

CAUTION AHEAD! CONSIDERATION OF LIVE BROADCASTING OF TRIALS

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Dear Editor,

Introduction

Proposed legislation in England and Wales will result in sentences passed by Crown Court judges being broadcast live from that court for the first time.¹ The broadcast will require the permission of the presiding judge and may be subject to necessary restrictions. In Ireland, in recent times, aside from audio visual images showing judges entering and leaving the courtroom, our Supreme Court has only occasionally taken to allowing live broadcasting of judgments delivered in Court.²

Whilst England and Wales proscribe recording of proceedings (including by sketch artists present in court) since at least 1925,³ this jurisdiction has no law underpinning the lack of broadcasting from courts.⁴ As Conor Gallagher suggests, the practice of preventing court proceedings being broadcast has simply developed with nothing preventing a trial judge (or court) from allowing cameras cover proceedings. Indeed, agreement reached between the judiciary, the Court Service and RTE enabled the recent coverage of Supreme Court judgments delivered live.

¹ The Crown Court (Recording and Broadcasting) Order 2020. It can be argued that broadcasting sentences delivered by judges may do something to allow a judge to control the dynamic of any subsequent debate over leniency or harshness. At the very least, it will demonstrate the time, effort and consideration that goes into imposing sentence.

² Mary Carolan, 'Supreme Court live: Ireland broadcasts judgment for the first time' *The Irish Times* (Dublin, 24 October 2017) <https://www.irishtimes.com/news/crime-and-law/courts/supreme-court/supreme-court-live-ireland-broadcasts-judgments-for-first-time-1.3266220> Accessed 28 May 2020. Chief Justice Clarke suggests that the broadcasting of the two judgments would aid in "demystifying" the court process. Also, see Mícheál Ó Scannáil, 'Graham Dwyer's Supreme Court appeal verdict will be televised' *Irish Independent* (Dublin, 21 February 2020) <https://www.independent.ie/irish-news/crime/graham-dwyers-supreme-court-appeal-verdict-will-be-televised-live-38976993.html> Accessed 28 May 2020.

³ The Criminal Justice Act 1925 s 41 prevents any photograph or sketch being taken of any participant to proceedings. Legislative exceptions now exist for the UK Supreme Court and Court of Appeal separate to the proposed legislation concerning the Crown Court.

⁴ See Conor Gallagher, 'Time to take another look at bringing cameras into court' *The Irish Times* (Dublin, 9 March 2015) <https://www.irishtimes.com/news/crime-and-law/time-to-take-another-look-at-bringing-cameras-into-court-1.2129571> Accessed 25 May 2020.

The Law

The seminal case of *In Re R Ltd*⁵ is not directly relevant to televised proceedings. Nonetheless, it does lay down important general principles relating to the constitutional requirement for public trials, having regard to Article 34.1° of Bunreacht na hÉireann.⁶ The Supreme Court ultimately rejected the application made by the CEO of the company seeking to have the case heard *in camera*. The Court held that the applicant must show a public trial ‘would deny justice as between the parties’ as opposed to simply prejudicing the company’s interests.⁷ In addition, the case made clear that the courts did not retain an inherent jurisdiction to exclude the media without legislative prescription subsequent to the adoption of the 1937 Constitution.⁸ Casey suggests uncertainty exists around the constitutionality of mandatory statutory provisions excluding members of the public from court proceedings.⁹

Furthermore, judgments of the European Court of Human Rights (ECofHR) may in time influence the requirement of justice to be administered in public and the specific issue of broadcasting court proceedings. In *Axen v Germany*,¹⁰ the ECofHR considered whether a decision of the Federal Constitutional Court of Germany was pronounced publicly, as required per Article 6 of the European Convention on Human Rights (“the Convention”), the Court states

that in each case the form of publicity to be given to the "judgment" under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 para. 1¹¹

In *Diennet v France*¹² domestic legislation ensured a medical disciplinary hearing was heard in private. The aim of the legislation was to prevent a participating medical professional from

⁵ *In Re R Ltd* [1989] 1 IR 126 (SC). The case was subsequently followed and applied by the Supreme Court in *Irish Press plc v Ingersoll Irish Publications Ltd*. (No.1) [1995] IESC 10, [1994] 1 IR 176.

⁶ Dame Janet Smith, Chairwoman of the public inquiry into the Dr Harold Shipman murders, rejected an application by a television company to broadcast evidence given by witnesses to the Inquiry. In her view, Article 10 did not extend to a right to receive information which is in the control of another. See Law Reform Commission, *Report on Public Inquiries Including Tribunals of Inquiry* (LRC 73-2005) [5.98].

⁷ *In Re R Ltd* (n 5) 135 (per Walsh J); See *Gilchrist v Sunday Newspapers Ltd* [2017] IESC 18, [2017] 2 IR 284 [41]-[46] (per O’Donnell J) suggesting that a less rigid and more fact specific test must be applied by courts considering applications for matters to be heard in private (in whole or part).

⁸ *In Re R Ltd* (n 5) 134 (per Walsh J).

⁹ James Casey, *Constitutional Law in Ireland* (3rd edn, Round Hall Sweet & Maxwell 2000) 277. The author makes the point that this type of mandatory provision in the Irish context seem to be limited to family legislation.

¹⁰ *Axen v Germany* (1984) 6 EHRR 195.

¹¹ *ibid* [31]. In Ireland, practice ensures that written decisions are produced even when proceedings are held *in camera* with redactions and amendments as necessary.

¹² *Diennet v France* (1996) 21 EHRR 554.

breaching his/her confidentiality obligations. No discretionary power rested with the disciplinary body to hold a public hearing and the *Conseil d'Etat* could not be viewed as 'a judicial body that has full jurisdiction', which if met, would have ensured part of the legal process was open to the public. In short, the ECofHR held that the private hearing amounted to a complete ban on members of the public attending, which was not strictly required by the circumstances.¹³ The Court held if there was a risk that the duty of confidentiality would be breached by the presence of members of the public, the body should have been able to hold that part of the proceedings in private.¹⁴

Finally, and most significantly, in *Pinto Coelho v Portugal (No.2)*¹⁵ the ECofHR considered audio recordings of a proceedings, made by a journalist without the permission of the domestic court (required by domestic law) and later distributed as part of a report highlighting a wrongful conviction. Despite the audio recordings including examination and cross-examination of witnesses, the witnesses, lawyers and judges' voices were digitally altered as part of the produced report. The Applicant journalist was convicted of breaching domestic law and fined €1,500. The Court held that the Applicant's Article 10 right to freedom of expression was breached.¹⁶ Though the domestic law was prescribed by law and pursuing a legitimate aim of protecting the proper administration of justice and the rights of others, the restriction was not necessary or proportionate to the said aim. The Court was conscious that the audio used was distorted to protect the identity of those involved and the broadcast was subsequent to the trial. Tomlinson highlights a number of points concerning the case.¹⁷ First, the Court did not consider

¹³ *ibid* [34].

¹⁴ *ibid*. As Casey highlights above, whether non-discretionary legislative provisions are Convention compliant is not clear. It is at least arguable they are not. In the High Court case of *A.B. v C.D.* [2013] IEHC 578, [2013] 3 IR 383 *Times Newspapers Ltd* applied to be allowed attend an action brought under the Judicial Separation and Family Law Reform Act 1989. One spouse opposed the application with the other spouse remaining neutral. Section 34 of the said Act states, 'Proceedings under this Act shall be heard otherwise than in public.' Section 38(6) of the Family Law Act 1995 states that provisions of s34 of the 1989 Act 'shall apply to proceedings under this Act in the High Court'. Keane J rejected the application of the newspaper group on the basis that she had no discretion, preferring the judgment of Laffoy J in *MP. v. A.P. (Practice: in camera)* [1996] 1 I.R. 144 (HC). However, one can envisage a more testing set of facts, where both litigants (whose dispute does not involve children) do not object to public proceedings. Incidentally, in Ireland, *bona fide* members of the press can now attend at and report on family law proceedings ensuring the identities of the parties are not revealed.

¹⁵ *Pinto Coelho v Portugal (No.2)* [2016] ECHR 296. The judgment was delivered in French. However, a legal summary of the judgment exists on the hudoc website. Available from: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22002-11095%22%5D%7D> Accessed 28 May 2020.

¹⁶ *ibid* [32].

¹⁷ Hugh Tomlinson, 'Case Law, Strasbourg: Pinto Coelho v. Portugal (No.2), Open Justice, Article 10 and broadcasting recordings of hearings', (*The International Forum for Responsible Media Blog*, 26 March 2013) <https://inform.org/2016/03/26/case-law-strasbourg-pinto-coelho-v-portugal-no-2-open-justice-article-10-and-broadcasting-recordings-of-hearings-hugh-tomlinson-qc/> Accessed 28 May 2020.

the matter through the lens of Article 6, Article 8 or for ‘maintaining the authority and impartiality of the judiciary’ as per Article 10. Secondly, he states the judgment ‘may provide grounds for a media challenge to the compatibility of section 9 of the Contempt of Court Act 1981 with Article 10’.¹⁸ Finally, he notes the Court did not consider whether a system of prior authorisation of audio tapes was ‘necessary and proportionate’.¹⁹ Despite the judgment being fact specific and not considering the additional ground under Article 10 of protecting the judiciary, it is difficult to see any future broadcast including an audio recording of proceedings (subsequent to the matter being finalised and with appropriate distortion) not protected by the Convention. Whether this could extend to audio visual transmission and in what context remains to be seen. Nonetheless, the *Pinto* judgment may be a timely indication of the direction in which Strasbourg jurisprudence is moving.

Concern

What follows are the arguments (and concerns) against televising court proceedings – some are well rehearsed with others more nuanced. In general, the desire for public education on the one hand competes with protecting the proper administration of justice on the other hand. There are additional concerns for broadcasting trial courts as distinct from appellate courts. However, this article is concerned with proceedings generally.

By far the greatest concern amongst jurists and commentators in allowing cameras into the courtroom, is that the quality of justice will suffer. The fear is lawyers and judges may be prone to grandstand and judges more inclined to censor their interjections.²⁰ The United States Supreme Court is the most interesting institution to analyse when considering this topic, being one of the only institutions of state in that jurisdiction which does not allow proceedings be broadcast.²¹ Despite legislation allowing some lower courts in the US broadcast their

¹⁸ Section 9 of the Contempt of Court Act 1981 Act relates to any equipment capable of making a recording of court proceedings.

¹⁹ Tomlinson (n 17).

²⁰ This is not to make mention of witnesses and juries in trial courts. See Ann-Marie Hardiman, ‘The word seller’ (2016) 21(4) Bar Review 115-117 where John Carlin in referencing the trial of Oscar Pistorius in South Africa (which was broadcast live on international television) argued that the televised trial was not a bad reflection of the South African justice system. Nonetheless, ‘on balance’ he says, ‘don’t televise it’. He draws attention to the rights of the televised trial distributed in the same way as a football match with broadcasters including ‘action replays’. Furthermore, to his mind, there was something ‘grubby’ about the transmission of evidence involving the line of prosecution witnesses being akin to a ‘ghoulish reality TV show’.

²¹ There is currently two similar pieces of proposed legislation, which if passed, would allow cameras into the US Supreme Court. See Kimberly Strawbridge Robinson, ‘Presiding Over Impeachment Trial, Roberts Urged to Embrace Cameras’ (*Bloomberg Law*, 16 January 2020) <https://news.bloomberglaw.com/us-law-week/chief-justice-urged-to-embrace-to-cameras-as-impeachment-begins>. Accessed 28 May 2020.

proceedings, the Supreme Court only allows audio recordings to be published at the end of the week of legal argument. Notably, all of the serving US Supreme Court justices, bar the two most recent appointments (Justice Gorsuch and Justice Kavanaugh) have signalled their opposition to the broadcasting of the Court's proceedings.²² Justice Breyer and former Justice Anthony Kennedy raise a number of less obvious concerns with cameras in court.²³ First, Justice Breyer notes that oral argument before the Supreme Court only constitutes approximately 2% of the Court's work.²⁴ As a result, not only will the public likely lay too much emphasis on this reality; human nature tends to personalise the case (and it's participants) rooting for one party (and perhaps in part the more appealing advocate) and by consequence against the other. In contrast, the Court must clinically decide each case based on legal principles for 300 million people. Secondly, he suggests that his practice of playing devils advocate – probing advocates before the Court with exaggeration, thereby, clarifying and refining legal points, would be threatened by quotes taken out of context and used to undermine judges.²⁵ Justice Kennedy argues cameras would change the dynamic of proceedings, lessen cordiality between colleagues and the conversational nature of the Court.²⁶ Finally, Chief Justice Roberts argues that the Court is not there to educate rather to reach the correct legal decision. He does not believe that any public institution has improved from television coverage.²⁷

Part of the difficulty with this issue, is the lack of certainty surrounding the effects of publicity on the justice system.²⁸ There are issues which should be carefully considered before any

²² Both recent appointments indicated their willingness to at least consider the issue with an open mind during their confirmation hearings. It's worth noting, several US Supreme Court justices changed their position from supporting the introduction of cameras prior to joining the bench, to opposing the introduction of cameras after appointment. These include, former Justice Scalia, Justice Ginsburg, Justice Sotomayor, Justice Alito and Justice Kagan of the current bench.

²³ Available from:

<https://www.c-span.org/video/?311494-1/supreme-court-fiscal-year-2014-budget> Accessed 28 May 2020.

²⁴ This is invariably true of all cases to an extent, particularly civil cases.

²⁵ (n 23). Justice Ginsburg cites Justice Souter's famous quote on cameras in the courtroom in a recent discussion – "over my dead body". She highlights Justice Souter spoke with some authority on this issue, as he had presided on the New Hampshire Supreme Court which allows its proceedings to be broadcast. He felt advocates had a tendency of 'acting up', but most importantly, he felt he censored his own approach to a case due to the presence of cameras. In addition, Justice Ginsburg shares a belief that televised proceedings may distort the case and leave some viewers with a belief that the 'better debater will win'. Available from:

<https://www.bloomberg.com/news/videos/2019-10-09/ruth-bader-ginsburg-says-cameras-in-court-give-the-wrong-impression-video> Accessed 28 May 2020.

²⁶ (n 23).

²⁷ Available from:

<https://www.c-span.org/video/?451977-1/chief-justice-roberts-stresses-supreme-courts-independence-contentious-kavanaugh-hearings> Accessed 30 May 2020.

²⁸ Paul Lambert, 'Cues, Cameras and Courtroom Actors: Resisting the Temptation of Courtroom Television Cameras', (1996) 14(1) *ILT* 13-17.

system of justice moves to broadcasting routinely, many of which specifically relate to the audio visual medium. Once a broadcast of proceedings exists, regardless of copyright, it exists to be copied and exist going forward. Claire Callanan argues that there is potential for any unsuccessful litigant to have a You Tube video (or similar record) as a permanent reminder of an unsuccessful case.²⁹ Other questions arise; would the public benefit from video clips of judges presiding in court subjected to some form of editing on social media? Perhaps playing their part in a meme.³⁰ Will broadcasting of proceedings invariably lead judges into a more confrontational role with the media and wider society? Furthermore, leaving aside the ‘attraction’ of cameras ‘for the exhibitionist - lawyer, party or witness’,³¹ cameras in courts of first instance may unwittingly create an additional platform for the crank simply seeking publicity.

Conclusion

It is difficult to assess whether understanding (as distinct from legitimacy) of the justice system has improved by the broadcasting of cases in jurisdictions which allow for this.³² Whatever developments may transpire in Ireland, the ‘quality of justice’ must be the preeminent and guiding principle.³³ Surely the questions which must be addressed before proceedings are broadcast include: – (1) What is it about the medium of television, when compared to other mediums, that risks damaging the justice system to a greater extent?; and (2) Can that potential for damage be sufficiently negated?

²⁹ Pamela Newenham, ‘The cases for and against televising Irish justice’ *The Irish Times* (Dublin, 5 November 2012) <https://www.irishtimes.com/news/crime-and-law/the-cases-for-and-against-televising-irish-justice-1.547612> Accessed 28 May 2020.

³⁰ This is to make no mention of the highly selective and edited clips produced by newsgroups and/or broadcasters. See Scarlett Conlon, ‘How Lady Hale’s giant spider brooch sent the web into spin’ *The Observer* (London, 28 September 2019) <https://www.theguardian.com/fashion/2019/sep/28/lady-hale-spider-brooch-launches-global-trend> Accessed 28 May 2020. The newspaper reported that according to the fashion data site “Launchmetrics” there were 427 online posts on social media relating to the brooch within 48 hours of it appearing on television. The search engine “Lyst” reports that there has been a 126% increase in searches for animal brooches since the *Miller* judgment was delivered. Furthermore, Lord Sumption also got an honourable mention for his dazzling array of ties three years earlier. See Cahal Milmo, ‘How Lord’s Sumption’s loud ties are dazzling the Supreme Court’, *The i* (London, 7 December 2016) <https://inews.co.uk/news/uk/judicial-dress-code-lord-sumptions-loud-ties-dazzling-supreme-court-531704> Accessed 29 May 2020. While the foregoing commentary may be harmless on one level, it is hard to see how it furthers the public’s understanding of the justice system and may be indicative of how judges can be drawn into debates they previously would have avoided.

³¹ Paul O’Higgins, ‘Tweet nothings’ (2018) 23(6) *Bar Review* 173.

³² Rory O’Malley, ‘A Change to the Scheduled Viewing: Does Ireland Need to Change Its Approach to Courtroom Television or Does the Camera Really Add Ten Years?’ (1999) 2(1) *Trinity College Law Review* 59-60. O’Malley makes the point, that just because a more accessible medium of transmission may exist, does not necessarily mean people are distanced from the justice system.

³³ Charles Lysaght, ‘Publicity of Court Proceedings’ (2003) 38(1) *The Irish Jurist* 57.

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