

**R574 Rillstone, Z.** Media coverage of criminal trials: sub judge contempt, freedom of expression and the right  
**2007 (Laws520)** to a fair trial

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**MEDIA COVERAGE OF CRIMINAL TRIALS:  
SUB JUDICE CONTEMPT, FREEDOM OF  
EXPRESSION AND THE RIGHT TO A FAIR  
TRIAL**

**LLB(HONS) RESEARCH PAPER  
CENSORSHIP AND FREEDOM OF EXPRESSION (LAWS 520)**

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## TABLE OF CONTENTS

	<b>ABSTRACT</b> .....	3
<b>I</b>	<b>INTRODUCTION</b> .....	6
<b>II</b>	<b>SUB JUDICE CONTEMPT – AN OVERVIEW</b> .....	6
<b>A</b>	<b>What is Sub Judice Contempt?</b> .....	6
<b>B</b>	<b>The Sub Judice Period</b> .....	7
1	<i>When does the period begin?</i> .....	7
2	<i>When does the period end?</i> .....	9
<b>C</b>	<b>Legal Test</b> .....	9
1	<i>Content</i> .....	9
2	<i>Circumstances</i> .....	13
<b>D</b>	<b>Summary</b> .....	14
<b>III</b>	<b>RIGHTS AND INTERESTS INVOLVED</b> .....	14
<b>A</b>	<b>Freedom of Expression</b> .....	15
<b>B</b>	<b>Right to a Fair Trial</b> .....	18
<b>C</b>	<b>The Public Interest</b> .....	20
<b>IV</b>	<b>IS SUB JUDICE CONTEMPT NECESSARY?</b> .....	21
<b>A</b>	<b>Does Publicity Cause Prejudice?</b> .....	22
1	<i>The New Zealand approach</i> .....	22
2	<i>Overseas research</i> .....	30
3	<i>Conclusion - courts can assume that publicity may cause prejudice</i> .....	36
<b>B</b>	<b>Are there Alternative Measures for Protecting Trials?</b> .....	36
1	<i>Possible alternative measures</i> .....	37
2	<i>Conclusion on alternative measures</i> .....	41
<b>C</b>	<b>Conclusion – Sub Judice Contempt is Necessary</b> .....	41
<b>V</b>	<b>BALANCE TO BE STRUCK BETWEEN THE RIGHTS AND INTERESTS</b> .....	42
<b>A</b>	<b>Do the Interests Conflict?</b> .....	42
<b>B</b>	<b>The Possible Approaches</b> .....	43
1	<i>Protecting freedom of expression</i> .....	43
2	<i>Balancing the rights</i> .....	45



3	<i>Protecting the right to a fair trial when there is a significant risk</i> .....	47
4	<i>Protecting the right to a fair trial when there is a reasonable risk</i> .....	48
C	<b>The Best Approach</b> .....	50
VI	<b>CONCLUSION</b> .....	51
	<b>BIBLIOGRAPHY</b> .....	53



## **ABSTRACT**

Sub judice contempt restricts freedom of expression by limiting what can be published in relation to a matter before the courts in order to protect the right to a fair trial. This paper examines the law of sub judice contempt and the rights and interests that are involved in media coverage of criminal trials. It argues that sub judice contempt is necessary to protect the right to a fair trial as publicity surrounding a trial may prejudice jurors, and there are no satisfactory measures which would counteract this prejudice. It further argues that when balancing the competing interests involved in sub judice contempt New Zealand courts should give maximum protection to the right to a fair trial. This would involve temporarily limiting freedom of expression whenever there is a reasonable risk to a fair trial unless this would endanger public safety. This approach goes further than the current approach of the courts but aligns with New Zealand's international obligations.

### **Word Length**

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 15,264 words.

Contempt-Freedom of expression-Fair trial



The Commission on the Law of Libel and Slander has been organized to study the law of libel and slander in order to protect the rights of the individual and to ensure the free flow of information. The Commission's report is published in this volume. The Commission's findings are based on a study of the law of libel and slander in the United States and on a comparison of the law in other countries. The Commission's report is divided into two parts. The first part deals with the law of libel and slander in the United States and the second part deals with the law in other countries. The Commission's report is a comprehensive study of the law of libel and slander and is a valuable contribution to the understanding of this important area of the law.

Word Length

The text of this paper (including abstract, title, and references) contains approximately 15,000 words.

Concept-Process of Expression



## *I INTRODUCTION*

Freedom of expression and the right to a fair trial are both fundamental human rights protected by the New Zealand Bill of Rights Act 1990. High profile criminal trials – such as those faced by David Bain and Scott Watson - illustrate that these rights may conflict. For this reason sub judice contempt is used to restrict some aspects of media coverage of criminal trials. This paper examines sub judice contempt and the impact that it has on the rights and interests which are involved. It assesses whether restriction of media coverage of criminal trials is necessary and identifies the appropriate balance to strike between the competing interests.

This paper begins by giving an overview of the law of sub judice contempt. First the rationale behind the contempt jurisdiction and some practical matters are briefly covered. The legal rules for what can be published about a criminal trial and when it can be published are then set out.

Part III then identifies the different interests affected by sub judice contempt – freedom of expression, the right to a fair trial, and the public interest. The significance of each interest and the reasons for protection of each interest are considered in turn.

Part IV seeks to answer the question of whether sub judice contempt is necessary. This is done by reference to two questions – whether media coverage of criminal trials endangers the right to fair trial, and whether there exist any feasible alternatives to restricting freedom of expression. This part argues that there is sufficient evidence that publicity surrounding a trial may cause juror prejudice to justify the retention of sub judice contempt. It further argues that there are no acceptable alternatives to restricting publication. It concludes that sub judice contempt is necessary for the protection of the right to a fair trial.

Finally, part V assesses what the appropriate balance is between the rights and interests involved in sub judice contempt. The approaches taken in several jurisdictions are examined before concluding that in the context of sub judice



contempt in New Zealand it is appropriate to restrict freedom of expression whenever there is a real risk to the right to a fair trial, unless there is a danger to public safety.

The conclusions made by this paper may have significant impacts for the current level of media coverage of criminal trials in New Zealand – a case in point being the extraordinary level of publicity surrounding David Bain in recent months.

## **II SUB JUDICE CONTEMPT – AN OVERVIEW**

### **A What is Sub Judice Contempt?**

Sub judice contempt is a class of contempt which relates to publishing information about matters that are due to be or are currently being tried in court. Contempt of court is concerned with protecting the administration of justice.<sup>1</sup> Protecting the administration of justice covers both actualities (ensuring that fair trials are actually received) and perceptions (ensuring that public perception is that a fair trial has been received).<sup>2</sup> In the context of sub judice contempt this means that the sub judice rule exists to prevent the risk of prejudice to a fair trial posed by the potential of publicity to influence potential jurors, but also to maintain public confidence that the accused has received a fair and unbiased trial. This is achieved by restricting publication of material which poses a risk to a fair trial.

The question of contempt can arise either after contemptuous material has been published or before publication if an injunction is sought by the Solicitor-General.<sup>3</sup> If material has been published which breaches the sub judice rule those involved in its publication may be punished by fine or imprisonment. If the material has not yet been published the court may grant an injunction to prevent publication.<sup>4</sup> Contempt is a criminal charge and therefore the onus is on the plaintiff to prove

<sup>1</sup> *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225, 229 (CA) Richmond P for the Court.

<sup>2</sup> John F Burrows and Ursula Cheer *Media Law in New Zealand* (5 ed, Oxford University Press, Auckland, 2005) 388.

<sup>3</sup> *Ibid*, 391.

<sup>4</sup> *Ibid*, 381.



beyond reasonable doubt that the publication in question tends to undermine the administration of justice.<sup>5</sup>

The courts have inherent jurisdiction to punish for contempt and although some areas of contempt are codified, the courts largely rely on the common law in exercising this jurisdiction.<sup>6</sup> Sub judice contempt has not been codified in New Zealand.

Not all publications about criminal trials are prohibited by the sub judice rule. A publication must be published within the sub judice period and breach the test for contempt before publication will be punished. This section of the paper sets out the relevant law as to what can be published about a criminal trial and when it can be published.

## **B The Sub Judice Period**

### *1 When does the period begin?*

There are two schools of thought on when the sub judice period begins – the first being that a matter is not sub judice until proceedings have begun (for instance when an arrest is made) and the second being that the sub judice period begins when criminal proceedings are likely.

The first position is the approach taken in Australia. This was confirmed by the High Court of Australia in *James v Robinson* where the majority of the Court held that those associated with the publication of prejudicial eyewitness accounts of a crime could not be held liable for contempt because the publication in question occurred before court proceedings had commenced. This was the case even though at the time of publication a manhunt was being conducted, and complaints were laid against the accused only two days after publication. The Court held that contempt is to be judged at the time of publication so, as the accused was not a party to criminal

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<sup>5</sup> *Solicitor-General v Radio Avon Ltd*, above n 1, 234 Richmond P for the Court; *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563, 567 (CA) Richardson J for the Court.

<sup>6</sup> *Taylor v Attorney-General* [1975] 2 NZLR 675, 678 (CA) Wild CJ.



proceedings at the time of publication, no contempt could be found.<sup>7</sup> A similar approach is also taken in the United Kingdom Contempt of Court Act 1981 which defines when criminal proceedings become active by reference to identifiable actions – arrest without warrant, the issue of a warrant of arrest or summons to appear, the service of an indictment or an oral charge.<sup>8</sup> Contempt can only be found if it relates to an active proceeding.

The New Zealand approach to when the sub judice period begins is found in the Court of Appeal's decision in *Television New Zealand Ltd v Solicitor-General*. This case was an appeal by Television New Zealand against an interim injunction which had been granted by the High Court. The injunction prevented the broadcast of a story about a murder of a 17 year old boy which named the prime suspect in the case, showed a photo of the suspect and stated that he was on the run and that he was believed to be armed with a shotgun. Television New Zealand relied on *James v Robinson* as authority that the Court has no jurisdiction to protect a fair trial where proceedings are "merely potential". The Court of Appeal rejected this argument and held that the Court has inherent jurisdiction to protect a criminal trial against prejudice when "the commencement of criminal proceedings is highly likely".<sup>9</sup> This means that the sub judice period may begin even when charges have not been laid, as long as it is highly likely that this will happen.

This is the approach favoured by the New Zealand Law Commission as it ensures greater protection for fair trial values by allowing protection of proceedings to commence earlier than the first approach. This discourages the publication of prejudicial information at any time prior to trial, regardless of whether an arrest has been made or not.<sup>10</sup> This approach does not have the advantage of identifying with certainty the precise moment when the sub judice period begins, which may make the position of the media more difficult, but the legal requirement that "the commencement of criminal proceedings is highly likely" does give a significant amount of guidance on the matter.

<sup>7</sup> *James v Robinson* (1963) 109 CLR 593, 607 Kitto, Taylor, Menzies and Owen JJ.

<sup>8</sup> Contempt of Court Act 1981 (UK), Schedule 1.

<sup>9</sup> *Television New Zealand Ltd v Solicitor-General* [1989] 1 NZLR 1, 3 (CA) Cooke P for the Court.

<sup>10</sup> New Zealand Law Commission *Juries in Criminal Trials Part Two: A Discussion Paper* (NZLC PP37(1), Wellington, 1999) 75.



## 2 *When does the period end?*

The sub judice period does not end when the jury has delivered its verdict but rather continues until any appeals have been determined or until it is clear that there will be no appeal.<sup>11</sup> It will be clear that there will be no appeal when the appeal period has expired – generally 28 days after the date of conviction or, if sentencing occurs after conviction, 28 days after sentencing.<sup>12</sup>

## C *Legal Test*

The test for whether a publication breaches the sub judice rule is whether:<sup>13</sup>

[A]s a matter of practical reality the actions of the particular respondent caused a real risk, as distinct from a remote possibility, of interference with the administration of justice; here, specifically, interference with a fair trial. Risk is assessed not by the actual outcome but by the tendency of the publication, although subsequent events may form part of the evidence. While the meaning of publications is decided by the impression made on the hypothetical ordinary reasonable reader (or, in the case of radio, listener) the tendency is assessed by the Court.

The sub judice rule therefore prevents publishing information which has a real risk of prejudice to a fair trial and punishes those who breach this rule. This risk is assessed by reference not to the actual results of the publication but to its tendency. In assessing whether material tends to cause prejudice the Court will look to both the content and the circumstances of the publication. It is the overall effect of both of these factors which is important – neither factor is on its own determinative.<sup>14</sup>

### 1 *Content*

There are several broad categories of information that have been identified by the courts as being potentially contemptuous. These categories include material

<sup>11</sup> John F Burrows and Ursula Cheer, above n 2, 394-395.

<sup>12</sup> Crimes Act 1961, s 388(1), but the appeal period may be extended by the Court of Appeal under s 388(2).

<sup>13</sup> *Solicitor-General v Wellington Newspapers Ltd* [1995] 1 NZLR 45, 47 (HC, Full Court) Eichelbaum CJ.

<sup>14</sup> *Gisborne Herald Co Ltd v Solicitor-General*, above n 5, 569 Richardson J for the Court.



which is inadmissible, or likely to be inadmissible, at trial; contentious details of the case; matters which might affect witnesses; and improper reports of court proceedings. The content of the publication includes not just the information that it contains - the way in which the information is presented is also significant. There are therefore two further categories of publications that may be in contempt of court not because of what they say, but because of how they say it – those which contain emotive reporting and those that prejudge the case.<sup>15</sup> These categories are examined below. It should be noted that these categories are not exhaustive and any content which tends to interfere with the administration of justice may be liable for contempt proceedings. These categories do however encompass the most common situations where the issue of sub judice contempt arises.

(a) Material which is inadmissible or likely to be inadmissible at trial

Material which is inadmissible or likely not to be admitted at the trial is likely to be found to be contemptuous. The purpose of restricting the publication of this material is directly linked to ensuring that the accused receives a fair trial by an unbiased jury. Restricting the publication of this material makes sure that information which the rules of evidence may not allow to be put before a jury in court because it is more prejudicial than probative is not presented to the jurors through other means.<sup>16</sup>

An example of evidence which is likely to be inadmissible at trial is the previous record or bad character of the accused. In *Gisborne Herald Co Ltd v Solicitor-General* the publication that was found to be in contempt of court was an article which detailed the previous criminal record of a man accused of assaulting a police officer, including another unrelated assault charge that he was due to face later that week. The Court of Appeal held:<sup>17</sup>

To publish the criminal record of an accused or comment on the previous bad character of an accused before a trial is a prime example of interference with the due

<sup>15</sup> These categories are based largely on the categories formulated in John F Burrows and Ursula Cheer, above n 2, 396-412. An alternative formulation can be found in *The Laws of New Zealand* (LexisNexis NZ, Wellington, 2007) Contempt of Court paras 13-16 (last updated May 2007) [www.lexisnexis.com](http://www.lexisnexis.com).

<sup>16</sup> John F Burrows and Ursula Cheer, above n 2, 396.

<sup>17</sup> *Gisborne Herald Co Ltd v Solicitor-General*, above n 5, 568 Richardson J for the Court.



administration of justice and, subject to considerations such as time and place, is almost invariably regarded as a serious contempt.

In another case a television channel was found to be in contempt after a television broadcast of a programme detailing an escape from prison six years earlier by a man who was at the time facing trial on an unrelated matter. The programme gave details of the man's previous convictions, gang associations and familiarity with firearms, all of which were matters which the jury were not to be made aware of.<sup>18</sup>

(b) Contentious details of the case

Even if evidence is admissible it may be contempt to publish it before a trial. Generally only those "bare facts" which could be obtained by any eye-witness can be published before a trial, and not details that may be contested at trial.<sup>19</sup> This is because it is important that jurors do not come to the trial having already formed opinions about contentious issues that the case may turn on. The facts published must not connect a person with a crime, not be likely to be in dispute at trial and must be completely accurate. Information outside of these parameters could influence potential jurors before the case begins and prevent them hearing the case with open minds.<sup>20</sup>

An example of information which falls outside the parameters outlined above is when newspapers conduct their own investigation into a crime and publish the "evidence" that they find. This was illustrated in the English Case *R v Evening Standard; Ex parte Director of Public Prosecutions*. In this case a newspaper had sent a team of reporters to investigate a murder which was the subject of a large amount of public interest and had then published a series of articles relating to their findings. The Court held that it was contempt of court for a newspaper to undertake their own investigation into the facts of an alleged crime and to publish the results of the investigation.<sup>21</sup> It noted that as it was not possible to anticipate what issues were

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<sup>18</sup> *Solicitor-General v TV3 Network Services Ltd* (1998) 16 CRNZ 401 (HC, Full Court).

<sup>19</sup> *Parker v Peacock* (1912) CLR 577, 588 Griffith CJ.

<sup>20</sup> John F Burrows and Ursula Cheer, above n 2, 402.

<sup>21</sup> *R v Evening Standard; Ex parte Director of Public Prosecutions* (1924) 40 TLR 833, 835-836 (KB) Hewart LCJ for the Court.



likely to be important at trial contentious details should not be published,<sup>22</sup> stating that “[a] man should be tried on evidence, not investigations”.<sup>23</sup>

(c) Matters which might influence witnesses

As well as potential jurors, it is important not to influence witnesses. For this reason publications which may have an effect on witnesses are also prohibited by the sub judice rule. An example of information that may influence witnesses is publication of photographs of the accused where identification will be an issue at trial.

This issue arose in *Attorney-General v Tonks*. In this case a newspaper published a front-page article which included a photograph of a man who had been arrested for a murder at a time when the police were conducting “identification parades” to see if witnesses could identify the accused from a line-up of men. The Court found that the publication of a photograph of the accused may have caused a witness who was unable to form a clear mental picture of the man they had seen to derive the mental picture based on scrutiny of the photograph.<sup>24</sup> The Court therefore found that it is contempt of court to publish the photograph of someone that has been accused of a crime “where it is reasonably clear that the question of identity of the accused person with the criminal has arisen or may arise”.<sup>25</sup>

(d) Improper reports of court proceedings

The concept of open justice means that unless there is a suppression order, and subject to a few statutory exceptions, the media are free to report proceedings held in a public court. This freedom does not however protect inaccurate or misleading reporting of trials. As this kind of reporting may influence jurors or witnesses this may also be liable for contempt.<sup>26</sup>

(e) Emotive reporting

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<sup>22</sup> Ibid, 835 Lord Heward CJ for the Court.

<sup>23</sup> Ibid, 834 Roche J.

<sup>24</sup> *Attorney-General v Tonks* [1934] NZLR 141, 154 (SC, Full Court) Blair J.

<sup>25</sup> Ibid, 146 Myers CJ.

<sup>26</sup> See John F Burrows and Ursula Cheer, above n 2, 407-408.



Material may influence potential jurors not just because of the information it contains but also because of the way in which it is portrayed. It may therefore be found to be contempt to report on a matter before the courts in a way that is likely to arouse strong sentiments in potential jurors. This is because it may prevent them from being impartial if selected to serve on the jury. The cases suggest however that there will be a very high threshold to be met before a court will find contempt in this kind of publication.<sup>27</sup>

(f) Prejudgement

The final category of content that may give rise to contempt is prejudgement of a matter before the courts. It is contemptuous to publish anything which goes beyond "fair and temperate" criticism of a party to the proceedings and purports to express an opinion on the merits of a particular case.<sup>28</sup> This category is concerned not just with the potential for jurors or witnesses to be influenced but also with maintaining confidence in the judicial system.<sup>29</sup>

2 *Circumstances*

Even if a publication falls very clearly into one of the categories identified above, it may not be contemptuous if the circumstances in which it was published make it unlikely that it will cause prejudice to criminal proceedings. There are several factors in the circumstances of the publication of information which can influence whether it is likely to prejudice a trial, the main ones being the length of time before the trial and where and how widely the information is published.

(a) Length of time before the trial

The length of time between publication and the trial is significant as the lapse of time may mean that the initial impact of the publication on potential jurors has dissipated before the trial commences. In *Gisborne Herald* the Court of Appeal stated

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<sup>27</sup> Ibid, 405-407.

<sup>28</sup> *Attorney-General v Times Newspapers Ltd* [1973] 3 All ER 54, 62 (HL) Lord Reid.

<sup>29</sup> Ibid, 60 (HL) Lord Reid; John F Burrows and Ursula Cheer, above n 2, 409.



that it was unlikely that the effect of media coverage would continue beyond six to eight months after publication.<sup>30</sup> Potentially prejudicial information published a long time before a trial is scheduled to begin may therefore not have enough of a tendency to endanger a fair trial to fall within the sub judice rule.

(b) Where the information is published

The audience that receives the information is also significant. If the audience receiving the information are not potential jurors - for instance if publication occurs in a different city than where the trial will be held - then it is unlikely that liability for contempt will be found.<sup>31</sup> With the increased use of the internet as a source for news and the relatively small size of New Zealand it is unlikely that many situations will arise when a publication may be exempt from liability on this ground.

**D Summary**

Sub judice contempt is concerned with ensuring that fair trials are received and that public confidence in the administration of justice is maintained. The sub judice rule therefore prevents the publication of information about likely or actual criminal proceedings which cause a real risk of prejudice to a fair trial. Whether there is a risk to a trial is assessed by reference to the content and circumstances of the publication.

The remainder of this paper examines what rights and interests are involved in the sub judice rule, the extent to which the rights conflict and the balance which should be struck between them.

**III RIGHTS AND INTERESTS INVOLVED**

The sub judice rule has important implications to two rights contained in the New Zealand Bill of Rights Act 1990 – freedom of expression and the right to a fair trial. Other interests may also be affected by the operation of the sub judice rule, in

<sup>30</sup> *Gisborne Herald Co Ltd v Solicitor-General*, above n 5, 570-571 Richardson J for the Court.

<sup>31</sup> *Ibid*, 568-569 Richardson J for the Court.



particular the maintenance of public confidence in the justice system and public safety.

This section of the paper seeks to explore the various rights that the sub judice rule is said to restrict or protect. It first examines freedom of expression and looks at what freedom of expression means, the arguments which support freedom of expression and its relevance in the reporting of criminal trials. It then sets out what the right to a fair trial entails and who the right burdens and benefits. This section then briefly identifies several other interests which may be affected by the operation of the sub judice rule.

The discussion contained in this section sets the scene for the later sections which will examine whether media coverage necessarily impinges on the right to a fair trial and will then look at the balance that should be struck between the competing rights in this context.

#### **A Freedom of Expression**

Freedom of expression is guaranteed by section 14 of the New Zealand Bill of Rights Act 1990 which states “[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form”.<sup>32</sup> It has been described as “unquestionably one of the most important rights in the Bill of Rights”.<sup>33</sup> Despite its importance there is not an absolute right to free speech, rather there is a right to be protected against unjustified restriction of expression.<sup>34</sup>

There are several arguments that explain why freedom of expression is so important. As can be seen in the legislative provision, freedom of expression is concerned both with the right to convey information and with the right to receive information. For this reason arguments in support of freedom of expression can focus

<sup>32</sup> New Zealand Bill of Rights Act 1990, s 14.

<sup>33</sup> Paul Rishworth et al *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 308.

<sup>34</sup> This is the result of section 5 of the New Zealand Bill of Rights Act 1990 but is also arguably the case even in the absence of a legislative provision justifying limitations on rights – see Eric Barendt *Freedom of Speech* (2nd ed, Oxford University Press, Oxford, 2005) 7.



either on the speaker or the audience.<sup>35</sup> This distinction may be relevant to what restrictions are permitted on the form of expression being protected. Ian Cram argues that when an argument is focussed on the right of the speaker there will be a higher threshold for allowing interference with speech than when an argument is focussed on the right of the audience. In the former instance a restriction should only be justified in the case of a compelling community interest, while in the latter restriction will be justified if on balance other interests outweigh the value of expression.<sup>36</sup>

The main arguments for freedom of expression are the argument from truth, the argument from democracy and the argument from individual self-fulfilment. The first two arguments are audience focussed while the latter is speaker focussed. Assessing which argument most closely aligns with the argument for unrestricted reporting of criminal trials allows the freedom of expression implications of the sub judice rule to be examined.

The argument from truth is the traditional argument for freedom of expression put forward by the likes of John Stuart Mill. It argues that in order for truth to be attained and established opinion tested individuals must have freedom to access the views of others and to communicate their own views.<sup>37</sup> A development of this argument is seen in the marketplace of ideas theory which holds that the best test of the truth of an idea is whether the idea is accepted in the competition of the market.<sup>38</sup> There are two important problems with the application of this argument to media coverage of trials. The first is that the truth of the information the media would wish to convey is often not in dispute. An example of this type of information is the criminal record of the accused. The argument from truth cannot convincingly be used to justify the publication of material to which there is no debate over its truthfulness.<sup>39</sup> The second problem with applying this argument to coverage of trials is that it is not the role of society in this instance to determine what the truth is when facts are

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<sup>35</sup> Eric Barendt, above n 34, 23.

<sup>36</sup> Ian Cram *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Hart Publishing, Portland, 2002) 2-3; 14.

<sup>37</sup> *Ibid.*, 7.

<sup>38</sup> Wojciech Sadurski *Freedom of Speech and Its Limits* (Kluwer Academic Publishers, Dordrecht, 2002) 8.

<sup>39</sup> Ian Cram, above n 36, 9.



disputed. This role is to be left to the jury, who will receive all of the information that the evidence rules allow over the course of the trial.<sup>40</sup>

The argument from democracy provides a better fit. This argument states that public discussion of public issues is necessary in order for citizens to understand political issues and be able to participate effectively in the democratic process.<sup>41</sup> Media coverage of trials clearly falls within this argument. Reporting of court proceedings plays a vital role in informing the public of "how justice is being administered in our courts"<sup>42</sup> and for most people is the only available source of information about the courts.<sup>43</sup> This argument focuses on the right of the audience to receive information, in this case the right of the public to find out what is happening in court. As such, pursuant to Cram's analysis above, it may be acceptable to impose restrictions when other interests outweigh the interest of the public in receiving the information. Nevertheless, it is clear that the sub judice rule imposes a restriction on a form of expression which the argument from democracy would protect.

The final main argument is the argument from individual self-fulfilment which focuses on the interest of the speaker and argues that restriction of expression inhibits the development of personality.<sup>44</sup> There are however other aspects of liberty which are necessary for individual self-fulfilment – for example personal freedom from detention, something which the accused may be deprived of if unrestrained coverage of trials were allowed. It is also questionable whether the media require the ability to report restricted details of trials in order to achieve self-fulfilment. This argument is therefore not particularly relevant in this context.

The sub judice rule clearly restricts freedom of expression by preventing publication of some details about trials. As the way in which the sub judice rule will operate is not always easily discernible it may also have a "chilling effect" on expression and prevent more expression than that which comes within its reach.<sup>45</sup> An

<sup>40</sup> Eric Barendt, above n 34, 337.

<sup>41</sup> Wojciech Sadurski, above n 38, 20-21.

<sup>42</sup> *R v Felixstowe Justices, ex parte Leigh* [1987] 1 All ER 551, 558 (QB) Watkins LJ.

<sup>43</sup> Ian Cram, above n 36, 13.

<sup>44</sup> Eric Barendt, above n 34, 13.

<sup>45</sup> M. David Lepofsky *Open Justice: The Constitutional Right to Attend and Speak about Criminal Proceedings* (Butterworths, Toronto, 1985) 246-247.



examination of the arguments for freedom of expression shows that the argument from democracy is offended by the restriction imposed, but not necessarily the arguments from truth or self-fulfilment. The interest of the public in receiving information about the administration of justice by the courts is therefore the most significant interest involved. This will be important in determining how the competing interests involved in the sub judice rule should be balanced later in this paper.

### **B Right to a Fair Trial**

There are several rights associated with the right to a fair trial. For present purposes the relevant right is contained in section 25(a) of the New Zealand Bill of Rights Act 1990 which states that anyone charged with a criminal offence has “[t]he right to a fair and public hearing by an independent and impartial court”.<sup>46</sup> The relevant part of this right in the context of the sub judice rule is the right to a fair hearing by an impartial court. The Court of Appeal has stated that the assurance of this right is “essential for the preservation of an effective system of justice”.<sup>47</sup>

There are three broad factors that contribute to a fair hearing – fair legal rules, fair exercise of judicial discretion and “good faith and competence of trial participants”.<sup>48</sup> Publication of matters surrounding a criminal trial threatens the last factor as there is a fear that it has the potential to influence trial participants – usually jurors but in some instances judges and witnesses. If this occurs then trial participants may have preconceived notions, which may mean that the court that hears the case will be unable to act impartially.<sup>49</sup> If the preconceived notions are that the accused is guilty of the offence then the accused will be denied the presumption of innocence, which is a critical right of the accused regardless of whether they are innocent or guilty.<sup>50</sup> Whether or not media coverage of criminal trials causes prejudice is examined later in this paper. The following paragraphs instead look at the practical

<sup>46</sup> New Zealand Bill of Rights Act 1990, s 25(a).

<sup>47</sup> *Gisborne Herald Co Ltd v Solicitor-General*, above n 5, 571 Richardson J for the Court.

<sup>48</sup> Paul Rishworth et al, above n 33, 664.

<sup>49</sup> *Ibid*, 673-675.

<sup>50</sup> New Zealand Bill of Rights Act 1990, s 25(c); *Randall v R* [2002] 1 WLR 2237, 2251 (PC) Bingham LJ for the Court.



matters of who is responsible for ensuring that a fair trial occurs and to whom the benefit of a fair trial belongs.

The first practical matter to address is to identify who bears the burden of ensuring that fair trials occur. While contempt orders are made by the courts it is the media who must ensure that their actions do not cause prejudice to a fair trial. The Bill of Rights Act applies only to acts done by a branch of government, or to acts done by others in the performance of a public function, power or duty conferred by law.<sup>51</sup> This clearly covers the courts as they are the judicial branch of government and also encapsulates the police and the prosecution. It is more difficult to find that this includes the media. The media often exercise functions conferred by law but whether these are public functions will depend on the facts in any particular case.<sup>52</sup> The better view is that in this context the burden of ensuring that fair trials occur falls to the courts, not the media, but the courts will restrict the actions of the media to discharge the burden. If a fair trial were to be prevented by prejudicial publicity it would not be possible to take a Bill of Rights action against the media.<sup>53</sup>

The final matter to consider is who has the benefit of the right to a fair trial. The wording of the right in the Bill of Rights Act states that it applies to “[e]veryone who is charged with an offence”.<sup>54</sup> This suggests that it is a right that belongs to the accused, but not to the prosecution. It seems clear however that the right to a fair trial exists for both sides in a criminal trial. There are two ways to reach this conclusion.

The first is by reference to the meaning of “fair”. Fair can be seen as a “referential term”, meaning that the fairness of a trial can only be determined by reference to the interests of both sides.<sup>55</sup> On this view a trial is not fair simply because it is not biased against the accused, rather there must be no disposition towards either side.

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<sup>51</sup> New Zealand Bill of Rights Act 1990, s 3.

<sup>52</sup> *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233, para 70 (HC) Randerson J.

<sup>53</sup> Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) 807.

<sup>54</sup> New Zealand Bill of Rights Act 1990, s 25.

<sup>55</sup> Paul Rishworth et al, above n 33, 666.



The second way to find that there is a right to a fair trial for the prosecution as well as the accused is by reference to the common law right which existed prior to the enactment of the Bill of Rights Act and is not restricted by virtue of non-inclusion in the Act.<sup>56</sup> A statement that this right is bilateral is found in *Commissioner of Police v Ombudsman* where McMullin J stated:<sup>57</sup>

It is plain enough that a "fair trial" embraces concepts of fairness to both sides ... [i]n the case of a criminal trial both the Crown and the accused are entitled to fairness because the ends of justice are served as much by the conviction of the guilty as they are by the acquittal of the innocent.

The right to a fair trial is therefore a right which belongs to both sides and, in the context of the sub judice rule, is the duty of the courts to provide.

### **C     *The Public Interest***

There are several categories of public interest which are commonly argued to exist in sub judice contempt cases. Notable interests are the interest of the public and victims in seeing that justice is done, the maintenance of public confidence in the justice system and public safety. These interests diverge on their relation to freedom of expression and the right to a fair trial.

The interest of the public and victims in seeing that justice is done is best regarded as forming part of the right to a fair trial as opposed to a distinct interest. This approach reflects the fact that the prosecution in a criminal trial is representing the public, therefore a fair trial for the prosecution fulfils the public interest in seeing the guilty convicted.<sup>58</sup>

The interest in maintaining confidence in the justice system is however distinct from the right to freedom of expression and the right to a fair trial. Publications which prejudge issues before the court may cause the authority of the courts as the forum for settling legal disputes to be undermined. Sustained attacks by

<sup>56</sup> New Zealand Bill of Rights Act 1990, s 28.

<sup>57</sup> *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 405 (CA) McMullin J.

<sup>58</sup> *R v Noonan* [1956] NZLR 1021, 1027 (SC) Henry J.



the media on the judiciary may have the same effect.<sup>59</sup> Preventing this is at the heart of the contempt jurisdiction and therefore favours restriction of freedom of expression.

The interest in protecting the public from harm is also engaged in some situations by the sub judice rule. An example of this is when a person who is accused of a violent crime has not yet been apprehended or has escaped from custody.<sup>60</sup> In this situation the interest of public safety would favour freedom of expression over the right of the accused to a fair trial.

These public interests will be relevant in part V of this paper which examines the balance that should be struck between the competing interests. The following part sets the scene for this discussion by exploring whether the right to a fair trial is at risk if not protected by the sub judice rule, which will determine whether the different interests identified above need to be balanced against each other.

#### ***IV IS SUB JUDICE CONTEMPT NECESSARY?***

The main justification for the law of sub judice contempt is that it is necessary in ensuring that those accused of a crime receive a fair trial. If the right to a fair trial is not threatened by media coverage, or if there are other ways of protecting the fair trial right without restricting media coverage, sub judice contempt will not be necessary. Identifying the appropriate balance between the interests will be irrelevant if this is the case. If media coverage does not have a prejudicial effect on jurors then for most categories of publication which sub judice contempt seeks to restrict there will be no need to balance the right to a fair trial against freedom of expression as the right to a fair trial will not be placed at risk.

This section of the paper seeks to show that sub judice contempt is necessary. It does this by addressing the two key questions relevant to determining whether restriction of freedom of expression is needed to protect the right to a fair trial. The first question is whether media coverage of a trial actually causes prejudice in jurors.

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<sup>59</sup> Eric Barendt, above n 34, 325-327.

<sup>60</sup> John Burrows and Ursula Cheer, above n 2, 420.



The second question is whether there are alternative methods of protecting the right to a fair trial which do not involve restricting freedom of expression.

After examining the research it is found that there is no clear answer to the first question but there is sufficient evidence to support the presumption made by the New Zealand courts in sub judice contempt cases that media coverage can prejudice jurors. In answer to the second question it is found that although there are alternatives to preventing publication, none of these alternatives provide a satisfactory substitute for sub judice contempt. It is therefore concluded that the use of sub judice contempt to restrict freedom of expression is necessary in order to provide for the right to a fair trial. The next question to answer is what approach should be taken in balancing the competing rights, the answer to which is found in the following section of the paper.

#### *A Does Publicity Cause Prejudice?*

To answer the question of whether publicity surrounding a criminal trial causes prejudice this section first examines the approach taken in New Zealand, with reference to what one High Court judge has called the "trail-blazing"<sup>61</sup> research undertaken by the New Zealand Law Commission in 1999. The approach taken by the courts before the Law Commission's research is set out first, before the Law Commission's research is examined and finally the reaction of the courts to the research is explored.

Following this discussion the research that has been undertaken overseas is surveyed to determine whether there is a consensus. It is concluded that although there is no clear answer, there is enough evidence to allow the courts to continue to presume, in the context of sub judice contempt, that media coverage of criminal trials may cause prejudice.

##### *1 The New Zealand approach*

###### *(a) Before the Law Commission's research*

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<sup>61</sup> *Tukuafu v R* (17 December 2001) HC AK A205/01, para 17 Chambers J.



Before the Law Commission's research the courts declined to apply overseas research on the effects of publicity on a jury trial, preferring instead to rely on judicial experience.<sup>62</sup> Judicial experience on the effect of media coverage seemed to diverge depending on the nature of the case at hand.

An often cited passage is that of the Court of Appeal in *R v Harawira*. The issue in this case was whether prejudicial pre-trial publicity had deprived the appellant of a fair trial, resulting in a miscarriage of justice. Richardson J, giving the judgment of the Court, stated:<sup>63</sup>

Experience shows that juries are quite capable of understanding and carrying out their role in this environment, notwithstanding that an accused may have been the subject of widespread debate and criticism. A ready example - far removed from this case factually - is the way charges of serious violence against gang members are dealt with. Undoubtedly there is widespread prejudice against them, yet juries still acquit or fail to agree on occasions, indicating that when confronted with an actual case, they can be expected to carry out their task responsibly in the light of the evidence.

In the later case of *Gisborne Herald Co Ltd v Solicitor-General* Richardson J, again giving the judgment of the Court of Appeal, noted that assumptions about prejudicial publicity have not been proven to be correct or incorrect in the New Zealand context:<sup>64</sup>

We do not even know by an assessment of the outcomes of jury trials affecting gang members or those charged with sexual abuse or drug dealing or other kinds of offending assumed to be susceptible by publicity to generic or particular prejudice, whether those assumptions have been borne out.

*Gisborne Herald* was an appeal by a newspaper against a finding that they were in contempt of court. Counsel for the appellant relied on overseas research to argue that there was no empirical evidence that pre-trial publicity had a prejudicial effect on jury trials. In responding to this the Court of Appeal noted that there were also studies

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<sup>62</sup> See for example *Solicitor-General v Wellington Newspapers Ltd*, above n 13, 48 Eichelbaum CJ; 57 McGechan J; *Gisborne Herald Co Ltd v Solicitor-General*, above n 5, 574-575 Richardson J for the Court.

<sup>63</sup> *R v Harawira* [1989] 2 NZLR 714, 729 (CA) Richardson J for the Court.

<sup>64</sup> *Gisborne Herald Co Ltd v Solicitor-General*, above n 5, 574 Richardson J for the Court.



which reached the opposite conclusion and held that in the absence of New Zealand data or guidance as to the application of overseas research to New Zealand juries the long standing judicial assumption that pre-trial publication could prejudice a fair trial would stand.<sup>65</sup>

It is interesting to note that judicial opinion recognised that pre-trial publicity could prejudice a fair trial when the question arose in the lead up to a criminal trial, such as in *Gisborne Herald*, but preferred to rely on the ability of juries to remain objective when the question arose after conviction, such as in *Harawira*.

(b) The New Zealand Law Commission's research

(i) Method and conclusions

The absence of New Zealand data on the effect of publicity on New Zealand juries was addressed by the New Zealand Law Commission in their *Juries* project. Over a period of nine months in 1998 the Law Commission researched several issues relating to juries in New Zealand, including the effect of publicity on jurors. The research was conducted by a pre-trial questionnaire and a post-trial interview with jurors in 48 jury trials (18 in the High Court and 30 in the District Court). The trials selected included all of the high profile cases in the nine month period and a significant number of complex cases. Both the questionnaires and interviews were voluntary, meaning that the total number of jurors interviewed was 312 out of the potential 575.<sup>66</sup>

To study the effect of publicity jurors were asked whether they were aware of any publicity about the case either pre-trial or during the trial and whether the publicity had impacted on their thinking about the case.<sup>67</sup> From the responses to these questions the Law Commission found that the impact of pre-trial publicity was in most cases minimal<sup>68</sup> and that although the impact of publicity during the trial was

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<sup>65</sup> Ibid, 575 Richardson J for the Court.

<sup>66</sup> New Zealand Law Commission *Juries in Criminal Trials Part Two: A Summary of the Research Findings* (NZLC PP37(2), Wellington, 1999) 2 ["Juries Two"].

<sup>67</sup> Ibid, 60.

<sup>68</sup> Ibid.



harder to ascertain, it was probably of limited impact and unlikely to affect the verdict reached by the jury.<sup>69</sup>

The factors that led the Law Commission to conclude that in most cases the impact of pre-trial publicity was minimal were that only 16 of the jurors in the sample could recall more than the "bare essentials" of their case from the publicity; that of those 16 jurors only two admitted that their knowledge had an initial impact on them; and that even if an individual juror was influenced by pre-trial publicity it was unlikely that this had an effect on the verdict reached by the jury collectively.<sup>70</sup> They based their finding that publicity during the trial was unlikely to have a large impact on the jurors' reasoning on the facts that most jurors who saw or heard publicity during the trial reported that they recognised that it was partial or inaccurate and therefore disregarded it, and that in three cases where jurors had tried to bring media reports of the case into the jury room they were told by other members of the jury that the information was not relevant.<sup>71</sup>

It must be noted that the Law Commission did not conclude that publicity had no impact on jurors, rather that the level of publicity allowed by the sub judice rule had only a small impact. The Law Commission therefore argued that the sub judice rule was still necessary and should not be relaxed:<sup>72</sup>

The only conclusion that can be drawn from the Research is that jurors are not generally affected by the current level of pre-trial or during-trial publicity... it can be assumed that the more we permit pre-trial publicity, the more effect it will have on jurors, and the more we would move away from the current low-impact position.

(ii) Limitations of the research

A major limitation of the research done by the Law Commission is that it relies primarily on self-reports of jurors.<sup>73</sup> This raises two potential dangers – the jurors' responses may not have been honest, and even if responding honestly, the

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<sup>69</sup> Ibid, 61-62.

<sup>70</sup> Ibid, 60-61.

<sup>71</sup> Ibid, 61.

<sup>72</sup> New Zealand Law Commission *Juries in Criminal Trials* (NZLC R69, Wellington, 2001) 180.

<sup>73</sup> "Juries Two", above n 66, 5.



jurors may not have been able to accurately identify the extent to which publicity had influenced their reasoning.

The Law Commission noted that it was possible that jurors would understate behaviours which were contrary to the directions of the judge.<sup>74</sup> The jurors were aware that having reference to media coverage was not allowed. They therefore may not have been willing to admit to paying attention to media coverage. This factor means that although only two jurors out of the sample admitted to being influenced by publicity there may be others who were influenced but did not admit to it. Similarly, jurors may not have placed a greater weight on media coverage during the trial than they acknowledged in interviews.

Even if the jurors in the sample all responded honestly their responses may not have been accurate as they may not have realised the impact that publicity had on their reasoning. This is illustrated by an American study in which potential jurors were surveyed regarding their knowledge of a high profile case, their opinion on whether the defendant was guilty and whether they thought they would be able to be impartial as a member of the jury. The study found that while there was a correlation between knowledge of the crime and perceived culpability of the defendant there was no correlation between perceived culpability of the defendant and willingness to admit impartiality. The authors therefore concluded that self-reports of impartiality could not be relied on.<sup>75</sup> These findings mean that media coverage may have played a much greater role in the trials where jurors were aware of publicity than what the Law Commission concluded.

Another limitation of the Law Commission's research is that it did not examine the level or nature of publicity that each case received. It does not appear that there were many truly high profile cases in the study – there were only four trials out of the 48 studied in which half or more of the jurors could recall any pre-trial publicity and only 16 jurors out of the sample of 312 could recall more than the basic

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<sup>74</sup> Ibid.

<sup>75</sup> Gary Moran and Brian Cutler "The Prejudicial Impact of Pretrial Publicity" (1991) 21(5) *Journal of Applied Social Psychology* 345.



facts of the case from the publicity.<sup>76</sup> The findings that publicity has little or no impact in most cases are therefore tempered by the fact that in most of the cases studied there was little or no publicity that the jurors could remember. This means that the findings may not apply to cases which receive a large amount of media coverage, or, as the type of publicity was not examined, coverage which is particularly prejudicial. It also means that the results of the research may not translate across time, as the results reflect the impact of the type and level of publicity in 1998, with nothing to enable a reader to compare this with the current level and type of media coverage.

(c) The courts' response to the research

Since the Law Commission's research was published it has at times been relied on by the courts as authority for the principle that pre-trial publicity has a minimal effect on jurors in most cases. In some cases more weight has been placed on the research than is perhaps appropriate given the above limitations, while in other cases the Court has taken the opposite approach and in one case has cautioned against placing undue reliance on the research.

The first judicial reference to the research was the Court of Appeal decision *R v Middleton*<sup>77</sup> and subsequent cases have cited this case as precedent for relying on the research. It is worth noting that *Middleton* did not actually apply the research and the Court's decision actually went against the research findings. *Middleton* was an application for leave to appeal against a pre-trial order for change of venue. Middleton had been charged with threatening to kill the man who murdered his step-daughter and was due to be released on parole. The Crown had been granted the change of venue due to extensive pre-trial publicity that was favourable to the accused. Middleton was a high profile campaigner for law and order issues and had considerable public support in his community. There was extensive publicity in his area about the issues surrounding his trial. The Court of Appeal stated that the Law Commission's research showed "that the impact of media publicity both before and during trial is in almost all cases minimal and that the apprehension which sometimes

<sup>76</sup> "Juries Two", above n 66, 60.

<sup>77</sup> *R v Middleton* (26 September 2000) CA 218/00.



exists about the effect of publicity may be over-stated.”<sup>78</sup> Due to the unique circumstances of the case however the Court dismissed the appeal and stated that they would also have allowed the change of venue.<sup>79</sup>

Cases following *Middleton* have relied on the Law Commission’s research and in some cases have taken it as authority for propositions which it did not prove. In denying an application for extension of suppression orders the Court of Appeal in *R v Burns (Travis) (No 2)* stated that the Law Commission research showed that even in high profile cases prejudicial media coverage has minimal impact.<sup>80</sup> In *R v Curtis* where the appellant claimed he was denied the right to a fair trial because the trial judge refused to adjourn the trial after the broadcast of a television programme which portrayed the appellant as “dodgy” the Court of Appeal noted that the decision to broadcast the show was irresponsible and potentially contemptuous<sup>81</sup> but in finding that the appellant received a fair trial relied on the Law Commission’s research as support for the statement that “concerns over pre-trial publicity have at times been over-rated”.<sup>82</sup> As has been examined above it is questionable whether the research can be said to apply to high profile cases and the research does not extend to allowing prejudicial media coverage that would be subject to sub judice contempt proceedings.

Not all cases have placed significant weight on the Law Commission’s research in making their findings. In *R v Cara* Potter J warned against placing undue reliance on the research in light of the limitations to the research, and in particular the fact that only 48 trials were studied.<sup>83</sup> The Court of Appeal has referred to the research with approval since this case however, for instance in *R v Curtis*, so this is far from being accepted judicial opinion.

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<sup>78</sup> Ibid, para 12 Robertson J for the Court.

<sup>79</sup> Ibid, para 36 Robertson J for the Court.

<sup>80</sup> *R v Burns (Travis) (No 2)* [2002] 1 NZLR 410, 413 (CA) Richardson P for the Court.

<sup>81</sup> *R v Curtis* (10 August 2006) CA 224/06, paras 27-29 Chambers J for the Court.

<sup>82</sup> Ibid, para 16 Chambers J for the Court.

<sup>83</sup> *R v Cara* (30 July 2004) HC AK CRI 2004-004-006560, paras 70-72 Potter J.



In other cases, rather than explicitly rejecting the research the courts have reverted to relying on judicial experience. This experience however, like when it was relied on previously, is not always consistent.<sup>84</sup>

The reaction of the courts to the Law Commission's research has been mixed. While it appears that the courts have been willing to rely on the research to show that the impact of publicity on the right to a fair trial is minimal it should be noted that in the cases where this has been relied on the issue has arisen after the trial. This approach is therefore similar to the approach taken in these cases before the research, where the courts relied on judicial experience to find that juries were capable of operating impartially despite publicity. In cases such as *Middleton*, where the question arose before the trial, the courts have continued to take a cautious approach to protecting the right to a fair trial.

(d) What conclusions can be made from the New Zealand approach?

The principles that can be derived from the cases involving potentially prejudicial publicity are that when the question of the impact of publicity arises before a trial, for instance in sub judice contempt cases, the court will presume that there is a potential impact and will therefore safeguard a fair trial, while when the question arises after a trial the court will presume that jurors were not prejudiced by publicity. While this seems inconsistent the approaches may be reconciled simply by reference to the existence of the court's jurisdiction to punish for sub judice contempt.

When the issue arises before a trial the court will restrict publication of matters that may cause prejudice to a trial. This in turn has the effect of preventing the media from publishing information which may cause prejudice to a trial, in order to avoid the possibility of contempt proceedings. When the issue arises after a trial the court can therefore presume that the publicity that has occurred will not have caused prejudice to a trial as publicity that falls within the sub judice rule will have been prevented. This is consistent with the Law Commission's research which suggests that media coverage which falls within the range acceptable under the sub

<sup>84</sup> Compare for example *R v H* (30 June 2006) HC AK CRI-2005-419-122, para 17 Heath J and *R v Rickards* (28 November 2005) HC AK CRI 2005-063-1122, para 97 Randerson J.



judice rule does not cause prejudice. In cases where publicity of a prejudicial nature has nevertheless occurred, the court can assess the actual effects of the publicity, rather than looking at the likely effects as is the approach in sub judice cases.<sup>85</sup>

## 2 Overseas research

There is a large amount of overseas research as to whether media coverage of a trial causes juror prejudice. It is not possible to draw clear conclusions from the body of research for several reasons: the lack of uniformity of the findings; methodological limitations; and jurisdictional differences. There are however sufficient indications in the research that media coverage may cause prejudice to justify the retention of sub judice contempt.

This section of the paper explains the limitations of the research and then explores two persuasive studies which may overcome the limitations. Other findings relating to the different effect of different types of publicity are then briefly mentioned, before concluding that there is sufficient evidence to support the presumption made by the courts in sub judice contempt cases that publicity may prevent a fair trial.

### (a) Limitations of the research

The first problem with drawing a conclusion on whether publicity causes prejudice in jurors from the overseas research is the lack of uniformity in the findings. The New South Wales Law Reform Commission has stated that the studies “fall almost equally into opposite camps in the conclusions they reach” and that even within each “camp” the research outcomes are not always consistent.<sup>86</sup> Tellingly, there is not even consensus on this divergence, with some commentators arguing that

<sup>85</sup> Eric Barendt, above n 34, 333-334.

<sup>86</sup> New South Wales Law Reform Commission *Contempt by Publication* (Discussion Paper 43, Sydney, 2000), para 2.66.



the majority of the evidence supports the conclusion that publicity causes prejudice<sup>87</sup> and others arguing the opposite.<sup>88</sup>

This difference in interpretation of the research is perhaps due to the different values placed on free speech, with authors arguing for a greater protection of free speech more likely to find that the research supports their view.<sup>89</sup> One text arguing that this is the case finds that the New Zealand Law Commission's research discussed above is the "most significant in recent years" and states that this research has "serious implications" for sub judice contempt,<sup>90</sup> even though the Law Commission expressly stated that this was not the case.<sup>91</sup> Misinterpretations such as this mean that research findings must be treated with care.

A further problem with drawing conclusions from the research is that a large amount of the overseas research suffers from methodological limitations. Most of the overseas research falls into one of two groups – "field studies" which draw on media coverage of real life cases and assess the potential impact of the coverage by use of surveys or interviews, and "experimental studies" which use trial simulations to gauge the effect of various levels and types of fictional examples of media coverage.<sup>92</sup> Each of these methods has significant limitations, mostly relating to the lack of resemblance to actual juror experience.

In field study approaches the subjects are usually exposed to publicity and then asked about their opinion of the defendant's guilt or innocence. The immediacy with which this occurs differs from actual trials, where there will often be weeks or months between the jurors being exposed to publicity and the trial.<sup>93</sup> In both field studies and experimental studies the atmosphere in which the subjects are asked to give an opinion is less formal than in actual trials, meaning that the subjects may not

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<sup>87</sup> See for example Solomon M Fulero "The Role of Behavioral Research in the Free Press/Fair Trial Controversy: Another View" (1987) 11 *Law and Human Behavior* 259, 262; Norbert L Kerr "The Effects of Pretrial Publicity on Jurors" (1994) 78 *Judicature* 120.

<sup>88</sup> See for example Rita J Simon "Does the Court's Decision in *Nebraska Press Association* Fit the Research Evidence on the Impact on Jurors of News Coverage?" (1976-77) 29 *Stan L Rev* 515, 528.

<sup>89</sup> See for example Ian Cram, above n 36, 116-120; Rita J Simon, above n 88, 528.

<sup>90</sup> Ian Cram, above n 36, 119-120.

<sup>91</sup> New Zealand Law Commission, above n 72, 180.

<sup>92</sup> T M Honess et al "Empirical and Legal Perspectives on the Impact of Pre-trial Publicity" [2002] *Crim LR* 719, 721-722.

<sup>93</sup> Ian Cram, above n 36, 117.



take as much care in their deliberation as actual jurors do.<sup>94</sup> Finally, experimental studies are criticised as not being representative of actual jurors as they are commonly composed solely of members of certain groups – usually university students.<sup>95</sup>

The final problem with drawing a conclusion from the overseas research in relation to publicity in New Zealand is the very fact that it comes from overseas. Most of the research comes from the United States, which has a very different media culture. Publicity surrounding criminal trials in the United States is significantly different in terms of both volume and content to the publicity in New Zealand.<sup>96</sup> This means that there may be a difference between how prejudicial American publicity is and how prejudicial New Zealand publicity is.

There are two studies of note that overcome some of these limitations. The following discussion explores these studies and their findings. Other studies are then briefly looked to in order to derive some principles about the effect of different types of publications.

(b) Overcoming problems of uniformity and method - a meta-analytic review

A 1999 American study compared the results of 44 empirical tests for the impact of pre-trial publicity.<sup>97</sup> The 44 tests were conducted between 1966 and 1997 and involved a total of 5755 subjects. The tests reached different conclusions as to whether exposing jurors to negative pre-trial publicity would produce more guilty verdicts than if the jurors were not exposed to the publicity – 23 tests finding that there would be more guilty verdicts, 20 tests finding that there would be no significant difference and one test finding that there would be less guilty verdicts. The tests suffered from different degrees of methodological problems.

To remedy the inconsistency in the conclusions and the methodological problems the authors of the study conducted a meta-analytic review of the tests.

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<sup>94</sup> Rita J Simon, above n 88, 520.

<sup>95</sup> Ibid.

<sup>96</sup> Michael Chesterman et al *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of New South Wales, Sydney, 2001) 22-23.

<sup>97</sup> Nancy Steblay et al "The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review" (1999) 23 *Law and Human Behavior* 219.



Greater weight was given to tests which used members of the potential juror pool as subjects, used real pre-trial publicity, involved the types of crimes that generally receive widespread publicity, and had a greater length of time between exposure to publicity and judgment.<sup>98</sup>

From this analysis several conclusions were made. The first was that jurors who are exposed to negative publicity about the defendant or the crime are more likely to return a guilty verdict than those who are not exposed to the publicity.<sup>99</sup> The next was that prejudice caused by negative publicity was most influential before the trial, but the effect of negative publicity continued through until after the trial and after jury deliberation.<sup>100</sup> The final conclusion was that the evidence gathered by all of the tests converged to justify the finding that pre-trial publicity has a substantial effect on jurors.<sup>101</sup>

This study is persuasive as it overcomes the problems of lack of uniformity and methodological limitations. It gives a strong indication that publicity can influence jurors against the defendant and therefore potentially deprive the defendant of the presumption of innocence.

(c) Overcoming problems of method and jurisdiction – New South Wales research

An example of a study that overcomes the methodological limitations of other studies and was conducted in an environment similar to New Zealand is the research undertaken from 1997 to 2000 by the Law and Justice Foundation of New South Wales.<sup>102</sup> This research involved interviewing jurors, judges and counsel for the prosecution and defence involved in 41 criminal trials. Two specific aspects of publicity were examined – the ability of the jury to recall the publicity and whether the publicity influenced jurors.

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<sup>98</sup> Ibid, 228.

<sup>99</sup> Ibid, 229.

<sup>100</sup> Ibid, 229.

<sup>101</sup> Ibid, 230.

<sup>102</sup> Michael Chesterman et al, above n 96.



In respect of juror recall of information it was found that in all of the cases that were studied at least one juror followed media coverage of the trial. Jurors were more likely to remember general themes of publicity than specific details. Of the specific details that were remembered, details of the crime were most likely to be remembered, followed by details of the arrest and of pre-trial proceedings. Overall, jurors were most likely to remember media coverage of the trial if the defendant was well-known in the community, the crime occurred in their local area, or if their first exposure to the publicity was after the trial began.<sup>103</sup>

To establish the level of influence that publicity had on jurors the researchers looked at whether the jurors identified the relevant issues that the judge and counsel thought should be considered, and examined whether the jury's verdict was determined by the publicity. It was found that juries were able to identify the relevant issues when the evidence led clearly to a conclusion as to the defendant's guilt, but were less successful at identifying the relevant issues when the evidence was equivocal. The researchers found that that in three of the 40 trials where a verdict was returned it was likely that publicity had determined the verdict, and it was possible that this had happened in a further seven trials. In 11 trials it was likely that publicity had influenced the jurors but had not influenced their verdict, and it was possible that this had happened in a further five trials. That left 14 trials where it was not possible that jurors had been influenced, of which six had not been covered by the media.<sup>104</sup>

The researchers then assessed whether the verdicts reached by the juries were safe. They did this by asking the judge, the defence counsel and the prosecution counsel involved in each case whether they felt that the jury's verdict was justified based on the evidence presented in court. In 30 of the trials all of the parties agreed that the jury's verdict was safe, in 8 trials the defence counsel felt the verdict was unsafe and in two trials two or more of the parties felt that the verdict was unsafe. The verdicts that were felt by at least one party to be unsafe were all in line with the tone of the publicity which the cases received.<sup>105</sup>

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<sup>103</sup> Ibid, xiv-xv.

<sup>104</sup> Ibid, xvi-xviii.

<sup>105</sup> Ibid, xvi-xviii.



In light of these findings the researchers concluded that jurors in New South Wales were generally resistant to the influence of media coverage. They noted however that this resistance was partly attributed to the sub judice rule which prevented jurors from being exposed to any highly prejudicial publicity close to the time of the trial.<sup>106</sup> The researchers therefore explicitly stated that their findings did not support arguments for reducing restrictions on media coverage of criminal trials.<sup>107</sup>

This research overcomes the methodological limitations faced by other studies by interviewing participants in actual trials. It was conducted in a context much closer to the New Zealand environment than American studies. It is therefore persuasive evidence that jurors may be influenced, but in the most part are not affected, by a limited amount of pre-trial publicity. Similarly to the New Zealand Law Commission research, the New South Wales research finds that the sub judice rule should be retained.

(d) Some findings relating to specific kinds of publicity

Other studies offer some indications as to what kinds of publicity are particularly prejudicial. Although these studies face the limitations discussed above, their findings on comparative effects of publicity may be of use as the comparisons occur within the same research framework.

Studies have shown that some types of publicity are "especially damaging" to juror impartiality.<sup>108</sup> Publicity which is specific to the particular case is more damaging than generic publicity – which discusses social issues involved in the case but not the case itself.<sup>109</sup> Publicity which indicates culpability of the defendant (for instance details of confessions or of prior criminal records) is more likely to cause prejudice than bare details of the offence and the larger the concentration of

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<sup>106</sup> Ibid, xxi.

<sup>107</sup> Ibid, xxii.

<sup>108</sup> Jonathon L Freedman and Tara M Burke "The Effect of Pretrial Publicity: the Bernardo Case" [1996] *Canadian Journal of Criminology* 253, 267.

<sup>109</sup> Edith Greene "Media Effects on Jurors" (1990) 14 *Law and Human Behavior* 439, 441.



prejudicial factors in an article, the more likely it is to cause prejudice.<sup>110</sup> Finally, emotive reporting is much more prejudicial than factual reporting, and has the effect of influencing jurors exposed to the reporting, and of making those jurors more persuasive in the jury room.<sup>111</sup>

These findings all support the distinctions made in the operation of the sub judice rule. The kinds of publicity which are identified as particularly prejudicial would all fall outside the bounds of what is allowable to publish without being found liable for sub judice contempt.

(e) What does the overseas research mean for sub judice contempt?

Given the limitations of the overseas research no clear answer can be found to the question of whether publicity influences jurors. It has not been conclusively proven either way. There is however sufficient evidence to justify the presumption made by the courts in sub judice cases that publicity may cause prejudice.

### 3 *Conclusion - courts can assume that publicity may cause prejudice*

In sub judice contempt cases the courts presume that sub judice contempt may interfere with the right to a fair trial. The courts therefore prevent publication of information which they deem to be particularly prejudicial. While neither the research conducted by the New Zealand Law Commission or the overseas research conclusively proves that this presumption is justified, there is a body of evidence which supports the presumption. As the arguments for free speech assume that speech has the power to influence, the burden must be on those arguing that speech in the context of criminal trials does not have an influence to prove that this is the case.<sup>112</sup> This burden has not yet been met.

#### ***B Are there Alternative Measures for Protecting Trials?***

<sup>110</sup> Norbert L Kerr, above n 87, 122.

<sup>111</sup> T M Honess et al, above n 92, 723.

<sup>112</sup> Eric Barendt, above n 34, 323.



In light of the findings above, sub judice contempt will be necessary to protect trials unless there are alternative feasible measures which can effectively combat juror prejudice. Alternative measures do exist and are commonly used in the United States and Canada.<sup>113</sup> Possible measures include instructions to the jury, sequestration, adjournment, venue change and questioning potential jurors. The New Zealand Court of Appeal has rejected reliance on these methods, stating that they do not provide adequate protection against prejudicial publicity.<sup>114</sup>

This section assesses the efficacy of the alternative measures for protecting a trial which do not involve restricting freedom of expression. It finds that the Court of Appeal was correct to caution against undue reliance on these methods as they are of questionable value and impose heavy costs on the criminal justice system.

### *1 Possible alternative measures*

#### (a) Instructions to the jury

The most convenient measure to protect a fair trial from prejudicial publicity is judicial instruction to the jury to disregard any media coverage of the trial and decide the case solely on the evidence presented in court. Although this measure entails no extra cost or inconvenience it is not clear that it is effective.

The New Zealand courts have expressed different opinions as to the usefulness of directions. In *R v H*, an application for a stay of proceedings due to pre-trial publicity, Heath J stated that he would not be inclined to issue a direction to ignore the publicity complained of in the circumstances of the case because it may remind the jurors of the publicity and actively make them consider it.<sup>115</sup> Randerson J took a different approach in *R v Rickards*, another application for a stay of proceedings, stating:<sup>116</sup>

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<sup>113</sup> *Ibid*, 331.

<sup>114</sup> *Gisborne Herald Co Ltd v Solicitor-General*, above n 5, 575 Richardson J for the Court.

<sup>115</sup> *R v H*, above n 84, para 22 Heath J.

<sup>116</sup> *R v Rickards*, above n 84, para 97 Randerson J.



It is not to be assumed that jurors ignore judicial directions to put to one side matters they may have heard outside the Court ... experience shows that jurors are responsive to judicial directions of that kind.

Research on the efficacy of directions favours the approach taken by Heath J, suggesting that they may actually highlight the issues that the judge warns the jury to ignore, particularly in complex cases.<sup>117</sup> Other studies conclude that jury instructions are largely ignored<sup>118</sup> and have no success in eliminating juror bias.<sup>119</sup> It has also been argued that despite their best endeavours jurors lack the cognitive control to deliberately disregard “emotionally arousing material”, so a judicial direction will not be able to overcome the effect of such material.<sup>120</sup>

Randerson J’s suggestion that jurors are responsive to judicial directions may therefore be inaccurate. The research suggests that jurors are likely to disregard directions and, even if directions are followed, jurors may be unable to restrict their judgement to matters before the court.

#### (b) Sequestration

Sequestration involves isolating the jury for the duration of the trial to prevent them from seeing or hearing anything about the case. There are obvious practical difficulties with sequestration. In *Gisborne Herald* Richardson J stated it “would add to the pressures on jurors and affect their ordinary lives”.<sup>121</sup> Sequestering the jury also involves considerable expense for the state.<sup>122</sup>

It is doubtful whether sequestration is an effective means to protect a trial. Sequestration does not prevent potential jurors from being exposed to publicity before

<sup>117</sup> Stephen J Krause “Punishing the Press: Using Contempt of Court to Secure the Right to a Fair Trial” (1996) 76 Boston University Law Review 537, 564.

<sup>118</sup> Joseph R Mariniello “The Death Penalty and Pre-Trial Publicity: Are Today’s Attempts at Guaranteeing a Fair Trial Adequate?” (1994) 8 Notre Dame J L Ethics & Pub Pol’y 371, 383.

<sup>119</sup> Newton N Minow and Fred H Cate “Who Is an Impartial Juror in an Age of Mass Media?” (1990-1991) 40 AM U L Rev 631, 648.

<sup>120</sup> Geoffrey P. Kramer et al “Pretrial Publicity, Judicial Remedies, and Jury Bias” (1990) 14 Law and Human Behavior 409, 412.

<sup>121</sup> *Gisborne Herald Co Ltd v Solicitor-General*, above n 5, 575 Richardson J for the Court.

<sup>122</sup> Michael Chesterman “OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America” (1997) 45 American Journal of Comparative Law 109, 135.



they are selected for the trial. It therefore cannot counteract prejudicial pre-trial publicity.<sup>123</sup> It is also suggested that sequestration may impair the jury's ability to deliberate dispassionately about the case, either because of the extra pressure that is imposed,<sup>124</sup> or because long periods of sequestration may cause the jury to resent the defendant.<sup>125</sup>

(c) Adjournment

Adjournment delays the trial to allow the effects of prejudicial publicity to diminish. This conflicts with the right of the accused to be tried without undue delay.<sup>126</sup> It has been argued that the breach of this right is overcome because it is usually the accused who is requesting the adjournment<sup>127</sup> but this ignores the fact that, if not for the publicity, the accused would not need to request a delay.

Adjournment may not achieve the objective of reducing potential juror prejudice. Delaying the trial may remedy the effects of purely factual publicity but it has been found that when the publicity has an emotional effect the effect will not be diminished by a delay.<sup>128</sup> The type of publicity that has surrounded a particular case would therefore need to be examined before adjournment were relied on and this would not prevent emotive reporting from occurring before the trial and having a lasting effect on potential jurors.

Even if adjournment did successfully remedy the effect of prejudicial publicity, it poses other risks to the trial. Delaying the trial increases the possibility that evidence will be lost before the trial or that the memories of witnesses will fade.<sup>129</sup> Adjournment therefore seems to be an unsatisfactory solution to the problem of prejudicial publicity.

(d) Change of venue

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<sup>123</sup> Joseph R Mariniello, above n 118, 375.

<sup>124</sup> Michael Chesterman, above n 122, 135.

<sup>125</sup> Stephen J Krause, above n 117, 565.

<sup>126</sup> New Zealand Bill of Rights Act 1990, s 25(b).

<sup>127</sup> Joseph R Mariniello, above n 118, 375.

<sup>128</sup> Stephen J Krause, above n 117, 565.

<sup>129</sup> Joseph R Mariniello, above n 118, 376.



Venue changes move the trial to another area. This may be successful where there has been a large degree of local publicity about a crime, but will not be effective where there has been widespread national publicity.<sup>130</sup> Given the small size of New Zealand and the popularity of internet news sites this may mean that there are very few situations where a change of venue will be useful. This is reflected in the small number of change of venue applications received by the courts.<sup>131</sup>

Where a change of venue is appropriate there are other problems with its use. In *Gisborne Herald* the Court of Appeal stated that New Zealand courts "have always taken the view that there is a particular public interest in trying cases in the community where the alleged crime occurred".<sup>132</sup> Changes of venue are also expensive, and cause inconvenience for those involved in the trial.<sup>133</sup>

(e) Questioning potential jurors

There are several ways that potential jurors can be questioned before being selected for the jury to ensure that they have not been prejudiced by publicity. These methods are called voir dire, challenges for cause and examination for cause. Using these methods jurors may be questioned by the judge or by counsel and the questioning may consist of a few brief questions or a detailed interrogation.<sup>134</sup> The New Zealand Court of Appeal has held that judicial discretion to allow these methods should only be exercised in exceptional cases.<sup>135</sup>

Questioning potential jurors before selection is unlikely to be successful at achieving a jury consisting solely of persons who have not been prejudiced by publicity. One reason for this is that it is unlikely a prejudiced potential juror would be able to recognise their own prejudice.<sup>136</sup> Even if the prejudice was identified, studies indicate that potential jurors may be unlikely to admit to their prejudices when

<sup>130</sup> Eric Barendt, above n 34, 331-332.

<sup>131</sup> *Gisborne Herald Co Ltd v Solicitor-General*, above n 5, 575 Richardson J for the Court.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> Michael Chesterman, above n 122, 131.

<sup>135</sup> *R v Sanders* [1995] 3 NZLR 545, 550 (CA) Cooke P for the Court.

<sup>136</sup> Gary Moran and Brian Cutler, above n 75, 345; *Murphy v R* (1989) 167 CLR 94, 103-104 Mason CJ and Toohey J.



questioned as they may seek to give the answer that they believe the judge or counsel questioning them wants to hear, out of a desire to please or to secure a spot on the jury.<sup>137</sup>

These methods may also prevent well-informed citizens from being selected for a jury. In the United States, where these methods are commonly used, commentators argue that their use results in the courts selecting jurors who may not be equipped to undertake the kind of deliberation required in criminal cases. This is because there is a tendency to choose jurors with absolutely no knowledge of the case, meaning that well-informed, and arguably more intelligent, people are rejected while "ignorant" people are selected for the jury.<sup>138</sup>

## 2 *Conclusion on alternative measures*

The above examination of the possible alternative measures to combat juror prejudice reveals that none are a satisfactory substitute for preventing prejudicial publications. Instructions to the jury are likely to be ignored and even if followed they may be impossible for jurors to comply with. Sequestration cannot combat the effects of pre-trial publicity and involves a large amount of expense and inconvenience. Adjournment may be effective to remedy purely factual prejudicial information but does not diminish the effect of emotional publications. It also deprives the accused person of their right to be tried without undue delay. Changes of venue cause unnecessary expense and will not be effective where there has been widespread publicity of a case. Finally, the likes of voir dire are not likely to be successful and may prevent well-informed citizens from participating in juries.

## C *Conclusion – Sub Judice Contempt is Necessary*

Research on whether publicity causes prejudice has not shown that prejudice is not caused, meaning that the presumption made by the courts in sub judice contempt cases that publicity may cause prejudice has not been rebutted. The various alternative methods to protect fair trials are all either ineffective or have serious

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<sup>137</sup> Newton N Minow and Fred H Cate, above n 119, 651.

<sup>138</sup> Stephen J Krause, above n 117, 567-568.



practical difficulties. In light of this, sub judice contempt is necessary in order to safeguard the right to a fair trial.

This conclusion justifies imposing limits on freedom of expression. The next question to address is in what circumstances freedom of expression should and should not be limited. Answering this question requires determining what balance should be struck between freedom of expression, the right to a fair trial and the public interest.

## **V BALANCE TO BE STRUCK BETWEEN THE RIGHTS AND INTERESTS**

In *Gisborne Herald* the Court of Appeal noted that:<sup>139</sup>

[T]he complex process of balancing the values underlying free expression and fair trial rights may vary from country to country, even though there is a common and genuine commitment to international human rights norms. The balancing will be influenced by the culture and values of the particular community.

In light of this observation this section explores the different balances that are achieved in various jurisdictions and seeks to identify what the appropriate approach is in the New Zealand context with respect to the sub judice rule.

This section starts by examining when and how the interests examined in part III conflict in sub judice cases and then looks to the possible approaches to balancing the interests. The different approaches are examined in order of the significance they place on the fair trial right, starting from a presumption that freedom of expression will defeat the right to a fair trial in most instances and moving through to the position that fair trial rights are always paramount. Examples are given of when each approach has been taken in different jurisdictions and the merits of each approach are examined before concluding that in sub judice contempt cases in the New Zealand context the best approach is the one which gives the right to a fair trial the most protection.

### **A Do the Interests Conflict?**

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<sup>139</sup> *Gisborne Herald Co Ltd v Solicitor-General*, above n 5, 573 Richardson J for the Court.



With respect to freedom of expression and the right to a fair trial the above question has been answered by section IV of this paper – it seems clear that these interests do conflict when the media seeks to publish information which may have a prejudicial effect on a trial. It must be noted however that these two rights are often compatible. This is seen by reference to the argument from democracy as a justification for freedom of expression – the media provide a check against abuse of judicial power<sup>140</sup> - and is reflected in the Bill of Rights Act which contains the right to a public hearing alongside the right to a fair hearing.<sup>141</sup> Where the rights do conflict the issue becomes how they can both best be accommodated under the Bill of Rights Act.<sup>142</sup>

The public interest can either conflict or coincide with freedom of expression and the right to a fair trial.<sup>143</sup> The maintenance of public confidence in the administration of justice will coincide with the right to a fair trial but conflict with freedom of expression where a publication tends to undermine the authority of the courts. The interest of public safety has the opposite relationship with the rights – supporting freedom of expression and conflicting with the right to a fair trial where the safety of the community will be protected by the publication of details of a potentially dangerous person in their midst.

Due to the various relationships that the different interests have with each other there is no straightforward answer as to which should be given more weight with respect to media coverage of criminal trials. The following section explores the different possible solutions to this problem.

## ***B The Possible Approaches***

### *1 Protecting freedom of expression*

The first possible approach is to protect freedom of expression and leave the protection of the right to a fair trial up to remedies other than suppressing media

<sup>140</sup> Eric Barendt, above n 34, 313.

<sup>141</sup> New Zealand Bill of Rights Act 1990, s 25(a).

<sup>142</sup> *Gisborne Herald Co Ltd v Solicitor-General*, above n 5, 571 Richardson J for the Court.

<sup>143</sup> See Part III C The Public Interest.



coverage. This is the approach favoured in the United States. In *Nebraska Press Association v Stuart* the Supreme Court found that restraining the media from publishing information which strongly implicated an accused facing trial was presumptively unconstitutional. The Court held that there was nothing at all that could stop the media from reporting on happenings within a court room.<sup>144</sup> Publication of other matters could not be restricted solely on the basis that publication would impair the defendant's right to a fair trial,<sup>145</sup> rather publication could only be restricted if the trial court could meet a very heavy burden of showing that no alternative measures would protect the defendant's rights.<sup>146</sup> Taking this approach means that the Supreme Court is more likely to reverse a conviction rendered unsafe by the level of prejudicial publicity surrounding the case than prevent the publication from occurring in the first place,<sup>147</sup> an approach which would likely be met with some distaste in New Zealand.<sup>148</sup>

An approach favouring freedom of expression is taken in other jurisdictions in respect of publications which discuss public affairs. Section 5 of the United Kingdom Contempt of Court Act 1981 provides that a publication which forms part of a genuine discussion of public affairs is not to be treated as contempt if the risk of prejudice to particular legal proceedings is merely incidental to the discussion.<sup>149</sup> This approach looks more to the circumstances in which the right to a fair trial is threatened than to the actual threat imposed. By doing this freedom of expression and the public interest are prioritised over the right to a fair trial when a publication causes prejudice in an incidental way, even if that prejudice is substantial.<sup>150</sup>

In Australia this approach was taken with respect to the discussion of public affairs for the 50 years following 1937 as a result of *Ex parte Bread Manufacturers*

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<sup>144</sup> *Nebraska Press Association v Stuart* (1976) 427 US 539, 567-568 Burger CJ for the Court.

<sup>145</sup> *Ibid*, 562-563 Burger CJ for the Court.

<sup>146</sup> *Ibid*, 563-565 Burger CJ for the Court.

<sup>147</sup> See for example *Sheppard v Maxwell* (1966) 384 US 333.

<sup>148</sup> See Don Mathias "The Accused's Right to a Fair Trial: Absolute or Limitable?" [2005] NZ Law Rev 217, 237-248.

<sup>149</sup> Contempt of Court Act 1981 (UK), s 5.

<sup>150</sup> See for example *Attorney General v English* [1983] 1 AC 116 (HL).



*Ltd; re Truth and Sportsman Ltd.* In his judgment Jordan CJ in the New South Wales Supreme Court held:<sup>151</sup>

The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.

Although this was a civil case the same reasoning was held to apply to later criminal cases<sup>152</sup> until the approach was rejected by the High Court of Australia in *Hinch v Attorney-General for the State of Victoria*.<sup>153</sup>

Taking an approach which balances the scales of justice firmly in favour of freedom of expression, such as that taken in the United States, does not accord with the rationale behind sub judice contempt. Taking this approach in relation to some forms of publication - for instance those which discuss public affairs - but not other publications seems inconsistent. The rights involved may be affected in the same way whether the publication discusses public affairs or not, so to reach a different balance of rights based purely on this factor may not be justifiable. The "incidental by-product" test seems to look more at the context of the publication than at the actual effects on the rights involved. Discussion of public affairs may well be of the highest importance in some situations, but there will surely be situations where the discussion has little, if any, value.

## 2 *Balancing the rights*

This next approach addresses the deficiencies of focussing on the context of the publication instead of the effects on the relevant rights faced by the approach discussed above. This approach involves balancing the rights against each other and has found favour in Canada and Australia. There is also a suggestion in the *Gisborne Herald* case that this approach may be taken in New Zealand.

<sup>151</sup> *Ex parte Bread Manufacturers Ltd; re Truth and Sportsman Ltd* (1937) 37 SR(NSW) 242, 249-250 (NSWSC) Jordan CJ.

<sup>152</sup> *John Fairfax & Sons Pty Ltd v Merae* (1955) 93 CLR 351, 372 Dixon CJ, Fullager, Kitto and Taylor JJ.

<sup>153</sup> *Hinch v Attorney-General for the State of Victoria* (1987) 164 CLR 15, 52-53 Deane J.



In the leading Canadian case on publication bans *Dagenais v Canadian Broadcasting Corporation* the Supreme Court of Canada held that the common law rule which existed before the enactment of the Canadian Charter of Rights and Freedoms (the Charter) and automatically favoured the right to a fair trial over freedom of expression was inconsistent with the Charter. This was because the Charter gives equal status to the right to a fair trial and to freedom of expression and therefore the majority felt that it would be inappropriate to continue to automatically favour a particular right.<sup>154</sup> The correct approach was rather to balance whether “the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban”.<sup>155</sup>

A similar approach was taken by the High Court of Australia in *Hinch v Attorney-General for the State of Victoria*. This was a contempt case in which a radio broadcaster (Hinch) made several highly prejudicial statements about a former Catholic priest who was facing a range of sexual assault charges. Deane J stated that the issue to determine was “whether the view that detriment [to the accused’s right to a fair trial] was outweighed by countervailing public interest considerations was reasonably open”. If the view was reasonably open then contempt could not be found.<sup>156</sup> While Hinch’s appeal against the contempt charge was dismissed it was noted that in some situations the interest in freedom of expression could outweigh the interest in a fair trial.<sup>157</sup>

In *Gisborne Herald* the New Zealand Court of Appeal suggested that it may be appropriate to balance the rights against each other, stating:<sup>158</sup>

[I]n 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.

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<sup>154</sup> *Dagenais v Canadian Broadcasting Corporation* (1995) 120 DLR (4th) 12, 37 (SCC) Lamer CJC.

<sup>155</sup> *Ibid*, 38 (SCC) Lamer CJC.

<sup>156</sup> *Hinch v Attorney-General for the State of Victoria*, above n 153, 51 Deane J.

<sup>157</sup> *Ibid*, 25 Mason J.

<sup>158</sup> *Gisborne Herald Co Ltd v Solicitor-General*, above n 5, 574 Richardson J for the Court.



Whether the Court actually accepted the balancing approach is however cast into doubt by later statements, as will be explained below.

The balancing approach adopted in Australia and Canada is attractive in that it gives equal value to the rights involved and attempts to allow both rights to be exercised to the greatest possible extent. It may not be appropriate to suggest, as the High Court of Australia did in *Hinch*, that it will ever be acceptable to give an accused anything less than a fair trial, even if there is an overwhelming interest in freedom of expression. If this approach is taken it may need to be accepted that in cases where there is a large amount of interest or where matters are raised that need urgent public discussion the accused will not be able to be tried. If this occurs the public interest in seeing offenders brought to justice is clearly not served.

### 3 *Protecting the right to a fair trial when there is a significant risk*

Following on from the argument above it may be argued that, unlike freedom of expression, the right to a fair trial cannot be balanced against. This is because while freedom of expression is a right against undue interference with expression,<sup>159</sup> the right to a fair trial is a "minimum standard"<sup>160</sup> right which cannot be limited.<sup>161</sup> This approach is seen to some extent by the approach of the New Zealand courts in protecting fair trial rights in sub judice contempt cases where there is a significant risk of prejudice.

In *Gisborne Herald*, following the passage quoted earlier, the Court of Appeal stated that the presumption in sub judice cases will be to protect fair trials, taking an approach similar to that rejected by the Canadian Supreme Court in *Dagenais*:

[W]here 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 temporarily curtail freedom of media expression so as to guarantee a fair trial.

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<sup>159</sup> Eric Barendt, above n 34, 7.

<sup>160</sup> New Zealand Bill of Rights Act 1990, s 25.

<sup>161</sup> Don Mathias, above n 148, 217.



A clearer affirmation of the principle that the right to a fair trial cannot be balanced against is found in *R v Burns (Travis)* where the Court of Appeal stated:<sup>162</sup>

The public's right to receive information, the principle of open justice, the type of information in question, its public importance and interest, its likely circulation, methods of diluting its effect on the minds of potential jurors, the presumption of innocence, and other issues are all to be balanced against its prejudicial effect. But once this exercise has been completed and it has been determined that there is a significant risk that the accused will not receive a fair trial, the issue ceases to be one of balancing.

The principles of freedom of expression and open justice must then be departed from; not balanced against. There is no room in a civilised society to conclude that, "on balance", an accused should be compelled to face an unfair trial.

While this approach gives priority to protecting fair trials it has been argued that this does not go far enough. This is because the requirement that there is a "significant risk" to a fair trial is potentially a very high threshold to meet.<sup>163</sup> Because of this the right to a fair trial may end up being sacrificed when a trial faces a real but not significant risk. As it is often difficult to determine ahead of time what issues the case will turn on it may also be difficult to determine what information poses a significant risk to the trial.<sup>164</sup>

This approach therefore still gives a significant amount of leeway to freedom of expression, and still poses a possible limitation on the right to a fair trial. This has been identified in relation to the United Kingdom's Contempt of Court Act 1981 which requires that a publication causes a "substantial risk" of prejudice to proceedings in order for liability for contempt to be found,<sup>165</sup> with Lord Lloyd stating that this approach is "a permanent shift in the balance of public interest away from the protection of the administration of justice and in favour of freedom of speech".<sup>166</sup>

#### 4 *Protecting the right to a fair trial when there is a reasonable risk*

<sup>162</sup> *R v Burns (Travis)* [2002] 1 NZLR 387, 404-405 (CA) Thomas J for the Court.

<sup>163</sup> Don Mathias, above n 148, 224-225.

<sup>164</sup> John Burrows and Ursula Cheer, above n 2, 401-402.

<sup>165</sup> Contempt of Court Act 1981 (UK), s 2(2).

<sup>166</sup> *Attorney General v Newspaper Publishing Ltd* [1987] 3 All ER 276, 310 (EWCA) Lloyd LJ.



The final possible approach is one which does not allow the right to a fair trial to be balanced against if there is a reasonable risk that prejudice will be caused. This is very similar to the approach taken in *R v Burns (Travis)* but sets a lower threshold at which the right to a fair trial must be protected. Support for this approach can be found in the International Covenant on Civil and Political Rights (ICCPR).

The New Zealand Bill of Rights Act affirms New Zealand's commitment to the ICCPR.<sup>167</sup> The provisions in the ICCPR therefore form part of the relevant context in interpreting the rights contained in the Bill of Rights Act.<sup>168</sup> There is express recognition in the ICCPR that freedom of expression may be subject to restrictions that are provided by law and necessary for the respect of the rights of others or the protection of public order.<sup>169</sup> There is no such recognition of allowable restrictions on the right to a fair trial.<sup>170</sup> This means that under the ICCPR the right to a fair trial may only be derogated from when there is a public emergency which threatens the life of the nation.<sup>171</sup> While the Bill of Rights Act states that all of the rights it contains may be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society",<sup>172</sup> the ICCPR suggests that limits to the right to a fair trial will only be demonstrably justified in a free and democratic society if there is a public emergency which threatens the life of the nation.

If this argument is accepted then more care should be taken to protect the right to a fair trial than that taken under the approach adopted by the Court of Appeal in *R v Burns (Travis)* and the United Kingdom Contempt of Court Act 1981. This may be achieved by setting a lower threshold at which the right will cease to be balanced against. A suggested approach is to set the threshold at the point where there is a reasonable risk to a fair trial.<sup>173</sup> This approach introduces an objective standard to determine whether a fair trial is at risk and in doing so may engage the right to a fair trial in more situations than if a significant risk were required.

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<sup>167</sup> New Zealand Bill of Rights Act 1990, long title (b).

<sup>168</sup> *Hansen v R* [2007] 3 NZLR 1, para 7 (NZSC) Elias CJ.

<sup>169</sup> International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 19(3).

<sup>170</sup> *Ibid*, art 14.

<sup>171</sup> *Ibid*, art 4(1).

<sup>172</sup> New Zealand Bill of Rights Act 1990, s 5.

<sup>173</sup> Don Mathias, above n 148, 225.



Adopting this approach in New Zealand would give recognition to New Zealand's international obligations under the ICCPR. It would however mean that public interest and freedom of expression considerations would not be able to be taken into account whenever there is a reasonable risk to the right to a fair trial. While these interests would only be temporarily restricted there is one notable situation where this would certainly not be desirable – when a potentially dangerous person who has been accused of a crime has not been apprehended or has escaped from custody. In this situation taking the approach of not allowing the right to a fair trial to be risked may mean that the public is placed in danger.

### *C The Best Approach*

In light of the above considerations the best approach to take to balancing the various interests in the context of sub judice contempt in New Zealand is the final approach explored above, with one slight variation. The variation would be to allow derogation from the principle of protecting the right to a fair trial in emergency situations. This would go further than the exception provided in the ICCPR for public emergencies which threaten the life of a nation and would instead be available when there is a risk to public safety.

This approach would allow publication of details that may protect the public from harm, for instance the information that a potentially dangerous person is at large in the community, even if the publication of the details would cause prejudice to the right of the accused to a fair trial. This does not mean however that the accused person in this situation should be left to face an unfair trial, rather in this situation the court will need to put in place such measures as may counteract any prejudicial effects of publicity. Relegating the reliance on measures to counteract publicity to situations such as this allows the courts to use potentially useful measures when absolutely necessary but recognises that current research does not prove that these are reliable.

In situations where the prejudicial effects of publicity cannot be remedied the appropriate action would be for the court to order a stay of proceedings. As this would only occur in a very limited set of circumstances (as publication of prejudicial details would only be allowed in a limited set of circumstances) this would recognise



the right of the Crown to bring offenders to justice while also aligning with the approach taken in the ICCPR that the right to a fair trial is not able to be limited except in extreme circumstances.

While this approach would restrict freedom of expression more than the first three approaches examined, it must be remembered that this restriction would only be temporary. This is surely preferable to the permanent harm that may be caused by limiting the right to a fair trial.

## **VI CONCLUSION**

Media coverage of criminal trials poses a risk to the right to a fair trial. To address this problem sub judice contempt restricts publications that are likely to endanger a fair trial, but in doing so restricts another fundamental right – freedom of expression.

Freedom of expression is particularly significant in the context of media coverage of trials as it is important that the public are able to obtain information about how justice is administered in the courts. Public interest considerations are also relevant in this context, with the maintenance of public confidence in the administration of justice and public safety being particularly noteworthy.

A vast body of research has not been able to conclusively prove that publicity surrounding trials does not influence jurors. There are no satisfactory alternatives that would protect the right to a fair trial without restricting freedom of expression. The restriction on freedom of expression imposed by sub judice contempt is therefore justified.

While different approaches have been adopted in different jurisdictions to determine the appropriate balance between the competing interests involved in sub judice contempt the appropriate approach in New Zealand - in light of our international obligations under the ICCPR - is to restrict freedom of expression whenever there is a reasonable risk to the right to a fair trial unless publication of potentially prejudicial matters is required to ensure public safety.







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