Status:  Positive or Neutral Judicial Treatment

**ex parte British Broadcasting Corporation and eight other media organisations**

**Regina v F, D**

Case No: 201505340 B1

Court of Appeal (Criminal Division)

11 February 2016

**[2016] EWCA Crim 12**

**2016 WL 01253996**

Before: The President of the Queen's Bench Division ( Sir Brian Leveson ) The Vice President of the Court of Appeal (Criminal Division) Lady Justice Hallett ) and Lady Justice Sharp

Date: 11/02/2016

In the Matter of an Appeal Pursuant to S. 159 of the Criminal Justice Act 1988

On Appeal from the Crown Court at Teesside

Mr Justice Globe

T20147608

Hearing date: 26 January 2016

**Representation**

1. Andrew Caldecott Q.C. and Jude Bunting for the B.B.C. and other appellants.
2. Steven Kovats Q.C. and Nicholas Campbell Q.C. for the Crown.
3. Jamie Hill Q.C. for F.
4. John Elvidge Q.C. for D.

**Approved Judgment**

Sir Brian Leveson P:

1 It is beyond argument that members of the public have long held and expressed views about all aspects of the criminal trial process, including the guilt of those facing trial, the gravity of the offending and the appropriate sentence. In the privacy of their homes, or in social gatherings, expressions of such views are part of the discourse of life. What passes in such discussions does not in any way affect the trials about which comment is made and those who might be affected (such as jurors) are unlikely to be involved. In any event, all jurors receive a warning in every trial not to discuss the case they are trying outside their number or allow anyone else to discuss it with them. In that way, the integrity of the process is protected.

2 The world has now changed and observations which were previously communicated orally or had the most limited publication now appear on social media sites and are readily accessible by a potentially vast audience. In that regard, what is published can extend beyond the reach of the traditional media (whether newspaper or television). Everyone is bound by the common law of contempt, but, as regards the traditional media, in order to ensure the fairness of the trial and to protect those whom the law has considered deserving of protection, there are further real constraints on what can be reported: these are contained within the [Contempt of Court Act 1981](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I602C5F80E42311DAA7CF8F68F6EE57AB) (“the 1981 Act”). This case, for the first time, raises the issue of how critical fair trial protections can be extended to prevent or control communications on social media.

3 The case comes before this court by way of an appeal brought pursuant to [s. 159 of the Criminal Justice Act 1988](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I5CA49121E44B11DA8D70A0E70A78ED65) against an order under [s. 4(2)](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C334390E44A11DA8D70A0E70A78ED65) of the 1981 Act directed at the press and intended to control what has been described as vile social media comment posted on the Facebook pages of media organisations in a high profile and extremely difficult trial in which two young teenage girls are charged with murder. In the event, Globe J, the very experienced trial judge sitting in the Crown Court at Teesside, felt constrained to discharge the jury and order a retrial at a different venue creating considerable additional stress for the family of the victim, the witnesses, the defendants and their families and everyone else involved in the trial.

**The Facts**

4 Given the significance of the issues, the context requires an examination of the facts. On Tuesday 8 December 2014, the body of Angela Wrightson was found by her landlord. She was in her living room, covered in blood and naked from the waist down. It became clear that she had been the victim of a sustained and brutal assault: she had sustained over 100 injuries generated as a result of being struck in 12 separate locations with a variety of objects.

5 On 9 December, F (then 14 and now aged 15) and D (then 13 and now aged 14) were living in separate establishments in the care of their local authority, were arrested and shortly thereafter were charged with murder. On 11 December, the case was sent to the Crown Court where it came before the Recorder of Middlesbrough for case management. Given the ages of the defendants and the particular issues discussed, these hearings were dealt with sensitively and without much information about the circumstances of the alleged offence being mentioned.

6 One of the aspects of case management concerned the mental state of the defendants and a number of reports were obtained from psychiatrists, psychologists and from those with expertise as intermediaries. These covered the mental functioning and level of understanding of the defendants. In the event, both were assessed as fit to plead and stand trial. However, the reports also disclosed that the defendants had a low level of understanding. Their difficulties are such, that in addition to full legal representation, on the unusual facts of this case, they have been granted the assistance of an intermediary throughout the trial.

7 Given these pre-trial complications, arraignment did not take place until just before the jury was empanelled on Wednesday 1 July 2015 at Teesside Crown Court: both defendants pleaded not guilty to murder. Both accepted that they were present at the time of the alleged offence. F's case was that she did not intend to cause serious harm: consequently, she offered to plead guilty to manslaughter on the ground of lack of intent or, in the alternative, diminished responsibility. This proposed plea was not accepted by the prosecution on either basis. D denied that she had taken part in the assault or encouraged F to assault victim. As such, the trial proceeded against the defendants on murder.

8 By the end of the court day on 2 July, the defence had become aware of the fact that numerous adverse comments had been posted about the defendants by members of the public on the Facebook link to the Hartlepool Mail's reporting of the opening. The defence contended (and the prosecution and judge agreed) that many of these comments could properly be described as vile. Without giving further unwarranted prominence to them, they fell into one of three categories: there were those that were threatening to the accused, those which were derisive of their not guilty pleas, and those which were dismissive of the court process. The deputy editor of the Hartlepool Mail attended court on 3 July, where he informed the court that it was his newspaper's intention to remove the Facebook post and thereby also the comments but he made it clear that other media organisations were posting links to their reports on Facebook which were generating similar comments.

9 The responsibility of establishing the extent of what had been posted was given to the Corporate Communications Manager for Cleveland Police. Together with her department, she produced a document to the court containing over 500 comments to the links to reports of trial posted on the Facebook pages of the Hartlepool Mail, the Daily Mirror, the Sunderland Echo, Breaking News Teesside and Sky News. However, it is important to stress that no one suggests that the linked news reports by any of these media outlets were anything other than fair, accurate, and reasonable reporting: the problem was the extreme comments to these posts left by members of the public.

10 Because of these comments, on 3 July 2015, Globe J made an order, under [s. 45(4) of the Senior Courts Act 1981](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C6A3210E44A11DA8D70A0E70A78ED65) , addressed at media organisations reporting the trial which directed them to:

“1. Remove any posted comments on any media reports or facility to leave posted comments upon such reports from any website under their control that is publishing material relating to the trial.

2. Remove links from the said websites to any other websites (including Facebook and other social media networking organisations).

3. Prohibit the publication of posted comments on any media report of the trial on websites under their control.

4. Refrain from providing links from reports relating to the trial on those websites under their control to any other websites (including Facebook and other social networking organisations).

5. Refrain from issuing or forwarding tweets relating to the trial.”

11 On Monday 6 July, the prosecution and defence of F and D jointly made an application for the jury to be discharged on the ground that there was a real risk that the defendants could no longer have a fair trial at that time. Reflecting the view of leading counsel both for the defence and the prosecution, Mr Jamie Hill QC for F referred to the widespread discussion on social media, and in particular its nature, which in their submission was so prejudicial that the fairness of the trial was imperilled and there was a real risk of injustice to the accused.

12 Globe J had given the usual warnings to the jury at the beginning of the case about not researching the case online and being wary of the possibility of inaccurate reports of the case by the press, but he readily acknowledged (as recorded in his ruling of 9 November 2015 at [19]) that he had not foreseen the avalanche of public outrage recorded on social media in reaction to media reports. As a result, he agreed with counsel that it was impossible to continue with the trial because there was a real risk of injustice to the defendants and, accordingly, discharged the jury. A new trial was ordered at a different venue (the Crown Court at Leeds): it is now scheduled to start in February 2016.

13 On 7 July, Globe J received submissions from nine media organisations (the BBC, Guardian News and Media Ltd, Associated Newspapers Ltd. Times Newspapers Ltd, Express Newspapers Ltd, Independent Print Ltd, The Telegraph Media Group Ltd, Mirror Group Newspapers and Sky News to whom we shall collectively refer as “the media organisations”) along with a request from the local news outlets for more time to make representations. The nine media organisations argued that the court had no jurisdiction to make the order, that it was disproportionate and, of particular significance, it was unworkable. Globe J laconically observed:

“No alternative proposition is put forward to preserve the integrity of the trial process.”

14 Both prosecution and defence responded that no practical solution to the risk of prejudice created by the provision of a platform for public comment during the trial had been offered, and that if, as asserted on behalf of the media organisations, the wording of the order of 3 July was unworkable, there could be no clearer argument for issuing an order pursuant to [s. 4(2)](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C334390E44A11DA8D70A0E70A78ED65) of the 1981 Act. Globe J agreed and revisited the order that he had previously made and made an order in these terms:

“1. The order made under [s. 45(4) of the Senior Courts Act 1981](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C6A3210E44A11DA8D70A0E70A78ED65) on 3rd July 2015 be revoked.

2. Pursuant to [s.4(2) Contempt of Court Act 1981](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0BCD2EC0E44A11DA8D70A0E70A78ED65) and subject to the specific exception in paragraph 3, the publication of any report of these proceedings or any part of these proceedings in [ *sic* ] postponed until the return of the verdicts in relation to both defendants or further order of the court.

3. After discharge of the jury today, the following facts may be reported:

“The jury in the trial of two teenage girls charged with murdering a 39 year old woman has been discharged. All parties agreed to the proceedings at Teesside Crown Court following the death of Angela Wrightson being halted. Mr Justice Globe directed that the trial of the two girls will take place on a later date. Miss Wrightson was found dead in her home in Stephen Street, Hartlepool last December.””

15 It was open to those affected by this order to appeal it. Given that the judge was conscious of the limited time that had been available to deal with the matter, however, he gave leave to any person directly affected by the order to apply on 48 hours' notice to vary or discharge it, thereby reflecting the available guidance in relation to these matters and, analogously, the observations in [*A v BBC [2015] AC 588*](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I4CBAD7D0D6A811E3A123BC932BC70157) at [67]. As a result, on 8 July, the BBC wrote to Globe J on behalf of the nine media organisations and applied to him to revoke it.

16 This application was heard on 20 October, when it was argued that para. 2 of the order should be discharged. Subject to an offered undertaking, this would have had the effect of leaving in place no mechanism for protecting the integrity of the trial from adverse comment such as had led to the discharge of the first jury. In a comprehensive reserved ruling dated 9 November 2015, the judge accepted that none of the media organisations had published any of the comments which had been posted under the news reports or, as a consequence, breached the strict liability rule. He noted that the only undertaking that any was prepared to give was that the relevant organisation would comply with any request made during the trial for a prejudicial comment which had been posted to be hidden on a Facebook feed over which that organisation had control. Globe J did not consider that this offer was sufficient to dislodge what he had concluded was a not insubstantial risk of prejudice to the defendants.

17 The media organisations placed reliance on the observations of Dominic Grieve Q.C., M.P., then Attorney General, in a speech on 6 February 2013 in which he dealt with archived news reports about previous convictions (now accessible on the internet) and “mere chaff and banter” on “someone's Facebook page or Twitter feed” which he believed the strict liability rule (in the 1981 Act) could be “fairly relaxed about”. Mr Grieve went on:

“It is unlikely to present a substantial risk of serious prejudice because it is a needle buried away in the haystack of the internet…. Indeed most publishers are very careful not to link reports of live cases to archived news reports about the same defendant. So, the chances of a juror seeing such material are fairly slim, provided they have not gone looking for it.”

18 Globe J underlined that these comments were not specifically directed to the scenario that had arisen in this case but in relation to the observation that publishers were “very careful not to link reports of live cases to archived news reports about the same defendant” and he observed:

“By analogy, that is exactly what the media organisations have done here. They have provided direct links to Facebook from their reports. [Counsel] confirmed … that the comments that have been recovered have come from those posted on the profile page of each media organisation within Facebook itself. Comments on that page were comments within the media organisation's own profile page and the comments were able to be seen by anyone viewing the media organisation's profile page, particularly that part of it containing a report of the case. Using similar words to those used by Mr Grieve in his speech, by providing the links, I am satisfied the media organisations identified the haystack, placed a lot of needles on top of it and ascribed significance to numerous comments that would otherwise have had lesser significance if they had been solely within a member of the public's private Facebook page.”

19 Globe J went on to explain that counsel for the media organisations had told him that the only way to remove the comments link from a media organisation's profile page on Facebook is to remove the whole Facebook link to the media organisation itself: the comments link is built into the hardware and is part of the functionality of the platform. Thus, it was asserted that the only way of removing it was not to publish anything at all and none of the media organisations were prepared to do that. Globe J went on:

“In other words, each of them intends to continue to identify the haystack and the needles. The limit of any undertaking that any of them will give is that, if a request is made during the trial for a prejudicial comment to be hidden on a Facebook feed over which the organisation has control, the organisation will comply with the request. I do not regard that offer as sufficient to dislodge what, in my judgment last July, was a ‘not insubstantial’ risk of prejudice to the fair trial of the defendants. … Nothing that has happened since convinces me that the same might not occur again if there were to be open reporting of the retrial next February.”

20 Having analysed [s. 4](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C334390E44A11DA8D70A0E70A78ED65) of the 1981 Act, in the light of the assertions as to the extent of what the media organisations said was technically achievable and the limited undertaking they offered, he refused the application, postponing reporting until the conclusion of the trial.

21 The nine media organisations now apply for leave to appeal that ruling under [section 159 of the Criminal Justice Act 1988](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I5CA49121E44B11DA8D70A0E70A78ED65) . They also seek leave to adduce fresh evidence from Mark Frankel, the Social Media Editor for BBC News (dealing with the technical position) and to refer to the evidence of Paul O'Connell, a solicitor in the litigation department of the BBC to the effect that a Facebook page “RIP Angela Wrightson” with related threads similar to those which were considered offensive when the trial was abandoned was still available on Facebook (indeed, the site was visible at the time we heard the appeal). In addition, the solicitor for D has provided updated material (not served on the nine media organisations) regarding the impact on her which, although of value for the sake of completeness, does not carry the argument further.

22 We can deal shortly with the timing of this appeal. The [Criminal Justice Act 1988](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I5FF71EB0E42311DAA7CF8F68F6EE57AB) does not specify a time within which appeals must be brought but refers to rules of court: see [s. 159(2), (4) and (6)](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I5CA49121E44B11DA8D70A0E70A78ED65) . [Part 40.2(2) of Criminal Procedure Rules 2015](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=IBEB327A031B211E59817E4E57CD98BBE) provides that an appeal notice must be served within 10 business days of the order under appeal but refers to [Part 36](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=IBE401A8031B211E59817E4E57CD98BBE) which permits an extension of time, even after it has expired (see [Part 36.4 CrimPR](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=IBE44875031B211E59817E4E57CD98BBE) ). Given that the judge specifically permitted an application to discharge to be made to him, it was entirely appropriate that the media organisations exercise that option before pursuing an appeal. In the circumstances, we grant leave.

**The 1981 Act**

23 It is worth setting out the principal terms and structure of the 1981 Act which, by [s. 1](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C2CDAF0E44A11DA8D70A0E70A78ED65) defines “the strict liability rule” as meaning “the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so”. The Act then continues:

2. Limitation of scope of strict liability

(1) The strict liability rule applies only in relation to publications, and for this purpose “publication” includes any speech, writing, programme included in a cable programme service or other communication in whatever form, which is addressed to the public at large or any section of the public.

(2) The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

3. Defence of innocent publication or distribution

(1) A person is not guilty of contempt of court under the strict liability rule as the publisher of any matter to which that rule applies if at the time of publication (having taken all reasonable care) he does not know and has no reason to suspect that relevant proceedings are active.

(2) A person is not guilty of contempt of court under the strict liability rule as the distributor of a publication containing any such matter if at the time of distribution (having taken all reasonable care) he does not know that it contains such matter and has no reason to suspect that it is likely to do so.

(3) The burden of proof of any fact tending to establish a defence afforded by this section to any person lies upon that person.

4. Contemporary reports of proceedings

(1) Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.

(2) 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.”

24 Globe J accepted that the reports published by the media organisations in relation to the trial were fair and accurate reports within [s. 4(1)](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C334390E44A11DA8D70A0E70A78ED65) and it is not submitted that he was wrong to do so. He also accepted that the media organisations had not themselves published the comments which were posted on their Facebook pages under the legitimate (and entirely lawful) reports of the proceedings but he had no doubt that these comments had created a substantial risk that the course of justice would be seriously prejudiced: had he not done so, he would never have contemplated discharging the jury in the ongoing trial. He was not addressed as to the impact of [s. 3](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C328040E44A11DA8D70A0E70A78ED65) of the 1981 Act.

25 Mr Andrew Caldecott Q.C. for the media organisations argued that on the basis that the media organisations were only publishing fair and accurate reports of the proceedings and that there was no risk of prejudice from those reports (as opposed to the comments that others posted underneath them which, themselves, he submitted did not give rise to the necessary risk of prejudice), there was no basis for restricting reporting under [s. 4(2)](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C334390E44A11DA8D70A0E70A78ED65) of the Act. This submission proceeded on the premise that the comments posted underneath the reports were not published by the media organisations responsible for the relevant reports.

26 Prior to the hearing, we raised with the parties whether Globe J was right to accept that the media organisations had not published the comments posted on their Facebook pages and have had the benefit of detailed written submissions on that issue. In the event, Mr Caldecott has advanced different arguments to those put before Globe J and initially contained within the Notice of Appeal and it is not necessary to analyse the issue of publication either by reference to national or European authorities. The reason is that he accepted that the media organisations could and should be treated as distributors of the posts so as to bring them within [s. 3(2)](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C328040E44A11DA8D70A0E70A78ED65) of the 1981 Act with the result that the exemption was subject to a duty of reasonable care: that, he argued, fitted closely with the modern approach to publication in the internet field in relation to the law of defamation. For the purposes of this case, we endorse that recognition of the position although, for the reasons explained below, we believe that further examination of the overall position is important.

27 Mr Caldecott went on to argue that, notwithstanding the findings of Globe J, the posts did not create a substantial risk of serious prejudice to the trial. If, however, the court did not accept that submission and, furthermore, accepted that, without an order, similar comments would continue to be posted on the organisations' Facebook pages, he recognised that, in the light of all that had passed, it would be difficult for the media organisations to avail themselves of the defence of innocent distribution contained within [s. 3(2)](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C328040E44A11DA8D70A0E70A78ED65) of the 1991 Act. On any showing, all had been put on notice as to the type of comment that would be posted.

28 Mr Caldecott repeated that the media organisations could not remove the link from their own websites to Facebook and could not prevent others from copying their coverage onto their own Facebook or other social media websites, adding such comment as they wished. He did, however, recognise that it would be possible to make an order that the media organisations do not place any report of the criminal trial on their respective Facebook profile page or pages. Furthermore, he accepted that it would also be possible to disable the ability for users to post comments on their respective news websites on any report of the criminal trial published by the media organisations on their own websites. That was, of course, the outcome that Globe J sought, the effect being that the reports of the media organisations on their websites would no longer provide a magnet for the needles that he was understandably anxious should remain buried in the haystack.

**Prejudice**

29 This approach to the law was premised on basis that the court concluded that there was a substantial risk of serious prejudice if these posted remarks remained available and visible on the Facebook pages of the media organisations. Mr Caldecott submitted that there was no justification for so concluding, referring to the approach of the court on the robustness of jurors and their ability to decide cases in accordance with the judge's directions of law and, thus, ignoring all extraneous material but focussing only on the four corners of the evidence presented in court.

30 Mr Caldecott referred to a number of well known observations to this effect. Thus, rejecting the need for an order under [s. 4(2)](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C334390E44A11DA8D70A0E70A78ED65) of the 1981 Act in relation to the reporting of a sentencing hearing in a terrorism case with other defendants still to be tried, Sir Igor Judge P observed (in [*Re B [2006] EWCA Crim 2692, [2007] EMLR 145*](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I8EBF4D507B7A11DBBB7ACB9BD8049A65) , at [31]) that:

“…juries up and down this country have a passionate and profound belief in, and commitment to, the right of a defendant to a fair trial. They know that it is integral to their responsibility. It is, when all is said and done, their birthright. It is shared by each one of them with the defendant. They guard it faithfully. The integrity of the jury is an essential feature of our trial process.”

31 This approach was endorsed in [*re MGN Ltd and Others [2011] EWCA Crim 100*](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I12D367A0331111E0A944A45E51F5A9E1) . That appeal concerned the postponement of reporting of the first of three trials (breaking into manageable proportions the trial of some 20 teenage defendants alleged to have killed another teenager in Victoria Station, London) so as not to prejudice the remaining two. Although the case was “very high profile” and “likely to create a considerable emotional response”, in rejecting the need for an order, Lord Judge CJ observed (at [17]):

“All that aside, however, in our judgment the juries in the second and third trials can be trusted to reach an unprejudiced verdict in relation to the alleged involvement in the offences of each and every individual defendant in accordance with the evidence”.

32 Secondly, it was argued that the effect “the drama of trial” has on jurors should not be discounted. In its report Contempt of Court (2): Court Reporting (Law Comm No 344), the Law Commission cited (at [13]) academic research that showed “jurors find the trial process absorbing, and significantly prioritise what they hear during the trial over what they might have heard from the media outside of the trial”.

33 Finally, Mr Caldecott also referred to the fact that many cases had been tried after the publication of extremely prejudicial material (as to which see, for example, R v West [1996] 2 Crim App Rep 374 at 386) albeit that these remarks were published before proceedings were active. The extreme nature of the comments in this case would not, he argued, affect fair minded jurors: rather, the extreme language in which they were couched would only serve to underline that they were the product of prejudice and, thus, without any value. As for the witnesses, the comments would not cause them to alter their evidence on the basis that they would always be drawn back to the terms of the statements they had made. In any event, those responsible for witness care would take steps to keep them away from such commentary.

34 We reject these submissions. Re B and re MGN Ltd and Others concerned what were fair and accurate reports of court proceedings which were susceptible to judicial direction and were not, in any event, inflammatory of the defendants still to be tried. West and many similar cases were different: what was published was inflammatory and aimed at the defendants to be tried but the well known ‘fade factor’ operated on the basis that the news reports were many months (and, in the case of West over 18 months) prior to the trial itself at a time before the proceedings were active. The internet did not feature in the case and the although careful research would doubtless have revealed the articles, they fell within the category identified by Mr Grieve in his speech: to find it, a juror would have had to go looking for it and judicial direction as to the risks of contempt were more than capable of dealing with such a risk.

35 In relation to modern social media, comments are immediately available at the click of a mouse and although we recognise that the printed pages of comments which have been put before us are not reflective of what would be seen by searching a computer, we do not accept (as was argued) that those trawling the internet would not go beyond the first page. There is a real risk that those interested in the subject matter would continue to scroll down comments, or potentially worse, search out the most ‘likes’ which are themselves likely to be the most inflammatory.

36 Suffice to say, we have no doubt that the publication on social media of comments of the type which caused Globe J to discharge the jury in Teesside would create a substantial risk of serious prejudice which could easily threaten a second trial as it undermined the first. Testing it another way, it is inconceivable that a responsible media organisation would allow comments on their own websites of the type of which complaint is made: even if comments of any sort were permitted (which we doubt) they would be moderated and excluded. We so no reason why the approach should be different when the report is copied onto the media organisations' Facebook or other social media site.

37 In the light of this conclusion as to prejudice, Mr Caldecott did not oppose an order pursuant to [s. 45(4) of the Senior Courts Act 1981](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C6A3210E44A11DA8D70A0E70A78ED65) . At one stage, it was tentatively suggested that this court did not have jurisdiction to make such an order of its own motion. On the basis that the order which has been appealed is that made by Globe J which revoked his earlier [s. 45(4)](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C6A3210E44A11DA8D70A0E70A78ED65) order, it was conceded that, in allowing the appeal, the court could also restore (and, if appropriate, modify) the original order made on 3 July 2015. In the circumstances, the point was abandoned.

**The s. 4(2) Order**

38 Mr Steven Kovats Q.C. (for the Director of Public Prosecutions), Mr Jamie Hill Q.C. and Mr John Elvidge Q.C. (for F and D respectively) all sought to support the order of Globe J under [s. 4(2)](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C334390E44A11DA8D70A0E70A78ED65) of the 1981 Act, notwithstanding the new approach offered by the media organisations at the hearing of the appeal. To that end, the arguments were wide ranging but essentially relied on analogous reasoning on the basis that this particular problem (namely the impact of widely available social media comment likely to prejudice a criminal trial) was new. Although it is tempting to seek to resolve that issue and to examine whether the law can or should be developed to deal with this new issue, we have decided that it is not necessary to do so.

39 The reasons are as follows. First, the original approach of Globe J designed to protect the integrity of the trial has now effectively been recognised as appropriate. Thus, the comparative exercise is not whether a [s. 4(2)](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C334390E44A11DA8D70A0E70A78ED65) order is necessary because otherwise there will be no protection (which itself raises the question whether an order under [s. 4(2)](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C334390E44A11DA8D70A0E70A78ED65) was lawful or warranted in the circumstances) but, rather, even if an order could be made under [s. 4(2)](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C334390E44A11DA8D70A0E70A78ED65) , whether the mechanism of proceeding by [s. 45(4) of the Senior Courts Act 1981](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C6A3210E44A11DA8D70A0E70A78ED65) renders it a disproportionate interference with the Article 10 ECHR rights of the press and the importance rightly attached to contemporaneous reporting of criminal proceedings which attract considerable entirely legitimate public interest.

40 Secondly, we are conscious that although we have received comprehensive submissions both from the media organisations, the Director of Public Prosecutions and the individual defendants, there is no doubt that there are wider issues involved than encompassed by this particular litigation. We have no doubt that the Attorney General (as guardian of the public interest in this area) should be involved in a general analysis of the overall position in order that a wider consultation can take place and appropriate guidance issued. In this regard, we welcome Mr Caldecott's observations that this appeal was not approached as contentious litigation between the parties but with a genuine wish to resolve what is clearly an important practical problem.

41 Finally, we are also aware that there is no appeal from the decision of this court so that had we wished to go further we would have been minded to invite the Attorney General to intervene (Mr Kovats making it very clear that his instructions were solely from the Crown Prosecution Service in connection with this case). In those circumstances, although we are grateful for all the assistance we have received, at this stage, we decline to go further; should another case arise in which these issues have to be addressed, doubtless the court will do so.

**Conclusion**

42 That is not to say that we are unable to express a number of clear conclusions. First, it is beyond doubt that the “RIP Angela Wrightson” Facebook website does contain material which potentially prejudices the rights of F and D to a fair trial and creates a substantial risk in relation to the trial which is about to commence. Those responsible for the website risk proceedings for contempt of court unless it is immediately removed: we understand that, if directed to do so, Facebook will remove the link. We so direct, allowing Facebook the opportunity to apply to the court within 7 days to discharge that order if so advised. In the meantime, however, the link must be removed.

43 In that regard, we ought to underline that anyone posting a comment on a publicly available website which creates a substantial risk of causing serious prejudice faces the potential prospect of proceedings for contempt of court and we anticipate that the authorities will be alert to inform the Attorney General should such circumstances arise. This does not just apply to the appellant or any other media organisations: it applies to individuals who run the risk of causing real difficulty to the smooth progress of a fair trial for these defendants.

44 In relation to the appeal, we discharge the order under [s. 4(2)](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C334390E44A11DA8D70A0E70A78ED65) of the 1981 Act (which we continued at the beginning of the hearing) and, in its place, order the media organisations, until verdicts in the criminal trial or further order (a) not to place any report of the criminal trial of F and D on their respective Facebook profile page or pages and (b) to disable the ability for users to post comments on their respective news websites on any report of the criminal trial published by the media organisations on their websites. We direct that this order shall also be published to the Press Association so that other media outlets not specifically involved in or aware of these proceedings may take appropriate steps to ensure that they do not risk a breach of the 1981 Act on the basis that, in the light of the foreknowledge available from these proceedings, the defence of reasonable care provided by [s. 3(2)](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=17&crumb-action=replace&docguid=I0C328040E44A11DA8D70A0E70A78ED65) of the Act will not be open to them.

45 Finally, besides the clearest warnings that we have no doubt that Globe J will give to the jury in the forthcoming trial, we have no doubt that the police will take appropriate steps to support witnesses and discourage them from researching the trial on the internet. Those responsible for the custody and care of F and D must take steps to isolate the defendants from potentially prejudicial material which could divert their attention from the exceptionally important issues that will be ventilated at trial.

46 The parties should draw up an appropriate order which reflects the terms of this judgment which must not be reported until the trial is completed or further order of the trial judge.

Crown copyright

© 2017 Sweet & Maxwell

