

## CONTEMPT OF COURT AND THE NEED FOR LEGISLATION

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### I. INTRODUCTION

The purpose of this article is to consider whether the law of contempt of court is sufficiently clear and unambiguous to operate effectively in this jurisdiction. In particular, it will be argued that there is an urgent need for legislative intervention. The basic principles of the doctrine of contempt and the leading cases have been exhaustively set out elsewhere and will not be repeated here.<sup>1</sup> What this article seeks to do is to identify some of the problems that exist with the law as currently applied in Irish courts.

The obsessive zeal with which litigants may pursue their imagined grievances and the inventive remedies that are available to the courts to utilise against them is well illustrated by the recent English case of *Attorney General v. Ebert*.<sup>2</sup> The Attorney General sought an order, *inter alia*, barring the respondent from entering the Royal Courts of Justice without permission. The respondent, one Mr. Ebert, was a bankrupt who had been declared a vexatious litigant. In the course of about three and a half years Mr. Ebert had made at least 151 applications to the court for permission to issue fresh proceedings or applications in existing proceedings. On up to ten occasions he had been removed from the court by security guards. He had accused one judge of being guilty of fraud and blackmail. He had visited bankruptcy chambers and said that if the registrar did not break off what he was doing and hear an application made by him without notice he would call the police. On many occasions Mr. Ebert had made requests of court staff that an application brought by him be heard immediately. He had also written many letters to Neuberger J. who had heard nearly all of his applications, making serious allegations against the judge in many of the letters. These allegations

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<sup>1</sup> See in particular the Law Reform Commission's excellent *Consultation Paper on Contempt of Court* (L.R.C. CP 4 - 1991).

<sup>2</sup> [2002] 2 All E.R. 789 (Q.B.).

incorporated such diverse matters as conspiracy, high treason, perjury and crimes against humanity. On at least four occasions Mr. Ebert had sat in court in cases before Neuberger J. which did not involve him. He had been accompanied by his wife on some of these excursions. He had also posted a notice outside the Royal Courts of Justice making allegations against judges. The final incident that was relied on by the Attorney General occurred when Mr. Ebert was discovered by the court's security staff holding a barrister who had appeared against him on the basis that the barrister had obtained a possession order by fraud and that Mr Ebert was entitled to make a citizen's arrest for theft. Unabashed, Mr. Ebert informed the court that while outside the precincts of the court he was entitled to effect a citizen's arrest on anyone, including Neuberger J.

Having carefully examined this extraordinary history, the High Court granted the order that the Attorney General sought. This was despite Mr. Ebert's complaint that it was quite unreasonable to prevent him from using the library or the coffee shop or the toilets at the Royal Courts of Justice. Brooke L.J. stated that:

Judges have to have broad shoulders, and the relevance of [the accusations made by the respondent against Neuberger J.] goes to the contention that Mr Ebert is now so completely obsessed by this litigation that he does not cavil about making allegations of corruption, high treason and crimes against humanity against the judge who has been handling his case with remarkable patience and sensitivity. He also published a notice outside the Royal Courts of Justice ... This illustrates how Mr Ebert's sense of perspective is now seriously out of kilter.<sup>3</sup>

What makes the decision an appropriate one with which to open this discussion is the fact that the Court recognised that the remedy being sought was in effect an alternative to what would otherwise be a clear case of someone who could be dealt with by the law of contempt of court. Thus, Brooke L.J. stated that:

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<sup>3</sup> [2002] 2 All E.R. 789 at 796-797 (Q.B.).

We also consider that Mr Ebert's past conduct is so exceptional that it is more appropriate that he be restrained by injunction than by the process of committal for contempt for individual acts, a process which we would regard as completely pointless in the context of this case.<sup>4</sup>

Thus, the case is authority for the view that the courts are entitled to construct creative remedies as an alternative to simply imprisoning someone for contempt of court.

## II. THE INTERESTS AT STAKE

Most criminal contempt of court cases involve a balance between the right of a fair trial on the one hand and the right of freedom of expression on the other. Often the speech value being protected is low. Thus, the tabloids which published sensationalist stories about the Catherine Nevin murder trial were simply engaged in speech designed to increase circulation and boost profits. Other cases are not so clear. One thinks of the case in England where a tabloid newspaper published pictures of five men under the headline "Murderers". Three of the men pictured had previously been acquitted of the murder of teenager Stephen Lawrence who had been killed in what was believed to have been a racially motivated attack. Many persons felt that the criminal justice system had completely failed in the case. Indeed since the tabloid article appeared the traditional protection against double jeopardy has been altered in England, apparently for the specific purpose of enabling some of the five persons pictured to be tried a second time for the murder. Thus the newspaper that published the pictures could validly claim that it had been responsible for pointing out defects in the criminal law and in initiating public debate and, ultimately, law reform. The courts cannot ignore the fact that we live in an age where much of the pressure for criminal law reform comes from the media rather than from the Oireachtas. In a sense the justification for contempt in such

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<sup>4</sup> [2002] 2 All E.R. 789 at 799 (Q.B.).

circumstances is somewhat circular in nature. The only way that we can find out what effect the media really has on the deliberations of jurors would be to ask them. But of course to question jurors about how they had reached their verdict would of itself probably amount to contempt of court. In other words, the only way to analyse contempt is to commit contempt. Whilst this has a certain ring of scientific rigour about it, it is hardly a satisfactory basis for maintaining the present uncertain state of the law.

### III. VAGUENESS

Before it is permissible to imprison someone for contempt one would have thought that the law pursuant to which that is occurring would have to be clear and well-defined. It is therefore discouraging to note that contempt of court is an area where almost no two lawyers or commentators can agree on many of the most fundamental aspects. The areas which are unclear include such core matters as:

- i) The *actus reus*;
- ii) The *mens rea*;
- iii) The mode of trial;
- iv) The penalty that can be imposed; and
- v) Which courts have jurisdiction to impose this penalty.

The question that arises is whether, in the absence of any clear guidelines (for example a Contempt of Court Act) it is legitimate to imprison anyone for contempt. Defenders of the contempt of court jurisdiction would point to the fact that it is difficult to lay down hard and fast rules in circumstances where the types of contempt that may be committed are unpredictable. Thus, Johnson J. has stated that:

The tricks and turns by which justice may be obstructed or perverted are so numerous and varied, and the ingenuity of mankind is so constant, that it is impossible to define in a comprehensive way, or rather to delimit,

the circumstances under which a contempt of court by the obstruction of justice may be committed, and no judge or court has ever presumed to lay down any such limitation.<sup>5</sup>

In response it can be stated that the means in which persons will commit criminal offences is equally at large and yet no-one would suggest that the content of the criminal law should be left solely to the discretion of judges. In *Kelly v. O'Neill*<sup>6</sup> Denham J. recognised the need for legislative intervention:

In many other jurisdictions the law of contempt of court has been developed by legislation. There is benefit in the legislature addressing such matters of policy so important in a democratic society. However, in Ireland this has not occurred. The law in the United Kingdom has been supplemented by legislation amending the common law.<sup>7</sup>

#### IV. EXTRA-TERRITORIALITY AND NEW TECHNOLOGIES

One of the difficulties about the law of contempt of court is predicting how it will adapt to new technologies. For example, it is clear that if I conduct an intemperate attack on an Irish judge in an Irish Sunday newspaper I may be guilty of contempt. But what if I attack a judge of the European Court of Human Rights in the same paper? Or what if I sit in an Internet café in New York and post an attack on an Irish judge on the web so that it can be read by persons in Ireland? Am I guilty of contempt in this jurisdiction? I believe there was a case in England a couple of years ago where a person posted an allegation of bias against an English judge on a U.S. web site. The case was easy to resolve as the person has previously given an undertaking to the English Court in question not to scandalise it.

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<sup>5</sup> *In re M.M. and H.M.* [1933] I.R. 299 at 341 (S.C.).

<sup>6</sup> Supreme Court, unreported, 2 December 1999.

<sup>7</sup> Supreme Court, unreported, 2 December 1999, at pp. 18-19 of the unreported judgment.

Thus, it was possible to resolve the proceedings on the narrow ground of the person's breach of his undertaking.

#### V. CIVIL CONTEMPT VERSUS CRIMINAL CONTEMPT

Few Irish cases have attempted to distinguish between civil and criminal contempt.<sup>8</sup> However, an examination of what case law exists suggests that the basic elements of criminal contempt are:

- i) It consists of behaviour calculated to prejudice the due course of justice that is criminal e.g. contempt in face of the court, acts calculated to prejudice the due administration of justice, disobedience to a writ of *habeas corpus* by the person to whom it is directed.
- ii) The sanction is punitive and consists of an unlimited fine and/or imprisonment.

The basic elements of civil contempt are:

- i) It consists of disobedience to an order of the court by a party to the proceedings in which the court generally has no interest to interfere unless moved by the party for whose benefit the order was made.
- ii) The sanction is coercive and consists of imprisonment until such time as the order is complied with or waived.

Attempts to neatly categorise the two forms of contempt have been unsuccessful. The modern view appears to be that behaviour may amount to civil or criminal contempt depending on the circumstances surrounding the contempt. In addition, the appropriate sanction to be imposed is to be determined by the objective to be achieved. Thus there can be a punitive dimension to civil contempt of court.

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<sup>8</sup> A notable exception being *Keegan v. de Burca* [1973] I.R. 223 at 227 (S.C.) *per* Ó Dálaigh C.J.

In *Flood v. Lawlor*<sup>9</sup> Keane C.J. appeared to reject any rigid analysis of the boundary between civil and criminal contempt and stated that:

... while ... there may be some room for a difference of view as to whether a sentence imposed in respect of civil contempt is exclusively – as distinct from primarily – coercive in nature in civil proceedings generally, I am satisfied that where, as here, the proceedings are inquisitorial in their nature and the legislature had expressly empowered the High Court to secure compliance with the orders of the tribunal, it cannot be said that a sentence imposed in respect of a contumelious disregard of the orders of the tribunal and the High Court is coercive only in its nature. The machinery available for dealing with contempt of this nature exists not simply to advance the private, although legitimate, interests of a litigant: it is there to advance the public interest in the proper and expeditious investigation of the matters within the remit of the tribunal and so as to ensure that, not merely the appellant in this case, but all persons who are required by law to give evidence, whether by way of oral testimony or in documentary form, to the tribunal comply with their obligations fully and without qualification.<sup>10</sup>

## VI. JURISDICTION

One of the main problems facing the law of contempt in this jurisdiction is identifying which courts have jurisdiction in respect of it. There is no doubt that the High Court has full jurisdiction over civil and criminal contempt. But the position is not so clear as regards the Circuit Court and the District Court. One view is that because the High Court has full jurisdiction to deal with the issue,

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<sup>9</sup> Supreme Court, unreported, 12 December 2001. For a good discussion of the case see Murphy, C., “Contempt for Failure to Make Discovery following *The Sole Member v. Lawlor*” (2002) 7(3) *Bar Review*, 160.

<sup>10</sup> Supreme Court, unreported, 12 December 2001, at pp. 47-48 of the unreported judgment.

that excludes the inferior courts (in the same vein people argue that as the High Court has jurisdiction to grant judicial review remedies, inferior courts cannot grant such things as a permanent stay on criminal proceedings). Commentators and the Law Reform Commission have left the question open.

In fact the question is even more complicated than it may seem. Suppose the Circuit Court hears a *de novo* appeal from the District Court in a civil matter. During the course of the appeal a breach of the District Court order is committed by one of the litigants. The question as to which court has jurisdiction in respect of such contempt throws up three possible answers:

- i) The District Court – this is the court which issued the order and therefore it has jurisdiction where the order is breached.
- ii) The Circuit Court – this is the court which has seisin of the order and its appeal process is being interfered with.
- iii) The High Court – by virtue of its general supervisory jurisdiction this is the court which should determine the contempt.

This is just one of the areas that legislation on contempt could usefully clarify.

## VII. THE *MENS REA*

The *mens rea* required for contempt is far from clear. The current position may be tentatively described as follows:

- i) Contempt in the face of the court – there are few authorities and no clear *mens rea*.
- ii) Scandalising the court – the authorities here are divided.
- iii) *Sub judice* – the test is whether the conduct was calculated to interfere with pending proceedings.
- iv) Civil contempt – this appears to be a form of strict



liability.

This raises the further question as to whether it is ever permissible to imprison someone either where the mens rea of the 'offence' is unclear or where no *mens rea* is required. Again, a Contempt of Court Act could provide some much needed clarity here.

#### VIII. THE MODE OF TRIAL

The correct mode of trial for a contempt of court case is far from clear. The present position in this jurisdiction appears to be that there is no requirement for a jury, even in a criminal contempt, where there are no facts in dispute and the contempt is one that attracts strict liability.<sup>11</sup> A number of criticisms can be made about this position:

- i) If the aim of the law of criminal contempt is to protect the integrity of the courts in the opinion of the public, why can't the public, in the form of a jury determine this?
- ii) How can one ever say that the facts are not in dispute in a trial? Whilst they may seem clear to the prosecution, the accused person or more importantly the jury might not agree with this at the end of having heard all of the evidence.
- iii) Trial by judge alone avoids the possibility of jury nullification. In other words in a case where the elements of the offence are made out the jury are deprived of the opportunity to indicate their disapproval of the conduct the prosecution or the state of the law by bringing in a verdict of acquittal. Whilst many judges and commentators would strongly disapprove of jury nullification it does represent a means by which the public can comment on the state of the law.

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<sup>11</sup> See *De Rossa v. Independent Newspapers* [1998] 2 I.L.R.M. 293 (H.C.).

## IX. PREJUDICIAL PRESS COMMENT ON PENDING CASES

The modern view is that media comment will rarely amount to a contempt of court unless the publication was plainly intended to have that effect or where it is likely to prejudice a jury trial. It will be particularly hard to establish this form of contempt where the trial will be by judge only. In *Desmond v. Glackin (No. 1)*<sup>12</sup> the public comments on radio of the Minister for Industry and Commerce concerning a matter of public controversy were said to have prejudiced judicial review proceedings which were then pending. O’Hanlon J. stated “... it is generally considered improper and unlawful to publish material which prejudices issues for determination by the court in pending proceedings ...”.<sup>13</sup> O’Hanlon J. was unimpressed with the claim of contempt in the case before him and stated that he did not consider that the interview made “it difficult for a judge of the High Court ... to decide in an objective and unbiased manner the legal issues which arise for consideration in these proceedings”.<sup>14</sup>

## X. SCANDALISING THE COURT

The contempt of scandalising the court occurs where there are words or conduct tending to destroy public confidence in the court against which they are directed. In the *State (DPP) v. Walsh*<sup>15</sup> it was held that such contempt does not occur where there is mere criticism or emphatic disagreement with what has been decided by a court. However, wild and baseless allegations of corruption or malpractice so as to hold the judges up to “the odium of the people as actors playing a sinister part in a caricature of justice”<sup>16</sup> will amount to contempt. A suggestion that the Special Criminal Court had so abused the rules of evidence as to make the court akin to a sentencing tribunal and that it had no judicial independence was held to be contempt.

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<sup>12</sup> [1992] I.L.R.M. 490 (H.C.).

<sup>13</sup> [1992] I.L.R.M. 490 at 506 (H.C.).

<sup>14</sup> [1992] I.L.R.M. 490 at 505 (H.C.).

<sup>15</sup> [1981] I.R. 412 (S.C.).

<sup>16</sup> *The Attorney General v. Connolly* [1947] I.R. 213 at 220 (H.C.) *per* Gavan Duffy P.

<sup>17</sup> [1976] I.R. 388 (S.C.).

In *Re Hibernia National Review Ltd.*<sup>17</sup> a published insult to the Special Criminal Court by way of imputing predictability of conviction was held to be a contempt. One wonders if the courts in such cases could instead have viewed the offending articles as being an attack on the non-jury system of courts generally rather than an attack on the Special Criminal Court in respect of a specific case. Where a tabloid says that a judge is incompetent it is likely to be contempt. Where the same charge appears in an academic article it would be unlikely to be so held. One view is that this is because of the moderation of the language that is likely to be found in the latter article. However it is tempting to conclude that the real reason for the distinction lies in the fact that the former is likely to have a much larger circulation than the latter.<sup>18</sup>

#### XI. CONCLUSION

Although this paper has identified several areas of concern it should not be taken as suggesting that the law of contempt is in some kind of crisis of is unworkable. Far from it; it operates on a frequent basis in our courts without causing any outcry or concern. In addition, I am not aware of any instance where Ireland has been successfully brought before the European Court of Human Rights in respect of its contempt laws. Having said that, the absence of a Contempt of Court Act must be a matter in need of urgent reform given the existence of the uncertainties which are outlined in this article. There is no reason in principle why the doctrine cannot be made the subject of legislation. In fact it already is in the limited extent of the Offences Against the State Act, 1939 which makes it an offence to prevent or obstruct by violent obstruction or intimidation the exercise of any member of the judiciary of his or her functions.<sup>19</sup> The problem is that since 1939 the Oireachtas seems to have lost interest in contempt. The result of this failure to legislate is that an undue burden is placed on the judiciary when determining what to do and how to do it in contempt of courts cases.

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<sup>18</sup> I was once informed that academic articles are read on average by seven persons.

<sup>19</sup> Section 7 of the Offences Against the State Act, 1939.