IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 531/92

KF1373C
15/9

IN THE MATTER of an application by Her Majesty's Solicitor-General in respect of alleged contempts of Court by RADIO NEW ZEALAND LIMITED, a company incorporated at Wellington

BETWEEN HER MAJESTY'S SOLICITOR-GENERAL

Plaintiff

A N D RADIO NEW ZEALAND LIMITED a duly incorporated company having its registered office at Wellington

Defendant

Coram: Eichelbaum CJ
Greig J

Hearing: 13 July 1993

Counsel: J J McGrath QC, DCS Morris & Ellen France for plaintiff
J W Tizard & Sandra Moran for defendant

Judgment: 30 AUG 1993

JUDGMENT OF THE COURT

Underpinning the Solicitor-General's contention that the defendant's conduct, as rehearsed below, was a contempt of

court is the proposition that the jury system is fundamental to the administration of the criminal law in New Zealand. It has as its basis the quality of a collective decision made by a group of ordinary New Zealanders in accordance with their unanimous opinion on whether or not a prosecution brought on behalf of the community has been proved beyond reasonable doubt. The concept is vulnerable to attack and if it is to be maintained as the lynchpin of the criminal justice system the courts must be vigilant to protect it. We agree with the whole of that submission.

The Background

In late 1990 David Wayne Tamihere was tried in the High Court at Auckland on counts of murder of Heidi Paakkonen and Urban Hoglin. The disappearance of these two Swedish tourists (at the time of the trial neither body had been found) and the subsequent trial were matters of widespread publicity and interest throughout New Zealand. Tamihere was found guilty on both counts and sentenced to life imprisonment.

On 10 October 1991 a body, subsequently identified as that of Urban Hoglin, was discovered. On 16 and 17 October an employee of the defendant contacted nine members of the jury which had tried Tamihere. In most if not all cases he spoke to them by telephone. In the succeeding days the defendant broadcast statements relating to those interviews. Depending on the time of day of the particular broadcast the estimated audience ranged between 2,700 in the early hours of the morning to a figure in excess of 400,000 at peak listening times. It is estimated that some 675,000 people aged 10 and over (of a total population a little in excess of 3 million) were listening to stations carrying the broadcast in question during one or more of the blocks of time during which the broadcasts were made.

Although the Solicitor-General did not rely on this aspect as a separate ground of argument, at the time of the broadcasts

applications by Tamihere for leave to appeal against the convictions were pending before the Court of Appeal. Following the broadcasts, a detective-inspector interviewed each of the jurors who had been contacted. The Solicitor-General had made an application to the Court of Appeal for leave to approach the jurors in this way but the Court indicated that for this limited purpose leave was not required, stating however that it was appropriate that the Solicitor-General should inform the Court, as he had done, and that the Court should indicate, as it did, that it saw no objection to such an approach.

While of course there were variations, in 8 cases out of the 9 the Detective-Inspector's enquiries showed that the jurors had reacted in much the same way. They were surprised and annoyed at the reporter's approach and that their identities should have become known, and refused to discuss the matter with him. On the former aspect, it is pertinent to note that S 9(6) of the Juries Act 1981 provides that except by leave of court granted for the purposes of any proceedings relating to the validity of the jury list or panel or the eligibility of any juror, the list shall be confidential to the Registrar and his staff. In the present case clearly there was a breach of that confidentiality but how it occurred is unknown. The reporter asked questions on the lines of what the juror thought now the body had been found, and whether the juror still considered Tamihere to be guilty. Two jurors contacted the police.

As to the ninth juror, although this does not appear from the record of the police interviews it is evident that one juror spoke to the reporter at some length. The substance of his views was contained in the defendant's various broadcasts. He was quoted as saying that anyone on the jury would have found it hard, he wondered what (Tamihere) had really done, whether he had done it or not, and that now the body had been found he had had second thoughts about the decision. Other broadcasts reported that the juror had been worried ever since the trial, and especially since the discovery of the body;

that he lay awake at night wondering had he done the right thing, or put an innocent man away. Some of the broadcasts included the playing of a tape of part of the interview with the particular juror. According to most of the broadcasts other jurors had refused to comment or had stated they still believed Tamihere was guilty. One programme, more extensive than others, was broadcast on *Morning Report* on 21 October 1991. This quoted one juror as saying she had done her duty and had no second thoughts, another that the evidence in total added up and nothing that had come out (about the finding of the body) was enough to make him change his decision, and a third that he was convinced of Tamihere's guilt by his nervous appearance in court, the identification made by two trampers, and the fact that he made off with the victims' car and property. The report also said it was clear the jurors were deeply affected by the trial and its aftermath.

The same day (21 October 1991) the Solicitor-General issued a statement advising he was considering the broadcasts with a view to possible contempt proceedings. The following day the defendant put to air a lengthy comment on *Morning Report*. Commencing with a reference to the Solicitor-General's investigation, it repeated portions of the earlier broadcasts and went on to say that *Morning Report's* legal opinion was that speaking to jurors was permissible provided anonymity was protected and the confidentiality of comments and debate in the jury room was not breached. New Zealand jurors had been interviewed in the past without any action being taken and the programme referred particularly to the *Appelgren* case where a re-hearing had been granted partly because a juror had spoken out. Remarks were quoted by this juror about doubts she had suffered after the verdict, including advice to jurors to speak out after the trial if they "go along with the majority decision and then afterwards regret it". Then in *Midday Report* the defendant broadcast comments of the Minister of Justice to the effect that he was considering changing the law to prevent media from talking to jurors should the practice become widespread.

An affidavit by the head librarian of the defendant's news information library referred to the considerable media coverage of the disappearance of Mr Hoglin and Miss Paakkonen, the subsequent searches, the comments of a politician in connection with the person charged, Tamihere's court appearances, and aspects of the trial described by the deponent as unusual. It was pointed out that on 20 October 1991 Television New Zealand screened a documentary canvassing the issue whether discovery of the body raised doubts about the propriety of the conviction. We interpolate that although the defendant's own broadcasts did not commence until the following day, by 20 October its interviews had been completed. The affidavit mentioned another well-publicised case of a tourist who had gone missing while on holiday in New Zealand. This occurred in November 1989 and it was not explained how it should be regarded as relevant to the present enquiry. Finally, the affidavit referred to two other instances where publicity had been given to jurors' comments. On 17 June 1991 the forewoman of a High Court jury trial made critical comments about the standard of the evidence in a murder trial, calling the case a waste of expensive time. This was immediately followed by comments from two other jurors who dissociated themselves from the forewoman's criticism of the police case. The second example was well after the present events.

Plaintiff's Claim

In these proceedings the Solicitor-General claims the defendant committed contempts of court in each of the following respects:

(1) Causing or permitting its servants or agents to make contact with members of the jury before whom David Wayne Tamihere was tried for the purpose of eliciting comment from them about their verdicts, and their views on the finding of the body of Urban Hoglin.

(2) Broadcasting reports of and a recording of comments made by the jurors before whom David Wayne Tamihere had been tried.

The Form of Contempt Alleged

As Lord Diplock said in *Attorney-General v Times Newspapers Ltd [1974] AC 273, 307,* contempt of court is a generic term which may take many forms. In relation to particular proceedings in a court of law it is descriptive of conduct which tends to undermine the system for the administration of justice by the courts or to inhibit citizens from availing themselves of it for the settlement of their disputes. In cases of the present kind the term "contempt of court" may mislead. It is not the dignity of the court which is involved or offended, what is in issue is the safekeeping of an impartial and effective system of justice. See *Solicitor-General v Radio Avon Ltd [1978] 1 NZLR 225, 229.* In that case, decided over 15 years ago, emphasis was placed upon the importance of the preservation of the justice system in the society of the day, and the growing forces to which the system was subjected, observations which apply even more strongly today. A related point is that the objective of the law of contempt is not to shield the judiciary or the judicial system from criticism. Least of all is it a matter of protecting the decision of the Judge or the jury in an individual case from appropriate comment. It is justice itself that is flouted by contempt of court, not the individual court or Judge attempting to administer it; see *Attorney-General v Leveller Magazine Ltd [1979] AC 440, 449.*

Neither the common law nor the legislature have attempted to define contempt of court in a comprehensive way, and we certainly do not propose to try to do so on this occasion. It is unnecessary to go further than to define the elements of the class of contempt into which the present case falls if proved. Broadly described, that is the category of conduct having the tendency to undermine the administration of justice. We said at the outset that this case is about protecting the jury system, but can be more precise than that. The particular aspects in issue are the finality of jury verdicts, candour and full participation in jury deliberations, and the privacy of

jurors. All three are referred to in a passage we will cite from the judgment of the Court of Appeal in *R v Papadopoulos [1979] 1 NZLR 621*. In that case, on an appeal against conviction a juror made an affidavit saying among other things that she thought the jury would be kept together until they had reached an unanimous verdict. The Court said:

> "As to the contents of the juror's affidavit, for centuries the Courts have declined to receive affidavits from jurors purporting to disclose what took place during their deliberations in the jury room or jury box...
>
> The rule is essential in the public interest for a number of reasons. Discussion of some of the reasons will be found, for instance, in the judgments of Lord Denning MR in *Boston v WS Bagshaw & Sons [1967] 2 All ER 87n; [1966] 1 WLR 1135n,* and of the Full Court in Victoria in *Re Matthews and Ford [1973] VR 199*. One reason is the need for finality in decisions; the uncertainty that would prevail if it were always open to a juror to say afterwards that he or she had not really agreed is obvious. It is also vital that jury discussions should be free and frank; no juror should be deterred from expressing his or her independent opinion by the fear of victimisation or undesired publicity if that opinion could later be disclosed. Public confidence in the jury system could be shaken and jurors could be distracted from doing their duty conscientiously if individual members of the jury were free to publicise their own versions of debates in the jury room. Jurors should not be exposed either to importuning on behalf of the accused or by litigants or to any temptation to capitalise on disclosures. All these reasons are as important today as ever they were." (p 626)

The finality argument goes to the core of how the jury system functions. Juries are not required to give reasons, nor could they be expected to do so. It is not the reasoning that is significant, but the conclusion. Indeed jurors are free to reach their conclusion by different paths, a point commonly made by Judges in the course of summing up. For example in a homicide case some jurors may decide the accused had one of the types of murderous intent specified in S 167, some another; or on a charge of sexual violation some may conclude the Crown has proved that the accused did not believe the complainant was consenting, while others may take the view there were no

reasonable grounds for any such belief. Or on an evidentiary level, in a case turning on proof of identity some jurors may regard one eye witness as critical, others may retain doubts about that evidence but regard the case as proved on other testimony. Subsequent investigations focussing on the views of one set of jurors or the other are damaging to the system; not the least, as the Solicitor-General submitted, because they misrepresent the basis of the jury system by focussing on jurors' reasoning. The system rests not on the process of reasoning followed by the jury, but on the community respect for their decision reached after a trial conducted in accordance with established procedures and principles.

Subject to rare exceptions the function of a jury ends with the delivery of its verdict. The proceedings may continue before the trial court or in the Court of Appeal, but so far as the particular jury is concerned its life is at an end. Nothing jurors say thereafter about the deliberations themselves can affect the verdict. Questioning jurors about their deliberations or their attitude to the discovery of further evidence is to endeavour to prolong the life of the jury, contrary to the principle of finality.

Jurors themselves are not always conscious of the principle; the experiences of the present case and the *Appelgren* disclosures tend to bear out the remarks of Lord Hewart CJ in *R v Armstrong [1922] 2 KB 555, 568:*

> "It may be that some jurymen are not aware that the inestimable value of their verdict is created only by its unanimity, and does not depend upon the process by which they believe that they arrived at it."

This passage like others lays emphasis on the aspect of unanimity. The requirement of a unanimous verdict still applies in this country, although it is no longer so in England; but we do not consider that affects in any material way the concept of community respect for jury verdicts.

Turning to the second aspect, the preservation of frankness in jury deliberations, since the strength of the jury process lies in the verdict clearly all jurors must be able and should be encouraged to contribute towards reaching it. Their participation should be in the certain knowledge that their own views may be expressed without fear of subsequent exposure, otherwise individuals, particularly the less forthright, experienced or confident, will be deterred from advancing opinions lest they be subsequently exposed to public criticism or ridicule. Cardozo J said in *Clark v United States (1933) 289 US 1, 34:*

> "This freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."

It is necessary to remember that a jury is brought together by compulsion to perform a public duty, a responsible and often difficult task requiring the courage to speak up in the jury room and sometimes to contribute to a decision unpopular with at least some members of the community. The desired qualities will not be promoted or safeguarded if afterwards enquiries are permitted revealing the process by which diverging views and opinions were melded into the final unanimous verdict.

The privacy of jurors is an equally important consideration. The responses and reactions of 8 of the 9 jurors approached in the present case confirm our own belief that generally jurors serve in the impression that their privacy will be respected and their identity remain undisclosed; that they will not be interviewed about their deliberations nor called upon to explain or justify their verdict.

The importance these aspects, individually or collectively, bear in the preservation of the jury system has been emphasised in many judgments, here and overseas. See *R v Papadopoulos (above), R v Armstrong (above), Ellis v Deheer [1922] 2 KB 113, Prothonotary v Jackson [1976] 2 NSWLR 457,*

and *Attorney-General v New Statesman & Nation Publishing Co Ltd [1981] QB 1*. Reference may also be made to the 1987 Report of the Australian Law Commission "Contempt" and to a number of quotations in a judgment which has come to hand since the hearing of the present case, *Attorney-General v Associated Newspapers Ltd [1993] 2 All ER 535, 540-541*. Since it is clear beyond argument that conduct which may undermine the jury system or public confidence in it is capable of constituting contempt, at this stage we need not analyse the cases or quote further from them.

Mens Rea

For the defendant it was accepted that conduct specifically intended to impede or prejudice the administration of justice was contempt. Absent specific intent it was submitted that what was required was that the conduct necessarily involved impeding or prejudicing the administration of justice, and that such was a clearly foreseeable consequence.

In *Attorney-General v Newspaper Publishing plc [1987] 3 All ER 277, 303* Lord Donaldson MR described mens rea in the law of contempt as something of a minefield. In this Court the decision in *Solicitor-General v Radio Avon Ltd* (above) is determinative of the issue. There the contempt fell into the category of scandalising the court, and the Court of Appeal declined to draw any distinction between cases of that type and those involving publications tending to prejudice the fair trial of actual cases pending in the Courts, in relation to mens rea. Both, as the judgment pointed out, involved conduct "calculated" to have the particular consequence. After quoting a well-known passage from the speech of Lord Diplock in *Attorney-General v Times Newspaper Ltd [1974] AC 273, 309* as to the purposes of the law of contempt and the nature of conduct amounting to a contempt, Richmond P who delivered the judgment of the Court continued:

> "Contempt by 'scandalising' the court is, of course, conduct which, in Lord Diplock's words, is calculated to undermine the public confidence in the proper functioning of the courts. It is to be noted that Lord Diplock, like Lord Russell, makes no distinction between one form of contempt and another from the point of view of the intent of the defendant. In the light of the approval given in *Ambard v Attorney-General* to Lord Russell's definition we doubt whether it would in any event be open to this court to introduce a special requirement of mens rea into this one branch of the law of contempt. We would not in any event be prepared to do so as we think that the public interest in the administration of justice is so important that it justifies the attitude which has been taken by the English courts." (p 233)

In this respect no meaningful distinction can be drawn between interfering with the administration of justice in relation to a pending case, or injuring the system as a whole in relation to its capacity to administer justice in the future. The latter must be regarded as of at least equal importance. Accordingly we hold that the mens rea element is satisfied by proof that the defendant knowingly carried out the act or was responsible for the conduct in question. Proof of an intention to interfere with the due administration of justice may assist the conclusion that the publication had the required tendency, and its presence or absence would also be relevant to penalty; but the absence of such an intention will not necessarily lead to a conclusion that no contempt has been committed. That is the law in Australia, see *Hinch v Attorney-General (1987) 164 CLR 15* per Wilson J at p 42, Deane J at pp 46 and 49, Toohey J at pp 69 and 70, and Gaudron J at p 85. We say now that here there are no grounds for inferring the presence of any such intention.

Proof of corrosive "tendency"

In argument there was some discussion regarding the meaning of "tendency" in this context, and how it was to be proved. We take the meaning adopted in *Solicitor-General v Radio Avon Ltd (above, at p 234)* which of course is binding on us, a real risk as distinct from a remote possibility that the broadcast items would undermine public confidence in the

administration of justice. A similar approach has been followed in Australia where the expressions used include a real risk of interference with the administration of justice, a substantial risk of serious injustice or a real and definite possibility that the conduct may prejudice the administration of justice. See *Hinch v Attorney-General (above) at 23, 34, 47*. Direct proof will rarely be possible. The Court must consider all the circumstances of the publication : *Attorney-General v New Statesman & Nation Publishing Co Ltd (above) at p 10,* following *Attorney-General v Leveller Magazine Ltd (above)* per Lord Edmund-Davies at p 465. Relevant factors include the statements published, the timing of their publication, the size of the audience they reached, the likely nature, impact and duration of their influence : see *Hinch v Attorney-General [1987] VR 729, 740, 742.*

The considerations set out above focus on the words published and the circumstances of their publication but in our view another important factor is the climate of the times, particularly (here) the need for protection of jurors and the jury system in the prevailing social environment. In a more stable period when there was a strong general respect for authority, conventions and institutions the justice system could more readily withstand the occasional aberration such as exhibited in the *Armstrong* case. Understandably Judges felt it was sufficient to condemn such conduct in strong terms without labelling it contemptuous, an issue indeed not before the Court in *Armstrong* itself, or in the contemporary decision in *Ellis v Deheer*. The exhortatory effect of judicial disapproval of this kind was sufficient to secure compliance with the convention that jurors did not disclose the secrets of the jury room and that the media did not seek out or publicise any disclosures. That was still felt to be the position in England in 1968 when the Criminal Law Revision Committee advised against making any statutory provision for protection of the secrecy of the jury room (see *Attorney-General v Associated Newspapers Ltd, above, at p 541)* but as noted in the same judgment, by the time *Attorney-General v New Statesman & Nation Publishing Co Ltd*

came before the Court in 1979 the picture had changed and Lord Widgery CJ considered that the solemn obligation of secrecy was breaking down, see *[1981] QB 1, 7, 11*. In New Zealand today we consider a very different ethos prevails among the media and breaches by one sector or member of the media inevitably put others under pressure to follow suit. Long-term we have no confidence in the ability of conventions or exhortations to preserve respect for jurors' privacy or prevent attempts to penetrate the secrets of the jury room. The recent breaches of convention referred to in these proceedings - four, including the present, in a short space of years - sufficiently illustrate the point. Nor do we see any likelihood that the trend will change if the Courts are not prepared to say the conduct is unlawful.

The plaintiff must prove the existence of a real risk beyond reasonable doubt, *Solicitor-General v Radio Avon Ltd (above)* at p 234. Founding himself on Canadian judgments and academic writing, Mr Tizard submitted that the test to be applied was that of the reasonable person : would the conduct, in the eyes of such a person, dispassionate and fully apprised of the circumstances, bring the administration of justice into disrepute? The key phrase we think is "fully apprised of the circumstances". This requires knowledge and an understanding of the functioning of the justice system, the place of the jury trial within it, an experience of jury trials and a perception of the effect which interference of various kinds with juries and jurors can have on the future well-being of the system. There seems little point in hypothetically investing an unlikely lay person with such qualifications and the more obvious and appealing course is that taken in *Hinch* and endorsed in *Solicitor-General v Broadcasting Corporation of New Zealand* namely that what is required is judicial satisfaction that the conduct infringes the principles.

Whether contempt proved

Against the background of the principles discussed we now turn to the issue whether the defendant's conduct constituted a contempt. We do so separately under the two headings alleged.

Under the first, it was not suggested that every approach to a juror after the conclusion of a case is a contempt. Here the allegation is linked with attempting to elicit comment about the verdicts, and jurors' views on the discovery of new evidence. In essence the allegation relates to an attempt to elicit information about the jury's deliberations including the reasoning on which the verdicts were based.

We have already discussed the reasons why such conduct is inimical to the well-being of the jury system. It violates the privacy to which jurors are entitled, and which they in fact expect. Knowledge that such breaches occur will render persons more reluctant to serve in the future, weaken public confidence in the system, and eventually might well contribute to its demise.

Turning to the particular circumstances, the approach to jurors was systematic, showing a determination to obtain publishable material. Plainly it involved acting upon a breach of the law relating to the confidentiality of the jury list. The conduct occurred against a background of a convention that such approaches were not made, and strong statements in past judgments about their impropriety. If it is said that such judgments were long ago, it may be answered that nothing had changed except that in recent times the media had shown increasing boldness in ignoring them.

The case for finding that the actual broadcasts had the tendency to undermine the justice system is even stronger. They were an open breach of the secrecy of the jury room, making it plain to future jurors in a highly public way that jury service was not necessarily accompanied by anonymity, that

they could expect to be contacted by the media after their service had concluded, questioned about their deliberations and called upon to justify their verdicts, and that the views of their fellow jurors as to what took place in the jury room and the reasoning by which the verdict was reached might be made public. Further, although no broadcast went this far, jurors might reasonably conclude that however discreet they might be themselves, they had no guarantee that fellow jurors might reveal not only their own reasoning but also that of others on the jury, thus exposing those members to public disapproval or ridicule. That this is not far fetched is shown by the Wellington incident where after media disclosure by one juror about the lack of impact the prosecution case allegedly made on the jury, others responded publicly disagreeing with the first juror's remarks.

In weighing the extent of the tendency of the publications to injure the justice system, regard should be had to their actual content. In the event they did not reveal much of the jury's deliberations or reasoning; in this respect it would be easy to think of worse examples. Nevertheless the corrosive tendency is obvious, and we do not need to repeat reasons already given in this respect. The broadcasts occurred on a number of occasions and reached a wide audience.

In the *New Statesman* case the defendant published an account given by a juror of the course of the jury's deliberations in a sensational trial. Considerations similar to those discussed in this judgment were rehearsed by the Court which regarded activity tending to imperil the finality of jury verdict, or affect adversely the attitude of future jurors or the quality of their deliberations, as capable of being a contempt. However, whether it was a contempt depended upon a consideration of all the circumstances, and "looking at the case as a whole" the Court was not satisfied that the article justified being so described. The grounds for that conclusion, with respect, do not clearly emerge from a perusal of the judgment.

Finally we revert to the point made earlier that the needs of the particular era have to be taken into account. In the past the Courts while critical of such conduct have stopped short of stigmatising it as contempt. It may have been thought that the strength of the convention against approaching jurors was sufficient and that it was preferable to tolerate the rare breaches which occurred rather than be seen to diminish freedom of expression. Unhappily the Court now finds itself placed in the position of either condemning the practice, or being taken as condoning it. As was said in the *New Statesman* case, if unchecked this type of activity might become the general custom; if so, it would soon be apparent that the secrecy of the jury room had been abandoned and should that happen, the end of the jury system would be in sight.

Subject to the Bill of Rights point we are satisfied that under both headings the conduct in question had the tendency to prejudice the administration of justice. The final step involves a balancing between the concept of freedom of speech and the need, for the sake of the community, to preserve the jury system from erosion. Freedom of speech is a concept of the highest value to a democratic community and the Courts must be alert to see that the legitimate open discussion of matters of public concern is not inhibited or stifled. Of equal concern is the sustaining of an impartial and effective justice system. In this respect - and this may constitute a distinction from the *New Statesman* case - in the present case the revelations lacked any counterbalancing virtue or merit. While the correctness of the convictions and the impact of the discovery of the body were matters that could properly be discussed, disclosure of jury deliberations or the reactions of individual jurors did not raise any legitimate matter of public concern, or otherwise advance the public good or the cause of justice. They achieved no more than the titillation of the listening public.

In concluding the discussion on this part of the case we think it worth repeating that nothing in the law of contempt inhibits appropriate criticism or discussion of jury verdicts including the probing of possible miscarriages of justice. It is simply that disclosure of the reasoning processes of individual jurors does nothing to assist. Nor should our decision stifle legitimate research into how juries function. If jurors are to be questioned for this purpose however we would regard it as appropriate to obtain their consent, and the Court's, in advance.

Bill of Rights

It is common ground that the Bill of Rights Act 1990 applies to these proceedings as applying to acts done by the judicial branch of the Government under s 3 (a). It is accepted, too, that the right of freedom of expression, expressed in s 14 of the Act, is involved in this case. There are two principal issues under the Act. The first is whether freedom of expression encompasses the committing of the contempt alleged in this case. In other words whether the defendant's right to freedom of expression is wide enough to include and to protect its conduct in this case. If it is wide enough the finding that there has been contempt will restrict or limit the defendant's right. The second issue, then, is whether the restriction created by the finding of contempt is within such reasonable limits as are set out in s 5 of the Act. It is appropriate to begin by quoting ss 4, 5, 6 and 14 of the Act.

> " 4. No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment—
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

> 5. Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 6. Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.
>
> 14. Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. "

The rights and freedoms affirmed by the Act are not absolute or to be applied each in isolation, but are to be construed and applied in the context not only of the Act and the other rights and freedoms contained in it but of all those other rights and freedoms which are not abrogated or restricted because they are not included in the Act (see s 28). The effect of ss 4, 5 and 6 is explicit in this regard: see especially Richardson J in *Ministry of Transport v Noort* [1992] 3 NZLR 260 at pp 282-283 -

> " By specifying how limitations on the rights and freedoms contained in the Bill of Rights are to be justified in particular cases, s 5 recognises explicitly that there are limits on those rights and freedoms. It reflects the reality that rights do not exist in a vacuum, that they may be modified in the public interest to take account of the rights of others and of the interests of the whole community. "

Within the Act itself the right to freedom of expression must be balanced against all the other affirmed freedoms and rights. These include minimum standards of criminal procedure in s 25 of the Act. Among others are -

(a) the right to a fair and public hearing by an independent and impartial court;

(c) the right to be presumed innocent until proved guilty according to law.

Outside the Act there are fundamental principles in protection and promotion of the free and impartial administration of justice which we have already discussed in detail.

Moreover, freedom of expression is intrinsically limited in certain ways. What is guaranteed in freedom of expression is the right to everyone to express their thoughts, opinions and beliefs however unpopular, distasteful or contrary to the general opinion or to the particular opinion of others in the community. But some forms of expression are not within that guarantee. As was said by the majority, Dickson CJC, Lamer and Wilson JJ in *Attorney-General of Quebec v Irwin Toy Ltd* (1989) 58 DLR (4th) 577 at 607:

> " ... a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen. "

The majority agreed with McIntyre J in *RWDSU v Dolphin Delivery Ltd* (1986) 33 DLR (4th) 174 at 187, in a discussion about picketing, when he said:

> " That freedom, of course, would not extend to protect threats of violence or acts of violence. "

Thus the right to freedom of expression does not license the publishing of defamatory expressions: see 8 *Halsbury's Laws of England* (4th ed) para 834.

The right to a fair and impartial trial, one in which the onus of proof is on the prosecution and the accused is presumed innocent until proved guilty, is at least as fundamental and as important as the right to freedom of speech. At the heart of the criminal trial is the jury's impartiality and its freedom from any constraint from outside. The finality of the verdict, the preservation of frankness in deliberation and the privacy of jurors are all important in the due administration of justice as we have already emphasised.

We think that on balance the right to freedom of expression is qualified by the necessity to preserve and protect those fundamental elements in the jury system. Freedom of expression does not authorise or permit the conduct of the defendant in this case. The right does not encompass the contempt alleged and found. The answer to the first issue is 'No' which resolves the Bill of Rights issue against the defendant.

We think it is appropriate nonetheless to go on to consider the second issue in this part of the case: whether this form of contempt of court creates no more than the justified limitation prescribed in s 5 of the Act.

There is no direct authority in New Zealand on this issue. The Bill of Rights is a recent enactment and the jurisprudence is developing gradually and case by case. As is customary in proceedings such as this, where the Bill of Rights is raised, reference has been made to decisions in other jurisdictions and particularly in Canada where they have had a relatively lengthy period of discussion and consideration of Bill of Rights issues under the Canadian Bill of Rights and, more recently, under the Canadian Charter of Rights and Freedoms which came into force in 1982. Section 1 of that Charter is as follows:

> " 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. "

The latter part of that is mirrored in the wording of s 5 of our Act. The Canadian courts have adopted a two-step approach. The first is to consider the particular section of the Charter to determine the scope of the particular right or freedom without reference to competing values or other considerations. It is then to be determined whether the particular right has been infringed. The second step is to consider and to weigh

the competing values implicit in s 1 of the Charter to determine which will prevail.

In Canada the principles have been stated and followed in a number of cases. The starting point is *R v Oakes* (1986) 26 DLR (4th) 200, a decision affirmed and followed by the Supreme Court of Canada in the *Irwin Toy* case. The principles may be stated as follows:-

1. The onus of justifying the limitation of the right or the freedom rests with the party seeking to uphold it, in this case the Solicitor-General.

2. The standard of proof is the civil standard of the balance of probability but that must be applied rigorously, consistent with the requirement that the restriction be demonstrably justified.

3. To establish that the limit is both reasonable and demonstrably justified in a free and a democratic society the law creating the limit on the right of freedom must have an objective of sufficient importance to warrant overriding a constitutionally protected right or freedom.

4. The means chosen by the law to achieve the objective must be proportional and appropriate to be objective.

5. To meet the requirement of the proportionality test there are three components. First, the limiting measures or the law must be designed to achieve the objective not being arbitrary, unfair or based on irrational considerations. This is described as being rationally connected to the objective. Second, the measures or the law should impair as little as possible the right or freedom. Third, there must be a proportionality between the effects of the measures or the law responsible for limiting the right or freedom and the objective. The law which restricts the right must not be so severe or so broad in application as to outweigh the objective.

In *Oakes* and *Irwin Toy* the measure or the law under consideration was an act of the legislature. In *Oakes* the statute created a presumption of guilt from the possession of drugs contrary to the right to be presumed innocent until proved guilty. In *Irwin Toy* the statute prohibited certain advertisements directed at children contrary to the guaranteed freedom of expression. There is no sound reason to suggest that the principles, appropriately modified, are not equally applicable to the provisions of the common law. Indeed, in *R v Kopyto* (1987) 62 OR (2d) 449 the majority of the Court of Appeal in Ontario applied the principles to a case of contempt of court and concluded that the law of contempt, as applied in that case, was not a constitutionally permissible limit on that freedom of expression.

There are a number of matters which prevent immediate application of Canadian principles or approach to the consideration and application of the New Zealand Act. The first distinction is that, as is well recognised, the Charter is a constitutional document entrenching the rights and freedoms therein expressed as part of the supreme law of Canada. It is not merely affirmative of the rights and freedoms therein expressed. The Courts in Canada have, on a number of occasions, made a distinction between the effect and interpretation of the rights and freedoms as set out in the Canadian Bill of Rights and in the Charter. The language of the Charter is imperative, declared and expressed with an intention to set a standard upon which present as well as future legislation is to be tested. The rights and freedoms are not simply recognised and declared as they existed before. That, indeed, is emphasised in the opening words of s 1 which guarantees the rights and freedoms.

There is no provision such as s 4 of our Act to which s 5 is made subject. Nor does the Canadian constitution or Charter have any provision similar to s 6 because the Charter and its expressions are a supreme law.

In the Charter freedom of expression is expressed as a fundamental freedom in the same paragraph as freedom of thought, belief and opinion, and includes explicitly freedom of the press and other media of communication. There is thus an express guarantee of the freedom of the press. In New Zealand the freedom of expression is one of all the various rights and freedoms. The right of freedom of the press is no more and no less than the right of all and any member of the public to make comment. In New Zealand s 14 expands on the expression of the freedom by an inclusive reference to the freedom to seek, receive and impart information and opinions of any kind and in any form.

Turning to the case of *Kopyto*, that too may be distinguished. It was a case on that form of contempt known as scandalising the Court. It arose out of a lengthy statement made to a newspaper reporter by a lawyer following the dismissal of a case in which he had acted as counsel for the plaintiff. Cory JA, while agreeing with the decision at trial that it amounted to the offence of contempt of court by scandalising the Court, described the comment as "no more than the puerile manifestation of petulant pique", but added, it "nevertheless represented the expression of a sincerely held belief on a matter of public interest." The decision of the majority was influenced in part by the Judges' view that, even intemperate criticism of a Judge after his decision on the case, absent evidence that there was likely to be any danger to the administration of justice, and when the criticism represented a sincerely held belief on a matter of public interest was to be robustly accepted in the Canadian democratic society.

It is, we think, implicit in the reasons of the majority that they felt that contempt of court by scandalising a Judge in the circumstances of that case, while unethical and unprofessional for a lawyer, ought not in a modern democracy to be treated as a criminal matter in the absence of proof of some

actual and real danger to the administration of justice or wilful and malicious wrongdoing.

It is, however, helpful to bear in mind the approach and the principles adopted in Canada, modified appropriately for New Zealand conditions. These include the interpretation and application of the New Zealand statute in which the Bill of Rights is expressed as well as our particular society and what may be thought to be justified and proper within it.

We were referred in argument to the decision of the European Court of Human Rights in the *Sunday Times Case* (1979) 58 ILR 491 which was an application brought by the publishers of the newspaper consequent upon the decision of the House of Lords in *Attorney-General v Times Newspapers Ltd* claiming that the injunction issued in the case constituted a breach of Article 10 of the European Convention for the Protection of Human Rights and Freedoms. That Article provides as follows:

> " 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. "

That again is a further and different expression of the right and the occasions upon which it may be limited. It requires the limitations to be necessary in a democratic society and in the interests of particular subject matters, including the maintenance of the authority and the impartiality of the

judiciary. Necessary implied, for the European Court, the existence of a pressing social need. In Canada in *Oakes* the corresponding test is expressed as sufficient importance to warrant overriding the constitutionally protected right of freedom, but that was described by Dickson CJC in *Oakes* at p 227 in these words:

> " It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important. "

We think, however, that there is a significant difference between what may be necessary and thus be of pressing social need and what may be said to be a reasonable limit demonstrably justified in a free and democratic society. The majority of the European Court, in the *Sunday Times case* at p 529, noted that:

> " ... whilst the adjective `necessary', within the meaning of Article 10 § 2, is not synonymous with `indispensable', neither has it the flexibility of such expressions as `admissible', `ordinary', `useful', `reasonable' or `desirable' and that it implies the existence of a `pressing social need' .... "

We think, in the end, little help is to be obtained from that decision of the European Court.

In *Noort* Cooke P did not think that any question for the Court arose under s 5. He expressed the view, at p 273, that that section does not on its face lay down a rule for interpreting other enactments but noted that ss 4 and 6 relate to inconsistency whilst s 5 deals with the limit that may be made and prescribed otherwise to the rights and freedoms. Richardson J, however, thought that s 5 did have application, stating that s 4 falls for consideration only when following the application of s 5 and s 6 there is a necessary inconsistency between the other statute and the particular provision of the Bill of Rights, even as modified in its

application. Richardson J set out a number of balancing factors to be weighed in considering s 5 at p 284 as follows:

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

Hardie Boys J thought that ss 4, 5 and 6 must be read as a whole and that s 5 had a reconciling or bridging role between s 4 and s 6, saying that, in terms of s 4, there will be inconsistency between an enactment and a right and freedom only if, after construing it in accordance with s 6, there is no room within it for the right or freedom even in modified or abridged form. It was to see s 5 as a mechanism to secure recognition of the acts, rights and freedoms to the fullest (p 287).

Gault J did not consider that s 5 of the Act assisted in that case. He said, at p 295:

> " Where on a proper interpretation of a New Zealand statute there is a limit imposed upon a fundamental right, it is no part of the function of the Courts to examine whether that limit can be justified. The limit must be given effect to as directed by s 4. Section 5 clearly serves a different role in the New Zealand Bill of Rights Act than does s 1 of the Canadian Charter. It seems rather directed to the role of the Attorney-General under s 7. It may assist in a conflict between common law rules and the fundamental rights, but I can see no part for it to play in cases of statutory inconsistency. "

In this case there is no statute involved so that only s 5 can apply directly. It is, however, to be considered in its

statutory context whereby the specific provisions of ss 4 and 6 are referred to in applying statutes in spite of inconsistency with any provision of the Bill of Rights and in interpreting statutes consistently with the rights and freedoms in the Act.

It should be observed that the requirement that the limit should be prescribed by law is an important one. It requires that the limit should be identifiable, adequately accessible and sufficiently precise: see Cooke P in *Noort* at p 272. Clearly s 5 applies to common law rules and there must always be a question of judgment as to whether, in the particular circumstances, the rule of law applies and to what extent. Unlike a statute it is not possible to turn to one provision or one set of provisions or to one authority. The common law is always developing and it is not possible to say with the precision of a statute what the law may be at a given time. As Dickson CJC said, in the context of a statutory provision and the judgment required in its application, (see *Irwin Toy* at p 617):

> " Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. "

In the case of a common law rule there is all the more "discretion" but it cannot be said that the rule is thereby not prescribed by law. The law of contempt, however, in the particular form that applies in this case is clearly enough prescribed and there was no issue taken about that in the arguments of counsel.

Adopting the general approach of the Canadian courts modified to New Zealand conditions, there is no doubt that the objective of the law of contempt, generally and specifically in this case, is of sufficient importance to warrant the limit of

the freedom of expression. Both as expressed in s 25 of the Act in declaring minimum standards of criminal procedure, and at ordinary common law, the protection of the due administration of justice, the impartiality and the freedom of deliberation of a jury, the finality of its verdict and preservation of the juror's anonymity are certainly important, substantial and pressing concerns of a free and democratic society. They are at least as fundamental as the freedom of expression.

The means available, by the sanction of procedures of contempt, to further and achieve this objective and to impose the limitation must, we think, be accepted to be reasonable and to be demonstrably justified. The means by which they are carried out is by another criminal or court procedure, impartially and fairly conducted by the Court. The result in any and each case is to prevent and to punish the particular contempt which has occurred. This is not like the cases to which we have already referred where some statutory provision applies generally to all the cases that fall within it. Here the decision of the Court is tailored to the particular circumstances of the case. It is a result which is no more than is appropriate and necessary to uphold the administration of justice and to limit the freedom of expression as little as possible, while, of course, any decision has a precedent effect and may be followed as a matter of principle.

In the result nothing in the Bill of Rights saves the defendant from the application of the law of contempt in this case.

Conclusion

We hold that the contempts alleged by the plaintiff have been proved and direct the Registrar to set a date when the Court may consider the question of penalty. We record that at the hearing we made an order prohibiting publication of the

names and addresses of the jurors in the case and any details leading to their identification. This order remains in place. The plaintiff is entitled to costs : we will deal with the quantum at the further hearing.

Solicitors:

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Oakley Moran, Wellington for defendant