CASE NOTE

DERRYN HINCH v. ATTORNEY-GENERAL FOR THE STATE OF VICTORIA[1]

Apart from the obvious value to the media that it entailed, *Derryn Hinch v. Attorney-General for the State of Victoria* is a decision of fundamental importance to the media in determining the extent of its freedom in Australia. The issues it raises range from wide considerations as to the value of competing public interests, to the more particular elements of the criminal offence of contempt of court. Most importantly for the media, it considers the legal implications of publishing comment or information which may interfere with the due administration of justice.

The case firstly clarifies the fundamental test for contempt of court as requiring a real and definite tendency to prejudice pending proceedings. It had previously been considered in New South Wales that the mere possibility of prejudice to the administration of justice was enough to constitute contempt of court, and the gravity of that risk was only relevant to the assessment of punishment.[2] All members of the High Court stress that there must be a real risk of prejudice to a fair trial, to amount to contempt.

The fundamental importance of the *Hinch* case lies in its discussion of the balancing of public interests in determining whether contempt of court has been committed. This balancing process arises in some judgments as a specific concession given to the public interest in maintaining a free discussion of a topic of continuing concern, and in other judgments as a general balancing of all public interests to establish whether the interest in the fair administration of justice must yield to a superior public concern. The latitude that is to be allowed to the consideration of competing interests will have major ramifications for the media concerning its freedom to pursue topics of public concern whilst proceedings are pending.

The intention of this note is to identify and compare the approaches and interpretations of the five members of the court, in an effort to ascertain the ambit and the direction of the law of contempt of court in this particular area.

THE FACTS

The appellants Mr Hinch and radio station 3AW were convicted on two counts of contempt of court arising from three separate broadcasts made with regard to charges of child molestation against Father Michael Glennon. The broadcasts were made in an effort to warn the public of Glennon's continuing position of responsibility over a youth foundation, and to pressure for his displacement. In the course of the broadcasts, Hinch made detailed references to Glennon's prior convictions, and his previous acquittal on rape charges and suggested that numerous other children may have been molested by Glennon but had been too frightened to tell the authorities.

The appellants based their appeal on the approach adopted by Jordan C. J. in *Ex parte Bread-Manufacturers Ltd; Re Truth and Sportsman Ltd*[3], where considerations affecting the public interest in freedom of discussion were balanced with the public interest in protecting the fair administation of justice. They contended that the correct balancing of interests would resolve the matter in their favour.

The critical passage of Chief Justice Jordan's judgement is as follows:

> the administation of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of

[1] (1987) 74 A.L.R. 353. High Court, 15 October, 1987. Mason C.J., Wilson, Deane, Toohey and Gaudron JJ.

[2] *Attorney-General (N.S.W.) v. John Fairfax & Sons Ltd* [1980] 1 N.S.W.L.R. 362. *C.f.* Attorney-General (N.S.W.) v. John Fairfax & Sons Ltd and Bacon (1986) 6 N.S.W.L.R. 695.

public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.[4]

THE JUDGEMENTS

Mason C.J.

The Chief Justice begins by noting that in the above passage Jordan C.J. was speaking about the continuation of a public discussion begun *before* the commencement of the relevant proceedings. He concludes that this 'incidental but not intended by-product' qualification is not in itself a general exculpation of liability, but rather is only applicable when the public discussion was commenced prior to the proceedings.

Mason C.J. acknowledges that the balancing of public interests does not solely arise in circumstances where the alleged contempt flows out of the continuation of a public controversy. He discusses the differences between the members of the High Court in *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation*[5] as to what is involved in the balancing process, and there categorizes Stephen, Wilson, Brennan JJ. and himself as considering it necessary to balance competing public interests in those cases in which there is *no intention* to interfere with the administration of justice.

Unfortunately he immediately cuts down this more liberal test by confining its success to extreme circumstances, such as a major constitutional crisis or the imminent threat of nuclear disaster.[6] Apart from such grave situations, Mason C.J. will only posit the balancing of public interests in such circumstances as the reporting of the proceedings of Parliament and the continuation of discussion of a matter of public interest commenced before the institution of proceedings. Any such discussion commenced after proceedings have been brought, even if prejudice to pending litigation be unintended and incidental, is unlikely to receive great sympathy from the Chief Justice, in the balancing of public interests.

Mason C.J. leaves this initial onerous test, to consider a second test of fact which he seems to feel is more appropriate to 'reconcile the conflicting demands for a free press and for a fair trial'.

This second test requires the Court to assess whether the publication in question 'presents a real risk of serious prejudice to a fair trial'.[7] This inquiry involves factors that have already appeared in the *Bread-Manufacturers'* exception such as 'whether the references to the subject matter of the litigation are central or merely incidental to the topic of public discussion'. This, of course, is not the exclusive consideration for determining the risk of prejudice, for the court must also regard the 'nature and extent of the publication, the mode of trial (whether by judge or jury) and the time which will elapse between the publication and the trial'.[8]

On the facts of this case, Mason C.J. assessed the nature of the publication as dramatic, with colourful language that was likely to evoke suspicion or hostility towards Glennon. The extent of the publication was very wide amongst potential jurors. The context of the broadcast unquestionably suggested the guilt of the accused, and the time lapse before trial was not sufficient to erode its impact on the memory of a juror.

Most significantly, the publication of prior convictions was considered to lead to an extremely high risk of serious prejudice against the accused in the minds of the jurors who may conclude that he had a propensity to commit the offence charged. The appeal was thus dismissed.

Wilson J.

Wilson J. sets out what he considers to be the initial and basic test for contempt: 'the impugned material must exhibit a real and definite tendency to prejudice or embarrass pending proceedings'.[9]

4 *Ibid.* 249-50.
5 (1982) 152 C.L.R. 25.
6 (1987) 74 A.L.R. 353, 362.
7 *Ibid.*
8 *Ibid.* 363.
9 *Ibid.* 367.

He then discusses the factors involved in that assessment, such as the content of the publication, the nature and stage of the proceedings, the persons to whom the publication is addressed, and the durability of the influence of the publication on its audience.

It is after a prima facie case of contempt satisfying the test has been established that the balancing of public interests may be considered. 'In an appropriate case the court is empowered to entertain a defence of discussion of a matter of public interest and in doing so to engage in a balancing exercise to determine which of the competing matters of public interest should prevail.'[10] By classifying this balancing process as a defence, Wilson J. is attempting to reconcile the position of Brennan J. with that of Stephen, Wilson and Mason JJ. in the *B.L.F.* case.

In that case, Stephen, Mason and Wilson JJ. saw the balancing of public interests as integral in ascertaining whether contempt had been committed, whereas Brennan J. saw the rationalizing of public interests as determining whether the offence was punishable. As a 'defence' the public interest is both instrumental in determining whether an offence has been committed, and in concluding whether the acts committed which *prima facie* constitute contempt should be excused.

Wilson J. emphasizes that this balancing exercise does not commence with evenly weighted scales. He regards as a most important factor (though not a rigid criterion) the qualification in *Bread-Manufacturers* that any prejudice to a litigant must be 'an incidental but not intended by-product' of the publication. Intention is so important, that 'if the interference is intended and would otherwise justify condemnation by the court, there can be no question of any defence based on a submission that the publication in question was made in the course of a discussion of a matter of public importance.'[11] The centrality of the litigation to the publication and the seriousness of the interference may also outweigh public interest in the freedom to discuss the matter.

In this manner, Wilson J. also attempts to reconcile the position of Gibbs C.J. in *B.L.F.*[12] with that of the majority. Whilst the court will determine the balancing exercise on the facts of the case, the law governs the weight to be accorded to the factors which must be considered.

In applying these principles to the facts Wilson J. found that the broadcast was occasioned by the laying of charges; it was not the result of a continuing controversy. It dealt solely with Glennon and was not an incidental by-product of a larger issue. The broadcast disclosed inadmissible evidence which was extremely prejudicial in nature, and this substantial risk to the fair administration of justice was held to outweigh any competing public interest. The appeal was dismissed.

Deane J.

Mr Justice Deane discusses the differences between the members of the court in the *B.L.F.* case and concludes that it is not necessary to decide whether the balancing process is integral in establishing the constituent elements of contempt, or alternately in determining whether a contempt is punishable, as the appellant would fail in either case. He does though, state his preference towards the consideration of balancing interests at the stage of assessing the existence of an offence, and works on this basis throughout his judgement.[13]

In contrast to Wilson J. who saw the balancing of public interests as part of a defence, Deane J. regards the onus as lying on the prosecution to prove in a case of criminal contempt, beyond reasonable doubt, that there is no competing public interest which will outweigh that of the fair administration of justice.

> In practical terms, that means that, in a case such as the present where the public interest factors upon which the accused rely have been identified, the issue ultimately resolves itself into a question whether the view that detriment was outweighed by countervailing public interest considerations was reasonably open.[14]

10 *Ibid.* 373.
11 *Ibid.* 374.
12 (1982) 152 C.L.R. 25, 60. Gibbs C.J. regarded the balancing of public interests as taking place in law in the formulation of the principles to be applied. He did not favour the court using its discretion in weighing the interests to determine whether contempt had been committed in particular cases.
13 (1987) 74 A.L.R. 353, 378.
14 *Ibid.* 380.

Despite this heavy burden, there are some cases where it will be clear that it is not reasonably open that countervailing interests will prevail. A clear example is given by Deane J. where publication is directed solely to the very issue to be determined in the pending proceedings, such as the guilt or innocence of the accused. In this case he concludes that no competing interest could 'effectively outweigh the detriment of a clear tendency to prejudice the due administration of justice.'[15]

Although such an example would be excluded from exculpation by the 'incidental and not intended by-product' stipulation, Deane J. is adamant that this is not a rigid rule of determination. He prefers each case to be decided on its own facts without recourse to rules which may prove unsuitable in different circumstances.

He stresses the importance of freedom of public discussion of matters of legitimate public concern, and notes that restrictions upon this freedom can only be justified if confined to cases where there is a clear tendency to interfere adversely with the due administration of justice, and when this interference is not outweighed by other general or specific public interests.

> The area in which restriction upon the freedom of discussion is most readily justifiable in the interests of the due administration of justice is the area of the administration of the criminal law. It is in that area that one finds the category of publication which is most difficult, if not impossible to justify by reference to countervailing public interest considerations.[16]

On the facts of this case, Deane J. held that the publication of prior convictions and the clear inference that Glennon was guilty of the very charges involved in the pending proceedings, left no reasonable possibility of the detriment to the fair administration of justice being outweighed by any countervailing interest.

Toohey J.

Toohey J. also discusses the *B.L.F.* case, concluding that the balancing of public interests must be carried out when a court determines whether or not a contempt has been committed, not at the later stage of assessing punishment.[17]

In concord with Wilson and Deane JJ., he agrees that the phrase 'incidental and not intended by-product' is relevant, but not a stringent test. He emphasizes the balance to be struck between the competing interests, to which the intention and the substance of the publication are but factors for consideration.

Toohey J. asserts that the first question that arises for determination is whether the publication has as a matter of practical reality a real and definite tendency to interfere with the due course of justice. He accepts the decision of the lower courts that this test has been satisfied.

> The question remains whether, taken in their entirety, the broadcasts were on a subject of legitimate public interest, an interest to which any tendency to interfere with Glennon's fair trial should yield.[18]

Rather than seeing this as a defence, Toohey J. maintains that the onus of proof does not at any stage shift to the accused. The balancing of interests is an essential part of discovering whether contempt of court has been committed at all.

In considering the factors to weigh in the balance, Toohey J. notes the legitimate purpose of warning the public of Glennon's continuing position of responsibility when charges of this nature had been laid against him. It was the references to prior convictions and the suggestion that further unknown crimes may have been perpetrated that swung the balance to the protection of the fair administration of justice. This clear implication of guilt was held to conflict with 'a precept quite fundamental to our society, that a person charged with an offence is entitled to receive a fair trial'. The appeal was dismissed.

Gaudron J.

Gaudron J. lays great importance on a wide view of fundamental public interests which include 'the maintenace of our democratic processes, and the maintenance of a free society, the latter concept

15 *Ibid.* 381.
16 *Ibid.* 385.
17 *Ibid.* 393.
18 *Ibid.* 398.

including the open administration of justice.'[19] She sees these matters as so essential that in some circumstances they may outweigh the public interest in the fair administration of justice in relation to both civil and criminal trials.

In relation to the *B.L.F.* case, Gaudron J. clearly follows Mason C.J., Stephen and Wilson JJ. in considering that the balancing process should take place in determining whether publication is contemptuous. She states that conduct engaged in to further superior public interests will not constitute contempt notwithstanding any risk to the fair administration of justice as long as the risk is the incidental but not intended by-product of that conduct.

In effect her test is divided into three parts. Firstly, a public interest must be identified that will compete with the public interest in the fair administration of justice. Secondly, these competing interests must be evaluated 'not as a matter of discretion, but as a question of law.'[20] Thirdly, if another interest does take precedence over the likelihood of prejudice then it must be considered whether the risk of interference is the 'incidental but not intended by-product' of the publication.

The onus is on the prosecution to prove beyond reasonable doubt that the risk was not the 'incidental but not intended by-product' of publication. To do so, the prosecution could prove that an ulterior purpose other than the pursuit of the dominating public interest was in existence. Although intention is not decisive, an ulterior purpose, especially if it be to prejudice the administration of justice may cause the protection to be afforded to the competing public interest to be lost.[21]

In regarding the facts of the case, Gaudron J. notes that the interest of the public in free discussion of the matter must be weighed against the fundamental importance of the integrity of the criminal justice system.

In taking the second part of her process, Gaudron J. expands upon the balancing of competing interests to include not only an 'abstract' evaluation, but the striking of a balance 'in relation to the "possibility of prejudice", a consideration which includes the degree of risk posed by the impugned conduct.'[22] This seems to be moving away from 'questions of law' to matters of discretion in assessing the severity of the risk.

Gaudron J. reconciles this conflict by asserting that although the onus is on the prosecution to establish beyond reasonable doubt that the conduct poses a real risk to the administration of justice, the question whether the competing public interest outweighs the degree of risk established is a question of law.[23]

She stresses that in principle a lesser public interest may prevail over the public interest in the administration of justice where the risk to justice is not significant, as when the information is general and not directed at the accused.

On the facts of this case, the seriousness of revealing prior convictions and the resulting extreme prejudice to the fair conduct of a criminal trial outweighed the public interest in free discussion of the matter, and left it unnecessary for Gaudron J. to continue to 'consider whether it was established beyond reasonable doubt that the risk which the broadcasts created was incidental but not intended.'[24]

THE BREAD MANUFACTURERS' PRINCIPLE

All members of the High Court agreed that the principle enunciated in *Bread Manufacturers* is applicable to criminal as well as civil proceedings.[25] It was also noted though, that the burden will be greater to displace the public interest in the fair administration of criminal justice than would be the case in civil proceedings.

The interest in the construction of the *Bread Manufacturers'* principle lies in its starkly different interpretation by members of the Court.

Mason C.J. confines the principle to the continuing public controversy commenced before the

19 *Ibid.* 405.
20 *Ibid.* 407.
21 *Ibid.*
22 *Ibid.* 408.
23 *Ibid.*
24 *Ibid.* 410.
25 (1987) 74 A.L.R. 353, *per* Mason C.J. 358, *per* Wilson J. 369, *per* Deane J. 378, *per* Toohey J. 392, *per* Gaudron J. 405.

instigation of proceedings. He acknowledges an independent balancing of public interests which arises when a competing public interest is recognized, but this competing interest will only prevail when it is of overwhelming importance.

Wilson J. pays little regard to the restriction in *Bread Manufacturers* of the continuation of a matter of public controversy. He merely mentions, as one of a plethora of damning circumstances, the fact that the broadcasts were occasioned by the charges laid against Glennon. It would seem that the balancing process that he advocated in *B.L.F.* has merged with the *Bread Manufacturers*' principle, perhaps to restrict the ambit of countervailing public interests, to that of free discussion of matters of public concern.

Deane J. does not regard *Bread Manufacturers* as being confined to matters of continuing public controversy. He refers to *Bread Manufacturers* in terms of a principle which balances public interests in general. He criticizes the confining of the *Bread Manufacturers*' principle to cases where detriment is an incidental but not intended by-product of a publication directed to other public interests. He considers that 'it is neither practicable nor desirable to attempt to define in advance the precise limits of possible countervailing public interests which may be taken into account as being furthered by a particular publication in the circumstances of a particular case.'[26]

Toohey J. contends that the judgment of Jordan C.J. in *Bread Manufacturers* must be read in context and not with undue concentration on each word used. 'The emphasis in the judgment is on the balance to be struck between the competing interests.'[27] He maintans that the details of the principle should not be taken as in some way overriding the need to strike that balance.

Gaudron J. interprets the judgement of Jordan C.J. as recognizing a wider category of superior interests to be balanced, of which the ventilation of a question of public concern is but a mere instance.[28] Indeed she sees the first step in applying the *Bread Manufacturers*' principle as identifying the public interest to be raised in competition with the public interest in protecting the fair administration of justice.

CONCLUSION

It is no longer the case that the publication of material, which exhibits a real tendency to prejudice the fair administration of justice, will only be excused in the case of the continuation of a public controversy commenced before litigation had become pending. Each member of the High Court posits some further balancing of public interests, either arising as a separate process, or through a widening of the *Bread Manufacturers*' principle.

It is at least resolved that this balancing process must take place in ascertaining whether contempt has been committed, rather than at the stage of determining whether the offence should be punished.

The weight of importance to be given to competing public interests varied considerably from Mason C.J. who attributed them little importance, to Toohey J. who gave them far greater consideration. Similarly the onus of proof, and where it was to be applied, varied amongst the members of the court.

Most significantly, there was considerable difference as to when the public interest was to be assessed as a matter of law, and when material factors must be proved to facilitate the balancing of the public interest.

Although none of these differences had any effect on the clear-cut facts of this case, it is submitted that they may cause great difficulties in border-line cases and must be regarded with respect by those who publish any material which may have a tendency to interfere with the administration of justice.

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26 (1987) 74 A.L.R. 353, 382.
27 *Ibid.* 392.
28 *Ibid.* 406-7.

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