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The magazine journalist and the law

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(contributor's bio and chapter abstract at the end)

Journalists who don't have a strong working knowledge of the law as it affects the media pose a real danger to their publication. And just because a magazine journalist may not be covering the criminal courts daily or exposing wrongdoing through major investigations, as would be expected of a newspaper reporter, this does not mean they won't face potentially expensive defamation or privacy actions at some point in their career.

Further, many human interest features favoured by consumer magazines may require a strong understanding of the criminal and civil courts – for instance, can you fully identify a rape victim who wants to tell her story in a woman's monthly glossy? Can you write about a soap star who is facing trial for assault? And what about writing about an individual's private health such as an eating disorder and a problem with alcohol? How about the divorce of a millionaire footballer?

Knowing the basics of anonymity, libel, copyright and defamation should ring alarm bells when a writer is researching his story and then writing it up and help him avoid running into costly legal situations such as being accused of, say, invading someone's privacy or libelling them in print.

Subeditors, crucially, must also know their law. They are the last line of defence in the magazine production process. Any transgressions which get past them may prove costly. Subs must carefully examine every piece of copy with an eye for legal problems and raise queries with writers in any case of doubt.

The writer, in turn, needs to look carefully at his subbed copy to ensure that the sub has not introduced any errors which were not there originally or changed its meaning by cutting down the word count. (The use of the masculine 'he' includes, throughout this chapter, the feminine 'she').

Many decisions on questions of law affecting the media (sometimes, whether a story should be published at all if there are doubts about its legal safety) have to be taken hurriedly by senior editorial staff as the magazine nears deadline.

A final publish-or-not decision is unlikely to fall to the subeditor or writer alone, but would be referred up through the chief sub to the Editor or even the Publisher, sometimes with the advice of in-house or freelance legal experts.

Magazines have traditionally been produced on paper, but the Internet has signalled a revolution. Many magazines now appear online, either as electronic versions of the printed magazine, or as one that is created for the digital world only.

But the same basic legal principles apply to material transmitted through the Internet, and to publication of material downloaded from the Internet, as apply to material obtained from any other source and published through any other medium.

So which aspects of the law affect magazine journalists? First, where the law comes from.

Sources of English law

Statutes (Acts of Parliament) will have passed their various stages through each House of Parliament and received the Royal Assent – nowadays a mere formality. Except for the overriding authority of legislative acts of the European Union and decisions of the European Court, they are of supreme authority and binding on the courts. Statutes may or may not apply to Scotland or Northern Ireland. Some statutes (or some sections of a statute) may not come into effect until an appropriate statutory instrument (see below) has been passed.

Delegated legislation. This is made by a subsidiary body under power delegated in a statute.

Statutory Instruments contain regulations put before Parliament by a government minister.

Orders in Council. These tend to consist largely of constitutional matters put forward by the Privy Council. Few are likely to affect the work of journalists.

By-laws. Local authorities and certain other bodies have power to make local laws within specific authority.

Laws of the European Union. Membership of the European Union requires UK courts to observe European Treaties and decisions of the European Court, and to apply EU legislation (Regulations and Directives) even if it conflicts with statutes:

Regulations apply generally throughout member states. They are immediately binding.

Directives, too, are binding, but the mode of implementation is left to the member states themselves.

Judicial precedent. Decisions on legal points by judges of the superior courts create precedents which must be followed by inferior courts when dealing with similar cases.

Decisions of the European Court of Human Rights. As a signatory to the European Convention on Human Rights, the UK has for long been bound to give effect to this court's decisions, which have thus been an indirect source of law.

Since the relevant provisions of the Human Rights Act 1998 came into effect in October 2000, the provisions of the Convention have been enforceable in UK courts. Of most interest to journalists are the conflicting Articles 8 (right to privacy) and 10 (right to freedom of expression).

Civil and criminal law

Criminal law is concerned with wrongs against the sovereign: anything from speeding to murder.

Civil law is concerned simply with disputes between citizens, perhaps to obtain compensation (called 'damages') for injuries suffered in a road accident, or an order (called an 'injunction') to restrain one person from, for example, assaulting or pestering another, or, another common example, to get a divorce.

A person may find himself in trouble with both the civil and criminal law over the same incident. A motorist who causes an accident may be both prosecuted in a criminal court for careless driving and sued for damages in a civil court for any injury he caused to the other driver.

The criminal courts

Magistrates' courts

Virtually every criminal case starts life in a magistrates' court, where three types of case are heard.

Summary offences

Cases which must be tried by magistrates. They are generally the least serious.

Either-way offences

Cases which may be tried by magistrates. They may, alternatively, be tried by a jury in the Crown Court. If the accused intends to plead 'not guilty' he may choose that his case is tried by jury. Otherwise it will be tried by the magistrates unless they decline to hear it because of its apparent seriousness. Theft, burglary and indecent assault are three examples of either-way offences.

Where a person appears before magistrates accused of an either-way offence, and is convicted, the magistrates will sentence him unless they feel that he deserves greater

punishment than they have power to impose. In that case they will send him to the Crown Court to be sentenced.

Indictable-only offences

Cases which cannot be tried by magistrates. Because of their seriousness they can be tried only in the Crown Court. Murder, rape and robbery are three examples. Such cases are transferred directly to the Crown Court, the magistrates having no jurisdiction to decide otherwise. Their jurisdiction is limited to questions of bail and legal aid.

Committal proceedings

If the offence is indictable-only, the magistrates, as stated above, must transfer it to the Crown Court, where the accused will come first before a judge in a preliminary hearing. If it is an either-way offence and the accused has opted for trial by jury (or the magistrates have refused to hear it) the magistrates sit as 'examining justices' to decide whether the prosecution case is strong enough to warrant trial in the Crown Court. They will not hear oral evidence, but will base their decision on written statements by prosecution and defence witnesses, and arguments advanced by lawyers for the two sides.

In some cases (called 'paper committals') the accused will have consented through his lawyers to the case being sent to the Crown Court for trial, and will indicate which of the prosecution witnesses he requires to be present. In such a case the magistrates will not study the witness statements. In some cases the prosecution may require the case to be transferred to the Crown Court. These are cases alleging serious fraud, or sexual or cruelty offences against children.

Appeals

A person who is convicted before magistrates may have his case reheard by a judge sitting with magistrates in the Crown Court. That court's decision is final on any question of fact. If the Crown Court upholds the conviction, it may impose any sentence which the magistrates could have imposed.

If the accused wishes to argue that he was wrongly convicted by the magistrates in law (that is, he does not dispute the facts but argues that, on those facts, he was not guilty of the offence charged) he can appeal to the High Court (the Queen's Bench Divisional Court) 'by way of case stated'. The magistrates set out in a 'stated case' the facts of the case and how they applied the law.

This procedure is open to the prosecution as well as the defence. So a person who has been acquitted by magistrates on a legal point may later be convicted by decision of the High Court. If the legal point is one of general public importance either party may, if leave is granted, take the case to the Supreme Court (formerly the House of Lords).

Magistrates

Most benches of magistrates, when trying a case, consist of at least two (more commonly three) magistrates. Most are not legally qualified, and are unpaid except for travel and subsistence. They are guided on the law by a legal adviser. Some courts, especially in large cities, are presided over by district judges (previously called stipendiary magistrates). These are experienced barristers or solicitors who sit as professional magistrates. They are paid a salary and sit alone to try cases.

The Crown Court

The main Crown Courts such as Old Bailey in London and in most major towns and cities across England and Wales try the most serious cases, such as murder, before the more senior judges (usually High Court judges). Others, presided over by circuit judges, recorders or assistant recorders, try lesser offences.

The cases will have been committed to the Crown Court by magistrates' courts.

If the accused pleads not guilty he will be tried by a jury. If he pleads not guilty to some counts but guilty to others, a reporter must make no reference to the pleas of guilty while the trial on the other charges is proceeding. As in the magistrates' court, the accused

cannot be found guilty unless the prosecution proves him to be so, beyond reasonable doubt.

It will call witnesses, each of whom will be examined in chief (the prosecution 'counsel', or barrister, will ask them questions aimed at proving the guilt of the accused). The witnesses can then be cross-examined – counsel for the defence (or a suitably qualified solicitor) will put questions aimed at shaking the credibility of the witnesses' evidence. Finally they may be re-examined – prosecuting counsel will put questions to deal with points raised in the cross-examination. The defence witnesses will be similarly questioned.

Then the respective lawyers will address the jury, and finally the judge will give his 'summing up' of the case. He will explain the functions of judge and jury, the relevant law and what has to be proved. He must always explain that it is for the prosecution to prove its case beyond all reasonable doubt. If the jury cannot reach a unanimous verdict then a majority verdict, of 11-1 or 10-2, may be accepted.

If the accused is found guilty the judge will proceed to sentence.

Appeals

A person convicted in the Crown Court may appeal against his conviction or sentence, or both, to the Court of Appeal (Criminal Division). His appeal will be heard by three senior judges. On an important legal point either the prosecution or the defence may, if leave is granted, appeal to the Supreme Court.

The main differences between English and Scots law

The civil courts

In Scots civil actions, for 'claimant' read 'pursuer' and for 'defendant' read 'defender'. Scotland is divided into six sheriffdoms, each of which is further divided into sheriff court districts. Each sheriff court district has its sheriff court – roughly the equivalent of a county court. An appeal from a sheriff court lies to the 'sheriff principal' (though for certain small claims appeal lies only on a point of law) and beyond that to the Inner House of the Court of Session – and ultimately, with leave, to the House of Lords.

A major civil action will come before the Outer House of the Court of Session and will be heard by a Lord Ordinary. The Inner House of the Court of Session hears

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appeals against decisions of the Lord Ordinary, and also against those of inferior courts. The Inner House has two Divisions – the First presided over by the Lord President, and the Second presided over by the Lord Justice Clerk. (A Lord Ordinary may seek the guidance of the Inner House before deciding a case.)

In defamation, Scotland draws no distinction between libel and slander. Scots law draws much from Roman law rather than from the English common law. Roman law looked to injury to the feelings rather than to the reputation, and Scots courts will take account of convicium (invective or abuse) especially when deciding questions of malice. However, for the pursuer there are strict rules of pleading, especially when an innuendo is relied upon.

The criminal courts

Scotland's approximate equivalents of the magistrates' courts are the district courts. As in England and Wales, these may be staffed by lay or professional magistrates. The sheriff courts (see above as to their civil jurisdiction) deal with crimes of a more serious nature, while the most serious offences are tried by the High Court of Justiciary. (Note that whereas the High Court in England and Wales is the highest first-instance civil court, the High Court in Scotland is the highest criminal court.)

The High Court is presided over by judges of the Court of Session. Unlike in civil courts, there is no appeal to the House of Lords.

Children who are adjudged to require a 'compulsory measure of care' (and this includes offenders) are referred to a children's panel, to be arranged by a local officer called a 'reporter'. Only by leave of the Lord Advocate (roughly the Scots equivalent of the

Attorney-General) may court proceedings be instituted against children – and only in the Sheriff Court or the High Court.

The Procurator Fiscal is a public officer, similar in many respects to a District Attorney in the US. He directs the inquiry into an alleged offence, and also decides whether to prosecute, and, if so, what mode of procedure to adopt. He may choose either the solemn procedure or the summary procedure, depending on the gravity of the alleged offence. In the solemn procedure, carrying more severe maximum penalties, the trial is before a judge and a jury of fifteen, the verdict being by a simple majority. The summary procedure involves a hearing before a judge alone.

Fatal Accident Inquiries (or FAIs) are roughly the equivalent of English inquests. Such an inquiry may be held if it appears that a death may have been sudden, suspicious or unexplained.

Civil courts in England and Wales

Magistrates' courts

Magistrates exercise civil jurisdiction in hearing matrimonial and allied cases in the Family Proceedings Court – separations of spouses, custody and maintenance, and paternity orders against men for the support of children whom they have fathered.

County courts

Most county court cases involve claims for money owed or for damages for injury resulting from civil wrongs, usually road or industrial accidents. Whether such cases are tried in the county court or the High Court will depend usually on the amount of money likely to be involved, but sometimes on the complexity of the case.

All divorce petitions are issued in county courts. Most are undefended. Defended cases may be transferred to the High Court.

County courts deal also with property and tenancy disputes, equity cases (trust funds for example) and, within financial limits, wills and intestacies. Some have jurisdiction in bankruptcy. County court actions for relatively small sums are usually heard in arbitration, a more informal procedure, in private, where costs are not normally awarded. Larger county court cases will be heard by a circuit judge, others (mostly in private) by a district judge.

The High Court

The High Court consists of three Divisions whose jurisdiction is, to a great extent, similar to that of the county courts, but on a larger scale. Some areas of jurisdiction are, however, exclusive to the High Court.

The Queen's Bench Division has unlimited jurisdiction in contract and for civil wrongs, often awarding huge damages in cases such as medical negligence and libel. It also exercises a general supervisory jurisdiction over other courts and tribunals and it deals with cases of contempt of court, usually referred by the Attorney General, arising from media reports of court proceedings.

The Chancery Division deals in the main with cases not involving money damages – those dealing with property rights, tax law, probate, trust funds, intellectual property, business associations and non-pecuniary remedies such as injunctions. This is, in many cases, to prevent publication in cases involving allegedly confidential information.

The Family Division hears some defended divorce petitions, though these nowadays are rare. Since the Family Law Act 1996 much time is devoted to questions arising from that Act in relation to mediation before divorce, parental responsibility, custody and maintenance, and domestic violence. Much of the business is in chambers (i.e. in private) but a judge may sit in open court to give his ruling on a point of law, or to seek the co-operation of the press and broadcasters to help to trace a child who has been snatched in a 'tug of love'.

This Division also hears appeals against decisions by magistrates in family proceedings courts.

Appeals

An unsuccessful party in the county court or the High Court may appeal to the Court of Appeal (Civil Division). From there the unsuccessful party may, if leave is granted, appeal on a legal point to the Supreme Court.

Coroners' Courts

Nearly all cases in these courts are inquiries into deaths where there may be some doubt as to whether the cause was natural. The inquest is held to determine the identity of the deceased, and how, where and when he died. If it can be shown that the inquest was not fairly conducted, a High Court order can be obtained – on a 'judicial review' – to quash the verdict and arrange a fresh inquest before a different coroner. Inquests are also held, rarely, to decide whether ancient gold or silver, which has been buried or hidden, is to be classified as 'treasure' and therefore belongs to the Crown.

Tribunals

Numerous tribunals decide various rights to benefits, etc. The tribunals most commonly covered by journalists are employment tribunals which deal with, among other matters, cases of unfair dismissal, redundancy, and discrimination at work on grounds of race or sex.

Admission to courts

All courts must admit the public unless they have power to exclude them. A court cannot exclude the press and public simply because it thinks that the case before it should not be published, or to spare a person embarrassment. (However, a court may exclude the public, but not the press, when a child is giving evidence in a sex case.)

Members of a court cannot hide their identities from the public. However, any court may exclude both public and press if it considers that justice cannot otherwise be served, or if it has power by statute to exclude the public – for instance, a criminal court trying a case under the Official Secrets Acts, or where a witness might be intimidated. In the latter case, one journalist, representing himself and his colleagues, must be admitted.

In youth courts the press, but not the public, have a right of admission.

In family proceedings the press have a right of admission, but may be excluded during the taking of indecent evidence or when the court is exercising powers under the Children Act 1989 in relation to a child or young person.

Rules of court permit sittings in private, for example when dealing with patents, welfare of children, certain nullity of marriage cases, and cases involving persons of unsound mind.

Admission rights to various kinds of tribunal vary. One must look at the appropriate procedural rules for a given tribunal in order to ascertain admission rights. Coroners may exclude the public only for reasons of national security.

The above are examples of where a court may sit in camera (that is, in private). Where proceedings are ancillary to a case they may be held in chambers – for instance, preliminary procedural matters relating to a civil action, or such matters as maintenance and custody concerning a divorce. Wardships, and bail appeals, are also commonly heard in chambers.

Article 6 of the European Convention on Human Rights authorises exclusion of the public and press 'in the interests of morals, public order or national security' in order to protect juveniles, privacy or the interests of justice.

Libel

A libel action can be cripplingly expensive and the outcome wildly uncertain.

And with the introduction of conditional fee agreements (no win, no fee) in 1998, the opportunity of suing for libel, formerly the domain of the very rich, became open to the everyman (and woman) in the street.

Awards of damages can be unpredictable (although a change in the law in 1990 means the Court of Appeal can now lower damages deemed wildly excessive) and the legal costs of libel cases are always enormous. The losing side usually has to pay them, but rarely will the successful party recover all its costs, so a magazine will almost invariably lose out financially even if it wins its case.

Juries' verdicts, too, are unpredictable. Much may depend on how the jury construes the disputed words. The list of unpleasant things which you might write about a person is endless, but implying immorality, dishonesty and financial difficulties are the most common giving rise to libel actions.

Mistake no defence

It is no defence to plead that the defamatory words were published by mistake. The law is concerned with what was in fact published and the meaning which it might convey to a reader, not with what the journalist intended to publish or the meaning which he intended to convey.

Nor is it a defence that you are reporting a mere rumour, even if you say that it is untrue. A racing correspondent reported an allegation by punters that a jockey had 'thrown' a race in collusion with bookmakers, adding that the allegation was untrue. Nevertheless, damages were awarded.

Innuendos and inferences

Double meanings can be very costly. Often the 'other meaning' can arise through circumstances unknown to the journalist but known to other people. In 1928 the Daily Mirror published a picture and caption of a couple who had just announced their 'engagement'. Unknown to the newspaper and the 'fiancée', the man was already married. His wife was awarded damages. In order to marry lawfully, he could not be married already. So people who knew that he and she had lived together would conclude that they must have been cohabiting outside wedlock.

An inference is a meaning which anyone could draw, even without any special knowledge. An example is a case in 1945 when a newspaper reported that a bomb-damaged house belonging to a councillor had been repaired by the local council to a better standard than the house next door which had been equally damaged but whose owner was not a councillor. This was factually correct, but the newspaper could not prove the likely inference – that the councillor had pulled strings to secure preferential treatment for himself.

Tests for libel

Judges have evolved four tests for deciding whether words are capable of being defamatory, asking whether they tend to do any of the following:

Lower the claimant in the estimation of right-thinking members of society generally. Here lies the beauty of trial by jury – jurors are drawn from various walks of life.

Expose him to hatred, contempt or ridicule. Many obviously damaging statements will tend to give rise to hatred or contempt. Satirical writers and cartoonists make a living from lampooning prominent people, but good-natured ribbing is one thing, imputing misconduct is quite another.

Disparage him in his office, profession, trade or calling. Anything which suggests that a person is incompetent at his job, or has behaved in a manner unbecoming his profession or calling, comes under this heading.

When a critic 'pans' an actor's performance, or a sports writer 'slags off' a footballer, clearly the person criticised is disparaged in his profession. If sued, the magazine would almost certainly use 'honest comment' as its defence. Note, however, that merely to state incorrectly that a person has ceased to carry on his profession, perhaps through retirement, does not disparage him in it, even if it may cause him financial loss. It may, however, give rise to malicious falsehood (**see pxxxx**).

4. Cause others to shun or avoid the claimant. If a hypothetical reasonable person would be less inclined to associate with him after reading the words in dispute, this test is satisfied.

'Referring' to the claimant

Defamation is concerned with damage to a person's reputation – that is, what other people think of him. The words of which he complains must therefore be reasonably capable of being understood (if by only a few people or perhaps by only one) to refer to him, or to a small group (e.g. a board of directors) to which he belongs. To publish, for instance, that 'all lawyers are thieves' would not enable any lawyer to sue the publication for libel unless there were something in the story which pointed towards him.

When cruel practices in 'a certain factory in the south of Ireland' were alleged it was held that sufficient clues had been included to enable a reader, familiar with southern Ireland, to glean which factory was referred to. And when a woman was stated to have been raped 'by a detective from Banbury CID', all ten male officers in Banbury CID recovered damages.

You cannot libel a local authority, but a disparaging story about a council may well reflect on identifiable members or officers.

Referring with insufficient particularity to an offender – 'Harold Newstead, 30-year-old Camberwell man' – was an invitation to all the other Harold Newsteads in Camberwell who were aged about thirty to sue the Daily Express for libel. One did!

A work of fiction is usually obviously fictitious, so the portrayal of a 'baddie' in such a work should not normally entail a risk of libel of a namesake. But there have been cases where the character and the namesake have had so much in common that libel proceedings have been threatened, even though the similarity was unintentional.

Publication

The defamatory words must have been communicated to at least one person other than the claimant. In media cases there can be no difficulty in proving publication, but some points must be borne in mind.

Every repetition is a fresh publication. Where a story appears in several different publications – as when it is supplied by a press agency – each of those publications can be sued, as can the agency.

There is a common misconception that, once a story has been broken it somehow becomes common property and is therefore fair game for everyone. So, for example, if a story is published saying that a politician has been having an affair with a prostitute, the fact that the politician does not appear to have taken or threatened any action against the publication which broke the story does not mean the story is true or safe to publish.

He may be wary of taking on a powerful national newspaper because he knows that he would have a costly fight on his hands. However, he may more readily sue a smaller publication because he knows that the high costs of fighting a libel action might persuade the publishers, or their insurers, to settle out of court.

There is a one-year limitation period. A claimant for libel must commence his action within one year of publication, though the court may, in exceptional circumstances, extend this period. So, although a defamatory story may have escaped through lapse of time, a

journalist must be careful not to repeat the allegation, otherwise the twelve-month period will begin again.

Defences

If the claimant proves that defamatory words referring to him have been published, he is entitled to succeed unless the publication can make good one of the following defences.

Justification

Except where the Rehabilitation of Offenders Act 1974 (see below) applies, it is a complete defence to prove that the words are true. But they must be proved true, on the balance of probabilities, in both substance and fact. A story alleged that a solicitor had trapped a girl 'for sex', when he slapped her bottom but did not have intercourse. The story was true in substance (that he was a lecherous man) but not in fact. Conversely, a story alleged that a councillor's house had been repaired by the council to a better standard than his neighbour's. The allegation was true in fact (this was not disputed) but not true in substance, because it implied that the councillor had misused his position on the council. The publication must prove the truth of any inference created by the words in question (as in the above example) and also any innuendo. We have seen how the Daily Mirror reported that a couple had announced their 'engagement'. This was true. But the newspaper could not prove the innuendo: that the woman with whom the man had until recently been living could not be his wife.

The full 'sting' of the words must be proved. Thus it is dangerous to call a person a 'thief' on the basis of only one conviction for theft. 'Thief' implies that he steals habitually.

If a story consists of more than one allegation and not all are proved to be true, the defence of justification will not fail if, in view of the most serious one which is proved, no real harm is done by the others.

In pleading justification the magazine bears the burden of proof. If the defence depends on the evidence of a star witness, what happens if that witness dies before the case comes to trial? A journalist should always preserve carefully his notebooks and other evidence. But what happens if important exhibits become lost, or the judge rules them to be inadmissible?

The claimant in a libel action is often a celebrity. He or she may captivate the jury, who may regard the press as intrusive and scandal-mongering. Where justification is pleaded unsuccessfully, damages are likely to be all the heavier.

If the publication has disclosed a previous criminal conviction which is now 'spent', the defence of justification will fail if it is shown that the claimant's criminal past was unearthed with malice. The Rehabilitation of Offenders Act 1974 sets out a table of periods after which convictions become 'spent' and cannot be reported.

The main ones are:

where the offender was fined – five years;

imprisonment for not more than six months – seven years;

imprisonment for more than six but not more than thirty months – ten years.

Jail sentences of two and a half years or more, whether immediate or suspended, are never spent.

Privilege

The law accepts that there are occasions when journalists, in reporting matters on which the public have a right to be informed, need protection, provided that they produce fair and accurate reports.

One such occasion is in reporting proceedings in courts of any kind in the UK, or in the European Court of Justice or the European Court of Human Rights. Here, the protection is absolute privilege. If the report is fair (not one-sided), accurate and published contemporaneously, there is total protection, regardless of any question of malice.

'Contemporaneously' means as soon as practicable. In the case of, for instance, a monthly magazine, publication may be 'contemporaneous' even though it takes place several weeks later.

If not published contemporaneously the protection is qualified privilege (that is, it is protected if it is fair and accurate and not shown to have been published with malice).

Qualified privilege protects also reports of various other kinds of press conferences, gatherings and official statements. These include parliamentary proceedings and parliamentary papers (documents published by order of either House of Parliament, and reports to Parliament);

proceedings of local councils and their committees, if heard in public;

tribunals and inquiries, if heard in public; public meetings such as bona fide gatherings, lawfully held, to discuss matters of public concern, such as election meetings, residents' association meetings; statements for public information by certain official bodies, including local authorities and the police; general meetings of public companies; findings and orders of bodies regulating professions, such as the General Medical Council, and sport, such as the Football Association.

In all of the above examples (except parliamentary proceedings and papers) the publisher will lose his protection if he does not publish, at the request of a person who has been criticised, a reasonable letter or statement by way of explanation or contradiction, or if he does so in an inadequate manner.

Note, though, that this is not an apology. If the story was fair and accurate there is nothing for which to apologise.

The Defamation Act 1996, which provides the above protection, also sets out various kinds of report where no such letter or statement needs to be published.

These include fair and accurate reports of proceedings of courts outside the UK, notices issued for public information by judges and court officers anywhere in the world (e.g. receiving orders in bankruptcy, and company windings-up) and information from public registries (e.g. companies, and births, deaths and marriages).

There is a privilege at common law if the publisher and all the readers have a common interest in the subject matter. If, as in most cases, it is possible for a publication to be read by someone who does not have such an interest, the defence will fail.

The defence of qualified privilege at common law was extended by the House of Lords when a newspaper published allegations against a former head of state of a European country. The House held that qualified privilege at common law could arise in respect of political information where there was a reciprocal duty to publish and receive the information, but dependent on the steps taken to verify the story, the urgency of the matter, the source and the circumstances of publication, including the timing. The defence did not succeed in this case, but was later used successfully by a newspaper in Leeds. When the MP George Galloway sued the Daily Telegraph in 2004 over allegations that he had received money from Saddam Hussein, the defence failed. The judge said that the newspaper did not give Mr Galloway a reasonable chance to respond to the allegations.

Honest comment

Comment appearing in magazines includes editorial columns, writers' columns, reviews of plays, books, sports reports, tests on motor vehicles and readers' letters. A comment differs from a statement of fact in that a comment cannot be proved to be 'right' or 'wrong'. A reader is able merely to agree or disagree with it.

The law protects the free expression of opinion if it is honestly held and expressed without malice on a matter of public interest.

Spending of public money and provision of public services are essentially matters of public interest. Opinions differ as to whether this extends to the moral indiscretions of public figures, but expressed judicial opinion is that such matters are of 'public interest' if they

reflect on the person's suitability to remain in office. But the facts on which the comment is based must be true or privileged. It is not sufficient that the writer believed the facts to be true. A 'privileged' fact would be, for example, a jury's verdict or the findings of an official inquiry.

Editors must be careful, when publishing criticisms of a person's actions or words, to avoid any suggestion that he had an improper motive for making or speaking them. Damages were awarded when a TV commentator suggested that a referee's decision to send a player off during a Wembley cup final was prompted by a desire to get his own name into the Football Association record books.

Malice, in the contexts of both honest comment and qualified privilege, means any deviation from the objective, or any ulterior motive. If an editor wanted a textbook reviewed it would be unwise to give the task to someone who had himself written a book on the same subject.

A criticism may be in harsh terms although the use of invective or immoderate language may provide evidence of malice, as when critic Nina Myskow wrote of the singer Charlotte Cornwell: 'She can't sing and her bum's too big'. Ms Cornwell was awarded £11,500 damages after the court heard there has been previous bad feelings between the two. (Note that it is permissible to quote the defamatory allegation in a subsequent report of the case, as this is.)

Consent to publication

There is a general legal rule that he who consents to a wrong cannot afterwards complain about it. If a married MP calls a press conference to deny a rumour that he has a secret homosexual lover, he obviously consents to publication of the rumour together with his denial of it. If a damaging allegation is to be published – for example, against a company – it is important to ensure that any consent to publication comes from a person who has authority to speak on the company's behalf.

It is important that there is a categorical consent. A mere 'no comment' will not suffice.

Offer of amends

The Defamation Act 1996 provides that a publisher may make an offer to publish, in an appropriate position, a suitable correction and apology, to pay the complainant's costs and, possibly, to pay a suitable sum by way of damages. If the offer is not accepted the publisher may rely on it as his defence and it will succeed if the court considers that it was adequate. If he does so, he will not be allowed to put forward any other defence. The defence is not available if the publisher knew or believed the words to be defamatory of the claimant and to refer to him.

Corrections and apologies

Here the magazine must tread carefully between being too profuse or inadequate. The correction should remove the full sting of the libel, but do no more. It is easy to escape from one libel and perpetrate another.

Unless published with the consent of the complainant, a correction will not absolve the publication from action for libel, and may well give the complainant more ammunition. It is always best to seek professional legal advice first.

Slander

Defamatory words published in any medium, including radio and TV as well as newspapers and magazines, will give rise to libel, not slander. Slander concerns transitory (usually spoken) words. However, a journalist needs to take care how he phrases his questions, and to whom he addresses them, when investigating a person's alleged misconduct. Otherwise the subject of his investigation may well sue for slander.

Malicious falsehood

Much rarer than libel, this consists of an untrue, albeit not defamatory, story of a kind likely to cause financial loss (e.g. that a business is to close down). Publication will be deemed to be 'malicious' if the reporter does not check it out before publication.

Contempt of court

A person who is involved in a court case, whether criminal or civil, is entitled to expect that its outcome will not be influenced by prejudicial media stories. When writing about crimes in respect of which court proceedings are in progress, or may shortly be started, journalists can be at risk of publishing material which may influence the outcome of a trial. The Attorney General, who in practice institutes virtually all proceedings for this kind of contempt, is concerned to ensure that accused persons who may appear before juries are tried on the basis of the evidence in court, and not on reporters' speculative stories.

Liability for contempt in criminal cases starts when a person is arrested, when a warrant is issued for his arrest, when a summons is issued or when he is orally charged. At this point proceedings become 'active' under the Contempt of Court Act 1981. Publication after this time of material which creates a 'substantial risk' that court proceedings may be seriously impeded or prejudiced can result in a heavy fine or, rarely, imprisonment.

Your intention, as a journalist, in carrying the story is irrelevant, though you have a defence if you can show that, having taken all reasonable care, you had no reason to believe that proceedings were 'active'.

A description, or picture, of the accused in a criminal case may amount to a contempt if a question of identification may arise. Eye-witness quotes may similarly cause a risk of prejudice.

The risk applies until the accused is acquitted or, if he is convicted, until he is sentenced. However, once a jury has given its verdict it is most unlikely that a background story would be likely to influence the judge when passing sentence. When the accused has been sentenced proceedings cease to be active until he lodges notice of appeal, if he does so. But again, as an appeal from the Crown Court will be heard by experienced judges in the Court of Appeal, there can be little risk of serious prejudice here.

Criminal proceedings will also cease to be 'active' if an arrested person is released without charge (but not if he is released on police bail); if the person named in a warrant is not arrested within twelve months; if a charge is ordered not to be proceeded with; if the accused is found to be unfit to plead or to be tried; or if he dies.

It is rare for contempt to arise in respect of civil proceedings, since most civil cases are tried before a judge sitting alone, and the risk of prejudice is therefore minimal.

Furthermore, the liberty of the subject is not at stake.

Civil proceedings become 'active' when an action is set down for trial (in the High Court) or a date fixed for the trial (in the county court). They continue to be 'active' until the case is over, or until it is withdrawn or abandoned.

It is not a contempt under the 1981 Act to discuss in good faith a matter of public interest which figures in 'active' proceedings, whether civil or criminal, if the risk of impediment or prejudice to those proceedings is merely incidental to the discussion. There was no contempt in publishing an interview with a woman who was contesting a parliamentary by-election as a pro-life candidate at a time when a doctor was on trial for the alleged 'mercy killing' of a Down's Syndrome baby.

Contempt at common law

Even if proceedings, civil or criminal, are not 'active', it is possible to be in contempt of court by publishing a highly prejudicial story with intent to prejudice court proceedings – as

when The Sun described a doctor as a 'real swine' at a time when the newspaper knew that he was likely soon to be arrested on a charge of rape.

The press frequently criticises court decisions, judges and magistrates, sometimes in harsh terms. A judge once said that justice 'is not a cloistered virtue' and the public have a right to make their comments. You will, however, be in contempt at common law by 'scandalising the court' if you undermine the court's authority, dignity, integrity or impartiality.

Restrictions on court reporting

1925 It became unlawful to take photographs in court for publication, or to take or publish pictures of persons involved in court cases while in the ill-defined 'precincts of the court'.

1926 It was made illegal to publish evidence from a divorce case. One may name the parties and witnesses, report allegations and so on, in respect of which evidence has been given. One may also report points of law and their outcome, and the decision of the court and any observations made in giving it.

The same Act made it an offence to publish, in a report of court proceedings, any indecent medical, surgical or physiological details such as might injure public morals.

1933 Special courts (now called youth courts) were set up to deal with cases involving youngsters. The age range now is from ten to eighteen. A report from a youth court must not include a juvenile's name, address, school, or any other particulars which might identify him, or any still or moving picture of, or including, him. This applies regardless of the capacity in which he appears before the court – even if, for instance, he is a witness. The restrictions can be lifted in the following circumstances:

By the court or the Home Secretary, in order to avoid injustice to the juvenile concerned.

In the public interest, for example, if the juvenile is a persistent offender against whom the public should be warned. In such a case the press may submit a request to the magistrates, who must give each side a chance to be heard before making a decision.

On an application by the Director of Public Prosecutions, if the juvenile is on the run and has been charged with, or convicted of, a sexual or violent offence, or one which, for an adult, carries fourteen years imprisonment or more.

1967 Parliament decided that evidence from committal proceedings should not be published, as it might influence jurors who sit at the subsequent trial. The restriction was re-enacted in the Magistrates' Courts Act 1980. Oral evidence is no longer given in these proceedings but it is unlawful, unless reporting restrictions are lifted, to report anything that is said, or anything else except the names of the court, the magistrates and the lawyers, the names, ages, occupations and addresses of the parties and witnesses, the charge(s) on which the accused appears, the decision to commit him for trial, to which court and on what charge(s), any adjournment, whether he gets legal aid, any arrangements for bail (but not the reasons for refusing it) and whether an application was made for the lifting of restrictions.

The restrictions apply from the first appearance in court of the accused. They will be lifted if he so requests. If he has a co-accused who objects to the lifting, then lifting restrictions may be done only if the magistrates are satisfied that it is in the interests of justice.

1976 In that year it became an offence to identify the alleged victim of a rape offence – such offences now being rape, attempted rape, aiding and abetting, counselling or procuring rape or attempted rape, incitement to rape, conspiracy to rape, and burglary with intent to rape.

Once a complaint of a sexual offence is made it is an offence to publish the alleged victim's name, address, identity of school or workplace, or a still or moving picture. When an accusation of such an offence is made it is unlawful to publish any detail which might enable a member of the public to identify the alleged victim.

The Sexual Offences (Amendment) Act 1992 made similar provision in respect of a long list of other sexual offences, the most frequent being indecent assault and unlawful intercourse.

The complainant (i.e. the alleged victim) may be female or male. He or she may be identified:

if the court permits it for the bringing forward of defence witnesses;

if the court considers that the restriction is a substantial and unreasonable curb on reporting the case and it is in the public interest to lift it; if the complainant (only if aged 16 or over) consents in writing to being identified, unless the consent was obtained by pestering him or her; if the complainant dies; if the complaint of rape is mentioned in criminal proceedings for a non-rape offence, for example if the complainant is charged with wasting police time by making a false allegation of rape.

The restrictions apply, however, to reports of civil proceedings which involve an accusation of a rape offence, for example where a rape victim sues the alleged rapist.

1980 The restrictions on reporting of committal proceedings (see above) were reenacted.

Reporting of Family Proceedings in magistrates' courts was restricted to the same basic points which apply to reports of divorce.

1989 It became an offence under the Children Act 1989 section 97 to identify a child appearing in a family court in proceedings under that Act, unless the court otherwise directs.

Powers of courts to restrict reports

Juveniles

We have seen that a juvenile appearing before a youth court may not be identified. If he appears in any other court he may be identified unless the court makes a discretionary order (a 'section 39' order under the Children and Young Persons Act 1933) which imposes restrictions in similar terms to those of the automatic ban in the youth court.

Such an order can be only in respect of a juvenile and the juvenile must be still alive. Such orders should not be made automatically and can relate only to proceedings in the court in which they are made.

If a person's identity is protected, whether by a court order or by a statute, a journalist must be careful to avoid 'jigsaw' identification, that is, identification made possible by the clues in the journalist's own story, or by reading that story in conjunction with a story in another magazine or newspaper.

When reporting cases where the defendant is accused of an offence against a child who is a relative, journalists have been advised to name the accused but blur the nature of their relationship with the child. Many publications still seem, however, to prefer to report the case anonymously, stating (incorrectly) that the accused 'cannot be named for legal reasons'.

'No names'

A court may, under section 11 of the Contempt of Court Act 1981, prohibit the publication of any 'name or other matter' appearing in a case, most often used in cases of blackmail or those involving state secrets and national security. But such an order cannot be made unless the 'name or other matter' has been held from the public during the proceedings. The High Court has held that such an order should not be used for suppressing details of an accused person in a criminal case.

Postponement

A court may direct that all, or part, of a case before it shall not be reported until some specified future time, if it considers that publication immediately may prejudice the

case in question, or any other connected case which is being heard or shortly to be tried. The High Court has ruled that such an order must be no more draconian than necessary. Where the defence, in a speech in mitigation of sentence, attacks the character of a person not involved in the case, the court may prohibit for twelve months reporting of the allegation if it was not made during the hearing. Such an order may also apply to a speech on behalf of a defendant when magistrates are considering whether or not to commit him to the Crown Court for sentence.

Gathering of information

Until very recently, except in certain limited instances, there has been no legal obligation on public bodies, or indeed on anyone, to give information to the Press. The Freedom of Information Act 2000, which came into force on 1 January, 2005, gives a right to information. It applies to legislatures in London, Cardiff and Belfast, government departments, health-care bodies, the police and educational bodies.

Scotland has its own Freedom of Information Act which also came in to force on 1 January 2005 and is also enforced by a Commissioner.

However, traditions die hard, and the authorities can make use of several loopholes. They can, for example, say that the information is available from another source (section 21); that it is a certified security matter (section 23); that it relates to court proceedings or has been created by a court (section 32); or that it relates to the privileges of either House of Parliament as certified by the Speaker (Commons) or the Clerk of the Parliaments (Lords) (section 34).

Other exemptions include information which would prejudice the prevention or detection of crime; investigations by a wide range of public safety authorities, including the Railway Inspectorate, the Civil Aviation Authority and local government officers such as trading standards and environmental health officers; or if disclosure of the information would be likely to prejudice the effective conduct of public affairs. It is no doubt on this last ground that most of the rejections of requests will be made.

A person who is dissatisfied with the way his request for information is treated may apply for a ruling by the Information Commissioner or his Scottish equivalent. A major snag is that the request and the reply must be in writing. This would serve a journalist who is seeking information for a feature to be published in a week or two, but would be of no help to a reporter who is seeking a quote for a story when his publication is about to go to bed. Some authorities may accept communication by fax or e-mail as 'in writing'. But others are likely to have an easy way to delay public disclosure of matters which they would rather suppress by insisting on using the post. Bodies which don't wish to divulge information are wont to give as a reason that it is protected under the Data Protection Act 1998. In many cases this may be so. In others, however, the information may be freely accessible without reference to any data storage system and the Act is being used as an excuse. The Freedom of Information Act and the Data Protection Act are now both enforced by the Information Commissioner.

Copyright

Print journalists will be concerned with 'literary and artistic' works. Editorial copy is 'literary'. Even compilations such as football league fixture lists, come under this heading. 'Artistic' works will include photographs, sketches, cartoons and graphics. Copyright lasts for seventy years from the end of the year of the author's death. If the author is not ascertainable, or if the copyright belongs to a corporation (as in the case of most newspaper and magazine articles), copyright runs for seventy years from the end of the year of publication.

A person will infringe copyright if he copies or reproduces a copyright work in any form. A journalist who 'lifts' a story from another publication will no doubt 're-jig' it in the hope of

disguising his misdemeanour. He may fail, however, if the original story contains an error which the rewritten version repeats. And, in any event, one can usually recognise one's own story, whatever efforts have been made to disguise it.

Don't confuse a 'lifting' with a 'follow-up'. You can always follow up a rival's story, unearthing your own material. A judge once said that there is no copyright in news, but there may be a copyright in the way in which it is presented.

Ownership of copyright

Copyright in a work belongs to its creator, unless it was produced in the course of an employment. In that event, copyright will belong to the employer unless the author's contract provides otherwise. Where, however, the author of the work is a freelance, he owns the copyright unless he assigns it to the publisher. The writer of a letter to the editor implicitly authorises the publication to which he sends it to publish his letter on one occasion only. Many publications reserve the right to shorten letters. Even where no such right is reserved, the judicial view has been towards a right to shorten unless the writer of the letter has stipulated that it is to be used in full or not at all.

Fair dealing

There are occasions when it is permissible, to a limited extent, to quote from a copyright literary work, or even to reproduce a copyright artistic work, with acknowledgement. When criticising or reviewing. What would be 'fair dealing' for this purpose has never been judicially quantified. When reviewing a book a critic may quote from it for the purpose of making his point. It may not be so much a question of how many words as which words he quotes. If, for instance, in reviewing a thriller, he were to give the game away, this would exceed fair dealing.

Reporting current events. It is permissible to quote from a copyright work where the words relate to a current event – again, within limits. For instance, if a cabinet minister sent a letter of resignation to the Prime Minister, a quotation from the letter setting out his reasons for resigning would be likely to be protected as fair dealing.

Moral rights

The most important right for journalists under this head is the right of a person not to have his name put on work which is not his. One example of a newspaper falling foul of this rule was when one gave a byline to Dorothy Squires for an account of her married life, even though it included a line in small print saying that the story was 'as told' to a reporter.

Commissioned photographic works

Where any photographic work has been produced under a commission since 1989, the copyright belongs to the person commissioned. So a wedding photographer has the copyright in the wedding photographs. The person who commissioned the pictures, however, (since such pictures are of a private and domestic nature) has the right not to have them made public without his consent.

When borrowing a photograph one should look for a photographer's stamp on the back. If it is a family-album shot, one is likely to have permission to use it. If it is by a professional photographer no doubt he will want payment. And to use it without his consent will infringe his copyright. Even with his consent one will need also that of the person who commissioned it, if it is of a private and domestic nature. For pictures taken before 1989 copyright belongs to the person who commissioned it.

Spoken words

Copyright in a report of spoken words belongs to the first person to reduce them to writing unless the speaker reserved copyright in his speech before making it. But, as fair dealing

permits limited inclusion of copyright material for reporting current events, to this extent a reporter could report the speaker's words despite his reservation of copyright.

Confidentiality

A servant is duty bound not to betray his master's secrets. A spouse is similarly bound. In 1962 the Duchess of Argyll obtained an injunction to stop her ex-husband, the Duke, from revealing secrets of their marriage. Sometimes an injunction may be granted against a 'kiss-and-tell' ex-lover. In 1988 a judge refused to strike out an action by a well-known woman, known only as 'T', to stop disclosure of her alleged lesbian relationship with a young woman. Basically, the tests will be as follows:

Is the material confidential in its nature?

Would disclosure be likely to damage the legitimate interests of the claimant?

- Was it communicated in breach of confidence?

If the answer to each of these questions is 'yes' an injunction is likely to be granted unless one of the following is the case:

The public interest in disclosure outweighs the claimant's interest in keeping his information confidential. For instance, a story from a manufacturer's internal memorandum showing that equipment in widespread use in police stations for breath-testing motorists gave erratic results.

The material in question is 'iniquitous'. For instance, a story, based on correspondence supplied by a former sales manager, stating that laundry companies had formed a liaison to inflate prices.

Often when an aggrieved person obtains a banning order from a judge (sometimes simply to save his own face) the editor learns of it for the first time when it is served on him. The order may later be lifted, either by the judge who granted it or on appeal. But in the meantime the publication will have been prevented from running the story and its potential impact is likely to have been lost.

Journalists' sources

Every journalist has contacts. No journalist worth his salt will betray a contact, even on pain of imprisonment. At present a reporter may be ordered to reveal his source if, in the opinion of the court, such revelation is necessary in the interests of justice, national security, or for the prevention of disorder or crime.

However, the European Court of Human Rights has ruled that a penalty imposed on Bill Goodwin, a trainee reporter on *The Engineer*, for refusing to reveal his whistleblower source was in breach of Article 10 of the European Convention on Human Rights.

Further, the Editors' Code of Conduct clearly states a journalist has a "moral obligation" to protect confidential sources.

Privacy

Privacy is a fast developing area of the law which will likely affect the next generation of journalists as much as libel does today, with damages awarded as high as those for libel. Many celebrities, public figures and sports stars have used their Article 8 right of privacy to gain injunctions, and so-called superinjunctions, pre-publication to prevent damaging stories about their private lives ever seeing the light of day.

This would have worked for Manchester United star Ryan Giggs if not for the power of Twitter and an MP naming him in Parliament with absolute privilege protection.

When a story has been published, the redress is to claim damages for privacy through the civil courts.

This happened when Max Mosley (the former president of the Federation Internationale de l'Automobile) won a record £60,000 privacy damages in 2011 against the now-defunct News of the World over a story concerning his private life.

Any court considering an alleged invasion into privacy will consider whether the complainant had a reasonable expectation of privacy and whether there is any public interest in intruding into that privacy.

Stories about someone's private health will almost certainly be frowned upon.

However, as in the case of England footballer Rio Ferdinand who lost a claim for privacy damages against the Sunday Mirror, the public interest in some public figures seen as "role models" means the media's right to expose hypocrisy outweighs the individual's right to a private life.

Meanwhile, the Editors' Code of Conduct outlaws (among other things) unnecessary reference to a person's religion, sexual orientation and so on, and states that 'everyone is entitled to respect for his or her private and family life, home, health and correspondence'. This does not apply where there is an over-riding consideration of public interest.

Journalists who obstruct the highway or footway while 'doorstepping' in pursuit of an interview or photograph could be prosecuted under section 137 of the Highways Act 1980.

A person who, while allowed on private premises for a particular purpose, attempts furtively to obtain information or take photographs, could be sued for trespass to land.

The Human Rights Act 1998, incorporating the European Convention on Human Rights into English law, provides (Article 8) a remedy in UK courts for wrongful violation of a person's privacy in relation to his private and family life, his home and correspondence.

This, again, is subject to considerations of public interest, and has to be weighed against Article 10, which upholds freedom to receive and impart information, subject to such constraints as 'territorial integrity' and 'national security'.

Official secrets

Since 1911 it has been unlawful to disclose, or attempt to discover, military secrets, and for unauthorised persons to be present for unlawful purposes in prohibited places such as Army and RAF bases and naval dockyards.

Under the Official Secrets Act 1989 it is an offence to make a 'damaging' disclosure. This may relate to the strength and/or disposition of troops, aircraft and naval vessels, their equipment, armaments and capabilities (particularly state-of-the-art equipment), the nature and standard of their training and logistics, and to defence strategies. The Act penalises journalists and their publications, and also Crown servants and government contractors. There is a defence if they can show that they did not know and had no reason to suspect that the disclosure would be 'damaging'.

If in doubt a journalist should seek guidance from the Ministry of Defence. Such advice would be most desirable when reporting, for example, the embarkation of troops, or the departure of aircraft or ships, for an overseas trouble spot, or before publishing a photograph of a crashed military aircraft. The Committee issues 'Defence Advisory Notices' which ask editors to seek the government's advice before publishing articles on specified topics.

A 'damaging disclosure' may relate also to the police or prison service, if it is of a kind which may facilitate crime or escapes from custody.

Recommended reading

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Crown Prosecution Service www.cps.gov.uk

Data protection www.ico.gov.uk/for_organisations/data_protection.aspx

Freedom of Information

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Home Office www.homeoffice.gov.uk

Judicial system ybtj.justice.gov.uk/

Law updates www.telegraph.co.uk/news/newsttopics/lawreports

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Media law news www.guardian.co.uk/media/medialaw

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Press Complaints Commission www.pcc.org.uk

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Chapter abstract:

How the media can act responsibly and flourish within the restrictions of legislation and self-regulation has never been so under the microscope.

Every magazine journalist needs a strong working knowledge of the areas of the law which may impact on their assignments.

This chapter will give an overview of the key areas including libel, copyright, confidentiality and privacy, all of which could pose costly dangers for your publication if not fully understood.

Further, you will learn the basics of the criminal and civil court system, and how reporting of cases may be restricted in the cases of juveniles, victims of sexual offences and by the law of contempt.

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