# BORRIE & LOWE: THE LAW OF CONTEMPT

Fourth edition

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# Butterworths Common Law Series
# The Law of Contempt

Fourth Edition

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# The Law of Contempt

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# Foreword

When Alice was called as a witness at trial of the Knave of Hearts and the King announced: "Rule forty-two: all persons more than a mile high to leave the court", Alice accused him of having just invented it.

'It's the oldest rule in the book,' said the King.

'Then it ought to be number one,' said Alice.

There are those who think that the law of contempt of court is *both* a judicial invention *and* number one in the book. And it is true that historically the judges of England and Wales were pretty fierce in handing out or threatening punishment to those who affronted their dignity. It is also true that without some donated or inherent power to ensure that it is respected and obeyed, a court is a toothless tiger.

In 1746 the Chief Justice of the Common Pleas gave judgment for £1000 damages in favour of a Lieutenant Frye against the president of a court martial which had misconducted its proceedings. He then encouraged the lieutenant to sue the other members of the court martial. Understandably, they protested to the King. The Chief Justice had the whole lot of them arrested for contempt and, when they apologised, released them with the warning: 'Whosoever set themselves up in opposition to the law or think themselves above the law will find themselves mistaken'.

It is said that a generation earlier Chief Justice Holt, threatened with arrest for contempt of Parliament if he did not stop hearing the election corruption case of *Ashby v White*, told the Speaker's retinue that if they did not leave he would have them arrested for contempt of court, 'had you the whole House of Commons in your belly'.

Modern bleeding hearts may doubt whether what appears to have been, until the mid-17th century, the standard penalty for violent conduct in court – amputation of the right hand, with hanging as an optional extra – was strictly necessary for maintaining the dignity of the ermine. But even in those cruel days the judges did not have it all their own way. The jurors trying Penn and Mead in 1670 for preaching unofficial ideas in Gracechurch Street chose to go to gaol for contempt rather than submit to the judge's direction to convict, and in doing so established one of the bedrocks of civil liberty in this country. And little more than a century ago, before a divisional court of the Queen's Bench, the editor of the Birmingham Daily Argus got off with a £100 fine for a diatribe against the newly appointed Mr Justice Darling which, while an undoubted contempt (counsel for the paper did not raise the still vexed question whether justification is, or ought to be, a defence), must also have been one of the finest passages of invective in the annals of British journalism[1].

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[1] While the Law Reports, the Times and the Weekly Reporter respectfully refrained from reproducing it, the Law Times, as the present text notes, along with the Law Journal, did history the service of reproducing it in full - raising the question whether a full and fair account of legal proceedings is a defence to contempt as it is to libel. Darling J seems to have been

Since then, indeed since the last edition of the present book, the wheel has been relentlessly turning. Lord Widgery CJ told the Phillimore Committee in 1974 that a modern judge had to have broad shoulders. His successors would probably say that that was putting it mildly. Since the day in 1986 when the Daily Mirror went unrebuked for publishing a massive headline – 'YOU FOOLS' – accompanied by inverted pictures of the law lords who had upheld the *Spycatcher* injunction, not only deference but civility towards the bench has become unmodish.

In principle this is not necessarily a bad thing. Contrary to the reiterated wisdom of the media, judges (unlike newspaper editors and leader-writers) are accountable for everything they do: accountable to the parties, accountable to the public and accountable to the higher courts which watch over them. What they are not is removable, save for misconduct or incapacity, which is as it should be if judicial independence is to mean anything at all. But being accountable means being prepared to put up with criticism – silently, since judges have no right of reply. And respect for free speech means putting up with criticism which is sometimes ignorant and occasionally malicious.

This is why the guarantees of judicial independence somewhat ingenuously spelt out in section 3 of the Constitutional Reform Act 2005 matter; though one wonders at the oddly limited requirement that 'ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary', when neither ministers nor anyone else outside the litigation can properly seek to influence judicial decisions either particularly or generally, and whether by special access or by public pressure. In recent years some ministers have used the media to launch attacks on judges who have given decisions they object to. They too need to remember, as this book reminds them, that ministers of the Crown are not beyond the reach of the law of contempt. The case which decided this has been one of the great constitutional milestones of modern times.

While protecting the courts – and now the unified tribunals too – from the corruption or debasement of their role remains both the most fundamental and the most sensitive (because the most self-regarding) of the judicial contempt powers, the enforcement of court orders is the purpose for which it is most frequently used. Here too the law has certainly not reached the end of the road. Indeed, critics might say that it has hardly reached the start of it so long as it continues to insist that the purpose of penalising contempt by disobedience is not to protect the private rights of litigants. The application to commit an opponent for procedural contempt is a shot in the locker of the litigation lawyer, not of the court.

Beyond this point, too, the road is strewn with boulders. To take one small example, the notion of purging contempt, with its theological underlay of penitence and forgiveness, works well enough for breach of a mandatory order: the contemnor agrees that he will now do what was required of him, and the judge may let him out of gaol. But how does it work with breach of a prohibitory order? What's done is done; a penalty has been imposed of greater or less severity depending on, among other things, the degree of

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unruffled by the episode: his entry in the Birmingham assize book for 1900 reads: 'A most satisfactory assize'.

contumacity; but what can such a contemnor then do to purge his contempt? Unless the court is to sit on appeal against its own sentence, the role of penitence and forgiveness seems spent. And what legitimate interest has the civil contemnor's adversary in the penalty? Here, as elsewhere in this branch of the law, there is work still to be done.

To prove it, if proof were needed, the European Court of Human Rights has now vindicated the doubt presciently expressed in this edition as to whether my judgment in the *Interbrew* case gave sufficient respect to the protection of press sources as an ingredient of free expression. A malign purpose may still tip the balance towards disclosure; but how the source's purpose can be established at the level of certainty envisaged by Strasbourg when the court *ex hypothesi* has no idea who the source is, is a conundrum which the next phase of contempt law will have to grapple with.

Such an ever-shifting picture is evidence less of the inconstancy of the law of contempt, though it still has many rough edges, than of the speed and extent of change in the world in which it operates. The contributors to the new edition of this pioneering text have done a service going well outside the legal profession in bringing it both up to date jurisprudentially and into kilter with a world in which technological and cultural change is setting a pace with which the law has to run to keep up.

Stephen Sedley

The Rt Hon Lord Justice Sedley
Royal Courts of Justice
August 2010

# Preface

The last edition of Borrie and Lowe was written fifteen years ago since which time significant changes to the law of contempt have occurred. A reader familiar with the layout and contents of the third edition will see at the outset that revisions to the overall structure and chapter titles have been made. For example, Part 1 of the fourth edition sets out to detail the changed constitutional and technological environment within which contempt rules operate. In this section of materials, two features predominate: namely the globalised nature of electronic communications and the impact of the Human Rights Act 1998. Naturally enough, discussion of aspects of each feature permeates through into later sections of this new edition. The incorporation of these new, scene-setting chapters at the beginning of this edition and the inclusion of post HRA materials elsewhere in the text has required some pruning of sections found in the third edition. At times for example, discussion of the common law of commonwealth jurisdictions has been scaled back. Another difference from the third edition is the separation into distinct chapters of sections dealing with respectively the reporting of criminal, civil and family proceedings in Part 2.

For some, the Human Rights Act is to be welcomed for heralding a new era in contempt law in which an altogether more principled, rights versus collective goals (and rights versus rights) analysis is placed centre stage. Legislators, judges, prosecutors (and even media professionals) are all now enjoined to have regard to core values such as freedom of expression, fair trials, the administration of justice and individual privacy. For such commentators, the 1998 Act is a welcome move away from the previous, rather ad hoc legal framework in which new statutory provisions and common law interpretations of the law were developed with merely a passing nod (if at all) to issues of fundamental principle. Of course today, in the case of statutory provisions, the Human Rights Act does not go so far as to allow a judge to strike down the HRA-inconsistent provisions of an Act of Parliament. Nonetheless, the HRA implications of a new measure will almost certainly have been debated in Parliament at some stage of its passage into law. Moreover, a judge called upon to interpret the provision is required under section 3 of the 1998 Act 'so far as is possible' to give a reading that is compatible with the European Convention on Human Rights. Significantly, this allows a judge to 'read-down' (within certain limits) a rights' infringing provision in order to achieve compatibility. In this new constitutional setting, the influence of Strasbourg jurisprudence needs to be fully recognised. At times (such as with the protection of journalists' sources discussed by Professor Phillipson in chapter 15), the European Court of Human Rights has provided a consistent and clear impetus for stronger domestic protection for media freedom than has hitherto existed in domestic law. Whether the same can be said about the Court's record across other aspects of its Article 10 jurisprudence is less certain.

The election of a Coalition Government in May 2010 has, for the time being, stalled discussion in certain political quarters of the repeal of the 1998 Act (even though the Prime Minister David Cameron publicly committed his party to this option in 2006 whilst leader of Her Majesty's Opposition). As this

edition goes to press, the Act remains fundamental to any analysis of the competing demands of open justice, the unbiased administration of justice and privacy claims of trial participants and others. Plans for some time-limited form of anonymity for defendants in rape cases have been aired by the Government on the back of an annual conference resolution of the Liberal Democrats agreed in 2006. Anonymity orders in a different context – this time relating to counter-terrorism powers to freeze suspected terrorists' financial assets – have lately come to occupy the Supreme Court. In a bold ruling (*Re Guardian News and Media Ltd* (2010)), the evident trend towards suspect anonymity was criticised by the Supreme Court. This ruling carries the obvious implication that anonymity orders in the wider counter-terrorism context (including those made in control order cases) will also come under closer judicial scrutiny in the near future.

The previous edition of Borrie and Lowe was written in its entirety by Professor Nigel Lowe and Brenda Sufrin. As such, that co-authored edition offered a particular treatment and analysis of contempt law. Back in 1995, the authors declared themselves to be concerned by the 'lack of prosecutions' under the Contempt of Court Act 1981. For example, in relation to the notion of strict liability contempt the authors were critical of the Attorney-General's failure to prosecute sections of the media in the infamous case of Michelle and Lisa Taylor sisters in 1993 after the Court of Appeal quashed the trial court's convictions on the basis that newspaper reports at the time of the sisters' trial had been 'unremitting, extensive, sensational, inaccurate and misleading'. The new edition is the product of a team of academics and practitioners who do not necessarily share a unified view about the various balances that are struck in our contempt laws. Consequently, there is no overarching, thematic analysis of contempt law to be found in this edition. No effort has been made to harmonize the individual chapters. Instead, individual authors have been left to offer their personal responses to developments in the field. The diversity of interpretations and viewpoints to be found in the chapters is, I would argue, an exciting new facet of the current edition of Borrie and Lowe.

This edition is Borrie and Lowe is a collaborative team effort in which a team of academics and practitioners have worked alongside each other. I am extremely grateful to my fellow contributors for their timely efforts in putting this edition together, some of whom came into the project at a relatively late stage. The authors' individual contributions are as follows: Professor Richard Stone (chapter 3); Professor Helen Fenwick (chapter 4); Nick Taylor (chapter 5); Professor Susan Edwards (chapter 6); Richard Munden (chapter 8); Caroline Kelly (chapter 9); Andrew Scott (chapter 10); Professor Gavin Phillipson (chapters 11 and 15); Howard Johnson (chapters 12 and 16); Amali de Silva (chapters 13 and 14). I contributed chapters 1, 2, 7 and 17. We were most fortunate in securing the willing assistance of Lord Justice Sedley who kindly agreed to write an incisive and thought-provoking foreword to the new edition.

I would like to record my sincere appreciation of the gentle but firm prompting and guidance of Evelyn Reid at LexisNexis Butterworths. Evelyn managed to keep this diverse set of authors on task when other pressing commitments threatened to slow the project. Mention should also be made of Silas Webb

who provided valuable support at proof stage.

Ian Cram

General Editor
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August 2010

# Series Preface

The common law is justifiably seen as a jewel in the crown of English law. The common law has travelled far afield to many other countries where it has been adopted and developed by the local courts. No longer the sole preserve of the judges in London (or Edinburgh and Cardiff), its durability and richness has been due in no small way to the diversity of approach that exists between the common law countries throughout the world. Many of the great judges in England, such as Coke, Mansfield, Blackburn, Atkin, Devlin, Reid and Denning, and those from overseas such as Oliver Wendell Holmes, Benjamin Cardozo and Owen Dixon, have been masters of the common law. As we enter the new Millennium, the common law continues to influence the development of law elsewhere. It will remain a major export, but now also an import, of this country.

*Butterworths Common Law Series* conceives of the common law in broad terms, providing analyses of the principles informing the frameworks of the law derived from judicial decisions and legislation. The *Series* seeks to provide authoritative accounts of the common law for legal practitioners, judges and academics. While providing a clear and authoritative exposition of the existing law, the *Series* also aims to identify and examine potential developments in the common law drawing on important and significant jurisprudence from other common law jurisdictions. Judges have increasingly looked to academic works for guidance on the accepted view of the law but also when contemplating a reformulation or change of direction in the law. The *Series* may, it is hoped, provide some assistance such that the law is less likely to be left undeveloped 'marching...in the rear limping a little', to quote a famous judicial aphorism (*Mount Isa Mines v Pusey* (1970) per Windeyer J).

Andrew Grubb

# Table of Statutes

Paragraph references printed in **bold** type indicate where the Statute is set out in part or in full.

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