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CONTEMPT AND THE MEDIA: CONSTITUTIONAL SAFEGUARD OR STATE CENSORSHIP?

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CONTEMPT AND THE MEDIA: CONSTITUTIONAL SAFEGUARD OR STATE CENSORSHIP?

Introduction

In 1941 the United States Supreme Court adjudicated on the classic clash between freedom of the press and the right to a fair trial. In *Bridges v California*[1] a major metropolitan newspaper had been found to have attempted to overawe a judge in a matter immediately before him by publishing forthright editorials, commenting on the desirable disposition of the case. The newspaper company and the publisher were convicted of contempt of Court and fined. They appealed against their convictions.

The majority, led by Justice Black, held it was contrary to the purpose and history of the First Amendment to the United States constitution to regard its protection of freedom of expression as restricted by the English common law power to publish for contempt. Furthermore, the "unequivocal language" of the first amendment which prohibited any law "abridging the freedom of speech or of the press" was, in Justice Black's view, to "be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society will allow".[2]

This opinion was the subject of a powerful dissent. Justice Frankfurter said its atmosphere and expression would mean that "trial by newspapers has constitutional sanctity".[3] In his view, freedom of expression was a value of very great importance. "But even that freedom is not absolute or pre-determined".[4]

Out of *Bridges* has emerged the United States' view that, as a general principle, the constitutional rights to a fair trial and to trial by jury[5] are, as regards the media, required to accommodate the prohibition in the First Amendment. Canada, perhaps inevitably, is following

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1 314 US 252 (1941).

2 At p 262.

3 At pp 279-280.

4 At p 293.

5 Themselves protected by the Sixth and Fourteenth Amendments.

that lead.[6] There is no apparent restraint by the media in disseminating any information about a pending criminal trial that attracts the public's attention. The criminal justice system in North America has, as a result, had to adjust to the appetite of the media. Prospective jurors are extensively interrogated, trials are often moved and juries are locked away, in an effort to preserve, as far as possible, the fairness of the proceeding in the face of virtually unrestricted reporting. By contrast in New Zealand, along with Australia and Great Britain, the common law continues to seek to uphold both fair trial and free speech values, first by requiring the media to delay comment that would harm judicial proceedings until the trial is over, and secondly, if the media does not comply, through the exercise of the judicial power to punish for contempt. In doing so, it recognises that we live in an era in which it is much more difficult for media organisations voluntarily to observe traditional conventions of restraint in reporting on matters of administration of criminal justice. The Chief Justice has observed if the Courts do not condemn breaches they are in danger of being seen to condone them.[7]

Although they take a different approach from that in North America, my proposition is that the New Zealand Courts are exhibiting keen concern over why and when their power to punish for contempt should be exercised. They are looking, in particular, for a formulation of the law which balances the conflicting rights so as to produce outcomes that fit the New Zealand community's values and culture. In this paper, I endeavour to demonstrate that proposition in the criminal justice context.

I develop this proposition by considering the competing values. First, the values attached to the rights associated with the administration of justice in general and the right to a fair trial in particular. Second, the values associated with the right to freedom of expression.

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6 *Dagenais v Canadian Broadcasting Corp* (1994) 94 CCC 3rd 289. While the Supreme Court of Canada's decision concerns prior restraint by an injunction it is difficult to see why the reasoning does not equally apply to exclusion of the contempt power by the Canadian Courts after publication.

7 *Solicitor-General v Radio New Zealand* [1994] 1 NZLR 48, 58 FC.

Criminal Justice: The Need for Protection

The law of contempt is concerned with conduct "which tends to undermine the system for administration of justice by the Courts or to inhibit citizens from availing themselves of it for the settlement of their disputes".[8] In relation to actions that may harm administration of criminal justice, the law is particularly concerned with the justice system's capacity to provide a fair trial. Indeed the moral right of society to impose sanctions for breaches of its rules must be dependent on it maintaining fair procedures to determine whether that power should be exercised in particular cases. In Australia the importance of this consideration was stated in the leading case of *Hinch v Attorney-General (Victoria)*[9] as follows:

> "The right to a fair and unprejudiced trial is an essential safeguard of the liberty of the individual under the law. The ability of a society to provide a fair and unprejudiced trial is an indispensable basis of any acceptable justification of the restraints and penalties of the criminal law. Indeed, it is a touchstone of the existence of the rule of law." (per Deane J).

Many of the relevant fundamental rights of accused persons in New Zealand are now codified in the New Zealand Bill of Rights Act 1990. Section 25(a) protects the right to a fair and public hearing by an independent and impartial Court, and s 25(c) the right to be presumed innocent until proved guilty according to law. Section 24(e) protects the right of an accused charged with an offence to a trial before a jury when the penalty for the offence may be imprisonment for more than three months. In practice, most serious criminal charges in New Zealand are tried by a jury and it is the characteristics and perceived vulnerabilities of the jury system that much of the application of the law of contempt is concerned to protect.

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8 *Radio New Zealand* at p 53. This paper is not directly concerned with contempt by actions inhibiting citizens from resorting to the Courts to determine disputes.

9 (1987) 164 CLR 15, 58.

(i) The particular concerns arising from trial by jury

A criminal jury trial is conducted according to established procedures and principles. Crucial among them are that the verdict of the jury must be unanimous and that it is delivered after a trial presided over by a judge. It has been said that the jury system "secures that the law not will not applied in a way that affronts the conscience of the common man". That view is widely held, but it is equally true, that "the interaction between judge and jury, slowly and carefully worked out over several hundred years, secures that the verdict will not be demagogic; it will not be the simply uninhibited popular reaction".[10] To this end, the range of inquiry in a criminal trial is strictly limited, as are the methods used to gather and the content of information put before the jury. Many of our rules of criminal procedure guide judges to ensure that juries deliver their verdicts only according to the evidence.

It is incidental to the right to trial by jury that: "a person accused of a crime is entitled to have the ... case presented to such a jury with their minds open and unprejudiced and untrammeled by anything which any newspaper for the benefit of its readers ... takes upon itself to publish before any part of the case has been heard".[11] That the right to a fair trial extends equally to the Crown has also long been recognised.[12]

Special characteristics of the jury system and the need for their protection were highlighted in 1991 when a news reporter of Radio New Zealand followed up the discovery of the body of one of the Swedish tourists of whose murder David Tamihere had the previous year been convicted. The reporter had obtained the jury list and contacted nine members of the jury by telephone seeking reaction to the news. Eight later indicated their surprise and annoyance at the approach and that their identities had become known. They had refused to discuss the matter. Statements relating to the inquiries, and responses of individual jurors were later aired

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10 These observations are attributed to Lord Devlin by McHugh J in "Juror's Deliberations, Jury Secrecy, Public Policy and the Law of Contempt" in "The Jury Under Attack" (Butterworths, Sydney, 1988) ed Findlay and Duff p 56, 57.

11 *Attorney-General v Tonks* [1934] NZLR 141, 149 FC, per Blair J.

12 *Attorney-General v Noonan* [1956] NZLR 1021, 1027 Henry J.

on the "Morning Report" national radio programme. Contempt charges were brought in response and in the Full Court held that in interviewing the jurors and broadcasting responses, Radio New Zealand was guilty of contempt. [13]

The Full Court held three key aspects of the jury system were undermined by the intrusive actions of Radio New Zealand and its reporter. There were the finality of jury verdicts, the need for candour and full participation by members of juries in deliberations and the need to respect the privacy of jurors. I look at each.

As to finality, the Court emphasised that the jury system is not concerned with the reasoning process of members. Rather it rests on the unanimity of their verdict reached after a trial in accordance with established procedure and principle. Delivery by the jury of their verdict concludes their part in the process and in that sense is final. For the media to investigate their reasons, and whether individual jurors' views might have differed had fresh evidence been put to them, is to misrepresent the system by focusing on the reasoning. This was contrary to the finality principle.

As to candour, the system also depends on preservation of frankness in jury deliberations. Fear of subsequent exposure of their individual views will deter jurors from expressing them in the jury room. In this regard, it is relevant that jury service is compulsory and that there will be a need to contribute to decisions that at times will be unpopular in the community.

Finally, jurors serve in the expectation that their privacy will be respected and their identities not disclosed. It is in the public interest to maintain that expectation. Each of these aspects are undermined if jurors are able to be approached by the media after a verdict is given. Such intrusion is likely to make members of the community more reluctant to serve on juries, and has the potential to undermine the integrity and finality of the verdict.

For these reasons, protection of the administration of criminal justice required, in the view of the Full Court, that even after they had been discharged jurors should be protected from acts

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13 *Solicitor-General v Radio New Zealand* (Eichelbaum CJ and Greig J)

such as those of Radio New Zealand. The broadcaster was convicted, fined $20,000 and ordered to pay costs of $15,000.[14]

The *Radio New Zealand* decision was unusual in that interrogation of jurors about their deliberations had not previously been held to be in contempt at common law.[15] There had been judicial recognition of a convention that the media did not explore secrets of the jury room nor publish any disclosures. Expressions of strong judicial disapproval of breaches along with indications that they could constitute contempt in the past had helped secure compliance with it.[16] The Full Court, however, felt that in the present competitive age a different ethos prevailed among the media. The Court was in the position where it had either formally to condemn the practice, or to be taken to condone it.[17] The judgment is an important indication that actions of the media which tend to interfere with the functioning of the jury system may be in contempt even if of a kind not previously so categorised.

(ii) Publication

Criminal record/character

Maintaining public confidence in the integrity of the justice system is a principal purpose of the law of contempt. *Radio New Zealand* is an instance of application of contempt law to protect administration of justice in the generality of cases.

While the right to a fair trial is not to be seen as just a private benefit for an accused,[18] the matters that are most commonly brought before the Court are those where its capacity to

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14 *Solicitor-General v Radio New Zealand No. 2* (CP 531/92, Wellington, 6 September 1993).

15 However, the Contempt of Court Act 1981 (UK) made it an offence "to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceeding".

16 The cases are discussed in *Attorney-General v New Statesman* [1981] 1 QB 1.

17 *Radio New Zealand* p 56 - 58.

18 *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563, 569 CA.

administer justice is under threat in a particular case. Here publication of certain kinds of material is well recognised as likely to put a trial at risk.

Specifically, "to publish the criminal record of an accused or comment on the previous bad character of an accused before trial is a prime example of interference with due administration of justice, and subject to considerations such as time and place almost invariably is regarded as a contempt".[19] Another high risk category is the publication of photographs of an accused before a trial if identification is likely to be in issue. Such a publication was held to be in contempt in *Tonks* when Blair J observed:

> "If a photograph of an accused person is broadcast in a newspaper immediately he is arrested, then such of the witnesses who have not then seen him may quite unconsciously be led into the belief the accused as photographed is the person they saw. The fact that a witness claiming to identify the accused person has seen a photograph of him before identifying him gives the defence an excuse for questioning the soundness of the witness's identification."[20]

Tonks was recently followed by the New South Wales Court of Appeal in a case arising from the publication of the photo of Ivan Milat, the accused in the "backpacker serial murders" case. The weekly magazine "Who" had published Milat's photo on its front page following his arrest. Gleeson CJ referred to the particular danger such actions created:

> "One of the particular problems about identification evidence is the difficulty that exists where a person, before performing an act of identification of an accused, has been shown a photograph of the accused. If, for example, prior to identifying an accused person in a police line-up, a witness had been shown by a police officer a photograph of the accused, then it would be strongly argued that the identification in the line-up was useless, or at least of very limited value. It would be argued that, because of what is sometimes described as the displacement effect, there was a high risk that at the time

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19 *Gisborne Herald* at p 568. See also *Solicitor-General v Broadcasting Corporation of New Zealand* [1987] 2 NZLR 100, 115.

20 *Attorney-General v Tonks* at p 152 - 153.

of the line-up the witness was performing an act of recognition, not of a person who had been seen by the witness on some previous occasion, but of the person in the photograph."[21]

Confessions

Another type of material at risk of being equally prejudicial if published pre-trial, is a report that an accused has confessed. The confession may later be ruled inadmissible, in which case, recollection by a juror of a report of a confession could be highly prejudicial. Reports of an accused's psychiatric history, tending to show a person is dangerous, could similarly interfere with a fair trial.

In criminal appeals based on miscarriage of justice by pre-trial publicity, it is regularly said that regard must be had to the ability of jurors to put prejudicial material out of their minds as directed by a trial judge. See, for example, those of the Court of Appeal in 1989 in *R v Harawira*.[22] These observations gave rise at the time to a measure of disagreement over the permissible limits of pre-trial publicity.[23]

However, the High Court of Australia, in *R v Glennon*[24] recognised an important distinction. The law of contempt is concerned with preventing prejudicial publicity rather than minimising its impact at trial. In *Glennon* a majority of the High Court, by special leave on a Crown appeal, reinstated the respondent's convictions for sexual offences against young people. In 1987 that Court had held that two radio broadcasts revealing the respondent's previous convictions amounted to contempt, such that there was a real risk of prejudice to the respondent's trial.[25]

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21 *Attorney-General (NSW) v Time Inc Magazine Co Ltd* (unreported CA 40331/94, 15 September 1994) p 6.

22 [1989] 2 NZLR 714, 729.

23 See "News Media Law in New Zealand" (3 ed 1990 OUP) J F Burrows, p 260.

24 (1992) 106 ALR 177.

25 In *Hinch v Attorney-General of Victoria.*

The High Court in *Glennon* emphasised the different tests applicable in contempt proceedings and in criminal appeals. Contempt proceedings are concerned with potential prejudice, which must be assessed at time of publication. Actual prejudice is not an element of a contempt charge. By contrast, before a conviction may be set aside, a Court is concerned with the extent of actual prejudice and, in particular, whether a miscarriage of justice has occurred. There was no inconsistency in upholding the convictions of *Glennon* along with that of *Hinch* for contempt.

While these instances can be categorised as presenting "bright line" contempt risks for publishers and broadcasters, it is important to bear in mind that in particular circumstances the mischief probably will not arise. The restrictions apply in relatively narrow circumstances. In the proceedings against John Barlow it was accepted at an early stage by the defence, that Barlow had been present at the scene of the murder of two men during the periods immediately before and immediately after they had taken place. Identification accordingly, and for the Solicitor-General at least, was not an issue. Nevertheless some media distorted photos they published of Barlow. They were both cautious and resentful of the absence of caution of others. I appreciate the dilemma but did not regard publication of photos of the accused as raising contempt issues in that case. However, as the *Milat* case dramatically shows, in other circumstances, publication of photos will be held to be a serious interference with the right to a fair trial.[26]

As to time of publication, the Court will have regard to the impact of likely delay between publication and trial. The media perspective is that lapse of time dims recollections of jurors. It was suggested in one case that the impact of one prejudicial item in a highly publicised case is "that of a snowflake in a furnace". The Court of Appeal's view is that the impact of such an influence may turn on the timing of the publication, whether or not its content is presented in a sensationalised and highly prejudicial form and the audience it reaches. In the absence of reliable empirical evidence of the dissipation of prejudicial immediate impact the Court has made its own value judgments on that effect. In the *Gisborne Herald* case the Court of Appeal upheld the Full Court's finding that the article would have retained prejudicial influence on

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[26] In *Attorney-General v Time Inc Magazine Co Ltd* fines totaling A$110,000 were imposed on the publisher and editor.

some prospective jurors who would be likely to read it through to an expected trial seven months later.

The importance of this branch of the judgment is that the Court of Appeal is concerned that the law of contempt should not over-reach its function of protecting against real risks of interference with fair trials. The Court, I suggest, wishes it to be understood that the purpose of the law is to provide a constitutional safeguard rather than a means of State censorship.

(iii) Other limits on the scope of contempt

There are other limits to the scope of what will be a contempt. The qualification stated by the Court of Appeal: "subject to considerations such as time and place" is important as it can bear on whether, as a practical reality, a particular publication even if of a recognised risky type, involves a real risk of interference with fairness of trials in the particular circumstances. This was the case in the Court of Appeal's recent decision in the *Gisborne Herald* case. Before the Full Court, the Gisborne Herald and two other newspaper publishers had been convicted of contempt for reporting the previous convictions of John Gillies at the time of his arrest in Gisborne on charges of attempted murder of a police constable.[27] The Court of Appeal disagreed with the Full Court's view that a publication in a Gisborne newspaper raised sufficient risk of interference with the fairness of scheduled trials of Gillies on other charges in Napier. The Gisborne Herald was not circulated in that city and it was highly unlikely copies would be taken to the Hawkes Bay and read there by jurors.[28] Thus a geographic limitation on the scope of contempt has been recognised which benefits regional rather than national media. The Court will ignore minimal or insubstantial risks that jurors will see, read or hear offending material when deciding whether a publication was in contempt. However, as the Gisborne Herald had been fined by the Full Court by reference solely to the effect of its publication on Gillies' prospective trial in Gisborne, the judgment and penalty stood.

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27 *Solicitor-General v Wellington Newspapers Ltd* [1995] 1 NZLR 45 and in relation to sentence at p 60.

28 *Gisborne Herald* p 568-9.

(iv) Judge alone

Can there ever be a "real risk" of the media influencing a Court comprising a judge sitting without a jury? The orthodox response is emphatically not. Lord Denning MR was of this school:

> "No professional judge would be influenced in the least by any criticism that appeared in the newspapers, even if he read them, or on the television, even if he watched it."[29]

To the contrary, it can be said that this is more a statement of policy than a literal truth.[30] The fortitude of judges will not preclude the possibility or appearance of some affect, at least in extreme cases. The area of concern to me is the type of case where there is media pressure on a judge to deliver a particular outcome. For example, where a judge who has been criticised for discharging an accused on a charge of manslaughter will preside at a trial, without a jury, on lesser charges in respect of the same incident. An accused and others may well feel less than confident the orthodox position is the reality and that in deciding remaining charges, there may be some unconscious affect on the judge of earlier publicity. It is to be remembered, that an important purpose of the law of contempt is to maintain public confidence in the independence of the judiciary and in the integrity of the administration of justice.

Freedom of Expression

The preceding discussion illustrates how the law of contempt in New Zealand has developed having regard to the right to a fair trial. The New Zealand law has also had to have regard to the importance of freedom of expression. In *Solicitor-General v Radio Avon Ltd*, a case dealing with the branch of contempt known as scandalising the Court, the Court of Appeal in 1978 said:

> "The Courts of New Zealand, as in the United Kingdom, completely recognise the importance of freedom of speech in relation to their work provided the criticism is put

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29 *Attorney-General v BBC* [1981] AC 303, 315 (CA).

30 See the discussion in "*The Law of Contempt*" Borrie and Lowe (3ed 1996) p 125).

forward fairly and honestly for a legitimate purpose and not the purpose of injuring our system of justice."[31]

Consistently with this view, the Court in the same case emphasised that proof beyond reasonable doubt of the existence of a real risk that justice will be undermined was required.[32]

A recent Full Court decision in *Solicitor-General v TV3 Network Services Ltd and Television New Zealand*[33] reinforces the importance of the standard of proof as one of the means of ensuring appropriate weight is given to freedom of speech.

On account of television coverage the previous evening, the judge aborted a trial for murder. The Crown's case was that the accused had driven his car deliberately and at speed into the path of an on-coming vehicle. His intention had been to kill himself but the impact killed the driver of the other car. Her two children, travelling with her were injured but survived. The Solicitor-General brought proceedings for contempt against both television broadcasters. The essence of the case was that the two channels' news broadcasts were both emotively presented, the effect being to arouse in the minds of viewers, considerable sympathy for the deceased and her family and correlative antipathy against an accused who was relying on a defence of insanity. The Court accepted that incorrect or sensational reportage, during its course, could create a real risk of interference with a fair trial. However, in general, errors of fact in reporting would be capable of correction by subsequent directions to the jury. As most concern over contemporary reports of trials related to such errors rather than sensationalism, it follows that the Court expects factual errors in reports rarely to be treated as instances of contempt. However, the harmful effect of sensationalism was more difficult to eradicate and in principle, could lead to cases of contempt. In the instant case, the Full Court held the standard of proof had not been met, in part because the judges took a less serious view of the potential prejudicial effect of the broadcasts than had the trial judge. A real risk of prejudice was not proved to the necessary standard and the application was dismissed.

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31 [1978] 1 NZLR 225, 230.

32 at p 234.

33 Unreported. M 520/96, Christchurch, 8 April 1997 (Eichelbaum CJ and Hansen J).

I would argue that the Full Court's decision is a contemporary indication of an intention to confine contempt to being a safeguard. It is significant that a trial judge had aborted the trial, to safeguard the interests of justice as he saw them. Of course, as the Full Court observed, the issue before it was not identical and the judges of that Court had a greater opportunity of reflection than the trial judge. But the Full Court's decision reminds us and, in particular me, that the "real risk" test presents a heavy burden which is not necessarily satisfied simply because trial disruption has followed reporting on its course.

This high standard of proof, along with the attention the Courts have given to recognising the limits of the law of contempt, both indicate that the value of freedom of speech has been appreciated over the years.

Twenty years on from *Radio Avon*, with the intervening enactment of the NZ Bill of Rights Act in 1990, the Court has recently added another dimension. In applying the law of contempt, as well as in its formulation, the need to accommodate the value of freedom of expression along with that of a fair trial has been recognised.[34] I develop this theme below by comparing the approach of the Full Court in both *Radio New Zealand* and in the two *Wellington Newspapers* judgments, with that of the Court of Appeal in the *Gisborne Herald* case.

The public importance of freedom of expression is sometimes underrated by lawyers because of the importance we attach to the right to a fair trial, a right we tend to see as close to absolute and not to be compromised. Some prior considerations therefore, of why press freedom in particular is basic to our democratic system is therefore instructive for us.

Paradoxically it is in the dissenting judgments of Justice Frankfurter in the Supreme Court of the United States that the public importance of freedom of the press to report on administration of justice is most persuasively stated. While Justice Black wrote for the majority in *Bridges v California* his reason for according close to absolute status to freedom of expression turned on matters of United States constitutional history, the purpose of the First Amendment in its historical context and its expression in prohibitory language. This analysis has not been fully embraced in New Zealand law. Here freedom of expression is protected by a statutory Bill of

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[34] *Gisborne Herald* at p 574.

Rights which provides that all rights and freedoms may be subject to reasonable limits prescribed by law that are demonstrably justified in a free and democratic society.[35] Particular rights are important, but rarely absolute.

Justice Frankfurter, on the other hand, although in dissent, emphasised the public interest that was served by the freedom of the press to criticise the work of the Courts: "Because freedom of public expression alone assures the unfolding of truth, it is indispensable to the democratic process". He was concerned that judges needed to be kept conscious of their fallibilities: "Judges must be kept mindful of their limitations and their ultimate public responsibility by a vigorous stream of criticism expressed with candour however blunt".[36] In his view, freedom of speech and of the press had a role in restraining all those who wield power including judicial power. Indeed the serious nature of the business of the Courts was such they lacked "many influences making for humour and humility, twin antidotes to the corrosion of power". Exposure to criticism provides an antidote on his approach.

Thus for Justice Frankfurter, a free press was not to be preferred to the right to fair trials but nor was the fair trial right to be preferred to a free press. Both values were indispensable.[37] Neither was an end in itself, the end was a free society. To reach that end it was necessary for the Court to mediate between the two competing social policies when they were in conflict, assigning so far as possible a proper value to each. This is the theme now emerging from the Court of Appeal as part of the law of contempt.

Bill of Rights Act: Balancing the Values

The *Gisborne Herald* case makes plain that the clash between freedom of expression and right to a fair trial is to be resolved by weighing the affirmed rights so as to accommodate both rights so far as is possible. This approach pre-supposes that there is a clash that cannot by other means reasonably available, fully be accommodated. As an example, procedural devices had

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35 Section 5 New Zealand Bill of Rights Act 1990.

36 *Bridges v California* at p 293.

37 See Justice Frankfurter's dissenting judgment in *Pennekamp v Florida* (1946) 328 US 331 at p 355.

not long before *Gisborne Herald* been seen as adequate in Canada to accommodate intrusions on the right to a fair trial from a television drama programme without resort to a ban on its broadcast until after the separate trials of the defendants:

> "Possibilities that readily come to mind ... include adjourning trials, changing venues, sequestering jurors, allowing challenges for cause and voir dires during jury selection and providing strong judicial direction to the jury. Sequestration and judicial direction were available for the *Dagenais* jury. Apart from sequestration, all of the other effective alternatives to bans were available for the other three accused. For this reason the publication ban imposed in the case at bar cannot be supported under the common law."[38]

However, the Court of Appeal in *Gisborne Herald* did not consider such measures would be adequate in New Zealand.[39] Rather, the Court of Appeal's approach is as follows:

> "So far as possible both values should be accommodated. But in some cases publications for which free expression rights are claimed may affect the right to a fair trial. In those cases the impact of any intrusion, its proportionality to any benefits achieved under free expression values, and any measures reasonably available to prevent or minimise the risks occasioned by the intrusion and so simultaneously ensuring protection of both free expression and fair trial rights, should all be assessed."[40]

The Court also expressly approved a passage in the separate judgment of McLachlin J in *Dagenais*. She said:

> "What is required is that the risk of an unfair trial be evaluated after taking full account of the general importance of the free dissemination of ideas and after considering

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38 *Dagenais* per Lamer CJ at p 319.

39 *Gisborne Herald* at p 575.

40 *Gisborne Herald* at p 574.

> measures which might offset or avoid the feared prejudice. What must be guarded against is the facile assumption that if there is any risk of prejudice to a fair trial, however speculative, the ban should be ordered. The courts are the guardians not only of the right to a fair trial but of freedom of expression. Both must given the most serious consideration."[41]

It is respectfully suggested that the adoption of this test by the Court of Appeal introduces a difference to the approach previously applied by the Full Court in both the *Radio New Zealand* and *Wellington Newspapers* decisions. The Court of Appeal does not explicitly say its approach is different from these earlier decisions so, to that extent, it is perhaps arguable that there is no difference. However, the requirement for a balancing of competing values in individual cases was not mentioned in either of the earlier Full Court decisions.

In *Radio New Zealand*, the Full Court had held the Bill of Rights provisions for freedom of expression were qualified by the necessity to preserve and protect the jury system. Rather than requiring a balancing of the various rights, the Court addressed the conflict by narrowing the right to freedom of expression. The scope of the right therefore did not extend to the acts found to be contempt. Secondly, the law of contempt, tailored as it was to limit the extent of the intrusion on freedom of expression met the requirements of s 5 of the Act. On both accounts, therefore, s 14 of the Bill of Rights Act did not save the defendant from application of the law of contempt. These principles were applied in the Chief Justice's judgment in the *Wellington Newspapers* case. There, the Chief Justice said that:

> "In the event of a conflict between the concept of freedom of speech and the requirements of a fair trial, all other things being equal the latter should prevail".[42]

McGechan J in the same case had observed that:

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41 *Dagenais* at pp 370-371.

42 *Wellington Newspapers* p 48.

> "In pre-trial publicity situations, the loss of freedom involved is not absolute. It is merely a delay. ... The loss is in immediacy: that is precious to any journalist, but is as nothing compared to the need for fair trial."[43]

This approach thereby appears to accord primacy to one right over the other. However, on appeal, the Court emphasised the importance of both values involved. In a short but important section of the judgment, it states why:

> "The common law of contempt is based on public policy. It requires the balancing of public interest factors. Freedom of the press as a vehicle for comment on public issues is basic to our democratic system. The assurance of a fair trial by an impartial Court is essential for the preservation of an effective system of justice. Both values have been affirmed by the Bill of Rights. The public interest in the functioning of the Courts invokes both these values. It calls for free expression of information and opinions as to the performance of those public responsibilities. It also calls for determination of disputes by Courts which are free from bias and which make their decisions solely on the evidence judicially brought before them. Full recognition of both these indispensable elements can present difficult problems for the Courts to resolve. The issue is how best those values can be accommodated under the New Zealand Bill of Rights Act 1990."[44]

The key point is that, in contrast to the Full Court's approach in *Radio New Zealand* of reading down freedom of expression, the Court of Appeal in the *Gisborne Herald* case derived the rule directly from its balancing exercise.

Interestingly, the outcome of the balancing had been influenced by the culture and values of the New Zealand community and by the status accorded to the value of a fair trial under the New Zealand Bill of Rights Act.[45] Leading cases in other jurisdictions, such as that of the High

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43 *Wellington Newspapers* p 57.

44 *Gisborne Herald* p 571.

45 *Gisborne Herald* at p 573.

Court of Australia in *Hinch v Attorney-General of Victoria*[46] were helpful assessments of that balancing albeit from the perspective of those jurisdictions. This is consistent with the approach of the Court and, in particular, Richardson J in other cases where fundamental rights have been in conflict.[47] Differences in New Zealand's legal and society history shape our society's values and affect the appropriate point of balance between such values in New Zealand. What the Court of Appeal does not accept is that the law of contempt, as a body of principles, can be seen as standing unaffected by or prevailing over the Bill of Rights Act.[48]

The outcome of the balancing process in the *Gisborne Herald* case was a clear principle:

> "The present rule is that, where on the conventional analysis freedom of expression and fair trial rights cannot both be fully assured, it is appropriate in our free and democratic society to temporary curtail freedom of media expression so as to guarantee a fair trial."[49]

Application to Common Instances

The *Gisborne Herald* case indicates the likely outcome of the balancing process where the intrusion on freedom of expression is one of temporary curtailment. Justice Black would have disagreed because the restriction, although temporary, is imposed at the precise time that public interest in the matters is at its height and the audience of those wishing to express views would be most receptive.[50] Professor Burrows has suggested "there is room for more tolerance

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46 (1987) 164 CLR 15.

47 For example, *R v B* [1995] 2 NZLR 172, 183.

48 For a view that Great Britain's international human rights obligations are forcing English courts to a greater accommodation of freedom of speech when administering the law of contempt, see "*Contempt, Free Press and Fair Trial: A Permanent Shift?*" ATH Smith: [1997] CLJ 467.

49 *Gisborne Herald* at p 575.

50 *Bridges v California* at pp 268-269.

where the issues involved in the pending case are ones of substantial public interest".[51] The *Gisborne Herald* outcome now allows scope for a different result where other elements of the public interest weigh in favour of freedom of expression.

The Court referred to a passage in *ex Parte Bread Manufacturers Ltd* where Jordan CJ observed:

> "It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason merely of the fact that the matter in question has become the subject of litigation, or that a person whose conduct is being publicly criticised has become a party to litigation either as plaintiff or as defendant, and whether in relation to the matter which is under discussion or with respect to some other matter ...".[52]

Had the reports in *Gisborne Herald* and *Wellington Newspapers* been fairly categorised as part of a continuing discussion of bail issues, the outcome may have differed. Similarly, if John Gillies had remained at large over a period following the attack the public interest in being informed of the imminent danger he presented to society would have been weighed differently.

Another common situation, which in New Zealand sometimes leads to complaints to the Solicitor-General, is whether following a verdict restraints should be observed in case there is a successful appeal and retrial. There are obiter observations of McGechan J supporting the view that the moratorium on the right to publish extends until appeals and any retrials have been resolved.[53] The Court of Appeal, however, did not express the period of curtailment as expansively.

Arguably in the balancing exercise, once the jury has delivered its verdict and the prospect of a retrial is contingent on a successful appeal, the weight to be attributed to each of the

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51 J F Burrows in "*Freedom of the Press under the New Zealand Bill of Rights Act*" in Joseph: Essays on the Constitution (1995) 286 at p 303.

52 (1937) 37 SR (NSW) 242, 249.

53 *Wellington Newspapers* p 57.

competing values will differ. In those cases I find it difficult to contemplate circumstances in which freedom of expression will be outweighed until it is clear there is to be a retrial.

At what point in time is the law of contempt activated? If Police investigations of a crime are likely to soon lead to charges against an identifiable person, do the restrictions apply? In *Solicitor-General v Television New Zealand*[54] it was argued that the Court had no jurisdiction to protect by injunction a fair trial of proceedings while they were merely potential, whether or not they were imminent. The Court of Appeal rejected that view and said:

> "In our opinion the law of New Zealand must recognise that in cases where the commencement of criminal proceedings is highly likely the Court has inherent jurisdiction to prevent the risk of contempt of Court by granting an injunction. But the freedom of the press and other media is not lightly to be interfered with and it must be shown that there is a real likelihood of a publication of material that will seriously prejudice the fairness of the trial."[55]

In that case, the Court held the test was not made out since, in its opinion, the report was neither so factual nor so detailed in its account as to be likely to prejudice a fair trial.

A different test was applied in England in *Attorney-General v Sports Newspapers Ltd.*[56] The Divisional Court there held proceedings must be pending or imminent to activate the protections of the law of contempt. However, as the Court recognised, that approach has its difficulties. "Imminent" is not a precise word. By omitting the concept of imminence the Court of Appeal in the *Television New Zealand* case appears to have stated a more workable test.

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54 [1989] 1 NZLR 1.

55 At p 3 per Cooke P.

56 [1992] 1 All ER 503.

Process

Prosecutions for contempt are proceedings brought to draw the High Court's attention to circumstances that may tend to interfere with the administration of justice. In common law countries this has been seen as a responsibility of the Law Officers of the Crown and by convention, since 1978, the particular responsibility of the Solicitor-General in New Zealand. The holder of that office is an official of the government who in matters of administration of criminal justice acts independently and free of political direction. Given, first, that the role of prosecutor of contempt to some extent leads the office of Solicitor-General to be unpopular with the media and, secondly, that it is not unknown for politicians to be the subject of contempt proceedings, it is, in my view, desirable that it not revert to the Attorney-General who, in New Zealand, is a Cabinet Minister.[57] However, the Solicitor-General makes no claim of exclusive right to prosecute in this jurisdiction.[58]

While different holders of the office may adopt different philosophies, my view is that contempt proceedings, whether by way of prosecution or application for injunction, are desirably reserved for what to the Solicitor-General are serious cases. They should be seen as a deterrent measure to be applied when necessary rather than as a purely regulatory offence. In this respect they can be contrasted with breaches of Court suppression orders which appropriately are made legislated offences of a regulatory character, for which Parliament has set relatively low maximum financial penalties.[59]

One issue not specifically addressed by the Court of Appeal in *Solicitor-General v Television New Zealand* was whether a more stringent test should be applied when an injunction was sought to restrain the media from acting in contempt, than that in proceedings brought after publication seeking punishment. It can certainly be argued that prior restraint will generally

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57 A different view is taken editorially in "The Legal System at Risk" [1994] NZLJ 357. See, however, the views of Lord Steyn in "The Weakest and Least Dangerous Department of Government" [1997] Public Law 84,92.

58 The right of a citizen to bring contempt proceedings was recognised in *Duff v Communicado*, a case of conduct inhibiting litigation [1996] 2 NZLR 89, 96.

59 Sections 139 and 140 Criminal Justice Act 1985.

lead to greater intrusion on press freedom than does subsequent punishment. This will be especially so when the Court is not made aware of the precise content of what the media wishes to publish. There is also a principle that the criminal law does not usually need the support of the equitable remedy of injunction.[60] As it was colourfully put in a United States decision:

> "A free society prefers to punish a few who abuse rights after they break the law than to throttle them and all others beforehand".[61]

And if persuaded that an injunction should be granted to restrain a contempt, the Court can be expected to be careful that the scope of its application is neither too wide nor undesirably uncertain.

To some extent, the Solicitor-General has a responsibility to consider steps other than prosecutions or seeking injunctions in particular cases. A timely public warning can cause the media to pause and refrain from publishing dangerously provocative material in particular cases. On other occasions, a marginal decision not to prosecute is appropriately followed by a cautionary letter. Invitations to discuss the general principles or past cases with media groups can and where possible are accepted.

The relationship of the media with the Solicitor-General in this area will always be wary but mystery as far as possible should be dispelled. It is desirable that there be exchanges of views. My perception is that the greatest difficulty the media faces with contempt is the lack of bright line rules as to what is permissible. But the danger for the media is that they will be written in a manner that over-reaches in order to ensure there is protection for a fair trial. Contempt is an imprecise mechanism for protection of fair trials. It is frustrating for a broadcaster or

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60 Referred to by J F Burrows in "Media Law" [1994] NZRLR 280, 288 citing *Mwai v Television New Zealand* (CP 630/93, Auckland, 19 October 1993, Hammond J).

61 *Southeastern Promotions Ltd v Conrad* 420 US 546, 559 (1975) cited by Brennan J in his opinion in the leading United States case on prior restraint of prejudicial pre-trial publicity: *Nebraska Press Association v Stuart* 427 US 539, 589 (1976).

publisher to take a cautious position, often in line with legal advice, only to find its competitors go further and without attracting sanctions.

Conclusion

I conclude with some personal observations. Over the last fifteen years the conventional acceptance of the media that it needs to function in a way that protects the needs of the criminal justice system has come under pressure. Some would argue it is no longer workable. This attitudinal change appears, to this observer, to be due to the emergence of real competition in the news market, in itself linked to the corporatisation of State television and the arrival of TV3 as a competing private broadcaster. The need for the media to focus on new means of attracting and holding the attention of its audience and readership has seen changes in the manner of news presentation and no more so than in the reporting of crime and criminal justice. This area is a fertile source of news for it offers human interest drama concerning the good and the bad of our society. Stories readily arouse emotions of fear and sympathy.

Unfortunately the audience that is sought is the same as that which the criminal justice system draws on to make decisions on the guilt or innocence of persons charged with offending. At present we lack data on the impact of media messages on jury behaviour.[62] Some research has been commissioned by the Law Commission but it cannot be assumed that it will provide absolute answers to the many questions. For the present accordingly value judgments are required as to the degree of protection required as a safeguard to the constitutional principles of a right to a fair trial. Because the convention of restraint is not presently functioning, as the Courts see it, they have little choice other than resort to the contempt power to provide the protection. They have considered other measures but find them inappropriate or ineffectual in New Zealand.

What the Courts have also done and, are continuing to do, is reappraise why and when they should exercise these punitive powers. They are doing so to ensure due value is given to freedom of expression. Their response is, I suggest, making it increasingly clear that the area of application of contempt is being minimised to what is absolutely necessary to protect

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62 Discussed in *Gisborne Herald* at p 570 and pp 574-575.

criminal justice. The yardstick is not whether the media is reporting in an accurate, impartial, balanced or responsible way, but whether what is done is a threat to justice. Even when it is in New Zealand, the Court will always judge matters in the end by balancing the public interest in freedom of expression against that detriment. This includes the public interest in the right to criticise all public institutions including the Court, judges and any public official.

Of course, there is scope for argument as to where the point of balance is fixed. In a gathering of members of the professions of journalism and law, views on what is the appropriate point will strongly differ and by no means always along occupational lines. But that a point of balance does exist is, in my view, not open to doubt.

But a rational and principled basis has now been reached for the law of contempt such that it cannot, fairly, be described as State censorship. It is truly a constitutional safeguard.

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