ISSN 1758 8421

Criminal Law News

SALLY RAMAGE®

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PUBLISHED BY SALLY RAMAGE
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UK and US Freedom of Expression

by

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Introduction

English law balances freedom of expression with public order criminal offences with regard to freedom of assembly. Participation in a political protest or demonstration constitutes an act of expression attracting the protection of Article 10. The arrest and detention of a person for breach of the peace in the course of such a protest will be compatible with Article 10(2) only to the extent that it is proportionate to the need to maintain public order or to protect the rights and freedoms of others as in *Steel v UK* [1998] Crim.L.R. 893, in which the arrest and retention of two applicants for physical obstruction was held compatible with ECHR Article 10(2).

Recently, in the UK case of *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23; [2009] WLR (D) 35, the court decided that Paragraph 7(2) (f) of the Atomic Weapons Establishment (AWE) Aldermaston Byelaws 2007, was not justifiable and violated the rights to individual freedom of expression and to freedom of peaceful assembly protected by articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedom.

In both the UK and the US, and as decided in the US case of *United States v Johnson*, 390 U.S. 563, 566-67 (1968), there are criminal penalties against intimidation and violence. These penalties are aimed at securing equal access to constitutional rights and privileges.

International protection of freedom of expression

Freedom of expression is protected in several international laws, namely, ECHR articles 6 and 8 of the United Nations Declaration on Human Rights Defenders; article 19 of the Universal Declaration of Human Rights; article 19 of the International Covenant on Civil and Political Rights; article 9 of the African Charter on Human and Peoples' Rights; the Declaration of Principles on Freedom of Expression in Africa; article 13 of the American Convention on Human Rights; article iv of the American Declaration on the Rights and Duties of Man; the Inter-American Declaration on Principles of Freedom of Expression; article 10 of the European Convention for the Protection of Human Rights; and article 32 of the Arab Charter on Human Rights.

Criminal offence is hate speech

The UK has hate speech criminal offences. Hate speech is an offence which carries a prison sentence. The UK Public Order Act 1986, Part 3, prohibits expressions of racial hatred .The US can use its 13th amendment breach similarly. Hate speech that is intentionally used to intimidate others can drastically undermine public safety and social welfare. Under Title VII of the US Civil Rights Act of 1964, employers may sometimes be prosecuted for tolerating 'hate speech' by their employees, if that speech contributes to a broader pattern of harassment resulting in a hostile or offensive working environment' for other employees. Section 2 of the US Thirteenth Amendment

authorises Congress to punish the intimidating display of symbols associated with slavery and its incidents, including the display of burning crosses and similar badges of servitude.

The Court's decision in *Virginia v. Black*, 538 U.S. 343, 362-63 (2003) announced, for the first time, the constitutionality of laws punishing intentionally intimidating cross burning. It is to be noted that, of the Reconstruction Amendments, the Thirteenth Amendment is particularly relevant to the regulation of hate symbols and other destructive messages. Under the Thirteenth Amendment, Congress may rationally determine and legitimately pass necessary and proper legislation to eradicate any remaining badges and incidents of servitude.

In *Jones v Alfred H. Mayer Co*., 392 U.S. 409, 440 (1968), the court said,

> '*Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery and the authority to translate that determination into effective legislation.'*

In this landmark case the Supreme Court extended the Thirteenth Amendment's of the Constitution of the United States to reach well beyond forced labour. *Jones* ruled that with the Civil Rights Act of 1866 Congress prohibiting private and public discrimination in the sale of real estate, and that doing so was 'necessary and proper' to enforce the Thirteenth Amendment.

In *Runyon v McCrary*, 427 U.S. 160, 172-73, 179 (1976), the Court determined that s. 1981, passed pursuant to Congress's Thirteenth Amendment enforcement authority, prevented a private school from refusing to enrol black children.

The US 13th Amendment's prohibition also prohibits slavery with substantial effect on the interstate economy, and applies to any form of involuntary servitude, even when its perpetration is completely centred in one state. The US Anti-Peonage Act is a prohibition against intrastate and interstate acts of involuntary servitude.

Behaviour *contra bonos mores*

In the UK, the arrest and detention of three applicants, for handing out leaflets and holding up banners during a demonstration, was held to be in breach of Article 10 in *Hashman v United Kingdom*, 30 EHRR 241, an order imposed on two hunt saboteurs, requiring them to be 'of good behaviour' was held to be in breach of Article 10 since it was not 'prescribed by law' within the meaning of Article 10(2). In the Court's view, the concept of behaviour *contra bonos mores* was too vague to qualify as law. Article 10, Freedom of Expression, ECHR, states:

> *'Everyone has the right of freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without inference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting,*

> *television or cinema enterprises. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

Free speech including in schools, must not harass, say UK courts

The UK Protection from Harassment Act 1997, section 8 states:

> *'(1) Every individual has a right to be free from harassment and, accordingly, a person must not pursue a course of conduct which amounts to harassment of another and (a)is intended to amount to harassment of that person or (b)occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person.*
> *(2)An actual or apprehended breach of subsection (1) may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question and any such claim shall be known as an action of harassment.*
> *(3)For the purposes of this section "conduct" includes speech.'*

Courts in recent years have provided little protection for student speech, least of all when it is involved in curricular activities. All of the values of freedom of expression exist in educational institutions. Protecting freedom of speech advances a core goal of school education: teaching students about the Constitution and their rights. Forty years ago, in the US case *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Supreme Court held that the government could punish student speech only if there was a showing that the expression was actually disruptive of school activities, but more recently, in *Morse v. Frederick*, 127 S. Ct. 2618 (2007), the court decided that schools can regulate and evaluate student speech when it relates directly to the curriculum and education. It is implied that teachers can punish students for talking out of turn or disrupting class with speech that is irrelevant to the discussion; they can evaluate student work and give grades based on its content and quality.

The US Court's decision in *Morse* expressed the need for great deference to school authorities when they punish student speech. School choices concerning the curriculum are government speech and not vulnerable to civil liberties challenges of freedom of speech. The US Supreme Court used the First Amendment rationale that governs government speech to justify restricting student speech, illustrating the government as speaker in setting the curriculum and the government as regulator in punishing student speech.

Hazelwood School District v. Kuhlmeie, 484 U.S. 260 (1988)

was the US Supreme Court case in which a journalism class, with approval from the faculty advisor, planned to produce a school newspaper containing stories about students' experience with pregnancy and divorce (although no students' names were included in the article on pregnancy, one name was mentioned in the article on divorce, although the name had been deleted after the paper had been forwarded to the principal for review). The articles discussed student experiences and none referenced to specific students by name. The school principal decided to publish the newspaper without these articles. The principal believed that the article on pregnancy discussed sexual activity and birth control in a manner inappropriate for some of the younger students at the school. The principal was concerned that the anonymous students in the article on pregnancy might be identified from other aspects of the article. Thereafter, three former students of the school sued, claiming that school officials had violated their 1st Amendment right, 'freedom of speech'.

The Supreme Court upheld the principal's decision and rejected the former students' challenge, referring to Tinker *v Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 506 (1969):

> '*First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings…The determination of what manner of speech in the classroom or in school assembly is inappropriate, properly rests with the school board.'*

The Court emphasized the ability of schools to control curricular decisions, such as the content of school newspapers published as part of journalism classes.

Different UK approach

Contrary to the situation in the US, few UK school cases alleging breach of freedom of expression reach the courts. The UK has guidance for schools provided by the National Strategies on school behaviour and attendance including provisions in the School Discipline chapter of the UK Education and Inspections Act 2006 (EIA 2006), strengthening schools' powers to discipline, reducing the risk of misunderstandings and challenges to their disciplinary authority. A separate chapter of the EIA 2006 sets out provisions on more specific issues around parental responsibility and excluded pupils.

Censorship

In the US case, *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 856 (1982), the court considered whether removing certain books from the school library was a breach of the students' free speech and decided that it was. The Court held however, that whether removal of books from school libraries violated the First Amendment depends upon the motivation behind the government's actions. The Court explained:

> *'If the government intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then*

> *petitioners have exercised their discretion in violation of the Constitution . . . . On the other hand,. . . an unconstitutional motivation would not be demonstrated if it were shown that petitioners had decided to remove* the *books at issue because those books were pervasively vulgar.'*

Pico illustrates that courts feel that schools have a broad discretion in the management of school affairs, particularly in selecting curriculum. Curriculum is government speech, and in the US there is no First Amendment basis for objecting when the government chooses to speak, as in *Rust v. Sullivan*, 500 U.S. 173, 177 (1991), when the government was exonerated from breach of free speech for prohibiting recipients of federal funds from giving abortion-related advice. The court said:

> *'The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.'*

The US excludes non-US citizens from teaching in schools

In another US case, *Ambach v Norwich*, 441 U.S. 68, 80-81 (1979), the Court upheld the ability of schools to exclude non-citizens from holding teaching positions, arguing that teachers are integral to self-government

because they are responsible for inculcating democratic values in youth, having the opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities.

The UK has not taken quite the same outspoken cultural stance but in 2006, a Muslim teaching assistant in a British school was suspended for refusing to remove her veil in class, as reported in the BBC news. The cultural tone of the suspension was accentuated when the Leader of the UK House of Commons, Jack Straw, suggested that '*the full veil over the face separated communities*'. She failed in her claim of religious discrimination and harassment but won a claim for victimisation. In 2007, the government ordered a ban on the wearing of the full Muslim veil by all schoolchildren.

No abridgments to US free speech?

The precedent in *Tinker*, that schools in the US can punish student speech that disrupts the educational process is still good law. Congress (and the States) must not abridge the right to free speech. The US Fourteenth Amendment protects the citizen against the State itself and all of its creatures, the marketplace of ideas, i.e. the classroom, (*Keyishian v Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)), and so there is a need to protect student speech.

Conclusion

It can be argued that freedom of expression is being stifled. Having examined freedom of expression and public order criminal offences with regard to freedom of assembly, breach of the peace; hate speech; harassment;

disruption to school activities; censorship; and violation of freedom of peaceful assemble, and bearing in mind the international protections of the freedom of expression, it might be said that, rather, freedom of expression, is in an evolutionary state, In the UK, there is still judicial independence, an important part of the structure of British Politics. Democratic rights depend on decisions taken within courts.

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Domestic violence in the United Kingdom in 2009

Sally Ramage

Introduction

One reason for the increase in legal awareness of domestic violence is that there are now many research reports that evidence the link between violence and mental illness. The stigma encountered by individuals with psychiatric disorders lowers their self-esteem, contributes to disrupted family relationships, and adversely affects their ability to socialize, obtain housing, and become employed (Wahl, 1999). This association of mental illness with violence is apparently increasing. Violence includes murder and manslaughter, the principal offences under the English statute of Offences against the Person Act 1861. Other examples of domestic violence are of violence against children other than sexual offences and kidnapping. Multiple studies have demonstrated that individuals with psychiatric disorders who are being inadequately treated, or not treated at all, are more likely to be violent than the general population (Yesavage, 1982; Taylor, 1985; Smith, 1989; Bartels et al., 1991; Link et al., 1992; Modestin and Ammann, 1996; Kasper et al., 1997; Swanson et al., 1997; Swartz et al., 1998; Taylor et al., 1998; Arango et al., 1999).

Legislation

In 2004 the UK government passed the Domestic Violence , Crime and Victims Act. This compares poorly with the United States where domestic violence laws were passed by way of the 1963

Illinois Code of Criminal Procedure (Hearsay) 725 ILCS 5/115-10.2; the Illinois Domestic Violence Act of 1986; the New Jersey Definition of Domestic Violence, NJSA 2C:25-19; and the United States federal law passed in 1994, Violence against Women Act 42 USC 10418, for instance. Newer legislation that addresses domestic violence in the UK includes the Safeguarding Vulnerable Groups Act 2006 which goes some way in complying with the European Convention on the exercise of Children's Rights 1996, Article 4 of which obliges Member States parties to take all appropriate legislative and other measures for the implementation of the rights recognized in the Convention. This 1996 Convention deals with the whole range of family proceedings affecting children and taking place before a judicial authority.

Court cases

In the UK today, domestic violence has begun to be taken seriously and although in many cases of domestic violence, the complainant withdraws their complaint, the prosecution continues if the Crown Prosecution Service ('CPS') decides that it should. Most cases of domestic violence appear only in the Magistrates Courts where 'the bench' of three magistrates decide the case , giving reasons for those decisions, albeit based on a text-book answer . If the case is strongly defended and goes to the Crown Court, it is decided by a jury, and no reasons are given for their decision. However, in cases involving children where there had been allegations of domestic violence, a fact-finding hearing has to be conducted. That exercise cannot be curtailed.(see the case of *Re Z: children* [2009] EWCA Civ represents good practice and precedent). The Family Court has issued practice directions on the matter.

The judge had to conduct a fact-finding hearing and it was only if, at the conclusion of that hearing, he found as a fact that the children were in no way at risk or that for some other reason contact should take place that he could make an order for contact. He had to hear all the evidence. There was no equivalent of "no case to answer" in cases involving children and he could not simply say that he had heard one side and not thought much of it. While the judge was the ultimate arbiter of fact, the hearing had to be fair, and the judge had to give the parties the opportunity to make submissions. Moreover, he was not to prejudge the issue where an officer from the public body, the Children and Family Court Advisory Support Service ('CAFCASS') was involved and had given provisional views pending the outcome of the fact-finding hearing. The judge must hear all the evidence. In cases involving children everything has to be done in court and had to be on the record. There should not be private discussions between the judge and counsel.

As a result of the case of *R (on the application of MM v Lewisham London Borough Counci*l [2009] EWHC 416 (Admin), assessments of whether a child was a child in need within the meaning of the Children Act 1989 s.17 were not to be dealt with summarily and without proper inquiry. The order sought from the court must be exactly what was needed according to the authorities, as in the case of *Re T (a child)* [2009] EWCA Civ 121.

Recent developments

The whole world has reported on Britain's child abuses, many of which are domestic violence offences resulting in deaths and

serious injuries, the most recent about '*Baby Peter*' who died of horrendous injuries. On November 11, 2008, Baby Peter's mother, her boyfriend and a lodger were convicted, at the Old Bailey Court, of causing or allowing his death. His mother's boyfriend began to began abuse him when he was barely nine months old and this man continued to abuse the baby for nine months until the child finally died in his bloodstained cot. Section 5 of the Domestic Violence, Crime and Victims Act ('DVCVA') 2004.

The DVCVA made provision about homicide; made common assault an arrestable offence; made provision about the execution of warrants and the enforcement of orders imposed on conviction; and made provision about the recovery of compensation from offenders. The DVCVA, section 5, created the criminal offence of causing or allowing the death of a child or vulnerable adult. This offence is committed where a child or vulnerable adult dies as a result of an unlawful act of a person who was a member of the same household as the deceased and who had frequent contact with him or her. The defendant must either have caused the death, or should have been aware that the deceased was at significant risk of serious harm and failed to take reasonable steps to prevent that harm. This offence was introduced to resolve the problem that arose when it cannot be shown which member of the household caused the death and all members of the household will be liable for such a death. It is noted that the term '*significant risk'* in this offence, has been defined to be one of '*serious physical harm'* but sadly, the term '*serious physical harm'* is not defined and so what must be shown is that the defendant failed to take such steps as could reasonably be expected to be taken to protect the victim from the risk.

The section 5 offence carries a maximum sentence, on indictment and conviction, of 14years imprisonment, an unlimited fine, or both.

NSPCC

Lobbying for this new law was mainly done by the National Society for the Protection of Cruelty to Children ('NSPCC'), whose 2003 report , '*Which of you did it*?' revealed that each week, two or three infants in the United Kingdom suffer serious injury or death when in the care of adults who ought to have been protecting them. This report followed the NSPCC 1999 report which alleged that its findings were that around one million children in Britain were impoverished, injured and abused. This section 5 offence was used to prosecute the case of *R v Uzma Khan, Nazia Naureen and Majid Hussain* [2009] EWCA Crim 2 , in which the murder of Sabia Rani by her husband, was found and it was also found that his family, which was also her family, utterly failed to protect her in the face of repeated violence. A similar case to Baby Peter's was the case of *R v Abid Ikram and Sumaira Parveen* [2008] EWCA Crim 586, in which the two defendants had been charged with counts of murder and causing or allowing the death of a 16-month-old child contrary to the Domestic Violence, Crime and Victims Act 2004 s.5.

Post Mortem

A post mortem found the toddler to have numerous bruises and abrasions as well as a broken leg and a laceration behind the knee. Baby Talha had been placed in foster care after his father left him alone at home in March 2006, but was allowed to return to Ikram in June of that year. Within two months the baby was dead . Returning to the case of Baby Peter, it is noted that both his mother and her

boyfriend were themselves children in the care system and the boyfriend especially was of a low IQ and known to the authorities for animal cruelty. The baby's maternal grandmother was also known to the authorities for drugs and alcohol abuse. A total of twenty two injuries were inflicted on the baby who died.

Conclusion

Most of the court procedures, orders and injunctions available are aimed at keeping a violent partner out of the family home. None can help a child or vulnerable adult when the partner is wanted in the home. Locking the door with the offender firmly inside the bosom of the family is of no help to helpless victims. Durkheim's linking of deprivation with violence 'cuts no ice' in a developed society where poverty is relative Such violent behaviour appears to be a complex subject beyond the realms of risk assessment and risk management. Children who suffer domestic abuse appear to be victims of an abdication of duty, substance misuse, and selfish adults and even post partum puerperal psychosis. Since the majority of the social workers in the United Kingdom are unqualified, this does not bode well and is perhaps one of the main reasons why domestic abuse is often allowed to escalate, the system being bereft of expertise.

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Printed and published by SALLY RAMAGE  ®,
Copehale, Coppenhall, Stafford, ST18 9BW, UK. Registered as a Newspaper at the Post Office. ISSN 1758-8421