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JELAŠ, J. Scandalising the court...

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**SCANDALISING THE COURT
A REASONABLE LIMITATION ON FREEDOM
OF EXPRESSION**

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I ABSTRACT

This paper considers whether that branch of contempt known as scandalising the court, by an act or publication after trial or unrelated to any particular proceedings, would survive a s 5 New Zealand Bill of Rights Act 1990 analysis. That is, whether scandalising the court is a reasonable limitation demonstrably justified in a free and democratic society on the right of freedom of expression affirmed in s 14 of the New Zealand Bill of Rights Act 1990.

I approach this issue by considering the Ontario Court of Appeal's decision *R v Kopyto* (1987) 47 DLR (4th) 213. By a margin of three to two the court determined the offence of scandalising the court was not a justifiable limitation on the entrenched right of freedom of expression under the Canadian Charter of Rights and Freedoms.¹ I then consider whether the rationale of the majority judgments would be accepted in New Zealand, having particular regard to New Zealand's legal, social and cultural context, and the developments in this area of contempt in the intervening 15 years since the *Kopyto* judgment. In my view *Kopyto* will be a relevant consideration to an s 5 BORA analysis of scandalising the court, but the majority of the rationales given in *Kopyto* will not be adopted due to the passage of time and the need to consider the local circumstances of the publication when determining the offence. However in order for the offence to be BORA compliant the offence should be reformulated to include an additional *mens rea* element requiring proof of intent to undermine the administration of justice.

A Word Length

The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 13,634 words.

¹ Canadian Charter of Rights and Freedoms, ss 1, 2(b), Part 1 of the Constitution Act 1982 (Canada Act 1982 (UK), Sch B).

II AN INTRODUCTION TO CONTEMPT BY SCANDALISING THE COURT

That branch of contempt known as scandalising the court is the least invoked and perhaps the most controversial branch of the law of contempt. Its existence has been the topic of debate² since Lord Russell of Killowen CJ defined the offence in the seminal decision *R v Gray*.³ Its rationale has been described as speculative.⁴ It has been referred to as an archaic offence that should be abolished⁵ or never invoked.⁶ Despite the controversy contempt by scandalising the court presently exists in New Zealand. Whether it will continue to be so in light of ss 5 and 14 of the New Zealand Bill of Rights Act 1990 ("BORA") is the focus of this paper.

Contempt of court is a generic term that may take many forms.⁷ A legal tool developed by the common law to maintain the respect and dignity of the court and its officers whose task it is to uphold and enforce the law, for without such respect the public faith in the administration of justice would be undermined and the law would fall into disrepute.⁸ The public's confidence in the integrity of the justice system is crucial.⁹ Lord Simon said in *Attorney-General v Times Newspaper Limited*¹⁰ that the rules embodied in the law of contempt are the means by which the law vindicates the public interest in the due administration of justice. Contempt does not exist to protect the private rights of individuals, parties to litigation or in order to shield a particular judge or a particular case from the criticism, as perhaps the expression "contempt of court" misleadingly suggests.¹¹ This point was made by Lord President Clyde in *Johnson v Grant*.¹²

² Clive Walker "Scandalizing in the Eighties" (1985) 101 LQRev 359.

³ *R v Gray* [1900] 2 QB 36, 40.

⁴ Nigel Lowe and Brenda Sufrin *The Law of Contempt* (3 ed, Butterworths, London, 1996) 361.

⁵ Clive Walker "Scandalizing in the Eighties" (1985) 101 LQRev 359, 384.
Attorney-General v Blomfield, *Attorney-General v Giddis* (1913) 33 NZLR 545, 563 (SC) Williams J.

⁷ *Attorney-General v Times Newspaper Limited* [1974] AC 273, 307.

⁸ Michael K Addo *Freedom of Expression and the Criticism of Judges* (Dartmouth Publishing Company Limited, England, 2000) 32.

⁹ *Gisborne Herald Company Limited v Solicitor-General* [1995] 3 NZLR 563, 569 (CA).

¹⁰ *Attorney-General v Times Newspaper Limited* [1974] AC 273, 315 (HL).

¹¹ *Solicitor-General v Radio Avon and Another* [1978] 1 NZLR 225, 229 (CA) Richmond P.

The phrase "contempt of court" does not in the least describe the true of nature of the class of offence with which we are here concerned ... The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice ... It is not the dignity of the Court which is offended – a petty and misleading view of the issues involved – it is the fundamental supremacy of the law which is challenged.

The offence of contempt is the only common law offence still existing in New Zealand, preserved by s 9 of the Crimes Act 1961. Similarly in Canada the Canadian Criminal Code preserves the common law power of contempt. In the United Kingdom, where the contempt power originated, the law of contempt is partly codified in the United Kingdom Contempt of Court Act 1981.¹³ For those areas of contempt not covered by the 1981 Act, that includes scandalising the court, the common law is retained.¹⁴

The description and categorisation of contempt varies from authority to authority, reflecting Sir John Donaldson's MR remarks in *Attorney-General v Newspaper Publishing Plc*¹⁵ that contempt is as diverse as are the means of interfering with the course of justice. Lord Russell of Killoween in *R v Gray*¹⁶ categorised contempt according to its effect. That is acts done or writing published that are calculated to lower the authority of the court or a judge. Secondly, acts or writing calculated to obstruct or interfere with the due course of justice or lawful process of the courts. In New Zealand's first motion for committal for contempt for a scandalous publication, the then Chief Justice Stout¹⁷ distinguished between contempts *in facie* of the court and those *ex facie* of the court. That is contempts or acts done in court and those done outside the court. Another classification of contempt distinguishes between contempt that

¹² *Johnson v Grant* 1923 SC 789, 790, cited with approval in *Solicitor-General v Radio Avon and Another* [1978] 1 NZLR 225, 229 (CA) Richmond P.

¹³ Contempt of Court Act 1981 (UK).

¹⁴ C J Miller *Contempt of Court* (3 ed, Oxford University Press, Oxford, 2000) 28.

¹⁵ *Attorney-General v Newspaper Publishing Plc* [1987] 3 All ER 276, 294 (CA).

¹⁶ *R v Gray* [1900] 2 QB 36, 40.

¹⁷ *Attorney-General v Blomfield, Attorney-General v Giddis* (1913) 33 NZLR 545, 556 (SC).

“interferes” with the court process or a particular court proceedings and contempt by “disobedience” with court orders or undertakings to the court.¹⁸

Contempt is also classified into civil and criminal contempt. Civil contempt being generally described as the “disobedience” contempt and criminal contempt as the “interference” contempt.¹⁹ Sir John Donaldson MR in *Attorney-General v Newspaper Publishing Plc*²⁰ cast doubt on the value of distinguishing between civil and criminal contempt, preferring to use the general categorisations of disobedience and interference. The underlying rationale for all contempts is effectively the same – upholding the effective administration of justice. Both civil and criminal contempts require the same criminal standard of proof of beyond reasonable doubt, both have equivalent appeal rights, and a punitive element of punishment can be imposed for each.²¹

A contempt that is of the “interfering” kind can be further divided between those acts or publications that interfere with particular proceedings and those contempts that interfere with the course of justice as a continuing process. In the later category there is no requirement that the acts or publication be linked to any particular proceedings.²² It is the “interference” category of contempt that scandalising the court falls within.

Scandalising the court is an act or the publication of material such as an accusation of bias or corruption on partiality against a judge of the court that interferes with the administration of justice by scandalising a court or judge. It was first described by Wilmont J in *R v Almon*²³ as:

... an impeachment of [the King’s] wisdom and goodness in his choice of his judges, and excites in the minds of his people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them ...

¹⁸ C J Miller *Contempt of Court* (3 ed, Oxford University Press, Oxford, 2000) 567.

¹⁹ Nigel Lowe and Brenda Sufrin *The Law of Contempt* (3 ed, Butterworths, London, 1996) 2.

²⁰ *Attorney-General v Newspaper Publishing Plc* [1987] 3 All ER 276, 294 (CA).

²¹ Lowe and Sufrin, above, 3-4.

²² C J Miller *Contempt of Court* (3 ed, Oxford University Press, Oxford, 2000) 567.

²³ *R v Almon* (1765) Wilm 243, 255.

The most commonly cited definition of this branch of contempt is that formulated by Lord Russell of Killoween in *R v Gray*,²⁴ as follows:

Any act done or writing published calculated to bring a court or a judge of the court into contempt or to lower his authority, is a contempt of court.

In more modern times, Lord Diplock, in a judgment delivered for the Privy Council, summarised the offence as:²⁵

Scandalising the court, is a convenient way of describing a publication which, although it does not relate to any specific case either past or pending or any specific judge, is a scurrilous attack on the judiciary as a whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice.

While scandalous conduct can occur in the face of the court,²⁶ outside of the court, related or unrelated to particular proceedings, this paper focuses upon that sub-branch of scandalising that occurs after trial or unrelated to any proceedings at all. In these instances the harm caused by the scandalous act or publication relates solely to the impact of the act or publication upon the public's perception of the administration of justice.

A Modern Examples of Scandalising

Contempt by scandalising the court or judge can be difficult to conceptualise and brief reference to some recent examples are worth considering. The older authorities need to be treated with caution. What was once held to be a scurrilous abuse may not be viewed the same way today.

An example of scandalising by scurrilous abuse of the Court and Judges is a series of articles that appeared in the *Oriental Daily News* ("ODN"), the largest circulating newspaper in Hong Kong, between December 1997 and January 1998.²⁷ The articles followed two court cases involving the ODN and one of its subsidiaries. In the first case the ODN received an adverse ruling from

²⁴ *R v Gray* [1900] 2 QB 36, 40.

²⁵ *Chokolingo v Attorney-General of Trinidad and Tobago* [1981] 1 All ER 244, 248 (PC).

²⁶ *R v Wiseman* [1969] NZLR 55 (CA).

²⁷ *Secretary for Justice v The Oriental Press Group Ltd and Others* [1998] 2 HKC 627.

the Hong Kong Obscene Articles Tribunal ("OAT"), and in the second, an order to pay costs where nominal damages had been awarded to the ODN. In retaliation to what the ODN perceived to be two adverse rulings a series of articles were published that later formed the basis of the one charge of contempt by scandalising the court. The first of two articles, appearing on the same day, described the Judges of the Court of Appeal and the members of the OAT as "swinish white-skinned judges" and a "mangy yellow-skinned dogs", amongst other things, and that the ODN was "determined to wipe them all out".²⁸ The second article went on to state:

The crux of the problem is that there exists in the Hong Kong judicial sector a block of colonial remnants. They harbour animosity towards Oriental. The Obscene Articles Tribunal is attached to the judiciary system. It is merely a tail-wagging dog outside the judiciary. All of the adjudicators kept by the Tribunal are stupid men and woman who suffer from congenital mental retardation and have no common knowledge worth mentioning ... The masters of these yellow-skinned canine adjudicators are none other than the likes of Rogers and Godfrey [JJ], the sheltering condoning judicial scum-bags and evil remnants of the British Hong Kong government.²⁹

Several other articles were published in the following weeks repeating allegations of political bias and persecution, and continuing abusive offensive and scurrilous attacks with racial slurs upon the judiciary and OAT. The Court of Appeal summed up the campaign as follows:

The vitriolic campaign waged by the [ODN] on the Judiciary in general, and on Rogers J and Godfrey JA and the OAT in particular, is without parallel in modern times. The articles were not the spontaneous, unconsidered reactions of a disappointed litigant, but amount to a deliberate and persistent campaign of vilification of Hong Kong's Judiciary.³⁰

In addition to the articles published the ODN also deployed a paparazzi to follow a High Court Judge for three days. This conduct was the basis of a

²⁸ *The Secretary for Justice v The Oriental Press Group Ltd and Others* (23 June 1998) High Court of Hong Kong HC MP 407/1998 (Hong Kong HC) page 6 <<http://www.hklii.org/cgi-hk/ii/dis.pl/hk/eng-jud/HKCFI/1998> (last accessed 11 Sep-2003).

²⁹ *Secretary for Justice v The Oriental Press Group Limited and Others*, above, page 6.

³⁰ *Secretary for Justice v The Oriental Press Group Ltd and Others*, above, page 21.

second charge of contempt. The Chief Editor was convicted on the first charge and sentenced to imprisonment for four months. The publishing company was convicted on both charges and fined HK\$5 million.

A publication that destroys public confidence in the administration of justice was illustrated in *Fitzgibbon v Barker*.³¹ An application for committal of contempt for the Family Court of Australia, under s 112AP(1) of the Family Law Act 1975, a statutory provision designed to preserve the common law relating to contempt not involving an order of the court, was brought against the publisher and proprietor of the newspaper *The Broadmeadows Observer*. The article and accompanying photograph related to the protest of ten persons against a two-year jail sentence imposed on a Mr Swartsoff, father of four, for breaches of the equivalent to a New Zealand protection order.³² The article recorded the protestors' claim that Mr Swartsoff was being punished "only because he wanted to see his children".³³ The article also reported the protestors' view that the Family Court was biased against the non-custodial parent, who was in the majority of cases the father. It was also reported that protestors had met with a local politician who had promised to "examine the matter".³⁴

Considering the publication as a whole, that included the photograph of the protestors with their placards, the Court found the publication gave readers the impression the Family Court penalised non-custodial parents, mainly fathers, and has jailed a father merely because he wanted to see his children. This was a gross distortion of the truth. Mr Swartsoff had been convicted of 29 breaches of the protection order for ongoing harassment of his separated wife over a period of months. The harassment included assaults (head-butting and striking), intimidation and threats in public and in private places, entering her home during the early hours of the morning, unwanted telephone calls and tail-gating. The Court found that the publication was a blatant distortion of the role of the Family Court, apart from the gross distortion of the findings of the Mr Swartsoff case and:

³¹ *Fitzgibbon v Barker* (1992) 111 FLR 19 (Austral Fam Ct).

³² Domestic Violence Act 1995, s 14.

³³ *Fitzgibbon v Barker*, above, 192.

³⁴ *Fitzgibbon v Barker*, above, 193.

... a statement calculated to bring the court into disrepute ... they are calculated to lessen or discredit the authority and prestige of the court in the minds of reasonable people ...³⁵

It is one thing to criticise a court for what is seen as bad or unworkable interpretation of law, it is quite another thing to suggest that it jails fathers for no good reason at all.³⁶

Finally, in *Ahnee v DPP*³⁷ the Privy Council considered an appeal from the Supreme Court of Mauritius upholding the convictions of the journalist, editor, and owner of the newspaper *Le Mauricien* that published a contemptuous article. The article stated that a Judge, whom had filed defamation proceedings against a politician, had improperly fixed the date for the hearing of his own defamation claim. The same Judge had also chosen the Judges to preside over his proceedings. The assigned Judges were liable to be called as witnesses. All of these allegations were wrong. The Supreme Court of Mauritius, upheld on appeal to the Privy Council, found that the article imputed improper motives to the Judge concerned that had been calculated to bring into contempt the administration of justice in Mauritius.

B Legitimate Criticism

While contempt acts as a constraint on criticism of the administration of justice the case law, both New Zealand³⁸ and overseas, have emphasised that the administration of justice is open to criticism, so long as the criticism is put forward fairly and honestly for a legitimate purpose and not for the purpose of injuring the system of justice.³⁹ The most quoted passage from the United Kingdom that expressly recognises the public's right to make fair and temperate criticism is Lord Atkins' opinion in *Ambard v Attorney-General for Trinidad and Tobago*:⁴⁰

³⁵ *Fitzgibbon v Barker*, above, 201.

³⁶ *Fitzgibbon v Barker*, above, 201-202.

³⁷ *Ahnee v DPP* [1999] 2 AC 294 (PC).

³⁸ *Attorney-General v Butler* [1953] 1 NZLR 944, 948 (SC) Fair J.

³⁹ *Solicitor-General v Radio Avon and Another* [1978] 1 NZLR 225, 230 (CA) Richmond P.

⁴⁰ *Attorney-General v Trinidad and Tobago* [1936] AC 322, 335 (PC).

The path of criticism is the public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are generally exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and the respectful even though outspoken comments of ordinary men.

The public's right to criticise the court was again emphasised in *Metropolitan Police Commissioner, ex p. Blackburn (No 2)*⁴¹ where Lord Denning MR stated:

We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can do faithfully with all that is done in a court of justice. They can say that we are mistaken in our decisions, erroneous, whether they are subject to appeal or not. All that I ask is that those who criticise us remember that, from the nature of our office, we cannot reply to these criticisms. We cannot enter into the public controversy. Still less into political controversy. We must rely on our own conduct itself to be its own vindication.

What is legitimate criticism and what publications will invoke the power of contempt reflects not only the need to uphold the administration of justice but contemporary social norms. What was held to be a scandalous publication at the turn of the twentieth century will not be viewed the same today where the judiciary is more accustomed to public criticism and society more accustomed and accepting of strong language.⁴² For example in May 1992 the United Kingdom magazine *Legal Business* published a ranking order of the High Court judges, claimed to be the results of a survey amongst the legal profession. Of the Judge whom polled the lowest the editor of the magazine wrote:

⁴¹ *Metropolitan Police Commissioner, ex p. Blackburn (No 2)* [1968] 2 All ER 319, 320 (CA).

⁴² Nigel Lowe and Brenda Sufrin *The Law of Contempt* (3 ed, Butterworths, London, 1991) 343.

... his conduct should ... disqualify him from being a High Court judge ... share bloody mindedness and rudeness ... his behaviour in court ... undermines the very credibility of English law ... his behaviour in court ... undermines the very credibility of English law and he does a disservice to all involved in the legal process ... the behaviour of [X] is unacceptable ... [X] is an embarrassment to the bench.⁴³

No action was taken in response to the article. The above passage is not that dissimilar from the scandalising article in *R v Gray*.⁴⁴ A case that further illustrates that scandalous statements will be determined in the context of the social norms of the day is *Anissa Pty Ltd v Parsons*,⁴⁵ an application for the conviction of the defendant for contempt. The defendant, a solicitor, was found to have said of the Judge whom had made the injunction that was served upon him by counsel for the applicant, in the presence of two police officers and a liquidator that "...Justice Bench has got his hand on his dick".⁴⁶ It was held that the words spoken must be "judged by contemporary Australian standards". The words spoken were obscene but not scandalous and did not undermine the confidence of the administration of justice but rather the public's confidence in the defendant, as a solicitor.⁴⁷

C Freedom of Expression and Scandalising the Court

While the law of contempt has always been a restraint on freedom of expression the degree of the restraint is changing. Freedom of expression post entrenchment in the Canadian Charter is interpreted more broadly and with fewer restrictions than pre-charter.⁴⁸ The New Zealand Court of Appeal in *Moonen*⁴⁹ also adopted an expansive definition of freedom of expression, moving away from the reading down of the right as occurred in the *Solicitor-General v Radio*

⁴³ Nigel Lowe and Brenda Sufrin *The Law of Contempt* (3rd ed, Butterworths, London, 1996) 343.

⁴⁴ [1900] 2 QB 36, 40.

⁴⁵ *Anissa Pty Ltd v Parsons* (on application of the Prothonotary of the Supreme Court of Victoria) [1999] VSC 430 <<http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/vic/VSC/1999/430.html>> (last accessed 19 Sep 2003).

⁴⁶ *Anissa Pty Ltd v Parsons*, above, para 8.

⁴⁷ *Anissa Pty Ltd v Parsons*, above, para 22.

⁴⁸ *R v Kopyto* (1987) 47 DLR (4th) 213, 224-225 Cory JA.

⁴⁹ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 15 para [15] CA, Tipping J for the Court.

New Zealand Limited.⁵⁰ Freedom of expression clearly encompasses those acts or publications said to be scandalous and contemptuous and are therefore subject to s 5 of the BORA.

As stated it is that sub-branch of contempt of scandalising the court, either after trial or directed at the system of justice as an on going process, that is the focus of this paper. In other branches of contempt the values and ideals competing with freedom of expression are generally more recognisable. For example the balancing of freedom of expression with pre-trial publicity that jeopardises an accused's right to a fair trial and the public interest in an accused standing trial. It is generally accepted that pre-trial publicity places at risk an accused standing trial and the limitation of freedom of expression is a deferment of that right until after the trial has concluded.⁵¹ Scandalous statements made in the fact of the court may undermine the court's ability to make an impartial judgment. The tension however between scandalous publications and a loss of public confidence in the administration of justice is more tenuous. This is perhaps one of the reasons why this branch of contempt has been so controversial. The focus of this paper is to consider how the competing ideals of maintaining the public confidence in the administration of justice and the public's right to criticise a fundamental public institution will be balanced under s 5 of the BORA. What is obvious from the recent New Zealand contempt cases is that the courts are attempting to formulate the law of contempt that balances the conflicting right so as to produce outcomes that fits the New Zealand community's value and culture.⁵²

III NEW ZEALAND EXAMPLES OF SCANDALISING THE COURT

In this section I summarise the New Zealand's cases of scandalising a judge or the administration of justice either after trial or directed at the justice

⁵⁰ *Solicitor-General v Radio New Zealand Limited* [1994] 1 NZLR 48, 60 (HC) Judgment of the Court.

⁵¹ *Gisborne Herald Co Limited v Solicitor-General* [1995] 3 NZLR 563 (CA).

⁵² John McGrath QC "Contempt and the Media: Constitutional Safeguard or State Censorship?" (1998) NZ Law Rev 371, 372.

system *per se*. There are relatively few cases in this narrow branch of contempt, both in New Zealand and abroad. As a result courts frequently consider precedents from other jurisdictions. Whilst comparisons with cases abroad may be helpful there are limitations. Each case is very fact dependent and the "real risk" assessment is essentially a judicial value judgment, having regard to all the relevant circumstances of the publication, including the culture and values of society and the climate of the times.⁵³ What may be a "real risk" on a small island such as Mauritius, where the administration of justice is more vulnerable,⁵⁴ may not be so in New Zealand.

New Zealand cases are to a limited extent helpful in evaluating factors the court considers relevant to determining the cultural and social context and provides some insight into developments of New Zealand society. They also illustrate the restraint Law Officers have traditionally adopted when exercising their discretion to bring committal proceedings and the court equally conservative response.

New Zealand Supreme Court, after 72 years of its existence, first considered scandalising the court in *Attorney-General v Blomfield*, *Attorney-General v Geddis*.⁵⁵ A weekly Auckland newspaper described as a "light and flippant periodical"⁵⁶ imputed to a Judge who had presided over a divorce suit, a bias towards the respondent induced by her sex and appearance.⁵⁷ All five Judges wrote separate judgments arriving at a variety of conclusions. Those Judges that found scandalising the court still existed as an offence⁵⁸ held that the cartoon was coarse and insulting⁵⁹ but it would not shake the confidence of the people of Auckland in the Judge and obstruct the administration of justice.⁶⁰ Significant factors included that the Judge was Auckland based and his work was well known in the Auckland area through frequent newspaper publications that

⁵³ *Solicitor-General v Radio New Zealand Limited* [1994] 1 NZLR 48, 56 (CA).

⁵⁴ *Ahnee v DPP* [1999] 2 AC 294, 306 (PC).

⁵⁵ *Attorney-General v Blomfield*, *Attorney-General v Geddis* (1913) 33 NZLR 545 (SC).

⁵⁶ *Attorney-General v Blomfield*, *Attorney-General v Geddis*, above, 562.

⁵⁷ *Attorney-General v Blomfield*, *Attorney-General v Geddis*, above, 561.

⁵⁸ Stout CJ and Denniston J were both of the view that the Privy Council had stated in *McLeod v St Aubyn* [1899] AC 549 that contempt of court by scandalising the court was extinguished.

⁵⁹ *Attorney-General v Blomfield*, *Attorney-General v Geddis*, above, 561.

⁶⁰ *Attorney-General v Blomfield*, *Attorney-General v Geddis*, above, 562.

were widely read by the public. The Court considered that the kind of person that the Judge was and the way he administered justice was a matter of public knowledge, and in such circumstances Williams J concluded:⁶¹

... I fail to see how a single imputation of bias in an isolated case published, not in a serious journal but in a light and flippant periodical ... can obstruct the administration of justice.

It is interesting to note that those Judges that accepted this branch of contempt continued to exist, post *McLeod v St Aubyn*⁶², expressed scepticism as to its utility. Justice Williams was of the view that scandalising a judge post trial “resembles some antique weapon that will probably do more harm to those who use it than those against whom it is used”.⁶³ Justice Denniston’s view was that this branch of contempt was wholly out of step with “the trend of modern ideas”. In his view the judiciary must earn the public’s respect and any steps to impose limits on public opinion will be counter-productive to that purpose.

You cannot compel public respect for the administration of justice by flouting public opinions. Judges, like other public men, must rely upon their own conduct to inspire respect.⁶⁴

In New Zealand’s second case 29 years later, *Attorney-General v Blundell and Others, Attorney-General v Glover*⁶⁵ the Supreme Court considered whether a publication unrelated to any specific case undermined public confidence in the administration of justice. The newspapers, the *Standard* and the *Evening Post* had both published passages of a speech made by the President of the New Zealand Labour Party at its annual conference. The President was reported as stating that “he had never known the Supreme Court to give a decision in favour of the workers where it could possibly avoid it”. He then was reported as stating that “while he agreed that they could not get fair play from the Court of Arbitration he was of the opinion that unless they altered the basis and

⁶¹ *Attorney-General v Blomfield, Attorney-General v Geddis*, above, 562.

⁶² *McLeod v St Aubyn* [1899] AC 549.

⁶³ *Attorney-General v Blomfield, Attorney-General v Geddis*, above, 563.

⁶⁴ *Attorney-General v Blomfield, Attorney-General v Geddis*, above, 574, Denniston J.

⁶⁵ *Attorney-General v Blundell and Others, Attorney-General v Glover* [1942] NZLR 287 (SC), Myers SCJ.

the grouping of the workers they had to have a court to do the job".⁶⁶ No issue was taken as to the continued existence of this branch of contempt. Scandalising the court had been confirmed during the intervening years since *Attorney-General v Blomfield*, in *Ambard v Attorney-General of Trinidad and Tobago*.⁶⁷ The Supreme Court held:

In this case we can entertain no doubt that the passages complained of are calculated to depreciate the authority of both the Supreme Court and the Court of Arbitration. The implication of the statements is that the workers have been and are unable to obtain justice in those courts. Such statements are calculated to diminish the confidence of the public in the purity and impartiality of the administration of justice by the courts, and they are clearly contempts of court.⁶⁸

Counsel for each respondent admitted the contemptuous nature of this statement. The main question for the Court was the issue of punishment. Both newspapers denied knowledge of an important pending industrial relations litigation before the Court of Appeal relating to the rights of workers and employers. The Court had regard to the full apologies both respondents had made and their expressions of regret. Consideration was also given to the fact there was a dispute as to whether the President of the Labour Party had in fact made the reported statements. This dispute could not be resolved, the President not being a party to the contempt proceedings. The Court, in the absence of any ability to reconcile the evidential conflict, adopted the position most favourable to the newspaper; that the statements had been made and were accurately reported. Fines of ten pounds per passage published by each newspaper, plus costs, were imposed.

New Zealand's third case, *Attorney-General v Butler*⁶⁹ also related to an industrial dispute. The Court of Arbitration had issued a new award. The new award, bar a few minor amendments, was of substantially the same terms as the pre-existing award. The Secretary of the union concerned wrote a circular letter,

⁶⁶ *Attorney-General v Blundell and Others*, *Attorney-General v Glover*, above, 287.

⁶⁷ *Ambard v Attorney-General of Trinidad and Tobago* [1936] AC 322 (PC).

⁶⁸ *Attorney-General v Blundell and Others*, *Attorney-General v Glover*, above, 289, Myers CJ.

⁶⁹ *Attorney-General v Butler* [1953] NZLR 944 (SC) Fair J.

distributed to the ten branches of the union, the Court of Arbitration, the Minister of Justice, Secretary for Labour and Employment Department and the Acting Prime Minister. The letter, after referring to the "new award", contained the following passages:

I have stated previously, and repeat, that the Arbitration Court is the greatest and the most powerful factor in creating dissatisfaction with the Arbitration Act. Recent decisions of the Court of Arbitration, of which the present is typical, ruthlessly disregard the rights of employees to a fair standard of living and are important factors in creating in the minds of the workers a sceptical regard of justice as administered by the courts.

It is unfortunate that an important Court of this kind, should appear, by its decisions, to ignore the elementary principles of equity and justice particularly at this fairly critical period when democracy and the rule of law as understood by English speaking people, is under severe strain.

Whilst the Arbitration Court continues its present policy, it is the opinion of the writer, that there is no necessity for a communist party in New Zealand, as these obvious unjust decisions will more readily fan the flames of discontent that any propaganda which may be introduced into this country by a foreign power ...⁷⁰

The Court found the language of the letter was to insight disapproval of particular decisions, to shake the public's confidence in the Court and provoke discontent and ill feeling. It was held that contempt had been committed. It would seem from the judgment that upon concluding the criticism of the Arbitration Court was couched in language of abuse and invective the offence of contempt was proved. This is despite the fact that the respondent had also confirmed his confidence in the system of arbitration as the preferred method of settling industrial disputes. No penalty other than an award of costs was imposed, that being viewed as sufficient to ensure future compliance. The Court accepted that if the same criticism had been expressed in more moderate language no offence would have been committed.⁷¹

⁷⁰ *Attorney-General v Butler*, above, 946.

⁷¹ *Attorney-General v Butler*, above, 948.

The fourth and last case of scandalising the administration of justice, post hearing, is the most compelling case of the four. In *Solicitor-General v Radio Avon Limited and Others*⁷² a privately owned Christchurch radio station broadcasted a news item that stated that a Judge of the Supreme Court was at the centre of another closed court controversy and amongst other things had dismissed a criminal charge in a hearing behind closed doors ten days before. A few months prior, the son of the same Judge had been convicted of driving with excess breath alcohol. The son's conviction had generated public controversy that included allegations of "preferential treatment" and "locked doors". It was clearly established that the Judge had had nothing to do with his son's prosecution other than arrange legal representation for him. The news editor had been unaware of the news item prior to its airing. Having heard it at home he arranged for its immediate withdrawal. In the Supreme Court the radio station and news editor were both convicted and fined \$500 and \$200 respectively. Both defendants unsuccessfully appealed their convictions. The appeal judgment records:

... We are satisfied, and beyond reasonable doubt, that when the contents of the broadcast item are considered objectively, that is to say without regard to the actual intention of the sub-editor who rewrote the item and caused it to be published, the subject matter of the broadcast comes clearly within Lord Russell's words, namely something published which was calculated to lower the authority of a judge in the court.⁷³

This decision has been New Zealand's first and only extensive consideration of this branch of the law of contempt. It firmly rejected the submission that the offence was obsolete (based on *McLeod v St Aubyn*).⁷⁴ The Court of Appeal specified the elements of the offence, acknowledging the powers of contempt will only rarely be invoked.

⁷² *Solicitor-General v Radio Avon Limited and Another* [1978] 1 NZLR 225 (CA) Richmond P.

⁷³ *Solicitor-General v Radio Avon Limited and Another*, above, 231.

⁷⁴ *McLeod v St Aubyn* [1899] AC 549.

Aside from two other instances of scandalising the court by filing documents with "scandalous" contents,⁷⁵ cases of this branch of contempt are rare. Whether this is due to the "chilling" effect the laws of contempt have had upon the media in New Zealand, or a high degree of tolerance for criticism of the administration of justice, or a combination of factors, it is difficult to know. With the last scandalising case, post hearing, being in 1978⁷⁶ the New Zealand courts have yet to consider the impact of the BORA upon this branch of contempt. Although other branches of contempt have been considered post BORA the competing ideals of freedom of expression and maintaining the administration of justice are not comparable with other contempts.

IV *KOPYTO – THE CANADIAN APPROACH*

A motion for committal for contempt by scandalising the court would require the New Zealand court to consider the Ontario Court of Appeal decision *R v Kopyto*.⁷⁷ The majority of the Court held that scandalising the court was inconsistent with the constitutionally guaranteed freedom of expression in s 2(b) of the Canadian Charter. *Kopyto* would be a significant consideration under s 5 of the BORA. *Kopyto* was the basis of the submission to the High Court of Hong Kong in the *Oriental Daily News* case⁷⁸ that the common law offence was inconsistent with the protection of freedom of expression provided by Article 16 of the Hong Kong Bill of Rights.⁷⁹ It was also relied upon in *Ahnee*,⁸⁰ before the Privy Counsel, for a similar submission based upon the Mauritius constitutional protection of freedom of speech.⁸¹ In the most recent Australian case, *R v Hoser*

⁷⁵ *Re Wiseman* [1969] NZLR 55 (CA), *Solicitor-General v Robert Van der Kap* (30 May 1977) High Court Hamilton M155/97, Hammond J.

⁷⁶ *Solicitor-General v Radio Avon Limited and Another* [1978] 1 NZLR 225 (CA) Richmond P.

⁷⁷ *R v Kopyto* (1987) 47 DLR (4th) 213.

⁷⁸ Refer pages 7-9 above.

⁷⁹ *Secretary for Justice v The Oriental Press Group Limited and Others* (23 June 1998) High Court of Hong Kong HC MP 407/1998 page 29 (Hong Kong HC) <<http://www.hklii.org/cgi-hk/ii/dis.pl/hk/emg-jud/HKCFI/1998> (last accessed 11 September 2003).

⁸⁰ Refer pages 10 above.

⁸¹ *Ahnee v DPP* [1999] 2 AC 294 (PC).

and *Kotabi*,⁸² counsel for the defendant unsuccessfully submitted that free speech was paramount to the common law powers of contempt. In all three cases the submission was unsuccessful. The purpose of this section is to outline the rationales of the three majorities and the joint dissenting judgment. The applicability of the rationales to the s 5 of the BORA analysis will be considered in the next section of this paper.

Mr Kopyto was a lawyer against whom contempt proceedings were brought following a statement he made to the press relating to an unfavorable judgment in a case where he had appeared as counsel for the unsuccessful litigant. Mr Kopyto's statement could not be considered to be a spontaneous response to the media request for his comment. He had been contacted the previous day by the press but declined to comment until after he had read the decision. The following day, after considering the judgment, he contacted the reporter and stated:

"This decision is a mockery of justice. It stinks to high hell. It says it is OK to break the law and you are immune so long as someone above you said to do it.

Mr Dowson and I have lost face in the judicial system to render justice.

We're wondering what is the point in appealing and continuing this charade of the courts in this country which are warped in favour of protecting the police. The courts and the RSMP are sticking so close together you'd think they were put together with crazy glue."⁸³

The Court was unanimous in allowing the appeal but divided as to the circumstances, if any, that scandalising the court might be inconsistent with the constitutionally guaranteed right of freedom of expression. Justice Cory and Justice Goodman held the offence would be consistent with the Charter if it was redefined and limited in its scope.⁸⁴ Justice Houlden concluded that scandalising, however defined, was for an identifiable public interest.⁸⁵ The joint dissenting judgment of Justice Dubin and Justice Brooke, delivered by Justice

⁸² *R v Hoser and Kotabi Pty Ltd* [2001] VSC 443.

⁸³ *R v Kopyto* (1987) 47 DLR (4th) 213, 219.

⁸⁴ *R v Kopyto*, above, 241 and 263.

⁸⁵ *R v Kopyto*, above, 253.

Dubin, concluded contempt was not protected by freedom of expression, the right of freedom of expression not being an absolute right.

The Ontario Appeal Court's followed the *R v Oaks*⁸⁶ approach to s 1 of the Canadian Charter, the equivalent to 5 of the BORA. Firstly, whether the offence of scandalising the court fell within the scope of the constitutional protection of freedom of expression. The majority held that scandalous conduct was constitutionally protected, the right of freedom of expression being broadly defined.⁸⁷ Secondly, whether the objective that the measures responsible for the limit of freedom of expression are of sufficient importance to warrant overriding the constitutional protection of freedom of expression. Thirdly whether the restriction upon freedom of expression was constitutionally permissible as a reasonable limitation prescribed by law and demonstrably justified in a free and democratic society. The third step is referred to as the "proportionality test", of which there are three components. Firstly, whether the measures adopted are designed to meet the objective identified. Secondly, that the means chosen to achieve the identified objective impaired as little as possible freedom of expression. Finally, whether there was proportionality between the effect of the measure and the objective achieved.⁸⁸

In Justice Cory's view the offence of scandalising the court was not a justifiable limitation on freedom of expression because the offence was not carefully designed to achieve the objective in question, failing in two respects. Firstly the criminality of the offence was "assumed" without actual proof.⁸⁹ Justice Cory adopted the American test that contempt of court will not be found unless it is established that the words in issue constitute a "real and present danger"⁹⁰ to the administration of justice, in a case pending in the courts.⁹¹ Secondly, the offence should include proof that the accused intended (or was reckless) that his/her words would cause disrepute to the administration of justice, and that the consequences of the words or conduct were serious and the

⁸⁶ *R v Oaks* [1986] 1 SCR 103.

⁸⁷ *R v Kopyto*, above, 229, 252.

⁸⁸ *R v Kopyto*, above, 230, 238-239.

⁸⁹ *R v Kopyto*, above, 239-240.

⁹⁰ *Bridges v State of California* (1941) 314 US 252.

⁹¹ *R v Kopyto*, above, 246.

apprehended danger to the administration of justice was shown to be real, substantial and immediate.⁹²

In my view, Justice Cory's conclusions were influenced by two factors. Firstly, his survey of the laws of contempt in other commonwealth countries (United Kingdom, Australia, New Zealand) and the United States. At that time the United States was the only other country that freedom of expression had constitutional or conventional protection. As a result the United States "clear and present danger" test was influential.⁹³ In addition, Justice Cory was skeptical as to whether the effect of the scandalous words would in fact undermine or adversely affect the administration of justice in Canada. He said:

... the courts are not fragile flowers that will wither in the hot heat of controversy. Rules of evidence, methods of procedure and means of review and appeal exist that go far to establishing a fair and equitable rule of law. The courts have functioned well and efficiently in difficult times. They are well regarded in the community because they merit respect. They need not fear criticism nor need they seek to sustain unnecessary barriers to complaints about their operations or decisions.⁹⁴

In response to this skepticism a more stringent test was formulated.

Justice Goodman helpfully set out at the beginning of his judgment the pre-Charter offence of contempt: the utterance of scurrilous remarks calculated (likely or intended) to bring the administration of justice into disrepute. No proof that the administration of justice had in fact been brought into disrepute was required. In his view the remarks of Mr Kopyto that alleged bias by the courts would have constituted an offence pre-Charter.⁹⁵ Justice Goodman was in agreement with Justice Cory, that the offence was not a proportional response and was not a reasonable limit on freedom of expression.⁹⁶ For the offence to be Charter compliant three additional elements were required. Firstly, proof that the words in issue were either an assertion of facts recklessly made as to their truth, or knowingly false, or an opinion not honestly held. Secondly, the words must

⁹² *R v Kopyto*, above, 240.

⁹³ *R v Kopyto*, above, 234.

⁹⁴ *R v Kopyto*, above, 227.

⁹⁵ *R v Kopyto*, above, 257.

⁹⁶ *R v Kopyto*, above, 260.

bring the administration of justice into disrepute in the mind of a reasonable person.⁹⁷ Finally, proof that the utterance had resulted in a clear and significant and imminent or present danger to the administration of justice.⁹⁸

Unlike Justice Cory's reformulated test that required specific proof of the accused intent, Justice Goodman's focus was upon the truthfulness of the facts or the honesty of the opinions expressed. He was influenced by the fact that the same opinion expressed in crude, vulgar, impolite and acerbic language would be unlawful under the pre-existing test, but lawful if revised into a polite, temperate, scholarly opinion.⁹⁹ In his view, this result was unpalatable and honestly held opinions should be protected by freedom of expression and not subject to the law of contempt. Like Justice Cory, he also adopted the United States "clear and present danger test" but he did not limit it to cases pending before the court.

Justice Houlden, the third majority judgment, also accepted that had the offending occurred pre-Charter Mr Kopyto would have been convicted for contempt.¹⁰⁰ However, post-Charter, it was his view that the offence was unconstitutional, for reasons different to those already stated. In Justice Houlden's view the offence went beyond what was required to achieve the objective of maintaining the administration of justice.¹⁰¹ Freedom of expression should not be curtailed because of a scandalous publication. The public were not so gullible nor the courts so weak that criticism of the kind in issue would affect the administration of justice. In his view the offence, however constituted, was simply not required. There was no longer any scope for its operation.¹⁰²

I feel confident that our judiciary and our courts are strong enough to withstand criticism after a case has been decided no matter how outrageous or scurrilous that criticism may be. I feel equally confident that the Canadian

⁹⁷ *R v Kopyto*, above, 263.

⁹⁸ *R v Kopyto*, above, 263.

⁹⁹ This dilemma was noted in *Attorney-General v Butler* [1953] NZLR 944, 948 (SC) Fair J.

¹⁰⁰ *R v Kopyto*, above, 248.

¹⁰¹ *R v Kopyto*, above, 253.

¹⁰² *R v Kopyto*, above, 255-256.

citizenry are not so gullible that they will lose faith and confidence in our judicial system because of such criticism.¹⁰³

Like Justice Cory, Justice Houlden was influenced by the absence of a comparable offence in the United States and its disuse in United Kingdom for "almost 60 years".¹⁰⁴ In addition, Justice Cory recorded the recommendations of the Law Commission reports in the United Kingdom, Australia and Canada. Australia recommended abolishing the offence. The United Kingdom and Canada recommended its retention as a narrower statutory offence provision.¹⁰⁵

Finally, in a lengthy and joint dissenting judgment delivered by Justice Dubin, he determined that freedom of expression, not being an absolute freedom, does not protect a person's conduct that constitutes a real, serious or substantial prejudice to the administration of justice. That is, freedom of expression does not encompass contempt and therefore contempt is not unconstitutional. In reaching this conclusion he emphasised the historical recognition and importance of freedom of expression that had been developed by the courts in conjunction with contempt as a device to protect the rule of law from endangerment.¹⁰⁶

In Justice Dubin's opinion the majority had misconstrued the elements of the offence. In his view the offence requires proof of an intention to bring the administration of justice into disrepute.¹⁰⁷ The fact that the words may be capable of having this effect will be insufficient. Proof of a serious risk to the administration of justice is also required. The risk or prejudice must be serious, real or substantial.¹⁰⁸

In conclusion, the judgments provide different rationales for concluding the offence of scandalising the court does not comply with the Charter, and various solutions to achieve that goal. At this juncture I do not wish to embark on any significant analysis of the reasons given other than to note two factors. Firstly it is unlikely that the New Zealand courts would adopt the dissenting view

¹⁰³ *R v Kopyto*, above, 255

¹⁰⁴ *R v Kopyto*, above, 255.

¹⁰⁵ *R v Kopyto*, above, 248-250

¹⁰⁶ *R v Kopyto*, above, 274.

¹⁰⁷ *R v Kopyto*, above, 277-278.

¹⁰⁸ *R v Kopyto*, above, 290.

that contempt fell outside the constitutional protection of freedom of expression. A similar conclusion was reached in *Solicitor-General v Radio New Zealand Limited*.¹⁰⁹ The narrow interpretative approach adopted by Justice Dublin to freedom of expression was contrary to general Canadian jurisprudence. In addition the broad definition of freedom of expression in the *Moonen* decision¹¹⁰ would encompass freedom of expression. Secondly, Justice Cory and Justice Houlden were influenced by the jurisprudence of the United States, rejecting the more moderate commonwealth approach. Decisions from the United States would be treated with some caution in New Zealand having regard to our differing social contexts and constitutional arrangements.

V THE NEW ZEALAND BILL OF RIGHTS ACT AND SCANDALISING THE COURT

The offence of contempt by scandalising the court requires the applicant, normally the Crown, to prove beyond reasonable doubt that the accused intended the act or publication (hereafter acts or publications will be referred to as "publications") in question and that there is a real risk, as opposed to a remote possibility that the actions complained of will undermine the public confidence in the administration of justice. No proof of an accused intent to undermine the administration of justice is required. The intended purpose of the publication is only relevant to determining the appropriate punishment.¹¹¹

Under the BORA the courts must interpret and if necessary reformulate the common law offence so it is consistent with and reflects the values of the BORA.¹¹² To date only "sub judice contempt", the publication of material that is likely to prejudice an accused right to a fair trial, has been considered by the Court of Appeal and it determined that no reconfiguration of the common law offence was required.¹¹³

¹⁰⁹ *Solicitor-General v Radio New Zealand Limited* [1994] 1 NZLR 48, 60 (HC).

¹¹⁰ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 15 para [15] CA.

¹¹¹ *Solicitor-General v Radio Avon Limited* [1978] 1 NZLR 225, 233 (CA).

¹¹² *Gisborne Herald Co Limited v Solicitor-General* [1995] 3 NZLR 563, 575 (CA).

¹¹³ *Gisborne Herald Co Limited v Solicitor-General*, above, 575.

The approach to determining whether scandalising the court complies with s 5 of the BORA was thought to have been established in *Moonen*.¹¹⁴ Subsequently in *Moonen (No 2)*¹¹⁵ the Court has emphasised that other approaches are open. The early cases under the Canadian Charter, that have been of significance in the development of New Zealand BORA jurisprudence, held that as part of the proportionality analysis there was to be the least possible interference with the right in question.¹¹⁶ It is now accepted in Canada that the test is whether the law or action infringes the right in question “as little as is reasonably possible”.¹¹⁷ The move from ‘minimal’ infringement of the right in issue to “as little impairment as reasonably possible” is thought to have contributed to the Court of Appeal acknowledgement in *Moonen (No 2)* that a more flexible approach was needed.¹¹⁸

In light of the uncertainty that surrounds the approach outlined in *Moonen (No 1)* I will proceed using the approach of Justice Richardson, as he then was, in *MOT v Noort*¹¹⁹ that is as follows:

In the end an abridging enquiry under s 5 is a matter of weighing

- (1) The significance in the particular case of the values underlying the Bill of Rights Act;
- (2) The importance of the public interest in the intrusion on the particular right protected by the Bill of Rights Act;
- (3) The limits sought to be placed on the application of the Bill of Rights Act provision in the particular case; and
- (4) The effectiveness of the intrusion in protecting the interests put forward to justify those limits.

Although the *Noort* (and *Moonen*) decisions both related to interpreting statutory provisions consistently with the BORA, the same considerations apply to common law provisions with one additional consideration. Unlike

¹¹⁴ *Moonen v Film Literature Board of Review* [2001] 2 NZLR 9, 15 para 15 (CA).

¹¹⁵ *Moonen v Film Literature Board of Review* [2002] 2 NZLR 754, 760 para 14 (CA).

¹¹⁶ *R v Oakes* [1986] 1 SCR 103.

¹¹⁷ *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 782; *RJR MacDonald v Canada* [1995] 3 SCR 199, para 160.

¹¹⁸ *Moonen v Film Literature Review Board* [2002] 2 NZLR 754, 760 para 15 (CA). Also see Andrew S Butler “Limiting Rights” David Carter and Matthew Palmer (ed) *Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) 113.

¹¹⁹ *Ministry of Transport v Noort; Police v Curran* [1992] 3 NZLR 260, 283-4 (CA) Richardson J.

inconsistent statutory provisions that remain in effect by virtue of s 4 of the BORA, the court has the additional task of determining if a non-BORA compliant common law power can be reformulated into a BORA compliant offence.

Two pre-requisites must be satisfied before the s 5 BORA analysis can be undertaken. Firstly, it must be determined whether a scandalous publication falls within the affirmed right of s 14 of the BORA. That is, whether freedom of expression is wide enough to include and protect the publication in issue. If it is not, the scandalous publication falls outside of the protection of the BORA and analysis under s 5 is not required. As already noted¹²⁰ it is unlikely freedom of expression would be narrowly construed as it was by the High Court in *Solicitor-General v Radio NZ Limited*.¹²¹ The courts have given the rights in the BORA a generous and purposive interpretation¹²² evident in *Moonen*, where freedom of expression was considered to be as wide as human thought and imagination.¹²³ The broad and purposive approach is consistent with the Canadian jurisprudence. Justice Cory in *Kopyto* concluded:

In my view, statements of a sincerely held belief on a matter of public interest, even if intemperately worded, so long as they are not obscene or criminally libellous, should, as a general rule, come within the protection afforded by s 2(b) of the Charter. It would, I think be unfortunate if freedom of expression on matters of public interest so vital to a free and democratic society was to be unduly restricted. The constitutional guarantee should be given a broad and liberal interpretation.¹²⁴

The second pre-requisite is whether the limitation scandalising the court places on freedom of expression is one "prescribed by law". Prescribed by law requires the common law offence to be adequately accessible and sufficiently precise.¹²⁵ No successful challenge has been brought on the basis of this pre-requisite requirement. In *Solicitor-General v Radio New Zealand Limited*¹²⁶

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Refer page 25-26 above.

121

Solicitor-General v Radio NZ Limited [1994] 1 NZLR 48, 60 (HC).

122

Ministry of Transport v Noort; Police v Curran [1992] 3 NZLR 260, 268 (CA) Cooke P.

123

Moonen v Film Literature Board of Review, above, 15 para 15.

124

R v Kopyto (1987) 47 DLR (4th) 213, 229.

125

Ministry of Transport v Noort; Police v Curran [1992] 3 NZLR 260, 272 (CA) Cooke P.

126

Solicitor-General v Radio New Zealand Limited [1994] 1 NZLR 48, 53 (HC).

the High Court considered that the law of contempt relating to the contact and interrogation of jurors about their deliberations was clearly enough prescribed, although this was the first New Zealand case to hold that such interference was a contempt.¹²⁷ In *Gisborne Herald Co Limited v Solicitor-General*,¹²⁸ a case involving pre-trial publicity that jeopardised an accused right to fair trial, guidelines were sought by Counsel for the appellant for pre-trial publication. The Court declined to issue any guidelines, noting that guidelines would be no more precise in the principles of contempt.¹²⁹

Despite the discretionary nature of the offence a challenge to the sufficiency and precision of its formulation is unlikely to succeed. The offence of contempt is broadly defined by the Court of Appeal in *Solicitor-General v Radio Avon Limited and Anor*¹³⁰ reflecting the myriad of forms of challenges to the administration of justice. The applicants before the European Court of Human Rights in *The Sunday Times v The United Kingdom*¹³¹ unsuccessfully argued that contempt was not prescribed by law. In *Kopyto*, Justice Houlden rejected a similar submission concluding that:

This branch of the law has been clearly defined by both English and Canadian courts. A person would have no difficulty in ascertaining the law and regulating his conduct accordingly ... The law of contempt of court by scandalising the court is, therefore, a limit prescribed by law.¹³²

I will proceed with the s 5 analysis on the basis that the contempt by scandalising the court is prescribed by law and falls within the scope of the statutory protection of s 14 of the BORA.

¹²⁷ This conclusion was adopted in *Duff v Communicado Limited* [1996] 2 NZLR 89, 100 (HC) Blanchard J.

¹²⁸ *Gisborne Herald Co Limited v Solicitor-General* [1995] 3 NZLR 563 (CA).

¹²⁹ *Gisborne Herald Co Limited v Solicitor-General*, above, 575.

¹³⁰ *Solicitor-General v Radio Avon Limited and Another* [1978] 1 NZLR 225 (CA).

¹³¹ *The Sunday Times v The United Kingdom* (1979) 2 EHRR 245, 273 para 53.

¹³² *R v Kopyto* (1987) 47 DLR (4th) 213, 252 Houlden JA.

A *The Significance of Freedom of Expression*

The first step of the *Noort* approach is to identify the significance of freedom of expression having particular regard to the contempt power of scandalising the court.

The right to freedom of expression has been firmly recognised in the Constitution of the United States, the Canadian Charter and many other constitutions, conventions and bill of rights. It is incorporated into the European Convention of Human Rights (Article 10)¹³³ and the International Convention of Civil and Political Rights (Article 19(2)) that was ratified by New Zealand in 1968.¹³⁴ Freedom of expression is now incorporated into s 14 of the BORA and reads:

Section 14: Freedom of Expression – everyone has the right to freedom of expression including freedom to seek, receive and impart information and opinions of any kind and any form.

The fundamental value and importance of freedom of expression in a democratic society has been repeatedly emphasised by the courts. It has been described as “indispensable to the democratic process” and “essential to the enlightenment of a free people and in restraining those who wield power”.¹³⁵ While recognising the fundamental value of freedom of expression it has equally been acknowledged by the courts that freedom of expression is not an absolute right. By virtue of s 5 of the BORA rights affirmed in the BORA, including freedom of expression, are expressly subject to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.¹³⁶

The administration of justice plays a crucial role in a democratic society. A system of justice is the forum not only for the resolution of disputes between

¹³³ European Convention of Human Rights <http://www.echr.coe.int> (last accessed 30 September 2003).

¹³⁴ International Covenant on Civil and Political Rights <http://untreaty.un.org/plweb/cgi> (last accessed 1 October 2003).

¹³⁵ *Bridges v State of California* (8 December 1941) United States Supreme Court, Justice Frankfurter <<http://www.caselaw.rp.findlaw.com/scripts/getcase> (last accessed 12 December 2002).

¹³⁶ *Police v O'Connor* [1992] 1 NZLR 87, 98 (HC).

the public, but the public and the state.¹³⁷ As a consequence of the court's fundamental role in democracy it has long been recognised that there is a public interest in the administration of justice being subject to scrutiny and criticism, and such scrutiny should only be restricted where circumstances necessitate it.¹³⁸ The Court of Appeal in *Solicitor-General v Radio Avon and Another* stated:¹³⁹

The courts in New Zealand and in the United Kingdom, completely recognise the importance of freedom of speech in relation to their work provided that criticism is put forward fairly and honestly for a legitimate purpose and not for the purpose of injuring our system of justice.

The public also has an equal and significant interest in those who administer the justice system. Judges as persons (or courts as institutions) are entitled to no greater immunity from criticism than other persons (or institutions).¹⁴⁰ The importance of the public being able to scrutinize the actions of the judiciary must be particularly significant where judges hold office until retirement, subject to good behaviour, with limited or no check on their powers.¹⁴¹

The significance of freedom of expression in a democratic society cannot be overstated. Nor can the importance of public scrutiny of a crucial institution such as the administration of justice. Both are of significant importance to any democratic society. In conclusion, while freedom of expression is not an absolute right, limitations upon it that affect the public's ability to express its views about a fundamental institution should only be contemplated if an equally important and fundamental public interest requires it.

B The Importance of the Objective of Scandalising the Court

The second step in the *Noort* approach¹⁴² requires the importance of the public interest that is the basis for the intrusion and limitation of freedom of

¹³⁷ *R v Kopyto* (1987) 47 DLR (4th) 213, 227 Cory JA.

¹³⁸ *Attorney-General v Butler* [1953] NZLR 944, 946 (SC).

¹³⁹ *Solicitor-General v Radio Avon and Another* [1978] 1 NZLR 225, 230 (CA).

¹⁴⁰ *Bridges v State of California*, above.

¹⁴¹ Honourable Margaret H Marshall "Dangerous Talk, Dangerous Silence: Free Speech, Judicial Independence, and the Rule of Law" (2002) 24 Sydney LR 445, 462-463.

¹⁴² Refer page 26 above.

expression to be examined. If the objective is not sufficiently important to warrant a limitation of the right the limitation is not demonstrably justifiable. In *Kopyto* Justice Cory accepted that the objective of protecting the administration of justice was of sufficient importance to warrant overriding a constitutionally protected right or freedom.¹⁴³ Justice Houlden expressed the contrary opinion. In Justice Houlden's opinion public confidence would not crumble following a scandalous publication, noting that there was no empirical evidence that supported the alleged consequence. In Justice Houlden's opinion scandalising the court was not a justifiable limitation on freedom of expression, the alleged consequences of the publication being purely speculative.¹⁴⁴ If the effect of the publication does not result in the harm the offence seeks to protect there can be not public interest in the offence. In short, if there is no problem there is not public interest.

Considering firstly Justice Holden's position, it is my view that the New Zealand courts would not adopt the scepticism Justice Houlden expressed and will continue to conclude that scandalous publications risk undermining the public's confidence in the administration of justice. The absence of empirical evidence to support the "cause and effect" rationale underlying the law of contempt has been referred to in New Zealand in pre-trial publicity contempt cases.¹⁴⁵ The Law Commission has undertaken some analysis of the media's impact on jurors and concluded that the research shows the impact is minimal and jurors are well capable of putting media coverage to one side. The research result is interpreted as indicating the correct balance has been struck. It has not been viewed as a basis for liberalising present restrictions.¹⁴⁶

New Zealand courts have traditionally adopted a cautious approach to the value judgments the law of contempt requires. The influence of precedent and caution will continue until reliable empirical data supports a contrary approach. An additional factor influencing the scepticism expressed in *Kopyto* included the

¹⁴³ *R v Kopyto* (1987) 47 DLR (4th) 213, 239 Cory JA.

¹⁴⁴ *R v Kopyto*, above, 255 Houlden JA.

¹⁴⁵ *Gisborne Herald Co Limited v Solicitor-General* [1995] 3 NZLR 563, 570 (CA); *R v Television New Zealand Limited and Another*, CA 308/00, 1 September 2000, para [23].

¹⁴⁶ New Zealand Law Commission *Juries in Criminal Trials* (NZLC Report 69) Wellington, 2001.

American approach.¹⁴⁷ The United States veered away sharply from the Commonwealth law with the seminal case of *Bridges v California*.¹⁴⁸ The “clear and present danger test” gave the American public a virtually unseated freedom to criticise its judiciary.¹⁴⁹ The American right to criticise the administration of justice is frequently and vehemently invoked, but it cannot be said that chaos has resulted. In general, Americans live in a “orderly society” in which people follow the rules of the court as matter of course.¹⁵⁰

The social experience of the United States is unlikely to find favour with the New Zealand courts. Our courts have emphasised that the evaluation and balancing of fundamental principles and freedoms must in the end be assessed in a local context.¹⁵¹ This point was again emphasised in the majority judgment of the Court of Appeal in *Lange v Atkinson*:¹⁵²

The leading decision [from other jurisdictions] just reviewed do not present a simple picture. They reflect the proposition that however fundamental freedom of expression may be in the culture, law and politics of the jurisdictions in issue will be given varying degrees of importance when it collides with other rights and interests.

An obvious example in a contempt context of what might occur if New Zealand courts too readily adopted the approach of other jurisdictions, disregarding New Zealand’s social context, are the necessity for “procedural devices” that are employed in the criminal justice process in the United States and Canada.¹⁵³ Devices such as sequestering of jurors for the duration of trial and questioning potential jurors are the necessary consequences of giving primacy to freedom of expression over an accused right to a fair trial.¹⁵⁴ A similar result would be quite contrary to New Zealand’s social context and a marked departure from present day practices. The Chief Justice in the *Woman’s*

¹⁴⁷ *R v Kopyto*, above, 255, Houlden JA.

¹⁴⁸ *Bridges v California* (1941) 314 US 252.

¹⁴⁹ Hon Margaret H Marshall “Dangerous Talking, Dangerous Silence: Free Speech, Judicial Independence, and the Rule of Law” (2002) 24 Sydney Law Review, 455, 459.

¹⁵⁰ Hon Stephen G Breyer “Judicial Independence in United States” (1996) 40 St Louis U LJ 989, 996.

¹⁵¹ *Gisborne Herald Co Limited v Solicitor-General* [1995] 3 NZLR 563, 575 (CA).

¹⁵² *Lange v Atkinson* [1998] 3 NZLR 424, 459 (CA).

¹⁵³ *Dagenais v Canadian Broadcasting Corp* 94 CCC (3d) 289.

¹⁵⁴ Keith Mason QC “Australia and the World” (1995) 69 ALJ 157, 158.

Weekly case expressed a view that where there is a realistic risk of prejudice to a trial, a publication ban is preferable to the “uncertainties of counter measures available”.¹⁵⁵

Having determined that Justice Houlden’s opinion would not find favour in New Zealand the objective and rationality of scandalizing the court and the public interest in those factors requires consideration. The Hong Kong High Court summarized the objective and rationality of scandalising the court as follows:

A civilised community cannot survive without efficient machinery for the enforcement of its laws. The task of enforcing those laws falls on the courts, and on the judges who preside over them. It has always been regarded as vital to the rule of law for respect for the judiciary for the maintained and for their dignity to be upheld. If it were otherwise, public confidence in the administration of justice would be undermined, and the law itself would fall into disrepute.¹⁵⁶

Emphasising the court’s ability to protect itself from attacks that may bring it into disrepute, and in turn undermine the rule of law, were expressed in *Borrie and Lowe’s Law of Contempt*:

The necessity for this branch of contempt lies in the idea that without well regulated laws a civilised community cannot survive. It is therefore thought important to retain the respect and dignity of the court and its officers, whose task it is to uphold and enforce the law, because without such respect, public faith in the administration of justice would be undermined and the law itself would fall into disrepute.¹⁵⁷

Similar sentiments appear in other authorities.¹⁵⁸ Democracy is a fundamental value of New Zealand society founded on the rule of law. The

¹⁵⁵ *The Solicitor-General for New Zealand v W & H Specialist Publications Limited* (7 December 2002) High Court Auckland M 810-IMO2 6 para [19], Elias CJ.

¹⁵⁶ *The Secretary for Justice v The Oriental Press Group Limited and Others* (23 June 1998) high court of Hong Kong HC MP 407/1998 (Hong Kong HC) <<http://www.hklii.org/cgi-hklii/dis.pl/hk/eng-jud/HKCFI/1998>> (last accessed 11 September 2003)

¹⁵⁷ *R v Kopyto* 47 DLR (4th) 213, 252 Houlden JA.

¹⁵⁸ *Solicitor-General v Radio Avon Limited and Another* [1978] 1 NZLR 225, 230 (CA).

courts play an important role in any democratic society.¹⁵⁹ One of the fundamental functions of the courts are to uphold the rule of law and resolve disputes. If public confidence in the administration of justice is undermined, the standard of conduct of all those who may have business before the court is likely to be weakened. Recourse to other unlawful methods of resolving disputes may result.¹⁶⁰ The courts also uphold fundamental rights. The value of freedom of expression can only be reinforced and maintained through a respected and impartial system of justice. As can be seen from the case law it is the courts that have interpreted and developed the importance of freedom of expression. Without a respected justice system, all freedoms, including freedom of expression, are vulnerable.¹⁶¹ In my view the importance of maintaining the integrity and impartiality of the third branch of New Zealand's constitutional configuration is a sufficiently important objective to warrant some limitation on freedom of expression.

C *The Limitations on Freedom of Expression (the proportionality test)*

The third step in the *Noort* approach is to identify the limits scandalising the court seeks to place on freedom of expression and to consider if those limits are a "proportional" response to the objective of protecting the administration of justice from being brought into dispute in the eyes of the public. In my view the limits scandalising the court places upon freedom of expression is minimal. This paper has already highlighted¹⁶² that the public's ability to criticise the administration of justice is not prohibited by this contempt. Rather criticism is limited to criticism that is for a legitimate purpose. As Lord Russell CJ said in *R v Gray*:¹⁶³

Judges and courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court

¹⁵⁹ *R v Kopyto* 47 DLR (4th) 213, 227 Cory JA.

¹⁶⁰ *Re Ouellet (No. 1)* (1967) 67 DLR (3d) 73, 93.

¹⁶¹ J L Caldwell "Is scandalising the Court a scandal?" (1994) NZLJ 442,443.

¹⁶² Refer page 10-12 above.

¹⁶³ *R v Gray* [1900] 2 QB 36,40.

The fact there has only been three successful New Zealand prosecutions for scandalising the court after trial¹⁶⁴ or unrelated to any particular proceedings is evidence in itself that this power of contempt is rarely invoked and reserved for the most extreme cases. It is unlikely that mere use of vitriolic and intemperate language will of itself be sufficient for contempt proceedings to be brought. Many examples could be put forward of intemperate criticism of the administration of justice, which if they were to result in an application for committal of contempt would draw a negative public response and criticism that the power of contempt was being abused to protect those whom wield it. The limit of the offence and its impact upon freedom of expression is tempered by the "real risk" test. Real risk must be assessed having regard to all of the circumstances of the publication.¹⁶⁵ Relevant factors include the statements published, the timing of their publication, and the size of the audience reached, the likely nature, impact and duration of their influence.¹⁶⁶ Another factor emphasised by the High Court in *Solicitor-General v Radio New Zealand Ltd*¹⁶⁷ is the climate of the times and the prevailing social environment. The court has not been unrealistic to recognise that the justice system could readily withstand the occasional aberration when the respect for the authority, conventions and institutions of the justice system are strong.¹⁶⁸ The relevance of considering the circumstances surrounding the publication was also emphasised by Justice Goodman in *Kopyto*.¹⁶⁹

While it is not possible to view a given form of words in isolation and to say that it will either invariably amount to a contempt or that it will never do so, the real risk test and the requirement to have regard to the circumstances of the publication will result in minimal encroachment upon of freedom of expression. The expressions of a disgruntled litigant are unlikely to invoke the contempt power. Regard would be had to the reader's common sense to appreciate that the comments are those of a disgruntled litigant. Similarly the one off spontaneous

¹⁶⁴ Refer pages 15-18 above.

¹⁶⁵ *Attorney-General v New Statesman and National Publishing Co Ltd* [1981] QB 1,10 (CA).

¹⁶⁶ *Hinch v Attorney-General* [1987] VR 721,740,742.

¹⁶⁷ *Solicitor-General v Radio New Zealand* [1994] 1 NZLR 48, 56 (HC).

¹⁶⁸ *Solicitor-General v Radio New Zealand*, above, 56.

¹⁶⁹ *R v Kopyto* 47 DLR (4th) 213, 264, Goodman J.

remarks are likely to be viewed as ill-conceived remarks reflecting more poorly on the speaker than undermining the administration of justice.

It has been suggested that some of the most trenchant criticism comes from within the justice system itself. In the most famous example is that of Lord Denning in his dissenting judgment in *Candler v Crane, Christmas and Co*¹⁷⁰ when he accused his colleagues of being “timorous souls”¹⁷¹ which, in “ordinary parlance, will imply cowardice and lack of imagination”. Such instances are rare and immune from punishment by virtue of the criticisms arising during the performance of the judicial function. Such examples are not evidence that the administration of justice is being undermined from within. The public would regard the criticism as having been measured and justified. Such criticism could also be viewed by the public as constituting a vindication of the system of justice, not its undoing.¹⁷²

A further consideration as to the limits contempt imposes is whether the limits are necessary given the other possible legal avenues that the judiciary could utilise to seek redress such as bringing defamation or proceedings based on the tort of libel. Both defamation and personal libel are personal and individual remedies not designed to protect group or official representations that the offence of scandalising the court is concerned with.¹⁷³ The English Law Commission review of the laws of contempt, carried out in the early 1970's, known as the Phillimore Report¹⁷⁴ concluded that one of the reasons scandalising the court should remain, as an offence is the lack of protection the law otherwise affords.¹⁷⁵ In addition there is a general reluctance amongst the judiciary to commence proceedings. It is not a means that New Zealand Judges would readily employ. It also places upon the shoulders of the judiciary the function of personally protecting the system, when the protection and response should come from the system itself.

¹⁷⁰ *Candler v Crane, Christmas and Co* [1951] 2 KB 164.

¹⁷¹ *Candler v Crane, Christmas and Co*, above, 178.

¹⁷² *R v Hoser and Kotabi Pty Ltd* [2001] VSC 443, para 216.

¹⁷³ Nigel Lowe and Brenda Sufrin *The Law of Contempt* (3rd ed, Butterworths, London, 1996) 361

¹⁷⁴ United Kingdom Report of the Committee on Contempt of Court, chaired by Lord Justice Phillimore, Her Majesty's Stationery Office, 1974.

¹⁷⁵ United Kingdom Report of the Committee on Contempt of Court, above, para 162.

Finally, the minimal limits scandalising the court places on freedom of expression only affects those publications that don't assist the public debate and scrutiny of a fundamental public institution. Scandalous remarks are only tenuously related to the public interest of protecting freedom of expression about such institutions. False and injurious statements do not enhance change and development. To the contrary they are detrimental in their effect. The European Court of Human Rights recognised the limited contribution of a publication in issue to public debate when it stated, "[the applicants] did nothing to enhance protection accorded to the expression of political opinions".¹⁷⁶

D The Effectiveness of Scandalising the Court (Rationality Test)

The final step in the *Noort* approach is consideration of whether the offence is a rational response to the need to protect the administration of justice. Does it limit freedom of expression in an appropriate and effective way? Both Justice Cory and Justice Goodman concluded that the offence was not rationally connected to its objectives and re-constituted the offence, in different ways. In this section I will consider whether the *actus reus* and the *mens rea* of the offence as presently defined is rationally connected to its objective or whether the elements of the offence require reformulation.

1 Actus reus: clear and present danger v real risk test

Justice Cory and Justice Goodman both concluded that the *actus reus* for scandalising the court was insufficient for the offence to be a rational response to protecting the administration of justice. Justice Goodman required proof that the administration of justice had been brought into disrepute and both required proof of a "clear and present danger"¹⁷⁷ to the administration of justice. In my view the "real risk" test is rationally connected to the objective of maintaining public confidence in the administration of justice and no additional proof of harm is required.

¹⁷⁶ *Prager and Oberschlick v Austria* (1995) EHRR 1, 20.

¹⁷⁷ *R v Kopyto* (1987) 47 CLR (4th) 213, 231, Cory JA.

Justice Cory conclusion was based upon an inaccurate analysis of the *actus reus* of the offence. He proceeded upon the basis that the offence assumed that the publication in issue would bring the court into contempt or lower its authority in the eyes of the public.¹⁷⁸ This premise is not supported by the authorities¹⁷⁹ and conflicts with the existing test as outlined by Justice Goodman.¹⁸⁰ On the other hand Justice Goodman simply concluded that more proof was necessary. The “clear and present danger” test that they both adopted has not been followed in subsequent Canadian contempt cases. Justice Dublin’s¹⁸¹ test that serious risk to the administration of justice as perceived by a reasonable person in the community, has been applied.¹⁸²

Although the basic premise of Justice Cory’s determination is inaccurate and Justice Goodman’s determination is a subjective value judgment, the issue still remains as to whether the clear and present danger test or the real risk test best satisfies that rationality of the offence when compared with its objective.

The objective of the offence of scandalising the court is the protection of the administration of justice from disrepute caused by a loss of public confidence. It is the maintenance of public confidence in a system of justice that scandalising the court seeks to protect. Requiring proof of clear and present danger to the administration of justice requires proof that a loss of public confidence has already occurred. The danger to the administration of justice can only be “present” if public confidence has already being undermined or eroded by the publication in issue. The clear and present danger test emphasises the effects caused by the publication on the administration of justice at the cost of protecting the confidence of the public. If clear and present danger were required the offence would be weighed towards “punishment” for the loss of public

¹⁷⁸ *R v Kopyto*, above, 239 and 260.

¹⁷⁹ For an example see *Solicitor-General v Radio Avon Limited and Another* [1974] 1 NZLR 225, 231-233 (CA); *Attorney-General v Times Newspapers Limited* [1973] 3 All ER 54, 66-67 (HL) Lord Morris.

¹⁸⁰ *R v Kopyto*, above, page 257.

¹⁸¹ *R v Kopyto*, above, 267.

¹⁸² For example *R v Prefontaine* [2002] AJ No 1364 <http://ql.quicklaw.com/qltemp/C2ohgXoekJVejsf/00005ajre-00341372.htm> (last accessed 25 August 2003).

confidence, not the prevention of the confidence of the public from being impaired.

Contempt has traditionally focused upon the prevention of harm. For example maintaining the accused right to a fair trial, ensuring the Judiciary has the ability to make impartial judgments, the protection of jurors from unlawful influence or disturbance. If the *actus reus* of the offence was "punishment focused" the prevention of harm that the scandalising the court guards against, would be lost. In my view the real risk test is the appropriate balance between the prevention of harm to the administration of justice and freedom of expression.

One criticism of the real risk test is that the threshold does not take into account the reality that most contempt proceedings are brought after publication and by which time the negative effects of the publication upon the administration of justice, if any, should have occurred and be obvious. If no disrepute has been caused to the administration of justice then the fact there may have been the risk, however real, of disrepute is irrelevant. As noted in response to a similar submission made to the Supreme Court of Victoria in *R v Hoser and Kotabi Pty Ltd*¹⁸³ the practical reality of assessing whether the reputation of the courts had been diminished amongst those members of the public that had read the publication would be impossible. The real risk test, like the clear and present danger test, is a value judgment by the judiciary. Further the purpose of the test is to prevent the anticipated disruption that would result from the loss of public confidence in the administration of justice and to ensure that there are timely reminders of the acceptable boundaries. The New Zealand Court of Appeal noted the growing dangers of direct actions against the administration of justice in *Solicitor-General v Radio Avon and Another*.¹⁸⁴ So too did Justice Eames in the Supreme Court of Victoria who stated:

¹⁸³ *R v Hoser and Kotabi Pty Limited* [2001] VSC 443 para 215.

¹⁸⁴ *Solicitor-General v Radio Avon and Another* [1978] 1 NZLR 225, 229 (CA).

... Organised and quite sophisticated campaigns against the integrity of the courts, if unchecked, may prove very effective in damaging the reputations of the courts.¹⁸⁵

In my view, the real risk test is rationally connected with the objective of the offence. The four examples of it being invoked in New Zealand to date suggests it is not readily resorted to and will only be employed for extreme cases.

2 *Mens rea – is proof of the intended consequences of the publication required?*

Justice Cory determined that an additional *mens rea* element was also necessary for the offence to be Charter compliant. He recommended proof that an accused intended to cause disrepute to the administration of justice or was reckless, despite the foreseeability of that consequence, was necessary. While only devoting one short paragraph to the proposed additional *mens rea* element, it was Justice Cory's view this was a "reasonable requirement" of the Crown, the absence of which would result in an arbitrary standard.¹⁸⁶ I agree with Justice Cory that proof of the accused blameworthy state of mind is necessary for scandalising the court to be a justifiable limitation on freedom of expression. Evidence of specific intent or recklessness despite foreseeable consequences will suffice.

To date New Zealand has resisted all attempts to introduce an additional intentional element. The courts have traditionally adopted the response that the importance of the objective of the offence justifies, what in my view is, a lower standard of proof.¹⁸⁷ Neither the United Kingdom nor Australia requires proof of an accused intent, or recklessness, to undermine the administration of justice.¹⁸⁸ Canadian cases¹⁸⁹ since *Kopyto* have adopted Justice Cory's re-formulation of the *mens rea* element, requiring proof of direct intent or recklessness. The only

¹⁸⁵ *R v Hoser and Kotabi Pty Limited*, above, para 228.

¹⁸⁶ *R v Kopyto* (1987) 47 DLR (4th) 213, 240 Cory JA.

¹⁸⁷ *Solicitor-General v Radio Avon Limited and Another* [1978] 1 NZLR 225, 233 (CA).

¹⁸⁸ *R v Editor of New Statesman, ex p DPP* (1928) 44 TLR 301,303 Lord Heward CJ; *Attorney-General of New South Wales v Munday* [1972] 2 NSWLR 887, 911-2, Hope JA.

¹⁸⁹ *R v Glasner* (1994) 93 CCC (3d) 226, 244 (Ont CA) Laskin JA; *R v Prefontaine* [2002] AJ No 1364 para 98 (Alberta QB) Moreau J.

New Zealand contempt case to have given some consideration to whether an additional *mens rea* element should be required to ensure the offence was not an unjustifiable infringement of freedom of expression under the BORA is *Duff v Communicado Limited*.¹⁹⁰ Communicado had brought proceedings to commit the author Alan Duff for contempt of court for statements he had made on the radio and television that were viewed as an endeavour to apply public pressure on Communicado to settle Mr Duff's civil claim against the company. Justice Blanchard hesitated as to whether the fact contempt could be committed without "an intention to interfere with the due administration of justice" as an undue restriction on freedom of expression. In Justice Blanchard's view the standard of proof beyond reasonable doubt of "real risk" ensured that justifiable criticisms of the administration of justice were not stifled and was a sufficient safeguard against unjustifiable limitations on freedom of expression. Further, proof of whether an accused intended the consequences was necessary before penalty was imposed. Justice Blanchard was of the view that "marking" (but not necessarily punishing) serious interferences with the administration of justice outweighed the right to freedom of expression.¹⁹¹

In my view the absence of an additional *mens rea* requirement is contrary to the fundamentals of criminal law that contempt, as the sole surviving common law offence, is part of. The primary function of criminal law is to condemn and punish for wrongdoing. If a person is not blameworthy for the wrong done, the censure of the criminal law is not appropriate – and if it is inflicted, the public will tend to think that it is because the person is to blame.¹⁹² The effectiveness of criminal law as a tool of social control would be diminished if persons who are not culpable of the prohibited act were convicted of the wrongdoing.¹⁹³ In a modern world where freedom of expression is highly valued and to be expected and encouraged of public institutions, it is likely that more social distrust would be caused by a conviction for contempt where no punishment is imposed for lack of intent, than the publication itself. Scandalising the court was not developed

¹⁹⁰ *Duff v Communicado Limited* [1996] 2 NZLR 98 (HC).

¹⁹¹ *Duff v Communicado Limited*, above, 101.

¹⁹² A P Simester and Warren Brookbanks *Principles of Criminal Law* (Brookers, Wellington, 1998) 12.

¹⁹³ Brookbanks, above, 12.

nor is it maintained to "mark" incursions caused by unlawful publications, but to punish those who are responsible for doing so.

Contempt by virtue of its summary process and objective is a serious criminal offence. In contrast to all other serious criminal offences no specific intent to cause the prohibited outcome as required. The public's confidence in the administration of justice is reliant upon a number of factors not only the prevention of the integrity of system that is placed at risk by scandalous publications. The public's confidence will also be undermined if the public perceives that those who administer the system do not do so by the consistent application of the principles of criminal law. Scandalising the court by its label wrongly suggests to the public that it exists to shield the judiciary and the judicial system from criticism.¹⁹⁴ To convict an accused of a serious crime that was not intended, that to the public "appears" to be for the benefit of those who administer the system, is likely to undermine public confidence that the criminal justice is being consistently dispensed. A conviction in the absence of intent would suggest to the public that the "system" was protecting itself for self interest purposes.

Finally, proof of "real risk" beyond reasonable doubt is a high and difficult burden to discharge in social circumstances where a much greater degree of tolerance to attacks upon the administration of justice is evident. The difficulties of proving "real risk" are illustrated by the unsuccessful application by the Solicitor-General for contempt following a media publication during a murder trial that had resulted in the trial Judge aborting the trial.¹⁹⁵ The burden of real risk was not simply satisfied by the trial been aborted.¹⁹⁶ Increased tolerance to criticism of the judiciary makes it unlikely that the cartoon in *Blomfield* case¹⁹⁷ would result in contempt proceedings today. No proceedings were brought for example when the *Daily Mirror* responded to the *Spycatcher* injunction in 1987 by publishing a photograph of the Law Lords below the

¹⁹⁴ *Solicitor-General v Radio Avon and Another* [1978] 1 NZLR 225, 229 (CA).

¹⁹⁵ *Solicitor-General v TV3 Network Services Ltd & TVNZ*, HC, Christchurch, M 520/96, 8 April 1997, Eichelbaum CJ and Hansen J.

¹⁹⁶ John McGrath QC "Contempt and The Media: Constitutional Safeguard or State Censorship" (1998) NZLR 371, 378.

¹⁹⁷ Refer pages 14-15 above.

headline "You Fools!".¹⁹⁸ The high burden of proof coupled with the general restraint upon invoking the court's powers of contempt, particularly those relating to scandalising, that are reserved for urgent and flagrant cases¹⁹⁹ makes it difficult to envisage that a serious interference with the administration of justice could occur inadvertently.²⁰⁰ In my view "real risk" will only be proved where there is the accompanying intent, albeit reckless disregard to the foreseeable consequences. In the recent cases of scandalising the court, outlined in section II(A) of this paper,²⁰¹ intent, although not required to be proved, could have been inferred from the facts of each case. In *Oriental Press Group*²⁰² there was a sustained course of conduct by the newspaper over a substantial period of time entailing extreme and abusive language that could only have been designed to harass intimidate and abuse tribunal members and Judges. The numerous publications had resulted in correspondence to the newspaper from members of the public that evidenced that the newspapers campaign to undermine the administration of justice was having that effect. On the facts of the case it would have been open to the Hong Kong High Court, if required, to have inferred that the editor and publishers had intended to bring the administration of justice into disrepute. In the Australian case *Fitzgibbons v Barker*²⁰³ and the Privy Council decision of *Ahnee v DPP*²⁰⁴ intent could also have been inferred from the extremity of the impropriety alleged in each publication and the blatant misstatements of material non-contestable facts. These cases illustrate that "real risk" is only likely to be found in extreme cases where an intent to undermine the administration of justice could also be inferred from the facts of the case. As the seriousness of the "real risk" to the administration of justice has increased it is unlikely that the intent could not be inferred from the publication in issue.

¹⁹⁸ Nigel Lowe and Brenda Sufrin *The Law of Contempt* (3rd ed, Butterworths, London, 1996) 343.

¹⁹⁹ *Badry v DPP of Mauritius* [1983] 2 AC 297, 303-304; John Burrows and Ursula Cheer *Media Law in New Zealand* (4th Edition, Oxford University Press, Auckland, 1999) 273 and 278.

²⁰⁰ *Duff v Communicado Limited*, above, 101.

²⁰¹ Refer pages 7-10 above.

²⁰² *Secretary for Justice v Oriental Press Group Limited and Ors* [1998] 2 HKC 627.

²⁰³ *Fitzgibbon v Barker* (1992) 111 FLR 19 (Austral Fam Ct).

²⁰⁴ *Ahnee v DPP* [1999] 2 AC 294 (PC).

Two criticism of an additional *mens rea* requirement might be that the standard of proof that is more difficult²⁰⁵ thereby placing at risk the administration of justice if proof of the offence becomes unattainable. While an initial concern it is more likely that the difficulties of proving "real risk" in today's social climate is the real limitation. Further, while convictions may be more achievable without proof of an additional intent, the absence of any penalty imposed due to the lack of an accused intent is of itself an unsatisfying result. A second criticism may be that the absence of intent from those areas of contempt that fall within the strict liability offence provisions under the United Kingdom Contempt of Courts Act 1981 reflect the importance of the objective of the offence that has been the basis of resisting an additional *mens rea* requirement to date. In my view little can be inferred from the statute that does not cover scandalising the court. In addition the impact of the United Kingdom Human Rights Act 1998 is yet to be determined.

VI CONCLUSION – IS SCANDALISING THE COURT A JUSTIFIABLE LIMITATION

While the courts will exhibit some caution to decisions from overseas jurisdictions given the need to consider the local contemporary circumstances when determining contempt proceedings, New Zealand courts will also not want to adopt an approach that would be entirely contrary to other jurisdictions that New Zealand normally has regard to. *Kopyto* was determined at a time when the power of contempt for scandalous publications had not recently been invoked. As Justice Cory and Justice Houlden both noted, "The United Kingdom, although recognising the existence of the offence, has not registered a conviction for over 60 years".²⁰⁶

Since *Kopyto* New Zealand has enacted the BORA and the United Kingdom the Human Rights Act 1988. Scandalising the court in the intervening 15 years since *Kopyto* has continued to invoked periodically. Although no successful prosecution in the United Kingdom has been brought, the Privy

²⁰⁵ *R v Kopyto* (1987) 47 DLR (4th) 213, 241, Cory JA.

²⁰⁶ *R v Kopyto*, above, 238 Cory JA, 255 Houlden JA.

Council has continued to uphold the offence.²⁰⁷ The Australian Supreme Court of Victoria found an accused guilty in November 2001 for contempt for publishing a scandalous book that was unrelated to any proceedings.²⁰⁸ Contempt proceedings for scandalous remarks in the face of the court were brought before the Canadian Alberta Court of Queens Bench in November 2002.²⁰⁹ Finally, the Hong Kong High Court for the first time entered convictions for scandalising the court, post-trial, in 1998.²¹⁰

No careless involvement of scandalous contempt has come before the European Court of Human Rights. The relevance of European convention jurisprudence in New Zealand is emphasised in *Lange v Atkinson*.²¹¹ In *Prager and Oberschlick v Austria*²¹² the European Court considered whether the applicant's conviction for defaming a judge in a periodical was a violation of their right to freedom of expression, contrary to Article 10 of the European Convention of Human Rights. The European Court concluded the publication in issue had not only damaged the judge's reputation but also undermined public confidence in the integrity of the judiciary as a whole.²¹³ The European Court held that there had been no violation of Article 10, that the limitation of the applicant's freedom of expression was "necessary in a democratic society". Of significance is the following passage in the judgment:

Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying.²¹⁴

²⁰⁷ *Ahnee v DPP* [1999] 2 AC 294.

²⁰⁸ *R v Hoser and Kotabi Pty Limited* [2001] VSC 443.

²⁰⁹ *R v Prefontaine* [2002] AJ No 134.

²¹⁰ *The Secretary for Justice v The Oriental Press Group Limited and Others* [1998] 2 HKC 627.

²¹¹ *Lange v Atkinson* [1998] 3 NZLR 424, 457 (CA).

²¹² *Prager and Oberschlick v Austria* (1995) 21 EHRR 1.

²¹³ *Prager and Oberschlick v Austria*, above, 20 para [36].

²¹⁴ *Prager and Oberschlick v Austria*, above, 20 para [34].

The above recent cases illustrate that New Zealand would not be on its own if it were to continue to rely upon the contempt powers of scandalising the court.

Scandalising the court, as archaic as it may sound, is an important safeguard in protecting a fundamental public institutions. The appropriate balance needs to be struck between the competing ideals of freedom of expression and protecting the administration of justice from falling into disrepute in the eyes of the public. Both ideals are fundamental to a democratic society. If the balance were to shift too far in favour of the offence the public confidence that it seeks to protect would be undermined by the impression that the courts were adopting a "self preserving" approach. On the other hand, the need for there to be some reasonable means for preventing public confidence being lost by publications that make no contribution to the public debate, while not stifling debate about the administration of justice, must be achieved.

In my view the balance is struck by an offence that is only invoked in the most serious of cases that requires proof beyond reasonable doubt of not only intent to publish, but also intent (direct or reckless disregard) that the publication would undermine public confidence. In addition there must be a real risk that the publication will result in the administration of justice being brought into disrepute. The test is sufficiently high in terms of the standard of proof and the evidence required that the encroachment on the affirmed right of freedom of expression will be minimal and reserved for only those few very cases where the circumstances of the publication call for action to be taken. The addition of a further element of intent will enhance the acceptability of the offence and prevent the public perception that the offence is one of self-interest that would of itself undermine public confidence. The additional intent requirement is unlikely to be burdensome upon the applicant and will act as a check as to whether there is sufficient evidence of "real risk" for the proceedings to be brought. The history of the offence in New Zealand of itself illustrates that a cautious conservative approach has been traditionally adopted by the Law Officers responsible for initiating committal proceedings and by the Courts in determining them. This

history of itself illustrates freedom of expression will not readily be limited in New Zealand.

Kopyto will be relevant to a s 5 BORA analysis of the offence of scandalising the court, but given the passage of time since *Kopyto*, the continued recognition of the offence in various jurisdictions and need for an evaluation of the elements of the offence from a local contemporary perspective it is unlikely that the various rationales for re-formulation of the offence would be followed in New Zealand, expect of the adopting of an additional *mens rea* element of intent.

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