SANDRA JOY SANDFORD

CONTEMPT OF COURT

- a casenote on Radio Avon and Lilley v. Solicitor-General.

Legal Writing Requirement for the LL.B (Hons.) degree.

Victoria University of Wellington,

Wellington, New Zealand. 1978.

SANDRA JOY SANDFORD

CONTEMPT OF COURT

- a casenote on Radio Avon and Lilley v. Solicitor-General.

Legal Writing Requirement for the LL.B (Hons.) degree.

Victoria University of Wellington,

Wellington, New Zealand. 1978.

INTRODUCTION:

Lord Russell of Killowen C.J., in R. v. Gray,[1] sets out the classic definition, from a legal point of view, of what is included in the concept of contempt of court: [2]

> "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. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court. The former class belongs to the category which Lord Hardwicke L.C. characterised as "scandalising a Court or a Judge": Roach v. Carvan (1742) 2 Atk. 469, 471."

A rationale for the existence of the law of contempt was expressed by Lord Denning M.R. in Morris v. The Crown Office [3] when he said:

> " The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society."

Traditionally, Contempt of Court is classified into two branches:

(1) Criminal contempt, which is also in two branches -

  (a) Contempt in the face of the court

  (b) Contempt out of court

(2) Civil contempt.

However, this double dichotomy of classification obscures the fact that the rationale of both criminal and civil contempt is essentially the same, i.e. upholding the effective administration of justice.

This paper will deal only with Criminal Contempt of Court, excluding the area of contempt in the face of the court.

---

1 [1900] 2 Q.B. 36

2 ibid p. 40.

3 [1970] 1 All E.R. 1079, 1081.

Contempt of court, as a criminal offence, is unique in New Zealand because it is a composite of statute law and common law, while all other New Zealand crimes are purely statutory.

Section 9 of the Crimes Act 1961 states that the Supreme Court retains its power to punish anything which would have been a contempt at common law -

> s.9 - No one shall be convicted of any offence at common law or of any offence against Act of the Parliament of England or the Parliament of Great Britain or the Parliament of the United Kingdom:
> Provided that -
> (a) Nothing in this section shall limit or affect the power or authority of the House of Representatives or of any Court to punish for contempt:

In New Zealand the distinction between contempt in the face of the court and contempt outside the court is very significant because s.401 of the Crimes Act 1961 governs contempts in the face of the court. Section 401(1) enumerates three instances where contempt in the face of the court can be committed and wilfulness is an element in each of these instances. Subsection 3 retains jurisdiction for common law contempts to which s.401 does not apply. The same provision occurs in s.56C of the Judicature Act 1908 (inserted by s.3 of the Judicature Amendment Act 1960). As a result, contempt in the face of the court is largely free from the subjective and uncertain powers which the Court can exercise in respect of contempts falling outside this section.

Criminal contempt is a criminal offence [4] and is punishable by

(i) unlimited fine

and/or (ii) unlimited period of imprisonment. [5]

---

4 Baloch v. Crown Court at St. Albans [1974] 3 All E.R. 283, 289 per Lord Denning, M.R.

5 This is theoretically so, but Attorney-General v. Jones [1962] 2 Q.B. 637 held that the imprisonment must be for a fixed term.

Several characteristics distinguish it from ordinary crimes:-

(1) criminal contempt is tried by summary process without a jury.

(2) proceedings are begun by an application for an order of committal, whereas normal prosecutions are begun on an indictment or by the issue of a summons.

(3) evidence is by affidavit, whereas in an ordinary criminal case, the hearing is by oral evidence.

(4) the full range of orders available to a Judge in an ordinary criminal offence are not available in cases of contempt. In Attorney-General v. Taylor,[6] for example, Beattie J. made an order under s.42 of the Criminal Justice Act 1954, and later had to revoke it because s.42 was not applicable to a contempt case.

(5) a subjective intention to commit contempt is not an element of the offence, something which is contrary to the general policy of the criminal law.

.....

In this paper particular emphasis will be placed on the branch of the law of contempt known as "scandalising a court or judge". The special justification for this category is that it is contrary to the public interest that public confidence in the administration of justice should be undermined. Thus Lord Denning, speaking extra-judicially, has said:[7]

> "The judges must of course be impartial: but it is equally important that they should be known by all people to be impartial. If they should be libelled by all traducers so that people lost faith in them, the whole administration of justice would suffer."

---

6 [1975] 2 N.Z.L.R. 138.

7 Lord Denning, The Road to Justice - Stevens, 1955, p.73.

It is important to appreciate that this branch of the law does not exist to vindicate the personal dignity of the Judge who has been abused, but rather to preserve respect for the administration of justice in the courts.

RADIO AVON and LILLEY v. SOLICITOR - GENERAL: [8]

Issues relating to the characteristics of contempt by "scandalising the court or judge", and to the law of contempt in general, were recently considered by the Court of Appeal in the Radio Avon case.

Briefly, the facts were these. On 28 May 1976 a Christchurch radio station, which had a listening audience of about 50,000 people of the age of 10 years or more, broadcast a news item in the 7.30 a.m. news which said that Mr Justice Roper, having been involved in a controversy relating to his son's prosecution on a blood alcohol charge in February 1976, was now at the centre of another controversy relating to his dismissal of a charge against a man involved in the Moby Dick's arson case "in a hearing behind closed doors 10 days ago."

The second appellant, news editor at Radio Avon, heard the news item at his home and immediately arranged to have it withdrawn from any further broadcasts.

The item had been rewritten by the morning sub-editor who, in the process of re-writing, had misinterpreted and misrepresented the facts, but Mr Lilley had taken it upon himself to refuse to name the sub-editor. The Company broadcast an apology at 7.30 a.m. on 13 July, stating that the procedure referred to was not the subject of any controversy and that "the words 'behind closed doors' were inappropriate to refer to a matter dealt with in chambers."

Following Police enquiries, the Solicitor-General filed a motion in the Supreme Court in August 1976, alleging that the news item broadcast on 28 May amounted to a contempt of court.

---

8 [1978] 1 N.Z.L.R. 225

The Supreme Court's decision. [9]

The case was heard by a Full Court (Wild C.J. and Casey J.). In a reserved judgment delivered on 4 November 1976 by Wild C.J., it was held that the broadcast amounted to a contempt of court, and Radio Avon Ltd. was fined $500. Mr Lilley, as news editor in overall control of the news items broadcast by Radio Avon, was fined $200.

The Court said that although the news item lasted only 40 seconds, there was no doubt that it conveyed to the listener that there was something improper about the hearing and the decision. The inference was that "the judge had permitted a hearing before him to take place in private when it should have been in public, and that there had been some preferential treatment. This plainly imputed impropriety and a lack of judicial integrity on the part of the judge." [10]

Mr Lilley was found guilty of contempt by applying to the broadcasting situation the principle of editorial responsibility which has been adopted in England where a newspaper publishes material which amounts to a contempt of court. Mr Lilley was held liable "not only by reason of his stopping any repetition of the broadcasting but also by taking upon himself ... the responsibility of refusing to identify the sub-editor concerned. These actions demonstrate that he was in overall control of this area of the station's activities, making it appropriate that he be held responsible for what was broadcast within that area, in the same way as would apply to a newspaper editor." [11]

---

9 Solicitor-General v. Radio Avon Ltd. & another [1977] 1 N.Z.L.R. 301.

10 ibid at p.303.

11 ibid at p.305.

The Court of Appeal's decision.

The appellants appealed to the Court of Appeal pursuant to s.384 of the Crimes Act 1961, which confers a special right of appeal where any person is found guilty in the Supreme Court of a criminal contempt. The appeal was against both conviction and the fines imposed.

The Court dismissed the appeal by Radio Avon, but allowed that of Mr Lilley.

With regard to the appeal by Radio Avon, the Court agreed with the conclusion reached by the Supreme Court, "that this plainly imputed impropriety and lack of judicial integrity on the part of the Judge", and said that the broadcast amounted to "an irresponsible act prompted by commercial motives and carried out ... with indifference to the effect which it was likely to have on public confidence in the administration of justice." [12] As a result the Court found that the broadcast fell squarely within the first limb of Lord Russell's classic definition of contempt. [13]

As regards the fine of $500 imposed by the Supreme Court, the Court of Appeal said that "in terms of present day currency the fine of $500, imposed on a commercial undertaking, was in fact a modest one", [14] and the imposition of the fine and of the order to pay costs was justified.

The appeal by Mr Lilley was allowed because "in all the circumstances of this particular case if the Company is fined we would not think it necessary to penalise the news editor as well." [15] In any case the Court thought Mr Lilley could not be saddled with liability without evidence of his responsibility regarding the editing of news items when he was not at the Station, and such evidence was lacking.

---

12 note 8 supra, p.242.

13 ante p.1.

14 note 8 supra, p.242.

15 idem.

ISSUES ARISING FROM THE DECISION:

First of all, the Court of Appeal affirms that "scandalising the Court" does still exist as a category of contempt, despite the statement by Lord Morris in McLeod v. St.Aubyn [16] that -

> "Committals for contempt of court by scandalising the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."

That the jurisdiction did still exist was affirmed in England only one year after the McLeod decision by R. v. Gray, [17] and in New Zealand in the 1914 case of Attorney-General v. Blomfield [18] when Williams J. said [19] -

> "The Privy Council does not deny the power of the Court to commit for this class of contempts but merely says that such committals in England have become obsolete ... the mere fact that a power which once existed has for a long time remained unexercised does not cause the power to cease to exist. That the power in question continues to exist in England, although it may have been long unexercised, is shown by the case of R. v. Gray."

The Court regarded subsequent decided cases, namely the decision in Re Wiseman, [20] as showing that the jurisdiction does still exist. Wiseman, an Auckland solicitor, alleged that during a previous case certain judges had been guilty of forgery, of fabricating evidence and of deliberately showing partiality to W's opponents, and was convicted of criminal contempt by "scandalising the Court".

Secondly, the Court of Appeal clearly decided that it is not possible in New Zealand to prosecute the common law offence of contempt of court by way of indictment. [21] "This is because of the effect of

---

16 [1899] A.C. 549, 561.

17 note 1 supra.

18 [1914] 33 N.Z.L.R. 545.

19 ibid p.560.

20 [1969] N.Z.L.R. 55.

21 note 8 supra, p.235.

s.9 of the Crimes Act 1961." [22] Section 9 was enacted to give statutory recognition to the decision of the Full Court in Re Cobb, [23] a case decided in relation to s.5 of the Crimes Act 1908, which was replaced by s.9 of the present Act. In delivering the judgment of the Court in that case, Salmond J. concluded: [24]

> "The purpose and effect of that section were merely to abolish common-law felonies and common-law misdemeanours as the subject-matter of indictment, and to provide that for the future the only indictable offences should be those set out in the Criminal Code or in some other statute not inconsistent therewith. This being so, the Supreme Court preserves unimpaired and unaffected its original jurisdiction to ... deal summarily with all conduct which is recognised by the common law as amounting to criminal contempt of Court."

Thus, the Court of Appeal concluded that the position under s.9 is "precisely as stated in the foregoing passage", and as a result the only way in which contempt of court can be dealt with in New Zealand is by the summary process.

Thirdly, when holding that the power still existed, the Court of Appeal placed particular emphasis on the reasons for the jurisdiction, especially when Richmond P. said: [25]

> "No one can question the extreme public importance of preserving an efficient and impartial system of justice in today's society which appears to be subject to growing dangers of direct action, in its various forms. It is to that end, and to that end alone, that the law of contempt exists."

That statement reinforces the traditional justification for the power; that is, that it exists not to vindicate a judge, but to protect the administration of justice.

The justification offered by the Court of Appeal corresponds with the conclusions reached by the English (Phillimore) Committee

---

22 idem.

23 [1924] N.Z.L.R. 495.

24 ibid, at p.498.

25 note 8 supra, p.229.

on Contempt of Court.[26] In para. 10 of their Report, the Committee recommended the preservation of the contempt power because -

(1) new forms of communication, such as television, can make a powerful impact on the public and so potential dangers to the administration of justice were obvious.

and (2) in recent years there has been a tendency to challenge authority of all kinds, including that of the Courts.

In the Radio Avon decision the New Zealand Court of Appeal was making no changes in the traditional concept of contempt. The traditional justifications for the power were maintained in a modern context. The Court felt that "it is the fundamental supremacy of the law which is challenged",[27] and in the modern era, with the influence of the media and challenges to the social structure, more than ever did the administration of justice need to be maintained.

This reasoning is evident in several places in the judgment -

(1) the Court alludes to the risk involved in broadcasting an imputation of judicial partiality to 50,000 people of 10 years and over, saying that it was a "real risk ... that public confidence in the administration of justice would be undermined."[28]

(2) the Court referred to a proposition advanced on behalf of the appellants that a prosecution could have been brought under s.216 of the Crimes Act 1961.[29] Section 216 defines the crime of criminal slander: "every one who, without lawful justification or excuse, uses words that are likely to injure the reputation of any person by exposing him to hatred, contempt, or ridicule, or likely to injure him in his profession, office, business, trade, or occupation, is guilty of

---

26 Cmnd. 5794, reported to the House of Commons in December 1974 - hereinafter referred to as the Phillimore Committee.

27 Johnson v. Grant (1923) S.C. 789, 790 per Lord President Clyde.

28 note 8 supra, p.234.

29 note 8 supra, p.237.

criminal slander." However, the Court says such a prosecution was not a suitable alternative to the contempt proceedings because s.216 "is not a section which is particularly concerned with protecting the administration of justice." [30]

Fourthly, the Court pays heed to the classic expression of the extent of, and the limits to, criticism of the administration of justice, made by Lord Atkin in the Privy Council decision of Ambard v. Attorney-General for Trinidad and Tobago: [31]

> "The path of criticism is a 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 genuinely exercising a right of criticism, and are 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 respectful, even though outspoken, comments of ordinary men."

The Court of Appeal noted that Lord Atkin's statement in the Ambard case excludes from protection any criticism which imputes improper motives to those taking part in the administration of justice, and recognised that criticism "put forward fairly and honestly for a legitimate purpose and not for the purpose of injuring our system of justice" [32] was protected by the right of freedom of speech.

This recognition is in line with the conclusion reached by the Phillimore Committee that there must be freedom to comment or criticise within reasonable limits, because the conduct of judges as judges and the decisions of courts are matters of legitimate concern.

The Court then raised the issue of the availability of the defences of fair comment and justification. [33] Although the Court expresses no concluded opinion on the issue, it does lean to the view that while a defence of fair comment will be allowed, a defence of justification to

---

30 idem.

31 [1936] A.C. 322,335.

32 note 8 supra, p. 230.

33 note 8 supra, p. 231.

allegations of partiality and bias will not be available.

Referring to Lord Atkin's statement in the Ambard case, [34] the Court of Appeal proposed that if criticism imputing improper motives to those taking part in the administration of justice was excluded from protection then "nobody could publish a true account of the conduct of a judge if the matter published disclosed that the judge had in fact acted from some improper motive", nor, on the basis of facts truly stated, could it be possible "to make an honest and fair comment suggesting some improper motive, such as partiality or bias, without running the risk of being held in contempt." [35]

That question was considered by the authors of The Law of Contempt, [36] and the view expressed that "provided the allegation of partiality is free from the taint of scurrilous abuse and can be either justified or be properly considered as fair comment, it ought not to amount to contempt." [37]

Borrie & Lowe consider that "the courts seem to be well able to draw the line between scurrilous abuse on the one hand and criticism of a court's conduct on the other." [38] Some examples of comment which have been held to be scurrilous abuse are:

> (i) The judge is an impudent little man in horse-hair. ... a microcosm of conceit and empty headedness ... No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice Darling is exempt. Mr Justice Darling would do well to master the duties of his own profession before undertaking the regulation of another.[39]

Of those words Lord Russell of Killowen C.J. said "it is not criticism: I repeat that it is personal scurrilous abuse of a judge as a judge", [40]

---

34 note 31 supra.

35 note 8 supra, p. 231.

36 G.J. Borrie & N.V. Lowe, The Law of Contempt - Butterworths, 1973, pp.383-384; hereinafter referred to as Borrie & Lowe.

37 ibid at p. 384.

38 ibid at p. 383.

39 note 1 supra.

40 note 1 supra, p.40.

and the author himself said in an affidavit "I used language referring to Mr Justice Darling in terms which were intemperate, improper, ungentlemanly, and void of the respect due to his Lordship's person and office".

> (ii) If that bastard [meaning the Magistrate] hears the case I will see to it that he is defrocked and debarred ... the decision is so blatant and so improperly judicially improper that I can only come to one conclusion, that it was based on political considerations, rather than on the facts as they are in the Civil Service Act and in the Vacations Pay Act. [41]

Of these words Nitikman J. called the language used "vulgar, abusive and threatening." [42]

However, a newspaper article which began -

> "Mr Justice Higgins is, we believe, a political Judge, that is, he was appointed because he had well served a political party. He, moreover, seems to know his position, and does not mean to allow any reflections on those to whom he may be said to be indebted for his judgeship" [43]

was held not to be scurrilous abuse as Griffith C.J. found the article was "not calculated to obstruct or interfere with the course of justice or due administration of the law in the High Court", and so did not amount to a contempt of court.

So, how have the Courts distinguished between allegations of partiality which are "free from the taint of scurrilous abuse", and those which are not?

Australian cases shed some light on this question: In R. v. Fletcher, ex parte Kisch [44] Evatt J. said "the facts forming the basis of the criticism must be accurately stated, and the criticism must be fair and not distorted by malice." [45] In R. v. Brett [46] O'Bryan J. posed questions: "What are the limits of criticism and comment ... and when does hostile criticism become contempt of court?" [47]

---

41 Anger v. Borowski [1971] 3 W.W.R. 434 (Manitoba).
42 ibid at p. 446.
43 R. v. Nicholls (1911) 12 C.L.R. 280.
44 (1935) 52 C.L.R. 243.
45 ibid at pp.257-258.
46 [1950] V.L.R.226.
47 ibid at p. 229.

He considered that there were two factors which may vitiate a comment which might otherwise be considered fair and justifiable -

(1) an untruthful statement of the facts upon which a comment is based

and (2) the motive of the writer, i.e. malice, or an intention or tendency to impair the administration of justice,

may result in a comment becoming a contemptuous one. These factors were used as a test by the Court in R. v. Foster, ex parte Gillies [48] in holding that as the writers and publisher of a letter printed in a newspaper were not acting in malice or attempting to impair the administration of justice, but were exercising their general right of criticism, then they were not guilty of contempt of court. In Attorney-General v. Mundey [49] Hope J.A. said "the use of strong language will not convert permissible criticism into contempt unless perhaps it is so wild and violent or outrageous as to be liable in a real sense to affect the administration of justice." [50]

Similarly, in the English case of R. v. Commissioner of Police of the Metropolis, ex parte Blackburn (No 2), [51] Salmon L.J. said "no criticism of a judgment, however vigorous, can amount to contempt of Court, providing it keeps within the limits of reasonable courtesy and good faith." [52]

Thus, it seems to emerge from these cases that a criticism will overstep the line and become scurrilous abuse and so constitute contempt, if it evinces an intention or tendency to impair the administration of

---

48 [1937] St.R.Qd. 368.
49 [1972] 2 N.S.W.L.R. 887.
50 ibid, at p.910.
51 [1968] 2 Q.B. 150.
52 ibid, at p.155.

justice because -

(i) the criticism is distorted by malice

or (ii) the language employed does not meet a standard of reasonable courtesy, i.e. the criticism may be made in such an offensive and insulting manner that it exceeds the limits of 'fair' criticism.

The Court of Appeal stated that "there are greater difficulties as regards a defence of justification"[53] and directed the reader to a discussion made by C.J. Miller.[54] These "greater difficulties" referred to, stem from the fact that no decision has yet recognised the availability of a defence of justification, despite Borrie & Lowe's view that it is available.

Miller noted that in the New Zealand case of Attorney-General v. Blomfield[55] Williams J. considered whether a defence of justification might be available to a contemnor charged with scandalising the Court through imputing partiality to the judge. However, Williams J. decided that it was not open to the alleged contemnor to bring forward evidence in justification to show whether and how far his imputations were justified because "that has never been done and cannot be done in summary proceedings for contempt. The Court does not sit to try the conduct of the Judge."[56] On this issue of the availability of the defence of justification, Stout C.J., also of the majority, had this to say:[57]

> "[I]f a criticism is alleged to be a contempt, the Court would be bound ... to allow the person charged with the contempt to justify his criticism and to show that the comment was fair. The procedure in a case of contempt ... is hardly suitable for the conduct of inquiries such as these."

---

53 note 8 supra, p.231

54 Contempt of Court - Hlek Books, 1976, pp.192-194.

55 note 18, supra.

56 note 18 supra, p. 563.

57 note 18 supra, p.559.

As long ago as 1873, in Skipworth's and Castro's Case,[58] Blackburn J. denied a defence of justification when he said:[59]

> "The defendant urged that we ought to allow the case to go to trial before a jury, because he might prove the truth of what he had alleged. The truth of it has nothing to do with the question. The question at present is, is he trying to interfere with the course of justice?"

The English case of Vidal[60] and the Justice Committee in their report Contempt of Court[61] also suggested that the defence was not available.

Miller prefers the view of the Phillimore Committee who considered the availability of a defence of justification, but rejected it on the ground that such a defence might give a public platform, in the form of a criminal trial, for "malicious invective". They also thought that it would encourage allegations to be made in the hope of having a case reheard, or that some damaging episode from a Judge's past may be published in the hope of casting doubt upon his fitness to try caswa. Instead, the Phillimore Committee said it should be a defence to show that allegations were true and that the publication was for the public benefit.[62] The Committee recommended that evidence of corrupation or partiality should be submitted to the Lord Chancellor, so as to meet the public benefit requirement.

Although the Court of Appeal does not seem to think that justification can be pleaded, it is submitted, following the recommendations of the University of Birmingham's Institute of Judicial Administration,[63]

---

58 (1873) L.R. 9 Q.B. 230.

59 ibid, at p. 234.

60 The Times, 9 May 1931, quoted in C.J. Miller - Contempt of Court at p. 195.

61 (1959), at p. 15.

62 note 26 supra, para 167.

63 Evidence to the Phillimore Committee on the Law of Contempt of Court, G.J. Borrie & N. V. Lowe, December 1971.

that an allegation of bias [64] should be allowed to be justified, because if it is proved that a Judge was biased, then it is he, not the person who makes the allegation, who is really responsible for bringing the administration of justice into disrepute. Thus it is submitted that New Zealand courts should admit a defence of justification only if the alleged contempt was a statement that the Court or Judge was biased. This limitation ought to be imposed because, as the Phillimore Committee said, the conduct of judges as judges and the decisions of courts are matters of legitimate concern. Uninvestigated suspicion about a judge's partiality towards one of the parties before him is likely to erode public confidence in the administration of justice more than the spectacle of a court considering whether a judge actually was partial. If it finds that he was, at least the truth is out. If it finds that he was not, most of the public, apart from some inevitable cynics, will be reassured.

Fifthly, the Radio Avon decision held that an article may constitute a contempt without the necessity to prove an actual intention, on the part of the author, to interfere with the administration of justice by scandalising the Court. [65]

In R. v. Odham's Press Ltd.[66] Lord Goddard C.J. stated: [67]

> "Lack of intention or knowledge is no excuse ... The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result."

---

64 "bias" is used in the sense of "partiality".

65 note 8 supra, p. 232.

66 [1956] 3 All E.R. 494.

67 ibid, at p.497.

However, lack of intention to scandalise is relevant to the question of penalty according to the decisions in Odham's Press and in the New Zealand case of Attorney-General v. Hancox.[68] Thus the only relevant intention, so far as liability is concerned, is an intention to publish. But it is the irrelevance of the intention to scandalise which is contrary to the general principles of criminal law.

Counsel for the appellants submitted that in the case of contempt by scandalising the Court, the alleged contemnors could be convicted only if -

(a) the act complained of was -

(i) wilful and calculated to lower the authority of the Judge,

and (ii) intended to have that effect;

or (b) the defendant must have foreseen such a possibility and had been reckless as to the result.

That was the decision of Claassen J. in the South African case of S. v. Van Nierkerk.[69] The Phillimore Committee took a more restrictive view and concluded[70] that there should be liability only if the article was published with the intention of impairing confidence in the administration of justice.

Referring to Lord Russell's speech in R. v. Gray,[71] the Court of Appeal said that he made no distinction between one form of contempt and another, from the point of view of the intent of the defendant, and so - (i) the Court of Appeal doubted whether it was able to introduce a special requirement of mens rea into one branch of contempt, namely "scandalising the court", and

---

68 [1976] 1 N.Z.L.R. 171.

69 [1970] 3 S.A.L.R. 655.

70 note 26 supra, para 164.

71 note 1 supra.

(ii) in any event the Court was not prepared to do so, as it felt that the public interest in the administration of justice must be the paramount consideration, and concluded that that reasoning justified the attitude taken by the English courts.

As to the first of the Court of Appeal's objections, the writer respectfully agrees that there should be consistency and an absence of anomalies in the law of contempt. However, if contempt of court by "scandalising" were removed from the category of Contempt and replaced by a strictly defined criminal offence, as has been suggested by other writers in this field, [72] it is submitted that there would then be justification for introducing the requirement of intent to scandalise, as such a subjective intention is a generally accepted element of a criminal offence. If this were done, then the separate criminal offence of "scandalising the court" would be outside the category of Contempt, and so contempt of court would remain an offence for which a lack of an intention to scandalise is irrelevant.

However, as the law stands at present, mens rea is not an element of contempt and, given that the public interest in the administration of justice must be the paramount consideration, the stance taken by the existing law is correct. After all, it is the allegation which brings the administration of justice into disrepute, regardless of whether the author intended that result.

As to the Court of Appeal's second reason for imposing strict liability, it has been said that: [73]

> "It has become customary in certain fields for offences of strict liability to be created. This is because the subject matter in those areas is such that it is considered justifiable to demand a high standard of positive care and control in the interests of society as a whole."

---

72 notably - Phillimore Report, para.164.

- A.V. Parish, The Law of Contempt: should it be Codified?, LL.M. Research paper, Victoria Univ. 1975.

73 Thornton, Legislative Drafting - London, 1973, at p.265.

The Court of Appeal imposed strict liability because it considered that the public interest in the administration of justice was so great that a high standard of care and control was demanded to protect society as a whole. As a result the imposition of strict liability was warranted.

However, it is submitted that the imposition of strict liability in the law of contempt will not improve the observance of the law. The person who has never put his mind to the risk of his article incurring a Contempt allegation, will publish regardless of the law because he does not see his article as being contemptuous - in that case the law is no deterrent. But it will improve observance in that it may cause organisations to improve their business methods so as to prevent instances of contempt. Reference to this aspect was made by the Court of Appeal when it said: [74]

> "...no evidence was given on behalf of Radio Avon to show what steps if any had been taken to set up a system designed to prevent the publication of offending material."

Sixthly, the Court of Appeal raised the issue whether the principle of strict editorial responsibility for the publication of contempts, should be adopted as part of the law of New Zealand (although that issue was not argued in the case).

That principle has been accepted in English courts since the case of R. v. Evening Standard [75] decided that it was necessary for the proper protection of the administration of justice that some individual person in a position of central responsibility should be called on to answer for a contempt.

The issue was considered by the Phillimore Committee, who decided [76] that the principle should be retained, both in the case of newspapers

---

74 note 8 supra, p. 242.

75 (1924) 40 T.L.R. 833.

76 note 26 supra, paras.150-151.

and in broadcasting, although they pointed out that there was greater difficulty in the case of broadcasting in deciding who was to bear this responsibility.

The Court of Appeal recognised these difficulties and postulated [77] that "on fuller consideration the advantages of adopting such a strict rule may be found insufficient in the public interest, to justify an exception to the ordinary rules of the common law as to vicarious liability in criminal cases."

However, the Court expressed no concluded opinion on the matter for two reasons -

(1) the jurisdiction over contempt has traditionally been exercised with restraint and tolerance - for example, the Court here imposed no penalty on Mr Lilley because the Company was fined.

(2) if editorial responsibility applies to radio stations in New Zealand, the Court questioned whether the news editor of a particular station was the appropriate person to bear the responsibility, even in respect of news broadcasts.

In regard to the Court's doubts as to who should bear the responsibility, the Phillimore Committee said [78] that in any broadcasting situation, there is or should be one senior executive who has overall day-to-day responsibility for the content of programme output, and so that person would be in an analogous position to a newspaper editor as regards responsibility. The writer agrees with that analogy, and submits that the Court of Appeal was correct to question whether the news editor ought to bear the responsibility, for each radio station has a Programme Controller or a Station Manager who fulfills that role.

---

77 note 8 supra, p.241.

78 note 26 supra, paras.150-151.

> "When one considers the extent to which television and radio have superseded the printed word as popular media of communication, it is remarkable that there is virtually a complete lack of case law involving alleged contempts committed through them." [79]

In R. v. Pacini [80] a Melbourne radio station broadcast an interview with a detective who had been concerned with the arrest of a man for attempted murder. The programme was held to imply the guilt of the accused and therefore to have jeopardised his chances of a fair trial. As a result, the broadcasting company and the announcer were convicted of contempt, but were given small fines because "there had been no previous proceedings of this kind against a broadcasting station and I do not think that those directing the broadcasting were aware, as those directing the newspaper are aware, of the necessity of seeing that matter broadcast did not amount to contempt. Nor did they instruct or warn their broadcaster of the danger." [81]

There have been so few cases involving radio contempts that the courts have not really considered responsibility, but s.3(5)(c) of the Criminal Justice Act 1967 (U.K.) places liability for broadcasts upon "any persons having functions in relation to the programme corresponding to those of the editor of a newspaper or periodical." Borrie & Lowe suggest that this means "liability will devolve only on those really responsible for the broadcast", [82] and further suggest that this responsibility means that they have control over what they broadcast, in terms of content of broadcast and 'cutting' the programme if necessary. " T his liability can be established on the same grounds as the editor of a newspaper." [83]

The draft bill annexed to the Report of the Special Committee on Defamation [84] proposes that "an editor or other person responsible for

---

79 note 54 supra, p.179.

80 [1956] V.L.R. 544.

81 ibid, at p.551.

82 note 36 supra, pp.202-203.

83 idem.

84 Reported to the Minister of Justice, December 1977.

the control of a publication or a broadcast shall not be liable unless he approved publication of the offending article or was on duty at the time it was prepared for publication." [85]

In the Radio Avon case the Court of Appeal referred to this responsibility as involving "vicarious liability", but it is submitted that that would not be the nature of the liability. Borrie & Lowe suggest [86] that contempt of court should not be an offence which imports vicarious liability for three reasons -

(1) the essence of a contempt is the publication of material, and that is an act which can be done by the proprietors, the editor/programme controller, and the reporter. Thus, the liability is original rather than vicarious.

(2) the principle of vicarious liability is not generally applicable to common law crimes.

(3) the principle of vicarious liability is generally applicable only where there is a master/servant relationship, and in the contempt situation the relationship between the reporter/news reader and the editor/programme controller is not that of master and servant, but rather of superior and inferior servant.

Borrie & Lowe find the third of those reasons to be the most cogent reason, but base the editor/programme controller's liability on an alternative ground given in the first reason, i.e. his liability is original because he commits the actus reus (because he decides to publish the material) and he has the necessary mental element, namely the intention to publish.

However, this distinction in labelling would appear to be purely academic, as the only legal consequence which flows from the distinction, is that if original responsibility is imposed then the person more closely responsible will be saddled with liability, i.e. a Station Programme Con-

---

85 note 84 supra, p.119, para.544 - cl.86D Judicature Amendment draft bill.

86 note 36 supra, pp.192-194.

troller could be liable on the basis of original liability, and so too could a News Editor. As the news editor is more directly in control of an offending news item, then it is submitted that it should be he who should bear the liability, if an individual is to be saddled with liability ; subject to the recommendation of the Special Committee on Defamation, that the person responsible for the control of a publication or a broadcast ought not to be liable unless he approved publication of the offending article or was on duty at the time it was prepared for publication. [87]

---

87 note 85 supra.

CONCLUSIONS:

The Radio Avon decision has affirmed that -

(1) contempt of court by "scandalising" is an existing category of contempt.

(2) it is not possible in New Zealand to prosecute for contempt upon indictment, because of the provisions of s.9 of the Crimes Act 1961.

(3) criticism "put forward fairly and honestly for a legitimate purpose and not for the purpose of injuring our system of justice" will not amount to contempt.

(4) an intention to interfere with the administration of justice by scandalising the court is not an element of the offence, but the defendant's intention is relevant to the penalty to be imposed.

The doubts and unresolved issues raised by the Court of Appeal point to the uncertainty and vagueness of criminal contempt of court by "scandalising" in New Zealand.

This shows the need for a survey of the law of contempt to be undertaken in this country, similar to that in England which culminated in the Phillimore Report.

On 1 June 1976 the Minister of Justice extended the terms of reference of the Special Committee on Defamation [88] to include "an examination of the law of contempt as it may concern the publication of matter relating to civil court proceedings that are imminent or pending", but that inclusion was a narrow one, leaving other aspects of the law of contempt beyond the scope of that examination.

---

88 note 84 supra.

Certainly the time is ripe for a review of this uncertain area, for it goes against the grain of the policy of our criminal law to have someone held strictly liable for, and punished for, an uncertain offence. It is essential to the rule of law, as it operates in New Zealand, that a person should not be punished for an offence the ambit of which is hazy.

However, the Radio Avon decision is useful as a warning that there are limits to freedom and to speech. The decision reminds us that a man's basic constitutional rights can so easily be taken away from him - is it not unthinkable that a man can be given an unlimited fine and an unlimited period of imprisonment for an uncertain offence in which the court with its inherent jurisdiction, acts in a sense as both prosecutor and judge. Thus, any such case involves not only the right to enforce respect for the Court's authority and to punish acts which tend to diminish such respect, but also the wider questions of preservation of personal liberty, the right of free speech (especially in relation to the media), and the limits of criticism. Such cases as Radio Avon and Lilley v. Solicitor-General are rare, and this shows that the power is exercised with restraint.

.....

1
Folder
Sa

SANDFORD, S.J.

Contempt of court - a casenote on Radio Avon and Lilley v. Solicitor-General. 368,825

Due	Borrower's Name
2/3	Judith Tyldon
20/4	L. J. Locke
2/5	R. Wilson
19/7	T. Blew
6/8	A. Cott
7/8	A. Cott
10-8	A. C
11-8	A.
17-8	
19-3	
14/	
9/	

Due	Borrower's Name
12/9	NZMLaw
20/1/89	NZ Law Comm
12/5/89	[illegible]
6/8/87	C. Baylis.
21/9.	Judi Kett.
4/7	C. Penesa
10 MAR. 1993	A. Butler