant authority that Mr Justice Mann should have taken into account when carrying out his intense focus on the evidence in Sir Cliff Richard's litigation.

Mr Justice Mann's rejection of the BBC's case

There is no doubt that public and political opinion are strongly sympathetic and supportive of Sir Cliff Richard's successful action against the BBC. His position on anonymity for criminal suspects is backed by **an opinion poll conducted by YouGov** where 86% of respondents support the anonymity of suspects under investigation and 62% favour anonymity for those on trial who have not yet been found guilty of an offence. The poll was conducted on 19th and 20th of July 2018 with a sample of 1669 adults in Great Britain.

Paragraphs 20 to 28 of Mr Justice Mann's ruling offer a withering deconstruction of the reliability of the BBC's witnesses. Of the BBC's reporter Daniel Johnson he said: 'he was capable of letting his enthusiasm get the better of him in pursuit of what he thought was a good story so that he could twist matters in a way that could be described as dishonest in order to pursue his story.' Of the BBC's deputy to the Director of News, Fran Unsworth (who was later promoted to Director) he observed: 'Her acts and thinking on the day, like the acts and views of others, were affected by the desire to protect the scoop.' She was 'tinged with wishful thinking and a bit of ex post facto convenient rationalization.' The judge decided on the balance of probabilities to accept the South Yorkshire Police case that they felt pressurized into agreeing to tell the BBC when they were going to search Sir Cliff's apartment in Berkshire.

They said they made that offer in order to prevent Mr Johnson publishing a story prior to the search, thereby potentially compromising it. Mr Justice Mann decided the BBC did not give sufficient consideration to Sir Cliff's reasonable expectation of privacy when they decided to name him as the suspect while at the same time using spectacular helicopter coverage of the search, which he condemned as a 'significant degree of breathless sensationalism.'



Traditional Metropolitan Police Lamp. Image: Tim Crook

He highlighted the content of emails between news editors and reporters that revealed the crassness and competitive hubris of journalists when working under pressure to deliver coverage that was entered for and received a nomination for the **Royal Television Society award in the category 'Scoop of the Year.'** In the light of a previous Law Lord recognizing the public interest in journalists discharging vital functions 'as a bloodhound as well as a watchdog', and acting 'without the benefit of the clear light of hindsight' is it possible the Judge has not evaluated the BBC's conduct with the proper perspective? He actually added £20,000 in aggravated (punitive) damages for the decision to enter the coverage for an award. Has the judge properly taken into account Lord Rodger's view that judges should accept that 'editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information?'

The rejection of the BBC's position on public interest

Mr Justice Mann rejected the BBC's argument that it had a public interest duty to identify Sir Cliff Richard as a suspect when covering the police search of his home in England.

What is also significant is that in the absence of the hullabaloo helicopter sensationalism a boring copy read by a presenter in the studio naming Sir Cliff Richard would still have been a serious breach of his privacy: 'A lower key report of the search and investigation (for example, done merely by a measured reading of the relevant facts by a presenter in the studio) would, on my findings be a serious infringement, and would not be outweighed by the BBC's rights of freedom of expression.' In cross-examination BBC deputy editor of News **Fran Unsworth** identified two BBC editorial guidelines on public interest that she believed applied in this case: 'exposing or detecting crime' and 'protecting people's health and safety.'

But the judge said 'it was not clear to me whether she actually considered them at the time,' and added: '...while I am prepared to accept that a journalist's views on the justification of publication (or his/her absence of views) might assist the court in detecting the public interest in the balancing exercise, the ultimate question is one for the court, not for the journalist. So it does not help much if Ms Unsworth did not consider the guidelines, considered the wrong ones, or misinterpreted the right ones.' Is it significant that when listing the BBC's editorial guidelines on public interest in his judgement, he omitted 'There is also a public interest in freedom of expression itself.' Can it not be argued that Mr Justice Mann has not given fair consideration to the public interest defence position of journalists and editors who have to make decisions in the heat of competitive deadline pressures and without the benefit of hindsight?

Even the 2013 Defamation Act imposes a statutory duty on courts under section 4[4] to 'make such allowance for editorial judgement as it considers appropriate' when determining whether it was reasonable for a media defendant to believe that publishing the statement complained of was in the public interest.

Is Mr Justice Mann's ruling a significant precedent?

Mr Justice Mann seemed to take exception to the mainstream media coverage of his ruling and said: 'It is simply wrong to suggest there is now some blanket restriction on reporting investigations.'

Close reading of his ruling proves that he does set a precedent on a wide range of issues. He says so himself when declaring at paragraph 322: 'I agree that the case is capable of having a significant impact on press reporting...'

At paragraph 248 he says: 'It seems to me that on the authorities, and as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation, and I so rule. As a general rule it is understandable and justifiable (and reasonable) that a suspect would not wish others to know of the investigation because of the stigma attached.'

His ruling creates a chilling effect for any news publication that wishes to name a suspect under police investigation. Editors now know that to do so will run the risk of an action for breach of privacy and this could be costly. The position is inhibiting. The legal cost liability is estimated to be in terms of millions of pounds. We may be revisiting the chilling effect of disproportionate costs to damages that led the European Court of Human Rights in 2011 to decide in the Naomi Campbell case that the level of legal fees was a breach of Article 10 freedom of Expression.

The award of an additional £20,000 in aggravated damages for pursuing professional awards recognition of a breach of privacy story is certainly unprecedented. It means that news publishers face being awarded damages against them for being competitive in the pursuit of scoops and awards for stories that could turn out to be breaches of privacy. Mr Justice Mann stated more clearly than any previous case that in breach of privacy damages can be collected

for harm to reputation- a remedy usually encompassed by libel law. But in privacy, unlike libel, claimants are not required to prove that their reputations have suffered 'serious harm, or a likelihood of serious harm.'

This is creating a telescoping and inequitable overlap between libel and privacy; particularly when privacy can be a remedy for truthful and untruthful information. The case breaks new ground in making clear that there is a special damages liability for the consequences of a media breach of privacy when this triggers further problems for a claimant as a result of the behaviour of other people. Special damages are to be assessed for the costs involved in employing lawyers and public relations experts to deal with the fall-out from the BBC's coverage. This includes a Facebook site called 'Christians against Cliff,' which contained 'a large number of outrageous, highly offensive and defamatory allegations and remarks about Sir Cliff.' His lawyers had to also head off attempts by other newspapers and broadcasters to publish false allegations, there was an attempted blackmail, potential US immigration difficulties, and a lost book deal.

The future

There is one immediate lesson that all professional journalists, the BBC and media could learn from the case. Absolute care and caution needs to be taken in electronic communications between journalists in the newsroom.

The kind of communications that have been traditionally common-place between reporters and their editors should never be allowed to be funnelled into the public arena of judgment and condemnation of media legal litigation.

The gallows humour, satire and irony that relieves stress and tension should be kept analogue, ephemeral and unrecorded. The decision by the BBC not to appeal the case after Mr Justice Mann refused leave to appeal means that until another case emerges **the issues and problems identified** here will remain unresolved. There is the possibility of a future direction of travel in reasonable expectation of privacy and anonymity in the criminal process that could well extend to the identity of people arrested, charged, put on trial, acquitted, and released after the completion of their sentences.

This is because of the emphasis Mr Justice Mann has placed on the problem of stigma never being checked by the presumption of innocence and indeed its legal declaration and confirmation through public exoneration and not guilty verdict.

It is unusual for all mainstream media publishers, including the Society of Editors, to join in a consensus about the judge's ruling damaging media freedom and all the more disappointing that these concerns cannot be addressed by the higher courts. While public and political opinion appears to support the ruling and **Sir Cliff Richard's campaigning for suspect anonymity,** the situation could change. Would the public be content if the leader of one of the main political parties, or key members of the Royal Family found themselves suspects in a serious criminal investigation and the media were prevented from making any identification?

During his lifetime the entertainer Sir Jimmy Savile was protected by the libel laws when over a 54 year period between 1955 and 2009, 500 people aged between 5 and 75 complained that he had sexually assaulted them. With the burden of proof in libel on the media defendant news publishers were unable to publish allegations made against him. It was feared that the credibility of his vulnerable and often disturbed victims would not have survived aggressive cross-examination in adversarial trials. He was interviewed and investigated by the Surrey and Jersey police forces in 2007 and 2008 over indecent assault allegations, but the cases never proceeded to charge.

It can certainly be argued that Mr Justice Mann's ruling will not assist any media investigation into another case like it. It should not be the role of any judge or court to change laws that are strictly matters for Parliament, and in particular, the democratically elected chamber of the House of Commons.

Something as serious as the right of any criminal suspect prior to formal arrest and charge to anonymity is a constitutional issue that should be decided by Parliament; not by some single judge in the Chancery Division of the High Court who has not addressed and followed binding previous precedent from the United Kingdom Supreme Court. Any party to legal proceedings should be subject to robust public criticism; particularly where the issue will not be tried by lay jury. However, the BBC had come under vituperative public and political pressure not to appeal the matters of legal principle arising.

It is disturbing that rather than use the legal system, it has felt the need to directly contact the government and Parliament for redress.

The financial consequences of pursuing an appeal were clearly disproportionate in terms of the rising and accruing costs compared to the actual amount of general damages awarded. The English legal system does not assist here in having so many levels and layers of appeal and potential redress. Any freedom of expression and privacy dispute has the potential of six legal forums: High Court to Appeal Court to UK Supreme Court for injunctive relief, and the same three part staircase for any trial of the substantial issue.

This sorry case is a worrying precedent and there is no doubt that freedom of expression and the rights of the media have been left bruised and compromised. We are a long way from the judicial rhetoric of the courts recognising that in a democracy the media must be allowed to perform their watchdog role as bloodhounds. Time will tell if Sir Cliff Richard v BBC has replaced the bloodhound with a poodle.

When the Director-General of the BBC, Lord Tony Hall, appeared before the House of Commons Digital, Media and Sport House of Commons Select Committee a few months after the ruling he conceded 'I felt we overdid it to be blunt... if we were to appeal we'd be unlikely to win, cost licence fee money and prolong what Sir Cliff had been through, so I felt on those counts we should not appeal..

However he did highlight the wider ramifications of the case and pointed out: 'this is an issue for reporting which - rather than judges - parliament should decide. MPs should say what is right for us to report.'

See: <https://pressgazette.co.uk/bbc-overdid-it-with-coverage-of-raid-on-sir-cliffs-home-director-general-admits/>

Important links for this case history

BBC Statement on losing the case

<https://www.bbc.co.uk/mediacentre/statements/cliff-richard-ruling>

BBC Statement on deciding not to appeal

<https://www.bbc.co.uk/mediacentre/statements/cliff-richard-appeal>

Campbell v MGN Ltd [2004]

<http://www.bailii.org/uk/cases/UKHL/2004/22.html>

S (a child), Re [2004]

<http://www.bailii.org/uk/cases/UKHL/2004/47.html>

Appeal Court PNM v Times Newspapers Ltd

<http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2014/1132.html>

UK Supreme Court ruling 2017 PNM v Times Newspapers Ltd <http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2017/49.htm> |

In re Guardian News and Media Ltd [2010]

<http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2010/1.html>

Hannon v News Group Newspapers Ltd

<http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Ch/2014/1580.html>

ERY v Associated Newspapers Ltd

<http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2016/2760.html>

ZXC v Bloomberg LP

<http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2017/328.html>

Reynolds v Times Newspapers 1999. Lord Nicholls <http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/1999/45.html>

Yougov poll on public opinion concerning anonymity for crime suspects

<https://inform.org/2018/07/24/yougov-poll-public-backs-courts-decision-in-cliff-richard-case-86-favour-investigation-anonymity/>

Mosley v United Kingdom 2011.

<http://www.bailii.org/eu/cases/ECHR/2011/774.html>

MGN v United Kingdom 2011 <http://www.bailii.org/eu/cases/ECHR/2011/66.html>

Key useful background facts about UK Privacy

a. The law developed because the Human Rights Act 1998 (enacted from October 2000) placed a statutory obligation on the UK judiciary that courts and tribunals must apply the European Convention of Human Rights to its decisions (Section 6) and '**must take into account** any judgment, decision, declaration or advisory opinion of the European Court of Human Rights and any decision of the Committee of Ministers of the Council of Europe (the non EU body that runs the ECtHR) (Section 2) Under Section 6 it is 'unlawful for a public authority to act in a way which is incompatible with a Convention right,' and public authority includes any court or tribunal. Under Section 12 Freedom of Expression, UK courts have to carry out an equal balancing act between Article 8 Privacy and Article 10 Freedom of

Expression with an intense scrutiny of the facts in each case. They have to consider the extent to which there was public interest for the material to be published, and have particular regard for freedom of expression and for any privacy code.

Under Section 3 of the Act UK legislation has to be interpreted so that it 'must be read and given effect in a way which is compatible with the Convention rights.'

b. Prior restraint by injunctions became possible in privacy actions because of the idea that privacy was like a cube of ice. Once exposed to the heat of exposure it would melt and be lost forever. However, the practice became controversial due to hearings being in secret, the media not being notified or represented to argue for freedom of expression, and 'superinjunctions' preventing any reporting of the fact that an injunction had been applied for and granted. There had also been an increase in anonymity for the parties involved in privacy actions. The *Guardian* newspaper had complained that a court injunction and superinjunction relating to a report on the activities of the corporation Trafigura and its disposal of chemical waste in third world countries prevented their ability to even report discussion of it in Parliamentary proceedings [see <http://www.theguardian.com/world/2009/oct/16/trafigura-carter-ruck-the-guardian>]. A report of a Parliamentary committee chaired by the Master of the Rolls, Lord Neuberger, in 2011 'on super-injunctions, anonymity injunctions and open justice,' observed 'Super-injunctions are now only being granted, for very short periods, and only where this level of secrecy is necessary to ensure that the whole point of the order is not destroyed.' The report recommended that 'When anonymised orders are made, the court has and should wherever practicable provide a reasoned judgment for its decision,' and follow procedure and guidelines to 'enable the media to be informed about applications in advance as Parliament envisaged when it passed section 12 of the Human Rights Act 1998.'

c. The right to respect for privacy became consolidated in May 2004 when at the UK's then highest court, the Judicial Committee of the House of Lords (after 2009 this was replaced by the UK Supreme Court) ruled that the supermodel Naomi Campbell had had her privacy breached when the *Daily Mirror* linked a published photograph of her in a Chelsea Street with her receiving therapy at Narcotics Anonymous for an addiction illness. [Campbell v MGN Ltd [2004] UKHL 22 (6 May 2004) See: <http://www.bailii.org/uk/cases/UKHL/2004/22.html>] One of the Law Lords, Baroness Hale explained that the issue at stake was not trivial: 'The information revealed by the article was information relating to Miss Campbell's health, both physical and mental. Drug abuse can be seriously damaging to physical health; indeed it is sometimes life-threatening.' In her assessment of the public interest in freedom of speech she observed: 'The political and social life of the community, and the intellectual, artistic or personal development of individuals, are not obviously assisted by pouring over the intimate details of a fashion model's private life.'

It is important to note that on appeal to the ECtHR in 2010 the UK House of Lords decision on privacy/breach of confidence was upheld, but the fact that the media defendant Mirror Group Newspapers had to pay nearly £1 million in legal costs through the conditional fee agreement success fees system was a breach of Article 10 Freedom of Expression. MGN LIMITED v. THE UNITED KINGDOM - 39401/04 [2011] ECHR 919 (9 June 2011).

See: <http://www.bailii.org/eu/cases/ECHR/2011/919.html>

In June 2004 at the ECHR in Strasbourg, Princess Caroline of Monaco won a case over the persistent photographing of her in public and private locations where there was deemed to be no public interest. [VON HANNOVER v. GERMANY - 59320/00 [2004] ECHR 294 (24 June 2004) See: <http://www.bailii.org/eu/cases/ECHR/2004/294.html>] The court ruled: 'The present

case does not concern the dissemination of “ideas”, but of images containing very personal or even intimate “information” about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution.’

In a concurring opinion Judge Zupancic observed: ‘...it is impossible to separate by an iron curtain private life from public performance. The absolute incognito existence is the privilege of Robinson; the rest of us all attract to a greater or smaller degree the interest of other people [...] I believe that the courts have to some extent and under American influence made a fetish of the freedom of the press.’

d. Political contestation in UK Privacy. Media privacy has developed out of the common law of confidentiality that protects individuals, businesses, corporations and even government bodies. The Human Rights Act 1998 and British law interlocking with European Court of Human Rights law meant that the confidential legal obligations between two parties could be extended to third party publishers via the legal duty of the judiciary as a public authority to apply the rights enshrined in the European Convention on Human Rights and fundamental freedoms. Privacy as a right became enforceable through judicial remedy in an horizontal vector between individual and individual via the vertical vector of the individual to the state in the form of the courts as a public authority. The European legal principles of i) the infringement of the human right being clearly proscribed by an existing law ii) there needing to be a proportionate interference with the human right and iii) the requirement of a pressing social need in the context of a democratic society for the interference with any human right had to be applied in the balancing act in any intense focus on the facts of any case where there was a conflict between Article 8 Privacy and Article 10 Freedom of Expression.

e. The political and jurisprudential struggle remains in a state of flux. It is neither certain nor predictable. For example, in *A v B & C* [2002] EWCA Civ 337 (11th March, 2002)

(See: <http://www.bailii.org/ew/cases/EWCA/Civ/2002/337.html>) a privacy battle between the then premiership footballer Gary Flitcroft and the *Sunday People* newspaper over revelations about his private life in respect of extramarital affairs, the Court of Appeal ruled freedom of expression should take precedence. The then Lord Chief Justice Lord Harry Woolf said: ‘A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure. The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public attention then you have less ground to object to the intrusion which follows. In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation, then it can be appropriately taken into account by a court when deciding on which side of the line a case falls. The courts must not ignore the fact that if newspapers do not publish

information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest. The same is true in relation to other parts of the media.'

After the Campbell and Von Hannover cases in 2004, injunctions against the media for anonymous claimants about infidelity became common. The superinjunction would prohibit publication about the very existence of the injunction. This was seen as killing off the tabloid 'kiss and tell' genre of story. Even media journalist celebrities such as Andrew Marr and Jeremy Clarkson later admitted to obtaining superinjunctive privacy relief about their private lives.

The media would win some cases, but lose others and it became apparent that publishing private information with what was seen as 'trivial' tabloid style entertainment public interest justification became an expensive and risky enterprise.

The legal process often concerned leading sports celebrities such as Premiership soccer players. Some selected case histories:

1. Loreena McKennitt- successful privacy injunction by the folk singer against former friend and employee Niema Ash who wished to publish a book including descriptions about McKennitt's private life. *McKennitt & Ors v Ash & Anor* [2005] EWHC 3003 (QB) (21 December 2005 upheld by Court of Appeal.

See: <http://www.bailii.org/ew/cases/EWHC/QB/2005/3003.html>)

Mr Justice Eady had said: "Even where there is a genuine public interest, alongside a commercial interest in the media in publishing articles or photographs, sometimes such interests would have to yield to the individual citizen's right to the effective protection of private life."

2. Lord Browne of BP v *Mail on Sunday/Associated Newspapers*. Mr Justice Eady decided BP's shareholders had the right to know that Lord Browne had lied in court. But they did not need to know the details of his personal conversations with ex-boyfriend Jeff Chevalier, which remained private. *Browne v Associated Newspapers Ltd* [2007] EWHC 202 (QB) (09 February 2007

See: <http://www.bailii.org/ew/cases/EWHC/QB/2007/202.html>)

3. *Prince of Wales v Associated Newspapers*. Mr Justice Blackburne balanced Articles 8 and 10 of the Human Rights Act and found that Privacy was stronger than Freedom of Expression in the case of publishing the prince's diary. Upheld by the Court of Appeal. *Associated Newspapers Ltd v HRH Prince of Wales* [2006] EWCA Civ 1776 (21 December 2006

See: <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1776.html>)

4. *Douglas v Hello!* House of Lords 2007. After a complex series of litigation and rulings, the UK's highest court ruled that Michael Douglas and Catherine Zeta-Jones were entitled to collect damages against *Hello!* magazine for publishing surreptitiously taken images of their wedding when they had made a commercial prior exclusive arrangement for *OK!* Magazine on the grounds of breach of confidence. [*Douglas & Ors v. Hello! Ltd & Ors* [2007] UKHL 21 (02 May 2007) See: <http://www.bailii.org/uk/cases/UKHL/2007/21.html>]

5. Max Mosley- privacy injunction failed because intrusive video of orgy had already been published by the *News of the World*, but privacy action on substantive issue of intrusion succeeded with £60,000 damages. *Mosley v News Group Newspapers Ltd*. [2008] EWHC 1777 (QB) (24 July 2008 See: <http://www.bailii.org/ew/cases/EWHC/QB/2008/1777.html>)

6. Tiger Woods- privacy injunction in December 2009, but ineffective because all of the information already in global public domain after US coverage where the First Amendment freedom of expression and media has precedence.

See: <http://www.theguardian.com/sport/2009/dec/11/tiger-woods-law-injunction-media>

7. John Terry- privacy injunction over extra-marital affair with girlfriend of fellow team-player, but lifted after media appeal. Terry v Persons Unknown (Rev 1) [2010] EWHC 119 (QB) (29 January 2010 See: <http://www.bailii.org/ew/cases/EWHC/QB/2010/119.html>)

8. Ryan Giggs- privacy injunction, but breached by Twitter publication. First ruling by Mr Justice Eady when Giggs was referred to as 'CTB' CTB v News Group Newspapers Ltd & Anor [2011] EWHC 1232 (QB) (16 May 2011

See: <http://www.bailii.org/ew/cases/EWHC/QB/2011/1232.html> and

<http://www.bailii.org/ew/cases/EWHC/QB/2011/1334.html>) A year later Mr Justice Tugendhat gave permission for Giggs to be named and observed: 'The way that this case has been conducted by the parties has done much to undermine confidence in the administration of justice.' Giggs v News Group Newspapers Ltd & Anor [2012] EWHC 431 (QB) (02 March 2012 See: <http://www.bailii.org/ew/cases/EWHC/QB/2012/431.html>)

9. Rio Ferdinand- unsuccessful privacy action over *Sunday Mirror* article about his extra-marital affairs. Ferdinand v MGN Ltd (Rev 2) [2011] EWHC 2454 (QB) (29 September 2011 See: <http://www.bailii.org/ew/cases/EWHC/QB/2011/2454.html>)

10. Fred 'The Shred' Goodwin- Royal Bank of Scotland Chief Executive, privacy injunction over extra-marital affair with colleague in the bank, later partially lifted when injunction contested. Mr Justice Tugendhat said: '...what is of interest to the public is not the same as what it is in the public interest to publish. Newspaper editors have the final decision on what is of interest to the public: judges have the final decision what it is in the public interest to publish.' He prevented the media from identifying the colleague with whom Goodwin had conducted his affair and further observed: 'The circumstances of injunctions applied for out of hours on the telephone are not favourable to a considered development of the law...To the extent that media defendants choose not to submit evidence and argument to the courts, judges will find it difficult to develop the law of privacy to meet the needs of society.' Goodwin v NGN Ltd [2011] EWHC 1437 (QB) (09 June 2011)

See: <http://www.bailii.org/ew/cases/EWHC/QB/2011/1437.html>

11. In early February 2012 the EctHR is said to have re-balanced the recognition of public interest when Caroline Von Hannover lost a case concerning photographs taken of her in public by German magazines, and a well-known German television actor was unsuccessful in claiming privacy over the exposure of his minor drug possession offending. A Grand Chamber of the EctHR did not find that photographs of Caroline and her family in a public street in St Moritz breached their right to privacy because of the general public interest in the health of Prince Albert' The judges ruled that the German courts had 'carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken.' Von Hannover v. Germany (no. 2) 40660/08 [2012] ECHR 228 (7 February 2012)

See: <http://www.bailii.org/eu/cases/ECHR/2012/228.html>

In the case of the German actor and his minor drug convictions, the Grand Chamber of the EctHR reaffirmed the principle 'Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment...it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those

that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”.’ The court observed in its reasoning: ‘that the articles in question concern the arrest and conviction of the actor X, that is, public judicial facts that may be considered to present a degree of general interest. The public do, in principle, have an interest in being informed – and in being able to inform themselves – about criminal proceedings, whilst strictly observing the presumption of innocence’

AXEL SPRINGER AG v. GERMANY - 39954/08 [2012] ECHR 227 (7 February 2012)

See: <http://www.bailii.org/eu/cases/ECHR/2012/227.html>

12. Some media lawyers are arguing that these key rulings of the EctHR mean that the pendulum on British privacy is swinging to allow reporting of infidelity where public figures have a role model function. But these 2 cases suggest the boundaries and interpretations of public interest and private right continue to vary and fluctuate.

In August 2012, former England soccer manager Steve McClaren lost in his bid to injunct the *Sun* over a story alleging he had had an extramarital affair. Mr Justice Lindblom gave his reasons the following month and said: ‘the claimant belongs to the category of those from whom the public could reasonably expect a higher standard of conduct. Even if one allows for the degree of difference there must be between the position of a former manager and that of a serving captain of England’s football team, he is clearly still a prominent public figure who has held positions of responsibility in the national game.’ *McClaren v News Group Newspapers Ltd.* [2012] EWHC 2466 (QB) (05 September 2012)

See: <http://www.bailii.org/ew/cases/EWHC/QB/2012/2466.html>

As discussed and referenced above in January 2013, the third husband of the Oscar winning British actress Kate Winslet won a privacy action against the *Sun* over the publication of images taken of him at a private party that had previously been posted on Facebook. Mr Justice Briggs said: ‘The question is whether the publication of the Photographs, or of a more detailed description of their contents than the fact that the claimant is depicted partially naked, would add anything beyond mere titillation. In my judgment it would not.’ He said the threat to publish them ‘comes very shortly after the belated discovery by the media of the claimant and Miss Winslet’s recent marriage, at a time when the claimant finds himself in a temporary blaze of largely reflected publicity.’ The judge also engaged the issue of there being no possible reason for exposing Kate Winslet’s ‘children to a real risk to additional embarrassment or upset from the nationwide publication of photographs (or their contents) depicting their other carer behaving in a foolish and immature manner when half naked.’ *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch) (17 January 2013)

See: <http://www.bailii.org/ew/cases/EWHC/Ch/2013/24.html>

13. The Right To Be Forgotten. As indicated and discussed earlier in May 2014 the European Union Court of Justice asserted the ‘right to be forgotten’ allowing individuals to force removal of links to web articles. The EU court has ‘direct effect’ in UK media law and represented a sobering reminder that British publishers are increasingly becoming subject to European developments in media law and regulation, particularly with regard to privacy, data protection and data processing. The case involved a Spanish lawyer who objected to Google linking to old information about an unpaid debt. The ruling opened the floodgates for people demanding that links to old news about them online should be deleted. It does not mean that news publishers will be under a duty to remove archived articles. It applies specifically to Google in terms of it being seen as a ‘data processor’ rather than publisher. The full text of the ECJ ruling

in Google Spain and Google (Judgment of the Court) [2014] EUECJ C-131/12 (13 May 2014) is available at <http://www.bailii.org/eu/cases/EUECJ/2014/C13112.html> . Google were forced to set up a system of receiving and deciding requests. By July Google was having to deal with 1,000 demands every day. In September 2014 Press Gazette reported that more than 80 stories across the national press and BBC websites had been subject to 'right to be forgotten' removals. (<http://www.pressgazette.co.uk/more-80-stories-across-national-press-and-bbc-have-right-be-forgotten>) The right to be forgotten does not extend to any legal duty for journalistic publishers to remove online articles even from their archives. However, the implications of the ruling are that individual online users would find it harder to access information about people they were carrying out 'searches' on. The EJC ruling does not apply to Google's search engine operations outside the European Union. The case coincides with the UK Information Commissioner's Office (ICO) carrying out its public consultation on new guidance on data protection and the media and the publication of 'Data protection and journalism: a guide for the media' in September 2014.

This is downloadable available at: <https://ico.org.uk/for-organisations/guide-to-data-protection/>

By 2015 the Information Commissioner's Office was taking a more pro-active and interventionist approach to applying Data Protection law when it was judged that a continuing online media publication that had been de-linked from the Google search engine still needed a public interest justification. The Chartered Institute of Journalists became concerned after the 2018 ruling in *NT2 v Google* that the English High Court was setting a trend that would disassemble the online index of public record of journalistic coverage of past criminal convictions.

See: <http://cioj.org/right-to-be-forgotten-ruling-branded-a-criminals-charter/> & <http://www.bailii.org/ew/cases/EWHC/QB/2018/799.html>

14. *Paul Weller on behalf of his children v Daily Mail online (Associated Newspapers)* 2014. The ruling by Mr Justice Dingemans is seen as a significant development of UK privacy media law in barring the interference of privacy rights of children photographed in a public place, anywhere in the world. Associated Newspapers were refused leave to appeal to the UK Supreme Court so the precedent stands. *Weller & Ors v Associated Newspapers Ltd* [2014] EWHC 1163 (QB) (16 April 2014)

See: <http://www.bailii.org/ew/cases/EWHC/QB/2014/1163.html> The article was titled: "A family day out... Paul Weller takes wife Hannah and his twin sons out for a spot of shopping in the hot LA sun." The photographs were taken on 16th October 2012 by an unnamed photographer in Santa Monica, Los Angeles, California, United States of America. The photographs were of Paul Weller and the children out shopping in the street, and relaxing at a café on the edge of the street.

The first child shown in the photographs was Dylan Weller ("Dylan"), then aged 16 years. Dylan was misdescribed in the photographs as Hannah Weller, who is Paul Weller's wife. The other children shown in the photographs were the twins John Paul ("John Paul") and Bowie Weller ("Bowie"), then aged 10 months, sons of Paul Weller and Hannah Weller. All three children were the claimants acting by their father and litigation friend Paul Weller.

The article was illustrated with seven photographs which showed, among other matters, the faces of Dylan and the twins. The claimants contended that the pictures of the children's faces should have been pixelated and took the proceedings for damages for misuse of private information and breach of the Data Protection Act, and an injunction. The Mail Online denied

that the publication of the unpixelated photographs was wrongful, or that the Claimants were entitled to any relief. The judge said: 'these photographs were intrusive as they showed a range of emotions shown by the children on a family outing with their father.' This is how he approached his legal reasoning: 'In my judgment the balance comes down in favour of finding that the article 8 rights override the article 10 rights engaged. These were photographs showing the expressions on faces of children, on a family afternoon out with their father. Publishing photographs of the children's faces, and the range of emotions that were displayed, and identifying them by surname, was an important engagement of their article 8 rights, even though such a publication would have been lawful in California. There was no relevant debate of public interest to which the publication of the photographs contributed. The balance of the general interest of having a vigorous and flourishing newspaper industry does not outweigh the interests of the children in this case. I consider that, although the interpretation of the Editors' Code is not for me, this conclusion is consistent with the approach set out in the Editors' Code which recognises that private activities can take place in public, and that editors should not use a parent's position as sole justification for the publication of details of a child's private life. For these reasons, I find that the Claimants have established their claims for misuse of private information'. In respect of the Data Protection Act claim he said: 'It is common ground that the claim for infringement of the Data Protection Act stands or falls with the claim for wrongful misuse of private information. In the light of my finding above I find that the claims for breach of the Data Protection Act are established'. He concluded: 'I find that there was a misuse of private information in the publication, from 21 to 22 October 2012, by Mail Online of photographs showing the faces of the Claimants on a family outing with their father. There was also a breach of the Data Protection Act. I have made awards of damages of £5,000 for Dylan, £2,500 for John Paul and £2,500 for Bowie, and I have made no award of aggravated damages. The undertaking not to publish the photographs again should be offered to the Court to provide clarity for the parties. I do not grant any other injunctive relief.'

Making 'Privacy'/'Private Use' Decisions when editing and publishing photographs

As with so many media publication decision making the professional ethics and private morality are often bound up with existing and developing law.
When does reality and the imperative to report fact face pressure and, indeed obligation, to give way to self-censorship, or perhaps even recognition of the rule of law?



This is an iconic image from the Warsaw Ghetto uprising of 1943 and of the Holocaust directed against European Jewry by the German Nazi regime. Do privacy rights belong to an historical photograph taken by the SS as part of their report on the liquidation of the Ghetto and murder of Jewish men, women and children? Does it matter if the child raising his hands later died in a concentration camp, or survived to be an adult? In his moment of terror and persecution he has no control and are we entitled to gawk and stare at this terrible injustice and outrage of human dignity even 70 or more years later? Holocaust historians have investigated the identity of the child. See:

<http://www.holocaustresearchproject.org/nazioccupation/boy.html>

As is clear, there is much debate about who the boy actually was. He was 'self-identified' as seven-year-old Tsvi Nussbaum. After the war, Nussbaum moved to Israel, and then to the United States, where he worked as a physician in New York City. See: http://www.ihr.org/jhr/v14/v14n2p-6_Weber.html Would it matter if Dr. Nussbaum insisted that the photograph was not used because of the impact of post-traumatic stress disorder every time he saw it in contemporary media?

The parents and families of two 11 year-old-girls Holly Wells and Jessica Chapman have repeatedly asked the media not to republish the image of them wearing Manchester United FC shirts shortly before they were murdered by their killer Ian Huntley in 2002. The photograph was originally released to the media in the search for them and before their bodies had been found. Would such use of the image, that can be easily found online, now constitute a breach of the Data Protection Act, misuse of private information and breach of Article 8 Human Rights? The image in the BBC archive system is labelled 'Do-Not-Use.' 15 years after their

murders a Daily Telegraph online feature about the case did include the picture at <http://www.telegraph.co.uk/news/0/soham-murders-ian-huntley/>

What would be the situation in respect of an of two substitute girls used in a reconstruction by the police after their disappearance?

Questions to be answered would certainly revolve around public interest justification- even in respect of using the photograph of the actual two murder victims. These substitute girls would now be young adult women. Would they not have privacy rights in the use of their image when children for a specific public interest purpose in 2002, but not necessarily so in a feature article about the murder investigation in 2016?

The Mail Online decided to use the original picture of Holly and Jessica in a 2016 article about an 18-year-old woman who had discovered that Ian Huntley was, in fact, her father.

See: <http://www.dailymail.co.uk/news/article-3682494/How-Ian-Huntley-real-father-Aged-14-Samantha-Bryan-googled-school-project-saw-photograph-revealed-truth.html> If you were the Mail Online editor what public interest justification could you advance to justify the inclusion of the image?

Harold Evans' iconic book on news photography *Pictures on a Page* (London: William Heinemann, 1978) featured many images showing the moment or near moment of death that were chosen in the historical context as significant news photographs worthy of publication in different cultural and national contexts. They included Communist regime secret policemen being executed during the Hungarian uprising in Budapest 1956, a girlfriend smiling at a press photographer while her boyfriend lay dying from drowning in Italy, and a mother and child jumping out of a burning apartment in New York City. The mother did not survive. During the Tet offensive in Saigon in 1968, at the height of the Vietnam War, a South Vietnamese General executed a captured Vietcong guerilla. This was depicted in shocking black and white news photograph as well as colour news film footage. What are your views on whether it would be possible to justify publication in the public interest according to contemporary Ethics codes?

See: <http://www.photohistories.com/Photo-Histories/69/harold-evans-and-pictures-on-a-page>



YouTube posting at <https://www.youtube.com/watch?v=iU83R7rpXQY>

This sequence shows the moment the fatal bullet strikes the head of US President Jack Kennedy in Dallas in 1963. The amateur footage filmed by Jack Zapruder was withheld from the public domain until several years after the assassination. Is there any justification for publishing this sequence and any screen grab image of when the fatal bullet strikes the President's head?

To pixilate or not?

In 2016 three members of family holidaying in Newquay, Cornwall were washed into the sea by a wave. The father and young daughter did not survive despite being rescued by the RNLI. Consider the coverage in the Mail Online in August 2016 at: <http://www.dailymail.co.uk/news/article-3756265/She-s-peacefully-resting-daddy-Two-year-old-girl-swept-sea-Newquay-father-dies-hospital.html>

The images included indicate contemporary application of pixilation policy on the grounds of ethics, regulation and law. Can you break down the principles, primary and secondary media law applying? An image was published showing emergency medical treatment being given on the quayside to the father and daughter who both died in the incident. There is clear photographic editing to conceal the identification of the people being given emergency aid. The article also includes a family photograph showing the adult parents, but concealing the faces of their children.

It is likely that the Mail Online would have been applying the Editors' Code of Practice applied by IPSO regulation which states under clause 4 that in stories involving personal grief or shock, 'enquiries and approaches must be made with sympathy and discretion and publication handled sensitively.' Furthermore, under clause 6 (iii) 'concerning children it is also possible that consideration was given to the principle that children under 16 must not be interviewed or photographed on issues involving their own or another child's welfare unless a custodial parent or similarly responsible adult' had consented. The parents at this stage were clearly not in a position to be consulted. The father had died and the mother was dealing with the most dreadful shock and grief.

The desperately sad images of Aylan Kurdi who drowned while trying to migrate from Turkey to EU territory in 2015 became emblematic of the Syrian refugee crisis. Was the inclusion of these images justified in terms of ethics? Some news publishers pixilated Aylan's face.

The images were originally taken by Nilüfer Demir, a Turkish photographer for the Dogan News Agency.

They achieved considerable global impact when re-tweeted by Peter Bouckaert of Human Rights Watch who in the film in this Time online posting at <http://time.com/4162306/alan-kurdi-syria-drowned-boy-refugee-crisis/> argues that now Aylan should be given back his dignity with the media removing the pictures of his dead body from circulation.

The Paul Weller case of 2014 seems to indicate that private zone of law protection applies to children in public spaces where there is a reasonable expectation of privacy. And the fact that they are the relatives of celebrity is not regarded as in the public interest.

But the position of Wayne Rooney and his children appears to receive different treatment by tabloid news publishers. Is it because Mr. Rooney and his wife have previously decided to make their children part of a public presentation and profiling ritual?

No effort had been made to pixelate the children when they and Coleen Rooney had been the victims of a crime in news coverage by the Daily Mirror on August 11th 2016. See: <http://www.mirror.co.uk/3am/celebrity-news/coleen-rooney-takes-kids-stroll-8611678>

Wayne Rooney selected his son Kai as a mascot in the packed 'stadium of dreams,' at Manchester United's Old Trafford and the photograph has pride of place in the article in Mail Online 16th March 2015.

See: <http://www.dailymail.co.uk/tvshowbiz/article-2996738/Wayne-Rooney-walks-son-Kai-Old-Trafford-pitch-official-mascot-ahead-Man-United-s-win-Tottenham.html>

To what extent has he forfeited his young son's privacy rights?



This brings us to the front page of the *Sun* after England had been defeated by Iceland in the European Championship with their manager resigning immediately after. The paper decided

to include on its front page the picture of Kai Rooney holding his head in despair and showing distress over his father being on the losing side.

Data Protection Acts and EU General Data Protection Regulation

The influential media lawyer, Hugh Tomlinson QC argued in *UK Press Gazette* that the Sun had breached the Data Protection Act 1998 because there was no public interest at all in ever deciding to use the picture of 6-year-old Kai in distress for publication as soon as it was viewed.

See: <http://www.pressgazette.co.uk/top-media-law-qc-says-sun-could-face-action-under-data-protection-act-over-front-page-pic-of-six-year-old-kai-rooney/>

He said: ‘A data controller which processes a photograph showing a crying child cannot reasonably believe that publication of this photograph would be in the public interest. As a result, section 32 does not apply.’ Section 32 is a statutory defence available where the data is being processed ‘with a view to the publication by any person of any journalistic, literary or artistic material.’ The section states that there has to be a belief on the part of the data controller that publication would be in the public interest, that this belief had to be ‘a reasonable one’ and ‘regard may be had to his compliance with any code of practice which is relevant to the publication in question.’

From the 25th May 2018, the Information Commissioner took on the role of enforcing a new data protection regime in the UK combining General Data Protection Regulation, known as GDPR with the new Data Protection Act 2018 (DPA 2018).

See: <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/>

Under the Data Protection Act 2018, journalists are exempted from compliance with certain requirements providing they can satisfy the two-step test of:

- the processing being carried out with a view to the publication by a person of journalistic, academic, artistic or literary material, and
- the controller reasonably believes that the publication of the material would be in the public interest.

The Information Commissioner has explained how it would view compliance on the part of journalists and publishers.

1. View to Publication

The ICO guidance states that the information must be used with a view to publication of journalistic material. As long as the ultimate aim is to publish a story (or for someone else to publish it), all the background information collected, used or created as part of a journalist’s day-to-day activities could also be exempt, even if those details are not included in any final article or programme – and even if no story is actually published or broadcast.

In this context, “publish” means “make available to the public or any section of the public”.

This means that the exemption can potentially cover any information collected, created or retained as part of a journalist’s day-to-day activities, both before and after publication. However, the exemption cannot apply to anything that is not an integral part of the newsgathering and editorial process.

This element of the test is relatively straightforward and easier to satisfy than the requirement to show publication would be in the public interest which is explored below.

2. In the Public Interest

The DPA 2018 puts the onus on the media to make their own independent decisions on whether publication is in the public interest, as long as those decisions are reasonable.

- Any consideration of the public interest should ultimately aim to strike an appropriate balance between freedom of expression and privacy rights. The ICO advises organisations: and freelance journalists to take into account:
- the general public interest in freedom of expression
- any specific public interest in the subject matter
- the level of intrusion into an individual's private life, including whether the story could be pursued and published in a less intrusive manner
- the potential harm that could be caused to individuals.

The ICO therefore accepts that there will be a public interest in the full range of media output, from day-to-day stories about local events to celebrity gossip to major public interest investigations. However, this does not automatically mean that publication is always in the public interest. Any consideration of what is in the public interest must involve an element of proportionality – it cannot be in the public interest to disproportionately or unthinkingly interfere with an individual's fundamental privacy and data protection rights.

If the method of investigation or the details to be published are particularly intrusive or damaging to an individual, a stronger and more case-specific public interest argument will be required to justify that, over and above the general public interest in freedom of expression.

Where the journalist is working as part of an organisation it is the belief of the data controller that counts, not the individual journalist. However a particular journalist's belief could count as the belief of the data controller depending on the organisation's policies and how they allocate responsibility for reaching the decisions. In principle the data controller could allow individual journalists to apply the public interest test in each case and it would be the journalists' beliefs that count as being the beliefs of the data controller and these would be looked at for reasonableness.

The ICO will expect organisations to be able to show that there was an appropriate decision-making process in place to consider the public interest of a story. The ICO takes the view that it is the belief at the time of the processing that is important.

The data controller must be able to demonstrate that it had a belief about the public interest, i.e. that the issue of public interest was actually considered. It should be able to show, too, that it was considered at the time of the relevant processing of personal data and not just after the event.

If a journalist initially considers that a story will be in the public interest, but in the end the organisation decides not to publish, the exemption can still cover all journalistic activities undertaken up to that point.

Secondly, the exemption requires only a reasonable belief. The ICO does not have to agree that publication is in the public interest, as long as the intended publisher's belief is a reasonable one.

In determining whether it is reasonable to believe that publication would be in the public interest, the controller (the organisation or the freelance journalist) must have regard to

whichever of the following codes of practice or guidelines are applicable to the medium of publication in question:

- BBC Editorial Guidelines
- Ofcom Broadcasting Code
- Editors' Code of Practice

In practice, the ICO is likely to accept there was a reasonable belief that publication was in the public interest if the organisation or freelance journalist:

- has clear policies and procedures on public interest decisions
- can show that those policies were followed
- can provide a cogent argument about the public interest
- has complied with any relevant industry codes.

(The briefing on GDPR for journalists was prepared by Boyes Turner for the Chartered Institute of Journalists 19th June 2018)

The ICO provides an online guide for journalist/media bodies setting out journalist and media publisher legal duties as data controllers. See: <https://ico.org.uk/for-organisations/media/> Journalists and publishers should be vigilant in managing the collection of personal data, particularly of contacts and sources. These should be protected by firewalls, IT security and if transported by on USB keys or memory sticks have additional encryption.

Copyright/Intellectual Property

Copyright resides in two main categories of expression:

1: Authorial/primary works. LDMA standing for- Literary, Dramatic, Musical and Artistic.

2: Entrepreneurial/derivative/secondary works. SFBCT standing for- Sound recordings, Films, Broadcasts, Cable programmes, Typographical works.

Copyright law in the UK is derived from the 1988 Copyright, Patents and Designs Act, its amendments since then and European Union Directives on copyright and intellectual property.

Copyright does not protect slogans, facts, news, ideas or information, but it does offer protection in the way they are expressed. Tables and listings of information are a copyrighted expression of selected facts. So is computer coding, software and online digital databases.

Copyright takes effect as soon as copyright protected material is created.

It is the information you select and the way you arrange that information that makes it unique. In order for material to have copyright protection it has to result from independent intellectual, or creative effort. In other words, you must have put some work into it.

Copyright lasts for the duration of the author' life plus 70 years for literary, dramatic or musical works. The situation is the same for directors, screenplay authors and musical directors of films, 70 years for sound recordings and 25 years for published typographical editions. Copyright in databases lasts for 70 years in the case of identifiable authors who have made them with intellectual effort and creativity, and 15 years for databases of information produced as the result of investment.

There is copyright in iconic designs that are the logos of public and private corporations. For example, the design of the London Underground map is copyrighted. Photographing and

publishing images of banknotes is a criminal offence unless you have obtained the permission of the relevant authority e.g. The Bank of England.

See: http://www.bankofengland.co.uk/banknotes/Pages/reproducing_banknotes.aspx

Journalists have 'a fair dealing' defence if they use quotations and material during the course of reporting current events, criticism or review, and where only the less than substantial part of a literary, dramatic, musical or artistic work is used. What 'less than substantial' means varies from case to case but the general principle is that it is not excessive beyond the purpose of reporting, or reviewing, and does not undermine a copyright owner's commercial interests. It is a matter of quantity and quality.

It is necessary that the quotations are attributed. It should be fairly obvious that publishing the substantial part or key, identifying element of a copyrighted work without permission undermines the defence.

In *Fraser-Woodward v BBC* in 2005, the High Court decided that 14 photographs of David Beckham and his family taken by a celebrity photographic agency had been used for the purposes of criticism and review in a documentary about tabloid journalism. The judge observed: 'Apart from one which was on screen for about 4 seconds, they were shown for no more than 2 or 3 seconds each, and some of them less than that. On occasions, they were shown as part of a brief still image; on others the camera panned quickly across them or zoomed in relation to them'.

See: <http://www.bailii.org/ew/cases/EWHC/Ch/2005/472.html>

In another case in that year the court decided that the Sun newspaper had not satisfied the criticism and review concept. In a half page advertisement of its new TV listings magazine it had also reproduced without permission the cover of a rival TV listings title.

See: <http://www.bailii.org/ew/cases/EWHC/Ch/2005/317.html>

Facts re-written do not amount to a breach of copyright. Blatant lifting of the original work (i.e. another story) with the same words, skill, labour and judgment of the original journalist is a breach of copyright, but rewriting a news story broken by a rival publisher is unlikely to be so.

In 2001 the Sunday Telegraph was not allowed to depend on Article 10 freedom of expression rights when defending a breach of copyright action involving the former leader of the Liberal Democrats, Paddy Ashdown. The newspaper's political editor had included substantial sections of Mr. Ashdown's confidential note of a meeting with the Prime Minister. The quotations went much further than those normally incorporated in a news report.

See: <http://www.bailii.org/ew/cases/EWCA/Civ/2001/1142.html>

In theory, there is 'a public interest' defence for copyright under common law and the 1998 Human Rights Act, but it is rarely recognized. The threshold for refusing to enforce copyright on public interest grounds would be 'if the work, (the images) were immoral, scandalous, contrary to family life, injurious to public life, public health and safety or the administration of justice.' A small claims court judge ruled in favour of a regional newspaper that had copied

images from a website showing the activities of urban explorers in derelict buildings because they illustrated police concern that crimes were being committed.

Image Issues

You cannot usually publish a picture without permission from the copyright holder. You should ensure you use images online that you and your colleagues have originated yourself. If you are relying on a Creative Commons license for an image derived from Wikipedia, Wikimedia, Flickr, Pinterest, or Google images, make sure that you comply with all the specific terms. See: <https://creativecommons.org/>

The licenses usually require a specific attribution such as: 'Creative Commons 10th Birthday Celebration San Francisco' by tvol is licensed under CC BY 2.0'. When publishing on an online platform you can do a number of things that show respect and courtesy to the CC licensing. For example, in Wordpress editing you can embed the url of the source image hosting so that it clicks through. You should use captioning to fulfil attribution, and hyperlinking can also act as source acknowledgement.

The fair dealing defence for news and current affairs does not apply to images. Image fair dealing only relates to criticism and review. This should mean that you can use images to illustrate your genuine criticism or review of a photographic exhibition or book of photographs. But your selection and publication should not be so excessive that you would defeat the purpose of anyone visiting the exhibition or buying the book of photographs.

All images (photographs, designs, artwork, sculptures etc) have rights implications in Europe (including UK) where made and published/exhibited after 1st July 1912. In the USA the position is more complicated because of copyright renewal provisions.

Case law in England and Wales is trying to catch up with the Internet and online social media communications. But copyright law still applies to photographic images distributed by Twitter, Instagram, or other social media platforms such as Facebook.

If you find user generated image content on Twitter, for example, you can direct message the account holder to find out if they originated the image and would be prepared to allow you to use the image with a credit. It is important to establish that the person giving permission has the right to do so and ideally owns the photograph.

Social media images and photographs taken for domestic purposes are protected by a privacy provision in section 85 of the 1988 Copyright, Patents and Designs Act, so it is important to seek permission and check the origin and provenance of such imagery. Family images on a Facebook page connected to somebody involved in a news event could have a copyright belonging to the person who commissioned them as well as the person who was paid to take them. An example would be a wedding or official school photographer.

Although it is becoming a common practice for mainstream news publishers to 'screengrab' images from television coverage of news events to use in their online publications, a strict interpretation of copyright law is that this could be infringement

without the permission of the source provider. Mohammed Al Fayed successfully sued the *Sun* for publishing two stills from the security video-tape of his property Villa Windsor in Paris. The newspaper argued they were running a public interest news story disputing how much time his late son Dodi and the late Diana, Princess of Wales had been there. The court ruled the information from the images could have been published without infringing photographic copyright.

See: <http://www.bailii.org/ew/cases/EWCA/Civ/2000/37.html>

The situation appears to be different though when using short clips of digital video or sound from publishers covering a news event. This is derived from a test case in 1991 involving the BBC and the satellite news provider BSB. The case established that within a 24-hour period rival media organizations can use extracts of video for news reporting taken from exclusive rights coverage of public interest sport and news events. In this case it was the World Cup. Again, the extracts had to acknowledge the source/origin, not be substantial in use, be used after the rights holder had first published, and such occasional limited news usage did not undermine or compete with the original publisher's commercial interests in buying the rights exclusively.

The BSB use had been deemed reasonable in terms of using clips ranging between 14 to 37 seconds and only up to four times in any 24-hour period.

The 2016 case taken by the England and Wales Cricket Board and Sky against the Fanatix sports app indicated that an excessive use of short though qualitative clips became a tipping point of 'purely commercial rather than genuinely informative' usage.

See: <http://www.bailii.org/ew/cases/EWHC/Ch/2016/575.html>

In 2014 the fair dealing defence was reformed to include quotation of works (whether for criticism or review or otherwise) and copying works for the purposes of caricature, parody or pastiche. This has opened up a debate about whether this expands the fair dealing defence for online photographs and images. It could be argued that in order to quote a statement or event presented on a website, using a screengrab of the relevant webpage for current reporting purposes might qualify under this extension of fair dealing.

However, it is unlikely to change the exclusion of photographic images in current event fair dealing. The government's Intellectual Property Office has said: 'Whilst the exception applies to all types of copyright work, it would only be in exceptional circumstances that copying a photograph would be allowed under this exception. It would not be considered fair dealing if the proposed use of a copyright work would conflict with the copyright owner's normal exploitation of their work. For example, the ability to sell or license copies of photographs for inclusion in newspapers would be a normal exploitation'.

See:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375951/Education_and_Teaching.pdf

Quite detailed research needs to be undertaken to ascertain rights holders in photographic images and legal disclaimers will need to be published to avoid future actions from the owners

of what appeared to be 'orphan' works. [material previously published with no assigned and traceable ownership/originality.]

Original images of other images, or two, or three-dimensional works of art are subject to rights implications where they are taken in private exhibition spaces or from in copyright publications. However, public architecture and sculptures are deemed to be in the public domain; however recently built and created.

You need to be aware that the use of digital still and video images taken in people's homes, on private and corporate property are not copyright free. You will need to obtain permission. Sometimes you might be in an environment that you think is public, but is, in fact, privately owned. This could even be a park, shopping mall, railway station, airport, or transport hub.

Incidental Use

There is an incidental use defence in UK copyright when images, designs, words and indeed music, video and broadcasting might be included in a separate publication whether photographic or filmic or online video sequence. The key expression from section 31 of the 1988 copyright legislation in this defence turns on the idea that the defence fails 'if it is deliberately included'. An example of incidental use would be the filming of a documentary about shoplifting and in a sequence showing somebody being arrested the store's background music is playing, or if the sequence was in an electrical goods shop with large plasma screen televisions, there might be a film or broadcast television service showing on the screens. Obviously if you digitally edited the ironic selection of a scene from a film showing shop-lifting onto the screens, then you would need to obtain the rights for the use of that sequence. It would be different if this was incidental and a rather miraculous showing at the time of the arrest. The mere serendipity of such a coincidence could be argued to be an incidental use.

Moral Rights

Most employed journalists producing online publications are not entitled to the CDP 1988 Act's establishment of the right to be identified as the author or director of a published work and the right to object to derogatory treatment of the work. These are known as 'Moral Rights', but journalists are still entitled to the protection against false attribution of their work. This means that it would be unlawful for somebody else to claim credit for your work or for a publisher to put your name to a publication that you had no involvement in.

Small Claims Actions

It is important to appreciate that copyright infringement actions are becoming more frequent and easier to launch. The Small Claims track of the Intellectual Property Enterprise Court (IPEC), a division of the High Court in London, is now operating for actions involving damages of less than £10,000. It means that individual photographers can litigate on their own behalf in a less formal legal process. More than 60 actions are being heard each year.

See: <https://www.gov.uk/guidance/take-a-case-to-the-intellectual-property-enterprise-court>

Music Issues

Music publishers, composers, musicians, and record companies have two very powerful music licensing organisations, PRS, and PPL, actively enforcing copyright compliance in all

dimensions of media. If you are involved in an online/web publisher that regularly uses in copyright music for entertainment, there will be an obligation to pay for an annual license and probably make detailed returns on the music that has been used. PPL will be anxious that as a music publisher you have control over your own streaming. This could require hosting your music use on your own server. There may be difficulties obtaining a music use license if your music usage is encoded from a host platform such as Soundcloud, Youtube or Vimeo. This is because access to the music is provided to all users of the host platforms rather than your own online publication.

It is possible to use music journalistically with the current event reporting and criticism and review, as well as quotation fair dealing defences. However, the music used would have to be relevant, illustrative and short- certainly not the substantial part in length of any track. An European Union Directive extended copyright duration for music recordings from 50 to 70 years in October 2013. This means that recorded music released for public consumption prior to 31st December 1962 is likely to be out of copyright, though music compositional and arrangement copyright continues for 70 years after the death of the author. Any musical recording published after 1st January 1963 will remain in copyright until the end of 2043.

Database Issues

It is very important to appreciate that data journalism and Internet data scraping software programmes generate two risks of copyright infringement in UK media law. Database copyright exists where the database itself is a literary work of an author's own intellectual creation, and a Database Right resides in a collection of independent works, data or other materials which are arranged in a systematic or methodical way and individually accessible by electronic or other means.

The Database Right does not require any intellectual or creative effort. It exists if there has been a substantial investment in obtaining, verifying or presenting the contents of the database, and investment for these purposes means any investment whether in financial, human or technical resources. The information does not have to be confidential. The Database copyright duration lasts 70 years from the death of the author, and the Database *sui generis* Right lasts 15 years from the end of the calendar year when the production of the database was finished.

This means that the extraction or re-utilisation of all or a substantial part of the contents of online sites that qualify under the definition of databases is likely to be UK copyright infringement. Copying the contents to another digital electronic storage device amounts to extraction. Making the contents available to the public by any means amounts to re-utilisation. This would, of course, include the engagement of computer graphics data journalism software to organise the data extracted in an illustrative form.

There is a fair dealing defence for Database copyright in terms of current event reporting, for criticism or review, or quotation for journalistic purposes. This could operate where a journalist had extracted database information from different sources and is setting out an analysis or comparison for public interest purposes. The fair dealing defence for Database Right infringement is explained as extraction by a lawful user, extraction for the purpose of illustration or teaching or for a non-commercial purpose, and where the source is indicated. This would

appear to provide a defence for data journalistic illustration provided that the source is indicated. However, it will be wise to check the terms and conditions applying to visitors of online database resources. When the terms and conditions exclude visiting the website for the purposes of data scraping, there is an argument that the journalist researcher is not 'a lawful user' of the site. The ultimate and most effective defence is, of course, the consent and the agreement of online database owners.

Such database arrangement protection, does not apply in the USA where compilation copyright does not apply to all the data extracted from a copyright database. And in the case of databases not protected by copyright law it could be lawful to 'scrape' all of a database unless the website's terms and conditions make it a breach of contract in relation to registered site members or visitors. The European database right is only available to companies based in EU countries.

Reporting Courts-Martial- This section is informed and largely derived from the content of 'Practice in the Court Martial: Collected memoranda, version 4' at <http://www.justice.gov.uk/downloads/courts/judge-advocate-general/practice-memos-court-martial.pdf> and 'The Court Martial and the Summary Appeal Court guidance - Volume 2: Guide for court members - Version 6' at <http://www.justice.gov.uk/downloads/courts/judge-advocate-general/procedure-guide-vol-2.pdf>

1. The courts martial system in the British Services is run by the office of the Judge Advocate General and Military Court Service. The current JAG is His Honour Judge Jeffrey Blackett.
2. The system consists of 4 Primary Permanent Courts operating from British Force Germany at Sennelager, Bulford, Catterick and Colchester in England. These sit full-time on a continuous basis 43 weeks of the year in modern, fully equipped facilities. There are 8 secondary courts situated at the 4 centres above and additionally at Aldergrove, Northern Ireland (two courts) and Cyprus (Episkopi) and Portsmouth.
3. This system of courts tries criminal offences as well as breaches of specific armed forces discipline and duties. Summary Appeal Courts hear appeals from summary decisions and punishment handed out by commanding officers.
4. At courts martial in trial and sentence hearings a professional judge known as the Judge Advocate presides over the proceedings. He/she is joined by a court martial board that consists of a minimum of 3 and maximum of 7 service people at commissioned officer and warrant officer level who have served for not less than three years. The senior officer is called the President of the Board. The Judge rules and directs on law and the members of the board decide the facts and also the sentence. This means the risk of media prejudice extends between findings of guilt and the sentence hearing.
5. The board members operate like jurors in the civilian courts, though unlike jurors they have a role in determining the sentence with the Advocate General who does not have a vote in relation to the determination of the verdict which is known as a 'finding' in military courts. Courts martial board members must not have been the commanding officer of any defendant/appellant, nor have served in the same unit at any time from the date of the alleged offence.
6. Cases are prosecuted by the Service Prosecuting Authority. During trial the Judge Advocate is addressed as 'Sir' or 'Madam', the Judge Advocate General as 'Your Honour' and when a High Court Judge presides, as Mr Justice McKinnon did at Bulford in the Baha Mouza case, the proper address is 'My Lord.'
7. The usual composition of a military court board is five and this can deliver majority verdicts of three to two. The Appeal Court ruled in 2009 that courts martial can no longer reveal whether verdicts are unanimous. The Court Martial Appeal Court ruled in 2010 that majority verdicts do not infringe the right to a fair trial or produce an unsafe conviction.

8. The principle of open justice as expressed in *Scott v Scott* in 1913 applies to the Court Martial just as it does in any other criminal court, and the presumption is that all criminal court proceedings are open and accessible to the public. There is a statutory requirement that the Court Martial sit in open court unless there is a compelling reason for the judge to direct otherwise: for instance, cases involving matters which could lead to the disclosure of security classified information may be held in camera.
9. In Courts Martial just as in other criminal courts, automatic reporting restrictions apply under certain circumstances which may render discretionary restrictions unnecessary, such as: restrictions on publishing information identifying of victims or alleged victims in sexual offence cases; rulings made at preliminary hearings. The judge may provide guidance to the media as to the applicability of automatic reporting restrictions in a specific case. The media remain responsible for ensuring they comply with the law.
10. Discretionary reporting restrictions can be imposed by a judge under the Contempt of Court Act 1981. Section 4(1) of the Act provides that publication of a fair, accurate and contemporaneous report of proceedings held in public is lawful, and s 4(2) provides: In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.
11. The Armed Forces Court Martial Rules give military courts the power to give leave for any name or other matter given in evidence in proceedings to be withheld from the public. The Coroners and Justice Act 2009 s 86 provides for witness anonymity orders (s 94 makes it clear this provision applies to Service courts). A witness anonymity order requires specified measures to be taken in relation to a witness to ensure that the identity of the witness is not disclosed in or in connection with the proceedings. The kinds of measures to be taken include measures for securing that the witness's name and other identifying details may be withheld or removed from materials disclosed to any party; that the witness may use a pseudonym; that the witness is not asked questions that might lead to his or her identification; that the witness is screened; and that the witness's voice is subjected to modulation.
12. The Contempt of Court Act 1981 s 11 provides: In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld. S 11 directions may be made in relation to the defendant or a witness, or any other "matter" relevant to proceedings (for instance, evidence which is sensitive for security reasons).
13. Prosecution or defence counsel may apply for orders imposing reporting restrictions so as to withhold from the public the identity of defendants or witnesses only if such an order is necessary for avoiding a risk of impediment to or frustration of the administration of justice. This may be in the instant proceedings or in future proceedings. For the protection of a particular witness, directions may be given for example permitting the witness to give evidence from behind a screen or under a pseudonym ("X") rather than their real name. It is not sufficient that the reporting of the name, etc. would cause the defendant or witness embarrassment, or even financial loss; those applying for such a restriction must show by way of evidence that failure to exercise the discretion to withhold the name would risk frustrating or impeding the administration of justice, for example because there are reasonable grounds for fearing that the operational or personal safety of these individuals is threatened.
14. Judges consider each such application on its merits, giving due weight to the public interest in the principle of open justice and to the qualified right to freedom of expression (the right both to impart and receive information) under Article 10 of the European Convention on Human Rights (ECHR). Personal safety considerations may, where there is cogent evidence in support, justify non-disclosure of identity on the grounds that disclosure would contravene the rights of the individual under ECHR Articles 2 right to life & 8 right to privacy. The Armed Forces (Court Martial) Rules 2009 r 26 contain general provisions enabling the judge to conduct the proceedings: "...in such a way as appears to him to be in the interests of justice."
15. A Court Martial Appeal Court case involving the *Times* and *Guardian* and a trial of members of the Special Forces in 2008 established a two-fold test for deciding whether to withhold the name of the defendant:

either that 'the administration of justice would be seriously affected were it not to grant anonymity' (from Scott v Scott) or that 'there is a real and immediate risk to life' (a more modern limb arising from ECHR Article 2 as recognized in the 2007 House of Lords case about police officer witnesses to an inquiry in Northern Ireland known as Re Officer. The ruling in the case of Marine A, Sgt Alexander Wayne Blackman in December 2013, convicted of executing a wounded Afghan insurgent re-affirmed this principle. This case also stipulated that anonymity issues had to be resolved before the beginning of courts-martial and any release of footage or image of the victims of murders or serious crimes should consider the impact on their or their families' rights to respect for privacy and family life.

16. Where practicable the media must be notified in advance about any applications for reporting restrictions and have the opportunity to make submissions in relation to the application. Failing that, in an exceptional case, an order should be expressed to be interim and be followed up by a further hearing open to the public and notified to the media at which the judge reconsiders the reporting restrictions already made, after giving the media an opportunity to be heard or represented.
17. Media representatives prefer to and are entitled to expect to be given an avenue for making representations at the time when the restrictions are originally imposed. The media may appeal against reporting restrictions imposed in the Court Martial to the Court Martial Appeal Court.
18. The Judicial Communications Office circulates the existence of media restriction orders to a wide circle of media contacts, and deals with phone calls or queries from the media about actual or possible reporting restrictions. The Court Officer hands out hard copies of the order imposing reporting restrictions locally to any media representatives present at court on the day. Simple queries received locally may be dealt with locally, if the answer is sufficiently obvious, but otherwise are referred to JCO.
19. Whenever there is significant media interest in a forthcoming trial, with the likelihood of many press and broadcast media personnel attending, MoD Media Ops make arrangements for management, accreditation, etc of the journalists and if required for a pre-trial briefing. MoD Media Ops may arrange a photo-opportunity for the defendants, if they agree. Nothing prevents the media from taking any other photographs or videos outside of the court precincts in the same way as for a Crown Court. MCS Court Officer arranges for journalists and their vehicles to be accommodated suitably inside and outside the court centre, and may arrange a photo-opportunity for the judge, if he agrees.
20. Media representatives address requests for access to images, documents, or video material to the prosecutor in the first instance, and the prosecutor takes the initial decision to permit or deny access. It has been agreed that the prosecutor will have regard to the Crown Prosecution Service / Association of Chief Police Officers (CPS/ACPO) document "Publicity and the Criminal Justice System – Protocol for working together" (October 2005), insofar as it is relevant. The overriding objective is to provide an open and accountable prosecution process, by ensuring the media have access to all relevant material wherever possible, and at the earliest appropriate opportunity.
21. Although the ECHR Article 10 guarantees the right to impart and receive information, this must be balanced against the other rights guaranteed, notably by Article 2 (Right to Life) and Article 8 (Right to Respect for Private and Family Life). Additional considerations for a military prosecutor would be whether material should not be disclosed for operational reasons or for reasons relating to the personal safety of military personnel.
22. In September 2014, The Society of Editors said it would be investigating complaints that the Military Court Service was not providing enough information to journalists about forthcoming cases heard in the military courts. 'Society of Editors to investigate military trial 'obstructionism''
See: <http://www.theguardian.com/media/greenslade/2014/sep/15/military-open-justice>
23. There was also concern expressed in September 2014 that MOD guidelines on contact between service people and journalists would create a chilling effect, discourage public interest disclosure and a culture of secrecy. See 'Secret state: Members of armed forces must notify press officers even if they meet a journalist socially' at: <http://www.pressgazette.co.uk/secret-state-members-armed-forces-must-notify-press-officers-even-if-they-meet-journalist-socially> The guidelines are set out in a document known as 'The Green Book.' See: <https://www.gov.uk/government/publications/the-green-book>

Reporting Inquests

1. Under the Coroners and Justice Act 2009 a coroner must conduct an investigation into violent or unnatural deaths, deaths where the cause is unknown and deaths which occur in custody or otherwise in state detention. In certain cases, this investigation will include the coroner holding an inquest.
2. Inquests convened by Coroners are inquisitorial court proceedings and fair, accurate and contemporaneous reporting provides absolute privilege in terms of libel- reverting to qualified privilege when reporting is not to the nearest deadline of publication.
3. Inquests are covered by the Contempt of Court Act 1981 so it is possible to commit media contempt- not so much in relation to influencing the professional coroner, but to those hearings where a jury is convened to decide on a verdict of sudden death occurring in prison or in police custody, or in the execution of a police officer's duty, or if it affects public health or safety. Inquests will be held into the deaths of service people abroad in the coroners' jurisdictions where the body is brought back to Britain. Between 7 and 11 jurors can sit at Inquests and the largest minority allowed in a majority conclusion is 2.
4. Inquest proceedings become active in terms of contempt of court risk as soon as the first 'opening' hearing takes place. (Determined by a Court of Appeal Case Peacock v LWT 1986). This means publications that create a substantial risk of serious prejudice or impedance to the administration of justice by discouraging witnesses to give truthful evidence could attract prosecution by the Attorney General.
5. IPSO's Editors' Code of Practice and broadcasting regulation stipulate rules of conduct in cases involving grief and shock. For instance, publication in such circumstances must be handled sensitively and, when reporting suicide, care should be taken to avoid excessive detail about the method. In 2008 the Ministry of Justice published a discussion paper 'Sensitive Reporting in Coroners' Courts' setting out how bereaved people can be upset by media coverage.
6. All inquests must be held in public in accordance with the principle of open justice, and so members of the public and journalists have the right to, and indeed may, attend (although parts of a very small number of inquests may be held in private for national security reasons).
7. Suicide notes and personal letters will not usually be read out at the inquest unless the coroner decides it is important to do so. If they are read out, their contents may be reported.
8. An inquest is a limited, fact-finding inquiry to establish who has died, and how, when and where the death occurred. An inquest does not establish any matter of liability or blame. Although it receives evidence from witnesses, an inquest does not have prosecution and defence teams, like a criminal trial; the coroner and all those with "proper interests" simply seek the answers to the above questions.
9. Coroners have powers to issue reporting restrictions that postpone and prohibit the reporting of their proceedings under the 1981 Contempt of Court Act, 1933 Children and Young Persons Act- relating to young people aged 17 and under, and the statutory protection of sexual offence complainants applies at inquests as in any other proceeding or situation.
10. Coroners have an inherent jurisdiction in common law to order that witnesses give evidence anonymously where there is a real and immediate risk to their safety and this is also backed by Article 2, right to life under the 1998 Human Rights Act. [R v HM Coroner for Inner South London High Court 2004 and in re Officer L Northern Ireland, House of Lords 2007]
11. Coroners now record conclusions as to death rather than the term 'verdict.' These include: I.Accident or misadventure; II.Alcohol/drug related; III.Industrial disease; IV.Lawful/unlawful killing; V.Natural causes; VI.Open; VII.Road traffic collision; VIII.Stillbirth; IX.Suicide
12. As an alternative, a brief narrative conclusion may be made. The standard of proof required for the short form conclusions of "unlawful killing" and "suicide" is the criminal standard of proof- 'so the coroner or jury are sure, beyond all reasonable doubt.' For all other short-form conclusions and a narrative statement the standard of proof is the civil standard of proof- 'on the balance of probabilities.'
13. It is becoming standard practice for police firearms officers involved in the fatal shooting of members of the public, and members of the Special Forces to have anonymity during inquests. Sir Michael Wright, the coroner in the 2008 inquest into the death of Brazilian electrician Charles de Menezes, who was shot by police when mistaken for a terrorist, warned the media that any attempt to take photographs of police officer witnesses granted anonymity would be contempt of court.

14. The Chief Coroner publishes a detailed guide online titled: 'The Coroner and the Media'. The latest version updated in 2016 is available at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/guidance-no-25-coroners-and-the-media.pdf>
15. This document places a considerable emphasis on the principle of Open Justice and states: 'Coroners will be guided in the first instance by the important principle of open justice. This is best explained in the well-known Court of Appeal case of Guardian News and Media Ltd which applies to all courts including coroners' courts. It is the principle behind public courts, open hearings, recording hearings, public notification of inquests in advance, and provision to the media where appropriate of access to documents.' See: <http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2012/420.html>
16. When Southwark Coroner's Court in London inadvertently failed to notify the media of the opening of an inquest into the perpetrators of the terrorist attack on London Bridge and Borough Market in 2017, accredited journalists were permitted to take notes from a recording of the hearing. See: <http://www.pressgazette.co.uk/opening-of-inquest-into-death-of-london-bridge-terrorists-goes-unreported-as-journalists-not-informed/>
17. The Coroners (Inquests) Rules 2013 provide detailed guidance on procedure. There are three types of hearing: a pre-inquest review hearing; an inquest opening; and the full hearing that may also be described as the final hearing. Inquests can be adjourned.

Rule 9 of the 2013 Coroners (Inquests) Rules stipulates that the date, time, and location of an inquest hearing must be publicly available. The Chief Coroner has issued a guidance briefing stating that:

1. The coroner must, in advance of a 'final' inquest hearing, and where possible seven days before it, publish (preferably online) certain details including the date, time and place of the inquest, name and age of the deceased, and date and place of their death.
 2. Where possible such advance notice should be given for pre-inquest review and 'opening' hearings, and that it is 'good practice' to use email to update the media about forthcoming cases.
18. Rule 11 states that there is a general expectation for any pre-inquest hearing and inquest hearing to be held in public but that:
 - a. A coroner can direct that the public be excluded if it is considered to be in the interests of justice to do so;
 - b. A coroner who does not have immediate access to a courtroom or other appropriate place in which to open the inquest can open it privately and then announce that it has been opened at the next hearing held in public;
 - c. A coroner can direct that the public (including journalists) should be excluded from all or part of a hearing that the coroner considers would be in the interests of national security to do so.
 19. The availability of the recording of the inquest from Southwark Coroner's Court in the case set out in paragraph 16 was the result of the implementation of the 2013 rules which required Coroners to keep an audio recording of every inquest hearing including 'pre-inquest reviews.' A copy of the recording can be provided to what is considered as a 'proper person' to have possession of it. This facility was used by Kent Online in 2017 to defend a complaint made against it by somebody who alleged it had published an inaccurate report. Any publication or broadcasting of recordings provided is prohibited with prosecution for contempt of court engaged by anybody doing so.



A composite of the stills that Judge Advocate General Jeffrey Blackett agreed could be released for use by the media during the 2013 trial of Royal Marines for murder in Afghanistan. He ruled against the release of moving video and any still image of the actual death of the wounded Taliban fighter.

He did agree to a release of the sound from the video. His decision that all five soldiers originally charged, including Marine Sergeant A found guilty, should be identified was challenged by the servicemen at the Court Martial Appeal Court. In a significant precedent the three-judge appeal, including the Lord Chief Justice, decided Sergeant Alexander Wayne Blackman should be named and at least two of those who had been acquitted. The risk to the right of life had to be ‘real and immediate’ and the standard of decision ‘reasonableness.’

The court also decided releasing footage or images of victims of murders and assaults might be a serious encroachment on their and their families’ rights to respect for privacy and family life. In 2017, following a substantial campaign supported by the thriller writer Frederick Forsythe, the Daily Mail and politicians saying Sergeant Blackman was the victim of a miscarriage of justice when he was convicted of murder and jailed for life with a minimum of eight years, a further appeal resulted in the substitution of a conviction for manslaughter and a jail sentence enabling near immediate release.

See the ruling at Blackman, R. v [2017] EWCA Crim 190 (15 March 2017) at: <http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Crim/2017/190.htm>

Questions to ask yourself in relation to your reporting

Is your story in the public interest? (not just sensational title tattle or gossip)	Libel/privacy/secondary media law regulation.
Is your information from a privileged source e.g. court hearing, public inquiry, public meeting, press conference, government body press release (e.g. police) academic journal/conference, local authority/assembly/parliamentary proceeding? These contexts operate as legally privileged shields against libel, but they require conditions- the most important being fairness, accuracy and the absence of malice.	Contempt for court hearings, libel everything else.
At first base you have to ask yourself is your reporting fair and accurate? And are you sure you are not operating under any hidden agendas that could be perceived as malicious?	Libel/contempt
Are children/youths-(17 and under) involved? Check if they are subject to anonymity orders because of criminal/civil/family proceedings. Obtain guardian & parent permission if under 16 or I/V interaction is in a school.	Contempt, privacy and secondary media law regulation. Separate standalone criminal office.
Is a complaint of a sexual offence being made? If so anything that could lead to identification of the complainant has to be removed. You can't rely on police and authorities to do this. Any identifying feature that would be recognized by the complainant's relative or close friend would be enough to convict you. Sex offence complaints often wish to keep their suffering and experience from their family and friends. The UK legal systems are extending the range of anonymity rights. This includes police firearms officers, intelligence agency personnel, members of the special forces, jurors, the alleged victims of people trafficking offences, alleged victims of female genital mutilation (FGM) blackmail victims where the menaces are the threat to expose something embarrassing, and teachers accused of offences against children at their schools prior to any decision to formally charge them.	Contempt/privacy/secondary regulation. Separate standalone criminal offence.
Can you double-check/cross reference your notes? (is your shorthand good enough/do you have a recording?) Do they tally with PA/news agencies, and other reporters?	Everything. There is no public interest defence for inaccuracy.
What is the prior history/contact with the subject(s) of the story? Is it clear there is nothing that could be construed/constructed as any form of prior negative disposition, or malice? Make sure there are no conflicts of interest e.g. you have not been paid or been given any favours/freebies/junkets. Has your conduct been courteous/polite throughout? Make sure you have no negative comments or doodles in your notes/computer systems against anyone referred to for the story.	Libel/privacy.
Make sure you have made no material promises or offered favours and/or inducements to obtain information, or used the threat of exposure/publication to obtain a response/cooperation/supply of information.	Potential criminal offences of bribery and blackmail.
Have you maintained neutral non-sensationalist language throughout to publication, including in investigatory/research emails/notes in case of litigation that might scoop up files/documentation by legal discovery?	Libel/privacy.

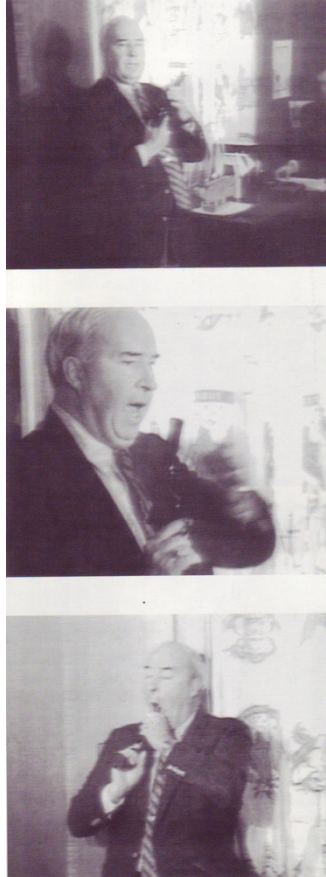
Have you given a reasonable opportunity for anyone being criticized or accused of anything to respond to the allegations and give their side of the story? Has the gist been included in the report? Did you accurately represent the allegations/criticism that they face?	Libel/secondary media law regulation.
Is it possible to find out if there is or has been any investigation into the issue you are reporting on carried out by any authority (whether employer/government body/professional disciplinary/regulation/state authority or police)? If there is, can this support the story? Sometimes state authorities allow unlawful conspiracies to run while suspects are under surveillance to collect evidence of more serious crimes, or there may be undercover agents inside the operation with participating informants. Also bear in mind that the FBI and other federal investigative authorities in the USA are known to allow illegal operations to run across international borders, particularly on the Internet, in order to collect evidence. Their agents and participating informants could be at the heart of and in control of the activity.	Libel/privacy/secondary media law regulation
If you are investigating something deemed unlawful, anti-social/controversial, have you excluded the possibility that the subject has been given special permission to be doing what's going on e.g. for charitable/humanitarian/compassionate reasons or as a result of prior exceptional agreement?	Libel/privacy.
Have you checked and double-checked that documentary/witness information for the story has not been fabricated/forged by informant sources with malicious/conspiratorial/political/situationist/mischievous hoaxing motives?	Libel/privacy/secondary media law regulation.
Have you checked and double-checked that your source(s) do not have any legally disabling axes to grind/past feuds with people and organizations they are criticising? Were they previous employees/contractors? Are they commercial/reputational rivals?	Libel/privacy/secondary media law regulation.
Have you made sure that what you state as facts are not in fact your opinions? Have you made sure that allegations/criticisms are attributed to sources and are not expressions of your editorial point of view e.g. 'editorializing.' Pay close attention to your use of adjectives and adverbs. If using sound or televisual media take care to avoid sarcasm and double meanings through voice inflection, facial expression, and body language.	Libel/secondary media law regulation.
Have you checked that your story and its multimedia content are not breaches of privacy e.g. ask if your subjects have a reasonable/legitimate expectation of privacy? Have they given permission for its publication, or is the information already in the public domain? Does it relate to personal sexuality/relationships/family life, home, correspondence (all personal communications), private space including salary/financial affairs/education/activities that take place on private property? If you are alerted to any affirmative answers to these questions, you next need to ask if public interest in an equal balancing act with freedom of expression would defeat the right to respect for privacy.	Privacy.
Is there a risk of breaking any existing criminal law or professional ethical rule in the process of your researching and publishing this story? If there is you need to check your conscience, support and approval of your employer, and professional association/union. You need to establish if there is a public interest defence for the crime. If not, does the DPP/CPS	All primary and secondary media law.

operate any public interest policy on deciding whether or not to decide to charge and prosecute?	
Are you using surreptitious/ clandestine devices and subterfuge? Have you established that you cannot obtain the information/story by any other non-deceptive technique? Since any use of surreptitious recording devices and subterfuge involves breaching privacy, have you established there is credible prior information of an issue that justifies such intrusion in the public interest? This excludes imaginative 'fishing expeditions' based on intuition and mere suspicion.	Privacy and secondary media law.
Does your story need witnesses and sources who would be willing and effective to give evidence in defence of privacy and defamation actions? If so are sworn affidavits in place? If documents have been supplied by public authorities are you sure they will not challenge their use in defence of libel or privacy actions?	Libel/privacy.
Have you recorded interviews and actuality without the knowledge and agreement of your subjects? In backing your notes and research in the UK you can record telephone/mobile calls without the other party knowing and this is legal as long as your recording device does not electronically intercept a telephone system that you do not own. Recording without the other party's permission can be a criminal offence in foreign jurisdictions. You cannot use these recordings for broadcasting on Ofcom licenced stations without the permission of the other party unless there is an Ofcom recognized public interest.	Criminal law and secondary media law regulation.
Are your images/photographs compliant with UK copyright? You do not have a current event fair dealing defence for using in copyright images. So are they your pictures, or if they have been taken by somebody else, do you have permission for use in your publication? Better to have this in writing by email. If there is a creative commons usage possibility, check the conditions to make sure your publication meets these. Make sure you have attributed/acknowledged the copyright holder.	Copyright/Intellectual Property
If you do not have permission, have you made sure your pictures were not taken on private property since this is likely to be a breach of privacy and copyright? Buildings and sculptures in public can be photographed for publication, but art/photographs/exhibitions in private corporate space have IP rights and require permission.	Copyright/Intellectual Property and Privacy
Have you sought permission from the guardian/school, and/or parent(s) when taking images/digital video and sound recording of children (16 and under) prior to broadcast/internet multimedia use? Use of media equipment to record a child on school premises requires the permission of the school as well as the parent/guardian.	Secondary media law regulation/privacy
Have you promised confidentiality to any of your sources? If you have, does your employer/publisher know and will they agree to support the confidentiality? How secure have you made your protection? You and your source become more vulnerable, the greater the number of people who know. Meeting confidential sources in public places (such as cafes, pubs, and restaurants) is less secure than in private spaces. Using digital communications is also insecure, though encryption and proxy servers help. The world's leading intelligence services have broken all forms of digital/Internet encryption. You cannot count on digital/Internet communications being free of surveillance or detection. Essentially the	Secondary media law regulation/Primary media law statute and case law.

<p>more sensitive the story, the greater risk of being under surveillance or exposed. You need to be careful about how much secrecy and confidentiality you can promise to a source.</p>	
<p>Is it clear and have you evidence that your source is lying to you or manipulating/deceiving you? Bear in mind that your professional pledge of confidentiality can be released in these circumstances. If the information provided turns out to be fabricated and untruthful, professional ethics allow you to be released from your confidentiality. Equally if you need your source to be on the record, you can seek to use persuasion. If your source comes to you with information supplied to you illegally and the result of criminal behaviour, ECHR and English common law offers an argument for the protection of your source, but the issue will be balanced with other issues such as national security etc. You need to seek legal/editorial advice before getting yourself deeply involved and obligated in these situations.</p>	<p>Secondary media law regulation/Primary media law statute and case law.</p>
<p>Is there a risk that the police, or another state investigative authority will want your media recordings of a public event? If requested you should politely ask the authority to seek a court order under the Police and Criminal Evidence Act 1984. It is advisable to label your equipment 'Media material protected by special procedure duty under PACE 1984.' If your notebooks and digital equipment contains confidential information held by you for the purposes of journalism, you can inform any state authority trying to seize and examine it that it is 'excluded' material under PACE 1984 and their access to it requires the permission of a court. Labelling, though tedious, gives your equipment a clearly stated status under the law.</p> <p>Be aware that if your sources are police officers, members of the armed forces or connected with state intelligence bodies and the story is politically sensitive it is likely you will be vulnerable to covert examination of your phone records and Internet activities. These concerns are based on the revelations of former CIA contractor Edward Snowden and the details of the Metropolitan Police report in Operation Alice which revealed detectives had used the Regulation of Investigatory Powers Act 2000 to obtain phone records of the newsdesk and political editor of the Sun thereby enabling them to identify the police officer sources for the allegations made against former Government chief whip Andrew Mitchell's about altercation with officers outside 10 Downing Street.</p> <p>You should adopt counter-surveillance measures such as email/database encryption, use of onion servers that can conceal your ISP number, avoid all digital communications and carrying of devices even when seemingly switched off, and working in 'analogue world' e.g. commit key information to your memory or writing on paper which you can much more reliably and easily destroy if necessary.</p>	<p>Secondary media law regulation/Primary media law statute and case law.</p>
<p>When interviewing your source(s) has it been made clear what is meant by 'on the record', 'non-attributable', 'off the record', Chatham House Rules'? There are conventions in journalism that although clear to reporters/editors are not so clear to their subjects. If it needs clarification make sure your interviewees know whether i. their comments are for publication and attribution; ii. Are for publication but not attributable and using a conventional description e.g. 'Whitehall source'(s) 'friends of'; iii</p>	<p>Secondary media law regulation.</p>

not for publication unless confirmed and corroborated by another named source; iv not for publication under any circumstances- the information is background guidance; v 'Chatham House rules' which means 'comments can be reported, however neither the identity of the speaker nor their affiliation, i.e. who they work for, must be revealed.' See: <http://www.chathamhouse.org/events/conferences/information-journalists>

Analysis of Ethics and Law- case history from the past.



Page 143 *On Liberty, Today [Della Liberta, Oggi]* by Anthony Smith, Alberto Abruzzese, Erik Barnauw, Jo Groebel, Rome, Italy: Special Edition for Prix Italia, Ravenna.

[Caption: '23 January 1987 – The Pennsylvania State Treasurer, Budd Dwyer, accused of corruption, shot himself before the television cameras at a press conference. Only a few television stations broadcast this sequence. Its exceptionally dramatic nature and the decision to screen it gave rise to heated debate throughout the world.

See: <http://www.nytimes.com/1987/01/23/us/official-calls-in-press-and-kills-himself.html>

These are archive images from the USA where a politician has called a media conference and takes his own life by shooting himself in the mouth. The aftermath of the suicide, which is obviously very distressing and unpleasant has not been included in this guide, but you do not need much imagination to envisage the horror of the event. It is understood that the politician killed himself during live television and radio coverage, and press photographers also captured what happened. In Britain no primary laws would be broken by recording and broadcasting the event, but profound ethical and secondary media law issues arise.

1. If the person concerned had given prior warning he was going to kill himself, media organizations would have to ethically challenge their reason for going to the press conference and thereby contributing to the event;
2. Running live coverage of media events in licensed broadcasting raises the importance of operating a delay device so that unforeseen events of this kind can be intercepted before actual transmission;
3. Broadcasting the moment of death in western media is generally seen as a moral taboo;
4. Any part of this sequence in broadcasting would have to be evaluated in terms of 'harm and offence.' Any evidence of 'under eighteens' being a significant proportion of the audience would question its inclusion in a newscast. A warning about the content would be expected at any time.
5. Under the Editors' Code of Practice for the Independent Press Standards Organisation (IPSO) and, indeed other regulatory codes, publication in print or online would engage a range of issues. Certainly, publishing after the event requires consideration of the impact on the politician's family. Had next of kin been informed? To what extent is the use of the imagery in the public interest? What is informative, gratuitous and voyeuristic about inclusion of the images? The context may well be differing for the print online media if the event had been live broadcast on television and radio and was continuing to be recycled. Then the debate on taste, decency, media harm and offence is active.
6. Recycling the footage in any form could compound the distress, and reproducing it in later years for anniversary items or illustration in feature and documentary publications would continue to have an impact on the politician's surviving family. This is why great care must be taken when replicating police released images of crimes and trials in later journalism. The families of two 11-year-old murder victims Holly Chapman and Jessica Wells have pleaded with the British media to stop using what became an iconic image of the two girls in Manchester United shirts that was actually taken on the day of their murder in 2002.
7. Any reporting of suicide in the media has been judged to have profound emotional consequences for those involved and members of any media audience. The British media have begun to recognize the advice and guidance of The Samaritans and their informative briefings on the social implications of use of language and purpose of representation in relation to suicide.
8. What are the copyright/intellectual property issues arising? The BBC v BSB case of 1990 may provide a defence for using screen-grabs or an edited portion of the tv sequence within 24 hours of the event taken from the broadcaster which had decided to publish. This may come under fair dealing in relation to a news and current event. For an elected politician to act in this way and use a live firearm for violent and shocking self-destruction would certainly come under the common law and 1998 Human Rights Act jurisprudence of 'public interest.'

9. The wider media would have a fair dealing defence under criticism or review if using a less than substantial proportion in the context of the media ethics debate. Acknowledgement of the source of the images would be needed to qualify for fair dealing.

We now move onto 2) **Secondary Media Law**- regulation by statutory and industry bodies.

This dimension moves from acting under moral principle in terms of duties and responsibilities (having the honourable motive and intention) to a position of compliance and acting on inclination to observe the rules of regulation which when transgressed can be enforced by sanctions. Having the worthy motive and intention is sometimes seen as morally superior to only making decisions to avoid punitive and unpleasant consequences to you personally. But this virtue is vulnerable to the paradox that 'the path to hell is paved with good intentions.' This is an acknowledgement that always telling the truth can do more damage than good. Many writers and experienced journalists have reflected on the good judgment including using discretion on what not to report in terms of ethics.

Secondary media law sometimes overlaps with primary media law where the sanctions include criminal prosecution and punishment and civil law actions with damages/compensation and court orders (known as injunctions).

The ethics codes are critical to determining hard-fought over primary legal cases. This is because section 12(4)(b) of the 1998 Human Rights Act obliged the courts to reference them when adjudicating a dispute between Article 10 Freedom of Expression and Article 8 Privacy.

The court **must have particular regard to the importance of the Convention right to freedom of expression** and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

- (a) the extent to which—
 - (i) the material has, or is about to, become available to the public; or
 - (ii) it is, or would be, in the public interest for the material to be published;
- (b) any relevant privacy code.**

The most regulated journalists in terms of secondary media law in the UK are broadcast journalists who are news and story gathering and publishing for licensed broadcasters in radio and television. This regulation directly stems from legislative and executive government control. The statutory regulator Ofcom is constituted by Act of Parliament and a body of legislation and statutory instruments and is also answerable in many ways to the Department of Culture, Media and Sport and Secretary of State for this department who has a seat in the Cabinet. From April 3rd 2017 it assumed full regulation of the BBC both for all content publication and ancillary issues such as competition and performance.

Ofcom Regulation

Ofcom has the power to punish licensed broadcasters though cannot award compensatory damages to complainants. Breaches of licensing and the broadcasting code can result in substantial fines, and the suspension and deletion of the licence of some broadcasters.

Regulation has the potential to discipline broadcasters and journalists for professional mistakes that do not breach primary media law such as libel, privacy, copyright and media contempt. It sets up a liability with consequences for inaccuracy, or political bias.

Broadcast journalists should be vigilant in monitoring Ofcom 'Broadcast and On Demand Bulletin reports on the outcome of investigations into potential breaches of Ofcom's codes and rules for TV, radio and video-on-demand programmes, as well as the licence conditions with which broadcasters regulated by Ofcom are required to comply.'

The bulletin reports are released in pdf files at: <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/broadcast-bulletins>. The bulletin for 11th September 2017 reported on an investigation into Channel 4 News:

'On 22 March 2017, Channel 4 News reported on the terror attack in London which had taken place earlier that day. The report included coverage live from Westminster of the aftermath of the events, as well as analysis from the studio and discussions in various formats between journalists and contributors to the programme. The first half of the programme focused on a man, Abu Izzadeen, who Channel 4 News incorrectly identified as the person responsible for the terror attack and who had been shot dead by police. In fact, Abu Izzadeen was in prison. Six complainants subsequently objected to this.'

Ofcom decided that 'Channel 4 News' rush to get this story to air resulted in it broadcasting a significant error on a major news story.' It also noted that it was the fourth case in three years in which Ofcom had found Channel 4 News in breach of the requirement to report news with due accuracy, under Rule 5.1 of the Code.

In deciding the sanction on this occasion Ofcom said: 'We took into account that the Licensee had taken a number of steps to ensure that its audience was aware of the error and to correct it. However, given the serious breach in this case, Ofcom directs the Licensee to broadcast a summary of Ofcom's Decision in a form and manner to be decided by Ofcom.'

In 1998, Ofcom's predecessor regulatory authority, the Independent Television Commission imposed a fine of £2 million on the former ITV broadcaster in the Midlands, Central Television, for including fabricated scenes in a documentary about heroin-smuggling from Columbia to Britain. The programme, called *The Connection*, had won awards for its investigative journalism and Ofcom justified the level of the fine by pointing out the damage the deception had caused to the trust of viewers in the integrity of broadcast journalism. The ethical problems of the programme had been exposed by an investigation carried out by the Guardian newspaper.

The largest fines imposed by Ofcom amount to a total of £5.675m in 2008 for what was described as the 'abuse' of premium-rate phone lines in popular light entertainment programmes.

The shows included Ant and Dec's *Saturday Night Takeaway*, Ant and Dec's *Gameshow Marathon* and *Soapstar Superstar*. Viewers had been misled by competitions they had been invited to participate in. Ofcom's sanctions committee said: 'millions of paying entrants were misled into believing they could fairly interact with some of ITV's most popular programmes.' In one instance the broadcaster did not point out that transmissions were not live so people ringing in were still charged for taking part. ITV was ordered to transmit six on-air apologies for their transgressions of broadcast regulation. Ofcom also investigated the BBC for unfair conduct of viewer and listener competitions that included *Children In Need* and *Comic Relief*. The highest fine imposed was £400,000.

See: <https://www.theguardian.com/media/2008/may/08/itv> and <https://www.theguardian.com/media/2008/jul/30/bbc.ofcom>

In 2012 Ofcom withdrew its licence from Press TV, a news channel funded by the Iranian government. The service broadcast in English from the UK and had not addressed concerns that its editorial content was determined from Tehran, and had not paid a fine of £100,000 for broadcasting an interview with Maziar Bahari, an imprisoned Newsweek journalist, that had been conducted under duress.

See: <https://www.theguardian.com/media/2012/jan/20/iran-press-tv-loses-uk-licence>

Ofcom does not have any legal powers to curtail or end the licences of public service broadcasters such as the BBC, Channel 4 and S4C (in Scotland). Primarily its investigation and sanctions against broadcast journalists are concerned with the concepts of 'harm and offence,' the protection of children, the representation of crime, and the maintenance of the principles of fairness and 'due impartiality and due accuracy.' Like the press regulators it applies a public interest formula to complaints about broadcast journalist conduct in relation to deception and misrepresentation, secret filming and recording, and issues of privacy.

You should regularly check and evaluate Ofcom rulings in Broadcast and On Demand Bulletins.

See: <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/broadcast-bulletins>

The online Channel 4 Producers' Handbook very effectively analyses key adjudications that set secondary media law precedent for broadcasters.

For example, see 'Ofcom finds against Fox News for Due Impartiality Breaches'

See: <https://www.channel4.com/producers-handbook/news/ofcom-finds-against-fox-news-due-impartiality-breaches>

And 'Unwarranted use of "body cam" footage Channel 5's "Can't Pay? We'll Take it Away!'

See: <https://www.channel4.com/producers-handbook/news/unwarranted-use-body-cam-footage-channel-5s-cant-pay-well-take-it-away>

The Ofcom Broadcasting Code

Section one: Protecting the under-eighteens

This section outlines the rules around scheduling and content information in programmes with regard to protecting children under the age of eighteen.

Example: Material that might seriously impair the physical, mental or moral development of people under eighteen must not be broadcast. TV watershed is before 2100 and after 0530. Radio broadcasters must have particular regard to times when children are particularly likely to be listening.

Section two: Harm and offence

This section outlines standards for broadcast content so as to provide adequate protection for members of the public from harmful and/or offensive material and this includes strong language.

Example: Factual programmes or items or portrayals of factual matters must not materially mislead the audience. Material which may cause offence must be justified by the context.

Section three: Crime, disorder, hatred and abuse

This section of the Code covers material that is likely to incite crime or disorder, reflecting Ofcom's duty to prohibit the broadcast of this type of programming.

Example: Material likely to encourage or incite the commission of crime or to lead to disorder must not be included in television or radio services or BBC ODPS (on demand programme services) and this includes hate speech.

Section four: Religion

This section relates to the responsibility of broadcasters with respect to the content of religious programmes.

Example: The religious views and beliefs of those belonging to a particular religion or religious denomination must not be subject to abusive treatment.

Section five: Due impartiality and due accuracy

To ensure that news, in whatever form, is reported with due accuracy and presented with due impartiality. To ensure that the special impartiality requirements of the Act are complied with.

Examples:

"Due" is an important qualification to the concept of impartiality. Impartiality itself means not favouring one side over another. "Due" means adequate or appropriate to the subject and nature of the programme. So "due impartiality" does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented.

Significant mistakes in news should normally be acknowledged and corrected on air quickly.

No politician may be used as a newsreader, interviewer or reporter in any news programmes unless, exceptionally, it is editorially justified. In that case, the political allegiance of that person must be made clear to the audience.

Due impartiality on matters of political or industrial controversy and matters relating to current public policy may be achieved within a programme, or over a series of programmes taken as a whole.

Section six: Elections and referendums

This section covers the special impartiality requirements and other legislation that must be applied at the time of elections and referendums.

Examples: In determining the appropriate level of coverage to be given to parties and independent candidates broadcasters must take into account evidence of past electoral support and/or current support. Broadcasters must also consider giving appropriate coverage to parties and independent candidates with significant views and perspectives.

Discussion and analysis of election and referendum issues must finish when the poll opens.

Broadcasters may not publish the results of any opinion poll on polling day itself until the election or referendum poll closes.

If a candidate takes part in an item about his/her particular constituency, or electoral area, then broadcasters must offer the opportunity to take part in such items to all candidates within the constituency or electoral area representing parties with previous significant electoral support or where there is evidence of significant current support. This also applies to independent candidates. However, if a candidate refuses or is unable to participate, the item may nevertheless go ahead.

Any constituency or electoral area report or discussion after the close of nominations must include a list of all candidates standing, giving first names, surnames and the name of the party they represent or, if they are standing independently, the fact that they are an independent candidate. This must be conveyed in sound and/or vision.

If, in subsequent repeats on that day, the constituency report does not give the full list of candidates, the audience should be directed to an appropriate website or other information source listing all candidates and giving the information set out above.

Section seven: Fairness

This section is to ensure that broadcasters avoid unjust or unfair treatment of individuals or organisations in programmes.

Examples: Where a person is invited to make a contribution to a programme (except when the subject matter is trivial or their participation minor) they should normally, at an appropriate stage:

- be told the nature and purpose of the programme, what the programme is about and be given a clear explanation of why they were asked to contribute and when (if known) and where it is likely to be first broadcast;
- be told what kind of contribution they are expected to make, for example live, pre-recorded, interview, discussion, edited, unedited, etc.;
- be informed about the areas of questioning and, wherever possible, the nature of other likely contributions;
- be made aware of any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and which might cause material unfairness;
- be told the nature of their contractual rights and obligations and those of the programme maker and broadcaster in relation to their contribution; and

- be given clear information, if offered an opportunity to preview the programme, about whether they will be able to effect any changes to it.
- If a contributor is under sixteen, consent should normally be obtained from a parent or guardian, or other person of eighteen or over in loco parentis. In particular, persons under sixteen should not be asked for views on matters likely to be beyond their capacity to answer properly without such consent.
- If a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.

Section eight: Privacy

This section is to ensure that broadcasters avoid any unwarranted infringement of privacy in programmes and in connection with obtaining material included in programmes.

Examples:

Where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.

Legitimate expectations of privacy will vary according to the place and nature of the information, activity or condition in question, the extent to which it is in the public domain (if at all) and whether the individual concerned is already in the public eye. There may be circumstances where people can reasonably expect privacy even in a public place.

Broadcasters can record telephone calls between the broadcaster and the other party if they have, from the outset of the call, identified themselves, explained the purpose of the call and that the call is being recorded for possible broadcast (if that is the case).

Surreptitious filming or recording should only be used where it is warranted. Normally, it will only be warranted if:

- there is prima facie evidence of a story in the public interest; and
- there are reasonable grounds to suspect that further material evidence could be obtained; and
- it is necessary to the credibility and authenticity of the programme.

Section nine: Commercial references on TV

This section relates to broadcasters' editorial independence and control over programming with a distinction between editorial content and advertising.

Examples:

Product placement is not permitted in the following:

- a) religious programmes;
- b) consumer advice programmes; or
- c) current affairs programmes.

News and current affairs programmes must not be sponsored.

No undue prominence may be given in programming to a product, service or trade mark. Undue prominence may result from:

the presence of, or reference to, a product, service or trade mark in programming where there is no editorial justification; or

the manner in which a product, service or trade mark appears or is referred to in programming.

Section ten: Commercial communications on radio

This section relates to radio broadcast only and is to ensure the transparency of commercial communications as a means to secure consumer protection.

Examples:

Spot advertisements must be clearly separated from programming.

No commercial reference, or material that implies a commercial arrangement, is permitted in or around news bulletins or news desk presentations.

No commercial reference, or material that implies a commercial arrangement, is permitted on radio services primarily aimed at children or in children's programming included in any service.

Broadcasters may broadcast appeals for donations to make programming or fund their service. Listeners must be told the purpose of the appeal and how much it raises. All donations must be separately accounted for and used for the purpose for which they were donated.

Ofcom's Regulation of the BBC

From April 3rd 2017, Ofcom became the new external regulator of the BBC. Its job is to 'hold the BBC to account.' Regulation covers three main areas: Content standards – including assessing the impartiality and accuracy of BBC news and current affairs programmes; Competition issues – including the final determination on new BBC services or significant changes to existing services, and ensuring the BBC's commercial services are not unfairly cross-subsidised by the licence fee; and Reviewing the BBC's performance against its mission and public purposes.

The Government has decided that a new BBC unitary board will govern and run the BBC, and ultimately be responsible for editorial and management decisions.

Previously Ofcom rules about the protection of children, harm and offence, crime, disorder, hatred and abuse, religion, and fairness and privacy, all applied to the BBC already. After April 3rd 2017 Ofcom now enforces the remaining rules on accuracy and impartiality, elections and referendums, and commercial references in programmes.

How will complaints against BBC programmes be handled after April 3rd 2017?

Ofcom is the final arbiter for complaints. Under the new system, Ofcom operates a Broadcaster-first complaints policy – that is complainants must address their complaints to the BBC first and Ofcom will only be involved if the complaint goes to an appeal stage. However, complaints about Fairness and Privacy (Sections 7 and 8 of Ofcom's Broadcasting Code) can go direct to Ofcom. Complaints about

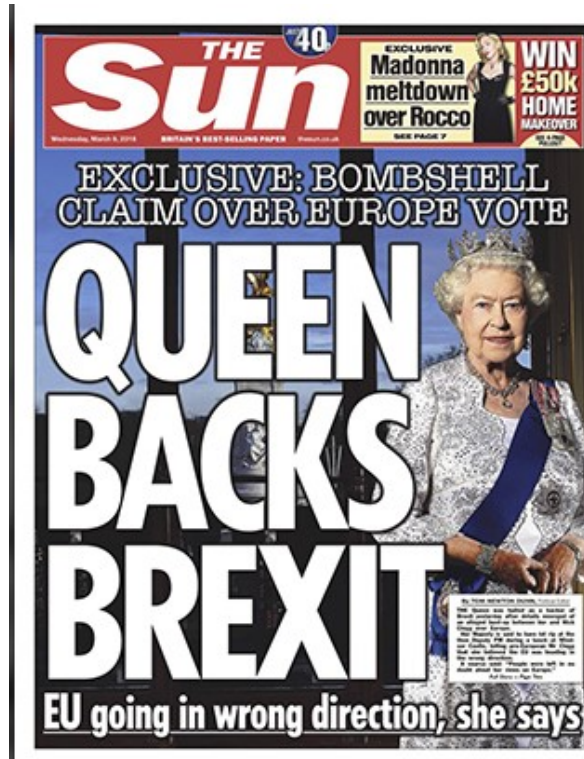
the BBC World Service will still be the sole responsibility of the BBC, with no appeal to Ofcom. Ofcom can offer advice about other online material, judged against the BBC's Editorial Guidelines. Appeals to Ofcom will be judged against the Ofcom Broadcasting Code only. Editorial complaints to the BBC will continue to be assessed against the BBC's Editorial Guidelines.

See: <https://www.ofcom.org.uk/consultations-and-statements/ofcom-and-the-bbc>

In this section I have set out the detail of the UK Independent Press Standards Organisation (IPSO) Editors' code (<https://www.ipso.co.uk/IPSO/cop.html>) adopted and developed from that of its predecessor body the Press Complaints Commission (PCC), and grafted ethical rules set out by the UK's Chartered Institute of Journalists and National Union of Journalists. A rival press and online regulator to IPSO, IMPRESS, (<http://impressproject.org/>) has been approved by the Press Recognition Panel set up by post the Leveson Inquiry Royal Charter. I have included extracts from its own code of standards operational from April 2017. As you can see there is wide consensus and coincidence of regulation between professional and regulatory bodies covering all forms of media publication, but there are also differences between print/online and licensed broadcasting by analogue or digital signal.

Breaching these rules carries sanctions. IPSO (<https://www.ipso.co.uk/IPSO/>) took over from the PCC, Press Complaints Commission (<http://www.pcc.org.uk/>) 8th September 2014. Its status and efficacy is an ongoing matter of controversy in the light of the Leveson Inquiry and continuing criticisms by media victim groups such as Hacked Off and the Media Standards Trust. Although it is said that 90 per cent of newspaper, magazine and online media have contracted to be regulated by IPSO, the Financial Times, Independent, London Evening Standard and Guardian newspapers have still not at the time of writing (3rd October 2017). Those media companies contracting to IPSO are part of a regulatory regime that can impose fines of up to £1 million and make directions to publish apologies and corrections. Up until the time of writing there have been no substantial fines, but newspapers have been directed to publish corrections in more prominent positions; sometimes accompanied by an Editor's protests.

This was the case with the Sun and its story in 2016 that the Queen was opposed to the UK's membership of the European Union. See: <http://www.thedrum.com/news/2016/05/18/sun-editor-defiantly-upholds-queen-backs-brexit-headline-ipso-rules-it-significant>



Buckingham Palace v The Sun- IPSO found this headline and story ‘significantly misleading’ and ordered the paper to publish its critical adjudication on page 2. See: <https://www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=01584-16> News publishers who do not participate in any Royal Charter backed and recognized form of regulation could be subject to punitive (described as ‘exemplary’) damages if sued for media law civil wrongs such as libel and privacy under the 2013 Crime and Courts Act. Journalists responsible for mistakes and transgression will continue to face disciplinary action by their employers ultimately leading to dismissal. The sanctions facing broadcasters can be imposed by their employers. Under the force of statute, Ofcom can fine, admonish, suspend or delete the broadcasting licenses. Disciplinary action is frequently taken against employees of independent television and radio and the BBC for breaching the Ofcom Broadcasting Code and/or the BBC’s Editorial Guidelines.

Parliament agreed to legislation that would exclude smaller online and print publishers from the proposed new regime of independent regulation backed by Royal Charter. [These are defined as ‘micro-businesses’ - business with fewer than 10 employees and an annual turnover below £2 million.]

But this will mean that such ‘micro-businesses’ will still be subject to the full force of primary media law in relation to privacy and libel. The ‘chilling effect’ of claimant friendly advantages in costs and damages has not been fully reformed at the time of writing, and proposals to replace the problem of paying 100% uplifts or bonuses in costs to lawyers on the winning side, and the very expensive ‘after the event’ insurance premiums taken out by ‘no win, no fee’

claimants, have been criticized by media lawyers and Index on Censorship as adding to the 'chilling effect.'

A proposed cost protection scheme would result in claimants of 'modest means' litigating unsuccessfully and leaving media defendants to pay their costs of winning the case. Broadcasters will not be included in the proposed system of low cost and fast track media law arbitration for libel, slander, breach of confidence, misuse of private information, malicious falsehood, harassment, and would also be subject to any problems arising out of the proposed costs system giving protection to claimants with modest means.

In January 2016 IPSO updated the Editors' Code in various parts and placed emphasis on news publishers honouring its spirit as well as maintaining an effective complaints system:

IPSO Code Preamble

The Code – including this preamble and the public interest exceptions below – sets the framework for the highest professional standards that members of the press subscribing to the Independent Press Standards Organisation have undertaken to maintain. It is the cornerstone of the system of voluntary self-regulation to which they have made a binding contractual commitment. It balances both the rights of the individual and the public's right to know.

To achieve that balance, it is essential that an agreed Code be honoured not only to the letter, but in the full spirit. It should be interpreted neither so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it infringes the fundamental right to freedom of expression – such as to inform, to be partisan, to challenge, shock, be satirical and to entertain – or prevents publication in the public interest.

It is the responsibility of editors and publishers to apply the Code to editorial material in both printed and online versions of their publications. They should take care to ensure it is observed rigorously by all editorial staff and external contributors, including non-journalists.

Editors must maintain in-house procedures to resolve complaints swiftly and, where required to do so, co-operate with IPSO. A publication subject to an adverse adjudication must publish it in full and with due prominence, as required by IPSO.

IMPRESS Code Preamble

Journalism plays a crucial role in society. Every day, journalists report significant events, policies and controversies, expose wrongdoing, challenge unfairness and satirise, amuse and entertain. Such power comes with responsibility. IMPRESS aims to ensure that journalists behave responsibly, while protecting their role to investigate and report freely. All publishers regulated by IMPRESS agree to abide by the following rules, which together constitute the IMPRESS Standards Code.

This Code seeks to balance the rights of the public, journalists and publishers. The Code should be read alongside the guidance, which provides information about what these rules mean in practice.

This Code is intended to be:

A practical working tool that enables journalists, editors and publishers to do their jobs;

Easily understood by the public; and

Effectively enforceable through IMPRESS's powers and remedies as a regulator.

Publishers will be held directly responsible for compliance with this Code, which applies to all content and newsgathering activities for which publishers are responsible under the terms of their Regulatory Scheme Agreement with IMPRESS, regardless of the medium or platform of publication. All references here to publishers apply equally to anyone acting under a publisher's authority. All references here to journalists apply equally to anyone acting in a journalistic capacity.

This Code is distinct from the law and publishers are separately responsible for ensuring that they comply with the law.

1. Accuracy, Opportunity to reply, Due Impartiality.

IPSO

1. Accuracy

- i) The Press must take care not to publish inaccurate, misleading or distorted information or images, including headlines not supported by the text.
- ii) A significant inaccuracy, misleading statement or distortion must be corrected, promptly and with due prominence, and — where appropriate — an apology published. In cases involving IPSO, due prominence should be as required by the regulator.
- iii) A fair opportunity to reply to significant inaccuracies should be given, when reasonably called for.
- iv) The Press, while free to editorialise and campaign, must distinguish clearly between comment, conjecture and fact.
- v) A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.

IMPRESS

1. ACCURACY

- 1.1. Publishers must take all reasonable steps to ensure accuracy.
- 1.2. Publishers must correct any significant inaccuracy with due prominence, which should normally be equal prominence, at the earliest opportunity.
- 1.3. Publishers must always distinguish clearly between statements of fact, conjecture and opinion.
- 1.4. Whilst free to be partisan, publishers must not misrepresent or distort the facts.

2. ATTRIBUTION & PLAGIARISM

- 2.1. Publishers must take all reasonable steps to identify and credit the originator of any third party content.
- 2.2. Publishers must correct any failure to credit the originator of any third party content with due prominence at the earliest opportunity.

NUJ – A journalist

- 2. Strives to ensure that information disseminated is honestly conveyed, accurate and fair.
- 3. Does her/his utmost to correct harmful inaccuracies.
- 4. Differentiates between fact and opinion.

CloJ

1) You have a duty to maintain the highest professional standards of accuracy and clearly distinguish between fact, conjecture or opinion in all your work.

4) If a factual inaccuracy is discovered in your work, you will seek to have it corrected at the first available opportunity, in the same format of publication, and with due prominence so that similar readership will be aware of the correction.

11) You should be able to compensate sources of any kind in proportion to the public interest value of their information and the risks they are undertaking.

Ofcom

2a All news in any part of the service should be presented with due accuracy and impartiality.

2b Due impartiality should be preserved on the part of persons providing the service as respects matters of political or industrial controversy or relating to current public policy.

Meaning of "due impartiality":

"Due" is an important qualification to the concept of impartiality. Impartiality itself means not favouring one side over another. "Due" means adequate or appropriate to the subject and nature of the programme. So "due impartiality" does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented. The approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience. Context, as defined in Section Two: Harm and Offence of the Code, is important.

Due impartiality and due accuracy in news

5.1 News, in whatever form, must be reported with due accuracy and presented with due impartiality.

5.2 Significant mistakes in news should normally be acknowledged and corrected on air quickly. Corrections should be appropriately scheduled.

5.3 No politician may be used as a newsreader, interviewer or reporter in any news programmes unless, exceptionally, it is editorially justified. In that case, the political allegiance of that person must be made clear to the audience.

Special impartiality requirements: news and other programmes

Matters of political or industrial controversy and matters relating to current public policy

Meaning of "matters of political or industrial controversy and matters relating to current public policy":

Matters of political or industrial controversy are political or industrial issues on which politicians, industry and/or the media are in debate. Matters relating to current public policy need not be the subject of debate but relate to a policy under discussion or already decided by a local, regional or national government or by bodies mandated by those public bodies to make policy on their behalf, for example non-governmental organisations, relevant European institutions, etc.

The exclusion of views or opinions

(Rule 5.4 applies to television and radio services except restricted services.)

5.4 Programmes in the services (listed above) must exclude all expressions of the views and opinions of the person providing the service on matters of political and industrial controversy and matters relating to current public policy (unless that person is speaking

in a legislative forum or in a court of law). Views and opinions relating to the provision of programme services are also excluded from this requirement.

The preservation of due impartiality

(Rules 5.5 to 5.12 apply to television programme services, teletext services, national radio and national digital sound programme services.)

5.5 Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service (listed above). This may be achieved within a programme or over a series of programmes taken as a whole.

Meaning of "series of programmes taken as a whole":

This means more than one programme in the same service, editorially linked, dealing with the same or related issues within an appropriate period and aimed at a like audience. A series can include, for example, a strand, or two programmes (such as a drama and a debate about the drama) or a 'cluster' or 'season' of programmes on the same subject.

5.6 The broadcast of editorially linked programmes dealing with the same subject matter (as part of a series in which the broadcaster aims to achieve due impartiality) should normally be made clear to the audience on air.

5.7 Views and facts must not be misrepresented. Views must also be presented with due weight over appropriate timeframes.

5.8 Any personal interest of a reporter or presenter, which would call into question the due impartiality of the programme, must be made clear to the audience.

5.9 Presenters and reporters (with the exception of news presenters and reporters in news programmes), presenters of "personal view" or "authored" programmes or items, and chairs of discussion programmes may express their own views on matters of political or industrial controversy or matters relating to current public policy. However, alternative viewpoints must be adequately represented either in the programme, or in a series of programmes taken as a whole. Additionally, presenters must not use the advantage of regular appearances to promote their views in a way that compromises the requirement for due impartiality. Presenter phone-ins must encourage and must not exclude alternative views.

5.10 A personal view or authored programme or item must be clearly signalled to the audience at the outset. This is a minimum requirement and may not be sufficient in all circumstances. (Personality phone-in hosts on radio are exempted from this provision unless their personal view status is unclear.)

Meaning of "personal view" and "authored":

"Personal view" programmes are programmes presenting a particular view or perspective. Personal view programmes can range from the outright expression of highly partial views, for example by a person who is a member of a lobby group and is campaigning on the subject, to the considered "authored" opinion of a journalist, commentator or academic, with professional expertise or a specialism in an area which enables her or him to express opinions which are not necessarily mainstream.

Matters of major political or industrial controversy and major matters relating to current public policy

5.11 In addition to the rules above, due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public

policy by the person providing a service (listed above) in each programme or in clearly linked and timely programmes.

Meaning of "matters of major political or industrial controversy and major matters relating to current public policy":

These will vary according to events but are generally matters of political or industrial controversy or matters of current public policy which are of national, and often international, importance, or are of similar significance within a smaller broadcast area.

5.12 In dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes. Views and facts must not be misrepresented.

The prevention of undue prominence of views and opinions on matters of political or industrial controversy and matters relating to current public policy (Rule 5.13 applies to local radio services (including community radio services), local digital sound programme services (including community digital sound programme services) and radio licensable content services.)

5.13 Broadcasters should not give undue prominence to the views and opinions of particular persons or bodies on matters of political or industrial controversy and matters relating to current public policy in all the programmes included in any service (listed above) taken as a whole.

Meaning of "undue prominence of views and opinions":

Undue prominence is a significant imbalance of views aired within coverage of matters of political or industrial controversy or matters relating to current public policy.

Meaning of "programmes included in any service taken as a whole":

Programmes included in any service taken as a whole means all programming on a service dealing with the same or related issues within an appropriate period.

BBC

3.2.1

We must do all we can to ensure due accuracy in all our output.

3.2.2

All BBC output, as appropriate to its subject and nature, must be well sourced, based on sound evidence, thoroughly tested and presented in clear, precise language. We should be honest and open about what we don't know and avoid unfounded speculation.

Claims, allegations, material facts and other content that cannot be corroborated should normally be attributed.

3.2.3

The BBC must not knowingly and materially mislead its audiences. We should not distort known facts, present invented material as fact or otherwise undermine our audiences' trust in our content.

3.2.4

We should normally acknowledge serious factual errors and correct them quickly, clearly and appropriately.

The BBC is responsible for maintaining its own standards in relation to due impartiality. Its values mirror those of Ofcom and are set out in Section Four of their Editorial Guidelines 'Impartiality' at <http://www.bbc.co.uk/editorialguidelines/page/guidelines-impairtiality-introduction/>

'Impartiality lies at the heart of public service and is the core of the BBC's commitment to its audiences. It applies to all our output and services - television, radio, online, and in our international services and commercial magazines. We must be inclusive, considering the broad perspective and ensuring the existence of a range of views is appropriately reflected.'

4.2.1

We must do all we can to ensure that 'controversial subjects' are treated with due impartiality in all our output.

4.2.2

News in whatever form must be treated with due impartiality, giving due weight to events, opinion and main strands of argument.

4.2.3

We seek to provide a broad range of subject matter and perspectives over an appropriate timeframe across our output as a whole.

4.2.4

We are committed to reflecting a wide range of opinion across our output as a whole and over an appropriate timeframe so that no significant strand of thought is knowingly unreflected or under-represented.

4.2.5

We exercise our editorial freedom to produce content about any subject, at any point on the spectrum of debate, as long as there are good editorial reasons for doing so.

The BBC also has a policy on '**Right to Reply**' in its Section Six on Fairness, Contributors and Consent'

6.4.25

When our output makes allegations of wrongdoing, iniquity or incompetence or lays out a strong and damaging critique of an individual or institution the presumption is that those criticised should be given a "right of reply", that is, given a fair opportunity to respond to the allegations.

We must ensure we have a record of any request for a response including dates, times, the name of the person approached and the key elements of the exchange. We should normally describe the allegations in sufficient detail to enable an informed response, and set a fair and appropriate deadline by which to respond.

6.4.26

Any parts of the response relevant to the allegations broadcast should be reflected fairly and accurately and should normally be broadcast in the same programme, or published at the same time, as the allegation.

There may be occasions when this is inappropriate (for legal or overriding ethical reasons) in which case a senior editorial figure, or commissioning editor for independents, should be consulted. It may then be appropriate to consider whether an alternative opportunity should be offered for a reply at a subsequent date.

6.4.27

In very rare circumstances where we propose to broadcast a serious allegation without giving those concerned an opportunity to reply, the proposal must be referred to a senior editorial figure or, for independents, to the commissioning editor. Referral must also be made to Director Editorial Policy and Standards. The allegation must be in the public interest and there must be strong reasons for believing it to be true. Our reasons for

deciding to make the information public without requesting a response from the individuals or organisations concerned may include possible interference with witnesses or other legal reasons.

Sources

IPSO

14. Confidential sources

Journalists have a moral obligation to protect confidential sources of information.

IMPRESS

8. SOURCES

8.1. Publishers must protect the anonymity of sources where confidentiality has been agreed and not waived by the source, except where the source has been manifestly dishonest.

8.2. Publishers must take reasonable steps to ensure that journalists do not fabricate sources.

8.3. Except where justified by an exceptional public interest, publishers must not pay public officials for information.

NUJ

Protects the identity of sources who supply information in confidence and material gathered in the course of her/his work.

CloJ

7. You will maintain the confidences you agreed with any contributors.

9. You will check sources and understand that previously published material may not always have been created using the exacting standards of a professional journalist and will independently seek to verify that the information is accurate.

12. You should be able to compensate sources of any kind in proportion to the public interest value of their information and the risks they are undertaking.

OFCOM

7.7 Guarantees given to contributors, for example relating to the content of a programme, confidentiality or anonymity, should normally be honoured.

BBC

Accuracy:

Where appropriate to the output, we should:

gather material using first hand sources wherever possible

check and cross check facts

validate the authenticity of documentary evidence and digital material

corroborate claims and allegations made by contributors wherever possible.

Anonymity

6.4.10

Sometimes information the public should know is only available through sources or contributors on an 'off-the-record' or anonymous basis.

When we grant a contributor or source anonymity as a condition of their participation, we must clearly agree the extent of anonymity we will provide. It may be sufficient to ensure that the contributor or source is not readily recognisable to the general public, or they may wish to be rendered unidentifiable even to close friends and family. We should keep accurate notes of conversations with sources and contributors about anonymity. A recording is preferable where possible.

(See Section 3 Accuracy: 3.4.10)

6.4.11

We must ensure when we promise anonymity that we are in a position to honour it, taking account of the implications of any possible court order demanding the disclosure of our unbroadcast material. When anonymity is essential, no document, computer file, or other record should identify a contributor or source. This includes notebooks and administrative paperwork as well as video and audio material.

6.4.12

Effective obscuring of identity may require more than just anonymity of a face. Other distinctive features, including hair, clothing and voice may need to be taken into account. Blurring rather than pixilation, which can be reversed, is the best way of ensuring anonymity in pictures. When disguising a voice, using a 'voice-over' by another person is usually better than technically induced distortion, which can be reversed, but audiences should be told what they are hearing. To avoid any risk of 'jigsaw identification' (that is, revealing several pieces of information in words or images that can be pieced together to identify the individual), our promises of anonymity may also need to include, for example, considering the way a contributor or source is described, blurring car number plates, editing out certain pieces of information (whether spoken by the contributor or others) and taking care not to reveal the location of a contributor's home. Note that, in some circumstances, avoiding the 'jigsaw effect' may require taking account of information already in the public domain.

We may need to disguise the identity of international contributors to meet our obligations of anonymity or if their safety may be compromised. Third party websites may reproduce our content globally without our knowledge or consent.

Crisis in the Protection of Journalist Sources

The confidentiality of journalists' investigations, research and communications is closely bound up with the professional duty to protect sources. The whistle-blower, Edward Snowden, revealed the extent of surreptitious interception of online data by state intelligence agencies. In the UK, the online magazine *Press Gazette* highlighted police force use of the Regulation of Investigatory Powers Act 2000 to obtain journalists' phone data without any court hearing and scrutiny by an independent judge. While steps are being taken to lobby Parliamentarians to improve journalist source protection, you would be advised to follow techniques and advice that provide some level of information security for journalists. A ruling of the Investigatory Powers Tribunal in the case of Scottish investigative journalist and former police officer, Gerard Gallacher, suggest the legal system is beginning to provide a remedy for breaches of the right to protect journalist sources. In 2016, he was awarded £10,000 damages against Police Scotland when detectives unlawfully collected communications data when trying to identify his source(s) for a series of stories on an unsolved murder inquiry. See: <http://www.ipt-uk.com/judgments.asp> .

In 2017 the IPT awarded damages of £3,000 each to two police officers whose phone records had been unlawfully accessed by Cleveland Police investigating leaks to the regional newspaper the Northern Echo. But in the case of *Dias and Others against Cleveland Police* at <http://www.ipt-uk.com/judgments.asp?id=39> the journalists whose records had been unlawfully intercepted received nothing in compensation. See: <http://www.pressgazette.co.uk/cleveland-police-illegal-phone-records-grab-police-officers-given-3000-but-journalists-get-nothing/>. The large-scale criminal prosecution of journalists and their official civil servant sources in Operation Elveden demonstrated the risk of the authorities

using criminal remedies to punish the phenomenon of leaking, and leaving the courts to decide whether such actions were in the 'public interest.' All journalists prosecuted who denied any criminal wrongdoing were eventually acquitted or cleared, but most of their official sources were convicted and many jailed. The implications of not protecting journalists' sources have been explored in two online articles published by The Conversation.

See: <https://theconversation.com/protect-journalists-sources-or-give-up-on-british-democracy-22011>

<http://theconversation.com/the-lack-of-justice-for-journalists-sources-is-a-catastrophe-for-democracy-68613>

Former Belmarsh prison officer Robert Norman is challenging his conviction and jail sentence and although he was unsuccessful at the Court of Appeal in the ruling *Norman, R v* [2016] EWCA Crim 1564 (20 October 2016).

See: <http://www.bailii.org/ew/cases/EWCA/Crim/2016/1564.htm> He is pursuing his appeal to the ECHR in Strasbourg on the basis that he was entitled to Article 10 Human Rights freedom of expression protection as a valid source providing information to a journalist that was in the public interest. He also argues that his rights under Article 7 (no crime without law) of the convention were breached in that the use of the common law offence of misconduct in public office to criminalize public official sources giving information to journalists in the public interest did not exist when he began his source/journalist relationship with Daily Mirror report Stephen Moyes. His payments totaling £10,000 were disclosed to the police by the newspaper publishers of the Daily Mirror and now defunct News of the World. In November 2017, and his legal team at Garden Court Chambers held a seminar to raise the implications of his case and discuss his appeal to Europe.

See: <https://www.gardencourtchambers.co.uk/events/free-speech-vs-misconduct-in-public-office-protecting-journalists-and-whistleblowers-from-prosecution/>

Case History. Robert Norman v United Kingdom ECtHR 2018. The European Court of Human Rights 4th Section

It is a struggle to find any other example in case law with a set of circumstances as seriously damaging to Article 10 protection of source rights. Operation Elveden, through the prosecution of a previously non-existent and unknown ancient common law offence, criminalized every aspect of the applicant's decision to inform a professional journalist at the highest circulation national news publishers in the country of serious public interest issues concerning the prison system. The applicant was one of scores of public officials disproportionately humiliated, shamed and criminalized by the state and legal system for exercising the legitimate aim and pressing social need to contact journalists confidentially for the purposes of public interest journalism. The personal consequences for him could not be more impactful and devastating as a warning to any other public or private individual seeking to communicate anything they wish to a journalist. In the industry's recognized online platform for professional and specialist news, *UK Press Gazette*, and the *Guardian* newspaper the individual personal cost to his professional and family life was laid bare. It was reported that he had to 'sell his house in order to pay the £51,000 costs of his defence. His wife's mental health, already fragile, deteriorated. She attempted to take her own life and was committed to psychiatric care on three occasions.'

See: 'Trinity Mirror's chiefs should resign for failing to protect a source' *Guardian* 24th November 2016.

At: <https://www.theguardian.com/media/greenslade/2016/nov/24/trinity-mirrors-chiefs-should-resign-for-failing-to-protect-a-source>

He served six months in prison and five under home detention. It was also reported he was living on the £64 a week, which he was receiving from the state as his wife's full-time carer.

The applicant and the journalist to whom he communicated have consistently emphasized that the motivation was to bring matters to do with prison security, welfare and management to the wider attention of the public. Stephen Moyes, in the statement he released when he was told he was not going to face a criminal trial for conspiracy to commit misconduct in public office, said of the applicant: 'Without him a number of important security and safety exposés would have been hushed up – by the same negligent prison management who were responsible for them. His concerns – of sweeping staff cuts when they were at full capacity, threatening the lives of warders, inmates, and the general public – were backed up by reports and statistics from the independent prison inspector and charities such as the Howard League for Penal Reform.'

See: 'Case against cleared Sun reporter Stephen Moyes said he 'demonised' Suffolk Strangler by writing stories about him'

<https://www.pressgazette.co.uk/evidence-against-cleared-sun-reporter-stephen-moyes-said-he-demonised-suffolk-strangler-writing/>

The applicant has been denied all of the Article 10 freedom of expression rights he was entitled to as a protected journalistic source as reaffirmed in the ruling of The ECtHR Grand Chamber at paragraphs 50 to 51 of *Sanoma Uitgevers B.V. v. the Netherlands* (no. 38224/03):

'50. Freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. Whilst the press must not overstep the bounds set, not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (*Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216) The right of journalists to protect their sources is part of the freedom to "receive and impart information and ideas without interference by public authorities" protected by Article 10 of the Convention and serves as one of its important safeguards. It is a cornerstone of freedom of the press, without which sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information to the public may be adversely affected.

51. The Court has always subjected the safeguards for respect of freedom of expression in cases under Article 10 of the Convention to special scrutiny. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, an interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.'

See: <http://www.bailii.org/eu/cases/ECHR/2010/1284.html>

ECtHR jurisprudence has indicated that the importance of the source and journalist confidentiality and protection from disclosure is such that it is not necessary that the information being provided has to be proved to be of public interest. This was acknowledged in the summary of submissions in the case of *GOODWIN v. THE UNITED KINGDOM* - 65723/01 [2008] ECHR 61 (22 January 2008) at paragraph 37: 'the degree of public interest in the information could not be a test of whether there was a pressing social need to order the source's disclosure. A source may provide information of little value one day and of great value the next; what mattered was that the relationship between the journalist and the source was generating the kind of information which had legitimate news potential.'

See: <http://www.bailii.org/eu/cases/ECHR/2008/61.html>

Further ECtHR case law in *TELEGRAAF MEDIA NEDERLAND LANDELIJKE MEDIA BV AND OTHERS v. THE NETHERLANDS* - 39315/06 - HEJUD [2012] ECHR 1965 (22 November 2012) has emphasized that the motivation of the source is not critical to determining the pressing social need for journalist and source protection. At paragraph 128 the court observed in its ruling:

'While it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose (for example, by intentionally fabricating false information), courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. In any event, given the multiple interests in play, the Court emphasizes that the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10 § 2 (Financial Times Ltd. and Others, cited above, § 63).'

See: <http://www.bailii.org/eu/cases/ECHR/2012/1965.html>

The importance of the conduct of the source was fully considered in FINANCIAL TIMES LTD AND OTHERS v. THE UNITED KINGDOM - 821/03 [2009] ECHR 2065 at paragraph 63:

'In the case of disclosure orders, the Court notes that they have a detrimental impact not only on the source in question, whose identity may be revealed, but also on the newspaper against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on the members of the public, who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves (see, mutatis mutandis, Voskuil v. the Netherlands, no. 64752/01, § 71, 22 November 2007). While it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose and disclosed intentionally falsified information, courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. In any event, given the multiple interests in play, the Court emphasises that the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10 § 2.'

See: <http://www.bailii.org/eu/cases/ECHR/2009/2065.html>

As a long form investigative academic researcher and journalist concentrating on the criminal justice system and the conduct of state investigation agencies and public bodies, I have detected two significant diminishing reductions in source confidence and communication. From the year 2000 longstanding sources became much more apprehensive about the security of electronic communications, the use of traceable landline and mobiles for discussion and there was a sense that their identification was much more vulnerable. Many years later that apprehension was fully justified when it became apparent that the Regulation of Investigatory Powers Act 2000 afforded police and state investigatory bodies access to mobile phone records and other communications data without independent judicial oversight. The Act enabled approval for such data acquisition from a senior officer in the same force or body.

The Leveson Inquiry in 2011 signaled a critical and hostile social and political view of journalist and public official contact; particularly with regard to any accompanying hospitality and the payment of fees for stories. The central charge was that unofficial police and journalist contact had become too close to the extent it was potentially compromising and corrupting. This was accompanied by lurid and sensational media reports of public officials and journalists being arrested in Operation Elveden for misconduct in public office offences. It was reported that overly large teams of detectives raided the homes of suspects, conducted intrusive searches when family and children were present, a sense that the crimes being investigated were being treated as seriously as terrorism or murder, followed by very long periods of police bail, sometimes as much as two years, before decisions were taken to charge and proceed to trial. Reports of public official sources receiving custodial sentences began emerging towards the end of 2012. It was noticeable that several personal sources connected with the prison

and criminal justice system became unavailable. This kind of 'chilling effect' impact was reported throughout the profession of journalism.

In 2013 the BBC's Home Affairs Correspondent, Guy Smith, concluded in a quantitative and qualitative academic dissertation and survey that 'Both police communicators and crime journalists are in sharp disagreement with how they perceive each other's methods. The results suggest both have low professional opinions of each other in terms of manipulating information.' He added the Operation Elveden had 'destabilised the relationship and caused significant damage.'

See: 'Police relationship with crime reporters under strain, research finds Survey finds lack of understanding between forces' media officers and journalists since prosecutions and Leveson inquiry At: <https://www.theguardian.com/media/2013/nov/20/police-crime-reporters-leveson-inquiry>
Dissertation downloadable at: <https://www.cipr.co.uk/sites/default/files/GuySmith.pdf>

In 2016 Millar and Scott reported in their influential legal textbook on newsgathering law that although Lord Justice Leveson had urged in his report 'that "remedial action" has the potential of going too far in the direction of disengagement or, speaking more colloquially, battering down the hatches," retrenchment and a chilling effect in communication developed. They observe that the College of Policing's 2013 guidance on police and journalist relations 'pays little heed to Lord Justice Leveson's warning. All officers or civilians who meet a journalist, are interviewed, or provide information on a matter for which they are responsible should record "a note of the meeting or disclosure...In a diary or pocket book." Chief Officers should "record all contact with the media where policing matters are discussed." Millar and Scott further observed that 'a simple rule' on contact 'would discourage contact by junior officers in deference to senior officers heading investigations and to force press officers.

The guidance was derided by one experienced crime reporter as "a top-down, paranoid, defensive over-reaction by officers [who] are not accountable to anybody". She also highlighted the fact that it had caused the suspension of one Metropolitan Police Officer for "sending texts to a journalist", and another for having "a journalist's number on their mobile phone". The upshot has been a significant loss of trust between journalists and the police.' Millar and Scott chronicled a significant chilling effect descending on media relations between journalists and civil servants with changes in the Civil Service Management Code which from 2015 would preclude: '...any activities or...public statement which might involve the disclosure of official information or draw upon experience gained in their official capacity without the prior approval of their department or agency. They must clear in advance material for publication, broadcasts or other public discussion which draws on official information or experience. All contacts with media should be authorized in advance by the relevant Minister unless a specific delegation or dispensation has been agreed which may be for blocks of posts or areas of activities.' [...] The revision was criticized ... as "a blanket ban on media contact for civil servants [that is] ... an unnecessary, unworkable, and unjustified restriction on the work of the civil service ...we can see no justification for this sudden, drastic change, other than intimidating civil servants into silence."

(All quotations from pages 117-119 and sections 6.55 to 6.60 Millar & Scott 2016)

The *Guardian's* veteran and retired crime correspondent and author, Duncan Campbell, explained how the Leveson Inquiry had constructed a problematization of journalist and police contact. The Inquiry's QC Robert Jay had listed five potential features that suggested the relationships were 'over-cosy': inappropriate hospitality; off-the-record briefings; leaks; press attribution of "police sources"; and the press turning up at incidents because they had been tipped off by the police.' (Campbell 2016:231) The denunciation of the expression 'police sources' was infused with an implication of bad faith: 'a term which is redolent of impropriety, or at the very least carries with it the possibility of inappropriate behavior, either because the police officer has indulged in gossip or leaks, or because the term is in truth a cipher or fig-leaf for an invented story because the source does not in fact exist'. (ibid) The former Met Police Commissioner Lord Condon introduced a sense of disgust when talking about how

'hospitality can be the start of a grooming process' as though he were discussing the strategies of child abusers.

In 2011 the Home Secretary and Metropolitan Police Commissioner asked Dame Elizabeth Filkin to investigate 'The Ethical Issues Arising From Relations Between the Police and the Media.' She reported in 2012 and recommended that police officers should watch out for 'late-night carousing , long sessions, yet another bottle of wine at lunch – these are all long-standing media tactics to get you to spill the beans. Avoid.' Other Dame Filkin homilies included 'Mixing the media with alcohol is not banned but should be an uncommon event,' drinking with officers 'may be seen as inappropriate hospitality' and the police should watch out for reporters 'flirting'.

Dame Filkin's report is available at:

<http://webarchive.nationalarchives.gov.uk/20140122180353/http://www.levesoninquiry.org.uk/wp-content/uploads/2012/03/Report-by-Elizabeth-Filkin.pdf>

Duncan Campbell summarizes the cumulative chilling effect of Operation Elveden arrests and prosecutions, the Leveson and Filkin reports in the words of Sean O'Neill, the Crime Editor of the *Times*, in that it had "created a culture of fear reinforced by a set of rules and regulations that have left sensible officers worried about the impact on their careers of having conversations with journalists." (Campbell 2016:234). Mr. O'Neill warned that Operation Elveden was overwhelmingly damaging to the public interest because it would lead to 'a press that is all too willing to bash the police at every opportunity because it has now seen bully-boy policing up close' (ibid).

Mr. Campbell contrasts the post Operation Elveden chilling effect with the more open and effective policy of former Met Police Commissioner, Sir Robert Mark, who has been credited with checking and rooting out police corruption during the 1960s and early 70s and who issued a memorandum in May 1973 which sought to build cooperation and goodwill with the public by fostering symbiotic and positive police and media relations: 'He urged that the police should supply the media with information "within officers' knowledge at as low a level as possible"- that is to say that a detective constable on a minor case should be able to talk directly to a reporter. And he also acknowledged that, "The new approach to dealings with the news media will of course involve risks, disappointments and anxieties; but officers who speak in good faith may be assured of my support even if they make errors of judgement when deciding what information to disclose.'" (ibid 147) Mr. Campbell ended his chapter on what he titled as the 'Leveson Leviathan' with the response of a senior serving detective in March 2015 whom he had asked to interview about media/police relations: "Much as I would like to, I cannot speak to journalists without a senior press officer present and they only give permission to comment factually on jobs. The world is a very different place. Sorry.'" (ibid 235)

The chilling effect generated by the applicant's experience as a suspect and convicted defendant in Operation Elveden should also be contextualized with the fact that notwithstanding his betrayal by the very news publisher which had invited him to accept remuneration in return for his public interest stories on the prison system, the Police would have been able to identify him as a journalistic source without any intervening judicial scrutiny by using their powers under the Regulation of Investigatory Powers Act 2000. In September 2014 the *UK Press Gazette* spotted that the Metropolitan Police had somewhat triumphantly revealed their use under the legislation to obtain, without any court hearing, the phone records of *Sun* newspaper journalists in contact with unauthorized police sources in a dispute between a leading politician and officers on security duty at the gates of 10 Downing Street.

Press Gazette's subsequent investigation through Freedom of Information Act requests revealed large-scale use of such powers to identify largely police and public official sources suspected of leaking stories to the media over many years.

In February 2015, the then Interception of Communications Commissioner's Office reported that in an investigation going back the previous three years they had established that detectives had been able to obtain the communications data of 82 journalists using these RIPA 2000 powers. A separate non-attributable source disclosed to me: 'Think of any significant police and civil servant leak since the Act was passed and assume that the name of the journalist's source and much more was found out by the police being able to access data without having to go to a judge for a court hearing.' In the three year period 'there were 242 suspected sources investigated by police under ... 34 investigations, with 233 having their communications data taken.

The IOCCO concluded that police forces generally 'did not give the question of necessity, proportionality and collateral intrusion sufficient consideration.' It said that while generally Article 8 (privacy) of the European Convention of Human Rights was considered, Article 10 (freedom of speech) was not. The IOCCO's report also stated 80 per cent, 484 out of 608 RIPA applications in this three year period related to Operation Elveden, the Metropolitan Police's investigation into alleged inappropriate payments to public officials. The Office recommended that Parliament legislated so that 'judicial authorisation is obtained in cases where communications data is sought to determine the source of journalistic information.'

See: Some 82 journalists have had their communications data obtained by police under the Regulation of Investigatory Powers Act in three years, the Interception of Communications Commissioner's Office has found.'

At: <https://www.pressgazette.co.uk/interception-commissioner-82-journalists-phone-records-targeted-police-three-years-forces-should/>

IOCCO report available at: <http://www.statewatch.org/news/2015/feb/uk-IOCCO-Communications-Data-Journalist-Inquiry-Report.pdf>

In conclusion, it can be strongly argued that this applicant's case under Article 10- Freedom of Expression and Article 7- No punishment Without Law, is in the context of a national regime of law, state body practice and judicial decision-making that disrespects and violates the democratic and constitutional necessity of confidential journalistic source protection under Article 10. Neither existing law, nor judicial intervention and scrutiny offered the necessary protection to the applicant, and the other source and journalist suspects targeted in Operation Elveden. The Police were operating in a culture where Article 10 rights for sources and journalists were irrelevant, ignored, and given no effective and proper consideration. The scale of improper acquisition of communications data by the police using their powers under RIPA 2000, and which enabled the identification of confidential sources without a Police and Criminal Evidence Act 1984 style production order hearing that respected the status of 'Excluded Material', is evidence of public authority antipathy to the purpose and importance of Article 10.

There is no evidence that the United Kingdom state has shown sufficient interest in safeguarding Article 10 rights for journalists and sources through the legislative provision of public interest defences for the purposes of journalism. It is absent from the 2010 Bribery Act. It did not exist when common law misconduct in public office was conjured to operate as an old Section 2 Official Secrets Act, Trojan Horse, Catch-all that criminalized any public official seeking to leak public interest information to journalists and their news publishers. The Leveson and Filkin reports have demonized and problematized public official and journalistic exchange and encounter. The collective trauma of Operation Elveden arrests, prosecution, and convictions has not served the essential vital public interest that underpins the purpose of protecting journalists' sources; namely the public interest in free communication of news and opinions.

The overall message presented by Operation Elveden, and the applicant's involvement in it, is that journalist sources on a massive scale were not protected by the UK legal system, they were

disproportionately criminalized, and they will not be protected in the future. The fact that the UK state has failed to protect journalist sources in this unprecedented police inquiry means UK journalists are not going to be able to obtain information enabling them to uncover matters in society that constitute the heart of political, social and cultural debate and hold powerful government bodies and private corporations to account.

Society's paramount interest in the free communication of news and opinions has not been protected. The UK state had no overriding requirement in the public interest to use the confidential information identifying the applicant for the purposes of a criminal prosecution. He had stopped providing information to Mr. Moyes a year before the newspaper's disclosure. The sourcing of his information for story publication had been in the public interest for journalistic purposes. No crime for providing such information to a journalist when working as a public official was properly prescribed by law at the time. The engagement of criminal investigation for what had been regarded in law as an employment disciplinary matter was wholly disproportionate to any harm in relation to the rights of others. None of what happened to the applicant was necessary in a democratic society.

Recognizing journalist and source liability on the part of publishers and the pressing social need for Article 10 rights to accrue to journalist sources.

How the applicant as a source has been betrayed and his confidentiality breached to enable the police to prosecute him for an invalid crime that did not exist when he began giving information to Mr Moyes and the *Daily Mirror* is, arguably, not the pre-eminent issue. His betrayal was without his consent and that of his journalist contact. The disclosure action was by the publisher employing his journalist contact and without the knowledge of either the applicant or his journalist contact. The publisher had also been employing the applicant as its source since it was the party that had been paying him and not the individual journalist, Mr Moyes.

The narrative in terms of nexus and cause and effect is much more complicated than previous case law decided on Article 10 protection of sources by the ECtHR. The applicant's case is unique. Both he and the journalist he provided his information to have always sought to sustain the confidentiality of the protected source role that is considered so important by ECtHR jurisprudence. But that has not been the case in respect of the publisher which took the decisive action to surrender the identification of the source and electronic communications he had with the journalist to the police. It is also the case the Metropolitan Police, Crown Prosecution Service, and judiciary, at Crown Court, Appeal Court and Supreme Court level have not intervened to properly ensure the applicant's Article 10 rights.

At no stage has there been any independent judicial hearing into whether the applicant's and Mr. Moyes' Article 10 rights on protection of journalist source confidentiality preclude any use of the data provided by Mirror Group Newspapers. The Crown Court and Appeal Court engaged a balancing act using the very information that Article 10 freedom of expression journalistic source protection was supposed to shield, or to use the terminology of the Police and Criminal Evidence Act 1984 to fully exclude.

Norman V United Kingdom could be an opportunity for the European Court of Human Rights to fully recognize the applicant's standalone right as an anonymous source. It is a key foundation for the legal mechanism to protect the right of the public to a free press. His right and standing in relation to Article 10 Freedom of Expression's protection of journalist source principle should be fully recognized as equivalent to that of the journalist to whom he has entrusted his public service imperative whistleblowing. The protection from disclosure and the jeopardy of identification has to exist independently of any action being taken against the journalist or not. The circumstances of the applicant's case give rise to the pressing social need for such protection to accrue directly to the source and should vector legally

on a vertical dimension between citizen and public authority or body, and horizontally in respect of citizen to citizen.

ECtHR case law on protection of sources is expanding and widening the frame of source vulnerability when it has previously resided in disproportionate and improper orders and directions to journalists for disclosure. In *BECKER v. NORWAY* - 21272/12 (Judgment : Violation of Article 10 - Freedom of expression-{general} (Article 10-1 - Freedom of expression Freedom to impart information...) [2017] ECHR 834 (05 October 2017) the ECtHR was invited to explore Article 10 protection of source rights when the source had apparently volunteered his identity and participation in a criminal trial process. Yet, the court quite rightly evaluated the protection of source rights asserted almost theoretically by a journalist witness being ordered to give evidence about the identity of her source and any dealings with him. I would argue that the Court in Becker recognized changing circumstances and contexts necessitating the continuing assertion of protection of source principle. In Becker it was stated: ‘... the Court has held that protection afforded to journalists when it comes to their right to keep their sources confidential is “two-fold, relating not only to the journalist, but also and in particular to the source who volunteers to assist the press in informing the public about matters of public interest” (Paragraph 76). <http://www.bailii.org/eu/cases/ECHR/2017/834.html>

I would argue that paragraph 74 is of particular significance in enabling consideration of the applicant’s special needs and recognition for *sui generis* stand-alone source protection when his Article 10 rights are not being considered by the journalist who wrote up his story or the news publisher that brought it to the attention of the public:

‘74. The Court confirms that it has not previously had an occasion to consider the specific question arising in the present case. At the same time the Court recalls that in cases where a source was clearly acting in bad faith with a harmful purpose, it held that the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into account in the balancing exercise under Article 10 § 2 of the Convention (see, paragraphs 67-68 above quoting *Financial Times Ltd and Others*, cited above, §§ 63 and 66, and also *Telegraaf Media Nederland Landelijke Media B.V. and Others v. The Netherlands*, no. 39315/06, § 128, 22 November 2012). Consequently, a journalist’s protection under Article 10 cannot automatically be removed by virtue of a source’s own conduct. In the Court’s view, these considerations are also relevant in a situation when a source comes forward, as in the present case. The Court recalls, moreover, that it has previously held that source protection under Article 10 applied also when a source’s identity was known to the investigating authorities before a search.’

At paragraph 70 the ECtHR in Becker amplified the different set of circumstances and position for source protection when its identity had already been known to the police:

‘Issues concerning source disclosure have not only arisen with respect to disclosure orders, but also in cases dealing with investigative searches, including *Görmüş and Others v. Turkey*, no. 49085/07, 19 January 2016 and *Nagla v. Latvia*, no. 73469/10, 16 July 2013. In the latter, the Court noted that there was a fundamental difference between that case and other cases, where disclosure orders had been served on journalists, requiring them to reveal the identity of their sources. However, the distinguishing feature lay not, as the Government in that case had suggested, in the fact that the source’s identity had been known to the investigating authorities prior to the search. According to the Court, that fact “[did] not remove the applicant’s protection under Article 10 of the Convention” (*Nagla*, cited above, § 95).’

The Court in Becker also drew on a wider range of international declarations that in my opinion can enable the present court to accommodate the recognition that the applicant’s protection source rights have been severely derogated disproportionately and without a legitimate aim. On 8th September 2015 the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression submitted a report to the UN General Assembly (A/70/361), which stated:

'...both reporter and source enjoy rights that may be limited only according to article 19 (3). Revealing or coercing the revelation of the identity of a source creates disincentives for disclosure, dries up further sources to report a story accurately and damages an important tool of accountability. In the light of the importance attached to source confidentiality, any restrictions must be genuinely exceptional and subject to the highest standards, implemented by judicial authorities only. Such situations should be limited to investigations of the most serious crimes or the protection of the life of other individuals.' (Paragraph 40) I would argue that these observations support the applicant's case in that the revelation or coercion of his identity brought about by Mirror Group Newspapers as the publisher clearly created a devastating disincentive for other sources to come forward to assist with news publication. The restrictions envisaged by the Special Rapporteur of investigating serious crime or protecting life did not apply to the applicant's arrest and prosecution.

Throughout *Becker v Norway*, there are, in my opinion important jurisprudential openings to recognize the special protection that adheres to the applicant as someone who volunteered to assist the press in informing the public about significant matters of interest: '...the Court has held that protection afforded to journalists when it comes to their right to keep their sources confidential is "two-fold, relating not only to the journalist, but also and in particular to the source who volunteers to assist the press in informing the public about matters of public interest" (see *Nordisk Film & TV A/S v. Denmark* (dec.), no. 40485/02, ECHR 2005-XIII and, for example, *Stichting Osade Blade* (dec.), no. 8406/06, § 64, 27 May 2014). (Paragraph 76) I also think it is significant that the Court in *Becker* extrapolated the following section of the explanatory report on the right of journalists not to disclose their sources of information, adopted by the Committee of Ministers of the Council of Europe on 8 March 2000:

"d. Information identifying a source

18. In order to protect the identity of a source adequately, it is necessary to protect all kinds of information which are likely to lead to the identification of a source. The potential to identify a source therefore determines the type of protected information and the range of such protection. As far as its disclosure may lead to an identification of a source, the following information shall be protected by this Recommendation:

- i. the name of a source and his or her address, telephone and telefax number, employer's name and other personal data as well as the voice of the source and pictures showing a source;
- ii. 'the factual circumstances of acquiring this information', for example the time and place of a meeting with a source, the means of correspondence used or the particularities agreed between a source and a journalist;..." (Paragraph 41) Again this is another example of a standalone recognition of how European Human Rights law can specifically protect the source as a separate juridical entity from the journalist.

The unprecedented decisions by News International and MGN/Trinity Mirror to engage in such large-scale disclosure breaching the journalist source confidentiality of so many journalists and their informants has changed the terms and legal geography in this area of law. That which had never been done before and on this scale has impacted so fundamentally upon Article 10 freedom of expression rights that I strongly urge the Court to recognize any extension necessary to bring the applicant into the remit of the longstanding protection of journalist source human rights jurisprudence. The Chartered Institute of Journalists recognized the urgency of the need to buttress and strengthen the specific protections and needs of the journalistic source with a resolution at its Annual General Meeting in 2013: 'Motion on protection of sources.

'The Institute deplores and condemns the disastrous surrendering of confidential material on journalists sources by News Corporation's Management and Standards Committee (MSC) to the Metropolitan Police.

It is apparent that much of this information was confidential journalistic material and should have been subject to the protection of the Police and Criminal Evidence Act 1984. This information should not

have been released unless by court order after a hearing before a judge at which the sources and individual journalists concerned should have had the right to independent representation.

The Institute calls on Parliament to introduce legislation so that confidential sources who have been negligently and without court order identified by the media institutions receiving, using or paying for their information can sue for compensation for the breach of their Article 10 Freedom of Expression protection of source rights as recognized by English common law and the European Court of Human Rights in a longstanding line of powerful rulings.'

UK law on the right of sources to have a legal remedy against media publishers that betray their duty of confidentiality should be given the same recognition as set out in the US Supreme Court in *Cohen v Cowles Media Co* 501 US 663 (1991)

<http://supreme.justia.com/cases/federal/us/501/663/case.html>

The UK's new independent press regulator in the UK, IMPRESS, which has been recognized by the Press Recognition Panel as being fully compliant with the terms of the Leveson Inquiry, has recognized the obligation of 'publishers' as well as journalists to protect the anonymity of sources in its standards code.

'Publishers must protect the anonymity of sources where confidentiality has been agreed and not waived by the source, except where the source has been manifestly dishonest.'

(IMPRESS standards Code)

See: <https://impress.press/standards/impress-standards-code.html>

'Journalists have a moral obligation to protect confidential sources of information.' (UK editors' code of practice)

See: http://www.editorscode.org.uk/the_code.php

'You will maintain the confidences you agreed with any contributors'

'You should be able to compensate sources of any kind in proportion to the public interest value of their information and the risks they are undertaking.' (Chartered Institute of Journalists code of conduct)

See: <https://cioj.org/the-cioj-code-of-conduct-for-our-members/>

'A journalist protects the identity of sources who supply information in confidence.'"(National Union of Journalists' code of conduct)

See: <https://www.nuj.org.uk/about/nuj-code/>

'Protecting sources is a key principle of journalism for which some journalists have gone to jail.' (BBC editorial guidelines)

See: <http://www.bbc.co.uk/guidelines/editorialguidelines/assets/guidelinedocs/Producersguidelines.pdf>

As shown above all of the ethical codes of regulators and professional journalism associations in the UK fully recognize that the protection of sources is a moral, professional and legal duty and central to the essential human right of freedom of expression. In conclusion, I would suggest the language, spirit and scope of these legal and ethical obligations invest the applicant's argument that his protection of source rights have been violated. There was no pressing social need and it was not necessary in a democratic society for the surrender of his confidentiality by MGN/Trinity Mirror to be used by the police and legal system to disproportionately prosecute him for a criminal offence that had no legitimacy, clarity and proper application at the time he offered to provide public interest stories to a *Daily Mirror* journalist.

The very fact that disclosure was made by the newspaper publisher and not ordered by a court, or given up by the journalist whose source he was, is, in my opinion, an urgent invitation to the ECtHR to strengthen stand-alone rights for the journalist source. As Judge Tsotsoria so eloquently stated in *Becker v Norway* in 2017: '...we are living in the modern digital era where the legal framework of the protection of journalistic sources is under significant strain. This expands the risk of erosion, restriction and compromise in the work of journalists, with an impact on freedom of expression, the media and investigative journalism in particular. The Court has been a frontrunner and an advocate of judicial protection of journalists and their sources and in so doing it has also served as an inspiration for many

other jurisdiction.’ (Concurring opinion). The applicant’s case is a dramatic manifestation and example of the significant strain referred to and professional journalists in the United Kingdom are hoping that the function they have in furthering the country’s democratic tradition can be supported by holding that his rights under Article 7 and 10 have been violated.

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This is an extract from the affidavit provided by Professor Tim Crook in Norman v United Kingdom Application no, 41387/17, August 2018.

Case History Discussion. The Snoopers’ Charter.

In September 2018 the European Court of Human Rights ruled the UK Government’s mass surveillance programmes were unlawful and violated the freedom of the press. ECtHR Judges found, by five votes to two, that the UK’s mass interception regime revealed by NSA whistleblower Edward Snowden in 2013 violated the Article 8 right to privacy under the European Convention on Human Rights.

This was because its bulk surveillance was ‘effectively indiscriminate, without basic safeguards and oversight’, and it did not have sufficient legal basis under the Regulation of Investigatory Powers Act 2000. The court also ruled there had been a breach of Article 10, the right to freedom of expression, due to the ‘potential chilling effect that any perceived interference with the confidentiality of journalists’ communications and, in particular, their sources might have on the freedom of the press.’

There were insufficient safeguards in respect of confidential journalistic material. The case was brought by a number of parties, including the Bureau of Investigative Journalism, campaign groups Big Brother Watch and English PEN, and human rights groups including Amnesty International.

Rachel Oldroyd, TBIJ managing editor was reported in Press Gazette saying: ‘The Bureau believes the freedom of the press is a vital cornerstone of democracy and that journalists must be able to protect their sources. We are particularly concerned about the chilling effect that the threat of state surveillance has on whistleblowers who want to expose wrongdoing, and this ruling will force our government to put safeguards in place.’

See: <https://www.pressgazette.co.uk/extremely-good-day-for-journalism-as-echr-rules-uk-government-surveillance-regime-violated-freedom-of-the-press/>

See: The ECtHR ruling at: <http://www.bailii.org/eu/cases/ECHR/2018/722.html>

The ruling reported the 'deep concern' of the UK Media Lawyers' Association that domestic law was moving away from the strong presumption that journalistic sources would be afforded special legal protection, since surveillance regimes allowed the authorities to intercept journalists' communications without the need for prior judicial authorisation. Since the protection of journalists' sources was one of the core components of Article 10, more robust protection was required.

The majority ruling stated at paragraphs 487 to 489: 'The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. The protection of journalistic sources is one of the cornerstones of freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public about matters of public interest. As a result the vital public-watchdog role of the press may be undermined, and the ability of the press to provide accurate and reliable information may be adversely affected. The Court has always subjected the safeguards for respect of freedom of expression in cases under Article 10 of the Convention to special scrutiny. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, an interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.'

The Court has recognised that there is "a fundamental difference" between the authorities ordering a journalist to reveal the identity of his or her sources, and the authorities carrying out searches at a journalist's home and workplace with a view to uncovering his or her sources. The Court considered that the latter, even if unproductive, constituted a more drastic measure than an order to divulge the source's identity, since investigators who raid a journalist's workplace have access to all the documentation held by the journalist. However, the Court has also drawn a distinction between searches carried out on journalists' homes and workplaces "with a view to uncovering their sources", and searches carried out for other reasons, such as the obtaining of evidence of an offence committed by a person other than in his or her capacity as a journalist.'

The court decided: '...in view of the potential chilling effect that any perceived interference with the confidentiality of their communications and, in particular, their sources might have on the freedom of the press and, in the absence of any "above the waterline" arrangements limiting the intelligence services' ability to search and examine such material other than where "it is justified by an overriding requirement in the public interest", the Court finds that there has also been a violation of Article 10 of the Convention.'

In relation to the complaint of the violation of Article 8- the privacy of journalists and their sources, the court decided that regime of surveillance under the Investigatory Powers Act 2000 'was not in accordance with the law as it permitted access to retained data for the purpose of

combating crime (rather than "serious crime") and, save for where access was sought for the purpose of determining a journalist's source, it was not subject to prior review by a court or independent administrative body.'

The UK government's attempts to amend and develop the Investigatory Powers Act, otherwise known as 'The Snoopers' Charter' had hit more legal buffers in April 2018 in the ruling of the English High Court.

The court ruled that parts of the Investigatory Powers Act 2016, dubbed the "Snoopers Charter", must be amended as it runs contrary to European Union law.

Judges found that the Data Retention and Investigatory Powers Act 2015 (DRIPA), which the 2016 Act replaced and expanded upon broke the law by allowing access to individuals' phone and internet records without the suspicion on criminal activity.

Parts of the 2016 Investigatory Powers Act are also unlawful.

The court concluded: 'For the reasons we have given this claim for judicial review succeeds in part, because Part 4 of the Investigatory Powers Act 2016 is incompatible with fundamental rights in EU law in that in the area of criminal justice:

- (1) access to retained data is not limited to the purpose of combating "serious crime"; and
- (2) access to retained data is not subject to prior review by a court or an independent administrative body.

We have concluded that the legislation must be amended within a reasonable time and that a reasonable time would be 1 November 2018, which is just over 6 months from the date of this judgment. We have also concluded that the appropriate remedy is a declaration to reflect our judgment.

See: <http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2018/975.html>

See the Liberty briefing at: <https://www.libertyhumanrights.org.uk/campaigning/people-vs-snoopers-charter>

At the heart of the [2016 Investigatory Powers Act](#) is the government's belief that we do not own our communications data.

The information about who we contact, on which day and at what time, where and in what way belongs to private internet service providers and telecommunications companies.

That is why the legal access is a relationship between government and data processors; not the users.

There is nothing in the Act to explicitly declare that the content of a communication is our personal property, but perhaps that is implied.

The trick played on journalists and everyone else is that the police, intelligence agencies and any of the 48 state investigatory bodies given access powers in the 2016 legislation have the data map to that content should it be preserved on computer hard discs or any form of digital storage server.

It is the roadmap to finding the more detailed evidence if required.

US government whistle-blower [Edward Snowden and Liberty say the Investigatory Powers Act is the most invasive surveillance regime of any democracy in the world.](#)

The fear for all of us is that it introduces staggering state spying powers that give the government access to up to one year of everybody's web histories, email, text and phone records.

The government says it makes us more safe and free from all the dangers of terrorism and other awful crimes.

The Dystopian Big Brother vista of doom conjured by privacy campaigners is an unnecessary and inaccurate exaggeration.

Ministers say IPA was intended to introduce transparency to state surveillance following Snowden's revelations of unlawful mass monitoring of the public's communications.

But Liberty's legal experts say it simply legalises the practices he exposed – and introduces hugely intrusive new powers which undermine our privacy, free press, free speech, protest rights, protections for journalists' sources and whistle-blowers and legal and patient confidentiality.

When it was passed in Parliament at the end of 2016 there was an atmosphere of shambolic opposition and a political climate reeling from the implications of the EU referendum.

The government was criticized for not providing any credible evidence that the extreme indiscriminate powers included in the legislation complied with European Union and European Human Rights law and were fully necessary to prevent or detect crime.

[A public petition has called for its repeal](#) with more than 200,000 signatures, but has not been debated by Parliament.

In January 2018, the [English Court of Appeal ruled](#) that near-identical powers in the Government's previous surveillance law – [the Data Retention and Investigatory Powers Act – were unlawful](#) because they let public bodies access the nation's internet activity and phone records with no suspicion of serious crime and no independent sign-off.



Twin towers of the European Court of Justice, in Kirchberg, Luxembourg. Image: Tercer. Creative Commons licence.

This ruling had applied [an earlier judgment in the same case from the European Court of Justice \(ECJ\)](#).

The Government has conceded that Part 4 of the new Act needs reform, in the light of these cases, but further intervention by the courts is not needed.

IPA not only gives state agency access to communications data on demand.

The law also allows the State to hack computers, phones and tablets on an industrial scale, and collect the content of our digital communications and records about those communications created by our computers, phones and other devices.

The scandal over Facebook's leak of data [belonging to 87 million social media users](#) has heightened public sensitivity about the significance of personal data.

It is being likened to 'the new oil' or to coin another metaphor 'the oxygen of the information age,' meaning that while it is vital to life it is also very dangerous in its pure form especially when mixed with a burning substance.

The flame of an investigation will burn ever so more brightly with IPA access to a detailed picture of a person's movements, contacts, habits and views.

The Act purports to provide safeguards for the protection of confidential journalistic information and journalist source data.

But these provisions are not equal to those offered by the [Police and Criminal Evidence Act 1984](#) where independent judicial hearings have to take place with representation for the journalist and news publisher as parties to the applications.

The IPA system does not recognize that the journalist has a right to be party to the review.

The Act appoints [a Judicial Commissioner to adjudicate applications](#) and journalists have no rights to be informed about the applications or access to their information.

[The Investigatory Powers Commissioner's Office](#) is now up and running under Sir Adrian Fulford with a plan to use around 15 current and recently retired High Court, Court of Appeal and Supreme Court Judges as Judicial Commissioners.

Everything will be conducted in secret with no public scrutiny at all and absolutely no due process of legal representation.

'Protections' for sensitive categories such 'confidential journalistic material' and 'sources of journalistic information,' are invalidated where the 'information is created or acquired for the purpose of furthering a criminal purpose.'

Criminal activity is defined as a situation where an accused 'who has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of 3 years or more.'

This means any public official trying to leak anything to a journalist will be furthering a criminal purpose because the maximum sentence is life imprisonment for misconduct in public office and will be 14 years for leaking info under a proposed Espionage Bill.

At the judicial review hearing held over three days at the end of February, the government's QC James Eadie contended that the vast majority of communications data retained will never be accessed by the state because most people are not affected by police or other relevant investigations.

This is certainly not the case with professional journalists.

Under the old Regulation of Investigatory Powers Act 2000 scores, [perhaps hundreds of journalists had their data secretly accessed with a sign-off from a senior police officer in the same force](#).

The lack of scrutiny in such oversight chimes ironically with a profession castigated during the Leveson Inquiry for 'marking its own homework.'

When RIPA 2000 was debated in Parliament politicians assured the media industry its powers would never be used against journalists in leak inquiries.

The government lawyer told the High Court in February that accessing a person's entire communications data history would require the most serious justification and 'in reality the law does not permit vast, intrusive collection by the state of communications data.'

See: <http://cioj.org/thejournal/contesting-the-worlds-most-invasive-surveillance-regime/>

Privacy

IPSO * indicates subject to public interest exceptions.

2. *Privacy

- i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications.
- ii) Editors will be expected to justify intrusions into any individual's private life without consent. In considering an individual's reasonable expectation of privacy, account will be taken of the complainant's own public disclosures of information and the extent to which the material complained about is already in the public domain or will become so.
- iii) It is unacceptable to photograph individuals, without their consent, in public or private places where there is a reasonable expectation of privacy.

IMPRESS

PRIVACY

7.1 Except where justified by the public interest, publishers must respect people's reasonable expectation of privacy. Such an expectation may be determined by factors that include, but are not limited to, the following:

- a) The nature of the information concerned, such as whether it relates to intimate, family, health or medical matters or personal finances;
- b) The nature of the place concerned, such as a home, school or hospital;
- c) How the information concerned was held or communicated, such as in private correspondence or a personal diary;
- d) The relevant attributes of the person, such as their age, occupation or public profile; and
- e) Whether the person had voluntarily courted publicity on a relevant aspect of their private life.

7.2 Except where justified by the public interest, publishers must:

- a) Not use covert means to gain or record information;
- b) Respect privacy settings when reporting on social media content; and
- c) Take all reasonable steps not to exacerbate grief or distress through intrusive newsgathering or reporting.

Ofcom

To ensure that broadcasters avoid any unwarranted infringement of privacy in programmes and in connection with obtaining material included in programmes.

Rule

8.1 Any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

Meaning of "warranted":

In this section "warranted" has a particular meaning. It means that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in

the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.

BBC

7.1

The BBC respects privacy and does not infringe it without good reason, wherever in the world it is operating. The Human Rights Act 1998 gives protection to the privacy of individuals, and private information about them, but balances that with a broadcaster's right to freedom of expression. In regulation, the Ofcom Broadcasting Code states "Any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted." (Rule 8.1, Ofcom Broadcasting Code)

Meeting these ethical, regulatory and legal obligations in our output requires consideration of the balance between privacy and our right to broadcast information in the public interest. We must be able to demonstrate why an infringement of privacy is justified.

An infringement is considered in two stages, requiring justifications for both the gathering and the broadcasting of material where there is a legitimate expectation of privacy.

Harassment and Intrusion into grief or shock

IPSO

3. *Harassment * indicates subject to public interest exceptions.

- i) Journalists must not engage in intimidation, harassment or persistent pursuit.
- ii) They must not persist in questioning, telephoning, pursuing or photographing individuals once asked to desist; nor remain on property when asked to leave and must not follow them. If requested, they must identify themselves and whom they represent.
- iii) Editors must ensure these principles are observed by those working for them and take care not to use non-compliant material from other sources.

4. Intrusion into grief or shock

In cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion and publication handled sensitively. These provisions should not restrict the right to report legal proceedings.

5. *Reporting Suicide

When reporting suicide, to prevent simulative acts care should be taken to avoid excessive detail of the method used, while taking into account the media's right to report legal proceedings.

IMPRESS

5. HARASSMENT

5.1 Publishers must ensure that journalists do not engage in intimidation.

5.2 Except where justified by the public interest, publishers must ensure that journalists:

- a) Do not engage in deception;
- b) Always identify themselves as journalists and provide the name of their publication when making contact; and

c) Comply immediately with any reasonable request to desist from contacting, following or photographing a person.

9. SUICIDE

9.1 When reporting on suicide or self-harm, publishers must not provide excessive details of the method used or speculate on the motives.

NUJ

6. Does nothing to intrude into anybody's private life, grief or distress unless justified by overriding consideration of the public interest.

BBC

5.4.32

BBC content must respect human dignity. Intimidation, humiliation, intrusion, aggression and derogatory remarks are all aspects of human behaviour that may be discussed or included in BBC output. Some content can be cruel but unduly intimidatory, humiliating, intrusive, aggressive or derogatory remarks aimed at real people (as opposed to fictional characters or historic figures) must not be celebrated for the purposes of entertainment. Care should be taken that such comments and the tone in which they are delivered are proportionate to their target.

7.4.38

We must always balance the public interest in full and accurate reporting against the need to be compassionate and to avoid any unjustified infringement of privacy when we report accidents, disasters, disturbances, violence against individuals or war.

7.4.41

We should normally request interviews with people who are injured or grieving following an accident or disaster by approaching them through friends, relatives or advisers. We should not: put them under pressure to provide interviews; harass them with repeated phone calls, emails, text messages or knocks at the door; stay on their property if asked to leave; normally follow them if they move on.

Ofcom

8.11 Doorstepping for factual programmes should not take place unless a request for an interview has been refused or it has not been possible to request an interview, or there is good reason to believe that an investigation will be frustrated if the subject is approached openly, and it is warranted to doorstep. However, normally broadcasters may, without prior warning interview, film or record people in the news when in public places.

8.16 Broadcasters should not take or broadcast footage or audio of people caught up in emergencies, victims of accidents or those suffering a personal tragedy, even in a public place, where that results in an infringement of privacy, unless it is warranted or the people concerned have given consent.

8.17 People in a state of distress should not be put under pressure to take part in a programme or provide interviews, unless it is warranted.

8.18 Broadcasters should take care not to reveal the identity of a person who has died or of victims of accidents or violent crimes, unless and until it is clear that the next of kin have been informed of the event or unless it is warranted.

8.19 Broadcasters should try to reduce the potential distress to victims and/or relatives when making or broadcasting programmes intended to examine past events that involve trauma to individuals (including crime) unless it is warranted to do otherwise. This applies to dramatic reconstructions and factual dramas, as well as factual programmes.

In particular, so far as is reasonably practicable, surviving victims and/or the immediate families of those whose experience is to feature in a programme, should be informed of the plans for the programme and its intended broadcast, even if the events or material to be broadcast have been in the public domain in the past.

Professional Values

CloJ

Publication refers to all work that is undertaken by editorial staff, during the course of their professional duties, regardless of the means of dissemination or their status as contract, freelance, contributors or staff. Specifically, this excludes private correspondence but includes contributions made in online activities.

2. You will comply with the Editors' Code of Practice. You will co-operate fully with any enquiry held by the Press Complaints Commission except where sources are compromised, and, subject to any legal advice you may receive.

5) You will not request or accept payment for the publication of editorial matter under whatever guise, including costs relating to colour separation of pictures or other devices, which compromise your editorial independence.

6) You will not accept money, or any other inducement whatsoever, to manipulate editorial comment unless it is clearly identified.

8) You will respect the work of other media professionals and will not seek to undermine exclusive stories submitted by freelance contributors.

10) You will defend the principles of a free press and freedom of speech and will do nothing to damage these principles.

NUJ

A journalist:

1. At all times upholds and defends the principle of media freedom, the right of freedom of expression and the right of the public to be informed.

8. Resists threats or any other inducements to influence, distort or suppress information and takes no unfair personal advantage of information gained in the course of her/his duties before the information is public knowledge.

10. Does not by way of statement, voice or appearance endorse by advertisement any commercial product or service save for the promotion of her/his own work or of the medium by which she/he is employed.

12. Avoids plagiarism.

The NUJ believes a journalist has the right to refuse an assignment or be identified as the author of editorial that would break the letter or spirit of the NUJ code of code.

BBC

The BBC sets out a wide range of professional values that it obliges its employees to comply with in its Editorial Guidelines. They include:

Section 14 **Editorial Integrity and Independence from External Interests.**

See: <http://www.bbc.co.uk/editorialguidelines/page/guidelines-editorial-integrity-introduction/>

'The BBC's reputation, in the UK and around the world, is based on its editorial integrity and independence. Our audiences must be able to trust the BBC and be confident that our editorial decisions are not influenced by outside interests, political or commercial pressures, or any personal interests.

14.2.1

We must be independent from outside interests and arrangements which could undermine our editorial integrity.

14.2.2

We must not endorse or appear to endorse any other organisation, its products, activities, services, views or opinions.

14.2.3

We must not give undue prominence to commercial products or services.

14.2.4

There must be no product placement in programmes.

On-air and online credits must be clearly editorially justified.

14.2.6

We must never include a link on a public service website or within the editorial content of a commercial site, in return for cash, services or any other consideration in kind.

14.2.7

We must not unduly promote BBC commercial products or BBC-related commercial products and services on our public service outlets.

Section 15 **Conflicts of Interest** at:

<http://www.bbc.co.uk/editorialguidelines/page/guidelines-conflict-of-interest-introduction/>

‘A conflict of interest may arise when the external activities of anyone involved in making our content affects the BBC’s reputation for integrity, independence and high standards, or may be reasonably perceived to do so.

Our audiences must be able to trust the BBC and be confident that our editorial decisions are not influenced by outside interests, political or commercial pressures, or any personal interests.’

15.2.1

External activities of individuals working for the BBC must not undermine the public’s perception of the impartiality, integrity, independence and objectivity of the BBC. Nor should they bring the BBC into disrepute.

15.2.2

There must never be any suggestion that commercial, financial or other interests have influenced BBC editorial judgements. Those involved in the production of BBC content must have no significant connection with products, businesses or other organisations featured in that content.

15.2.3

The BBC must be satisfied that individuals involved in the production of its content are free from inappropriate outside commitments and connections.

15.2.4

The involvement of talent or their agents in the ownership or senior management of independent production companies making content for the BBC must not cast doubt over the integrity, editorial judgements, or impartiality of any BBC output. Appropriate measures must be put in place so that the BBC maintains overall editorial control of all aspects of the programme or content.

Section 16 **External Relationships and Funding** at:

<http://www.bbc.co.uk/editorialguidelines/page/guidelines-external-relationships-introduction/>

'It is a basic premise of the BBC Charter and Agreement that public service television, radio and online services in the UK are funded from the licence fee. No licence fee funded broadcast or online service can carry sponsored programmes or take funding from advertising.'

16.2.1

When entering into an external relationship, we must ensure that BBC services do not broadcast sponsored programmes or carry advertising. Arrangements with external organisations must not give any impression that a BBC service is commercially sponsored.

16.2.2

The BBC's editorial impartiality and integrity must not be compromised by any external relationship or external funding and the BBC must retain editorial control of BBC output.

16.2.3

The choice of external partners must be appropriate and editorially justified and must not bring the BBC into disrepute.

16.2.4

We must not accept money or other services in exchange for broadcast or online coverage or publicity, or online links or credits and we must not promote or appear to endorse other organisations, products, services, views or opinions. We may credit others fairly where editorially appropriate.

16.2.5

To ensure transparency, we must operate rigorous financial systems when accepting any funding from an outside organisation.

16.2.6

Money from external organisations or individuals may not be used to pay programme costs, except for funding from BBC commercial services, the Open University, co-productions (i.e. funding in exchange for rights), co-funding and production and location incentives.

Section 17 **Interacting with our Audiences** at:

<http://www.bbc.co.uk/editorialguidelines/page/guidelines-interacting-introduction/>

'Trust is the BBC's most important value and we must not undermine public trust in the BBC. We will maintain an honest and open relationship with our audiences and we will not intentionally mislead them. When the public engages with us through interactivity they will be treated with respect, honesty and fairness.'

17.2.1

All audience interactivity must be conducted in a manner that is honest, fair and legal. In particular:

- Winners must always be genuine and never invented or pre-chosen

- Interactive competitions and votes must be handled with rigorous care and integrity

- Competitions, contests and votes must have clear rules, which must be made known as appropriate

- Prizes must be described accurately, and be appropriate for the target audience

- The audience must be made aware if the opportunity for interactivity is no longer available when content which includes interactivity is repeated, made available via an on-demand service or otherwise time shifted

- Production values must not override these principles.

17.2.2

All BBC competitions, votes and awards on our publicly funded services must conform with the BBC's Code of Conduct for Competitions and Voting.

17.2.3

When we offer interactivity to our audiences on our publicly funded channels, it must add public value and enhance our output in a way which fits our public service remit. It must also be distinctive, have a clear editorial purpose and match the expectations of the likely audience.

17.2.4

We must respect the privacy of everyone who interacts with us and only collect personal information with their consent.

17.2.5

Audience interactivity on our publicly funded services must not act as a commercial service, cost a prohibitive amount to participate, or be designed to make a profit unless it is specifically set up and approved in advance as a method of raising money for a BBC charitable initiative.

17.2.6

On our publicly funded services, jointly organised competitions, donated prizes for a viewer, listener or online competition, and external funding of a prize, bursary or award, must conform to the Framework for Funding Prizes and Awards.

17.2.7

The BBC must maintain overall editorial control of interactivity when working in partnership with others.

IMPRESS

10. TRANSPARENCY

10.1. Publishers must clearly identify content that appears to be editorial but has been paid for, financially or through a reciprocal arrangement, by a third party.

10.2. Publishers must ensure that significant conflicts of interest are disclosed.

10.3. Publishers must ensure that information about financial products is objectively presented and that any interests or conflicts of interest are effectively disclosed.

10.4. Publishers must correct any failure to disclose significant conflicts of interest with due prominence at the earliest opportunity.

Reporting children and 'children in sex cases.'

IPSO

6. *Children

i) All pupils should be free to complete their time at school without unnecessary intrusion.

ii) They must not be approached or photographed at school without permission of the school authorities.

iii) Children under 16 must not be interviewed or photographed on issues involving their own or another child's welfare unless a custodial parent or similarly responsible adult consents.

iv) Children under 16 must not be paid for material involving their welfare, nor parents or guardians for material about their children or wards, unless it is clearly in the child's interest.

v) Editors must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child's private life.

7. *Children in sex cases

The press must not, even if legally free to do so, identify children under 16 who are victims or witnesses in cases involving sex offences.

In any press report of a case involving a sexual offence against a child -

i) The child must not be identified.

ii) The adult may be identified.

iii) The word "incest" must not be used where a child victim might be identified.

iv) Care must be taken that nothing in the report implies the relationship between the accused and the child.

IMPRESS

3. CHILDREN

3.1. Except where there is an exceptional public interest, publishers must only interview, photograph, or otherwise record or publish the words, actions or images of a child under the age of 16 years with the consent of the child or a responsible adult and where this is not detrimental to the safety and wellbeing of the child. While a child should have every opportunity to express his or her wishes, journalists have a responsibility to consider carefully the age and capacity of the child to consent. Unless there is a detriment to the safety and wellbeing of a child, this provision does not apply to images of general scenes.

3.2 Except where there is an exceptional public interest, publishers must not identify a child under the age of 16 years without the consent of the child or a responsible adult unless this is relevant to the story and not detrimental to the safety and wellbeing of the child.

3.3 Publishers must give reasonable consideration to the request of a person who, when under the age of 16 years, was identified in their publication and now wishes the online version of the relevant article(s) to be anonymised.

NUJ

1. A journalist shall normally seek the consent of an appropriate adult when interviewing or photographing a child for a story about her/his welfare.

Ofcom

1.1 Material that might seriously impair the physical, mental or moral development of people under eighteen must not be broadcast.

1.2 In the provision of services, broadcasters must take all reasonable steps to protect people under eighteen. For television services, this is in addition to their obligations resulting from the Audiovisual Media Services Directive (in particular, Article 27, see Appendix 2).

1.3 Children must also be protected by appropriate scheduling from material that is unsuitable for them.

Meaning of "children":

Children are people under the age of fifteen years.

Meaning of "appropriate scheduling":

Appropriate scheduling should be judged according to:

the nature of the content;

the likely number and age range of children in the audience, taking into account school time, weekends and holidays;

the start time and finish time of the programme;
the nature of the channel or station and the particular programme; and
the likely expectations of the audience for a particular channel or station at a particular time and on a particular day.

1.4 Television broadcasters must observe the watershed.

Meaning of "the watershed":

The watershed only applies to television. The watershed is at 2100. Material unsuitable for children should not, in general, be shown before 2100 or after 0530.

On premium subscription film services which are not protected as set out in Rule 1.24, the watershed is at 2000. There is no watershed on premium subscription film services or pay per view services which are protected as set out in Rules 1.24 and 1.25 respectively.

1.5 Radio broadcasters must have particular regard to times when children are particularly likely to be listening.

Meaning of "when children are particularly likely to be listening":

This phrase particularly refers to the school run and breakfast time, but might include other times.

1.6 The transition to more adult material must not be unduly abrupt at the watershed (in the case of television) or after the time when children are particularly likely to be listening (in the case of radio). For television, the strongest material should appear later in the schedule.

1.7 For television programmes broadcast before the watershed, or for radio programmes broadcast when children are particularly likely to be listening, clear information about content that may distress some children should be given, if appropriate, to the audience (taking into account the context).

(For the meaning of "context" see Section Two: Harm and Offence.)

The coverage of sexual and other offences in the UK involving under-eighteens

1.8 Where statutory or other legal restrictions apply preventing personal identification, broadcasters should also be particularly careful not to provide clues which may lead to the identification of those who are not yet adult (the defining age may differ in different parts of the UK) and who are, or might be, involved as a victim, witness, defendant or other perpetrator in the case of sexual offences featured in criminal, civil or family court proceedings:

by reporting limited information which may be pieced together with other information available elsewhere, for example in newspaper reports (the 'jigsaw effect');

inadvertently, for example by describing an offence as "incest"; or
in any other indirect way.

(Note: Broadcasters should be aware that there may be statutory reporting restrictions that apply even if a court has not specifically made an order to that effect.)

1.9 When covering any pre-trial investigation into an alleged criminal offence in the UK, broadcasters should pay particular regard to the potentially vulnerable position of any person who is not yet adult who is involved as a witness or victim, before broadcasting their name, address, identity of school or other educational establishment, place of work, or any still or moving picture of them. Particular justification is also required for the broadcast of such material relating to the identity of any person who is not yet adult who is involved in the defence as a defendant or potential defendant.

Drugs, smoking, solvents and alcohol

1.10 The use of illegal drugs, the abuse of drugs, smoking, solvent abuse and the misuse of alcohol:

must not be featured in programmes made primarily for children unless there is strong editorial justification;

must generally be avoided and in any case must not be condoned, encouraged or glamorised in other programmes broadcast before the watershed (in the case of television), or when children are particularly likely to be listening (in the case of radio), unless there is editorial justification;

must not be condoned, encouraged or glamorised in other programmes likely to be widely seen or heard by under-eighteens unless there is editorial justification.

Violence and dangerous behaviour

1.11 Violence, its after-effects and descriptions of violence, whether verbal or physical, must be appropriately limited in programmes broadcast before the watershed (in the case of television) or when children are particularly likely to be listening (in the case of radio) and must also be justified by the context.

1.12 Violence, whether verbal or physical, that is easily imitable by children in a manner that is harmful or dangerous:

must not be featured in programmes made primarily for children unless there is strong editorial justification;

must not be broadcast before the watershed (in the case of television) or when children are particularly likely to be listening (in the case of radio), unless there is editorial justification.

1.13 Dangerous behaviour, or the portrayal of dangerous behaviour, that is likely to be easily imitable by children in a manner that is harmful:

must not be featured in programmes made primarily for children unless there is strong editorial justification;

must not be broadcast before the watershed (in the case of television) or when children are particularly likely to be listening (in the case of radio), unless there is editorial justification.

(Regarding Rules 1.11 to 1.13 see Rules 2.4 and 2.5 in Section Two: Harm and Offence.)

Offensive language

1.14 The most offensive language must not be broadcast before the watershed (in the case of television) or when children are particularly likely to be listening (in the case of radio).

1.15 Offensive language must not be used in programmes made for younger children except in the most exceptional circumstances.

1.16 Offensive language must not be broadcast before the watershed (in the case of television), or when children are particularly likely to be listening (in the case of radio), unless it is justified by the context. In any event, frequent use of such language must be avoided before the watershed. (Regarding Rules 1.14 to 1.16 see Rule 2.3 in Section Two: Harm and Offence.)

Sexual material

1.17 Material equivalent to the British Board of Film Classification ("BBFC") R18-rating must not be broadcast at any time.

1.18 'Adult sex material' - material that contains images and/or language of a strong sexual nature which is broadcast for the primary purpose of sexual arousal or stimulation - must not be broadcast at any time other than between 2200 and 0530 on premium subscription services and pay per view/night services which operate with mandatory restricted access. In addition, measures must be in place to ensure that the subscriber is an adult.

Meaning of "mandatory restricted access":

Mandatory restricted access means there is a PIN protected system (or other equivalent protection) which cannot be removed by the user, that restricts access solely to those authorised to view.

1.19 Broadcasters must ensure that material broadcast after the watershed which contains images and/or language of a strong or explicit sexual nature, but is not 'adult sex material' as defined in Rule 1.18 above, is justified by the context.

(See Rules 1.6 and 1.18 and Rule 2.3 in Section Two: Harm and Offence which includes meaning of "context".)

1.20 Representations of sexual intercourse must not occur before the watershed (in the case of television) or when children are particularly likely to be listening (in the case of radio), unless there is a serious educational purpose. Any discussion on, or portrayal of, sexual behaviour must be editorially justified if included before the watershed, or when children are particularly likely to be listening, and must be appropriately limited.

Nudity

1.21 Nudity before the watershed must be justified by the context.

The involvement of people under eighteen in programmes

1.28 Due care must be taken over the physical and emotional welfare and the dignity of people under eighteen who take part or are otherwise involved in programmes. This is irrespective of any consent given by the participant or by a parent, guardian or other person over the age of eighteen in loco parentis.

1.29 People under eighteen must not be caused unnecessary distress or anxiety by their involvement in programmes or by the broadcast of those programmes.

1.30 Prizes aimed at children must be appropriate to the age range of both the target audience and the participants. (See Rule 2.16 in Section Two: Harm and Offence.)

BBC

The BBC mirrors and follows Ofcom regulation with Section 9 of its Editorial Guidelines entitled 'Children and Young People as Contributors'.

See: <http://www.bbc.co.uk/editorialguidelines/page/guidelines-children-introduction/>

'We must always safeguard the welfare of the children and young people who contribute to our content, wherever in the world we operate. This includes preserving their right to speak out and to participate, as enshrined in the United Nations Convention on the Rights of the Child.'

9.2.1

We must ensure that the physical and emotional welfare and the dignity of children and young people is protected during the making and broadcast of our content, irrespective of any consent given by them or by a parent, guardian or other person acting in loco parentis.

Their interests and safety must take priority over any editorial requirement.

9.2.2

We must ensure that children and young people are not caused unnecessary anxiety or distress by their involvement in our output. Their involvement must be clearly editorially

justified, consents should be obtained as appropriate to the circumstances of the child/young person and the nature of the contribution and output, and support should be given to them where necessary.

Hospitals

IPSO

8. *Hospitals

- i) Journalists must identify themselves and obtain permission from a responsible executive before entering non-public areas of hospitals or similar institutions to pursue enquiries.
- ii) The restrictions on intruding into privacy are particularly relevant to enquiries about individuals in hospitals or similar institutions.

Ofcom

Under the Privacy Section of the Broadcasting Code, Ofcom lays down regulation over the coverage of **Suffering and distress**:

8.16 Broadcasters should not take or broadcast footage or audio of people caught up in emergencies, victims of accidents or those suffering a personal tragedy, even in a public place, where that results in an infringement of privacy, unless it is warranted or the people concerned have given consent.

8.17 People in a state of distress should not be put under pressure to take part in a programme or provide interviews, unless it is warranted.

8.18 Broadcasters should take care not to reveal the identity of a person who has died or of victims of accidents or violent crimes, unless and until it is clear that the next of kin have been informed of the event or unless it is warranted.

8.19 Broadcasters should try to reduce the potential distress to victims and/or relatives when making or broadcasting programmes intended to examine past events that involve trauma to individuals (including crime) unless it is warranted to do otherwise. This applies to dramatic reconstructions and factual dramas, as well as factual programmes.

In particular, so far as is reasonably practicable, surviving victims and/or the immediate families of those whose experience is to feature in a programme, should be informed of the plans for the programme and its intended broadcast, even if the events or material to be broadcast have been in the public domain in the past.

8.8 When filming or recording in institutions, organisations or other agencies, permission should be obtained from the relevant authority or management, unless it is warranted to film or record without permission. Individual consent of employees or others whose appearance is incidental or where they are essentially anonymous members of the general public will not normally be required.

However, in potentially sensitive places such as ambulances, hospitals, schools, prisons or police stations, separate consent should normally be obtained before filming or recording and for broadcast from those in sensitive situations (unless not obtaining consent is warranted). If the individual will not be identifiable in the programme then separate consent for broadcast will not be required.

BBC

The BBC has a full guidance resource on media coverage of medical emergencies-primarily in the context of agree documentary projects.

See: <http://www.bbc.co.uk/editorialguidelines/page/guidance-medical-emergencies-full>

‘ The right of patients to privacy and confidentiality is usually paramount. To enable us to film in highly sensitive medical environments, or on location with the emergency services, we distinguish between consent to film (often verbal) and consent to broadcast (always in a form that is provable, often in writing). We would not normally broadcast any footage without clear, informed consent from patients and key medical or emergency staff featured.

Key to filming in these circumstances is the principle that we consult with the medical or emergency personnel whose work we are following before making the initial decision to film a patient.

It may be appropriate to seek consent to broadcast only after the patient's treatment is complete and the decision has been taken to include their story in our output. It will be necessary to maintain close contact with the patient and their family in order to determine how and when to discuss consent to broadcast.’

Reporting of Crime

IPSO

9. *Reporting of Crime

- i) Relatives or friends of persons convicted or accused of crime should not generally be identified without their consent, unless they are genuinely relevant to the story.
- ii) Particular regard should be paid to the potentially vulnerable position of children under the age of 18 who witness, or are victims of, crime. This should not restrict the right to report legal proceedings.
- iii) Editors should generally avoid naming children under the age of 18 after arrest for a criminal offence but before they appear in a youth court unless they can show that the individual's name is already in the public domain, or that the individual (or, if they are under 16, a custodial parent or similarly responsible adult) has given their consent. This does not restrict the right to name juveniles who appear in a crown court, or whose anonymity is lifted.

15. Witness payments in criminal trials

i) No payment or offer of payment to a witness – or any person who may reasonably be expected to be called as a witness – should be made in any case once proceedings are active as defined by the Contempt of Court Act 1981. This prohibition lasts until the suspect has been freed unconditionally by police without charge or bail or the proceedings are otherwise discontinued; or has entered a guilty plea to the court; or, in the event of a not guilty plea, the court has announced its verdict.

*ii) Where proceedings are not yet active but are likely and foreseeable, editors must not make or offer payment to any person who may reasonably be expected to be called as a witness, unless the information concerned ought demonstrably to be published in the public interest and there is an over-riding need to make or promise payment for this to be done; and all reasonable steps have been taken to ensure no financial dealings influence the evidence those witnesses give. In no circumstances should such payment be conditional on the outcome of a trial.

*iii) Any payment or offer of payment made to a person later cited to give evidence in proceedings must be disclosed to the prosecution and defence. The witness must be advised of this requirement.

16. *Payment to criminals

i) Payment or offers of payment for stories, pictures or information, which seek to exploit a particular crime or to glorify or glamorise crime in general, must not be made directly or via agents to convicted or confessed criminals or to their associates – who may include family, friends and colleagues.

ii) Editors invoking the public interest to justify payment or offers would need to demonstrate that there was good reason to believe the public interest would be served. If, despite payment, no public interest emerged, then the material should not be published.

IMPRESS

6. JUSTICE

6.1. Publishers must not significantly impede or obstruct any criminal investigations or prejudice any criminal proceedings.

6.2. Publishers must not directly or indirectly identify persons under the age of 18 who are or have been involved in criminal or family proceedings, except as permitted by law.

6.3. Publishers must preserve the anonymity of victims of sexual offences, except as permitted by law or with the express consent of the person.

6.4. Publishers must not make payments, or offer to make payments, to witnesses or defendants in criminal proceedings, except as permitted by law.

Ofcom

3.1 Material likely to encourage or incite the commission of crime or to lead to disorder must not be included in television or radio services.

3.2 Descriptions or demonstrations of criminal techniques which contain essential details which could enable the commission of crime must not be broadcast unless editorially justified.

3.3 No payment, promise of payment, or payment in kind, may be made to convicted or confessed criminals whether directly or indirectly for a programme contribution by the criminal (or any other person) relating to his/her crime/s. The only exception is where it is in the public interest.

3.4 While criminal proceedings are active, no payment or promise of payment may be made, directly or indirectly, to any witness or any person who may reasonably be expected to be called as a witness. Nor should any payment be suggested or made dependent on the outcome of the trial. Only actual expenditure or loss of earnings necessarily incurred during the making of a programme contribution may be reimbursed.

3.5 Where criminal proceedings are likely and foreseeable, payments should not be made to people who might reasonably be expected to be witnesses unless there is a clear public interest, such as investigating crime or serious wrongdoing, and the payment is necessary to elicit the information. Where such a payment is made it will be appropriate to disclose the payment to both defence and prosecution if the person becomes a witness in any subsequent trial.

3.6 Broadcasters must use their best endeavours so as not to broadcast material that could endanger lives or prejudice the success of attempts to deal with a hijack or kidnapping.

BBC

The BBC follows Ofcom regulation. Section 8 of the BBC Guidelines is entitled 'Reporting Crime and Anti-Social Behaviour' at:

<http://www.bbc.co.uk/editorialguidelines/page/guidelines-crime-introduction/>

'...we must ensure that the public interest in our reporting is not outweighed by public concern about our methods. We must ensure that we observe appropriate standards of behaviour ourselves, consider the consequences of our actions and avoid obstructing the work of the authorities.

Our reporting must not add to people's fear of becoming victims of crime if statistics suggest it is very unlikely.'

8.2.1

We must ensure that material likely to encourage or incite the commission of crime, or lead to disorder, is not included on our services. However, this is not intended to restrict the broadcasting of any content where a clear public interest can be demonstrated.

8.2.2

We will ensure that detailed descriptions or demonstrations of criminal techniques which could enable the commission of illegality are not included on our services unless clearly editorially justified.

8.2.3

We must seek to balance the public interest in reporting crime with respect for the privacy and dignity of victims and their families.

8.2.4

Investigations into crime or anti-social behaviour, involving deception and/or intrusion, must be clearly editorially justified and proportionate to the wrongdoing they seek to expose.

Clandestine devices and subterfuge

IPSO

10. *Clandestine devices and subterfuge

i) The press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls, messages or emails; or by the unauthorised removal of documents or photographs; or by accessing digitally-held information without consent.

ii) Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only in the public interest and then only when the material cannot be obtained by other means.

CloJ

3) You will behave in a transparent way.

NUJ

5. Obtains material by honest, straightforward and open means, with the exception of investigations that are both overwhelmingly in the public interest and which involve evidence that cannot be obtained by straightforward means.

Ofcom

8.12 Broadcasters can record telephone calls between the broadcaster and the other party if they have, from the outset of the call, identified themselves, explained the purpose of the call and that the call is being recorded for possible broadcast (if that is the case) unless

it is warranted not to do one or more of these practices. If at a later stage it becomes clear that a call that has been recorded will be broadcast (but this was not explained to the other party at the time of the call) then the broadcaster must obtain consent before broadcast from the other party, unless it is warranted not to do so.

(See "practices to be followed" 7.14 and 8.13 to 8.15.)

8.13 Surreptitious filming or recording should only be used where it is warranted. Normally, it will only be warranted if:

there is prima facie evidence of a story in the public interest; and

there are reasonable grounds to suspect that further material evidence could be obtained; and

it is necessary to the credibility and authenticity of the programme.

(See "practices to be followed" 7.14, 8.12, 8.14 and 8.15.)

Meaning of "surreptitious filming or recording":

Surreptitious filming or recording includes the use of long lenses or recording devices, as well as leaving an unattended camera or recording device on private property without the full and informed consent of the occupiers or their agent. It may also include recording telephone conversations without the knowledge of the other party, or deliberately continuing a recording when the other party thinks that it has come to an end.

8.14 Material gained by surreptitious filming and recording should only be broadcast when it is warranted. (See also "practices to be followed" 7.14 and 8.12 to 8.13 and 8.15.)

8.15 Surreptitious filming or recording, doorstepping or recorded wind-up' calls to obtain material for entertainment purposes may be warranted if it is intrinsic to the entertainment and does not amount to a significant infringement of privacy such as to cause significant annoyance, distress or embarrassment. The resulting material should not be broadcast without the consent of those involved.

However, if the individual and/or organisation is not identifiable in the programme then consent for broadcast will not be required. (See "practices to be followed" 7.14 and 8.11 to 8.14.)

BBC

The BBC Editorial Guidelines comply with Ofcom regulation and are covered in the Editorial Guidelines by the Section Six Fairness, Contributors and Consent at:

<http://www.bbc.co.uk/editorialguidelines/page/guidelines-fairness-introduction/>

6.4.17 In news and factual output, where there is a clear public interest, it may occasionally be acceptable for us not to reveal the full purpose of the output to a contributor. Such deception is only likely to be acceptable when the material could not be obtained by any other means. It should be the minimum necessary and in proportion to the subject matter.

Any proposal to deceive a contributor to news or factual output must be referred to a senior editorial figure or, for independents, to the commissioning editor. Editorial Policy, or in the most serious cases Director Editorial Policy and Standards, must also be consulted.

And Section Seven Privacy at <http://www.bbc.co.uk/editorialguidelines/page/guidelines-privacy-introduction/>

6.4.18

If deception is to be used for comedy or entertainment purposes, such as a humorous 'wind-up', the material should normally be pre-recorded and consent must be gained

prior to broadcast from any member of the public or the organisation to be featured identifiably. If they are not identifiable, consent will not normally be required prior to broadcast unless the material was secretly recorded or is likely to result in unjustified public ridicule or personal distress.

The deception should not be designed to humiliate and we should take care not to distress or embarrass those involved. We may need to consult with friends or family to assess the risks in advance of recording.

6.4.19

Deceptions for comedy or entertainment purposes involving those in the public eye will not normally require consent prior to broadcast unless the material was secretly recorded or is likely to result in unjustified public ridicule or personal distress.

6.4.20

Any proposal to deceive a contributor for comedy and entertainment purposes, whether or not they are in the public eye, must be referred to a senior editorial figure, or for independents to the commissioning editor, who may consult Editorial Policy.

6.4.21

On rare occasions, where strictly proportionate and editorially justifiable, it may be appropriate for the BBC to operate a website which appears to have no connection with the BBC.

For example, we might do this as part of an extended online game where clues are hidden on third party sites for players from BBC Online to discover. In such cases, we must ensure that non-participants who come across such a site can find out its real purpose quickly and easily.

In the case of websites created for an investigation, we must ensure that there is no significant detriment to those who discover the website but are not the subject of the investigation.

Any proposal to create a website which appears to have no connection with the BBC must be referred to a senior editorial figure and Editorial Policy.

6.4.22

Anyone actively intervening to steer the course of an online discussion for a BBC purpose, without revealing their link to the BBC, must be acting in the public interest and must refer to a senior editorial figure or, for independents, to the commissioning editor.

In the most serious cases, referral must also be made to Director Editorial Policy and Standards.

Victims of Sexual Assault

IPSO

11. Victims of sexual assault

The press must not identify or publish material likely to lead to the identification of a victim of sexual assault unless there is adequate justification and they are legally free to do so.

IMPRESS

Under 6 Justice

6.2. Publishers must protect the identity of victims of sexual assault and children under 18 years of age who are or have been involved in criminal proceedings.

Ofcom

The Ofcom Broadcasting Code makes it explicitly clear that broadcasters must not under any circumstances publish anything that could lead to the identification of sexual offence complainants under Sections One Protecting under Eighteens and this is considered to apply to the identification without consent of any adults who are also sexual offence complainants.

BBC

Under Section 18 of the BBC's Editorial Guidelines

18.7.1

All victims of rape and other sex crimes, including children, are automatically guaranteed anonymity for life from the moment they make a complaint that they are the victim of a sex crime. In Scotland, the law is different but the practice of respecting anonymity is the same.

These restrictions only apply to identifying the person as being the victim of an alleged sexual offence. They do not prevent the identification of the person in other contexts.

Judges may, on occasion, lift the restrictions at the request of the defence. They can do this to get witnesses to come forward and to ensure a fair trial, or to allow the reasonable reporting of a case of public interest.

If a victim were identified in another, unrelated, criminal case, then the reporting of that case would not be restricted.

Victims can be identified if they agree to it. The consent should be in writing and must not be the result of any pressure.

We should be aware of the risk of 'jigsaw identification'.

Discrimination

IPSO

12. Discrimination

i) The press must avoid prejudicial or pejorative reference to an individual's, race, colour, religion, sex, gender identity, sexual orientation or to any physical or mental illness or disability.

ii) Details of an individual's race, colour, religion, gender identity, sexual orientation, physical or mental illness or disability must be avoided unless genuinely relevant to the story.

IMPRESS

4. DISCRIMINATION

4.1. Publishers must not make prejudicial or pejorative reference to a person on the basis of that person's age, disability, mental health, gender reassignment or identity, marital or civil partnership status, pregnancy, race, religion, sex or sexual orientation or another characteristic that makes that person vulnerable to discrimination.

4.2. Publishers must not refer to a person's disability, mental health, gender reassignment or identity, pregnancy, race, religion or sexual orientation unless this characteristic is relevant to the story.

4.3. Publishers must not incite hatred against any group on the basis of that group's age, disability, mental health, gender reassignment or identity, marital or civil partnership status, pregnancy, race, religion, sex or sexual orientation or another characteristic that makes that group vulnerable to discrimination.

NUJ

9. Produces no material likely to lead to hatred or discrimination on the grounds of a person's age, gender, race, colour, creed, legal status, disability, marital status, or sexual orientation.

Ofcom

Under Section 4 of the Broadcasting Code (<https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-four-religion>) UK licensed

broadcasters are obliged to:

To ensure that broadcasters exercise the proper degree of responsibility with respect to the content of programmes which are religious programmes.

To ensure that religious programmes do not involve any improper exploitation of any susceptibilities of the audience for such a programme.

To ensure that religious programmes do not involve any abusive treatment of the religious views and beliefs of those belonging to a particular religion or religious denomination.

Ofcom also stipulates under Section Two of its code dealing with Harm and Offence that broadcasters must avoid 'discriminatory treatment or language (for example on the grounds of age, disability, gender, race, religion, beliefs and sexual orientation).'

BBC

The BBC covers issues of discrimination and prejudice under section Five dealing with Harm and Offence:

'5.4.38

We aim to reflect fully and fairly all of the United Kingdom's people and cultures in our services.

Content may reflect the prejudice and disadvantage which exist in societies worldwide but we should not perpetuate it. In some instances, references to disability, age, sexual orientation, faith, race, etc. may be relevant to portrayal. However, we should avoid careless or offensive stereotypical assumptions and people should only be described in such terms when editorially justified.

5.4.39

When it is within audience expectations, we may feature a portrayal or stereotype that has been exaggerated for comic effect, but we must be aware that audiences may find casual or purposeless stereotypes to be offensive.

Financial Journalism

IPSO

13. Financial journalism

i) Even where the law does not prohibit it, journalists must not use for their own profit financial information they receive in advance of its general publication, nor should they pass such information to others.

ii) They must not write about shares or securities in whose performance they know that they or their close families have a significant financial interest without disclosing the interest to the editor or financial editor.

iii) They must not buy or sell, either directly or through nominees or agents, shares or securities about which they have written recently or about which they intend to write in the near future.

BBC

BBC Editorial Guidelines cover regulatory issues for their financial journalists at:

<http://www.bbc.co.uk/guidelines/editorialguidelines/page/guidance-financial-summary>

It is essential that the integrity of the BBC and its output is not undermined by the outside activities or financial interests of any of its journalists. Our audiences must be able to trust the objectivity and impartiality of the BBC's output and to be confident that editorial decisions are based purely on sound, objective editorial judgement, and that those judgements are not influenced by outside business or financial concerns.

Journalists and presenters of the BBC's financial output should register all their shareholdings, financial and business interests or dealings in securities. All BBC employees must conform to the BBC's Employment Policy "BBC Declaration of Personal Interests" (see here. Link only available to internal BBC users.)

Journalists must not use for their own profit any privileged information or financial information they receive in advance of its general publication, nor should they pass such information to others.

It is essential that financial journalists do not promote, or give the impression of promoting, any business or financial service in the BBC's output.

Financial journalists are subject to some specific legal restrictions. They must not promote financial services or products without proper authorisation from the relevant regulatory authority. And they must not use non-public information they acquire to trade in securities, or pass that information on to others who may trade in securities. This is "insider trading", which is a criminal offence.

We may need to make our audiences aware that guests on financial news output have a financial or commercial interest in the topics under discussion.

The EU's Market Abuse Directive requires to us to make our audiences aware of some additional information if it directly recommends buying or selling some securities.

The Public Interest

IPSO

There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.

The public interest includes, but is not confined to:

Detecting or exposing crime, or the threat of crime, or serious impropriety.

Protecting public health or safety.

Protecting the public from being misled by an action or statement of an individual or organisation.

Disclosing a person or organisation's failure or likely failure to comply with any obligation to which they are subject.

Disclosing a miscarriage of justice.

Raising or contributing to a matter of public debate, including serious cases of impropriety, unethical conduct or incompetence concerning the public.

Disclosing concealment, or likely concealment, of any of the above.

There is a public interest in freedom of expression itself.

The regulator will consider the extent to which material is already in the public domain or will or will become so.

Editors invoking the public interest will need to demonstrate that they reasonably believed publication - or journalistic activity taken with a view to publication - would both serve, and

be proportionate to, the public interest and explain how they reached that decision at the time.

An exceptional public interest would need to be demonstrated to over-ride the normally paramount interests of children under 16.

IMPRESS

PUBLIC INTEREST

In certain circumstances, there may be a public interest justification for a particular method of newsgathering or publication of an item of content that might otherwise breach the Code. Where a public interest exception may apply, this is identified in the relevant clause. A public interest means that the public has a legitimate stake in a story because of the contribution it makes to a matter of importance to society. Such interests include, but are not limited to, the following:

- a. The revelation or discussion of matters such as serious incompetence or unethical behaviour that affects the public;
- b. Putting the record straight where an individual or organisation has misled the public on a matter of public importance;
- c. Revealing that a person or organisation may be failing to comply with any legal obligation they have;
- d. The proper administration of government;
- e. Open, fair and effective justice;
- f. Public health and safety;
- g. National security;
- h. The prevention and detection of crime; and
- i. The discussion or analysis of artistic or cultural works.

The following provisions apply where a publisher is about to undertake an action that they think would otherwise breach the Code, but for which they believe they have a public interest justification. The action might be a particular method of newsgathering or publication of an item of content. Before undertaking the action, the publisher should, where practicable, make a contemporaneous note, which establishes why they believe that:

- i) The action is in the public interest;
- ii) They could not have achieved the same result using measures that are compliant with the Code;
- iii) The action is likely to achieve the desired outcome; and
- iv) Any likely harm caused by the action does not outweigh the public interest in the action.

Harm and Offence

Ofcom

2.1 Generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material.

2.2 Factual programmes or items or portrayals of factual matters must not materially mislead the audience. (Note to Rule 2.2: News is regulated under Section Five of the Code.)

2.3 In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context (see meaning of "context" below). Such

material may include, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language (for example on the grounds of age, disability, gender, race, religion, beliefs and sexual orientation). Appropriate information should also be broadcast where it would assist in avoiding or minimising offence.

Meaning of "context":

Context includes (but is not limited to):

- the editorial content of the programme, programmes or series;

- the service on which the material is broadcast;

- the time of broadcast;

- what other programmes are scheduled before and after the programme or programmes concerned;

- the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally or programmes of a particular description;

- the likely size and composition of the potential audience and likely expectation of the audience;

- the extent to which the nature of the content can be brought to the attention of the potential audience for example by giving information; and

- the effect of the material on viewers or listeners who may come across it unawares.

Violence, dangerous behaviour, and suicide

2.4 Programmes must not include material (whether in individual programmes or in programmes taken together) which, taking into account the context, condones or glamorises violent, dangerous or seriously antisocial behaviour and is likely to encourage others to copy such behaviour. (See Rules 1.11 to 1.13 in Section One: Protecting the Under-Eighteens.)

2.5 Methods of suicide and self-harm must not be included in programmes except where they are editorially justified and are also justified by the context. (See Rule 1.13 in Section One: Protecting the Under-Eighteens.)

Exorcism, the occult and the paranormal

2.6 Demonstrations of exorcism, the occult, the paranormal, divination, or practices related to any of these that purport to be real (as opposed to entertainment) must be treated with due objectivity. (See Rule 1.27 in Section One: Protecting the Under-Eighteens, concerning scheduling restrictions.)

2.7 If a demonstration of exorcism, the occult, the paranormal, divination, or practices related to any of these is for entertainment purposes, this must be made clear to viewers and listeners.

2.8 Demonstrations of exorcism, the occult, the paranormal, divination, or practices related to any of these (whether such demonstrations purport to be real or are for entertainment purposes) must not contain life-changing advice directed at individuals. (Religious programmes are exempt from this rule but must, in any event, comply with the provisions in Section Four: Religion. Films, dramas and fiction generally are not bound by this rule.)

Meaning of "life-changing":

Life-changing advice includes direct advice for individuals upon which they could reasonably act or rely about health, finance, employment or relationships.

Hypnotic and other techniques, simulated news and photosensitive epilepsy

2.9 When broadcasting material featuring demonstrations of hypnotic techniques, broadcasters must exercise a proper degree of responsibility in order to prevent hypnosis and/or adverse reactions in viewers and listeners. The hypnotist must not broadcast his/her full verbal routine or be shown performing straight to camera.

2.10 Simulated news (for example in drama or in documentaries) must be broadcast in such a way that there is no reasonable possibility of the audience being misled into believing that they are listening to, or watching, actual news.

2.11 Broadcasters must not use techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds without their being aware, or fully aware, of what has occurred.

2.12 Television broadcasters must take precautions to maintain a low level of risk to viewers who have photosensitive epilepsy. Where it is not reasonably practicable to follow the Ofcom guidance (see the Ofcom website), and where broadcasters can demonstrate that the broadcasting of flashing lights and/or patterns is editorially justified, viewers should be given an adequate verbal and also, if appropriate, text warning at the start of the programme or programme item.

Broadcast competitions and voting

2.13 Broadcast competitions and voting must be conducted fairly.

2.14 Broadcasters must ensure that viewers and listeners are not materially misled about any broadcast competition or voting.

2.15 Broadcasters must draw up rules for a broadcast competition or vote. These rules must be clear and appropriately made known. In particular, significant conditions that may affect a viewer's or listener's decision to participate must be stated at the time an invitation to participate is broadcast.

2.16 Broadcast competition prizes must be described accurately.

(See also Rule 1.30 in Section One: Protecting the Under-Eighteens, which concerns the provision of appropriate prizes for children.)

Note:

For broadcast competitions and voting that involve the use of premium rate telephony services (PRS), television broadcasters should also refer to Rules 9.26 to 9.30. Radio broadcasters should refer to Rules 10.9 to 10.10.

Meaning of "broadcast competition":

A competition or free prize draw featured in a programme in which viewers or listeners are invited to enter by any means for the opportunity to win a prize.

Meaning of "voting":

Features in a programme in which viewers or listeners are invited to register a vote by any means to decide or influence, at any stage, the outcome of a contest.

BBC

The BBC Editorial Guidelines closely mirror Ofcom regulation under a section with the same title 'Harm and Offence' at:

<http://www.bbc.co.uk/editorialguidelines/page/guidelines-harm-introduction/>

'When our content includes challenging material that risks offending some of our audience we must always be able to demonstrate a clear editorial purpose, taking account of generally accepted standards, and ensure it is clearly signposted. Such challenging material may include, but is not limited to, strong language, violence, sex,

sexual violence, humiliation, distress, violation of human dignity, and discriminatory treatment or language.'

5.2.1

The BBC must apply generally accepted standards so as to provide adequate protection for members of the public from the inclusion of offensive and harmful material.

5.2.2

We must not broadcast material that might seriously impair the physical, mental or moral development of children and young people.

5.2.3

We must observe the 9pm television watershed to ensure material that might be unsuitable for children is appropriately scheduled.

5.2.4

We must balance our responsibility to protect children and young people from unsuitable content with their rights to freedom of expression and freedom to receive information.

5.2.5

We must ensure our audiences have clear information on which to judge whether content is suitable for themselves or their children.

5.2.6

The use of strong language must be editorially justified and appropriately signposted to ensure it meets audience expectations, wherever it appears.

The final instructive section for your Pocketguide is a section offering you short revision briefings on **Primary Media Law**. Here are ten fast briefings, backed up online with video-casts.

Video/podcast urls

UK Contempt and Reporting Crime	Video/podcast urls
<ol style="list-style-type: none">1. Demonizing crime suspects after they've been arrested by impeding a police inquiry, a defence case, or publishing seriously prejudicial material when there's a substantial risk of influencing a jury is media contempt & a criminal offence.2. You can twitter and email from court unless directed not to and accurate and fair reporting's ok.3. Taking pictures or recording sound inside a courtroom is usually a crime.4. Alleged sex offence victims have anonymity for life from the time they complain.5. Young people aged 17 and under, along with vulnerable witnesses, blackmail victims with embarrassing menaces, and undercover state investigators usually have legal anonymity.6. Never report anything in the absence of the jury.7. Don't interview jurors about their deliberations (another criminal offence), harass judges for interviews, or pay criminals and their families for stories.	http://www.youtube.com/watch?v=9jW78STg5KY

<p>8. Open justice is protected by freedom of expression Article 10 of the Human Rights Act, presumption of innocence is protected by Article 6 right to fair trial.</p>	
<p>Guide to Court Reporting Key facts and Checklist</p> <ol style="list-style-type: none"> 1. When you report court cases it's a good idea to be respectfully dressed as well as respectfully behaved. 2. Bear in mind that alleged victims of sexual offences will be named in court but you'll not be allowed to publish anything that's identifiable. 3. Be careful to remove any detail that leads to jigsaw identification, where people could put two and two together. 4. Where young people 17 and under are involved as accused or witnesses, adult courts have to make the orders, but in youth courts were the public's not admitted, there's default anonymity. 5. Orders on children also specifically cover the schools they go to. 6. Always check with the court if there are any other reporting restrictions- they might not be obvious. 7. Attribute everything, avoid comment, stick to the language you've heard in court, & satisfy fairness by representing both sides in your report. 8. You'll realize how important it was to take that shorthand writing course. Keep a couple of notes, one taking down newsworthy quotes and the other writing the story while you're there. 9. In April 2015 court reporting restrictions relating to people aged 17 and under were intensified in England and Wales. In criminal cases court orders protecting youths under Section 39 of the Children and Young Persons' Act were replaced with section 45 of the Youth Justice and Criminal Evidence Act 1999 with the result that any youth who was not a defendant covered by such an order had anonymity for life- beyond the time they reached the age of 18. The ceiling of £5,000 fines for breaching the youth anonymity orders was removed with the penalty changing to an unlimited amount. 	<p>http://www.youtube.com/watch?v=Rv1VL2jOt1c</p>
<p>Libel, Privacy, Accuracy and Balance</p> <ol style="list-style-type: none"> 1. Libel is untruthful publication to a third party, that seriously harms reputation, can identify by innuendo, & cross-media jigsaw connections, burden of proof is on defendant, & damage is presumed. 2. Harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss. 3. Defences include honest opinion, truth, a reasonable belief that the publication, either fact or opinion, was a matter of public interest with an allowance for editorial judgment, privilege in fair and accurate reports of courts, parliament, public meetings, press conferences, and peer-reviewed scientific or academic conferences & journals. 	<p>http://www.youtube.com/watch?v=oBq6CXeLHOc</p>

<ol style="list-style-type: none"> 4. Prior restraint not usually available if the media defendants intend to defend their case. 5. Media privacy & confidentiality stem from Article 8 of Human Rights Act, protects private information, either truthful or not truthful such as health, relationships, sexuality, home, correspondence and family life- where there's a reasonable expectation of privacy. Intrusion and publication has to be justified by public interest. Breach of privacy can be by media conduct as well as media publication. 6. Prior restraint usually available because privacy is like a cube of ice, It's gone once melted. Now English courts have to hold a hearing and hear legal argument against prior restraint before issuing injunctions. Even where parties remain anonymous, the legal system has to keep and make available a record of the decision. The media must have notice of prior restraint applications. 7. Inaccurate publication that neither harms reputation nor breaches privacy can still lead to fines, prominent corrections and apologies by Ofcom regulation of broadcasters and independent press regulation of print media. No public interest defence available. 8. Broadcasters have a legal duty to be impartial and avoid giving undue prominence to views and opinions. 9. Press can be partial, but Editors' Code expects a distinguishing between comment, conjecture & fact. 10. The right to be forgotten asserted in EU Court of Justice ruling in 2014 applies to data processing search engines such as Google; not the archive of journalistic publications. 11. Data Protection legislation in the EU and UK and regulated by the Information Commissioner's Office imposes public interest duties on media processing of private information and its publication. 	
<p>News Gathering, Story Finding, and Public Interest</p> <ol style="list-style-type: none"> 1. Public interest used to be what interested the readers who bought newspapers, watched television, listened to the radio or went online. 2. Now it's defined by Ofcom, a government quango for broadcasters, the BBC itself, independent press regulation, politicians in legislation, government law officers such as the DPP and judges in case law. And the law is what they say, not what the audience says it wants and is interested in. 3. This means journalists committing crimes and civil wrongs have public interest defences in a few situations but are denied it in most. 4. Phone and computer hacking - no public interest, bribing police officers, civil servants or anybody else, breaching national security, stalking celebrities & public figures, fraud by subterfuge - no public interest. 	<p>http://www.youtube.com/watch?v=WZMix7z7WhE</p>

<ol style="list-style-type: none"> 5. Blagging by tricking people to get private information, harassing by door-stepping - there're limited public interest defences. 6. Journalists' sources are protected by statute and European human rights law subject to the interests of investigating crime, national security and the administration of justice. 7. If the police want unused media footage of public events they need a court order, if they want confidential info in notebooks and computers there's an excluded material protection for the purposes of journalism but the Leveson Inquiry recommended the Home Office look into whether this should be scaled down. 8. There is evidence that the police and other state agencies have been using the Regulation of Investigatory Powers Act 2000 to obtain meta-communications data and phone records of journalists without their knowledge, but this is being challenged at the European Court of Human Rights and Investigatory Powers Tribunal. 9. There is a public interest defence to copyright infringement, but this is usually limited to material that discloses or reveals crime and there is no other way of reporting the event without using the material. 	
<p>Protecting Children</p> <ol style="list-style-type: none"> 1. Minimum age of criminal responsibility in England Wales and Northern Ireland is 10, in earliest age children can be prosecuted in Scotland is 12. 2. The criminal justice system protects young people aged 17 and under with anonymity restrictions for them and their schools- This has become the same in Scotland. There's no youth court system there- They're managed in a social work oriented system of children's panels. 3. Ofcom, BBC, independent press regulation, and the courts give the protection of children, their highest priority. There's a 9 p.m. watershed for television. Ofcom makes it clear material that might seriously impair the physical, mental or moral development of people under eighteen must not be broadcast. Watershed for radio can be any time when 'children are particularly likely to be listening.' 4. Children are never usually identifiable in any reports of family court proceedings. 5. The UK media, press & broadcasting are legally obliged to protect children so they're free to complete their school education without unnecessary intrusion, children under 16 must not be interviewed or photographed without consent of guardians/parents and must not be approached or photographed at school without the school's permission. 	http://www.youtube.com/watch?v=CbYig2gE0pk
<p>Copyright and Intellectual Property</p> <ol style="list-style-type: none"> 1. Primary authorial works of a literary, dramatic, musical and artistic kind have copyright protection lasting 70 years after the death of the author/creator. 2. Secondary entrepreneurial works such as sound productions, broadcasts, and films have a copyright protection usually lasting 70 years after first public release. 	http://www.youtube.com/watch?v=g bP-52lw1Gs

<ol style="list-style-type: none"> 3. Most journalists rely on the defence of fair dealing when using other people's copyright material without payment. But it's a limited and inflexible defence. 4. Things you should know- Fair dealing can be for criticism and review, but you must not use the substantial part of the original work and you must acknowledge and attribute. What is less than the substantial part is not clearly defined. 5. Fair dealing can also be for reporting current events and the application of the word 'current' is limited by case law. So TV clips of a news event covered by a rival broadcaster should only be usable with sufficient acknowledgement within 24 hours. There's no, repeat no fair dealing for reporting current events in relation to photographs and images. 6. But case law indicates there may be rare exceptions when an image carries great public interest value (such as showing a crime), has already been published, does not undermine the commercial rights of the photographer or publisher and its origin is fully acknowledged. 7. Can you 'fair deal' photographs for criticism & review? In theory yes, but in practice rather difficult. How can you 'quote' and extract what is the less substantial part of an image? 8. From October 1st 2014 UK copyright law extended the fair dealing defence to quotation of works (whether for criticism or review or otherwise); works for the purposes of caricature, parody or pastiche; and the making of personal copies of works (other than computer programs) for private use. However, the making personal copies provision has been ruled unlawful by the High Court. The government when enabling private copying as an exception to copyright laws did not ensure that rights holders received fair compensation. And the government's Intellectual Property Office says the quotation defence will not permit use by news media of current event photographs without the permission and/or remuneration to copyright owners. 9. Simple advice probably best to adopt a cautious approach; when using other people's stuff in media publication pay them, or get their permission. 	
<p>Laws and Rules for Elections and Politics</p> <ol style="list-style-type: none"> 1. During the coverage of elections libel, privacy, accuracy and fairness obligations remain the same. 2. What's additional? Well there's a separate criminal offence for making or publishing a false statement of fact about the personal character or conduct of an election candidate with a purpose to affect the voting. 3. While there's a continuation of qualified privilege subject to contradiction or explanation for election meetings open to the public, the defence does not, repeat does not apply to candidates' election addresses. 	<p>http://www.youtube.com/watch?v=WvddYLSkWk</p>

<ol style="list-style-type: none"> 4. There's a legal ban on publishing exit polls while people are voting on polling day. This does not mean you are prevented publishing the result of opinion polls surveyed before the polling stations open for voting. 5. UK broadcasters have a legal duty to be impartial and balanced in their coverage during election periods. Print and online publishers can be as biased as they want. 6. This means that broadcast presenters cannot, repeat cannot express their personal support for any candidate or party. And candidates and their parties should have an opportunity to participate in all reports and programmes covering the election. 7. Ofcom, the BBC and the Electoral commission usually publish helpful guides for the media when elections happen. 8. Lastly when covering election counts reporters need to respect and follow the directions of election/returning officers. 	
<p>The Secret World</p> <ol style="list-style-type: none"> 2. Journalists can breach the Official Secrets Act if they disclose information, without permission, knowing or having reasonable cause to believe it is protected...and they know the information, in the protected categories, is what is described as 'damaging'. 3. Categories include security and intelligence, defence, international relations, crime, information on government phone-tapping, interception of letters or other communications, information entrusted in confidence to other states or international organizations. 4. The UK state persecutes and terrorizes potential whistle-blowers and journalist sources- in other words crown employees/officers working in intelligence. 5. If they want to put anything into the public domain, they have to go before a secretive Investigatory Powers Tribunal, which has been criticized for giving decisions without reasons, though it does have a web-site publishing some of its rulings and has held some of its proceedings in public. 6. Journalists who annoy or embarrass the UK state can still have the indignity of being arrested and their homes, offices, papers, files and computers searched. So, a rather unpleasant message is delivered without any further legal action following. 7. Sensitive stuff that might relate to terrorism, torture and rendition is kept from the public by the use of 'special advocates' in SIAC hearings and other areas of litigation. 8. In total secrecy, suspected terrorists get lawyers who can't communicate with them but can see, hear & challenge the 'secret' information used against them. In 2013 the UK government expanded this process into the rest of the legal system in what they call 'closed material procedure.' 	<p>http://www.youtube.com/watch?v=MtAbRSMqloY</p>

<ol style="list-style-type: none"> 9. The identity of secret witnesses, unknown to the defence, is a standard practice in many criminal trials. Some witnesses appear as pseudonyms; others as letters or numbers. 10. Terrorism legislation provides no public interest defence for journalists and media workers who do anything that knowingly assists the preparation of acts of terrorism. There is a positive obligation in criminal law for journalists who have any knowledge about terrorism to report the information to the police. 11. In 2014 the <i>Guardian</i> challenged an Old Bailey judge's decision to hold an entire terrorism trial in secret with the identity of the 2 defendants anonymized. 12. The Appeal court ruled that the accused should be named, and elements of the trial had to be heard in open court including swearing in of the jury, reading the charges to the jury, part of the judge's opening remarks to the jury, part of the prosecution opening, the verdicts, and sentencing in the event of guilty verdicts. 13. Accredited journalists were also permitted to attend much of the <i>in camera</i> proceedings provided they agreed to be bound by confidentiality and left their notes with the court at the end of the day. This means that should the reason for the secrecy be lifted the media will be able to report what happened behind closed doors. But this has not happened and the issue is being challenged by newspaper groups. 	
<p>Scottish and Northern Ireland differences and issues</p> <ol style="list-style-type: none"> 1. Scotland and Northern Ireland have separate legal systems and the Scottish jurisdiction is substantially different because the country kept its own system after constitutional union in 1707. 2. Most restrictions on the media are similar- for example the protection of children and sexual offence complainants, the protection of trial by jury through media contempt law, and libel, though Scottish libel law is much more different. 3. Things to watch out for: If you're a broadcaster or publisher and distribute the same edition between England & Wales throughout Scotland and Northern Ireland, you need to be careful and conscious that: 4. Media contempt law in Scotland has been traditionally much more severely applied. 5. Publication of the photographs of accused people, unless they are well known public figures and celebrities, is usually contempt until the issue of formal dock identification is resolved during the trial proper. 6. Anonymity for youths in criminal courts in Scotland is now 17 and under and the same as in England and Wales. In civil and family proceedings, the same anonymity relating to people under 18 that applies in England also applies in Scotland. 7. Injunctions granted in the London courts do not apply in Scotland- a separate process to obtain what is known as an interdiction is required. 8. It is a criminal offence in Northern Ireland to publish anything leading to the identification of anyone on a jury or jury panel. 9. In Northern Ireland courts are more willing to grant anonymity to criminal defendants if there's a risk to life through sectarian vigilante attacks. 10. The reforming 2013 Defamation Act at present will not apply in Northern Ireland. 	<p>http://www.youtube.com/watch?v=P_wqCS4XU_wc</p>

<p>11. At present only the new qualified privilege defence for a peer-reviewed statement in scientific or academic journal applies in Scotland. The new 'having a reasonable belief in public interest defence' in the context of editorial judgment set out in the 2013 Defamation Act does not apply in Scotland, but the responsible journalism defence still applies and this is informed by the leading authorities of Reynolds 1999, Jameel 2006 and Flood in 2012. The Scottish Law Commission has recommended that defamation law mirrors that of England with one year to bring an action and a public interest defence set out in statute law. See: https://www.scotlawcom.gov.uk/files/1615/1316/5504/News_Release_-_Report_on_Defamation_Report_No_248.pdf</p> <p>12. Other reforms include abolishing the right to sue where a defamatory statement is made only to the person who is the subject of it and no-one else; where a statement has not caused serious harm to reputation there should be no right to sue; there should be a new 'single publication' rule- this means that the time limit for bringing a claim will not start afresh each time the same statement is downloaded by a new search on the internet.</p> <p>13. The judiciary in Northern Ireland and Scotland have traditionally been more sensitive to vituperative criticism. There is a more recent history of extreme communication about judges that are not based on facts in theory attracting criminal contempt consideration- it is known as scandalizing a judge. However, any resurrection of this old law would now be regarded as socially anachronistic. However, defamatory attacks on judges have attracted libel actions. Judges in the UK do sue, and there is an acute risk that abuse of judges that crosses the line into an inaccurate attack on reputation or 'hate speech' will attract some kind of legal consequence. Section 33 of the 2013 Crime & Courts Act abolished scandalizing judges as contempt of court in England and Wales.</p>	
<p>Social Media/Online/Blogging- the media law risks are the same and sometimes greater. Good reasons why in professional journalism there is little margin for error and you cannot afford to make mistakes.</p> <ol style="list-style-type: none"> 1. Tweets, re-tweets, blogs, Facebook, Instagram images or digital video, YouTube, Vimeo, messaging & 'status' notices and emails 'copied' and 'distributed' to more than a second party i.e. beyond the traditional single mail correspondent can be libelous and represent publications in terms of English law. The old rule was the letter seen by one person was not a libel publication unless opened by your butler or secretary. Bear in mind that libel in Scotland includes a damage to reputation communication to one person only; 2. In this country (England & Wales) libel is a civil law issue where the burden of proof is on the defendant, not claimant. English libel is an emotional civil wrong and damage to reputation, is presumed not objectively measured, construction of meaning in your communication has nothing to do with your intention, and is usually assessed by the most negative perception and by the most sensitive disposition; 3. Litigation is pursued by a privatised profit led legal profession that operates with very high costs, reward fees for success, and high after the event insurance premiums collected from the losing side. Changes to the legal costs regime for defamation and privacy actions have still not been implemented. If you are not a micro-business (Turning over more than £2 million and with more than 10 employees and did not join the proposed Royal Charter backed independent regulation scheme, you could face punitive damages as well. 4. Legal fees charged by English media lawyers have been researched and surveyed as being in the region of well over 100 times that charged in European 	<p>https://soundcloud.com/comparativemedialaw/o-you-want-to-publish-in-the</p>

countries. Damages awarded and agreed are generally seen in Europe as disproportionate, but in this country lawyers think they are fair and justly remedying;

5. All 'social media' communications are liable to other media law infringements and these include criminal offences. The most serious risk is contempt of court and breaching reporting restrictions that are, like libel, among the most severe in the western world;
6. Do not comment on any ongoing legal case (civil or criminal) after arrests or warrant for arrests have been issued or litigation is clearly ongoing. As an individual, you are unlikely to be aware of any special and additional reporting restrictions, many of which go beyond the intention of initial legislation. The legal system shows no sign of compassion or interest in your 'ignorance of the law' or indeed that you were not directly informed or had knowledge of the restriction. It will be assumed that you should have shown 'good faith' in finding out.
7. You do not even have to name people to get into trouble or even explicitly state or repeat an allegation. The House of Commons Speaker's wife, Sally Bercow, was successfully sued for libel for one tweet when she asked why a former Tory politician was 'trending' and added 'innocent face.' This was deemed to be libel by jigsaw identification/implication because allegations of child abuse had been broadcast by the BBC and on the Internet somebody the BBC did not name was being identified in blogs and social media.
8. It is a criminal offence in Britain to name teachers accused of committing crimes against their pupils, until charged by the police. Anything you say that could lead to somebody identifying a sexual offence complainant is also a criminal offence.
9. Be very cautious about even reporting or repeating accounts or references to legal cases. If you have not been trained professionally as a journalist and are without qualifications (unseen and rigorous examinations) can you be confident that you know what you are doing? Would you know how you can guarantee fair, accurate and contemporaneous representation? Do you know what is and what is not a 'substantial risk of serious prejudice' and 'impeding the administration of justice?'
10. What was in the public domain and not subject to a reporting restriction last week or yesterday may not be the case today or tomorrow, and you may not know about it. The English legal system sometimes somersaults between identification and anonymity; for example, in the search for missing youths who could be the victims of sexual offences. What is public knowledge yesterday, may be contempt of court and a serious criminal offence today.
11. Communications on electronic networks (Twitter & Internet) make you liable under section 127 of the 2003 Communications Act to criminal prosecution for messages that are 'grossly offensive or of an indecent, obscene or menacing character.' Up to 6 months imprisonment and fine of £5,000. In 2011, over 1,200 people were prosecuted under this law. Examples have included tweeting jokes at airports that have been misunderstood. What you think is a strong opinion could be seen as 'grossly offensive' by the police, CPS and DPP.
12. Section 127 can also be used for 'message stalking' that you might regard as protesting or a campaign if it can be proved that your electronic utterances are 'for the purpose of causing annoyance, inconvenience or needless anxiety to another.'
13. And if you thought that was all, you're wrong. There's Section 1 of the Malicious Communications Act 1988 that applies to old mail as well as electronic communication and makes it a criminal offence (same penalties as above) to

'threaten', message indecently, grossly offensively, or with false and known or believed to be false information on part of sender.

14. In 2013 the DPP finalized guidelines on when it is not in the public interest to prosecute you. Prosecutions are likely if social media communication contains 'a credible threat of violence, a targeted campaign of harassment against an individual or which breaches court orders.' The 'grossly offensive' category is expected to be reserved for racial/gendered orientation or hate crime abuse.

See:

http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/index.html

15. The 'Protection of Freedoms Act 2012' extended the range of behaviour that can constitute 'criminal stalking' in the 1997 Protection from Harassment Act, so the risk of being arrested for unreasonable, threatening and the menacing targeting of somebody you disagree with goes up.
16. There are only a few special privilege and public interest defences in relation to these media law infractions. This is when allegations are made in public meetings, during court proceedings, were published in an academic or scientific journal, or if you had a reasonable belief your publication was in the public interest. But malice on your part will probably defeat them. Malice means deliberately setting out to harm somebody usually to an unlawful extent.
17. Most media law crimes are strict liability, with construction of meaning by subjective interpretation of alleged victim or objective interpretation by judges. (observed by sociologists as being majority male, white, privately and Oxbridge educated and operating as a self-perpetuating elite.) The size of audience (i.e. how many Twitter followers you have and your Facebook privacy setting) internet site visitors, readers of your newspaper, listeners and viewers to your broadcasting station will be mitigation on damages and criminal penalty, but not a defence. If defamatory publication has been moderated e.g. actually checked prior to going live, this makes it more likely you will be successfully sued.
18. In theory, there may be defences for what you do, but the power of the state/private claimant and their lawyers' costs are so great, 'the chilling effect' (in the USA it is called SLAPP- strategic lawsuits against public participation) means it is easier, less risky, and cheaper to surrender, settle and apologise for trying to tell the truth. (well what you think is the truth). The alternative is to remain silent- generally seen as self-censorship and compliance in a climate of fear.
19. In England, where the legal profession is well over 90% privatised and there is less eligibility for legal aid than at any time since the Second World War, if you were courageous (and/or foolish?) enough to defend and represent yourself, Citizens Advice Bureaux are over-stretched and if you are lucky you might have volunteer pro bono lawyers to advise you. (most of whom will be students or the newly qualified.)

United States Society of Professional Journalists Code of Practice 2014

See: <https://www.spj.org/ethicscode.asp>

Preamble

Members of the Society of Professional Journalists believe that public enlightenment is the forerunner of justice and the foundation of democracy. Ethical journalism strives to ensure the free exchange of information that is accurate, fair and thorough. An ethical journalist acts with integrity.

The Society declares these four principles as the foundation of ethical journalism and encourages their use in its practice by all people in all media.

Seek Truth and Report It

Ethical journalism should be accurate and fair. Journalists should be honest and courageous in gathering, reporting and interpreting information.

Journalists should:

- Take responsibility for the accuracy of their work. Verify information before releasing it. Use original sources whenever possible.
- Remember that neither speed nor format excuses inaccuracy.
- Provide context. Take special care not to misrepresent or oversimplify in promoting, previewing or summarizing a story.
- Gather, update and correct information throughout the life of a news story.
- Be cautious when making promises, but keep the promises they make.
- Identify sources clearly. The public is entitled to as much information as possible to judge the reliability and motivations of sources.
- Consider sources' motives before promising anonymity. Reserve anonymity for sources who may face danger, retribution or other harm, and have information that cannot be obtained elsewhere. Explain why anonymity was granted.
- Diligently seek subjects of news coverage to allow them to respond to criticism or allegations of wrongdoing.
- Avoid undercover or other surreptitious methods of gathering information unless traditional, open methods will not yield information vital to the public.
- Be vigilant and courageous about holding those with power accountable. Give voice to the voiceless.
- Support the open and civil exchange of views, even views they find repugnant.
- Recognize a special obligation to serve as watchdogs over public affairs and government. Seek to ensure that the public's business is conducted in the open, and that public records are open to all.
- Provide access to source material when it is relevant and appropriate.
- Boldly tell the story of the diversity and magnitude of the human experience. Seek sources whose voices we seldom hear.
- Avoid stereotyping. Journalists should examine the ways their values and experiences may shape their reporting.
- Label advocacy and commentary.
- Never deliberately distort facts or context, including visual information. Clearly label illustrations and re-enactments.
- Never plagiarize. Always attribute.

Minimize Harm

Ethical journalism treats sources, subjects, colleagues and members of the public as human beings deserving of respect.

Journalists should:

- Balance the public's need for information against potential harm or discomfort. Pursuit of the news is not a license for arrogance or undue intrusiveness.
- Show compassion for those who may be affected by news coverage. Use heightened sensitivity when dealing with juveniles, victims of sex crimes, and sources or subjects who are inexperienced or unable to give consent. Consider cultural differences in approach and treatment.

- Recognize that legal access to information differs from an ethical justification to publish or broadcast.
- Realize that private people have a greater right to control information about themselves than public figures and others who seek power, influence or attention. Weigh the consequences of publishing or broadcasting personal information.
- Avoid pandering to lurid curiosity, even if others do.
- Balance a suspect's right to a fair trial with the public's right to know. Consider the implications of identifying criminal suspects before they face legal charges.
- Consider the long-term implications of the extended reach and permanence of publication. Provide updated and more complete information as appropriate.

Act Independently

The highest and primary obligation of ethical journalism is to serve the public.

Journalists should:

- Avoid conflicts of interest, real or perceived. Disclose unavoidable conflicts.
- Refuse gifts, favors, fees, free travel and special treatment, and avoid political and other outside activities that may compromise integrity or impartiality, or may damage credibility.
- Be wary of sources offering information for favors or money; do not pay for access to news. Identify content provided by outside sources, whether paid or not.
- Deny favored treatment to advertisers, donors or any other special interests, and resist internal and external pressure to influence coverage.
- Distinguish news from advertising and shun hybrids that blur the lines between the two. Prominently label sponsored content.

Be Accountable and Transparent

Ethical journalism means taking responsibility for one's work and explaining one's decisions to the public.

Journalists should:

- Explain ethical choices and processes to audiences. Encourage a civil dialogue with the public about journalistic practices, coverage and news content.
- Respond quickly to questions about accuracy, clarity and fairness.
- Acknowledge mistakes and correct them promptly and prominently. Explain corrections and clarifications carefully and clearly.
- Expose unethical conduct in journalism, including within their organizations.
- Abide by the same high standards they expect of others.

The SPJ Code of Ethics is a statement of abiding principles supported by additional explanations and position papers that address changing journalistic practices. It is not a set of rules, rather a guide that encourages all who engage in journalism to take responsibility for the information they provide, regardless of medium. The code should be read as a whole; individual principles should not be taken out of context. It is not, nor can it be under the First Amendment, legally enforceable.

Sigma Delta Chi's first Code of Ethics was borrowed from the American Society of Newspaper Editors in 1926. In 1973, Sigma Delta Chi wrote its own code, which was revised in 1984, 1987, 1996 and 2014.

The US Radio, Television, Digital News Association Code of Ethics 2015

Guiding Principles:

Journalism's obligation is to the public. Journalism places the public's interests ahead of commercial, political and personal interests. Journalism empowers viewers, listeners and readers to make more informed decisions for themselves; it does not tell people what to believe or how to feel.

Ethical decision-making should occur at every step of the journalistic process, including story selection, news-gathering, production, presentation and delivery. Practitioners of ethical journalism seek diverse and even opposing opinions in order to reach better conclusions that can be clearly explained and effectively defended or, when appropriate, revisited and revised. Ethical decision-making – like writing, photography, design or anchoring – requires skills that improve with study, diligence and practice.

The RTDNA Code of Ethics does not dictate what journalists should do in every ethical predicament; rather it offers resources to help journalists make better ethical decisions – on and off the job – for themselves and for the communities they serve.

Journalism is distinguished from other forms of content by these guiding principles:

—□ **Truth and accuracy above all**

o The facts should get in the way of a good story. Journalism requires more than merely reporting remarks, claims or comments. Journalism verifies, provides relevant context, tells the rest of the story and acknowledges the absence of important additional information.

o For every story of significance, there are always more than two sides. While they may not all fit into every account, responsible reporting is clear about what it omits, as well as what it includes.

o Scarce resources, deadline pressure and relentless competition do not excuse cutting corners factually or oversimplifying complex issues.

o “Trending,” “going viral” or “exploding on social media” may increase urgency, but these phenomena only heighten the need for strict standards of accuracy.

o Facts change over time. Responsible reporting includes updating stories and amending archival versions to make them more accurate and to avoid misinforming those who, through search, stumble upon outdated material.

o Deception in newsgathering, including surreptitious recording, conflicts with journalism's commitment to truth. Similarly, anonymity of sources deprives the audience of important, relevant information. Staging, dramatization and other alterations – even when labeled as such – can confuse or fool viewers, listeners and readers. These tactics are justified only when stories of great significance cannot be adequately told without distortion, and when any creative liberties taken are clearly explained.

o Journalism challenges assumptions, rejects stereotypes and illuminates – even where it cannot eliminate – ignorance.

o Ethical journalism resists false dichotomies – either/or, always/never, black/white thinking – and considers a range of alternatives between the extremes.

—□ **Independence and transparency**

o Editorial independence may be a more ambitious goal today than ever before. Media companies, even if not-for-profit, have commercial, competitive and other interests – both internal and external -- from which the journalists they employ cannot be entirely shielded. Still, independence from influences that conflict with public interest remains an essential ideal

of journalism. Transparency provides the public with the means to assess credibility and to determine who deserves trust.

o Acknowledging sponsor-provided content, commercial concerns or political relationships is essential, but transparency alone is not adequate. It does not entitle journalists to lower their standards of fairness or truth.

o Disclosure, while critical, does not justify the exclusion of perspectives and information that are important to the audience's understanding of issues.

o Journalism's proud tradition of holding the powerful accountable provides no exception for powerful journalists or the powerful organizations that employ them. To profit from reporting on the activities of others while operating in secrecy is hypocrisy.

o Effectively explaining editorial decisions and processes does not mean making excuses. Transparency requires reflection, reconsideration and honest openness to the possibility that an action, however well intended, was wrong.

o Ethical journalism requires owning errors, correcting them promptly and giving corrections as much prominence as the error itself had.

o Commercial endorsements are incompatible with journalism because they compromise credibility. In journalism, content is gathered, selected and produced in the best interests of viewers, listeners and readers – not in the interests of somebody who paid to have a product or position promoted and associated with a familiar face, voice or name.

o Similarly, political activity and active advocacy can undercut the real or perceived independence of those who practice journalism. Journalists do not give up the rights of citizenship, but their public exercise of those rights can call into question their impartiality.

o The acceptance of gifts or special treatment of any kind not available to the general public creates conflicts of interest and erodes independence. This does not include the access to events or areas traditionally granted to working journalists in order to facilitate their coverage. It does include "professional courtesy" admission, discounts and "freebies" provided to journalists by those who might someday be the subject of coverage. Such goods and services are often offered as enticements to report favorably on the giver or rewards for doing so; even where that is not the intent, it is the reasonable perception of a justifiably suspicious public.

o Commercial and political activities, as well as the acceptance of gifts or special treatment, cause harm even when the journalists involved are "off duty" or "on their own time."

o Attribution is essential. It adds important information that helps the audience evaluate content and it acknowledges those who contribute to coverage. Using someone else's work without attribution or permission is plagiarism.

—□ **Accountability for consequences**

o Journalism accepts responsibility, articulates its reasons and opens its processes to public scrutiny.

o Journalism provides enormous benefits to self-governing societies. In the process, it can create inconvenience, discomfort and even distress. Minimizing harm, particularly to vulnerable individuals, should be a consideration in every editorial and ethical decision.

o Responsible reporting means considering the consequences of both the newsgathering – even if the information is never made public – and of the material's potential dissemination. Certain stakeholders deserve special consideration; these include children, victims, vulnerable adults and others inexperienced with American media.

o Preserving privacy and protecting the right to a fair trial are not the primary mission of journalism; still, these critical concerns deserve consideration and to be balanced against the importance or urgency of reporting.

o The right to broadcast, publish or otherwise share information does not mean it is always right to do so. However, journalism's obligation is to pursue truth and report, not withhold it. Shying away from difficult cases is not necessarily more ethical than taking on the challenge of reporting them. Leaving tough or sensitive stories to non-journalists can be a disservice to the public.

A growing collection of coverage guidelines for use on a range of ethical issues is available on the RTDNA website – <http://www.rtdna.org>.

Revised Code of Ethics adopted June 11, 2015

- See more at: http://www.rtdna.org/content/rtdna_code_of_ethics#sthash.iNfkjRoR.dpuf

This is a very simple outline of how to survive the law in English journalism and media communication. For more information read: UK Media Law Pocket Book (2013- new edition due 2019) and Comparative Media Law & Ethics (2009- new edition due 2019) by Tim Crook. Both books have companion websites that are in the process of being updated. See:

<https://ukmedialawpocketbook.wordpress.com>

<https://2ndeditioncomparativemedialawandethics.wordpress.com>

I hope it does not need saying that this guide has been written by a human being with all the fallibilities that that implies. I take full responsibility for any mistakes and omissions, and offer advance apologies should these become obvious to the reader. At the same time, do please email me any corrections, mistakes and key omissions you think are needed and I will do my very best to correct and amend.

My email address is: t.crook@gold.ac.uk

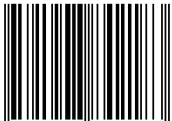
The Broadcast Journalism Training Council is a vital body that does excellent work liaising and supporting the training and educational relationship in broadcast journalism between universities and the industry. I am very grateful for this opportunity to write and make available this guide. And I wish all readers a fulfilling and enjoyable career in broadcast and multimedia journalism.

Sincerely and respectfully,

Tim Crook. Goldsmiths, University of London, September 20th 2018.

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The UK Supreme Court in Parliament Square
Image: Tim Crook.