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"The media and criminal law"

The Hon P de Jersey AC,
Chief Justice

Introduction

The media discharges a role in relation to the criminal justice process transcending its commercial motivation. So far as deterrence works, for example, the media assists by drawing attention to outcomes. More fundamentally, in relation to public understanding of the work of the courts, and public confidence, the media provides that glare of potential publicity, hence transparency, on which the legitimacy of the judicial process depends. But with pre-trial publicity, the media can be side-tracked by its commercial objectives into courses detrimental to particular accused persons, and the system generally. That occurs when two fundamental rights collide.

On the one hand, the media emphasizes the right to freedom of speech, a fundamental common law right. The High Court recognised two decades ago in a contempt case that freedom of expression is of "cardinal importance" and that "speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed".[1] It is as a result of the exercise of this right that the public's "right to know" is satisfied, our criminal justice system demonstrates its transparency by withstanding public criticism, and the media can, in a sense, be said to work "for the system".

On the other hand, all accused persons have a right to a fair trial. This right is embedded in the common law. Two Justices of the High Court (Deane and Gaudron JJ) have gone further, concluding, albeit in obiter dicta, that the right is constitutionally guaranteed.[2] One element of a fair trial is that jurors exercise an impartial mind, considering the admissible

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[1] *Gallagher v Durack* (1983) 152 CLR 238, 243 (Gibbs CJ, Wilson, Mason, Brennan JJ).
[2] *Dietrich v R* (1992) 177 CLR 292, 326 (Deane J), 362 (Gaudron J).

evidence, when deliberating on guilt. In other words, jurors should not be influenced by extrinsic material when exercising their function in the jury room. While obvious, that proposition remains topical, because of the plethora of extrinsic material to which a contemporary juror may be exposed, including from the Internet. Responsible media reporting must exhibit some restraint. While in more recent times the High Court has recognised the Constitution implies a guarantee of freedom of political discussion,[3] this has not "abolished the long-standing protection of fair trial from unlawful or unwarranted media or other intrusion".[4]

Superimposed on this tension between two cardinal stipulations is the judiciary's obligation to deliver justice according to law, and be seen to do that. One aspect of this obligation is meeting society's expectation that a person accused of a serious criminal offence will be brought to trial.[5] This entails, as I will go on to discuss, that save for truly exceptional cases, Judges exercise their discretion to refuse a permanent stay of proceedings, even where there has been substantial adverse publicity to an accused. This necessarily casts a heavy obligation onto the media to avoid publicity which will affect the fairness of the trial.

In situations where the media publishes material prejudicial to an accused, whether before or during a jury trial, Judges generally regard as effective directions to the jury to ignore extrinsic material and confine their consideration to the admissible evidence. Other remedial measures are available to the Judge, including changing the venue of the trial, granting an adjournment or discharging the jury. Further, contempt of court proceedings may be brought against a publisher who oversteps the "boundaries", and the prospect of those proceedings can deter.

[3] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
[4] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 187 (Deane J); *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81, 111 (Kirby P).
[5] *R v Glennon* (1992) 173 CLR 592; *Murphy v R* (1989) 167 CLR 94; *R v Lewis* [1994] 1 Qd R 613.

The potential benefit of media liaison or public affairs officers is well established in all higher jurisdictions in Australia, save Queensland where there is no such position. Hopefully this deficiency will one day be rectified.

Stay of proceedings v Use of judicial directions

The recent decision in *Gilbert v Volkers*,[6] before Holmes J of the Supreme Court of Queensland, illustrates the difficult balancing act required of Judges deciding cases involving substantial public exposure. Ms Gilbert unsuccessfully brought an application seeking leave, under s 686 of the *Criminal Code*, to bring a private prosecution against Mr Volkers on four charges of indecent dealing. Ms Gilbert, who was also one of the complainants in respect of those charges, brought her application after the DPP decided not to proceed with a public prosecution.

There was extensive media coverage of the case, which intensified after the DPP made the decision to drop the prosecution. In the week following the DPP's decision, Mr Volkers' solicitor was quoted in the Sydney Morning Herald, made comments on Radio National's *Australia Talks Back* and gave an interview on ABC's *Drive Time* radio in Brisbane. The tenor of his remarks was that the DPP's decision to drop the case vindicated his firm's stance that: the accusations were false; the complainant's statements were "fundamentally flawed" and "baseless" and had been disproved; Mr Volkers should never have been charged; and taxpayers should not have to "foot the bill of some ludicrous trial".[7]

Ms Gilbert then complained to the Crime and Misconduct Commission ("CMC") about the DPP's decision not to proceed. Before the release of the CMC's consequent report, Ms Gilbert took part in *Australian Story* (an ABC television program) in which she aired her accusations against Mr Volkers. The CMC's report, whilst finding no evidence of misconduct, did identify defects in the Director's decision-making process and the

[6] [2004] QSC 436.

investigation. Then, following the CMC's report, the ABC ran another program focusing on the case, this time as a segment of its *Four Corners* series. A number of complainants participated in that program, as well as Mr Volkers' stepbrother, who alleged he had witnessed Mr Volkers dealing indecently with young teenage girls. Following the airing of that show, the audience was invited to discuss the program online with Ms Gilbert and another complainant – approximately 75 people took up that opportunity, with almost all expressing sympathy for the complainants.[8]

This media coverage ensured a very public dispute in respect of a serious criminal matter, in which both Mr Volkers and Ms Gilbert appeared to be encouraging public support for their respective "sides". This intensity was exacerbated by the discovery the Victorian Women's Trust's website had linked to it a letter from Ms Gilbert's solicitors appealing for the public to fund the security for costs necessary to enable Ms Gilbert to bring a private prosecution (with the promise the money would be returned if the prosecution were successful).[9] Mr Volkers' counsel argued that such an appeal meant members of the public would have a "financial stake" in Mr Volkers' conviction.[10]

Holmes J acknowledge that the charges were serious, and that Ms Gilbert had been left without the opportunity of testifying in a criminal trial because the DPP dropped the case. But, her Honour was not prepared to grant leave to bring a private prosecution. The Judge said:[11]

> "The factor which convinces me that leave ought not to be given is the publicity given to the case and the way it has been presented. That publicity includes the dissemination of information strongly adverse to the respondent which would not be admissible in any trial …
>
> There is, I think, an overwhelming risk that if this trial were to be conducted on the basis that it was the applicant [Ms Gilbert] who was the prosecutor of the respondent [Mr Volkers], the perception of a personal contest between applicant and respondent would continue, with an attendant risk that the jury

[7] *Gilbert v Volkers* [2004] QSC 436, para 29.
[8] *Gilbert v Volkers* [2004] QSC 436, paras 30-35.
[9] *Gilbert v Volkers* [2004] QSC 436, para 37.
[10] *Gilbert v Volkers* [2004] QSC 436, para 28.
[11] *Gilbert v Volkers* [2004] QSC 436, paras 45-48.

> would perceive the process as one involving either the affirmation of the applicant's account and denunciation of the respondent on the one hand, or a rebuffing of the applicant and preferring of the respondent on the other. The impact of any attempt to cure that perception by direction would be considerably diminished by the very appearance of applicant and respondent as opposing parties.
>
> Weighing the public interest in a resolution of the applicant's allegations by jury trial against the public interest in not permitting a trial flawed by delay, publicity and the risk of misperception of its purpose, I consider, on balance, that I ought not give leave for the prosecution to proceed."

The weight Holmes J gave to the "private" character of the intended prosecution should be emphasised: it was that in conjunction with the publicity which influenced Her Honour. She observed that:[12]

> "[t]he existence of prejudicial material in the public form would not of itself dissuade me from granting leave: courts seldom stay trials because of adverse publicity, considering that appropriate directions can largely obviate the prejudice caused. But this case is, I think, in rather a different category [referring to the fact that the trial would not be conducted by an independent prosecutor and the positioning of Mr Volkers and Ms Gilbert as protagonists]".

One surmises Mr Volkers would have been unsuccessful if applying for a stay of proceedings, even given the extensive adverse publicity, had the DPP decided not to drop the prosecution.

The approach of the courts to this problem is robust and confident, illustrated by what might be considered a high-water mark case in this jurisdiction, *R v Lewis*,[13] decided in 1994. The former Commissioner of Police for Queensland, who had been convicted of corruptly agreeing to receive property, appealed. A principal contention was that prejudicial pre-trial publicity had deprived him of a fair trial. The adverse publicity was part of media reporting on the Fitzgerald Inquiry (the 1998 report of Mr G E Fitzgerald QC, commissioned to inquire into "possible illegal activities and associated police misconduct"). While the report itself did not conclude that Mr Lewis was corrupt, the report attracted

[12] *Gilbert v Volkers* [2004] QSC 436, para 45.
[13] [1994] 1 Qd R 613.

extensive media exposure. It is highly likely most members of the community learnt of its contents from the media coverage, not the report itself.

The following are some examples of that adverse publicity: Mr Lewis was referred to as a shark, in relation to the receipt of bribes, who takes big bites; a police officer was reported as giving evidence that Mr Lewis was involved in corruption; another police officer was reported as saying that Mr Lewis secured the transfer of officers of the Licensing Branch because the branch had been too successful against SP bookmakers; a witness gave evidence that Mr Lewis had received $25, 000 in return for guaranteeing an unfavourable report on the introduction of poker machines in Queensland; and another witness was reported as claiming he had paid Mr Lewis more than $600, 000 over the course of eight years in the form of bribes.[14]

Counsel for Mr Lewis submitted he should be acquitted and granted a permanent stay of proceedings. This was sought on the basis there was no way Mr Lewis could be guaranteed a fair trial, despite any lengthy adjournment or strong and emphatic direction to the jury. Pincus JA made two important observations. First, in relation to judicial directions to the jury:[15]

> "at least in some circumstances, an accused must be content with a trial in which the court does the best it can for him by way of directions, without producing any certainty that preconceptions derived from media treatment of the facts of the case will be utterly dispelled by the time the jury comes to consider its verdict."

Second, in relation to what would justify a permanent stay of proceedings:[16]

> "it is not necessarily enough, in order to justify a permanent stay, to show that the offences alleged against the appellant have been thoroughly canvassed in the media and that a great deal of material prejudicial to the appellant has been published. … One would expect the worst case to be one in which the crime alleged was one of horrendous kind, inciting universal revulsion (as in *Murphy*) and where the published material, perhaps pictorial evidence, was such as to be virtually conclusive of guilt. Even in circumstances of that kind,

[14] *R v Lewis* [1994] 1 Qd R 613, 631-633.
[15] *R v Lewis* [1994] 1 Qd R 613, 636.
[16] *R v Lewis* [1994] 1 Qd R 613, 639.

> in which it might be difficult to induce a jury to take arguments on behalf of the accused seriously, it is not clear that the accused would be entitled to a permanent stay. In the present case, it could not I think fairly be said that one would expect the jury to have been intractably set on convicting."

We do not inhabit Utopia, and the Judge's obligation is not to ensure a trial of absolutely pristine fairness. Otherwise the criminal justice process could not work. Accordingly, a permanent stay will not be granted simply because the "offences alleged against the appellant have been thoroughly canvassed in the media". The approach taken in *R v Lewis*[17] was informed by two important High Court decisions in the area.

In the first, *Murphy v R*,[18] the appellant was one of a number of men convicted of sexually assaulting and murdering a young women. The facts were graphically brutal. The victim was seized while walking along a suburban street and forced into a car containing five men. They subjected her to a series of sexual assaults before dragging her from the car, through a barbed wire fence, into an adjoining paddock, and cutting her throat. The crime was widely reported, with the public repulsed by its abhorrence.

At the commencement of the intended trial, one accused pleaded guilty, and that was widely reported, the same night. Another accused was described as a prison escapee. Those reports were accessible to the jurors after the first day of the trial. The jury was consequently discharged. When the court resumed for the new trial, counsel for the accused applied for a six month adjournment. Refusing the application, Maxwell J acknowledged the importance of securing a fair trial, but emphasised "the interests of the community in having trials brought on with regularity and expedition".[19] The present problem, he said, could be "dealt with by adequate and repeated directions to the jury."[20]

The High Court upheld the decision of the New South Wales Court of Criminal Appeal (which had upheld the decision of Maxwell J) affirming the refusal of an adjournment.

[17] [1994] 1 Qd R 613.
[18] (1989) 167 CLR 94.
[19] Quoted in *Murphy v R* (1989) 167 CLR 94, para 8 (Mason CJ and Toohey J).

Some degree of compromise will sometimes be unavoidable. Mason CJ and Toohey J acknowledged of course that to ensure a fair trial, the jury must decide the case on the facts presented in court uninfluenced by media reports. However, their Honours added:[21]

> "the might of media publicity in 'sensational' cases makes such a pristine approach virtually impossible. … It may be that in a particular case … remedies will [not] be fully effective. … The importance of a fair trial to an accused must not be underestimated. But it is not the only consideration. It is important that anyone charged with a criminal offence be brought to trial expeditiously."

Brennan J also acknowledged the tension between delay in proceedings (or, for present purposes, a stay of proceedings) and ensuring a fair trial:[22]

> "[s]ometimes those aspects are in competition. When they are, the trial judge must form a prudential judgment in determining how fairness can best be achieved. In reaching his decision the trial judge is entitled to consider whether any bias for or against an accused can be mollified if not abated by appropriate directions …"

The use of the words "mollified if not abated" is important. Pincus JA, in *R v Lewis*,[23] observed that neither the reasons of Mason CJ and Toohey J, nor those of Brennan J, would vitiate a conviction were the appropriate directions only successful in "mollifying" bias, as opposed to "abating" bias. Deane J's reasons are consistent – he accepted it was impossible to be confident members of any future jury would not have acquired or retained prejudicial information inadmissible in court, but considered the vigorous directions given by the trial judge would overcome the risk of prejudice.[24]

The second of these High Court decisions is *R v Glennon*.[25] Mr Glennon was a priest convicted in 1978 of indecently dealing with a girl under the age of 16. In 1985, Mr Glennon gave evidence at the criminal trial of his nephew and another person (Mr Hood)

[20] Quoted in *Murphy v R* (1989) 167 CLR 94, para 8 (Mason CJ and Toohey J).
[21] *Murphy v R* (1989) 167 CLR 94, 98-99.
[22] *Murphy v R* (1989) 167 CLR 94, 122-123.
[23] *R v Lewis* [1994] 1 Qd R 613, 636.
[24] *Murphy v R* (1989) 167 CLR 94, 125.
[25] (1992) 173 CLR 592.

who, it was alleged, had assaulted Mr Glennon. Counsel for the defendants questioned Mr Glennon about his conviction in 1978, alleging he had raped Mr Hood.

Extensive publicity ensued. In particular, Mr Derryn Hinch, then a Melbourne radio commentator, launched a verbal attack on Mr Glennon, making serious allegations of sexual impropriety, specifically referring to his 1978 conviction. Following those broadcasts, a number of people came forward alleging Mr Glennon had sexually assaulted them while members of a youth organisation. In 1987, having exhausted all avenues for appeal including the High Court, Mr Hinch served some time in custody for contempt of court. The Hinch conviction fuelled the media frenzy by then well and truly engulfing Mr Glennon.

Counsel for Mr Glennon twice sought, unsuccessfully, a stay of proceedings based on prejudicial publicity. In 1991, more than five years after the broadcasts by Mr Hinch, Mr Glennon was convicted on five counts, including indecently dealing with a girl and boys under the age of 16. The Court of Criminal Appeal in Victoria quashed the convictions and entered verdicts of acquittal. However, the Crown successfully appealed this decision to the High Court, by a majority of four to three. Two members of the majority, Mason CJ and Toohey J, affirmed the adequacy of directions to safeguard the accused's right to a fair trial, while at the same time meeting the community's expectation that a person charged with a serious offence will face trial:[26]

> "[The Court of Criminal Appeal] appears to have give little, if any, weight to the community's right to expect that a person charged with a criminal offence be brought to trial, … to the means available to a trial judge to ensure a fair trial and to the steps taken by the trial judge." (598)
>
> "The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial. The law acknowledges the existence of that possibility but proceeds on the footing that the jury, acting in conformity with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence." (603)

[26] *R v Glennon* (1992) 173 CLR 592, 598-605.

> "[A] permanent stay will only be ordered in an extreme case … and there must be a fundamental defect 'of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences'." (605)

Also in the majority, Brennan J (with whom Dawson J agreed) similarly emphasised these points:[27]

> "[S]ome degree of risk, albeit not a substantial risk, to the integrity of the administration of criminal justice is accepted as the price which has to be paid to allow a degree of freedom of public expression when it is exercised in relation to a crime that is a topic of public interest." (613)

> "[P]re-trial publicity prejudicial to an accused is stimulated by the notoriety of the accused and the heinousness of the crime. Yet it would undermine the criminal law's protection of society and its members to refuse to allow the law to take its ordinary course in these cases." (613)

> "If the courts were not able to place reliance on the integrity and sense of duty of jurors, … notorious criminals or heinous crimes [would] be beyond the reach of criminal justice …" (615)

Brennan J conceded some scope for compromise:[28]

> "Our system of protecting jurors from external influences may not be perfect, but a trial conducted with all the safeguards that the court can provide is a trial according to law and there is no miscarriage of justice in a conviction after such a trial."

The majority reached their conclusion notwithstanding Mr Hinch had already been convicted of contempt of court. They implicitly accepted that Mr Hinch's broadcasts had created real risk of prejudice to a fair trial, given his conviction. But, as Brennan J puts it, "[t]he administration of criminal justice by the courts … would be adventitious if trials could be halted by a punishable contempt."[29]

Influence of publicity on juries' verdicts

[27] *R v Glennon* (1992) 173 CLR 592, 613-615.
[28] *R v Glennon* (1992) 173 CLR 592, 615.
[29] *R v Glennon* (1992) 173 CLR 592, 613.

In 1985, Justice Kirby wrote:[30]

> "Judges have difficulty enough in putting [extrinsic] material out of their minds. Whether jurors can really do so, as judicial instructions enjoin, is a matter of grave psychological doubt. [Yet] [t]he instructions continue to be given."

Given the preference of courts for strong directions to the jury over stays, one must assess the strength of the claim juries adhere to such directions. The answer can rest only on inference and probability. Whether a jury's verdict has been influenced by adverse publicity is not susceptible of scientific analysis. Each jury will tackle the decision-making process in a different way. Jurors will differ in their abilities to ignore extrinsic inadmissible material available.

Be that as it may, it is useful to consider the study by Michael Chesterman, Janet Chan and Shelly Hampton described in their 2001 publication *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales*.[31] They interviewed jurors, Judges and counsel, across 41 criminal trials in New South Wales, to gauge the influence of adverse publicity on jurors and verdicts.

They found the vast majority of jurors themselves did not consider they were influenced by media coverage of the relevant trials. Only four percent considered they were influenced by specific publicity (pre-trial and/or during trial), while seven percent believed their fellow jurors were so influenced.[32] Questions concerning generic publicity produced similar responses.[33] If we take the responses from these jurors at face value, they support the confidence of the Judges that juries are, in the vast majority of cases, likely to heed judicial directions to ignore inadmissible material.

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[30] The Hon Justice Michael Kirby, 'Pre-Trial Publicity – Free Speech v Fair Trial' (1985) 6 *Journal of Media Law and Practice* 221, 230.
[31] M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, Sydney: 2001). See also M Chesterman, 'Contemporary issues in the law of Contempt' (Speech delivered at The Australian institute of Judicial Administration, 19th Annual Conference, Hobart, 21-23 September 2001) <http://www.aija.org.au/ac01/Chesterm.pdf> (23 February 2005), 13-14.
[32] M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, Sydney: 2001), 89-90.
[33] M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, Sydney: 2001), 90.

The responses of the jurors were corroborated by those from Judges and counsel. In 12 trials, despite media publicity supporting a different outcome, juries delivered verdicts which Judges and both counsel considered to be "safe".[34] There was only one trial where the Judge and both counsel believed press coverage aimed at generating sympathy for the accused resulted in an unjustified acquittal.[35] For one trial, defence counsel believed the jury had been influenced by adverse publicity to find the accused guilty. But neither the trial Judge nor the Prosecutor agreed with that assessment.[36]

Of particular interest today are the conclusions reached as to judicial directions and orders for the stay of proceedings. The researchers found that directions are mostly *ineffective* when framed in terms of *avoiding* press coverage of proceedings. In other words, jurors appear to be inherently curious about the media coverage of "their" trial. On the other hand, directions appear to be *valuable* when Judges recognise that jurors will come into contact with press coverage of the trial, but direct jurors to apply the evidence as they themselves perceived it in court, trusting their own first-hand, individual recollections.[37]

Second, on the issue of stay, in only seven of the 41 cases did counsel seek a "drastic order" – ie. a stay of proceedings, adjournment, or discharge of the jury. In all but one, in which a short adjournment was ordered, the application was refused. The study found that the verdict in only one of these seven trials could be considered possibly unsafe – that trial being the one to which I have already referred where defence counsel, but not Judge or prosecutor, believed the conviction was not supported by the evidence.[38] While the researchers conceded the number of trials was too small to support clear conclusions,

[34] M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, Sydney: 2001), 116-120.
[35] M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, Sydney: 2001), 109-110.
[36] M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, Sydney: 2001), 114.
[37] M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, Sydney: 2001), 144-145.
[38] M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, Sydney: 2001), 144-146.

they do assert the patterns were striking – judicial officers should not stay proceedings except in the most exceptional of cases;[39] to borrow the example offered by Pincus JA in *R v Lewis*, a case "in which the crime alleged was one of horrendous kind, inciting universal revulsion … and where the published material, perhaps pictorial evidence, was such as to be virtually conclusive of guilt."[40]

Contempt of court: incentive for the media to meet their obligations

The Attorney-General and the Director of Public prosecutions may institute contempt proceedings against a media organisation for the publication of certain material. The *sub judice* doctrine refers generally to that branch of contempt law applicable when the media publishes material which may influence a jury, and thus interfere with the fairness of a trial. Before a court will find such a publication to be prejudicial, the prosecution must show that it has a "real and definite tendency", as a "matter of practical reality", to "preclude or prejudice the fair and effective administration of justice in the relevant trial",[41] or cause "substantial risk of serious interference"[42] with the relevant trial.

A number of defences may apply. One is public interest – coined the *Bread Manufacturers* principle after the celebrated passage from the 1937 NSW case of *Ex parte Bread Manufacturers Ltd; Re Truth and Sportman Ltd*:[43]

> "Discussion of public affairs and the detriment of public abuses, actual or supposed, cannot be required to be suspended merely because of the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant … it is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason of the fact that the matter in question has become the subject of litigation."

[39] M Chesterman, 'Contemporary issues in the law of Contempt' (Speech delivered at The Australian institute of Judicial Administration, 19th Annual Conference, Hobart, 21-23 September 2001) <http://www.aija.org.au/ac01/Chesterm.pdf> (23 February 2005), 13-14.
[40] *R v Lewis* [1994] 1 Qd R 613, 639.
[41] *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, 34 (Wilson J), 46 (Deane J). See also 70, 77 (Toohey J).
[42] *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, 27-28 (Mason CJ).
[43] (1937) SR (NSW) 242, 249.

In *Hinch v Attorney-General (Vic)*,[44] Mr Hinch unsuccessfully relied on the public interest defence to exonerate him from his contempt of court in attacking Mr Glennon. Given there were five separate judgments in *Hinch v Attorney-General (Vic)*,[45] it may be difficult to extract with confidence the limits of this defence. What is certain is that courts must balance the public interest in freedom of speech with the public interest in the administration of justice.[46] The controversy about the defence is how the balancing exercise is to be carried out when the material goes directly to the guilt or innocence of the accused. The view of the Justices differed somewhat. Toohey J[47] and Wilson J[48] both held the public interest in publication of the material would have to be "substantial", to outweigh the public interest in a fair trial where the material went to the innocence or guilt of an accused person. Deane J went further:[49]

> "[i]t is difficult, if not impossible, to envisage any situation in which countervailing public interest considerations could outweigh the detriment to due administration of justice involved in public prejudgment by the mass media or the guilt of a person awaiting trial."

This issue arose in the NSW Court of Appeal decision, *Attorney-General for the State of New South Wales v X*.[50] The Sydney Morning Herald had published an expose of organised crime in the 1990s, claiming that Mr Duong was "the top heroin distributor", "a drug dealer", "the current drug Csar", a "drug boss", "your classic criminal" and "the country's largest heroin distributor". The articles also mentioned pending criminal charges against Mr Duong.[51] The Attorney-General brought an application against Fairfax alleging contempt of court, on the basis the publication implied Mr Duong's guilt and therefore had the tendency to interfere with his criminal trial for drug related offences. Fairfax invoked

[44] (1987) 164 CLR 15.
[45] (1987) 164 CLR 15.
[46] *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, 25 (Mason CJ), 41-42 (Wilson J), 46 (Deane J), 66 (Toohey J), 84, 87 (Gaudron J). See also *Attorney-General for the State of New South Wales v X* (2000) 49 NSWLR 653 (Spigelman CJ).
[47] *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, 75-77.
[48] *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, 45-46.
[49] *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, 52.
[50] (2000) 49 NSWLR 653.
[51] *Attorney-General for the State of New South Wales v X* (2000) 49 NSWLR 653, 681-682 (Mason P).

the public interest defence. The articles asserted the persons controlling drug related criminal activity were changing, owing to a cultural and financial revolution,[52] and that Mr Duong was one of the "new men" in control.

By a majority of two to one, the NSW Court of Appeal held that Fairfax was entitled to rely on the defence. All three Judges accepted the publication went to the guilt of Mr Duong and therefore had a tendency to interfere with the administration of justice.[53] However, Spigelman CJ (with whom Priestley JA agreed) held the defence was nevertheless open. Mason P dissented on this point.

Spigelman CJ rejected the proposition that where there is an implication of guilt, a suggestion of guilt, or canvassing of matters directly related to issues of guilt, there is no need for the court to balance the public interest in a fair trial, against the public interest in freedom of speech.[54] His Honour said where contempt has been found, involving publication going to the innocence or guilt of the accused (as in *Hinch*), the scales had fallen in favour of the administration of justice over freedom of speech because the "pith and substance" of the publication was directed to the central issues of the proceeding.[55] In that particular case, reference to the pending criminal trial was not the subject of the broader part of the article. The articles concerned a "major social problem" with "significant public policy implications"; the articles were of "substantial public interest".[56] In his Honour's view, this was sufficient to push the scales in favour of freedom of speech so that the public interest defence applied.[57]

Dissenting, Mason P held that where a publication implies guilt, suggests guilt or canvasses matters directly relating to guilt, a publisher may not rely on the public interest

[52] *Attorney General for the State of NSW v John Fairfax Publications Pty Limited* [1999] NSWSC 318, [127] (Barr J)
[53] *Attorney-General for the State of New South Wales v X* (2000) 49 NSWLR 653, 668 (Spigelman CJ, Priestley JA agreeing), 698 (Mason P).
[54] *Attorney-General for the State of New South Wales v X* (2000) 49 NSWLR 653, 668.
[55] *Attorney-General for the State of New South Wales v X* (2000) 49 NSWLR 653, 673.
[56] *Attorney-General for the State of New South Wales v X* (2000) 49 NSWLR 653, 681.
[57] *Attorney-General for the State of New South Wales v X* (2000) 49 NSWLR 653, 681.

defence.[58] He adopted what Deane J said in *Hinch*,[59] to the effect that it would be difficult, if not impossible, for free speech to outweigh the fair trial stipulation if the publication prejudged innocence or guilt.[60] He conceded only a small window of opportunity for free speech to prevail in those circumstances – for example, should there be a "major constitutional crisis" or "imminent threat of nuclear disaster",[61] as suggested by Mason CJ in *Hinch*.[62] On the facts, given the revelation (that Mr Duong was one of the leaders of the drug trade industry) was essentially a "narrow issue of public interest", it could not outweigh the "highly prejudicial" influence of the articles published.[63]

Attorney-General for the State of New South Wales v X[64] accordingly confirms a wide avenue of operation for this defence. Consistently, the Queensland Court of Appeal in the Childers backpacker hostel case (*R v Long*[65]), upheld the trial Judge's refusal of a stay: even with advance publicity strongly suggestive of guilt, the Judge's directions gave adequate protection.

Conclusion

What may be drawn from these cases is therefore very clear, and does not need repetition.

The transparency of court proceedings is one of their principal hallmarks. Just as courts minimize intrusion into basic freedoms, though sometimes vexed by pre-trial publication, or publicity during trials, it seems the courts respond strongly only rarely. Of course one would hope an arguable need for intervention could only infrequently be flagged. I began by acknowledging the media's role in relation to the criminal justice process. The end

[58] *Attorney-General for the State of New South Wales v X* (2000) 49 NSWLR 653, 693.
[59] *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, 58-59.
[60] *Attorney-General for the State of New South Wales v X* (2000) 49 NSWLR 653, 691.
[61] *Attorney-General for the State of New South Wales v X* (2000) 49 NSWLR 653, 693.
[62] *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, 26.
[63] *Attorney-General for the State of New South Wales v X* (2000) 49 NSWLR 653, 695.
[64] (2000) 49 NSWLR 653.
[65] (2003) QCA 77.

point, nebulous though it be, is that in discharging that role, the media must exercise considerable restraint, and real discretion. Again, I refer to the benefit of court liaison or public affairs officers.