# Audio-Visual Coverage of Courts

## A Comparative Analysis

DANIEL STEPNIAK

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# AUDIO-VISUAL COVERAGE OF COURTS

Researched over a period of fifteen years and written by an author who has participated in each country's debate, *Audio-Visual Coverage of Courts* is the first book to undertake a comprehensive comparative study of televised court proceedings in Great Britain, the United States, Canada, Australia and New Zealand.

Exhaustive in his identification and analysis of relevant law and key developments, Daniel Stepniak also relies on hitherto largely unpublished primary sources to provide unprecedented coverage of the experiences of courts. Through analysis of common law courts' regulation of audio-visual reporting Daniel Stepniak proposes a theoretical framework and proven action plan for the attainment of the potential benefits of audio-visual coverage, and argues that technological advances, the entrenchment of rights and, above all, the recognition by courts of their vested interests in facilitating greater public access and understanding of judicial proceedings have all led to audio-visual coverage becoming increasingly perceived as desirable.

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# ABBREVIATIONS

| | |
|---|---|
| A | Atlantic Reporter (US) |
| ABA | American Bar Association; Australian Bar Association |
| ABAJ | *American Bar Association Journal* |
| ABC | Australian Broadcasting Corporation |
| AC | Law Reports, Appeal Cases (UK) |
| ACT | Australian Capital Territory |
| AIJA | Australian Institute of Judicial Administration |
| AILR | Australian Industrial Law Reports (Australia) |
| ALJR | Australian Law Journal Reports |
| All ER | All England Law Reports (UK) |
| ALR | Australian Law Reports |
| ALRC | Australian Law Reform Commission |
| ASAL | Annual Survey of Australian Law |
| BBC | British Broadcasting Corporation |
| BCCLA | British Columbia Civil Liberties Association |
| BCJ | British Columbia Judgments (Canada) |
| BCLR | British Columbia Law Reports (Canada) |
| BCPC | British Columbia Provincial Court |
| BCSC | British Columbia Supreme Court (Canada) |
| BCTV | British Columbia Television |
| Cal. Super Ct | California Superior Court |
| CBC | Canadian Broadcasting Corporation |
| CBS | Columbia Broadcasting System |
| CCA | Court of Criminal Appeal (Australian State Court) |
| CCC | Canadian Criminal Cases |
| CCTV | closed circuit television |
| CJC | Canadian Judicial Council |
| CKVU | Citytv Vancouver |
| CLR | Commonwealth Law Reports (Australia) |

| | |
|---|---|
| CMC | conventional media coverage |
| CNN | Cable News Network |
| CPAC | Canadian Public Affairs Channel |
| CR | Criminal Reports, Canada |
| C-SPAN | Cable Satellite Public Affairs Network |
| Cth | Commonwealth |
| CTV | Canadian Television Network |
| DLR | Dominion Law Reports (Canada) |
| DPP | Director of Public Prosecutions |
| EHRR | European Human Rights Reports |
| EMC | electronic media coverage |
| F | Federal Reporter (US) |
| F. Supp | Federal Supplement (US) |
| FCR | Federal Court Reports (Australia) |
| FLR | Federal Law Reports (Australia) |
| HC Debs. | House of Commons Debates (UK) |
| HCA | High Court of Australia |
| High Ct | High Court (UK) |
| ICAC | Independent Commission Against Corruption (NSW) |
| ICCPR | International Covenant on Civil and Political Rights |
| ICH | Internet Content Host |
| ICHRL | Interights Commonwealth Human Rights Law |
| ICT | information and communications technology |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| IPI | International Press Institute |
| IR | Industrial Reports (Australia) |
| ISP | Internet Service Provider |
| IT | information technology |
| ITC | Independent Television Commission |
| ITN | Independent Television News |
| ITV | Independent Television |
| JC | Justiciary Cases (Scotland) |
| KNBC | NBC 4 |
| Leg. Rep. | Legal Reporter (Australia) |
| LRCWA | Law Reform Commission of Western Australia |
| LSUC | Law Society of Upper Canada (Ontario) |

| | |
|---|---|
| MALR | Media and Arts Law Review (Australia) |
| NAFTA | North American Free Trade Association |
| NSJ | Nova Scotia Judgments (Canada) |
| NSR | Nova Scotia Reports (Canada) |
| NSWCA | New South Wales Court of Appeal (Australia) |
| NSWCCA | New South Wales Court of Criminal Appeal (Australia) |
| NSWLR | New South Wales Law Reports (Australia) |
| NSWLRC | New South Wales Law Reform Commission |
| NTSC | Northern Territory Supreme Court (Australia) |
| NY Slip. Op. | New York Slip Opinion |
| NY Sup. Ct | New York Supreme Court Reports (US) |
| NYCRR | New York Codes Rules and Regulations (US) |
| NYS | New York Supplement (US) |
| NZLR | New Zealand Law Reports |
| Okla. Crim. Ct App | Oklahoma Criminal Court of Appeal (US) |
| Ont. Dist. Ct | Ontario District Court |
| PIO | Public Information Officer |
| QB | Law Reports, Queen's Bench (UK) |
| RSC | Revised Statutes Canada |
| RSO | Revised Statutes of Ontario (Canada) |
| RTNDA | Radio-Television News Directors' Association |
| SASC | South Australia Supreme Court |
| SASR | South Australian State Reports (Australia) |
| SBS | Special Broadcasting Service (Australia) |
| SCC | Supreme Court of Canada |
| SCCR | Scottish Criminal Case Reports |
| SCNSW | Supreme Court of New South Wales |
| SCOLAG | Scottish Legal Action Group |
| SCR | Supreme Court Reports, Canada |
| SR (NSW) | New South Wales State Reports |
| St R Qd | Queensland State Reports |
| TVNZ | New Zealand Television Network |
| TVW | Washington State's Public Affairs Network |
| UNSW | University of New South Wales |
| UNTS | United Nations Treaty Series |
| U.S. | United States Supreme Court Reports |
| U.S.C. | United States Code |
| VAR | Victorian Administrative Reports (Australia) |

| | |
|---|---|
| VR | Victorian Reports (Australia) |
| VSC | Victoria Supreme Court (Australia) |
| VTV | Vancouver Television |
| WAR | Western Australian Reports (Australia) |
| WASCA | Western Australia Supreme Court, Court of Appeal (Australia) |
| WLR | Weekly Law Reports (UK) |

# 1

# Introduction

## A An overview of the history of the debate

Whether media organisations should be permitted to photograph or otherwise record vision and/or sound of court proceedings has been debated for as long as such technology has existed.

Thus the debate in Britain dates back to the introduction of press photography, while in the United States the issue first gained prominence through the filming of trials for cinema newsreels.

Several factors account for the disquiet caused by the media's incorporation of visual images in courtroom reporting, which led such visual coverage to be prohibited in Britain and virtually banned in the United States. Early courtroom photography was undoubtedly disruptive and distracting to participants, not only because it involved the use of cumbersome and obtrusive technology, but also because it was novel. Courts and other authorities also deemed visual coverage undesirable because it facilitated unprecedented levels of public access, further fuelling interest in and debate of judicial proceedings.

Disquiet at the potential impact of such intrusive publicity on courtroom participants and on public respect for legal institutions has continued to dominate the debate long after technological advances eliminated the bases of concerns relating to physical distraction and disruption. The belief that respect and confidence in the judiciary is promoted and protected through the maintenance of judicial mystique and detachment has also served to provide a rationale for a denial of electronic media access to proceedings, even where the interests of parties and participants cannot be adversely affected.

Judicial resistance to audio-visual reporting may also be explained in terms of judges' traditional distrust and ambivalence towards media reporting, a factor predating audio-visual technology. It is only in recent years that courts in common law jurisdictions have begun to view media publicity not as a necessary evil but as a desirable aid to ensuring that

justice is done and is seen to be done, and to maintaining public confidence in the law and judicial system.

The pervasive culture of rights in the United States, largely attributable to the freedoms of speech and of the press enshrined in the Bill of Rights, ensured that the unqualified prohibition on audio-visual reporting of court proceedings first imposed in the 1930s was lifted as soon as it could no longer by justified on the basis of disruptive and distracting technology. While all American states now permit some proceedings to be broadcast, in practice many judges choose to exercise their discretionary power to deny such coverage. Federal judges and in particular the Justices of the Supreme Court of the Unites States remain opposed to the televising of court proceedings. Though largely unheralded and overshadowed by negative publicity surrounding the televising of high profile cases, the most positive and informative American experiences have been those of state courts which in increasing numbers actively and routinely promote and facilitate public access via media broadcasting or even their own webcasting.

The enactment of similar rights in Canada via the Charter of Rights and Freedoms and in New Zealand via the Bill of Rights Act 1990 has also led to a recognition that prohibitions on audio-visual reporting are, as a matter of legal principle, no longer able to be maintained.

Due in large measure to the commitment of key judicial figures, in the late 1990s New Zealand successfully experimented with and adopted closely regulated audio-visual reporting of its proceedings. In Canada, where the relaxation of common law bans on cameras in courts had been largely championed by the media, the courts have been more reluctant to permit camera access. However, with judicial opposition waning, Canadian jurisdictions are beginning incrementally to permit audio-visual coverage.

American and Canadian experiences reveal that where camera access is perceived in terms of media rights, it may be accepted in principle, yet in practice may continue to be resisted by the courts.

The British government has recognised that its enactment of the Human Rights Act 1998, which implements the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms into British domestic law, called for the promotion of a culture of rights, requiring a re-examination of the role of the judiciary and public access to courts. While in the early 1990s Scottish courts recognised that the new legal culture was incompatible with the maintenance of a prohibition on cameras in courts, a revision of the

statutory prohibition on cameras in English and Welsh courtrooms is currently under way.

Australia's position is distinguishable in that Australian law has not moved towards entrenching or even enacting a statute protecting or guaranteeing fundamental rights. However, the Australian judiciary continues to move towards embracing a more proactive role in facilitating public access and understanding of court proceedings. This has led courts to take significant steps designed to assist and promote accurate reporting of court proceedings. Even in the absence of pressure from the media, some Australian courts have instigated and encouraged restricted audio-visual coverage as a means of addressing public criticism of judicial activism and of promoting greater understanding of the role of courts.

## B Current issues of the debate

The key issues of the current debate are identified and addressed throughout this book.

A number of key issues relate to the impact of developments in communication and information technology. Technological advances have ensured that audio-visual recording of court proceedings need not distract nor disrupt proceedings. The utilisation of recording technology by courts has also made it increasingly possible for audio-visual recordings of proceedings to be undertaken utilising courts' installed recording equipment. While the mere knowledge of being recorded may still have an effect on participants, it could be said that the pervasiveness and extensive public use of audio-visual communication and information technology makes audio-visual coverage less daunting for courtroom participants and more acceptable to the public.

While technology provides the means for enhancing the openness of judicial proceedings, it also provides public access to information relating to court proceedings, the unavailability of which appears to be assumed in traditional principles regulating courtroom reporting through the balancing of principles of open justice and fair trial. This has served to temper the extent to which courts relying on preventative measures to counter the effects of prejudicial publicity embrace technology to promote open justice.

Another set of key issues flows from the perceived inconclusiveness of evidence regarding the effect of televising. In seeking to balance the interests of open justice and rights to access and publish information

about court proceedings on the one hand with the right to a fair trial on the other, the inconclusiveness of evidence as to the effect of broadcasting on participants has led many judges to deny camera access. This factor has caused the central question of the debate to be whether inconclusive evidence as to the effects of televising justifies prevailing statutory and other prohibitions and restrictions and common law presumption against such coverage. The perceived inconclusiveness of evidence continues to play a key role in the enforcement of the legal rights of those seeking to record and broadcast or gain access to audio-visual recordings of court proceedings and in the judiciary's exercise of discretionary powers to authorise audio-visual coverage.

A number of further key issues concern the impact of the recognition of legally enforceable rights of those seeking to record, broadcast or access audio-visual recordings of court proceedings. The experiences of Canada and Britain illustrate some aspects of the impact of the recognition of rights on the debate and in particular on the impasse created by the perceived inconclusiveness of evidence and on judicial reluctance to address the issue. Thus in Canada, the question whether rules placing the onus of establishing the absence of detrimental effect on those seeking to record and broadcast proceedings or making audio-visual coverage subject to the consent of parties are justified under section 1 of the Charter of Rights and Freedoms remains hotly contested and yet to be ruled on by the Supreme Court of Canada. However, even in the absence of such a ruling, the embracement of a rights culture and the acceptance of the benefits of courtroom publicity make routine broadcast of at least appeal proceedings inevitable.

In the United Kingdom, Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is forcing the courts and government to address the issues of whether court televising should be permitted and what restrictions are compatible with the provisions of the Convention, in spite of continuing concerns regarding the inconclusiveness of evidence as to the effects of recording and broadcasting. In Scotland the issue appears to be whether the potentially detrimental effects of televising justify the blanket prohibition on the televising of current trials. In England and Wales, the government's promotion of a rights culture, judicial reforms and focus on enhancing public participation, debate, access and understanding of law has led the government and senior judges to conduct an experiment with the recording of appeal proceedings. If the experiment is deemed a success it is highly likely to lead to the amendment of the statutory

prohibition on audio-visual coverage and thus to permit at least the televising of appeal proceedings. Irrespective of this development, it remains doubtful whether the retention of a blanket statutory ban on the televising of first instance hearings could withstand a direct challenge of its compatibility with the Convention.

A key issue also addressed throughout this book relates to the decisive role played by the attitude of judges. Thus the view held by some judges in all the jurisdictions considered in this book – that the requirements of open justice are satisfied in the absence of televised proceeding – is shown to pose an ongoing obstacle to the introduction of audio-visual coverage. The American experience also reveals that a lack of judicial support can in practice severely restrict the implications of legal rights to record, broadcast and access audio-visual recordings of proceedings. Thus, with few exceptions American courts continue to reject media argument seeking the recognition of a presumptive constitutional right to televise proceedings. Even if federal legislation were to override the objections of the Federal Judicial Council and grant federal judges the discretion to permit the televising of their proceedings, it would be unlikely to lead to a significant increase in the number of cases broadcast as public antagonism towards trial by media is currently causing courts in high-profile cases to restrict media coverage in order to safeguard the right to a fair trial and avoid the perception of trial by media.

New Zealand's experiences as outlined in this book reveal the decisive role played by influential members of the judiciary in the admission of audio-visual coverage, and illustrate that judicial willingness to accommodate and cooperate with the electronic media is required for such coverage to become accepted. Thus, although New Zealand courts have permitted proceedings to be routinely televised since 2000, and have recognised a presumption in favour of such coverage, the severity of restrictions imposed on such coverage had caused court televising to remain contentious. However, recent relaxation of the regulations and the acceptance by New Zealand's new Supreme Court of audio-visual coverage of its proceedings as a norm appear to have finally made extended coverage acceptable to all stakeholders and to the public.

This book also identifies and addresses issues flowing from the factors which distinguish Australia's experiences of court televising from those of the other common law countries – the lack of relevant legally enforceable rights, and the Australian judiciary's dominant role in the introduction of court televising. With Australian courts rather than the media instigating the occasional broadcasting of proceedings,

audio-visual coverage remains ad hoc and largely confined to documentaries, judgment summaries, sentencing remarks and occasionally some legal argument. In the absence of enforceable rights, on the basis of which a legal challenge to Australia's de facto prohibition of televising could be mounted, further innovations remain in the hands of the judiciary. In view of a lack of media interest and continuing judicial reservations regarding media access, it is likely that regular televising of proceedings will only occur through arrangements with public or dedicated broadcasters or through webcasting by the courts, which is currently under consideration by some Australian courts.

### C The key arguments

The cameras in courts debate has been dominated by arguments over the effects of the recording and broadcasting of court proceedings. Yet, studies, experiments and experiences in the United Kingdom, the United States, Canada, Australia and New Zealand have revealed such effects to be incapable of being established conclusively.

What they have revealed is that appropriate regulations and controls are capable of minimising if not eradicating potentially detrimental effects, and that personal experience of televised court proceedings tends to make participants more favourably disposed to such coverage. However, factors such as judicial and public distrust of the electronic media's motives for seeking access to record and broadcast court proceedings and the absence of evidence substantiating the touted potential benefits have served to stalemate the debate.

It is submitted in this book that the effects of audio-visual coverage are intrinsically incapable of being conclusively established and thus ought not to be the focus or determining factor of the debate.

Accepting the inescapable fact that effects can only be measured in terms of perceptions has implications not only for how the effect of audio-visual coverage is assessed but also for whether and the manner in which such coverage is introduced, by whom it is introduced, and the basis on which it is regulated and controlled.

The continuing insistence on a substantiated absence of effects as a prerequisite to audio-visual recording and broadcast of court proceedings, it is argued in this book, is also incompatible with the principles of open justice, which recognise inherent costs and dangers of the public administration of justice, and with the contemporary reality in which television is the dominant source of public information regarding court proceedings.

In this book it is proposed that while the minimisation of and acceptance of unavoidable risk is contingent on numerous factors, whether proceedings are subject to audio-visual coverage and whether the benefits of audio-visual coverage are attained is ultimately determined by three factors: the recognition of a legally enforceable right to record and broadcast and/or access audio-visual footage of court proceedings; the availability of technology capable of ensuring that such coverage is compatible with judicial proceedings; and above all, judicial attitudes which deem such coverage to be in the interests of the administration of justice and do not see it merely as a media right.

The analysis of the experiences in the common law jurisdictions considered in this book reveals that a willingness by courts to facilitate open justice, the presence of or a promotion of a culture of rights and the availability of suitable technology have been determinative in the successful introduction of audio-visual coverage.

On this basis, it is submitted that whether audio-visual coverage of court proceedings is permitted and how it is regulated ought to be determined not as a media right acceded to on the basis of conclusive evidence that it will not affect judicial proceedings, but rather as a medium of public information capable of enhancing public access and understanding of judicial proceedings.

## D Structure

Chapters 2 to 6 undertake an examination and analysis of the experiences of British, American, Canadian, Australian and New Zealand courts with audio-visual reporting of court proceedings. In the light of the history of each country's experiences the chapters evaluate the two key arguments regarding the determinative factors and the inconclusiveness of evidence as to effects.

The choice of the United Kingdom, United States, Canada, Australia and New Zealand as the countries whose experiences with audio-visual coverage would be the focus of my comparative study is attributable to a number of factors. To ensure that meaningful inferences could be drawn, the chosen jurisdictions needed to share key legal and political traditions. Thus, all five jurisdictions share a British common law tradition, an independent judiciary in which judges perform a comparable role in adversary proceedings and appeal hearings, and have a commitment to democratic rights and a transparent publicly accountable judicial system. Chosen countries also had to have sufficient experience with audio-visual

coverage for meaningful comparison. In this respect, the inclusion of the United Kingdom, Canada and New Zealand was partly motivated by a desire to reveal their significant experiences which are relatively unknown outside and in some cases even within their borders. While the United States was included because of the wealth of its studies and experiments, its jurisprudence in this area, and because it continues to be popularly equated with courtroom television, the book has confined its attention to those aspects of the American experiences which influence or carry inferences for the other countries considered.

The characteristics which distinguish these five common law countries were found to be equally relevant to the focus of this book, in that the identification of differences has served to highlight the implications of the adoption of differing policies and approaches to what this book presents as the key variables or determinative factors in the success and acceptability of audio-visual reporting of court proceedings. Thus, the significance of the presence of a culture of rights was able to be considered through an analysis of the influence of the American Bill of Rights, Canada's Charter of Rights and Freedoms, New Zealand's Bill of Rights Act 1990 and the United Kingdom's Human Rights Act 1998, and able to be contrasted with the absence of any relevant entrenched rights in Australia. A consideration of the different ways in which technology has affected the nature and debate of court reporting in these comparably affluent Western societies, and the divergent manner in which the judges have responded to the prospect of audio-visual coverage of courts, has facilitated comparisons conducive to the drawing of translatable inferences and substantiated conclusions.

Chapter 7 undertakes a comparative review and analysis of the findings of studies, experiments and experiences of the jurisdictions dealt with in Chapters 2 to 6. It emphasises that such findings reveal the detrimental and beneficial effects of electronic media coverage to be incapable of being established conclusively to everyone's satisfaction. It is argued in Chapter 7 that although some deem the findings to be inconclusive, those evaluating audio-visual coverage have consistently found feared detrimental effects to be either unfounded or capable of being acceptably minimised through appropriate regulation and control. Chapter 7's discussion also notes that though such findings have tended to reassure other jurisdictions considering electronic media coverage, they are shown not to be determinative of whether such coverage is permitted. Pilot projects and experiments are shown to have been undertaken only after jurisdictions have become persuaded

of the desirability for such coverage. The function of such experiments is consequently held to be largely to reassure those unconvinced of the desirability of such coverage, to acclimatise courtroom participants and the public, and to determine the most appropriate and effective methods of regulation.

The comparative analysis is shown to confirm that the key determining factors are the presence of a legal rights culture, which ultimately promotes an acceptance of audio-visual coverage; changes in courts' perceptions of their role (sometimes imposed on courts) which lead them to alter their relationship with the media and proactively promote public access to and understanding of judicial proceedings in order to bolster public confidence in the judiciary; and technological developments, which have eliminated some of the perceived dangers, concerns and adverse effects of televising.

In conclusion, Chapter 7 posits a new context in which audio-visual coverage of court proceedings should be considered and regulated. It proposes that in the light of earlier discussion and analysis audio-visual decisions as to whether the recording and broadcast of court proceedings ought to be permitted and how it should be regulated should be determined not in terms of the right of the electronic media's access to court proceedings, but rather as the utilisation of courtroom technology to enhance public access and understanding of proceedings and court rulings by the wider public.

## E Scope and terminology

While the main focus of this book is on television camera recording and broadcast of courtroom proceedings, the book also incorporates the consideration of related media issues such as still photography by the press, audio recordings by radio broadcasters, and courts' webcasting of their own audio and or visual recordings of proceedings.

Terms such as 'courtroom televising', 'broadcasting of proceedings', 'audio-visual coverage', 'extended media coverage', 'in-court televising' and 'electronic media coverage' are used interchangeably throughout. However, whenever relevant, factors distinguishing various forms of media, nature of recordings and broadcast formats are highlighted and addressed. For example, live broadcasts may be distinguished from delayed transmissions; audio recordings and broadcast from video recordings; civil proceedings from criminal proceedings; first instance hearings from appeal hearings; overlay footage from actual excerpts of

hearings; the recording and broadcast of segments of hearings from 'gavel to gavel' coverage; edited from unedited broadcasts; and broadcast with commentary from broadcasts without commentary.

The term 'access to courtroom proceedings' may encompass levels of access ranging from severely restricted access, bordering on prohibition, to unrestricted access. While the book argues against an unqualified absolute ban on audio-visual coverage of court proceedings, it does not advocate a particular minimum level of access. It is the basis on which access is restricted or prohibited rather than the extent of permitted coverage which the book challenges. Thus, the book argues that whether and to what extent access is granted ought to be determined not in terms of such access being a media right, or contingent on it being established that such access will not adversely affect proceedings, but rather on the basis of such access being seen as the utilisation of a medium capable of enhancing public access to information and understanding of court proceedings. This suggests that various levels of access may be appropriate for different types of judicial or quasi-judicial proceedings, with the nature of some proceedings and other issues justifying a total exclusion of audio-visual media coverage while others may warrant virtually unrestricted access.

The term 'open justice' as used in this book relates to the principle that deems it desirable that the public be afforded access to court proceedings and to information about the work of courts in order to enhance public confidence in and ensure meaningful public accountability of the administration of justice through informed commentary and criticism. This book argues that it is undesirable and inappropriate to equate the concept of 'open justice' with rights, as such an approach tends to lose sight of why it is deemed important that justice be administered openly.

# 2

# United Kingdom

## A Introduction

Statutory prohibitions bar television cameras from courtrooms in England, Wales and Northern Ireland.

Since 1925, section 41 of the Criminal Justice Act 1925 has imposed an absolute ban on the taking of photographs in courtrooms and in the precincts of courts in England and Wales.[1] Section 29 of the Criminal Justice Act 1945 imposes an identical prohibition with respect to courts in Northern Ireland.[2] Though section 41 does not expressly prohibit the *televising* of court proceedings, its prohibition on the taking and publishing

[1] Criminal Justice Act 1925 (15 & 16 Geo 5 c 86), s. 41 states:

> 1. No person shall:
>  (a) take or attempt to take in any court any photograph, or with a view to publication make or attempt to make in any court any portrait or sketch, of any person, being a judge of the court or a juror or a witness in or a party to any proceedings before the court, whether criminal or civil; or
>  (b) publish any photograph, portrait or sketch taken or made in contravention of the foregoing provision of this section or any reproduction thereof; and if any person acts in contravention of the foregoing provisions of this section he shall, on summary conviction, be liable in respect of each offence to a fine not exceeding level 3 on the standard scale.
> 2. For the purposes of this section –
>  (a) the expression 'court' means any court of justice, including the court of a coroner:
>  (b) the expression 'judge' includes recorder, registrar, magistrate, justice and coroner:
>  (c) a photograph, portrait or sketch is taken or made in court if it is taken or made in the court-room or in the building or in the precincts of the building in which the court is held, or if it is a photograph, portrait or sketch taken or made of the person while he is entering or leaving the court-room or any such building or precincts as aforesaid.

[2] Set out in *Broadcasting Courts: A Consultation by the Department for Constitutional Affairs* (November 2004), Annexure A. See www.dca.gov.uk/consult/courts/broadcasting-cp28-04.htm at 29 March 2007.

of photographs in courts has been held to apply to television cameras.[3] Prior to 1925, courtroom photography in England and Wales had been regulated and sometimes prohibited by judges' exercise of their inherent power to control proceedings, and the law of contempt of court.[4]

As section 41 does not apply to Scottish courts, such inherent power has governed camera access to courtrooms in Scotland.[5] A rule of practice flowing from the courts' inherent power effectively banned cameras from Scottish courts prior to 1992, and continues to severely restrict such coverage.

Since 1981, sound recording of British court proceedings has also been prohibited by section 9 of the Contempt of Court Act 1981, which imposes an absolute prohibition on the publication of sound recordings of legal proceedings and restricts the use of recording devices to occasions where leave is granted by the court and to the recording of official transcripts of proceedings.[6] Though the televising of proceedings involves the recording and broadcast of both vision and sound, it has generally been accepted that section 9 does not extend to the use of television cameras.[7]

The statutory prohibition and common law restrictions imposed by the law of contempt of court and inherent judicial power on television coverage of judicial and quasi-judicial proceedings have been

[3] *Re St Andrew's, Heddington* [1977] 3 WLR 287, 289–90 (Judge Ellison); *J Barber & Sons* v. *Lloyds Underwriters* [1987] 1 QB 103, 105 (Evans J).

[4] See Martin Dockray, 'Courts on Television' (1988) 51 *Modern Law Review* 593 and the view expressed by English Barrister Albert H Robins, that English *sub judice* laws would have prevented the trial by media which took place in the 1935 American case of *State* v. *Hauptmann* 180 A 809 (1935): Albert H Robins, 'The Hauptmann Trial in the Light of English Criminal Procedure' (1935) 21 *American Bar Association Journal* 301. For contempt of court and the courts' inherent power see also *Attorney-General (UK)* v. *Leveller Magazine Ltd* [1979] AC 440; Watkins LJ in *R* v. *Felixstowe Justices, ex parte Leigh* [1987] 1 QB 551.

[5] For an historical explanation see Lord Hope, 'Television in the Scottish Courts', paper presented at Meeting of Chief Justices and Attorneys-General of the European Union, Lisbon, May 1994, at p. 3; see Daniel Stepniak, *Electronic Media Coverage of Courts: A Report Prepared for the Federal Court of Australia* (1998), Appendix 22.

[6] Contempt of Court Act 1981, s. 9. See discussion of the 1974 recommendations of the Phillimore Committee on Contempt of Court in Clive Walker and Debra Brogarth, 'Televising the Courts' (1989) 153 *Justice of the Peace* 637, 638; Martin Dockray, 'Free Press or Fair Trial?' (1989) *Law Society's Gazette* 17, 17–18.

[7] See Hope, 'Television in the Scottish Courts', above n. 5, at p. 2. However, in the Shipman Inquiry Dame Janet Smith held s. 9 to govern the recording of the soundtracks of audio-visual recordings: Dame Janet Smith, *The Shipman Inquiry: Decision on Application by Cable News Network (CNN)*, 25 October 2001, para. 17, www.the-shipman-inquiry.org.UK/ruling_20011025.asp, at 29 March 2007.

increasingly questioned over the past twenty years. In light of technological developments and the television medium's prominence as a source of public information, the prohibition and restrictions are increasingly perceived to be inconsistent with common law principles of open justice; with the freedom of speech provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'the Convention') which were incorporated into British domestic law by the Human Rights Act 1998; with changes to the structure and role of the judiciary; and with government policies seeking to build a human rights culture which emphasises openness and accountability of public institutions and public participation in public affairs, and appear to reflect the values of a bygone era.

The significance and impact of these and other factors suggesting a need to review the restrictions on audio-visual coverage of court proceedings is revealed in the following analysis of Britain's debate and experiences, which, though significant, have been confined to coverage permitted by the Lord President's 1992 directions in Scotland; of the Appellate Committee of the House of Lords which the Law Lords do not regard as a 'court' for the purposes of the statutory prohibition; and the quasi-judicial proceedings of public inquiries established under the Tribunals of Inquiry (Evidence) Act 1921 to which the statutory prohibition also does not apply.

## B The Caplan Report

In 1988, some sixty-three years after the enactment of the Criminal Justice Act 1925 prohibition, the Public Affairs Committee of the General Council of the Bar set up a working party to 'enquire into the feasibility and desirability of televising court proceedings in England and Wales'.[8] After studying overseas experiences with cameras for over twelve months, the working party released its Report (hereinafter 'the Caplan Report').[9] In challenging the rationale and appropriateness of

[8] The working party consisted of Jonathan Caplan (Chair), Michael Kalisher QC and Anthony Spaeight.

[9] Public Affairs Committee of the General Council of the Bar, *Televising the Courts: Report of a Working Party of the Public Affairs Committee of the General Council of the Bar* (May 1989) ('Caplan Report'). For a summary of the Report see 'Bar Working Party Reports' (1989) May-June *Counsel* 5. For analysis of the Report see Walker and Brogarth, 'Televising the Courts', above n. 6, who also note other assessments at 640, note 31.

the statutory ban the Caplan Report's findings and recommendations have greatly influenced the cameras in courts debate in Britain and other common law countries.[10]

In their unanimous findings, the working party noted that the principle of open justice could no longer depend on public attendance of court proceedings,[11] and that public scrutiny and debate of court proceedings had become overwhelmingly reliant on media and especially television reporting.[12] The working party's research had convinced them that objections to the televising of courts were 'based largely on fears which, in practice, are revealed to be unfounded, and in part upon an emotive reaction to television',[13] and that in view of available 'non-intrusive technology', such risks as there may be could be 'effectively removed or controlled by the rules of coverage and the trial judge's discretion and they are not a justification for banning the camera altogether'.[14]

Reviewing the arguments for and against televising in the light of evidence as to the effects of televising revealed by overseas experiences led the working party to declare 'that the benefit of televising outweighs the arguments against it'[15] and warranted a presumption in favour of permitting television access.[16]

On this basis they concluded that they could 'see no legitimate reason in 1989 in continuing to exclude the major source of news for the great majority of the population'.[17] Consequently they recommended that the Criminal Justice Act 1925 and Contempt of Court Act 1981 be amended to permit pilot projects of radio, television and photographic coverage of civil, criminal and of appellate proceedings to be undertaken.[18]

The Caplan Report's recommendations as to the scope of coverage which should be permitted and the restrictions to be imposed revealed a cautious approach, which sought to allay even unsubstantiated concerns. Thus, for example, the working party recommended that rules governing coverage stipulate that recorded material 'should only be used for news documentary or educational purposes [and] should prohibit use in any light entertainment context'.[19]

[10] See in particular discussion in chapters 4 to 6, dealing with Canadian, Australian and New Zealand experiences.
[11] Caplan Report, above n. 9, at para. 1.6. [12] *Ibid.* p. 26, para. 4.2.
[13] *Ibid.* p. 47, para. 6.1. [14] *Ibid.* p. 46, para. 6.1. [15] *Ibid.* p. 35, para. 4.13.
[16] *Ibid.* p. 41, para. 5.6(i). [17] *Ibid.* pp. 46–7, para. 6.1.
[18] *Ibid.* p. 49, para. 7.1, recommendations iv–v. [19] *Ibid.* p. 43, para. 5.6(iii).

In 1990, the working party's proposals were endorsed by the Bar Council and led to a private member's Bill, the Courts (Research) Bill 1991, being submitted to the House of Commons by Dr Mike Woodcock JP. The Bill sought to amend section 41 of the Criminal Justice Act 1925 and section 9 of the Contempt of Court Act 1981 only so far as to enable the pilot projects to be undertaken.[20]

The Bill was vigorously debated in the House of Commons,[21] and though the government 'took a neutral stance in the debate', it was 'talked out on its second reading and stood over for further parliamentary time',[22] which it did not subsequently receive.

The main grounds on which the Bill was opposed appeared to reflect criticism of the nature of some recordings and broadcasts in the United States, concerns regarding the additional pressure which such coverage would impose on parties and witnesses, and fears that proceedings would be trivialised and 'showmanship' would turn courts into a 'media circus'.[23]

As the issues which section 41 raised extended beyond the question of whether televising of court proceedings ought to be permitted, the Caplan Report's recommendations were quite appropriately described as 'inevitable developments' in light of increasing calls for a more open system of justice,[24] and warrant further consideration in that context.

## C Towards greater openness of justice

### *1 Enactment of the statutory prohibition*

Circumstances surrounding the enactment of the section 41 prohibition reveal that it was imposed in reaction to the introduction of regular publication of courtroom photographs in newspapers, and to their

[20] The Bill also sought to amend s. 8 of the Contempt of Court Act 1981 to permit jurors to be interviewed and thus enable research to be carried out into how juries reach their decisions: Jacline Evered, 'Televised Justice: Considered Proposals for the Controlled Use of Television Cameras in the United Kingdom Courts' (1997) 11(4) *Contemporary Issues in Law* 23, 26; Mike Woodcock, 'Open Justice' (1991) February *Counsel* 20. Surprisingly this amendment is said to have provoked considerably less controversy than the other two amendments. See 'Bar Support for Television Pilot Scheme' (1991) 141 *New Law Journal* 190.

[21] See HC Deb, vol. 186 cols. 549–67 and 615–678, 22 February 1991.

[22] Evered, 'Televised Justice', above n. 20, at 26.

[23] Sir Michael Hutchison, cited in 'Bar Support for Television Pilot Scheme', above n. 20.

[24] *Ibid.*

contribution to the reporting of several notorious cases in the early 1920s.[25] It was intended to be an experimental measure,[26] aimed specifically at curbing the publication in newspapers of courtroom photographs taken without leave of the court.[27] A particularly significant photograph was that taken of Old Bailey Judge Bucknell in the act of passing sentence of death on convicted murderer Frederick Seddon, apparently without the consent of the court,[28] and published in the *Daily Mirror* newspaper on 15 March 1912.[29] Described in parliamentary debates some twelve years later as 'a most shocking thing to have taken, or to have published, dreadful for the Judge, dreadful for everybody concerned in the case',[30] the photograph had led to the compilation by the Home Office of a file of published courtroom photographs and was cited as evidence of the need to prohibit courtroom photography.[31]

The publication of the sordid details of evidence in a divorce case and the high level of media and public interest in two criminal cases in 1922 appeared to reinforce calls for restriction on courtroom reporting, and on photographic coverage in particular,[32] and to provide the final impetus for the enactment of the prohibition. The new phenomenon of press photography[33] was perceived to be of 'limited public benefit', press photographs being deemed to only exacerbate the media's intrusion into the court proceedings by exciting 'prurient or morbid curiosity'.[34] In voicing his support for the curtailment of their publication, in 1923 the Director of Public Prosecutions observed: 'Whether it is that

[25] Dockray, 'Courts on Television', above n. 4, at 593–7.
[26] Sir William Joynson-Hicks, Home Secretary, 1924–1925, HC Deb vol. 188 col. 849, 20 November 1925.
[27] This discretion was removed during the Bill's passage through the House of Commons: Caplan Report, above n. 9, at para. 2.2.
[28] Dockray, 'Free Press or Fair Trial', above n. 6, at 17.
[29] For a discussion of this incident see Martin Dockray, 'A Sentence of Death' (1989) May–June *Counsel* 17 and *see* Dockray, 'Courts on Television', above n. 4. For further discussion see Susan Prince, 'Cameras in Court: What Can Cameras in Parliament Teach Us?' (1998) *Contemporary Issues in Law* 82, 83; Daniel Stepniak, 'British Justice: Not Suitable for Public Viewing?' in Paul Mason (ed.), *Criminal Visions: Media Representations of Crime and Justice* (2003), p. 254 at pp. 255–8; Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (2002), pp. 315–16.
[30] Lord Darling (1924) HL Deb vol. 56 col. 313, 26 February 1924.
[31] Dockray, 'Courts on Television', above n. 4, at 595.
[32] *Ibid.* 596.
[33] In 1904 the *Daily Mirror* 'became the world's first newspaper to be regularly illustrated with photographs': *ibid.* 594.
[34] *Ibid.* p. 597.

the Press creates a morbid demand for the pictures of criminal cases or whether the public taste has sunk so low as to require newspapers to provide them with these pictures, I am not sure.'[35]

Though playing a key role in the enactment of the prohibition, the desire to restrict the media's promotion of public interest in the more lurid details of judicial proceedings in 1925 appeared to have little relevance to the concerns expressed later with regards to televising of proceedings. Thus, referring to the publication of the notorious *Daily Mirror* photograph, Dockray observed:

> It did not trivialise or distort the legal process; nor did it sensationalise a trial which was already notorious. Where is the vice in the picture? Was vulgarity the objection? And was it really so dreadful for everybody in the case? There is no evidence that it disturbed Seddon.[36]

By seeking to restrict media reporting and public commentary on judicial proceedings the prohibition appeared and continues to appear inconsistent with principles of open justice and in particular with increasing recognition of the important role which media reporting plays in facilitating public understanding and scrutiny of the judicial process.

In seeking to protect the privacy of and avoid pressure on parties and witnesses, and to prevent public discussion of salacious details of cases, the prohibition endeavoured to avoid the very costs of open justice which had been deemed as acceptable in 1913 by the House of Lords in *Scott* v. *Scott*.[37] In his judgment Lord Atkinson had stated:

> The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent to both parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to be found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means of winning for it public confidence and respect.[38]

In observing why publicity was an essential element of open justice, Lord Shaw cited Jeremy Bentham to observe: 'Publicity . . . is the keenest spur

[35] Letter from Sir Archibald Bodkin to Sir John Anderson, Under Secretary of State at the Home Office Public Record Office, 1923: reference LC0 2/775 cited in Caplan Report, above n. 9, at p. 8, para. 2.2.

[36] Dockray, 'A Sentence of Death', above n. 29.

[37] *Scott* v. *Scott* [1913] AC 417.

[38] *Ibid.* at 463.

to exertion . . . It keeps the judge himself while trying under trial.'[39] Yet, the purpose of the prohibition has been interpreted by some judges as a protection from the glare of publicity. For example, in *Re St Andrews Heddington*[40] Judge Ellison saw the purpose of section 41 as 'clearly to afford necessary privacy to judges and others concerned from unwelcome intrusion or feelings of such which is essential for the proper conduct of proceedings'.[41] He went on to explain that:

> Justice could not be properly administered if judges or witnesses suffered the pressures, embarrassment and discomfort of being photographed whilst playing their particular role with the expectation that every sign, mood or mannerism or observation should later be displayed to the public media.[42]

## 2 *Reforms of the 1980s*

Two extra-judicial pronouncements made in 1987 appeared to signal an acceptance of the desirability of judicial involvement in enhancing public understanding in order to facilitate informed public debate of judicial matters. The Master of the Rolls declared that it was 'crucially important that the judiciary should explain to the public what they are seeking to achieve, how they are seeking to achieve it, what problems they are encountering, what success is attending their efforts'.[43] Lord MacKay, the Lord Chancellor, appeared to make such involvement possible when he relaxed the Kilmuir Rules, which since 1955 had sought to protect judicial reputation, impartiality and avoid public criticism through a convention of judicial reticence,[44] stating that 'Judges should be free to speak to the press, or television, subject to being able to do so without prejudicing their performing of the judicial work.'[45]

Key judicial pronouncements of the 1980s also emphasised public debate and criticism as crucial elements of open justice which should not be stymied through unwarranted restrictions on media reporting. Thus, Lord Scarman observed: 'Justice is done in public so it may be discussed

[39] *Ibid.* at 447. [40] *Re St Andrews Heddington* [1977] 3 WLR 286. [41] *Ibid.* at 289.
[42] *Ibid.* at 289–90.
[43] *Court of Appeal (Civil Division) Annual Review 1987*, cited in Dockray, 'Courts on Television', above n. 4, at 598.
[44] A. W. Bradley, 'Judges and the Media: the Kilmuir Rules' (1986) *Public Law* 383, 384.
[45] 'New Lord Chancellor urges end to restraints: "Judges should be permitted to speak out"', *The Times* (London), 4 November 1987, p. 3.

and criticised in public.'[46] He emphasised that the purpose of facilitating public debate was 'so that society may judge for itself the quality of justice administered in its name, and whether the law requires modification'.[47]

The implication of this judicially recognised encouragement of public debate for the regulation of court reporting was spelt out by Lord Justice Watkins in *R* v. *Felixstowe Justices ex parte Leigh*,[48] where he held that:

> not only must nothing be done to discourage the fair and accurate reporting of proceedings in court, but that no exercise of the inherent power of the court to control the conduct of proceedings must depart from the general rule of open justice to any greater extent than the court reasonably believes it necessary in order to serve the ends of justice.[49]

Concerns relating to a perceived trend towards secrecy and the curtailment of reporting restrictions had also led to legal challenges and to legislative changes such as the relaxation of the strict liability rule of the common law of contempt of court in the Contempt of Court Act 1981,[50] and the reforms introduced by the Criminal Justice Act 1988.[51] However, such reforms were still perceived not to adequately address concerns relating to the openness of justice.[52] In calling on the Lord Chancellor to embrace the principle of open justice in the Citizen's Charter, the Guild of British Newspaper Editors pointed to prohibitions on the reporting of committal proceedings introduced in 1967 and the significant percentage of hearings which were subject to reporting restrictions under the Contempt of Court Act 1981 as illustrations of how far British justice had 'slipped from its once avowed policy of being open to examination'.[53] The Caplan Report noted that while section 4 of the Contempt of Court Act 1981 permitted the reporting of contemporaneous proceedings, the section had been used to prevent the

[46] *Home Office* v. *Harman* [1982] 1 All ER 532, 547.
[47] *Harman* v. *Secretary of State for the Home Department* [1983] 1 AC 280, 316.
[48] [1987] 1 QB 551. [49] *Ibid.* at 593.
[50] Following a ruling by the European Court of Human Rights in *Sunday Times* v. *United Kingdom* [1979] 2 EHRR 245 in which the Court found that the House of Lords decision in *Attorney-General (UK)* v. *Times Newspapers Ltd* [1974] AC 273 had violated Article 10 of the European Convention on Human Rights.
[51] See David Newell, 'Media Law Review' (1989) 86 *Law Society's Gazette* 23; Debra Brogarth and Clive Walker, 'Court Reporting and Open Justice' (1988) 138 *New Law Journal* 909.
[52] See Walker and Brogarth, 'Televising the Courts', above n. 6.
[53] 'Open Justice' (1989) 142 *New Law Journal* 957.

broadcast of re-enactments of ongoing proceedings on the grounds that such broadcasts posed 'a substantial risk of prejudice to the administration of justice in those proceedings'.[54]

As the Caplan Report had been perceived by some as 'an opportunity to look afresh at the wider implications',[55] it caused some commentators to criticise the Report as being too cautious, and for reasons of political expediency of being willing to accept 'restrictions on broadcasting not warranted by the principles of fairness and justice'.[56] Thus, it was suggested that the strict restrictions which the Report proposed reflected an:

> excess of zeal for the dignity of the courts, possibly based on the misguided belief that the whole edifice will crumble if fun is poked at barristers and Judges. Yet a legal system in a democracy must ultimately survive on its merits rather than by way of censorship.[57]

## D Broadcast of parliamentary proceedings

Calls for greater openness in the administration of justice also coincided with changing attitudes towards public participation in public affairs. Thus, early calls such as those by the Royal Commission on the Press in 1949, which urged that the 'democratic form of society demands of its members an active and intelligent participation in affairs of community',[58] led to the parliamentary proceedings of both the House of Commons and House of Lords being broadcast by radio from 1977. Parliament's favourable experience with radio broadcasting in turn led to proposals in the mid-1980s for the televising of parliamentary proceedings.[59] Though initially unsuccessful, the proposals led to experimental televising in 1989 and permanent coverage from 1991.[60]

While the initial parliamentary debates of the televising of Parliament proposal appeared to be the catalyst which led to the questioning of the

[54] Caplan Report, above n. 9, at p. 10, para. 2.4.
[55] 'Tele-Justice' (1989) 139 *New Law Journal* 705.
[56] Walker and Brogarth, 'Televising the Courts', above n. 6, at 640.
[57] *Ibid.* 640.
[58] *Royal Commission on the Press* (Cmd 7700 1949), para 362, cited in Dockray, 'Courts on Television', above n. 4, at 599.
[59] See Martin Dockray, 'In Camera' (1985) 135 *New Law Journal* 1254.
[60] Prince, 'Cameras in Court', above n. 29, at 84. See also Department for Constitutional Affairs, *Broadcasting Courts*, above n. 2, Annexure B, 'Televising Parliament', www.dca.gov.uk/consult/courts/broadcasting-cp28-04.htm, at 29 March 2007.

statutory ban on cameras in courts,[61] broadcasting of Parliament was to play a much more direct role by enabling the first radio and television broadcasts of British judicial proceedings.

## E First broadcasts of judicial proceedings

Though not authorised under the general provisions governing radio broadcasting of Parliament, 'provision was made for a broadcaster to apply to the Select Committee on Sound Broadcasting for permission to broadcast proceedings of a judicial nature ... [a] similar regime was applied to TV broadcasts when television was introduced into Parliament'.[62] This provision was utilised to permit the radio broadcast of a 1986 judgment by Britain's highest court, the Appellate Committee of the House of Lords. Shortly following the commencement of experimental television broadcasting of Parliament in 1989, BBC Television was granted permission to record and broadcast the Appellate Committee delivering their opinions to the House of Lords.[63]

As the Law Lords appeared not to regard the Appellate Committee as a 'court' subject to the provisions of the Criminal Justice Act 1925,[64] in 1992 the BBC sought permission to televise in a documentary not only the delivery of the Law Lords' judgment in the parliamentary chamber of the House of Lords, but also legal argument conducted in a committee room.[65] While the Law Lords indicated a willingness to permit such coverage, in reaction to an earlier television programme by another broadcaster which had 'made the judges look rather silly' they insisted on certain conditions. In particular, members of the committee reserved the right to prevent the broadcast of any segments depicting them to which they objected. As such editorial control was not acceptable to the BBC, the broadcasts did not proceed.[66]

[61] See Dockray, 'In Camera', above n. 59; Martin Dockray, 'Cameras in Court' (1985) 6 *Journal of Media Law and Practice* 244.

[62] Lord Taylor, 'Justice in the Media Age', paper presented at the Commonwealth Judges' and Magistrates' Association Hertfordshire Symposium, Hertfordshire, 15 April 1995, at 10.

[63] *Ibid.* Lord Taylor had observed (at 10) that since 1978, 'permission to broadcast judicial proceedings [had] been sought on several occasions'.

[64] Joshua Rozenberg, 'The Pinochet Case and Cameras in Court' (1999) *Public Law* 178.

[65] Joshua Rozenberg, *The Search for Justice: An Anatomy of the Law* (1994), p. 190.

[66] *Ibid.* pp. 190–1; Rozenberg, 'The Pinochet Case and Cameras in Court', above n. 64, at 178–9.

## F Relaxation of the Scottish common law prohibition

### *1 Reasons for the relaxation*

While access to the hearings of the Appellate Committee of the House of Lords appeared destined to remain a stalemate, the endeavours of British broadcasters to gain greater access to court proceedings were buoyed in August 1992 when Lord Hope, the Lord President of Scotland, announced a relaxation of the rule of practice which had barred cameras from Scottish courts.

As he later explained, Lord Hope had sensed that the common law rule which had served to deny cameras access to Scottish courts would not survive and consequently decided to take the initiative in order 'to control events'.[67] At Lord Hope's request, Lord Cullen, a Scottish High Court Judge, had consulted the legal profession and broadcasters and prepared a report,[68] revealing Scottish lawyers to be generally in favour of a relaxation of the strict rule of practice, and technology capable of permitting proceedings to be televised without undue impact on proceedings.[69] Lord Hope's consultation of other Scottish judges also revealed a majority in favour in principle to a relaxation of the ban.[70] Arguably the judiciary's support may at least in part be attributable to Scottish judges being far less likely than their English counterparts[71] to find media reporting to adversely affect participants in judicial proceedings and thus be deemed to constitute contempt of court. As Bonnington has noted:

> There has never been a successful plea advanced in Scotland by an accused person to prevent his trial proceeding because of adverse pre-trial publicity. Nor has there ever been a successful appeal against conviction on the basis of prejudice caused by the media.[72]

[67] Hope, 'Television in the Scottish Courts', above n. 5, at 3.
[68] 'Scots Look at Televised Courts' (1992) 142 *New Law Journal* 79.
[69] Lord Hope 'Television in the Scottish Courts', above n. 5. The legal profession's support for the relaxation of the ban had been disclosed, following the release of the Caplan Report, in remarks by the President of the Law Society of Scotland that the televising of sentencing could act as a deterrent to crime: Prof. Ross Harper, 'Court TV Deterrent?' (1988) 138 *New Law Journal* 906.
[70] Hope, 'Television in the Scottish Courts', above n. 5.
[71] See the Caplan Report, above n. 9, for a discussion of the English judges' approach.
[72] Alistair J. Bonnington, 'Press and Prejudice' (1995) 145 *New Law Journal* 1623.

### 2 Lord Hope's Directions

On 6 August 1992 a practice note, containing 'Lord President Hope's Directions re Television in the Courts' and an explanatory memorandum were issued to the legal profession and the media.[73] Noting that the practice had been to refuse all requests for permission to televise court proceedings, Lord Hope set out an explanation for why he did 'not think that it is in the public interest in the long term that such an absolute restriction should remain'.

The Lord President noted that advances in modern technology meant that proceedings could be televised 'without undue interference in the conduct of proceedings'. Lord Hope also observed that cameras had been admitted, and proven to be acceptable to Parliament, to religious services and in some European courts. He further observed that visual aids were increasingly being utilised to help the public understand court proceedings, and noted that the broadcast of overseas proceedings may lead to 'misunderstandings about the way in which court proceedings are conducted in our own country'. Lord Hope held that it would also be 'in the public interest that people in Scotland should become more aware of the way in which justice is being administered in their own courts'. Having found 'sufficient support within the judiciary and the legal profession in Scotland for such a change to be made',[74] Lord Hope concluded that '[i]t would be in keeping with these and other developments for the televising of some proceedings in the Scottish courts to be permitted'.

Though relaxing the absolute prohibition on televising, Lord Hope's Directions stopped well short of the Caplan Report's call for a presumption in favour of televising. While the Caplan Report had urged that camera access be decided on the basis of criteria indicating 'whether justice could be endangered' in each individual case,[75] the criterion by which Scottish courts were to determine whether to permit televising was 'whether the presence of television cameras in the court would be without risk to the administration of justice'.[76] Lord Hope noted that his determination of the appropriate extent of relaxation had been guided by his consultations with judges and the legal profession.[77]

[73] For text of note and the Directives see Department for Constitutional Affairs, *Broadcasting Courts*, above n. 2, Annexure C.
[74] See Harper, 'Court TV Deterrent?', above n. 69, at p. 16.
[75] Caplan Report, above n. 9, at pp. 41–2, para. 5.6(i). [76] Directions, para (b).
[77] Hope, 'Television in the Scottish Courts', above n. 5.

The Directions distinguished broadcasts of current proceedings from broadcasts following the conclusion of hearings, and appellate proceedings from first instance trials. Thus, while permitting the televising of current *appellate proceedings* with the approval of the presiding judge, the televising of current civil and criminal *proceedings at first instance* was to remain totally prohibited. The retention of this prohibition was deemed justified in the case of first instance trials by perceived 'risks to the administration of justice'.[78] The concerns which accounted for this cautious approach appeared to be fuelled by reactions to the broadcast of some American trials, as even supporters of the proposal to permit cameras in Scotland were said to have had second thoughts after seeing broadcasts of the Florida rape trial of William Kennedy Smith.[79]

Though the recording of 'proceedings, including proceedings at first instance for the purpose of showing educational or documentary programmes at a later date [were to] be favourably considered', the Directions noted that 'such filming may be done only with the consent of all parties involved in the proceedings, and it will be subject to approval by the presiding judge of the final product before it is televised'.[80]

As the Scottish media had expressed support for the televising of court proceedings prior to Lord Hope's announcement,[81] and the Lord President had acknowledged that he had been assisted in his decision 'by the fact that most people in key positions in broadcasting in Scotland were known to me personally',[82] it was no surprise that the Directions provoked significant media interest. This led Lord Hope to conclude that 'detailed guidelines were required to lay down the procedures to be followed'.[83] This in turn led to protracted and often tense discussions before agreement was reached on specific rules which would govern the proposed televising. As had been the case with House of Lords' televising, the issue of editorial control proved particularly difficult to resolve. The ultimate compromise left judges able to make suggestions as to the final edit of stories to be broadcast but without a power of veto.[84]

The stringency of the Guidelines may explain why permission to record was only granted in 'one per cent' of the applications lodged by

[78] Directions, paras. (c) and (d). [79] 'Scots Look at Televised Courts', above n. 68.
[80] Directions, para. (h). [81] 'Television in Scotland' (1992) 142 *New Law Journal* 1149.
[82] Hope, 'Television in the Scottish Courts', above n. 5. [83] *Ibid*. 9.
[84] Sean Webster, 'Year-long struggle allows TV only restricted view of the courtroom', *Independent* (London), 16 November 1994.

BBC producer Nick Catliff.[85] Particularly problematic was the guideline which permitted parties to withdraw their consent up to twenty-four hours *after* courtroom footage had been recorded. Noting that this almost inevitably happened,[86] Catliff described the process as a 'ritualistic dance'.[87]

The difficulties of gaining the consent of parties to proceedings were also said to have been exacerbated by the 'frustratingly off-putting' wording of the consent form approved by Lord Hope.[88] Somewhat surprisingly in view of Lord Hope's determination that a majority of judges supported the relaxation, obtaining the consent of judges was said to pose the greatest obstacle.[89]

Also somewhat inexplicably in view of the Directions' strict safeguarding of the integrity of the judicial process, Lord Hope acceded to the BBC's request that verdicts be kept secret until they were broadcast to ensure that viewers would watch entire programmes.[90] In the absence of further information explaining why this decision was taken, it can only be surmised that Lord Hope agreed to this request in order to appease broadcasters who had complied with the demanding preconditions to recording.

As the complex application process and consent requirements in actuality asked the media to devote substantial time and resources to applications and even recordings which they could not count on being able to broadcast, it is not surprising that a number of media networks lost interest.[91] It was only the BBC's determination to broadcast educational programmes containing courtroom footage and its willingness to devote resources far exceeding those it would expend on other documentaries and programmes,[92] that led to the recording and broadcast of a number of Scottish trials.

[85] Alexandra Frean, 'BBC presses Mackay to allow cameras in court', *The Times* (London), 24 August 1994, p. 4.

[86] See Nick Catliff, 'On Camera not *in* Camera' (1994) 144 *New Law Journal* 1597, 1597–8.

[87] Nick Catliff, 'His Lordship regrets that this particular case. . .', *The Times* (London), 15 November 1994, p. 29; Liz Fisher, 'Through the Camera Lens: When Justice Is Not, Seen to Be Done' (1995) 69 *Australian Law Journal* 477, 479.

[88] Nick Catliff, 'His Lordship regrets that this particular case. . .', above n. 87, at 29.

[89] Webster, 'Year-long struggle', above n. 84. For criticism of this decision see Stepniak, *Electronic Media Coverage of Courts*, above n. 5, at p. 105, para. 5.27.

[90] Fiona Bawdon, 'TV on Trial' (1994) 91 *Law Society's Guardian Gazette* 10.

[91] The difficulties experienced by the media are outlined in Webster, 'Year-long struggle', above n. 84; Catliff, 'On Camera Not *in Camera*', above n. 86.

[92] Nick Catliff, '*The Trial* and the British Experience', paper presented at the Cameras in the Courtroom Conference, Southampton Institute, 12 February 1999.

### 3 *Reactions to the broadcast of Scottish proceedings*

The first trial to be recorded by television cameras in a British court was a shoplifting and assault trial in the Edinburgh Sheriff Court. It was recorded by BBC Television on 31 May 1993, and broadcast in April 1994. Broadcasts by BBC Scotland included two, one-hour documentaries on the behind-the-scenes workings of Scottish courts and the investiture ceremony of a new judge of the Scottish Criminal Court of Appeal. However, the most notable recordings were those undertaken at great expense[93] over two years by BBC 2 for *The Trial*, a five-part documentary series on Scottish criminal trials.[94] The series was broadcast nationally in late 1994 and overseas in subsequent years. Domestically it attracted some eight million viewers, averaging 2.5 million viewers per episode and an estimated 3.3 million for the first episode alone.[95]

While the strictness of the governing rules and the huge expense could not be sustained by the media beyond the initial recordings, a sufficient number of proceedings had been recorded to enable the judiciary, the legal profession and the public to form informed views as to the desirability and viability of courtroom televising.

Lord Hope was reported to have been 'reassured' by what was televised.[96] His 1994 comment that 'Justice is not a private matter. The public have a right to know and to understand what goes on in court. Access to proceedings by means of a television camera will assist this process',[97] suggested that the experience had not altered his views as to the benefits of televising proceedings.

A 1995 BBC survey of viewers' reactions appeared to vindicate Lord Hope's assessment. It revealed that 80 per cent of viewers had found the broadcasts to be thought-provoking, with some expressing surprise at how the legal system worked in practice. Sixty-nine per cent disagreed

[93] According to the producer, 'at a cost of £180,000 an hour, which is almost as much as *Eastenders*, three times the price of *Top Gear* and six times that of *BBC Sport*': *ibid.*

[94] For a detailed review of the series see Roderick Munday, 'Televising the Courts: An Appraisal of the Scots Experiment' (1995) 159 *Justice of the Peace and Local Government Law* 37, 57.

[95] Evered, 'Televised Justice', above n. 20, at 30 citing *BBC Broadcasting Research Report TV 94/154* (January 1995), p. 2.

[96] Fisher, 'Through the Camera Lens', above n. 87, at 480.

[97] Lord Hope quoted in *The Times* (London), 8 November 1994, p. 37, as cited in Fisher, 'Through the Camera Lens', above n. 87, at 477.

with the suggestion that it was wrong to show real-life cases on television.[98]

Those who participated tended to come away from the experience with a favourable view. Thus, Lord Stephen noted that he was 'happy' with the experience,[99] a Queen's Counsel indicated that he would like to 'do it again',[100] and another advocate observed that participants 'soon forgot the cameras were there'.[101] Ian Ryan, the solicitor representing Colin Stagg, cleared of a murder charge in a hearing which had not been televised, suggested that his client would have benefited from the hearing being televised:

> With something like the Stagg case you are very dependent on how the newspapers decide to report it. There has subsequently been a slight whispering campaign about the judge being too robust. But if the people had seen or heard four or five days of evidence, and then heard his judgment, they would not have any doubt that he was right.[102]

The legal profession's assessment, though mixed, was generally positive and deemed the broadcast to have been educational and an accurate presentation of the workings of the courts.[103]

While concerns regarding lawyers playing up to cameras did not eventuate,[104] some comments revealed lingering concerns about the additional pressure which televising exerted on parties to proceedings.[105]

Most of the criticism appeared to suggest that while the recorded footage had been used to produce high-quality documentaries, broadcast programmes did not reflect the true nature of proceedings. Thus, one commentator described the broadcasts as manipulative and as imposing a dramatic format on legal events,[106] while another saw *The Trial* series as recreating trials as drama.[107]

Even some who actively advocated camera access to court proceedings questioned the benefits of the broadcasts. Media lawyer Mark Stephens questioned whether the documentary series had been able to

[98] Evered, 'Televised Justice', above n. 20, at 30.
[99] Fisher, 'Through the Camera Lens', above n. 87, at 480. [100] *Ibid.* p. 480.
[101] Webster, 'Year-long struggle', above n. 84.
[102] Cited in Bawdon, 'TV on Trial', above n. 90. [103] *Ibid.* p. 10.
[104] Webster, 'Year-long struggle', above n. 84.
[105] Ian D Willcock, 'Television in the Courts' (1994) 210 *SCOLAG* 41.
[106] Munday, 'Televising the Courts', above n. 94, at 57–8.
[107] Fisher, 'Through the Camera Lens', above n. 87.

convey what really happens in court.[108] Stephen Brill, managing director of US Court TV, said he was 'appalled' by the overdramatised and overproduced series, and argued that *The Trial* series had hurt the cause of cameras in court more than the Simpson trial.[109] Such criticism appeared to reflect a frustration with televising which would show newsworthy current proceedings and permit the public to gain an unsanitised glimpse of judicial proceedings being prohibited, while recordings and broadcasts which were so regulated and constrained that they failed to present the reality of proceedings, and on that basis provided opponents of televising with a basis for suggesting that televising would distort rather than educate, were permitted.

Fiona Bowden suggested that 'programme makers bring a set of different values and priorities to bear in deciding what is important in a case'.[110] The distinction between what was deemed legally significant about the cases and what the producers apparently thought would be of interest to the public led some critics to question the desirability of opening the judicial process to greater media coverage and public commentary. For example, a *New Law Journal* editorial expressed the view that 'the problem with all forms of reporting [is that] the public at large is only interested in salacity'.[111] Revealing even greater disdain for the value of public opinion as to legal matters another legal commentator remarked:

> As for public opinion, Bertrand Russell said all one needs to know on the subject: 'One should respect public opinion insofar as is necessary to avoid starvation and to keep out of prison, but anything that goes beyond thus is voluntary submission to an unnecessary tyranny'.[112]

While the delayed broadcast of the documentary led some to suggest that the experiences did not provide a true indication of what would happen in news television broadcasts of current proceedings,[113] the televising of Scottish proceedings had been well received by key members

[108] Mark Stephens, 'Justice on the Box? The Televising of Trials Panders to the Current Trend for True-Life Crimes Rather Than Showing the Reality' (1994) 91 *Law Society's Gazette* 2.
[109] Robert Verkaik, 'Cameras Cross Atlantic: the USA's Trial Broadcasters Are Making a Pitch to Televise UK Hearings' (1995) 92(19) *Law Society's Gazette* 14.
[110] Bawdon, 'TV on Trial', above n. 90.
[111] 'The Thoughts of Sir Thomas' (1994) 144 *New Law Journal* 593.
[112] Munday, 'Televising the Courts', above n. 94, at 61.
[113] Robin Day, 'Injustice Seen to Be Done' (1995) *Spectator* 11.

of the English judiciary, and appeared to foster a perception that such broadcasts would be of public educative value. Though some judges such as Lord Taylor remained opposed to television access, largely 'on the grounds that it would expose victims of crime and witnesses to unnecessary pressure',[114] others, such as Master of the Rolls Sir Thomas Bingham, favoured the admission of television cameras 'because it would encourage understanding of the way courts operate'.[115]

The Lord Chancellor, Lord McKay, was said to have reacted enthusiastically to a preview of the first episode of *The Trial*[116] and became a keen observer of the Scottish experiences. Consequently, in ensuing discussions with the BBC in 1993 and 1994 he revealed himself to be receptive to the idea of opening courts to television cameras.[117]

## G Impact of the broadcast of overseas trials

It is important to note that much of the criticism of the Scottish broadcasts may in large measure be attributed to the negative reactions to broadcasts of American trials, and in particular the O.J. Simpson trial, which to some extent overshadowed the comparatively sanitised presentation of Scottish trials. While reflecting a distaste for what was perceived as American 'trial by media', such comments also highlighted a resistance from sectors of the legal profession to the television media's facilitation of greater public access to information about and discussion of trial proceedings – a view which in 1925 had accounted for the imposition of the statutory ban on photography in English and Welsh courtrooms.

This underlying basis for opposition to the televising of judicial proceedings was exposed by one commentator who, in rejecting criticism of the broadcasting of the O.J. Simpson trial and arguing that it was 'compelling television which is actually good for you', noted 'there is a large element of snobbery in the resistance to trial television – a belief that what the general public is avidly interested in must in some respect be base'.[118]

While most British courts remained closed to television cameras, British viewers were growing accustomed to viewing not only Scottish proceedings but also broadcasts of trials in American and international

[114] Webster, 'Year-long struggle', above n. 84; see also Lord Taylor, above n. 62.
[115] Webster, 'Year-long struggle', above n. 84.
[116] Frean, 'BBC presses Mackay', above n. 85, at p. 4.
[117] Verkaik, 'Cameras Cross Atlantic', above n. 109.
[118] Thomas Sutcliffe, 'May justice be done, and be seen to be done', *Independent* (London), 3 August 1994, p. 14.