

**Trying Times: The Right to a Fair Trial in the
Changing Media Environment**

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INTRODUCTION

Knock Knock – Who’s There?

David Bain – David Bain Who?

Great! You can be on the jury!

Due to online access and the efficiency of search engines, the ability for jurors to access prior convictions and other information about defendants has been transformed. The likelihood of finding a juror with no knowledge of a high-profile case is low, particularly as a result of the potential for jurors to conduct a Google search and discover details of a defendant’s background. In addition, due to the preservative and disseminatory powers of the internet, the assumption that adverse pre-trial publicity will lose its impact on a jury with the passage of time may no longer be valid. The rise of internet use and associated new forms of media has resulted in a changing media environment in which the rights to open justice, freedom of expression, and the right to a fair trial are challenged. The right to trial by jury is very important to the New Zealand legal system, and is protected in the New Zealand Bill of Rights Act 1990 (“BORA”).¹ The democratic and confidential nature of the jury process has been noted as ensuring public confidence in verdicts,² which is especially important in high profile, serious crimes.³ It is therefore crucial that the integrity of the jury system, and the right of all defendants to have a fair trial is protected. This dissertation examines the impact of the changing media environment on the right to a fair trial, with an assessment made of the mechanisms protecting such a right, whilst balancing the rights to freedom of expression and open justice.

¹ Section 24(e) Bill of Rights Act 1990 protects the right of an accused charged with an offence to a trial before a jury when the penalty for the offence may be imprisonment for more than three months.

² The secrecy of jury deliberations has received statutory recognition in s76 Evidence Act 2006. From the perspective of the general public, it is said that jury secrecy ensures the finality of jury verdicts. This argument is based on the premise that since the public is not informed of the reasoning leading to the jury’s verdict, there is no basis upon which the verdict can be attacked. For further analysis, see for example, Enid Campbell, “Jury Secrecy and Contempt of Court” (1985) 11 *Monash University Law Review* 169; *Solicitor General v Radio New Zealand Ltd* [1994] 1 NZLR 48; For details of arguments made in favour of the disclosure of juror deliberations, see Des Butler and Sharon Rodrick, *Australian Media Law*, North Ryde, NSW: LBC Information Services, 1999, pp. 159-160.

³ New Zealand Law Commission, *Juries in Criminal Trials*, NZLC R69, 2001, p. 3. The Law Commission cites the example of the case of David Bain – noting the considerable interest in the case and attacks on the alleged shortcomings of the police investigations, but that, “The decision of the jury however, has not been attacked.” *Ibid*, p. 3.

Chapter One provides an overview of the guiding principles of the rights to freedom of expression, open justice, and the right to a fair trial. Chapter Two details the changing media environment within which these rights operate, including an analysis of the internet's characteristics which pose the greatest risk to a fair trial – the preservative nature of internet publications, and the opportunities afforded to freedom of expression and dissemination due to the World Wide Web. Several mechanisms exist which courts may use in order to protect a defendant's right to a fair trial and the administration of justice. Chapter Three analyses 'preventative mechanisms', being mechanisms directed at preventing the publication of prejudicial material, and Chapter Four analyses 'remedial mechanisms', which are utilised to remedy any prejudice from publications which do occur. The decision of whether a mechanism can be utilised involves a consideration of the rights to a fair trial, freedom of expression and open justice, in light of the individual circumstances of each case.

It will be argued that the application and effectiveness of such mechanisms are likely to be impacted by the growth of the new media forms, with the balancing of these rights, and the consideration of other relevant factors by courts, significantly altered as a result of the internet. This dissertation concludes that the right to a fair trial may still be protected in the changed media environment, despite the opportunities afforded for wider freedom of expression. Pragmatic adaptation of both preventative and remedial mechanisms is likely to occur, with a growing cooperation between the courts and the new media environment required. Such cooperation will recognise the enhanced opportunities for free expression within the restraints required by the right to a fair trial.

CHAPTER ONE

THE RIGHTS INVOLVED

A 2003 survey found ninety percent of New Zealanders rated the right to justice, including the right to a fair trial, as a very important human right.⁴ As a result of the growth of the internet and subsequent changing media environment, however, the right to a fair trial is coming under increasing pressure due to the increased likelihood of jurors being prejudiced by publications both before and during a trial. Before assessing the various mechanisms utilised to protect the right to a fair trial in light of the changing media environment, the guiding principles of the rights to open justice, freedom of expression, and the right to a fair trial must be outlined.

1.1 Open Justice

The value of open justice can be seen from the earliest days of the English legal system – if a person gave up their natural desire for revenge against someone, they wanted to be satisfied that the accused was dealt with in what a majority of their community thought to be a suitable way.⁵ Open court hearings have subsequently been recognised as providing the best security for the impartial administration of justice. In addition, to secure public support for their decisions, courts must inform the public and maintain its confidence.⁶ The justifications

⁴ This survey was cited in Human Rights Commission, “New Zealand Today”, *Human Rights in New Zealand Today*, Undated, Available at: <http://www.hrc.co.nz/report/index.html>, (Accessed: 12 April 2008).

⁵ Early cases in England were brought before courts attended by the community. In most cases, attendance at these meetings was compulsory, with the community providing judgment on the appropriate outcome. As a jury system began to emerge, the duty of members of the community to provide judgment was relaxed, but criminal trials have remained public. For further details, see, for example: P. Heath, “Freedom of Expression and the Administration of Justice: to Gag or not to Gag? A Trial Judge’s Perspective”, *Using the Bill of Rights in Civil and Criminal Litigation*, New Zealand Law Society: Wellington, 2008, p. 44; P. Wright, “The Open Court: The Hallmark of Judicial Proceedings”, (1947) 25 *Canadian Law Review* 721, p. 721; B. Harris, *The Courts, The Press, and The Public*, Barry Rose Publishers: Chichester, 1976, p. 11.

⁶ Bentham declared in 1825 that publicity is, “The soul of justice. It keeps the Judge himself, while trying, under trial”: J Bentham, Chapter 10, “Of Publicity”, *A Treatise on Judicial Evidence*, JW Paget: London, 1825. For examples of commentary on the importance of open justice, see: *Scott v Scott* [1913] AC 417 at 463; *Attorney General v Leveller Magazine Ltd* [1979] AC 440; *R v Thompson* [2005] 3 NZLR 577; *R v Wharevaka* (Auckland High Court, CRI-2004-092-4373, 8 April 2005, Baragwanath J); *R v B* [2008] NZCA 130 at [50]; *Broadcasting Corporation of NZ v Attorney General* [1982] 1 NZLR 120; *Lewis v Wilson and Horton Ltd and Ors* [2000] 3 NZLR 546; *R v Mahanga* [2001] 1 NZLR 641; John Lofton, *Justice and the Press*, Beacon Press: Boston, 1966, p. 137;

for open justice can be seen to carry significant weight in criminal proceedings, given the possible outcome of deprivation of personal liberty and freedom.⁷

The right to open justice is recognised in New Zealand by s25(a) of the BORA,⁸ and article 14(1)⁹ of the International Covenant on Civil and Political Rights 1966 (“ICCPR”). A similar requirement for open justice is enacted in s138 of the Criminal Justice Act 1985 (“CJA”).¹⁰ The principle of open justice requires that proceedings should be held in open court to which the press and public are admitted, and that all evidence introduced in court is communicated publicly.¹¹ The desirability of open justice, and for justice to not only be done, but also to be *seen* to be done, is thus generally the “starting point” of many judgments concerned with suppression of evidence or names.¹² The Court of Appeal recently affirmed this premise, stating that the “starting point, and usually the finishing point, must be a presumption of openness, which means that cause must be shown to depart from the logic that the courts are open”.¹³ In addition to the public gallery in courtrooms and media reporting of the courts, other methods by which court proceedings are open to the public

Mary O’Dwyer, Judge of the District Court of New Zealand, Private Discussion in Chambers at Dunedin District Court, 12 September 2008; Clive Walker, “Fundamental Rights, Fair Trials and the new Audio-Visual Sector”, (1996) 59(4) *The Modern Law Review*, p. 517; Peter Grabosky and Paul Wilson, *Journalism and Justice: How Crime is Reported*, Pluto Press: Sydney, 1989, p. 61; Peter Carey and Richard Verow, *Media and Entertainment: The Law and Business*, Jordans: Bristol, 1998, p. 493; Trevor Allan, “Common Law Constitutionalism and Freedom of Speech”, in Jack Beatson and Yvonne Cripps, (eds) *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams*, Oxford University Press: Oxford, 2000, p. 32; *Police v PIK and Others*, (Manukau Youth Court, 25 August 2008, Harvey J) at [16]; *Broadcasting Corporation of New Zealand v Attorney General* [1982] 1 NZLR 120, 122-123, per Woodhouse P.

⁷ C. Baylis, “Justice Done and Justice Seen to be Done – the Public Administration of Justice”, (1991) 21 VUWLR, p. 180; New Zealand Law Commission, *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character*, NZLC R103, 2008, p. 143; D. Bates, “Interviews with the Media: Lawyer’s Legal and Ethical Duties”, *Dealing with the Media*, NZ Law Society: Wellington, November 1999, p. 5; John Burrows and Ursula Cheer, *Media Law in New Zealand*, Oxford University Press: Auckland, 2005, p. 325

⁸ See Appendix One for full text for s 25 BORA.

⁹ Article 14(1) recognises the right to a “fair and public hearing by a competent, independent and impartial tribunal”.

¹⁰ As noted in s 138(1) CJA, the principle of open justice applies to public access and reporting of proceedings unless there is a specific Court order to the contrary.

¹¹ Daniel Stepniak, “A Comparative Analysis of First Amendment Rights and the Televising of Court Proceedings”, (2004) 40 *Idaho L. Rev.* p. 338. The public release of the police video involving the pepper spraying of a prisoner by Harrison J can be understood in light of the principle of open justice – whereby the verdict reached may be better understood if the evidence the jury viewed is open to the public.

¹² P. Heath, “Freedom of Expression and the Administration of Justice: to Gag or not to Gag? A Trial Judge’s Perspective”, p. 38; William Akel, Steven Price, and Robert Stewart, *Media Law: Rapid Change, Recent Developments*, NZ Law Society: Wellington, 2008, p. 2. For examples of cases stating this principle, see: *Television New Zealand Ltd v R* [1996] 3 NZLR 393; *R v Liddell* [1995] 1 NZLR 538; *Levis v Wilson and Horton Ltd and Ors* [2000] 3 NZLR 546; *Re Victim X* [2003] 3 NZLR 220; *X v Police* (Auckland High Court, CRI-2006-404-259, 10 August 2006, Baragwanath J); *Solicitor General v Broadcasting Corporation of NZ* [1997] 2 NZLR 100, 123 per Woodhouse P.

¹³ *R v B* [2008] NZCA 130 at [55].

have been developed. Mount notes the introduction of the courts website¹⁴ as a “significant development” towards both ensuring that justice is administered openly, and increasing public understanding of legal decisions.¹⁵ It is also interesting to note that the new Supreme Court building was designed with the goal of open justice in mind, with its courtroom visible from the street.¹⁶

1.2 Freedom of Expression

Open justice requires not only that courts are open to the public and media, but also that those attending are permitted to publish reports of proceedings to a wider audience. The right to freedom of expression in New Zealand is provided for in s14 BORA,¹⁷ and article 19(2) ICCPR.¹⁸ Nevertheless, the right to freedom of expression may be limited in the face of other considerations. While in some countries, such as the United States of America (“USA”), freedom of expression is a constitutionally protected right with no stated exceptions, in New Zealand the right to freedom of expression is limited by s5¹⁹ BORA.²⁰

Therefore, whilst freedom of expression is regarded as a fundamental value, competing interests can outweigh it.²¹ In the context of freedom to publicise information

¹⁴ This website is available at www.courtsofnz.govt.nz

¹⁵ Simon Mount, “The Interface Between the Media and the Law” [2006] NZLR 413, p. 420.

¹⁶ Rick Barker, “Supreme Court Building Design Unveiled”, *New Zealand Government Official Website*, 25 September 2006, Available at:

<http://www.beehive.govt.nz/release/supreme+court+building+design+unveiled>, (Accessed 26 September 2008). Barker has also stated that tours of the Court will be available, “so the public can be better informed about the New Zealand legal system”.

¹⁷ Section 14 BORA provides, “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.”

¹⁸ Article 19(2) ICCPR describes the freedom, “To seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media...” At an international level, freedom of expression is also recognised in Article 19 of the Universal Declaration of Human Rights 1948.

¹⁹ Section 5 BORA imposes on all guaranteed rights, “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

²⁰ In addition, pursuant to article 19(3) ICCPR, the right provided by article 19(1) may be limited where the “interests of justice, national security or the private lives of the parties would otherwise be prejudiced”. In addition, the ICCPR recognises rights, such as the article 14 right to a fair hearing which may conflict with the right to freedom of expression.

²¹ Geddis concludes that “the current state of freedom of expression under New Zealand law is that it is broadly recognised and respected as a valuable and important social good – until such time as another more valuable or important social good requires that it be restricted”: Andrew Geddis, “The State of Freedom of Expression in New Zealand: An Admittedly Eclectic Overview”, (2008) 11(4) *Otago Law Review* 657, p. 681. For further examples of commentary on the ability to override the right to freedom of expression, see: Sally Walker,

relevant to criminal proceedings, other values may be preferred, such as upholding the fairness of trials and respect for the judicial system in general, both of which may be damaged by unregulated speech.²² It has been noted:²³

The principle that justice must be administered openly and publicly is not absolute. If that were so, true justice would at all times be defeated...the principle of open justice must be balanced against the objective of doing justice.

As court proceedings are open in part to ensure the attainment of justice,²⁴ this purpose would be largely defeated if discussion of proceedings or premature public disclosure of relevant materials were allowed to undermine the fairness of trials.²⁵

1.3 Right to a Fair Trial

The common law and s25²⁶ of the BORA place a high value on the achievement of a fair trial.²⁷ The Court of Appeal in *Gisborne Herald Co Ltd v Solicitor General* emphasised the “crucial importance of a fair trial”, noting that a “fair trial is not a purely private benefit for an accused” as “public confidence in the integrity of the justice system” is equally

Media Law: Commentary and Materials, LBC Information Services: Pyrmont, NSW, 2000, pp. 5, 71; New South Wales Law Reform Commission, *Contempt by Publication*, Report 100, 2003, at 2.2, 2.6; James Spigelman, “The Internet and the Right to a Fair Trial”, 6th *World Wide Common Law Judiciary Conference*, Washington DC, 1 June 2005, Available at:

http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman010605,

(Accessed 1 March 2008); Michael Chesterman, “OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt with in Australia and America”, (1997) 45(1) *The American Journal of Comparative Law*, pp. 114-115.

²² Clive Walker, “Fundamental Rights, Fair Trials and the new Audio-Visual Sector”, p. 517.

²³ *Police v O'Connor* [1992] 1 NZLR 87, 95-96, per Thomas J.

²⁴ As noted above, by opening the courts to public scrutiny, which ensures no abuses of processes, and that a fair trial does in fact occur.

²⁵ Rosemary Robertson, “The Internet: Tipping the Balance of Rights?” (2003) 2 *New Zealand Students' Law Journal*, pp. 218-219; Clive Walker, “Fundamental Rights, Fair Trials and the new Audio-Visual Sector”, p. 518; Trevor Allan, “Common Law Constitutionalism and Freedom of Speech”, p. 32. This justification is noted in Lord Haldane’s dictum in the famous case of *Scott v Scott*, “While the broad principle is that courts in this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions...themselves the outcome of a more fundamental principle that the chief object of courts of justice must be to secure that justice is done”: *Scott v Scott* [1913] AC 417, 437-438.

²⁶ See Appendix One for the full text of this section.

²⁷ New Zealand Law Commission, *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character*, p. 143. The right of individuals to a “fair...hearing by a competent, independent and impartial tribunal” is also guaranteed by article 14(1) ICCPR.

important.²⁸ Therefore, a defendant's right to a fair trial must not be endangered through permitting any prejudging of the case, or publication of inadmissible evidence in the name of freedom of expression or open justice.²⁹ Despite some information being inadmissible at trial, its publication would make it unofficially part of the evidence which is likely to be considered, and may influence potential jurors.³⁰ As important as the rights to open justice and freedom of expression are, they have certain necessary and limited exceptions, with various mechanisms used to protect the fairness of the trial.³¹ Such mechanisms involve a balancing of the rights in order to consider which should have primacy.

1.4 Balancing of Rights

Therefore, the rights of open justice and freedom of expression can conflict with a defendant's right to a fair trial. Whilst these rights are recognised in the BORA, they are not absolute.³² Thus when faced with these conflicting rights, courts undertake a balancing process in order to see which right prevails, while seeking to accommodate the other rights as much as possible. The balancing of these rights must also take into account the presumption of innocence.³³

How the rights are to be balanced is a question of critical importance. Case law reveals that whilst courts begin by recognising the rights to open justice and freedom of expression,³⁴ such rights can be limited in order to avoid prejudice to a pending trial, so that justice may occur. Essentially, in weighing the rights against each other, where the right to a fair trial is compromised, a defendant may suffer permanent harm; whereas any restrictions

²⁸ [1995] 3 NZLR 563, 569, with the Court holding that freedom of expression needed to be limited in favour of fair trial rights. See also: Sally Walker, *Media Law: Commentary and Materials*, pp. 427-428; *Attorney General v Times Newspapers Ltd* [1973] 3 All ER 54, 60 per Lord Reid; *Police v PIK and Others* (Manukau Youth Court, 3 September 2008, Harvey J) at [78].

²⁹ Michael Menzies, *Contempt of Court Through Breach of the Sub Judice Rule*, Unpublished Honours Dissertation, Faculty of Law, University of Otago: Dunedin, 1977, pp 111-112. In addition, *R v B* [2008] NZCA 130 notes this argument on behalf of the applicant at [47].

³⁰ John Lofton, *Justice and the Press*, pp. 148-149.

³¹ See below at Chapters Three and Four.

³² As recognised by s5 BORA.

³³ As recognised in s 25(c) BORA, which recognises as a minimum right, "the right to be presumed innocent until proved guilty according to law". See Appendix One for the full text of s25. *R v Proctor* held that the presumption of innocence would be given the weight it merited in the circumstances, with it not displacing the important considerations of rights to a fair trial, open justice, and freedom of expression. (CA [1996] 1997 1 NZLR 295, 298-299).

³⁴ As noted above at footnote 12.

on freedom of expression and open justice end with the conclusion of legal proceedings in the majority of cases, thus only temporarily limiting rights.³⁵ Given the overriding concern is the administration of justice, freedom of expression and open justice can be limited to the extent a defendant's right to a fair trial requires, in order to ensure justice. Noting such a practice, in *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* it was stated that in a contest of rights, "The need for a fair trial should continue to have primacy."³⁶

The importance of the right to a fair trial in such a balancing process is thus clear, with a real risk of a defendant not receiving a fair trial displacing the principles of freedom of expression and open justice. The Court of Appeal recently held, "The right to a fair trial trumps all else."³⁷ After undertaking the balancing process in an earlier decision, it noted:³⁸

Once...It has been determined that there is a significant risk that the accused will not receive a fair trial, the issue ceases to be one of balancing. The principles of freedom of expression and open justice must then be departed from, not balanced against. There is no room in a civilised society to conclude that, 'on balance', an accused should be compelled to face an unfair trial.

The above balancing process is undertaken by courts in determining an appropriate response to the possibility or the occurrence of prejudicial publications. The following chapter outlines the media's role in facilitating public access and knowledge of court proceedings. The media plays an important role – acting as a 'watchdog' for the public, ensuring fair trial procedures and public scrutiny of the courts.³⁹ The media can also potentially interfere with the administration of justice and the right to a fair trial, however, with the changing media environment enhancing such a possibility, as detailed in Chapter Two.

³⁵ *Solicitor General v Wellington Newspapers Ltd* [1995] 1 NZLR 45, 57; New Zealand Law Commission, *Juries in Criminal Trials*, p. 181; Trevor Allan, "Common Law Constitutionalism and Freedom of Speech", p. 32; *Gisborne Herald Co Ltd v Solicitor General* [1995] 3 NZLR 563.

³⁶ New Zealand Law Commission, *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character*, p. 146. A similar view on the primacy of the right to a fair trial can be seen in John McGrath, "Contempt and the Media: Constitutional Safeguard or State Censorship?" [1998] NZLR 371, where at p. 380 he noted the right to a fair trial was, "A right seen as close to absolute and not to be compromised".

³⁷ *R v B* [2008] NZCA 130, [2], in granting an application for interim name suppression.

³⁸ *R v Burns* [2002] 1 NZLR 387, 404 per Thomas J, in continuing a name suppression order after conviction, pending an appeal.

³⁹ Katherine Venning, "Counsel Comment", (2008) 1(3) NZLSJ, p. 517.

CHAPTER TWO

THE MEDIA AND COURT REPORTING

New Zealand relies on twelve-member juries deliberating in isolation on evidence and argument as presented in court to determine the guilt or innocence of a defendant committed for trial. Although jurors are expected to reach their verdict based on the material presented in court, cases are often reported extensively in the media in the period preceding the trial, with potential jurors thus amongst the audience. The reporting of criminal matters has been noted as involving a delicate balancing exercise – between the media keeping the public informed, while at the same time refraining from publishing material that may interfere with the administration of justice.⁴⁰

Publications can be prejudicial, and thus interfere with the administration of justice, by containing material such as previous convictions. Such publications may induce a jury to conclude the defendant had a propensity to commit the offence charged, thus being predisposed to convict them.⁴¹ In addition, the material may be given undue importance by jurors in determining whether guilt has been proved.⁴² The New Zealand Law Commission has reported that jurors were rarely aware of sufficient detail of pre-trial publicity to enable them to form any bias or prejudgment.⁴³ Significantly, however, the Commission concluded that:⁴⁴

⁴⁰ For example, Auckland District Law Society, *Reporting Criminal Enquiries – the Balance between Freedom of Speech and the Interests of Justice*, Public Issues Committee, ADLS: Auckland, 1986, p. 1.

⁴¹ The new s 43(4) of the Evidence Act relating to propensity evidence was enacted to minimise the risk a jury will give undue weight to the inference of disposition which is available from the previous conviction, and convict on propensity grounds.

⁴² Lofton makes the argument that out-of-court reports of past criminal histories may be “even more harmful than material admissible under rules of evidence and may have with the jurors the character of forbidden fruit”: John Lofton, *Justice and the Press*, p. 153. A further possibility is the potential for prejudicial publications to result in selective attention by jurors – whereby when considering evidence, jurors focus only on the evidence confirming existing hypotheses, giving less attention or respect to inconsistent evidence. Subsequently, if a juror suspects a defendant is guilty due to pre-trial publicity, evidence supporting innocence may be discounted, and must be more compelling to have an effect.

⁴³ New Zealand Law Commission, *Juries in Criminal Trials: Part Two*, NZLC PP 37, 1999, at paras 7.51-7.55.

Note that a 2001 Australian study reached very similar conclusions: Michael Chesterman, Janet Chan, and Shelley Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in NSW*, Law and Justice Foundation of NSW, 2001.

⁴⁴ New Zealand Law Commission, *Juries in Criminal Trials*, citing Young, Cameron and Tinsley, p. 180 (Emphasis added)

The only conclusion that can be drawn from the jury research is that jurors are not generally affected by the *current level* of pre-trial or during trial publicity. An increase in the current level of publicity could mean a greater impact and a different result.

As detailed below, the internet completely transforms the ability for prejudicial pre-trial publicity to remain accessible to the public and jurors, with the increased level of publicity thus posing a real risk that jurors will be affected.

2.1 Traditional Media Reporting of the Courts

Due to infrequent public attendance of court proceedings, the media plays a crucial role in achieving open justice in society;⁴⁵ being ‘surrogates of the public’ in this regard.⁴⁶ Freedom of expression is thus important to the media’s role in ensuring justice occurs publicly. Developments in recent years have resulted in television cameras being permitted inside many courtrooms.⁴⁷ This development can be understood in light of the argument that such coverage gives the public better access to court proceedings, making the principle of the open administration of justice more of a reality.⁴⁸ Other recent developments highlighting

⁴⁵ Sally Walker, *Media Law: Commentary and Materials*, p. 418. Media organisations are accepted as having a role in communicating court proceedings – with seats set aside in the courtroom to let them hear submissions. In noting the importance of open justice, the Courts Consultative Committee has noted that the court system is a function of the community, and is thus accountable to the community; with media reporting the most effective way in which the community is able to view the court system: Courts Consultative Committee, *Media Coverage of Court Proceedings: Discussion Document*, Courts Consultative Committee: Wellington, 1998, pp. 6, 8. Harris notes that often the only member of the public present in court is a representative of the press; and that, “This solitary individual may represent the community’s only chance of learning about [events]”: Brian Harris, *The Courts, The Press, and The Public*, p. 9; *Police v PIK and Others*, (Manukau Youth Court, 25 August 2008, Harvey J) at [16]. In *R v B* [2008] NZCA 130, it was noted at [55] that the media are, “the eyes and ears of the community; and so the media may report what the public would have seen had they gone to court”.

⁴⁶ Peter Gregory, *Court Reporting in Australia*, Cambridge University Press: Melbourne, 2005, p. 42; Paul Heath, “Freedom of Expression and the Administration of Justice: to Gag or not to Gag? A Trial Judge’s Perspective”, p. 45; Des Butler and Sharon Rodrick, *Australian Media Law*, p. 129; Sally Walker, *Media Law: Commentary and Materials*, pp. 72, 421; *Police v O’Connor* [1992] 1 NZLR 87 at 96; William Flockton, *When is ‘Ambush’ OK? Balancing Public Interest in Newsgathering*, Unpublished Honours Dissertation, Faculty of Law, University of Otago: Dunedin, 2004, p. 8.

⁴⁷ There is even a television programme on the Documentary Channel on SKY which airs New Zealand court hearings before Judges, including discussions with family members of the Defendant and the Defendant themselves.

⁴⁸ Such expanded media coverage was only permitted after running a Pilot Study on the effects of cameras in courtrooms. The pilot project commenced in 1995, evaluated in 1998, expanded in 2000, and finally implemented in a further-expanded form in 2003: See Courts Consultative Committee, *Media Coverage of Court Proceedings: Introduction and Summary of Research Findings*, Courts Consultative Committee: Wellington, 1998; *Guidelines for Expanded Media Coverage of Court Proceedings* (May 2000); The In-Court Media Coverage Guidelines 2003. Burrows and Cheer note that cameras in court are consistent with open justice: “If publicity is indeed the

the importance of the media in providing open justice include more leeway in reporting,⁴⁹ and the opening of Parole Hearings to media representatives.⁵⁰

It has been noted the print and broadcast media devote much space and broadcast time to the publication of reports of police activity and criminal litigation; reflecting the public's curiosity about these matters.⁵¹ In high-profile cases the media report every stage of the process – from investigation to the final court appearance, thus having considerable potential to influence the public mind. The desire of the media to report events as they happen may lead to tension with fair trial rights, with material published prior to the trial having the ability to prejudice potential jurors, as well as publications during trial being able to prejudice jurors sitting on the case.

The philosophy of open justice is underpinned by confidence in the media's integrity and responsibility. Such reliance is partly justified, as traditional media have their own organisations such as the Broadcasting Standards Authority and the Press Council, which seek to control breaches of their professional standards.⁵² The integrity of media outlets is further strengthened by the Media in Court Committee, and the years of cooperation and protocols built up between the judiciary and the media.⁵³ Whilst traditional media outlets may still, unintentionally or otherwise, publish material prejudicing a fair trial, the development of the internet and its associated new media forms has dramatically increased the likelihood of such prejudicial material being published and accessed by jurors.

soul of justice, and if anyone can (in theory) go into court and observe proceedings, why should everyone not have the equivalent opportunity of watching them on television?" (John Burrows and Ursula Cheer, *Media Law in New Zealand*, pp. 327-328). The Court of Appeal has held that, "Television in the courtroom is now a regular feature of the juridical landscape": *R v Thompson* [2005] 3 NZLR 577 at [39].

⁴⁹ Such as the High Court overturning a Broadcasting Standards Authority decision re media chasing woman down the street. (*Television New Zealand v David and Heather Green* (Wellington High Court, CIV 2008-485-24, 11 July 2008, Mallon J)).

⁵⁰ D. Musseu, "Parole Hearings Opened", *Sunday Star Times*, 7 September 2008. Musseu cites comments recognising the importance of open justice made by the Parole Board Chairman, Judge Carruthers, "We are part of the criminal justice system that should be open to scrutiny, just as a Court proceeding is opened up."

⁵¹ Sally Walker, *Media Law: Commentary and Materials*, p. 417.

⁵² Such standards include ensuring publications do not create a risk to a fair trial. An example of a Broadcasting Standards Authority decision on this issue is provided by *Fletcher Homes v TVNZ* 1998-124.

⁵³ Mary O'Dwyer, Private Discussion in Chambers at Dunedin District Court.

2.2 The Changing Media Environment

The definition of ‘media’ has changed as a result of the information age. The ‘traditional’ understanding of print media such as books and newspapers, and electronic media such as radio and television, has been joined by other means of conveying information and ideas. ‘New’ forms of the media within the internet include online forms of ‘traditional’ media such as newspapers and television bulletins; blogs; and forums.⁵⁴ The traditional media’s role as a major source of public information has been challenged by the growth of the new forms of media, with Mount noting that many people now receive their news via the internet instead of the traditional forms of media.⁵⁵ Reinforcing this trend, the 2007 World Internet Survey showed 71% of New Zealanders rated the internet as an “important or very important” source of information – compared with 52% for newspapers.⁵⁶

Mainstream traditional media players such as Fairfax Media, TVNZ, and Radio NZ are converging online, providing the growing numbers of digital audiences with combined print, audio and video. Newspapers run online editions of their publications, and television and radio stations provide online live streaming, with such publications then archived online.⁵⁷ Increasingly too, media outlets are offering their online audiences the opportunity to create content – commenting on stories, taking part in online forums, and linking to multiple sites.⁵⁸ Over the past few years, blogs have become an extremely popular form of electronic communication, with an estimated 300 different message boards in New Zealand,

⁵⁴ Des Butler and Sharon Rodrick, *Australian Media Law*, p. 2; Sally Walker, *Media Law: Commentary and Materials*, p. v.

⁵⁵ Simon Mount, “The Interface Between the Media and the Law”, pp. 413-414.

⁵⁶ Allan Bell, Charles Crothers, Ian Goodwin, Kevin Sherman, and Philippa Smith, *The Internet in New Zealand 2007: Final Report*, Institute of Culture Discourse and Communication, AUT University: Auckland, 2007, p. 9.

⁵⁷ For example, website pages for TVNZ are archived back to 10 January 1997. (Available at www.tvnz.co.nz)

⁵⁸ Cate Brett, “Pushing the Virtual Envelope: Rickards and the Internet Challenge to New Zealand’s Law of Contempt”, *Law, Liberty and Legislation Conference*, 1-2 February 2008, School of Law, University of Canterbury, New Zealand. Harvey J noted the various linking and comments tools on a “typical news story web page” on the *NZ Herald* in *Police v PIK and Others*, (Youth Court, Manukau, 3 September 2008, Harvey J) at [52]

and thousands of un-mediated blogs.⁵⁹ According to the 2007 World Internet Survey, 10% of New Zealanders have blogs, and 27% have posted a message on a message board.⁶⁰

As a result of this changing media environment, the issue of how the rights discussed in Chapter One should apply to the new forms of media arises.⁶¹ Whilst publications by the traditional forms of media may result in some prejudice in the minds of potential jurors,⁶² the internet adds to this possibility significantly – both through the preservative power of internet publications, and the sheer volume and content of internet publications, often including detail which the traditional media outlets would be unlikely to publish, as detailed below. In addition, the ease by which information can be communicated across international borders brings with it the danger of pre-trial prejudice from websites hosted overseas, not being subject to domestic mechanisms.⁶³

(a) Preservative Power of Internet Publications

Traditional media publications have been noted as having a form of “partial obscurity”, with the general information possibly being remembered, but not in detail.⁶⁴ In comparison, information published on the internet is generally permanent and accessible; with the assumption that adverse pre-trial publicity loses its impact on the jury with the passage of

⁵⁹ Cate Brett, “Pushing the Virtual Envelope: Rickards and the Internet Challenge to New Zealand’s Law of Contempt”. Globally, blogs are growing at the rate of 175,000 new sites per day, with an estimated 113 million blogs in total worldwide: (Sunny Woan, “The Blogosphere: Past, Present, and Future. Preserving the Unfettered Development of Alternative Journalism”, (2008) 44(2) *California Western Law Review* 477, p. 482, citing Technorati (Available at www.technorati.com/about)).

⁶⁰ Allan Bell, Charles Crothers, Ian Goodwin, Kevin Sherman, and Philippa Smith, *The Internet in New Zealand 2007: Final Report*, pp. 11-12.

⁶¹ Sally Walker, *Media Law: Commentary and Materials*, p. 72.

⁶² Ceri Thomas, “Fair Trial”, *BBC News*, 10 April 2008, Available at: http://www.bbc.co.uk/blogs/theeditors/2008/04/fair_trial.html, (Accessed: 12 April 2008). While the risk of prejudice most frequently operates against the interests of a defendant, it should be pointed out that it need not necessarily do so – some publications may prejudice potential jurors against the victim, or in favour of accused. (Auckland District Law Society, *The Mass Media and the Criminal Process*, Public Issues Committee, ADLS: Auckland, 1989, p. 7).

⁶³ This issue is discussed below in Chapter Three, at 3.3.

⁶⁴ This factor is compounded by the public being “Continuously bombarded with a never-ending kaleidoscope of items of news so that the individual’s recollection of each and every item is ephemeral”. (Mark Armstrong, David Lindsay, and Ray Watterson, *Media Law in Australia*, 3rd Ed, Oxford University Press: Melbourne, 1995, p. 106) For examples of cases in which such a point was noted, see *Police v PIK and Others*, (Manukau Youth Court, 25 August 2008, Harvey J), at [14]; *Mahutoto & Wallace v R* (Auckland High Court, T000515, 20 June 2000, Chambers J) at [17]; *Solicitor General v Broadcasting Corporation of NZ* [1997] 2 NZLR 100, 115, per Davison CJ. However, note the fact that individual publishers’ websites are not likely to be as well indexed as traditional media sites, thus having the potential to be “buried in the noise” when conducting a search: *Police v PIK and Others* (Manukau Youth Court, 19 September 2008, Harvey J) [68].

time no longer valid.⁶⁵ The Court of Appeal recently noted in *R v B* that due to the ability to make inquiries on the internet, publicity about defendants, “can no longer be assumed to be of only transitory significance.”⁶⁶ Once information is published on the internet, it is almost impossible to completely remove,⁶⁷ with the ease by which such information may be disseminated through the internet compounding this issue. In *Police v PIK and Others*, Harvey J noted the “viral nature” of information on the internet, with the possibility that “information may spread from newspaper websites to blog sites and on such sites may be the subject of comment, editorialising, and opinion”.⁶⁸ This ability to comment on, and disseminate prejudicial material results in such material being even easier to access, and harder to completely remove.

Many jurors will be in a position to research the internet privately at home.⁶⁹ It is therefore possible for potential jurors prior to the trial, and jurors during a trial, to search using the defendant’s name, obtaining archived media reports of previous proceedings.⁷⁰ Whilst it was always impossible to search library archives of newspapers, such research can now be done with a few clicks of a mouse.⁷¹ Harvey J noted this ability of potential jurors to have reference to material on the internet, “which could well have an adverse effect upon a

⁶⁵ James Spigelman, “The Internet and the Right to a Fair Trial”; *Police v PIK and Others*, (Manukau Youth Court, 25 August 2008, Harvey J) at [5]; James Spigelman, “The Truth Can Cost Too Much The Principle of a Fair Trial”, *The Fourth Gerard Brennan Lecture*, 25 October 2003, Bond University: Queensland.

⁶⁶ *R v B* [2008] NZCA 130, at [78].

⁶⁷ D. MacKenzie, “Can Bloggers be Counted as Journalists” *Otago Daily Times*, September 2 2008; Bernard Hickey, “How a Judge is Trying to Sidestep Google”, *Stuff New Zealand*, 26 August 2008, Available at: <http://www.stuff.co.nz/blogs/showmethemoney/2008/08/26/how-a-judge-is-trying-to-sidestep-google/>, (Accessed 7 September 2008). Mount notes that even if information is removed from one website it can be “mirrored” on another; and even if deleted it can remain in a “cache” or electronic archive indefinitely: Simon Mount, “Freedom of Expression and the Administration of Justice: to Gag or not to Gag?” p. 66.

⁶⁸ (Manukau Youth Court, 25 August 2008, Harvey J) at para [12]; (Manukau Youth Court, 3 September 2008, Harvey J) at [54].

⁶⁹ Given that 78% of New Zealanders use the Internet: Eloise Gibson, “Kiwis top of international survey for blogging” *New Zealand Herald*, 29 July 2008, Available at: http://www.nzherald.co.nz/feature/story.cfm?c_id=363&objectid=10524003, (Accessed 5 September 2008)

⁷⁰ New Zealand Law Commission, *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character*, p. 104; Peter Gregory, *Court Reporting in Australia*, pp. 176-177; *Police v PIK and Others*, (Manukau Youth Court, 25 August 2008, Harvey J) at [11]; Richard Ackland, “The Judiciary and the Press”, *Australian Press Council News*, 17(2), May 2005.

⁷¹ It is interesting to note the ability to search for material on the Internet has dramatically increased since the rise of search engines such as Google. When the issue of jurors conducting Internet searches first arose, there were a number of judicial observations emphasising the difficulty in gaining access to online information.

fair trial” required an order suppressing publication of material on the Internet in *Police v PIK and Others*.⁷²

(b) Amount and Detail of Internet Publications

The internet greatly magnifies the risk of an unfair trial, particularly in regards to the ease by which prejudicial information can be published and disseminated by the public. Information may be rapidly transmitted around the world, having the potential to reach a wider audience than traditional media. Traditional media publications unilaterally feed information to the recipient, but other than letters to the editor, the ability to give feedback is limited.⁷³ In addition, the internet also enables individuals to reach a wide audience, when expressions might not otherwise be given the opportunity for publication,⁷⁴ resulting in greater freedom of expression.⁷⁵

This increased freedom of expression must be placed in the context of the essential characteristic of a fair trial, being that jurors must determine the guilt or innocence of a defendant on the basis of evidence admitted in court.⁷⁶ While the traditional media generally

⁷² (Manukau Youth Court, 25 August 2008, Harvey J), at [5]. This suppression order is discussed further in Chapter Four.

⁷³ Sunny Woan, “The Blogosphere: Past, Present, and Future. Preserving the Unfettered Development of Alternative Journalism”, p. 485.

⁷⁴ *Police v PIK and Others*, (Manukau Youth Court, 25 August 2008, Harvey J) at [10]; Simon Mount, “Freedom of Expression and the Administration of Justice: to Gag or not to Gag?”, p. 66; Sally Walker, *Media Law: Commentary and Materials*, pp. v, 4; New South Wales Law Reform Commission, *Contempt by Publication*, at 2.62; Matt Mollgaard, “Reflecting the New Realities of the Digital Age”, (2007) 13(1) *Pacific Journalism Review*, p. 8; Sunny Woan, “The Blogosphere: Past, Present, and Future. Preserving the Unfettered Development of Alternative Journalism”, pp. 480-481; D. Spender, “APC in the Information Age”, *Australian Press Council News*, 14(3), August 2002; A.T.H. Smith, “Free Press and Fair Trial: Challenges and Changes”, in Beatson, Jack, and Cripps, Yvonne, (eds) *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams*, Oxford University Press: Oxford, 2000, p. 125; Alastair Bonnington, “News Without Frontiers: Pre-Trial Prejudice and the Internet”, p. 199; Anne Branscomb, “Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces”, (1995) 104(6) *Yale Law Journal*, p. 1669. It has been noted that, “With the communicative potential of cyberspace, everyone who owns a computer and modem and is connected to the networks owns a press with built-in distribution capabilities”: Edward Cavazos, and Gavino Morin, *Cyber-Space and the Law: Your Rights and Duties in the On-Line World*, The MIT Press: Massachusetts, 1994, p. 85.

⁷⁵ Mike Godwin, *Cyber Rights: Defending Free Speech in the Digital Age*, Times Books: New York, 1998, pp. 11-12; *Police v PIK and Others* (Manukau Youth Court, 19 September 2008, Harvey J) at [24].

⁷⁶ Chief Justice Spigelman of New South Wales has stated that, “One of the most important manifestations of the principle of a fair trial is the withholding of evidence from the jury”: James Spigelman, “The Internet and the Right to a Fair Trial”; Bernard Hickey, “How a Judge is Trying to Sidestep Google”, Peter Gregory, *Court Reporting in Australia*, pp. 176-177.

act responsibly while a case is sub judice, there are contributors to the internet who do not.⁷⁷ Examples include Antonie Dixon posting on his MySpace page details of his life and offending,⁷⁸ and the Gwaze family website asserting the father's innocence regarding a murder charge he was facing.⁷⁹ Many internet publications operate free of the restrictions imposed upon corporate-owned media organisations.⁸⁰ Consequently, court-imposed sanctions on publication are less likely to be observed by independent, internet-based publishers operating within an environment promoting the supremacy of the right to freedom of expression, and placing less emphasis on the need for restraint in the interests of justice.⁸¹

2.3 The Internet's Impact on the Right to a Fair Trial

As a result of the above factors, the right to a fair trial may be impacted on, with the internet resulting in information being so generally accessible that it cannot be effectively controlled. It has been noted that "the rules of engagement are changing",⁸² with the internet showing there are limits to the courts' ability to control what information potential jurors are exposed to; therefore challenging the ability to ensure a fair trial.⁸³

⁷⁷ However, note the traditional media often deliberately pushes the boundaries through its publications, with a recent example being TV3 broadcasting images of Liam Reid despite the Judge declining their application to show such images, on the grounds that identity was at issue in the trial.

⁷⁸ The site had photos of Dixon in prison, with him admitting that he "cut the girls", and saying that it was a long time ago, and that he had changed and wanted another chance. His website was removed prior to his retrial for the attacks which he detailed on the site: NZPA, "Dixon's MySpace Page Removed After he Boasted of Murders", *New Zealand Herald*, 3 August 2008, Available at http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10525031 (Accessed 5 September 2008).

⁷⁹ The website contained statements about George Gwaze's character and behaviour at key times; seeming to put forward a version of events that would be in issue in the trial. The Solicitor General requested that parts of the site be removed out of concerns about its impact on a fair trial. (S. Scanlon, "Justice System Acts to Stop Trial by Internet", *Sunday Star Times*, 9 March 2008; Cate Brett, "Pushing the Virtual Envelope: Rickards and the Internet Challenge to New Zealand's Law of Contempt").

⁸⁰ This factor was noted in *Police v PIK and Others* (Manukau Youth Court, 19 September 2008, Harvey J) at [24]. Judge O'Dwyer has noted that whilst there is not yet a process of accreditation of news media, there has been some discussion between the Ministry of Justice and news media organisations as to whether there should be such a process. It has been suggested that in light of the changing media environment, a wider process of accreditation is required so that such standards do not only cover traditional news media but a wider range of media. (Mary O'Dwyer, Private Discussion in Chambers at Dunedin District Court)

⁸¹ Rosemary Robertson, "The Internet: Tipping the Balance of Rights?" pp. 215-216.

⁸² Cate Brett, "Pushing the Virtual Envelope: Rickards and the Internet Challenge to New Zealand's Law of Contempt".

⁸³ *Police v PIK and Others*, (Manukau Youth Court, 3 September 2008, Harvey J), at [21]; James Spigelman, "The Internet and the Right to a Fair Trial"; Clive Walker, "Fundamental Rights, Fair Trials and the new Audio-

Commentators have noted the internet opens up the prospect of juror misbehaviour during the course of the trial, by accessing the internet to acquire information about the events, the accused, a witness, or for the purpose of checking expert evidence.⁸⁴ In *R v Harder* the problem of jurors conducting internet searches and recovering information about prior convictions was noted to be, “a concern which as a result of improvements in the internet and technology...is now a risk in virtually any trial”, particularly in high-profile cases.⁸⁵

Of concern is the ability to discover information about the character of an accused, particularly about prior criminal conduct, whether alleged or proven. For example, the Australian website CrimeNet provides details on thousands of convicted criminals, apparently gathered from newspapers and court records. Questions were raised as to whether jurors had access to entries in several cases,⁸⁶ with the site now requiring a person to open an account, and to agree not to search for details whilst serving as a juror.⁸⁷ In New Zealand, the Sensible Sentencing Trust website contains databases of ‘Violent Offenders’,⁸⁸ and ‘Paedophiles and Sexual Offenders’;⁸⁹ detailing names, photos, birth dates, convictions, and facts of the offending. In addition, searches of newspaper website archives, or through search engines such as Google may result in previous convictions or behaviour of a defendant being retrieved.

Cases receiving significant levels of pre-trial publicity have a higher risk of being impacted by prejudicial material posted on the Internet. In these situations, the media saturates the public with news and opinions about every aspect of the case. As a result of intensive media reporting, public interest and curiosity increases, with discussion and publication occurring about the case on the internet by the public. A number of current

Visual Sector”, p. 520; Ceri Thomas, “Fair Trial”; *R v B* [2008] NZCA 130 at [50]; Cate Brett, “Pushing the Virtual Envelope: Rickards and the Internet Challenge to New Zealand’s Law of Contempt”. Randerson J noted this concern in *R v Rickards (No 2)* (Auckland High Court, CRI 2005-063-1122, 19 May 2006, Randerson J) at [51]: “...Today’s communication technologies, in particular email and the internet, pose a new challenge in relation to insulating jurors from prejudicial material not admitted in evidence at trial.”

⁸⁴ James Spigelman, “The Internet and the Right to a Fair Trial”.

⁸⁵ (Auckland High Court, CRI-2003-404-000291, February 5 2004, Williams J) at [44].

⁸⁶ See *R v McLachlan* (2000) VSC 215; *R v Cogley* (2000) VSCA 231. See also *R v Long* (2003) QCA 77, 138 A Crim R 103. The controversy surrounding this website was part of the catalyst for the introduction of an offence against jurors conducting Internet searches, as discussed below in Chapter Four, at 4.8.

⁸⁷ See “Criminal Database” www.crimenet.com.au (Last Accessed 8 October 2008).

⁸⁸ Sensible Sentencing Trust, *Violent Offender Database*, Available at <http://www.safe-nz.org.nz/Data/voddb.htm> (Last Accessed 8 October 2008).

⁸⁹ Sensible Sentencing Trust, *Paedophile and Sex Offender Database*, Available at <http://www.safe-nz.org.nz/sxdb/sxdb.htm> (Last Accessed 8 October 2008).

high-profile cases in New Zealand have prejudicial information published on the Internet about them. For example, details about the background of Liam Reid, accused of murdering Emma Agnew, have appeared on the Trade Me message boards⁹⁰ and other websites;⁹¹ concern has been raised about detailed Internet postings discussing the murder of Sophie Elliot;⁹² and within hours of the fatal stabbing of Augustine Borrell, his friends and even his alleged killer congregated on the social networking site Bebo.⁹³

The *R v Rickards*⁹⁴ trial indicated the threat the new media could pose to a fair trial. At times the Internet acted as a simple channel for disseminating information and gossip, but most controversially, at times it also acted as a powerful tool for undermining suppression orders. The treatment of this case by the traditional and new media clearly shows the differing attitudes towards court orders. The traditional media largely respected the need to postpone freedom of expression in order to protect the integrity of the legal process, despite the considerable challenges created by the restrictions on reporting the trials. However, the same could not be said of the new media, with extensive publicity on the

⁹⁰ TV3 News, "Background Information on Accused Killer Leaked on Trade Me", *TV3 News*, 29 November 2007, Available at: <http://www.tv3.co.nz/News/BackgroundinfoonaccusedkillerleakedonTradeMe/tabid/209/articleID/40375/Default.aspx?ArticleID=40375>, (Accessed 5 September 2008). It is of interest to note that this source links Reid's involvement in the Agnew murder to a brutal rape in Dunedin the weekend later through its "Related Articles" list at the bottom of the website. This link could have raised the issue of his involvement in both crimes to potential jurors; had the two offences continued to have been pursued separately. (They are now being tried together after an application for severance was declined.)

⁹¹ Jarrod Booker, "Fair Trial Chances 'Receding Hourly'", *New Zealand Herald*, 1 December 2007, Available at: http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10479454 (Accessed 5 September 2008). An example of a website posting highly prejudicial information is: Sunsawed, "Emma Agnew Memorial Thread", *Christy's World*, Last updated: 4 April 2008, Available at: <http://christysworld.yuku.com/topic/581/t/Emma-Agnew-Memorial-Thread.html?page=1>, (Accessed 5 September 2008). This website has all the relevant news stories archived, including details of Agnew's funeral, tributes, and the angry scenes at Reid's court appearances. While those viewing the television stories detailing the court appearances will be unlikely to remember the emotional scenes, the Internet enables the preservation of such emotions. In addition, the website contains other highly prejudicial information including details of previous rape charges and convictions for threatening to kill and assault under Reid's previous name; details of him attempting suicide in prison after his arrest for Agnew's murder; and details of the connection between the previously separate Dunedin rape allegation and Emma Agnew.

⁹² In the days and weeks after her murder, friends and colleagues of both Elliot and the defendant, Clayton Weatherston filled Facebook pages and blogs with detailed comments on her murder and the status of her relationship with the defendant: S. Scanlon, "Justice System Acts to Stop Trial by Internet"; Cate Brett, "Pushing the Virtual Envelope: Rickards and the Internet Challenge to New Zealand's Law of Contempt"; Karen Arnold, "Bloggers on Murder Case Ignore Law", *Sunday Star Times*, 24 February 2008.

⁹³ Brett reports that Borell's friends actually confronted the alleged killer online, prompting him to post an apology for the "incident", and to declare that he had handed himself in. (Cate Brett, "Pushing the Virtual Envelope: Rickards and the Internet Challenge to New Zealand's Law of Contempt").

⁹⁴ *R v Rickards and Others*, (Auckland High Court, Jury Trial, CRI 2005-063-1122, March 2006).

internet about Schollum and Shipton’s previous convictions.⁹⁵ Lack of respect for the suppression orders and a view that posters were somehow beyond the reach of the law was a constant theme in many of the online discussions about this matter. The sustained and widespread internet discussion of suppressed information both during and after the first trial thus provided the Defence Counsel for the three defendants with “compelling grounds”⁹⁶ for an application to the High Court for a stay of prosecution in respect of the second trial the three were facing.⁹⁷ In his assessment of the material, Randerson J noted this flagrant nature of some of the online breaches, stating:⁹⁸

...a disturbing element to the public reaction to the outcome of the Louise Nicholas trial is the apparent willingness of some members of the public deliberately to breach suppression orders regardless of the consequences...

The above analysis of the changing media environment has shown that several aspects of the internet and its new media forms can pose a risk to a fair trial, in terms of the availability of prejudicial material which may influence jurors. Due to the importance placed on the right to a fair trial, and the increasing use of the internet and thus the increasing danger of such risks to fair trials, a consideration of adapting current mechanisms or introducing new measures must be undertaken. The following chapters provide an overview of the mechanisms currently used to protect the right to a fair trial, and an assessment of any likely changes to such mechanisms as a result of the internet.

⁹⁵ New Zealand Law Commission, *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character*, p. 105; Cate Brett, “Pushing the Virtual Envelope: Rickards and the Internet Challenge to New Zealand’s Law of Contempt”. Brett notes that material breaching the suppression orders comprised of four large folders containing thousands of internet postings both during the trial itself and in the “heated days” after the verdict was delivered.

⁹⁶ Cate Brett, “Pushing the Virtual Envelope: Rickards and the Internet Challenge to New Zealand’s Law of Contempt”. Brett detailed some of the publications in breach of suppression orders, noting the resulting “compelling grounds” for a stay application.

⁹⁷ However, such a stay application was declined, as discussed in Chapter Four

⁹⁸ *R v Rickards (No 2)* (Auckland High Court, CRI 2005-063-1122, 19 May 2006, Randerson J) at [22].

CHAPTER THREE

PREVENTATIVE MECHANISMS

In recognition of the risk of jurors being influenced by prejudicial publications, mechanisms exist which are intended either to prevent prejudicial publications, or in the event prejudicial publications occur, to prevent or restrict the publications prejudicing jurors, thus remedying the situation. This chapter details the preventative mechanisms of sub judice contempt and suppression orders, with Chapter Four assessing several remedial mechanisms. Contempt of court can be understood as a preventative mechanism due to the threat of prosecution operating to prevent such publications occurring, with suppression orders prohibiting publication of material determined by a court to be prejudicial.

The preventative mechanisms of contempt and suppression orders are only employed after the courts undertake a balancing process of the rights detailed in Chapter One. The mechanisms do not limit freedom of expression and open justice indefinitely, postponing publication only until the risk of prejudicing a fair trial has passed.⁹⁹ This chapter details factors considered by courts in determining whether sub judice contempt has occurred, and whether to grant suppression orders. As noted in Chapter Two, the internet has dramatically altered the risk of publications prejudicing a fair trial. An assessment will thus be conducted of the likely impact the internet will have on the implementation and effectiveness of these mechanisms.

3.1 Sub Judice Contempt of Court

Individuals¹⁰⁰ or entities may be held to be in contempt of court for publications or actions that obstruct, interfere with, or undermine the administration of justice or the authority of

⁹⁹ Whilst permanent suppression orders may be granted restricting freedom of expression indefinitely, as noted below at 3.2, orders of this type are rare.

¹⁰⁰ It has been noted that strictly speaking, any person involved in the preparation, content, production, distribution or broadcasting of contemptuous material can be held responsible for the publication. Given the editor has ultimate and overall control over the content of the newspaper, they will always be held responsible for what is published: Des Butler and Sharon Rodrick, *Australian Media Law*, p. 175.

the courts.¹⁰¹ To the extent that material with such a tendency is available to the public on the internet, as with publishers of traditional media, the publisher of the website may be convicted for contempt. Although the ostensible purpose of contempt is to ensure defendants receive a fair trial, the underlying purpose is to preserve the appearance of the justice system as being impartial and free from outside influences,¹⁰² thus maintaining public confidence in the administration of justice.¹⁰³ Whilst there are several forms of contempt of court, not all are relevant to this dissertation. Sub judice contempt will be considered in this section, with contempt by breaching a suppression order noted in the section below.¹⁰⁴

Once a case is before the courts, or ‘sub judice’,¹⁰⁵ the media become subject to the constraints imposed by sub judice contempt, with courts having an inherent jurisdiction to prevent the risk of contempt of court by injunction.¹⁰⁶ Publicity prior to a trial has been noted as being protected by the law of sub judice contempt because of the ‘special nature’ of this stage of the process. Prior to a trial, the right of a defendant to a fair trial is most vulnerable, as potential jurors may form their own opinions based on what is published in the media.¹⁰⁷ As stated in *Solicitor General v Wellington Newspapers Ltd*,¹⁰⁸ and later confirmed by the Court of Appeal in *Gisborne Herald Co Ltd v Solicitor General*,¹⁰⁹ a publication will be in

¹⁰¹ New Zealand Law Commission, *Juries in Criminal Trials*, p. 176; Des Butler and Sharon Rodrick, *Australian Media Law*, p. 171; Philip Morgan, “Laws Designed to Bring Fairness to Sex Trials”, *NZ Herald*, 18 April 2006, Available at: http://www.nzherald.co.nz/topic/story.cfm?c_id=240&objectid=10377859, (Accessed 12 April 2008); William Akel, Steven Price, and Robert Stewart, *Media Law: Rapid Change, Recent Developments*, p. 22; Simon Mount, “The Interface between the media and the law”, p. 421; Sally Walker, *Media Law: Commentary and Materials*, p. 519.

¹⁰² D. Bates, “Interviews with the Media: Lawyer’s Legal and Ethical Duties”, p. 5.

¹⁰³ Des Butler and Sharon Rodrick, *Australian Media Law*, p. 173; Philip Morgan, “Laws Designed to Bring Fairness to Sex Trials”; John Burrows and Ursula Cheer, *Media Law in New Zealand*, p. 387.

¹⁰⁴ At 3.2.

¹⁰⁵ Proceedings are sub judice from the time an arrest is “highly likely”, until either the charges have been dropped, the accused has been acquitted, the time for lodging an appeal has elapsed, or all possible appeals (and any retrials) have been heard. (*TVNZ v Solicitor General* [1989] 1 NZLR 1 at 3; William Akel, Steven Price, and Robert Stewart, *Media Law: Rapid Change, Recent Developments*, pp. 25, 27; Steven Price, *Media Minefield: A Journalist’s Guide to Media Regulation in New Zealand*, New Zealand Journalists Training Organisation: Wellington, 2007, pp. 222-224, 229; John Burrows and Ursula Cheer, *Media Law in New Zealand*, pp. 392, 394-395). It has been noted that in practice, many of the “shackles” on reporting come off after the trial, due to criminal appeals not involving juries, with any retrial being a long time away: Steven Price, *Media Minefield: A Journalist’s Guide to Media Regulation in New Zealand*, p. 232; John Burrows and Ursula Cheer, *Media Law in New Zealand*, pp. 412-413. An example of reporting restrictions being lifted after a verdict was delivered is provided by the post-verdict order permitting disclosure of a video showing police pepper-spraying a prisoner.

¹⁰⁶ As noted in *TV3 Network Services Ltd v Broadcasting Standards Authority* [1999] NZAR 452, 459.

¹⁰⁷ Katherine Venning, “Counsel Comment”, p. 520.

¹⁰⁸ *Solicitor General v TV3 Network Services Ltd and Television New Zealand Ltd*, (Christchurch High Court, M520/96, 8 April 1997, John Hansen J, Eichelbaum CJ).

¹⁰⁹ *Gisborne Herald Co Ltd v Solicitor General* [1995] 3 NZLR 563, 567.

contempt of court if it creates a “real risk” of prejudice to a fair trial;¹¹⁰ an intention to interfere with a fair trial is not required.¹¹¹ The most common ground for a finding of contempt is that published material may prejudice a jury. Contempt of court seeks to strike a balance between the competing rights to a fair trial and freedom of expression.¹¹² Publications are permitted to contain a fair and accurate report of court proceedings,¹¹³ reflecting the media’s role in ensuring open justice. However, if the publication contains material likely to prejudice a fair trial, a contempt of court will have occurred. In the absence of actual evidence regarding the effect the publication has on jurors, judges rely on their own assessment of the likely impact of the material.¹¹⁴

(a) Types of Publications Which Constitute Contempt

Despite its seriousness, there is no set criteria of what constitutes contempt.¹¹⁵ However, it is possible to loosely categorise publications found to be in contempt of court due to their potential to influence juries. As noted above, the proper administration of justice requires that in reaching a decision, jurors should only consider arguments and evidence presented in

¹¹⁰ *Solicitor General v W and H Specialist Productions Ltd* [2003] 3 NZLR 12, 16; *Solicitor General v TV3 Network Services Ltd and Television New Zealand Ltd*, (Christchurch High Court, M520/96, 8 April 1997, John Hansen J, Eichelbaum CJ); *Solicitor General v Broadcasting Corporation of NZ* [1987] 2 NZLR 100, 107; *Gisborne Herald Co Ltd v Solicitor General* [1995] 3 NZLR 563, 567; Steven Price, *Media Minefield: A Journalist’s Guide to Media Regulation in New Zealand*, p. 225; John Burrows and Ursula Cheer, *Media Law in New Zealand*, pp. 387, 395, 403; Simon Mount, “The Interface Between the Media and the Law”, p. 422.

¹¹¹ Sally Walker, *Media Law: Commentary and Materials*, p. 544; John Burrows and Ursula Cheer, *Media Law in New Zealand*, p. 424. However, innocent intention may be relevant to the penalty: *Ibid*, p. 424; Simon Mount, “The Interface between the media and the law”, p. 422; Mark Armstrong, David Lindsay, and Ray Watterson, *Media Law in Australia*, p. 117.

¹¹² Michael Menzies, *Contempt of Court Through Breach of the Sub Judice Rule*, pp. 111, 113.

¹¹³ New South Wales Law Reform Commission, *Contempt by Publication*, at 2.17; Steven Price, *Media Minefield: A Journalist’s Guide to Media Regulation in New Zealand*, pp. 230-232; John Burrows and Ursula Cheer, *Media Law in New Zealand*, p. 407; Peter Gregory, *Court Reporting in Australia*, pp. 47, 49. For example, Price notes that the controversial newspaper publications detailing the charges against Tony Veitch are not in contempt, given they essentially summarise the police allegations, which are almost certain to be revealed in depositions: Steven Price, “Unprejudiced” *Media Law Journal*, August 25 2008, available at: <http://www.medialawjournal.co.nz/?p=149>, (Accessed 4 September 2008).

¹¹⁴ *Solicitor General v Wellington Newspapers Ltd* [1995] 1 NZLR 45, 57 per McGechan J.

¹¹⁵ Simon Mount, “The Interface between the media and the law”, p. 421; William Akel, Steven Price, and Robert Stewart, *Media Law: Rapid Change, Recent Developments*, p. 24; Steven Price, *Media Minefield: A Journalist’s Guide to Media Regulation in New Zealand*, p. 221; John Burrows and Ursula Cheer, *Media Law in New Zealand*, pp. 380, 388. Burrows and Cheer note that contempt is partly codified in Great Britain in its Contempt of Court Act 1981, and that there have been suggestions that statutory intervention is needed. (*Ibid*, p. 380). The Australian Law Reform Commission did suggest a list of criteria for contempt, which was rejected: Australian Law Reform Commission, Report No 35, *Contempt of Court* (1987) 463.

court. Sub judice contempt recognises that jurors are exposed to material not admitted in court, they may retain that information, thus not reaching an impartial and proper verdict.¹¹⁶ Such material includes statements or publications as to guilt or innocence;¹¹⁷ creating sympathy for the defendant or a victim;¹¹⁸ confessions which have not been admitted as evidence;¹¹⁹ information ruled inadmissible at trial;¹²⁰ details of previous convictions or other charges;¹²¹ photographs of defendants where prejudice may result;¹²² and prejudging issues awaiting judgment.¹²³ Whilst there is no official “public interest” defence to contempt, if the above types of material is published as an “incidental or unintended by-product” of a story concerning a matter of public interest, the courts will be less likely to punish it.¹²⁴ In this sense, freedom of expression about prejudicial matters is limited and defined.

¹¹⁶ New South Wales Law Reform Commission, *Contempt by Publication*, at 2.27.

¹¹⁷ Steven Price, *Media Minefield: A Journalist's Guide to Media Regulation in New Zealand*, p. 226; Simon Mount, “The Interface Between the Media and the Law”, p. 422.

¹¹⁸ Steven Price, *Media Minefield: A Journalist's Guide to Media Regulation in New Zealand*, pp. 222, 231; John Burrows and Ursula Cheer, *Media Law in New Zealand*, p. 405.

¹¹⁹ See, for example: Simon Mount, “The Interface between the media and the law”, p. 422; Steven Price, *Media Minefield: A Journalist's Guide to Media Regulation in New Zealand*, pp. 222, 226.

¹²⁰ See, for example: John Burrows and Ursula Cheer, *Media Law in New Zealand*, p. 399; William Akel, Steven Price, and Robert Stewart, *Media Law: Rapid Change, Recent Developments*, p. 26. However note that publishing evidence which may be admitted at trial also may be in contempt of court, if it is of such a nature as to prejudice jurors. If a retrial has been ordered on the ground that evidence was improperly admitted at the original trial, Burrows and Cheer note at p. 399 the importance when reporting the second trial not to refer to that evidence.

¹²¹ The Law Commission noted in its 2008 study, “Knowledge of previous convictions or past misconduct can and probably will prejudice a jury against a defendant, and in doing so may endanger a fair trial.” (New Zealand Law Commission, *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character*, pp 125-126, 136). In 1994 several newspapers were fined heavily for publishing that a defendant charged with assault on a Police Officer was already on bail for an upcoming assault trial: *Solicitor General v Wellington Newspapers Ltd* [1995] 1 NZLR 45; *Solicitor General v Wellington Newspapers Ltd* (No 2) [1995] 1 NZLR 60; *Gisborne Herald Co Ltd v Solicitor General* [1995] 3 NZLR 563. Oblique references to a defendant having previous convictions may also be considered as sub judice contempt – such as publishing that an offence was committed whilst the defendant was on parole, or referring to them as a “notorious prisoner”: Steven Price, *Media Minefield: A Journalist's Guide to Media Regulation in New Zealand*, p. 227. It will also usually be a contempt to report that a defendant is facing other charges for different offences, including reporting that the defendant was on bail: Simon Mount, “The Interface between the media and the law”, p. 422; Steven Price, *Media Minefield: A Journalist's Guide to Media Regulation in New Zealand*, p. 227; *R v Waterworth (No 2)* (Auckland High Court, CRI 2005-404-0276, 27 June 2006, Heath J) paras 14-15; John Burrows and Ursula Cheer, *Media Law in New Zealand*, pp. 399-400.

¹²² Such as when the identity of the defendant might be at issue during the trial. Contempt may also occur if the nature of the photograph has a tendency to influence the minds of potential jurors by suggesting guilt or bad character of the defendant: See, for example: Steven Price, *Media Minefield: A Journalist's Guide to Media Regulation in New Zealand*, pp. 222, 227; John Burrows and Ursula Cheer, *Media Law in New Zealand*, p. 404. In *Solicitor General v Wellington Newspapers Ltd* [1995] 1 NZLR 45, 58, it was held that publishing a mug shot photograph, showing a gang tattoo on the defendant's cheek was “prejudicial in its own right”.

¹²³ Publications cannot predict the outcome of a trial or include an ‘invitation’ to readers to conclude the defendant is guilty or innocent. See, for example: Simon Mount, “The Interface between the media and the law”, p. 422; John Burrows and Ursula Cheer, *Media Law in New Zealand*, p. 408.

¹²⁴ See, for example, *Solicitor General v Wellington Newspapers Ltd* [1995] 1 NZLR 45, 48-49 per Eichelbaum CJ and 56-57 per McGechan J, in respect of a claimed “public interest” in publishing the defendant was on bail for

(b) ‘Real Risk’ of Prejudice Test

It has been noted that despite the above material often being published about cases, few prosecutions for contempt occur.¹²⁵ Publications about the above matters will only be in contempt of court if a “real risk” of prejudice to a fair trial occurs,¹²⁶ with such a high threshold partly explaining the reason for low prosecutions. Courts take into account several factors in determining whether the publication has such a tendency. The publication’s form is relevant, with courts considering whether there is anything about the particular publication likely to result in jurors remembering it.¹²⁷ In addition, the individual circumstances surrounding the publication are analysed, including the length of time between publication and trial; and the size and location of the publication’s audience. The internet has impacted on the factors to be considered when assessing these circumstances, as detailed below.¹²⁸

(i) *Length of Time Between Publication and Trial*

The length of time between the publication and the likely trial date is relevant in determining whether a publication is in contempt of court. The effect of a publication on a fair trial depends to a significant extent upon the duration of its influence, with courts making allowances for jurors’ memories fading over time.¹²⁹ The Court of Appeal in *Gisborne Herald* held that after six to eight months, the influence of a publication on jurors would

previous offending at the time of the offending. The public interest test applied in New Zealand follows that formulated in *Ex parte Bread Manufacturers Ltd – Re Truth and Sportsman Limited* (1937) 37 SR (NSW) 242.

¹²⁵ Simon Mount, “The Interface between the media and the law”, p. 421; Steven Price, *Media Minefield: A Journalist’s Guide to Media Regulation in New Zealand*, pp. 228-229.

¹²⁶ John Burrows and Ursula Cheer, *Media Law in New Zealand*, p. 403.

¹²⁷ Relevant features include whether it is published in an “arresting form” which would be likely to make a deep impression on potential jurors: Steven Price, *Media Minefield: A Journalist’s Guide to Media Regulation in New Zealand*, p. 229; John Burrows and Ursula Cheer, *Media Law in New Zealand*, pp. 390-391. The publication of the fact the defendant had previously been acquitted of an unrelated rape in *Solicitor General v W and H Specialist Productions Ltd* [2003] 3 NZLR 12 one month before trial was held at 20 not to be in contempt of court, in part because the information was, “not in itself inherently memorable”.

¹²⁸ This factor was noted as being of concern by Judge O’Dwyer: Mary O’Dwyer, Private Discussion in Chambers at Dunedin District Court.

¹²⁹ This factor has been noted by several commentators, for example, Steven Price, *Media Minefield: A Journalist’s Guide to Media Regulation in New Zealand*, p. 224; John Burrows and Ursula Cheer, *Media Law in New Zealand*, pp. 390-391, 403, 410; Peter Carey and Richard Verow, *Media and Entertainment: The Law and Business*, p. 483.

fade.¹³⁰ On the basis of this estimate, such memory fade would happen in most, if not all, criminal proceedings.¹³¹ As noted in Chapter Two, however, the preservative nature of internet publications poses a challenge to arguments that a prejudicial publication will not pose a “real risk” to a trial occurring several months in the future.¹³² For example, whilst the delay between publishing the “Terror Files” and the likely trial date was relied on by Fairfax as part of their defence to contempt charges, such an argument was acknowledged by them as undermined when it emerged details of the publications in question were still available on the internet.¹³³

(ii) Size and Location of Publication’s Audience

In assessing the “real risk” of prejudice of a publication, the size and location of the audience is of importance. Generally, the smaller the audience, the less likely it is the material will create a “real risk” of prejudice to a fair trial, being less likely to have come to a jurors’ attention.¹³⁴ As noted in Chapter Two, the majority of New Zealanders use the internet. As a result, the potential exists for a sizeable portion of the jury pool to have access to, and have read prejudicial publications online, much like has been held to occur with traditional media publications such as in *Gisborne Herald*.

One advantage the internet does have in assessing the risk of a publication is the ability to utilise a website’s “hit count”¹³⁵ to determine the size of the audience.¹³⁶ However,

¹³⁰ *Gisborne Herald Co Ltd v Solicitor General* [1995] 3 NZLR 563, 570-571.

¹³¹ Figures have been provided that suggest an overall waiting period from arrest and trial date of 18-21 months. One such example is the homicide trial of the man accused of murdering Augustine Borrell in September 2006, which has a trial date set down for March 2009: Andrew Koubaridis, “Victim Outraged over 18-month Wait Before Trial”, *New Zealand Herald*, 9 August 2008, Available at: http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10526077, (Accessed 5 September 2008).

¹³² This factor was noted by O’Dwyer J as adding to the difficulties faced by traditional news producers as a result of publishing on the Internet: Mary O’Dwyer, Private Discussion in Chambers at Dunedin District Court.

¹³³ NZPA, “Fairfax Denies Contempt of Court”, *One News*, 18 September 2008, Available at: <http://tvnz.co.nz/view/page/423466/2088071>, (Accessed 18 September 2008); NZPA, “No Contempt in Police Tapes Publication – Barrister”, *New Zealand Herald*, 18 September 2008, Available at: http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10532952, (Accessed 18 September 2008).

¹³⁴ Des Butler and Sharon Rodrick, *Australian Media Law*, p. 203; John Burrows and Ursula Cheer, *Media Law in New Zealand*, pp. 390-391, 411. For example, in *Solicitor General v Broadcasting Corporation of NZ* [1987] 2 NZLR 100, 114, where the radio broadcast was aired after 11pm that, “The chances of a person who had heard the broadcast actually sitting on the trial jury were very small indeed”.

¹³⁵ For example, the Gwaze family website, referred to above in footnote 79, recorded a mere 800 hits, S. Scanlon, “Justice System Acts to Stop Trial by Internet”, but the publication of the “Terror Files” by the *Dominion Post* resulted in 150,000 hits: Steven Price, “DomPost Editor Says a Bunch of Interesting Stuff”, *Media*

the point in time at which the “hit count” is considered is relevant. As noted in Chapter Two, the preservative nature of the internet means publications may be accessed for a significantly longer period than the initial publication period, compared to traditional media. Given the ability for the hit count to continue increasing, and even skyrocket once the trial becomes close and general media coverage increases, the size of the audience may change dramatically. In addition, given website hits do not provide identifying detail, difficulties arise in determining whether the audience of a website includes potential jurors or jurors disregarding judicial directions and conducting online searches whilst sitting on a case.

The location of the audience is also relevant – as if publication occurs in a different part of the country or world to where the trial will be held, and the jurors selected from, it is unlikely a “real risk” of prejudice will occur.¹³⁷ For example, in *Gisborne Herald*¹³⁸ the Court of Appeal found there was no “real risk” of an article in the Gisborne Herald interfering with the fairness of a trial in Napier. The publication of many newspapers on the internet means an argument such as in *Gisborne Herald* would be unlikely to succeed today.¹³⁹ Previously, if the Timaru Herald published sub judice material about an upcoming trial in another region, it would most likely escape prosecution because of its distance from the location of prospective jurors and witnesses, particularly if it was well in advance of the trial. However, the Timaru Herald now has a national audience through its publication on Stuff.com.

Whilst the internet is more accurate regarding the audience size, as yet the location of the audience cannot easily be identified.¹⁴⁰ Those who view the publication may be nationwide, or even international, and thus not within the jury pool and able to pose any risk to a fair trial. Potential thus exists for developments in technology resulting in an accurate calculation of the size and location of the audience of prejudicial material, and the consequent impact on a fair trial.

Law Journal, 12 December 2007, Available at: <http://www.medialawjournal.co.nz/?p=35>, (Accessed 5 July 2008).

¹³⁶ In assessing the audience of traditional media publications, sales volumes or viewer numbers may not be an accurate indication of the audience size, as while they may buy the newspaper or watch the news broadcast on that night for example, they may not read or pay attention to the publication in question. Given hit counts are specific to individual publications, a more accurate indication of the audience size is available.

¹³⁷ Steven Price, *Media Minefield: A Journalist's Guide to Media Regulation in New Zealand*, p. 229; William Akel, Steven Price, and Robert Stewart, *Media Law: Rapid Change, Recent Developments*, p. 26; Peter Carey and Richard Verow, *Media and Entertainment: The Law and Business*, p. 483.

¹³⁸ *Gisborne Herald Co Ltd v Solicitor General* [1995] 3 NZLR 563, 568-569.

¹³⁹ Referring to this change, O'Dwyer J has noted that, “The advent of the Internet has complicated sub judice law for the media”: Mary O'Dwyer, Private Discussion in Chambers at Dunedin District Court.

¹⁴⁰ William Akel, Steven Price, and Robert Stewart, *Media Law: Rapid Change, Recent Developments*, p. 26.

(c) Balancing of Rights in Contempt Prosecutions

As noted in Chapter One, in cases where the public interest in the administration of justice and the right to a fair trial conflicts with the public interest in freedom of expression and open justice, traditionally the former has prevailed. Freedom of expression is recognised by the contempt test, with only a “real risk” of prejudice to a fair trial overriding the right to publish.¹⁴¹ Such a test makes it clear the limits imposed on freedom of discussion and open justice are only as much as are necessary to protect the administration of justice, thus being in accordance with s5 BORA.

Several cases provide examples of this high standard not being met. For example, in *Solicitor General v TV3 Network Services and Television NZ Ltd*¹⁴² contempt proceedings failed despite emotive publications during the trial resulting in the trial being aborted,¹⁴³ with a “real risk” of prejudice not established. Similarly, in *Solicitor General v W & H Specialist Productions Limited*,¹⁴⁴ the publication of a magazine article resulted in an adjournment of the retrial, but contempt proceedings failed, with Elias CJ and Morris J noting:¹⁴⁵

Because of the value placed upon free speech, the restriction on publication...must be proportionate to the attainment of a fair trial...the risk must be more than speculative. It must be likely the administration of justice could be prejudiced.

Thus, while other mechanisms enable a more precautionary approach to be adopted in respect of the right to a fair trial, contempt of court requires a “real risk” of prejudice to be established before freedom of expression will be restricted. However, despite a growing tolerance to pre-trial publicity in contempt proceedings, “serious cases” will still result in prosecutions and convictions,¹⁴⁶ such as *Gisborne Herald*, and the recent prosecutions for contempt regarding publications about the ‘Terror Raids’.

¹⁴¹ John Burrows and Ursula Cheer, *Media Law in New Zealand*, p. 645.

¹⁴² (Christchurch High Court, M520/96, 8 April 1997, John Hansen J, Eichelbaum CJ).

¹⁴³ These proceedings were reported as *R v Lynch* (Christchurch High Court, T 59/96, 20 August 1996), and are noted in Chapter Four regarding the remedial mechanism of staying proceedings.

¹⁴⁴ [2003] 3 NZLR 12.

¹⁴⁵ *Ibid*, at 16.

¹⁴⁶ Simon Mount, “The Interface Between the Media and the Law”, p. 424.

3.2 Suppression Orders

In addition to the threat of contempt proceedings for publishing material creating a “real risk” of prejudice, a further preventative mechanism exists, with the ability to grant suppression orders prohibiting the publication of material identified as posing such a risk.¹⁴⁷ Despite the basic premise of open justice and the desirability of publicity resulting in other witnesses and victims coming forward, there are instances when the interests of justice require information to be temporarily or permanently suppressed from the public.¹⁴⁸ Injunctions in respect of specific publications may be awarded on the basis of a risk to a fair trial, such as in *Burns v Howling at the Moon Magazines Ltd.*¹⁴⁹ Suppression orders covering all publications may also be granted where a court believes the interests of justice require such restrictions on reporting, having the ability to suppress the publication of names or evidence, or exclude the public from the court, pursuant to sections 138(2) and 140 Criminal Justice Act 1985. In addition, some names are automatically suppressed pursuant to sections 139 and 139A CJA.

(a) Balancing of Rights in Granting Suppression Orders

In determining whether to grant a suppression order, the rights outlined in Chapter One must be balanced. *R v Liddell*¹⁵⁰ establishes the balancing exercise is undertaken with a “prima facie presumption” in favour of openness.¹⁵¹ Such a presumption of open justice has been noted in several other cases,¹⁵² with the balancing of rights thus required to come down “clearly in favour of suppression”¹⁵³ in order for the limit upon this “prima facie

¹⁴⁷ Note that publications in breach of such suppression orders also may be in civil contempt of court.

¹⁴⁸ William Akel, Steven Price, and Robert Stewart, *Media Law: Rapid Change, Recent Developments*, pp. 8, 11.

¹⁴⁹ [2002] 1 NZLR 381.

¹⁵⁰ [1995] 1 NZLR 538. Whilst *Liddell* involved an application for name suppression post-conviction, it was held in *R v Proctor* CA [1996] 1997 1 NZLR 295 that the principles apply equally to the reporting of cases prior to conviction, with the presumption of innocence also to be taken into account. Several commentators and cases have referred to *R v Liddell* as being the lead authority on the guiding principles for suppression orders. For example, Rosemary Robertson, “The Internet: Tipping the Balance of Rights?” p. 220.

¹⁵¹ *R v Liddell* [1995] 1 NZLR 538, p. 547.

¹⁵² For example, *Lewis v Wilson and Horton Ltd and Ors* [2000] 3 NZLR 546; *Re Victim X* [2003] 3 NZLR 220; *X v Police* (Auckland High Court, CRI-2006-404-259, 10 August 2006, Baragwanath J); *R v B* [2008] NZCA 130 at para [55]; *Solicitor General v Broadcasting Corporation of NZ* [1997] 2 NZLR 100, 123 per Woodhouse P.

¹⁵³ *Lewis v Wilson and Horton Ltd and Ors* [2000] 3 NZLR 546, 559.

presumption” to be justified pursuant to s5 BORA. A recent example of the balancing of rights resulting in the right to a fair trial being prioritised over open justice is the blanket suppression orders imposed on the Depositions hearings for the Arms Act charges in respect of the Urewera raids, despite Perkins J noting the high degree of public interest in the proceedings. The danger to a fair trial if information was widely reported and later ruled inadmissible was noted; with Perkins J noting it would not be fair for such evidence to be put into the public arena before a trial judge could rule on it.¹⁵⁴ However in the third decision regarding *Police v PIK and Others*, Harvey J held, in lifting the internet-only suppression order, that the balancing of the rights did not come down clearly in favour of suppression, with nothing presently identified as showing an actual risk to a fair trial. A potential risk in the future was not sufficient to displace the rights of freedom of expression and open justice.¹⁵⁵

The division of the trial process into three stages can assist in determining whether a suppression order is likely to be granted, with the balancing of the rights resulting in different risks to a fair trial depending on the stage of the proceedings. There may be occasions where publicity should not be permitted at a particular stage of the proceedings, but be postponed until another point in the proceedings, when risks to the right to a fair trial may no longer exist.¹⁵⁶ Suppression is thus more common during the pre-trial stage than it is during and after a trial.¹⁵⁷ At the pre-trial stage, the test is “whether departure from the starting point is justified on an overall balancing of the relevant factors”.¹⁵⁸ In comparison, during or post-trial, “compelling reasons” or “very special circumstances”¹⁵⁹ are required to displace the presumption of open reporting, particularly where a defendant has been

¹⁵⁴ NZPA, “Accused Appear in Court Over Urewera Raids”, *NZ Herald*, 1 September 2008, Available at: http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10529981, (Accessed 6 September 2008); Kim Ruscoe, “‘Anti-Terror’ Hearings to be Suppressed”, *Stuff New Zealand*, 3 September 2008, Available at: <http://www.stuff.co.nz/4679769a11.html>, (Accessed 6 September 2008); Andrew Koubaridis, “Judge Slaps Blanket Ban on News Reports of Hearing for Ruatoki 18”, *NZ Herald*, 4 September 2008, Available at: http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10530513, (Accessed: 6 September 2008)

¹⁵⁵ *Police v PIK and Others* (Youth Court, Manukau, 19 September 2008, Harvey J) at [3], [52] and [53].

¹⁵⁶ These various stages of the trial process where the issue of publicity may be reviewed was noted at [49] in *Police v PIK and Others*, (Youth Court, Manukau, 3 September 2008, Harvey J).

¹⁵⁷ This has been noted by several commentators and cases, for example: William Akel, Steven Price, and Robert Stewart, *Media Law: Rapid Change, Recent Developments*, p. 15; *R v B* [2008] NZCA 130 per Baragwanath J.

¹⁵⁸ *X v Police* (Auckland High Court, CRI-2006-404-259, 10 August 2006, Baragwanath J), [34].

¹⁵⁹ Such a threshold was noted in *GAP v NZ Police* (Rotorua High Court, CRI-2006-463-68, 23 August 2006); and *Nobilo v Police* (Auckland High Court, CRI 2007-101-241, 17 August 2007). In *J v Serious Fraud Office* (Auckland High Court, A 126/01, 10 October 2001, Baragwanath J), Baragwanath J said that authority showed it would be “exceptional” if a suppression order applied during a trial, with it being “startling” if an order continued post conviction.

convicted.¹⁶⁰ Such restrictions on freedom of expression and open justice can be understood when assessing the risk to a fair trial at each trial stage, with the likely risk to a fair trial decreasing once the trial begins.¹⁶¹

Given suppression orders limit freedom of expression and open justice, such a limitation must be no wider than is necessary for the administration of justice.¹⁶² In this sense, suppression orders must “continue for no longer, and be cast no more widely, than is appropriate,”¹⁶³ with suppression of a defendant’s name largely only temporary.¹⁶⁴ It has been noted by the Court of Appeal, “Where all that is at stake is postponing publication, fair trial rights must trump open justice considerations”.¹⁶⁵ Permanent name suppression is likely to occur only if publication might identify a victim.¹⁶⁶

To breach a suppression order granted under the CJA is to commit an offence of strict liability.¹⁶⁷ The penalty for breaching or evading most suppression orders under the

¹⁶⁰ *R v Burns* [2002] 1 NZLR 387 is an example of a post-conviction suppression order being awarded in respect of material suggesting the defendant was a serial killer. Burns was appealing his conviction, and the Court was satisfied the publication of the “extraordinarily sensational information” could prejudice any retrial should his appeal succeed. The Court noted there could be restraints on publication after conviction in exceptional cases, holding this was such a case at p. 407, as the material could “virtually destroy any semblance of a fair trial”. However, after Burn’s appeal was dismissed, the Court of Appeal in *R v Burns (No 2)* [2002] 1 NZLR 410 discontinued the suppression orders.

¹⁶¹ The impact of the trial process has been noted in several cases; in the atmosphere of the courtroom, any feelings of prejudice disappear or are limited. For example: *R v Moloney* (Christchurch High Court, CRI 2003-009-13598, 15 April 2008, Chisholm J) at [34]. In addition, the defendant may place the defence contentions before the court and the public, with any publicity at this stage subsequently having less of an effect: *X v Police* (Auckland High Court, CRI-2006-404-259, 10 August 2006, Baragwanath J), para [16].

¹⁶² In accordance with s5 BORA.

¹⁶³ *Re Victim X* [2003] 3 NZLR 220, 222, per Hammond J. In this sense, suppression orders may be reviewed by courts, such as in the trial of David Bain in *Television NZ Ltd v R* [1996] 3 NZLR 393. The Trial Judge prohibited publication of the substance of certain proposed evidence, relating to the character of one of the deceased sisters and her relationship with another deceased member of the family. After the conviction, TVNZ applied for a review of the suppression order, with it lifted by the Court of Appeal.

¹⁶⁴ Out of 150,000 criminal cases each year, there are only about 730 final name suppressions in the District Court and 35 in the High Court. There are about three times as many interim name suppression orders. The discretion to suppress evidence or other facts is exercised about 440 times a year, with only about 100 of these being permanent. (Steven Price, “Suppression Unsuppressed”, 21 June 2008, *Media Law Journal*, Available at: <http://www.medialawjournal.co.nz/?p=123>, (Accessed 12 July 2008)).

¹⁶⁵ *R v B* [2008] NZCA 130 at [80].

¹⁶⁶ In addition, s140(4A) of the CJA and s28(2) of the Victim’s Rights Act 2002 require a victim’s views on applications for permanent name suppression to be ascertained and the court informed of that view. Thus, the victim’s desire either for openness or suppression may influence the balancing process.

¹⁶⁷ William Akel, Steven Price, and Robert Stewart, *Media Law: Rapid Change, Recent Developments*, p. 20. The test has been framed in terms of whether the defendant has “taken all reasonable care that a reasonable person would take in the circumstances if there be a publication which is prima facie in breach of s140” (*Karam v Solicitor General* (Auckland High Court, AP 50/98, 20 August 1999, Gendall J)). It has been noted that carelessness or accidental publication of suppressed information will thus still result in liability: John Burrows, and Bill Wilson, *Media Law*, NZ Law Society: Wellington, April 2003, p. 21.

CJA has remained at an “underwhelming”¹⁶⁸ \$1,000 since its inception.¹⁶⁹ Despite this light penalty, media outlets have not taken advantage¹⁷⁰ of the possible benefits in deliberately breaching suppression orders, with most cases involving, “accidental or unthinking infringement”.¹⁷¹ However, as breaching a suppression order may be considered contempt of court,¹⁷² this factor is likely to discourage intentional publication in breach of suppression orders in most situations.¹⁷³

(b) Impact of the Internet on Suppression Orders

In balancing the rights to a fair trial, freedom of expression and open justice when considering whether to grant a suppression order, courts must now take into account the aspects of the internet as noted in Chapter Two, as having the tendency to impact on fair trials – being its preservative power, and the amount and detail of internet publications. The internet has been noted as creating practical problems for suppression orders in high profile cases¹⁷⁴ – particularly in terms of the ease by which suppression orders may be breached.

(i) *The Internet as a Means to Frustrate Suppression Orders*

The effectiveness of suppression orders may be diminished due to prior publication of the suppressed material on websites. Whilst prior publication has long been a factor to be considered when determining whether to grant or continue a suppression order, the internet changes the balance. Previously, if potentially prejudicial material preceded trial by a significant period, or occurred in another geographic region of New Zealand, a suppression

¹⁶⁸ William Akel, Steven Price, and Robert Stewart, *Media Law: Rapid Change, Recent Developments*, pp. 20-21.

¹⁶⁹ Sections 138(7) and 140(1) CJA.

¹⁷⁰ For example, if one media outlet were to “break” the story by breaching a suppression order, it can be assumed that their revenue from the publication would be greater than the \$1000 fine.

¹⁷¹ John Burrows, and Bill Wilson, *Media Law*, pp. 22-23.

¹⁷² Section 138(1) CJA. Given that information must be considered by a court to be prejudicial in order for a suppression order to be imposed, breaching such an order can seriously undermine the fairness of a trial.

¹⁷³ Philip Morgan, “Laws Designed to Bring Fairness to Sex Trials”; John Burrows and Ursula Cheer, *Media Law in New Zealand*, p. 382.

¹⁷⁴ John Burrows, and Bill Wilson, *Media Law*, p. 20; Robin Charteris, “Open Justice”, *Otago Daily Times*, 29 August 2008; John Burrows and Ursula Cheer, *Media Law in New Zealand*, p. 339; Mary O’Dwyer, Private Discussion in Chambers at Dunedin District Court; Simon Mount, “Freedom of Expression and the Administration of Justice: to Gag or not to Gag?”, p. 66.

order was seen as still having the ability to protect the right to a fair trial. However courts would concede that if material had achieved widespread publicity before a suppression order were made, such an order would be futile.¹⁷⁵ Just as for contempt, the preservative power of the internet, and accessibility of internet publications has altered the situation,¹⁷⁶ with these characteristics increasing the likelihood of material receiving such widespread publicity. A recent example of this is provided by *Skelton v Family Court at Hamilton*, where the High Court refused to suppress the published Family Court decisions, noting, “The information is already in the public domain and an order from the Court cannot alter that reality”.¹⁷⁷

In general, courts will not lift a suppression order due to the publication of the material in question on an overseas website.¹⁷⁸ To the contrary, maintenance of the order in New Zealand will still ensure a significant number of people remain unaware of the suppressed material.¹⁷⁹ Further, due to the suppression order preventing the publication of the material in New Zealand, there will be less chance of the issues noted in Chapter Two, of the material being widely disseminated, commented on, and being difficult to remove. Furthermore, to allow an order to be defeated in this way has been noted with disapproval as being likely to encourage similar strategies in the future.¹⁸⁰

¹⁷⁵ For example, as occurred in *Lewis v Wilson and Horton Ltd and Ors* [2000] 3 NZLR 546, 568; *Tucker v New Media Ownership Ltd* [1986] 2 NZLR 716, 736; *Bouwer v Allied Press Ltd* (2001) 19 CRNZ 119 (CA). It has been noted that a court will be hesitant to undertake such exercises in futility and “bring its authority into disrepute”: William Akel, Steven Price, and Robert Stewart, *Media Law: Rapid Change, Recent Developments*, p. 17.

¹⁷⁶ Such a changing process is noted in Rosemary Robertson, “The Internet: Tipping the Balance of Rights?”, p. 223. Considering the extent of publication on the Internet has occurred in several name suppression order decisions, including *Abbott v Wallace* [2002] NZAR 95.

¹⁷⁷ [2007] 3 NZLR 368, 394. Publications about the judgments were available on the internet, including on Mr Headley’s website. This decision to decline the suppression order may appear surprising in light of the High Court finding that Ms Skelton’s rights to natural justice were breached, as well as suggesting there might be a danger to a fair trial. Instead of suppressing the decisions, the Court issued a challenge of sorts to the media, noting the possibility of further publication of the decisions impacting adversely on Ms Skelton’s fair trial rights, but noting, “the judgment whether to publish or broadcast is for the editors to make”, at p. 394. The High Court has been criticised for not removing the decisions from the Family Court website, in William Akel, Steven Price, and Robert Stewart, *Media Law: Rapid Change, Recent Developments*, p. 19. Note however, that in refusing an application for a stay of proceedings, the Court did order for the Family Court to remove the judgments from their website: (*R v Skelton* (Hamilton High Court, CRI 2006-019-6530, 9 July 2008, Priestley J) at [125].

¹⁷⁸ As will be noted below at 3.4, publications on overseas websites are outside of New Zealand’s jurisdiction, and thus unable to be prosecuted or prevented, with the material thus likely to remain available on the website.

¹⁷⁹ John Burrows, and Bill Wilson, *Media Law*, p. 20; John Burrows and Ursula Cheer, *Media Law in New Zealand*, p. 339. The fact that quashing the order would widen publication within New Zealand was affirmed to be an important factor by the Court of Appeal in *Lewis v Wilson and Horton Ltd and Ors* [2000] 3 NZLR 546, 569.

¹⁸⁰ An example of a case where this point was noted is provided by *Wilson and Horton v The District Court at Otahuhu*, (2000) 5 HRNZ 773 (HC) at [79]. However, note the sustained and deliberate breaches of suppression orders in respect of Shipton, Schollum, Hales and McNamara resulting in the lifting of the orders, despite the possible prejudice to Shipton and Schollum’s later rape trial from the fact they were facing other rape charges:

Therefore, it is clear that despite the challenges of the internet, courts will endeavour to maintain suppression orders out of concern for protecting the integrity of the process and order of the courts. Increasingly, a pragmatic approach is taken to internet publication and suppression orders, by considering not only the fact a breach has occurred, but the actual prejudice – assessing the extent and scope of the breach.¹⁸¹ The question courts must answer is thus whether recognition of the practical effect of internet publication in breach of, or prior to a suppression order will shift the balance towards freedom of expression at the expense of a fair trial.

(ii) Adapting Suppression Orders to Meet the New Media Challenges

In recognition of the impact of the internet on the right to a fair trial, it can be argued that suppression orders will be most effective as a result of adaptation and direction towards the challenges posed by the Internet to a fair trial, as noted in Chapter Two at 2.(a) and 2.(b). Subsequently, additional factors may need consideration before granting suppression orders, or alterations may be required to what the suppression orders cover.

(I) Consideration of publications available on Internet – both existing and future

Taking into account the preservative nature of the internet, in determining whether to grant a suppression order an additional factor to be balanced could be an assessment of existing, or likely future publications on the internet. The Court of Appeal undertook such a consideration when determining an application for a suppression order regarding severed rape charges in mid-2008,¹⁸² conducting a Google search of the Appellant, which revealed an unrelated previous conviction. In noting that without granting name suppression, references to the severed charges would also have appeared, it was concluded that if name suppression was not granted, a “very substantial risk” would exist that:¹⁸³

R v A (CA 288/05; CA295/05; CA 301/05; CA 301/05; William Young P, Hammond and O’Regan JJ, June 2006).

¹⁸¹ Such an approach was noted in Rosemary Robertson, “The Internet: Tipping the Balance of Rights?”, pp. 216, 227; and was undertaken in *Wilson and Horton v The District Court at Otahuhu*, (2000) 5 HRNZ 773 (HC) at [79].

¹⁸² *R v B* [2008] NZCA 130 at [78].

¹⁸³ *Ibid*, at [78].

Some jurors would have learnt that he was facing (or had faced) allegations of other sexual offending. Associated with this is a possibility that such knowledge might illegitimately enter into the decision-making process.

Considering existing and future internet publications would ensure freedom of expression and open justice is only limited in cases where the internet results in prejudice to a fair trial due to such publications; thus being reasonable limitations in terms of s5 BORA. However, due to the difficulties in predicting the likely effect of not suppressing details, it could be argued this approach is unlikely to be successful alone. Instead, existing and future publications, if known, could be a factor taken into account by courts, with the fact of past or future publications would not be required to be established in order for a suppression order to be granted.

(II) Directing suppression orders only at the internet and its associated risks to fair trials

Suppression orders may prevent publication on the internet, being directed towards the characteristics noted above at 2.2(a) and 2.2(b) as threatening the right to a fair trial. Harvey J adopted such an approach in his novel¹⁸⁴ order in which he suppressed¹⁸⁵ the publication of names or images of the defendants on the internet whilst permitting publication on the traditional media,¹⁸⁶ with the intention of ensuring that:¹⁸⁷

At a later stage, any concerns about a fair trial would not be prejudiced as a result of the availability of information stored on the internet. Potential jurors could, if such material were available, have reference to it which could well have an adverse effect upon a fair trial.

¹⁸⁴ The suppression order took such a novel approach to the challenge posed by the Internet that it was reported around the world on news websites, as well as commented upon (and often breached) on blog sites.

¹⁸⁵ Note however this was not a suppression order pursuant to s 138 or 140 CJA, but an order granting leave to the media to report proceedings pursuant to s438 Children, Young Persons and Their Families Act 1989, with the proceedings heard in the Youth Court due to a youth being jointly charged. Despite the different origination of the order, it is likely a similar order suppressing publication by the Internet could also be made under the CJA provisions.

¹⁸⁶ The three decisions in which he formulated such an approach were: *Police v PIK and Others*, (Manukau Youth Court, 25 August 2008, Harvey J); *Police v PIK and Others*, (Manukau Youth Court, 3 September 2008, Harvey J); *Police v PIK and Others* (Manukau Youth Court, 19 September 2008, Harvey J).

¹⁸⁷ *Police v PIK and Others*, (Manukau Youth Court, 25 August 2008, Harvey J) at [5].

It can be seen that such an order, whilst limiting freedom of expression and open justice on the internet, was demonstrably justified in terms of s5 BORA – with the identified risks to the defendants receiving a fair trial due to the internet’s preservative and disseminative power not requiring a blanket suppression order preventing freedom of expression across all forms of media.¹⁸⁸ In this sense, open justice and the public’s right to be informed about court processes was still protected, with the rights of the defendants to be protected from the potential availability of information to which a potential jury might have access preserved. Whilst such a direction of the suppression order appears justified in this sense, the order was lifted at the third hearing of this matter, given there was no clear prejudice to a fair trial *at that time*.¹⁸⁹ It thus appears likely that such a directed suppression order may be justified if, related to (I) above, it could be shown that publication of the material online would clearly result in a prejudice to a fair trial, not merely the possibility of prejudice in the future, as was the case in *Police v PIK and Others*.

However, whilst Harvey J’s suppression order had reason to be directed only towards the new media, given the names and images of the defendants were available on traditional news media, within a very short period of time many overseas and some domestic websites were deliberately flouting the suppression order.¹⁹⁰ Harvey J’s second judgment

¹⁸⁸ Judge Harvey specifically identified the risks to a fair trial as posed by the Internet, noting they were different to that from the traditional media, thus justifying the media-specific suppression order. See *Police v PIK and Others*, (Manukau Youth Court, 3 September 2008, Harvey J), at [54].

¹⁸⁹ *Police v PIK and Others* (Manukau Youth Court, 19 September 2008, Harvey J), at [51] and [52].

¹⁹⁰ An accidental breach of the suppression order by a Canadian news website was quickly corrected, (Radio New Zealand, “Canadian Website Breaches Online Hapeta Ruling”, *Radio New Zealand News*, 28 August 2008, Available at: <http://www.radionz.co.nz/news/stories/2008/08/28/12436e9fb94e>, (Accessed 6 September 2008)) with the remainder of the breaches occurring on blogs and online forums. A New Zealand site which breached the suppression order both by naming the defendants and displaying their photographs, included several irresponsible comments such as “should we load the net up with bullshit about these guys which would obviously make a conviction”: GP Forums, “Interesting Twist of Name Suppression”, *GP Forums/Open Discussion*, Available at: <http://www.gpforums.co.nz/showthread.php?s=5c534bc76e2eabd721b8e007a70b3c1&threadid=325092&ppage=25&pagenumber=1> (Accessed 6 September 2008). Many offshore sites breached the suppression order, including a US-based website breaching the suppression order after beginning by requesting New Zealanders to buy a copy of the paper and email those names to an email address so they could post it online: Popehat, “To Our Readers in New Zealand: Judge David Harvey Doesn't Want You To Know The Names Nathan Tuiti Reo Mutunga Williams and Daniel Bobby Tumata”, *Popehat Blog*, last updated 2 September 2008, Available at: <http://www.popehat.com/2008/08/25/to-our-readers-in-new-zealandjudge-david-harvey-doesnt-want-you-to-know-the-names-nathan-tuiti-reo-mutunga-williams-and-daniel-bobby-tumata/#comment-8835>, (Accessed 6 September 2008). Many of the sites were proud to be breaching the suppression order, stating they were in the US and thus had the right to freedom of expression, such as: Nutterz, “Murder Accused Ran into Party with Gun, Hammer – Police”, *Nutterz Forums – News and Current Affairs – New Zealand News*, last updated 29 August 2008, Available at: <http://www.nutterz.com/nutterz/index.php?showtopic=77698>, (Accessed 6 September 2008); Elliott Back, “Nathan Williams, Daniel Tumata[a] Accused of Murdering NZ Teen John Hapeta”, *Elliott*

noted that whilst the order would not prevent dissemination and the “viral spread” of the information on the internet such as through these publications, it would be “seriously inhibited”.¹⁹¹ Despite eventually lifting the internet-only suppression order, Harvey J concluded that:¹⁹²

the paradigmatically different qualities of pre-digital and digital publication justify a differing approach in considering publication where there may be some conflict between sections 14 and 15 rights.

Despite the difficulty in enforcing the overseas breaches which occurred, the suppression order can be seen as a sound response to the changing media environment, setting a precedent to be followed with interest. It is a judicial recognition of the need to adjust the mechanisms utilised to protect the right to a fair trial, due to the mismatch of such mechanisms to the new media of the internet. The alternative of suppressing information more readily and in its entirety would likely undermine public confidence in the administration of justice. However on the basis of the breaches of Harvey J’s internet-only suppression order, it is likely courts will be more risk averse – and if a risk to a fair trial is seen as emanating from the internet, a suppression order will be granted which covers all forms of media.¹⁹³

(III) Wider Use of Suppression Orders given the nature of Internet Publications

Due to the speed by which information can be published and disseminated on the Internet, perhaps appropriate steps need to be taken by courts, such as the anticipatory use of suppression orders. The Law Commission recently unsuccessfully proposed a general presumption of name suppression until the court considers the substance of the case, with

C. Back: In Aere Aedificare, last updated 26 August 2008, Available at: <http://elliottback.com/wp/archives/2008/08/25/nathan-williams-daniel-tumat-accused-of-murdering-nz-teen-john-hapeta/>, (Accessed 6 September 2008); Pandazing, “In Your Face Judge David Harvey!”, *Pandazing.net*, last updated 25 August 2008, Available at: <http://www.pandazing.net/2008/08/25/in-your-face-judge-david-harvey/>, (Accessed 6 September 2008)

¹⁹¹ *Police v PIK and Others*, (Manukau Youth Court, 3 September 2008, Harvey J), at [54], [55], [71]

¹⁹² *Police v PIK and Others* (Manukau Youth Court, 19 September 2008, Harvey J) at [67]

¹⁹³ Such a possible tendency was noted by O’Dwyer J, with her affirming that Judges will likely err on the side of caution by ordering blanket suppression orders in order to protect the principle of the fair trial, “being the paramount concern”. (Mary O’Dwyer, Private Discussion in Chambers at Dunedin District Court)

such a proposal recognising the presumption of innocence.¹⁹⁴ Such a mechanism would ensure information is not “let out of the bag” until an assessment has been made by the court as to whether it is of a prejudicial nature. Without such anticipatory suppression orders, the internet can remove the ability for courts to make such assessments. For example, during Chris Kahui’s depositions, a suppression order was sought at the end of one witness’s evidence in respect of a comment made approximately fifteen minutes earlier. However, by the time the order was sought, reporters in the court advised the comment had already been reported on the internet.¹⁹⁵

A further method of suppression has been suggested which may eliminate the risks to a fair trial as a result of information being published on the internet, being the use of abbreviations and pseudonyms.¹⁹⁶ Such a method of referring to defendants, instead of identifying them by name, would prevent the compilation of information about an individual that can later be retrieved and disseminated further. Furthermore, it can be argued that such reports would still inform the public of the general course and result of the court proceedings, thus facilitating open justice whilst protecting the right to a fair trial.¹⁹⁷ However, such limitations on the ability to search and recover information about a defendant can be overcome – with other key phrases such as the victim’s name, the location, or phrases about the crime still having the ability to retrieve publications about the crime and the defendant in question. Such an example is provided by the use of the pseudonym “Constable A” for the suppressed name of the police officer who killed James Wallace, with the link between the officer’s real name and the pseudonym quickly becoming available through Google.¹⁹⁸

¹⁹⁴ New Zealand Law Commission Report, NZLC R 85, *Delivering Justice for all*, pp. 315-316. Note that for several months in 1975 s45B CJA provided for name suppression until a defendant was convicted. This provision was removed with a change of Government.

¹⁹⁵ This event was detailed in Simon Mount, “Freedom of Expression and the Administration of Justice: to Gag or not to Gag?” p. 66.

¹⁹⁶ For example, see James Spigelman, “The Internet and the Right to a Fair Trial”.

¹⁹⁷ Such an argument was noted in John Burrows, and Bill Wilson, *Media Law*. Note however, that sometimes benefit exists in knowing the name of a defendant, such as when they are in a position of responsibility, for example, or where witnesses or other victims may come forward as a result of publicity about a named person.

¹⁹⁸ This was noted in Aardvark, “A Tale of Two PIGS”, *Aardvark Daily*, 26 August 2008, Available at: <http://www.aardvark.co.nz/daily/2008/0826.shtml>, (Accessed 6 September 2008)

3.3 Enforcement Issues

Whilst the above analysis has shown the internet introduces new factors to be considered when utilising preventative mechanisms, it also poses real difficulties in respect of enforcing such mechanisms – both in terms of who is held liable for prejudicial publications online; and in terms of a lack of jurisdiction over publications which occur by people located outside New Zealand. These problems are assessed below.

(a) Liability for Prejudicial Publications

Publications by people within New Zealand are subject to New Zealand contempt laws and suppression orders. An issue arises however, when a publication occurs by individuals who may be difficult to trace, such as where a comment is posted on a website on which any member of the public may publish. The internet has been noted as posing significant challenges to suppression orders which were designed for pre-digital information control, to be enforced against centralised media organisations.¹⁹⁹ In comparison to the centralised news media organisations, with identifiable individuals to whom authorities may have recourse, the internet is a decentralised and distributive system, with everyone potentially a publisher. Identifying responsibility for internet publications can be complex and uncertain, with the liability of ISPs for carrying or hosting material breaching sub judice contempt or suppression orders uncertain. In addition to ISP liability for publications, some commentators argue liability should rest with the publisher of a website, given their publications resemble the functions of traditional media. They argue liability is enhanced for website hosts who typically read every posting sent to them in determining what information should appear on their sites, thus acting in traditional editorial and publisher roles.²⁰⁰

However, a decision in the USA with liability imposed in such circumstances has been noted as creating a disincentive for ISPs to regulate content on their websites.²⁰¹ Prodigy was held liable for defamatory comments published on the “Money Talk” website

¹⁹⁹ *Police v PIK and Others* (Manukau Youth Court, 19 September 2008, Harvey J) at [64]-[65].

²⁰⁰ For example, see Melissa Troiano, “The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs”, (2006) 55 *American University Law Review*, pp. 1474-1475.

²⁰¹ This was noted in *Ibid*, pp. 1455-1456.

partly due to Prodigy's policy of monitoring and removing obscene content placed on its servers. As a result of this decision, and in recognition of the fact it would be nearly impossible for ISPs to review all content passing through their servers, Congress enacted a law²⁰² removing liability for such content.²⁰³ When considered in light of the importance placed on freedom of speech in the USA, such a law restricting liability can be understood – with the imposition of liability over the Money Talk comments seen as having the potential to restrict the ability for freedom of expression online, due to the potential of publishers being held liable, creating a disincentive for ISPs to function.

Such a limit on ISP liability is unlikely to be justified in the New Zealand context, where freedom of expression may be restricted if such expression poses a sufficient risk to a fair trial, as noted in Chapter One. In this sense, the publication of prejudicial material via ISPs poses the same threat to a fair trial as does prejudicial material published in a newspaper, with both publishers of newspapers and ISPs thus owing an obligation to ensure material published is not in contempt of court, or breaching any suppression orders. Whilst the difficulty for ISPs to be aware of all prejudicial comments they are hosting is acknowledged, where an ISP does become aware of such a publication which it carries or hosts, it should have an obligation to take steps to prevent the material from being further published.²⁰⁴

(b) Enforcement Against Publications from Outside New Zealand

An additional difficulty may arise in high-profile cases, where people located outside of New Zealand's jurisdiction publish prejudicial material on the internet.²⁰⁵ Whilst foreign publications breaching suppression orders and contempt of court laws have always been an issue, the speed and ability of disseminating such publications as a result of the internet has

²⁰² Communications Decency Act 1996.

²⁰³ Melissa Troiano, "The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs", p. 1456.

²⁰⁴ A solution along these lines was noted in New South Wales Law Reform Commission, *Contempt by Publication*, at 2.65; Mike Godwin, *Cyber Rights: Defending Free Speech in the Digital Age*, p. 84-85.

²⁰⁵ Such a problem was noted in Simon Mount, "Freedom of Expression and the Administration of Justice: to Gag or not to Gag?" *Using the Bill of Rights in Civil and Criminal Litigation*, New Zealand Law Society: Wellington, 2008, p. 66; Alastair Bonnington, "News Without Frontiers: Pre-Trial Prejudice and the Internet", in L. Edwards, and C. Waelde, (eds) *Law and the Internet: Regulating Cyberspace*, Hart Publishing: Oxford, 1997, p. 199-200. Bonnington notes at p. 200 that, "Within this global community single jurisdiction attempts at control are almost impossible"; Clive Walker, "Fundamental Rights, Fair Trials and the new Audio-Visual Sector", p. 523.

dramatically changed this problem. Whilst a court order may be effective in New Zealand, it is arguably ineffective if the material in question is put on a site beyond the reach of New Zealand's jurisdiction, but which is instantaneously accessible from within New Zealand.²⁰⁶ At least in theory, whilst the material may have been posted overseas in a jurisdiction which does not restrict such prejudicial publications, the publication could be subject to New Zealand's contempt or suppression laws due to part of the actus reus of the offence, being publication, occurring in New Zealand.²⁰⁷

3.4 Concluding Comments on Preventative Mechanisms

As detailed above, several rights and factors are considered and balanced by courts before the preventative mechanisms of contempt of court and suppression orders can be utilised. The internet has introduced new factors to be considered before these mechanisms are employed, particularly in terms of the scope of suppression orders, due to the preservative and disseminatory nature of the internet and subsequent risk to a fair trial once material is published online. In addition, the internet has impacted on several factors which courts already considered, such as the delay between publication and trial, and whether a suppression order would be futile due to prior publication of the material in question. Whilst such mechanisms are able to be pragmatically adapted in response to the challenges posed to a fair trial by the internet, real difficulties arise in respect of the enforcement of these mechanisms, particularly where the internet publications emanate from outside New Zealand. Due to the difficulties in enforcing the preventative mechanisms, some prejudicial publications are likely to be available on the internet. As a result, remedial mechanisms may play a greater role in ensuring the right to a fair trial is protected. An analysis of several remedial mechanisms and the role they may play in light of this changing media environment is undertaken in Chapter Four.

²⁰⁶ Such an issue with enforcing domestic laws in the internet environment was noted in Uta Kohl, *Jurisdiction and the Internet: Regulating Competence over Online Activity*, Cambridge University Press: New York, 2007, p. 4; A.T.H. Smith, "Free Press and Fair Trial: Challenges and Changes", p. 125; Karen Arnold, "Bloggers on Murder Case Ignore Law", citing Scott Optican.

²⁰⁷ S7 Crimes Act 1961. This point was also noted in John Burrows, and Bill Wilson, *Media Law*, p. 21; John Burrows and Ursula Cheer, *Media Law in New Zealand*, p. 339; *Police v PIK and Others*, (Manukau Youth Court, 3 September 2008, Harvey J) at para [73].

CHAPTER FOUR

REMEDIAL MECHANISMS

While the mechanisms detailed in Chapter Three may decrease the amount of prejudicial publications available to jurors, it must be recognised that due to the nature of the internet, some prejudicial publications about defendants will be available. The transnational, instantaneous, and transitory nature of internet publications reduce the effectiveness of pre-trial publication mechanisms, particularly due to the difficulties of enforcement. Remedial mechanisms thus have an important role to play in the changing media environment, in terms of reducing the prejudicial effect of such publications. However, remedial mechanisms have disadvantages,²⁰⁸ with the best approach likely to be a combined reliance upon preventing prejudicial publications, and using remedial mechanisms if such publications do occur.

As noted in Chapter Two, jurors exposed to prejudicial publicity may not be able to fulfil their duty of reaching an impartial decision on the basis of evidence admitted at trial. Various remedial mechanisms exist which attempt to diagnose and remedy the situations in which prejudicial material has been published and may affect jurors, thus ensuring a fair trial can still occur. Given that publication has occurred, remedial mechanisms do not involve balancing the rights detailed in Chapter One, although consideration of whether the right to a fair trial is threatened by a publication is important in determining whether the use of a remedial mechanism is required. It is assumed that in high-profile cases, the jury pool prior to a trial, and the jurors during a trial, are likely to encounter publications about the case and remember them sufficiently well to be prejudiced. Remedial mechanisms are thus relied upon to reduce any such influence to the extent necessary in order to produce an impartial jury and ensure a fair trial. Such a willingness to continue with a trial and rely on remedial mechanisms is based on a pragmatic assessment that the possibility of prejudice to a

²⁰⁸ It has been noted that a greater reliance on remedial measures increases the expenses that must be borne by Government and the defendant – such as requiring a retrial due to a verdict being set aside, or relocating the venue of a trial. Remedies that delay the finalisation of criminal charges increase the strain and hardship suffered by the Defendant, who may be in custody. Remedies also cause inconvenience and emotional harm to victims, and to jurors, such as when sequestration is required. (New South Wales Law Reform Commission, *Contempt by Publication*, at 2.57).

defendant does not outweigh the public interest in cases being tried.²⁰⁹ The relevant remedial mechanisms discussed below are the traditional mechanisms of judicial directions; voir dire; changing the trial venue; granting a stay of proceedings; the ability to appeal against conviction on the grounds of such publicity; and sequestering jurors. In addition, due to the specific challenges posed by the internet to fair trials the remedial mechanisms of working with websites, and introducing an offence against jurors searching the internet are discussed.

4.1 Judicial Directions

If pre-trial publicity has occurred, including prejudicial publications, it is likely jurors will have a preconceived view about the case and the defendant. The prejudice may be alleviated to a sufficient degree by the trial judge providing directions, such as instructing the jury to ignore publicity about the case, not to discuss the case with anyone, and to reach a verdict based only on evidence admitted in court.²¹⁰ Recognising this, it has been noted the jury trial system is based on the assumption jurors can and will understand and follow a judge's directions.²¹¹ However, commentators disagree upon whether judicial directions are effective in preventing prejudicial publications from influencing jurors.²¹² It is also an area in which generalisations are particularly difficult, as every trial and jury is different. Tanford has noted directions to disregard evidence are often difficult for jurors to understand,²¹³ stating that directing jurors, "often provokes the opposite of the intended effect", citing several

²⁰⁹ As noted in *R v B* [2008] NZCA 130 at [77]. The problems with such a frustration of the public interest in the administration of justice was noted in New South Wales Law Reform Commission, *Contempt by Publication*, at 2.60.

²¹⁰ For example, *R v B* [2008] NZCA 130 noted this tendency at [77]. In rejecting applications for a stay of proceedings and change of venue, Priestley J noted that directions to the jury would be required to ignore any publications and details other than those presented at trial: *R v Skelton* (Hamilton High Court, CRI 2006-019-6530, 9 July 2008, Priestley J) at [119].

²¹¹ New Zealand Law Commission, *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character*, p. 110. In *Gilbert v R* [2000] CLR 414, McHugh J stated that unless courts acted on the assumption that juries act on the evidence, and in accordance with the directions of the trial judge, there was no point in having jury trials.

²¹² It has been noted that judicial directions have been demonstrated to be ineffective: Newton Minow, and Fred Cate, "Who is An Impartial Juror in an Age of Mass Media?" (1991) 40 *American University Law Review* p. 648; New South Wales Law Reform Commission, *Contempt by Publication*, at 2.50-2.51.

²¹³ J. Alexander Tanford, "The Law and Psychology of Jury Instructions" (1990) 69 *Nebraska Law Review*, p. 86.

experiments in support.²¹⁴ The New South Wales Law Reform Commission also reports several instances in which jurors did not comply with instructions.²¹⁵ The anecdotal evidence from within the judiciary as to the value of directions also varies.²¹⁶

It has been noted juries follow directions which can be simply explained and readily understood, particularly where they accord with commonsense, and do not invite a “suspicious” reaction.²¹⁷ Difficulties arise in respect of directions of the more complex limited admissibility type,²¹⁸ with directions as to the use of evidence regarding previous convictions and past misconduct falling within this class.²¹⁹ Studies have shown evidence of prior convictions will often increase the likelihood of conviction, with judicial directions of no assistance,²²⁰ with the Law Commission noting, “Directions not to be swayed by prejudice are always given, but they have a ritualistic quality. It is simply unrealistic to expect they can or will be fully effective with all juries on all occasions”.²²¹ The 2008 Law Commission Report questioned the ability of jurors to disregard highly inflammatory

²¹⁴ For example, in “one classic experiment”, when civil jurors discovered a defendant was insured mean verdicts increased from \$33,000 to \$37,000, but increased to \$46,000 when instructed to disregard it. (Ibid, p. 86).

²¹⁵ New South Wales Law Reform Commission, *Contempt by Publication*, at 2.51. A newspaper article was cited, detailing a jury being told to disregard press reports about the case, with their response being to “make a special effort to find out what had been said in the press and to discuss its significance among themselves”: Petre, C. “View from the Jury Room” *National Times*, 4-10 May 1984. A study of 41 trials was detailed in Michael Chesterman, Janet Chan, and Shelley Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in NSW*, Law and Justice Foundation of NSW, 2001 at xiv-xv, showing that despite judicial instructions, in 34 out of 41 trials one or more members of each jury followed this coverage and in 32 of the trials it was discussed in the jury room.

²¹⁶ Such differing opinions are noted by the 2008 Law Commission Report, with it noted, “At extremes, there are some who warmly affirm a perceived willingness on the part of juries to understand and follow instructions; and there are those who are much more cynical, inclining to the view that a jury in the end will do what it sees as right, almost regardless” (Ibid, p. 110).

²¹⁷ New Zealand Law Commission, *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character*, p. 111.

²¹⁸ For example, evidence of previous convictions of the defendant may be relevant or mainly relevant to veracity. If so, and the evidence is admitted under the veracity rules as going to the defendant’s veracity, the trial judge must direct the jury that such evidence is to be used only in relation to the defendant’s veracity, and not as going to the defendant’s propensity to offend. Directions to segregate utilisation between propensity and veracity do not accord with normal ways of thinking, with a corresponding likelihood that they will not be understood or obeyed. (Ibid, p. 109).

²¹⁹ Ibid, p. 111.

²²⁰ For example, see Roselle Wissler, and Michael Saks, “On the Inefficiency of Limiting Instructions” (1985) 9 *Law and Human Behaviour*, p. 47; UK Law Commission, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, 1996; James Ogloff et al, *The Jury Report: Stage 1 – a Survey of Australian and NZ Judges*, Australian Institute of Judicial Administration: Melbourne, 2006 pp. 34-35. The distinction between propensity to offend and credibility has been noted as being “unrealistic” in *R v Campbell* [2007] EWCA Crim 1472, [20] and [28], Lord Phillips CJ.

²²¹ New Zealand Law Commission, *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character*, p. 108.

information, notwithstanding directions as to how the evidence may be used,²²² with varying empirical evidence as to the validity of judicial directions. In a New Zealand study involving directions given in actual trials, most jurors later claimed not to have used knowledge of previous convictions to the defendant's disadvantage.²²³ In addition, whilst it may be possible to put something out of one's mind at a conscious level, it is impossible to say whether or not information may yet operate at a subconscious level to influence thinking.²²⁴ Vidmar has questioned whether such studies of real trials carry the risk of jurors giving "socially correct responses" to questions.²²⁵

The limitations of judicial directions are recognised through the existence of the severance procedure,²²⁶ suppression orders and restrictions on admitting propensity evidence. These mechanisms aid the jury and the administration of justice by limiting irrelevant evidence available to jurors. However, the internet increases the ease by which the effect of these mechanisms can be restricted, thus enabling prejudicial material to be available to jurors. Due to such material being available online, warnings not to access the internet are often relied upon, despite conflicting views as to the effectiveness of directions. Referring to the internet in judicial directions is detailed below, as is the possibility of judicial directions becoming more persuasive in nature.

(a) Referring to the Internet in Directions

In light of the changing media environment, judicial directions often include instructions that jurors must not access the internet and search for material about the defendant.²²⁷ Judges often note the effectiveness of such directions, with Priestley J in *R v Skelton* noting

²²² Ibid, p. 8.

²²³ This study was referred to in Ibid, p. 110, citing Young, Cameron and Tinsley. Warren Young provided further evidence of this study to the High Court in the September 2008 contempt proceedings against Fairfax, with such evidence reported in Joanne Black, "Fair Facts?" *Listener*, 4 October 2008.

²²⁴ New Zealand Law Commission, *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character*, p. 108.

²²⁵ Neil Vidmar's Affidavit to the High Court in the Fairfax contempt proceedings was reported in Joanne Black, "Fair Facts?"

²²⁶ As provided in s340 Crimes Act 1961, providing Judges with the discretion to sever charges if it would be conducive to the ends of justice.

²²⁷ Such as Williamson J's clear warning at the Antonie Dixon retrial that jurors must not search the Internet and look at any reports of the previous trial: Kim Ruscoe, "Crown Outlines Dixon's Trail of 'Destruction': Don't Search the Internet, Judge tells Jury", *The Dominion Post*, 23 June 2008. Such directions were noted as "commonplace" in *R v Skelton* (Hamilton High Court, CRI 2006-019-6530, 9 July 2008, Priestley J) at [78]

the “team cohesion” amongst jurors as a result of judicial directions, stating that peer pressure would deter jurors from engaging in online research in defiance of a judge’s direction, or sharing the results of such enquiries with other jurors.²²⁸

However, several instances of juror misconduct have been reported, with many more likely to have occurred. Such misconduct has occurred despite judicial warnings not to undertake external enquiries.²²⁹ The internet transforms the likelihood of such misconduct, due to the ease by which discreet inquiries may be made. It was recently noted by the Court of Appeal that despite judicial directions, “internet enquiries, perhaps just in the form of ‘googling’ the defendant, must be commonplace”.²³⁰

The 2008 Law Commission Report cited a survey of New Zealand trial judges reporting that only 18% of judges direct juries not to access the internet. The Report’s explanation for the low rate of directions was that “the power of suggestion” may result in jurors who otherwise would not have searched the internet doing so.²³¹ The Court of Appeal recently noted such a possibility, and ordered the continuation of suppression orders.²³² However, the underlying assumption that no juror would consider an internet search without prompting seems dubious in light of the widespread access to the internet, and the ease of conducting searches.

(b) Accepting the Changing Media Environment and Directing Accordingly

Generally, public understanding of the reason why previous convictions and other prejudicial information is excluded from consideration by juries is poor.²³³ As a result of the internet, the temptation may be increased for jurors to conduct investigations to see what

²²⁸ Ibid at [81].

²²⁹ For example, in *R v Bates* [1985] 1 NZLR 326, jurors had inquired at a chemist about the availability and cost of purchasing ephedrine, being a central issue in the case, notwithstanding a direction to reach their verdict only on evidence given in Court. A retrial was ordered.

²³⁰ *R v B* [2008] NZCA 130 at [78].

²³¹ New Zealand Law Commission, *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character*, p. 105, citing James Ogloff et al, *The Jury Report: Stage 1 – a Survey of Australian and NZ Judges*, pp. 34–35.

²³² *R v B* [2008] NZCA 130 at [79].

²³³ Such a factor was noted in New Zealand Law Commission, *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character*, p. 8.

information is “hidden” from them.²³⁴ Whilst courts are placing increasing faith in the efficacy of directions to the jury to disregard prejudicial material and to not conduct their own investigations, an argument can be made that with modern juries, in this information-rich environment, it is more effective to persuade than it is to direct. Such a factor was acknowledged by Randerson J in *Rickards*,²³⁵ where he noted it must be recognised that juries are “unlikely to come to their task unburdened by prior extraneous information”, with a “more direct engagement between judge and jury on these issues” required.

Given the New Zealand Law Commission acknowledged that jurors tend to conduct their own research despite judicial directions,²³⁶ a need exists for more detailed instructions, directed not only to the requirement that the case be decided solely on the evidence led at trial but also the reasons why that is so. Thus, instead of directions, the use of explanations and persuasion has emerged as a possible solution. In *R v Harder* the danger of such directions drawing attention to the likelihood of material being available online was noted, with the Court stating there is “no way to avoid that possibility”.²³⁷ To resolve this difficulty, it was considered preferable to “alert the jury to the fact that the case has previously attracted publicity and stress that it is therefore even more important that jurors comply with the standard directions bearing on that issue”.²³⁸ In respect of the use of extraneous material by jurors, a New Zealand study reported, “By and large, juries simply did not seem to appreciate the importance, or...understand the logic, of restricting themselves to the information presented by the parties and the judge”.²³⁹ Therefore, directions explaining to jurors why they are not permitted to conduct their own enquiries are of value, potentially preventing such investigations being conducted by jurors unaware that such conduct may prejudice a fair trial. There has been judicial recognition of such a need, with directions not to access the internet clearly warning jurors that such searching would result in the trial being

²³⁴ Karen Arnold, “Bloggers on Murder Case Ignore Law”, citing Scott Optican. Such a suspicion may be increased due to high-profile cases such as *Rickards* in which prior convictions were suppressed from jurors which much of the public felt should have been disclosed.

²³⁵ *R v Rickards (No 2)* (Auckland High Court, CRI 2005-063-1122, 19 May 2006, Randerson J) at [54].

²³⁶ New Zealand Law Commission, *Juries in Criminal Trials: Part Two*, paras 7.54-7.57.

²³⁷ (CRI-2003-404-000291, HC Auckland, Feb 5 2004, Williams J) at [44].

²³⁸ *R v Harder* (Auckland High Court, CRI-2003-404-000291, February 5 2004, Williams J) at [44].

²³⁹ New Zealand Law Commission, *Juries in Criminal Trials: Part Two*, para 7.45. Boniface has noted that if jurors do not understand the reason for not undertaking independent inquiries, “they are more likely to rely on their own naïve understanding of the legal system based on ‘commonsense justice’, noting that, “as a result, jurors may ignore judicial directions that clash with their intuitive understanding of their role as truth seekers”: Dorne Boniface, “Juror Misconduct, Secret Jury Business and the Exclusionary Rule”, (2008) 32(1) *Criminal Law Journal* 18, 22.

aborted. Explanations are also provided to jurors as to why internet searches may not be undertaken – particularly focused on the fact that evidence recovered by searches may not be placed into context or cross-examined by counsel, or explained by the judge.²⁴⁰

Suggestions have been made that where judges can truthfully do so, they should tell the jury they have looked into the defendant’s previous convictions and other material available, and can assure them it does not help them in reaching their verdict.²⁴¹ In cases where previous convictions can clearly be distinguished and explained, or other prejudicial material can be placed in its context, it may be effective to outline the relevant circumstances, and demystify the situation.²⁴² Further, where there is reason to believe the prejudicial material has been disclosed partly with an intention to influence the jury, the judge could warn jurors not to be manoeuvred by other people who appear to be trying to influence them to reach a particular decision.²⁴³

Thus, perhaps due to the internet and the likely access by jurors to prejudicial material, the jury system is returning to its origins – consisting of a group of people who are knowledgeable about the parties involved and the facts of the case.²⁴⁴ Prejudicial material that traditionally has been seen as inadmissible may now be considered by jurors, due to the challenges posed by the internet. In recognition of the probable use of prejudicial material by jurors in their deliberations, such material could be admitted into court, enabling both prosecution and defence to address the jury as to its significance, and place it in context.

Where judicial directions cannot sufficiently counter the risk of prejudicial publications being accessed by jurors and influencing their verdicts, other mechanisms may be relied on, often in conjunction with directions. Aside from directing the jury as a whole about prejudicial publications available both through traditional and new media, the mechanism

²⁴⁰ Stephen O’Driscoll, Justice of the High Court of New Zealand, Private Discussion in Chambers at Dunedin High Court, 3 October 2008.

²⁴¹ New Zealand Law Commission, *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character*, p. 106.

²⁴² This possibility was noted in *Ibid*, p. 106; *R v B* [2008] NZCA 130 at [79].

²⁴³ New Zealand Law Commission, *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character*, p. 106.

²⁴⁴ Such a possibility is noted in Michael Chesterman, “OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt with in Australia and America”, p. 143; Newton Minow, and Fred Cate, “Who is An Impartial Juror in an Age of Mass Media?”, pp. 662-663. Boniface notes the jurors did not just have such knowledge, but were actually required to undertake investigations in order to gain the required knowledge: Dorne Boniface, “Juror Misconduct, Secret Jury Business and the Exclusionary Rule”, p. 19.

of voir dices can be utilised, diagnosing individual jurors who have been, or are likely to be prejudiced by such publications.

4.2 Voir Dire

Related to directing jurors, a voir dire may be held, with judges questioning jury members to ascertain whether any of them have encountered such prejudicial publicity, and if so, whether they are likely to be influenced by it in reaching their verdict.²⁴⁵ Jurors who indicate they have been prejudiced by pre-trial publicity may then be discharged. For example in the pre-trial hearing of *R v Skelton*, in rejecting applications for a stay of proceedings and change of venue, Priestley J indicated a preference for this mechanism as ensuring a fair trial could occur. He directed that prior to the jury being empanelled, the jury panel should be directed to indicate to the presiding judge whether they are in any way related to the parties involved; have supported or encouraged the mother or father in the case; or have clear recollections and strong views of the events.²⁴⁶ Questioning of potential jurors by Counsel on a “challenge for cause” basis may also be permitted where there is evidence of prejudice or bias in the minds of potential jurors.²⁴⁷ However, the threshold for challenges for cause is high, with the test stated in *R v Sanders* to be that prospective jurors may be challenged for cause only if the circumstances were “wholly exceptional”.²⁴⁸

²⁴⁵ In Canada, the right to challenge for cause has been noted as being “essential to...the...right to a fair trial”: *R v Parks* (1993), 24 C.R. (4th) 81, 65 O.A.C. 122, 15 O.R. (3d) 324, 84 C.C.C. (3d) 353 (C.A.), at p 262 C.C.C. p 91 C.R. per Doherty J.A, cited at p.p. 220-221 in P. Horwitz, “Jury Selection After Dagenais: Prejudicial Pre-Trial Publicity”, (1996) 42 *Criminal Reports*, 220.

²⁴⁶ (Hamilton High Court, CRI 2006-019-6530, 9 July 2008, Priestley J) at [118]. This case involved the kidnapping of Jayden Headley from the Hamilton library by his grandfather, with the grandfather and Jayden’s mother (Ms Skelton) subsequently charged with kidnapping after Jayden was not returned to his father (Mr Headley) for several months. It would seem the likely outcome of any jury identifying they sympathised either with Ms Skelton or Mr Headley would be them not being able to be a juror on the trial.

²⁴⁷ Section 25(1) Juries Act 1981 states in relation to challenges for cause that, “each party to the proceedings shall be entitled to any number of challenges for cause on the ground that a juror is not indifferent between the parties.”

²⁴⁸ (1995) 13 CRNZ 222, pp. 228-229. For example, an unsuccessful challenge for cause was raised in the Kahui trial against a juror with expertise in brain injuries. (Simon Moore, “The Dixon Retrial and Kahui Trial”, *Otago University Seminar*, 1 September 2008).

Disagreement exists as to the effectiveness of voir dire. Some argue it is an effective safeguard against the effect of prejudicial pre-trial publicity,²⁴⁹ while a number of commentators argue it is ineffective at preventing prejudice among the jury, focusing the court's attention on exposure to press reports by jurors, rather than on the existence and degree of prejudice that may have resulted from such exposure.²⁵⁰ Given that in high profile cases it is almost impossible to find jurors with no knowledge of the events of a case,²⁵¹ and the difficulty to identify jurors *prejudiced* by such publicity, not just *aware* of it; it is likely other remedial mechanisms better address the risk of prejudicial publications, including those available on the internet.

4.3 Change of Venue

In some circumstances, prejudicial publicity may result in a change of venue, which recently occurred in *R v Bain*.²⁵² In order for a change of venue to be ordered, the test is whether it would be “expedient for the ends of justice”.²⁵³ The starting point is that justice should be done in the community in which the alleged offending occurred,²⁵⁴ with the test being whether a “real risk” exists that a fair trial cannot occur in the current jurisdiction.²⁵⁵ The

²⁴⁹ For example, see F. Siebert, et al, *Free Press and Fair Trial: Some Dimensions of the Problem*, University of Georgia Press: Athens, 1970, pp. 65-71.

²⁵⁰ See for example, N. Kerr et al, “On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pre-Trial Publicity: An Empirical Study” (1991) 40 *Am UL Rev* 665 at pp. 697, 699; Newton Minow, and Fred Cate, “Who is An Impartial Juror in an Age of Mass Media?” pp. 633-634, 644, 650-651.

²⁵¹ Charles Whitebread, and Darrell Contreras, “Free Press v Fair Trial: Protecting the Criminal Defendant’s Rights in a Highly Publicised Trial by Applying the Sheppard-Mum’min Remedy”, (1996), 69 *S. Cal. L. Rev.* 1587, p. 1611.

²⁵² (Christchurch High Court, CRI 2007-412-00014, 7 May 2008). See also: *R v Mayer-Hare* [1990] 2 NZLR 561; *Wallace v Abbott* (New Plymouth High Court, T 9/02, 16 September 2002) and *R v Middleton* (CA 218/00, 26 September 2000). In *R v Mayer-Hare* such a “real risk” was held as being established at p. 563. It was noted that in the relatively small Tauranga jury pool, it would be “certain” the plight of the victims would be discussed, with a “real risk” of several jurors feeling personally involved, and “although such a juror could honestly persuade himself or herself of an impartial mind, he or she could not help starting from a position of sympathy for a known innocent victim”. Similarly, in *R v Bain* (Christchurch High Court, CRI 2007-412-00014, 7 May 2008) at [43] Panckhurst J noted much of the evidence to have a “distinctive Dunedin flavour to it”, and that, in comparison to a jury drawn from citizens from another area, it would be a, “considerable challenge to find a jury of Dunedin citizens who can sit in judgment uninfluenced by some element of prior knowledge about the case”.

²⁵³ Section 322(1) Crimes Act.

²⁵⁴ s168A Summary Proceedings Act 1957; s5(5)(b) Juries Act 1981; *R v Reid* (Christchurch High Court, CRI 2007-009-16445, 18 August 2008, Chisholm J) at [78].

²⁵⁵ *R v Reid* (Christchurch High Court, CRI 2007-009-16445, 18 August 2008, Chisholm J), at [78]; *R v Skelton* (Hamilton High Court, CRI 2006-019-6530, 9 July 2008, Priestley J) at[112].

trial venue may be shifted to an area where prejudicial material was not published, or only had limited circulation, with it thus possible to locate a pool of potential jurors who have not been exposed to as much pre-trial publicity, being able to render a fair verdict.²⁵⁶ In addition to the necessity of a “real risk” of an unfair trial, there must be a “significant difference”²⁵⁷ in the level of such prejudicial publicity in the current venue from alternative venues. In light of the internet’s incredible disseminatory powers, it is questionable whether there would be such a difference between locations, due to publicity often being nationwide, particularly in high-profile cases.²⁵⁸ It is likely any risk of an unfair trial would be similar among venues, such as was held to have occurred in *R v Skelton*, where an application for change of venue was declined due to prejudicial publicity being widespread.²⁵⁹ If prejudicial publicity has been so extensive that it is impossible for a defendant to receive a fair trial anywhere, the remedial mechanism of staying proceedings may be appropriate.

4.4 Stay of Proceedings

Stays of proceedings may be granted if media publicity has been so intense that any jurors selected are likely to be prejudiced.²⁶⁰ Subsequently, any risk of prejudice arising from such

²⁵⁶ Michael Chesterman, “OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt with in Australia and America”, p. 123; Charles Whitebread, and Darrell Contreras, “Free Press v Fair Trial: Protecting the Criminal Defendant’s Rights in a Highly Publicised Trial by Applying the Sheppard-Mum’min Remedy”, p. 1604.

²⁵⁷ *R v Reid* (Christchurch High Court, CRI 2007-009-16445, 18 August 2008, Chisholm J), at [80]. In rejecting a change of venue application, it was held in *R v Reid* at para [80] that, “While the publicity in Christchurch has been greater than elsewhere, there is no significant difference in the level of reporting in that city compared to Wellington and Auckland. It follows that a transfer of proceedings to Wellington or Auckland is unlikely to significantly alter the potential impact of publicity on a jury.” In *R v Skelton* any risk to a fair trial was noted in para [120] as existing not only in Hamilton, but “throughout New Zealand and particularly the North Island centres”. While it was noted at [120] that potential jurors in Hamilton will have been exposed to more historic publicity than potential jurors in other centres, it was held, “there is nothing to suggest that potential Hamilton jurors will have more retentive memories for historic publicity”. (*R v Skelton* (Hamilton High Court, CRI 2006-019-6530, 9 July 2008, Priestley J)).

²⁵⁸ Several commentators have noted the effectiveness of moving the venue of a trial is diminished due to the power of the Internet. For example, Michael Chesterman, “OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt with in Australia and America”, p. 143; Robert Hardaway, and Douglas Tumminello, “Pre-trial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong”, 46 *American University Law Review*, October 1996; Newton Minow, and Fred Cate, “Who is An Impartial Juror in an Age of Mass Media?”, p. 647; James Spigelman, “The Truth Can Cost Too Much The Principle of a Fair Trial”.

²⁵⁹ *R v Skelton* (Hamilton High Court, CRI 2006-019-6530, 9 July 2008, Priestley J) at [120], affirmed by the Court of Appeal in *R v S* (CA 424-2008) (Robertson, Wild and Ronald Young JJ, 22 September 2008) at [16].

²⁶⁰ New Zealand Law Commission, *Juries in Criminal Trials*, p. 177.

publicity may be limited by discharging the jury²⁶¹ and delaying the start of a trial until the effects of publicity have dissipated. A permanent stay of proceedings may be ordered if prejudice is of such a level of severity.²⁶² Commentators have noted a reluctance to grant temporary stays of proceedings, partly because of the burdens on the system in terms of witnesses, records and fading memories.²⁶³ In addition, the effectiveness of temporarily staying proceedings has been questioned – with one study cited by Minow and Cate showing a twelve-day stay was “ineffective in curing jury bias”.²⁶⁴

Permanent stays of criminal trials are rarely granted; no New Zealand authorities exist in which a permanent stay of criminal proceedings has occurred on the basis of adverse publicity.²⁶⁵ The Court of Appeal has noted, “To stay a prosecution, and thereby preclude the determination of the charge on its merits, is an extreme step which is to be taken only in the clearest of cases”.²⁶⁶ However, a stay may be granted if the publication is so prejudicial a fair trial cannot occur, even with the use of remedial mechanisms.

In assessing the risk to a fair trial from prejudicial publicity, factors such as the delay between publication and trial are considered. The delay before trial was an important factor in the High Court’s decision to decline an application for a permanent stay of proceedings in *R v Skelton*, with the majority of prejudicial publications occurring almost two years’ before the expected trial date.²⁶⁷ In addition, Priestley J noted that as designated Trial Judge he would be giving the jury a “strong direction” to ignore prejudicial publicity, with this being sufficient to ensure a fair trial.²⁶⁸ Whilst the preservative nature of internet publications can be seen as weakening such arguments based on the delay before trial, thus being a factor weighing in favour of granting a stay of proceedings; New Zealand judges have refrained from granting stays of proceedings, instead relying on the use of other mechanisms to combat any prejudicial publicity, such as judicial directions.

²⁶¹ In addition, pursuant to s374(4) Crimes Act, individual jurors may be discharged on the basis of bias.

²⁶² Michael Chesterman, “OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt with in Australia and America”, pp. 116, 122.

²⁶³ Such a reluctance also exists in granting a change of venue application: Newton Minow, and Fred Cate, “Who is An Impartial Juror in an Age of Mass Media?” pp. 647-648.

²⁶⁴ *Ibid*, pp. 647-648.

²⁶⁵ This was noted at [50] in *R v Skelton* (Hamilton High Court, CRI 2006-019-6530, 9 July 2008, Priestley J), and in John Burrows and Ursula Cheer, *Media Law in New Zealand*, p. 425.

²⁶⁶ *Fox v Attorney General* [2002] 3 NZLR 62 at [37].

²⁶⁷ As noted at para [32] in *R v Skelton* (Hamilton High Court, CRI 2006-019-6530, 9 July 2008, Priestley J).

²⁶⁸ *R v Skelton* (Hamilton High Court, CRI 2006-019-6530, 9 July 2008, Priestley J) at paras [74], [82], [83]. In addition, at [77] he ordered the removal of Family Court decisions about Ms Skelton from the Family Court website.

For example, in *R v Rickards*²⁶⁹ Randerson J held a fair trial was still possible notwithstanding substantial prejudicial publicity, including significant amounts of internet content.²⁷⁰ Despite Randerson J concluding that as a result of suppression order breaches, “significant sections of the New Zealand public,” including “at least some of the members of the jury” would be aware of the previous convictions of Shipton and Schollum, it was noted that any adverse effects caused by the earlier publicity “will have largely dissipated by the time of trial”, and combined with strong judicial directions, a fair trial would be possible. On balance, Justice Randerson argued it would be unacceptable to the community for such a “significant trial” to be aborted as a result of pre-trial publicity, reiterating the judicial conviction²⁷¹ that properly directed juries can be relied on to exclude evidence not before the Court.²⁷² The fact the jury in the second trial acquitted the three accused on all charges can be interpreted as a vindication of Justice Randerson’s decision,²⁷³ and indeed, of the confidence judges place in the competence and impartiality of “properly directed juries”.²⁷⁴ Randerson J’s decision to refuse the stay application in *R v Rickards*²⁷⁵ has arguably set a high standard in matters of pre-trial publicity. The decision has been noted as an acceptance in part that the new media is largely uncontrollable and in many ways beyond the reach of the courts.²⁷⁶ Therefore, given many high profile cases often involve widespread prejudicial publications, including online publications, a *real risk* of prejudice to jurors must be

²⁶⁹ (Auckland High Court, CRI 2005-063-1122, 28 November 2005, Randerson J)at [97].

²⁷⁰ Brett notes that, “By their own acknowledgement the police were only able to capture a limited snapshot of the activity. Prominent among the material presented to Justice Randerson were cached copies of message board discussions from Trade Me...At the Judge’s request seven Operation Austin members worked with Trade Me to retrieve and analyse the message board site. Investigators took a snap shot of the online Trade Me conversations that related to the trial in the months between March 14 2006 and April 16 2006, the period covered by the trial and its immediate aftermath. They identified 97 conversation “threads” comprising a total of 4001 individual postings written by 655 active participants”: Cate Brett, “Pushing the Virtual Envelope: Rickards and the Internet Challenge to New Zealand’s Law of Contempt”.

²⁷¹ Randerson J referred to some of the empirical jury studies, including the NZ Law Commission Report, *Juries in Criminal Trials: Part Two*; and the Australian study by Michael Chesterman, Janet Chan, and Shelley Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in NSW*, as lending weight to the belief that juries can be relied upon to disregard prejudicial pre-trial publicity.

²⁷² In addition, Randerson J noted that there was to be a reference by the Judge to the second trial at the time of balloting for the third, with a request to jurors to approach the Judge if doubt was felt as to ability to try the case fairly.

²⁷³ However, some have argued the jury did not in fact know of Schollum and Shipton’s prior convictions, as noted by Cate Brett, “Pushing the Virtual Envelope: Rickards and the Internet Challenge to New Zealand’s Law of Contempt”. Given that the jurors have not been questioned as to whether they had knowledge of such information, the correct viewpoint on this outcome is unknown.

²⁷⁴ *Ibid.*

²⁷⁵ (Auckland High Court, CRI 2005-063-1122, 19 May 2006, Randerson J)

²⁷⁶ Cate Brett, “Pushing the Virtual Envelope: Rickards and the Internet Challenge to New Zealand’s Law of Contempt”.

established in order for a stay of proceedings to be granted, with such a risk unable to be alleviated by the other remedial mechanisms.

4.5 Sequestering Jurors

By sequestering jurors, thus restricting their access to extra-judicial information, jurors must reach a verdict based solely on the evidence presented at trial. Sequestration of jurors is currently used in New Zealand only during jury deliberations, with the New Zealand Law Commission noting in 2001, “Unless the scope of allowable media coverage is expanded, sequestration during trial should not be required”.²⁷⁷

As a result of the preservative and disseminatory nature of internet publications, it can be argued that such media coverage has expanded, with sequestration thus justified. However, sequestration may not be effective in preventing jurors from accessing the internet, given developments in technology whereby small devices such as Blackberries may access the internet, even if attempts are made to ensure they do not enter the jury room. Furthermore, sequestration does not address any prejudice which may occur before the jury is empanelled.²⁷⁸ Moreover, the Juries Act 1981 is being amended in December 2008, ending the routine sequestration of jurors during deliberations.²⁷⁹ Thus an expansion of this practice is most unlikely.

4.6 Appeals against Conviction

Where the above mechanisms have either not been utilised or were ineffective, prejudicial publicity can amount to a ground of appeal against conviction.²⁸⁰ Whilst this mechanism

²⁷⁷ New Zealand Law Commission, *Juries in Criminal Trials*, p. 157.

²⁷⁸ Charles Whitebread, and Darrell Contreras, “Free Press v Fair Trial: Protecting the Criminal Defendant’s Rights in a Highly Publicised Trial by Applying the Sheppard-Mum’min Remedy”, p. 1613. The authors note the burdens and hardship placed on jurors by sequestration, and the possible impacts on a fair trial.

²⁷⁹ Article 29A Juries Act 1981.

²⁸⁰ For example, *R v Wickliffe*, CA 480/97, 9 September 1998 was a successful appeal against conviction on the basis of prejudicial publicity. A retrial was ordered where a “melodramatic” television broadcast was made about the defendant’s escape from prison midway through his trial, referring to him as a “dangerous criminal” and a “desperate man”.

does not remedy the prejudicial effect of a publication as the other mechanisms are intended to do, it is remedial in nature, through remedying any prejudice to a fair trial from such publications. Factors to be considered in determining whether the prejudice was of such a risk as to prevent a fair trial are similar to those detailed above regarding sub judice contempt.²⁸¹ Prejudicial publicity can include the publication of disallowed evidence, with a newspaper publishing inadmissible evidence during trial being one of several reasons for allowing an appeal against conviction in *R v Morris*.²⁸² As noted above, the likelihood of prejudicial publications being viewed by jurors has increased due to the internet, with an Australian example highlighting the impact of the internet on court proceedings. A rape conviction was overturned on appeal because the jury was found to have accessed online information detailing the defendant's previous trial, which was not admitted as evidence during the trial.²⁸³

However if a long period of time exists between the prejudicial publicity and trial, appeals are unlikely to succeed given the difficulty in establishing the conviction was due to such publicity.²⁸⁴ The likelihood of appeals against conviction occurring due to such publicity is thus likely to increase – both as a result of the increased amount of publications available, and the preservation of publications on the internet diminishing the previous difficulty in establishing a conviction was due to such publicity.

In addition to the above remedial mechanisms, several mechanisms may be of use, being specifically directed at the characteristics of the internet which can challenge the right to a fair trial. The remedial mechanisms of courts working with the internet, and creating an offence against jurors searching the internet are thus of value, being directed at the internet's preservative nature, and the ease of access to such prejudicial publications.

²⁸¹ See *R v Harawira* (1989) 2 NZLR 714 for an example of analysis of such factors in determining whether to allow an appeal on the basis of prejudicial publicity.

²⁸² [2001] 1 NZLR 1.

²⁸³ *R v K* (2003) NSWCCA 406; 59 NSWLR 431. In this case the defendant was being re-tried for the murder of his first wife, having also been tried but acquitted of the murder of his second wife. An appeal from the conviction were allowed because of internet searches by the jury, which revealed that he had been charged and acquitted of the murder of his second wife. The revelation of the prior charge of murder for his second wife was held to be a miscarriage of justice, with his conviction set aside and a retrial ordered.

²⁸⁴ John Burrows and Ursula Cheer, *Media Law in New Zealand*, p. 425.

4.7 Working with the Internet

Due to the ability by which information may be published on the internet, the development of procedures whereby information may be removed more easily is likely to increase in importance. To an extent, such a policy already exists, with the Solicitor General able to request news websites to remove archived articles if they are likely to prejudice a fair trial.²⁸⁵ A protocol for news websites could be created, in which it is agreed once a matter becomes sub judice, prejudicial material about the case is immediately removed. However, it is likely that such a protocol would only be observed by large websites, due to the resources which such monitoring would require. For example, Mike O'Donnell of TradeMe stated the site removes disclosures of names on its bulletin boards which have been suppressed, noting however many New Zealand-based websites would not have the resources TradeMe has for continuously checking their content.²⁸⁶ While such a mechanism would not result in all material available online being removed, it has been noted that there is value in dealing with the mainstream media outlets, given that most people get their information from such websites.²⁸⁷

In addition, internet searches should be continually undertaken whilst a case is sub judice, and in the event prejudicial material is identified, the website should be requested to remove it until the matter is no longer sub judice. Media liaison officers currently monitor details of suppression orders and other material about cases that may not be reported by the media.²⁸⁸ Due to the knowledge media liaison officers already have about cases, perhaps their role could be expanded to include not only advising the media as to what may be published, but searching for publications containing such material. Such searches would identify any

²⁸⁵ For example, the *NZ Herald* was requested to remove its archived articles relating to Liam Reid, the man accused of murdering Emma Agnew, including articles published about him when he was known by another name. (J. Rees, "SG takes unprecedented step in Agnew trial", 3 December 2007, *NZ Herald*) Simon Moore has noted that such a tactic is being used by Defence Counsel in the David Bain retrial – whereby they undertake internet searches and advise the Solicitor General of any prejudicial websites. (Simon Moore, Crown Solicitor, Auckland, Private Discussion at Otago University).

²⁸⁶ Such comments were made in respect of breaches of the Internet suppression order by Harvey J, and were reported in Stephen Bell, "Names found online despite judge's ruling", *Computeworld*, 1 September 2008, No 1,042

²⁸⁷ For example, this was noted in Simon Mount, "Freedom of Expression and the Administration of Justice: to Gag or not to Gag?", p. 67.

²⁸⁸ The role of media liaison officers was noted in Courts Consultative Committee, *Media Coverage of Court Proceedings: Discussion Document*.

publications missed by the media protocol suggested above, and publications available on blogs or online forums.

Harvey J placed significant emphasis in the third decision of *Police v PIK and Others* on the ability of websites to remove articles about the defendants if required, lifting the internet suppression order.²⁸⁹ Such a mechanism ensures the balance of the rights to freedom of expression and the right to a fair trial are maintained. The ability to remove information significantly mitigates any concerns that such a publication would interfere with the rights to a fair trial, with freedom of expression only restricted until the case is no longer sub judice. However, due to the ability for websites to be cached and mirrored, complete removal of websites is very difficult.²⁹⁰ Whilst the removal of content by media organisations was noted by Harvey J in *Police v PIK and Others* as “not necessarily result[ing] in total removal of the material from the internet because of the actions of third parties”, the ability for the removal of most of the publications was held to be sufficient.²⁹¹ Therefore, due to such a mechanism being unable to completely remove the risk of jurors accessing prejudicial publications, this mechanism would be most effective if used in conjunction with other remedial mechanisms, such as judicial directions.

4.8 Offences Against Searching the Internet

In order to address the likelihood of jurors accessing prejudicial publications which are available online, New Zealand could introduce an offence against doing so, as has occurred in several Australian States.²⁹² Such an offence would make it illegal for jurors to conduct their own investigations or to seek alternative information on any case in which they are involved. This type of offence has been noted as providing legal reinforcement to judicial

²⁸⁹ *Police v PIK* (Manukau Youth Court, 19 September 2008, Harvey J), at para [16].

²⁹⁰ For example, whilst NZ Herald has removed articles referring to Liam Reid’s previous convictions, these articles have been copied onto an online forum where they are easily accessible through searching either his current or previous name, or Emma Agnew. (Available at Sunsawed, “Emma Agnew Memorial Thread”, *Christy’s World*, Last updated: 4 April 2008; Available at: <http://christysworld.yuku.com/topic/581/t/Emma-Agnew-Memorial-Thread.html?page=1>, (Accessed 5 September 2008)).

²⁹¹ *Police v PIK* (Manukau Youth Court, 19 September 2008, Harvey J), at paras [14], [16], [55], [56].

²⁹² Queensland’s provision was introduced in 2002 following concerns about the CrimeNet website noted in Chapter One. A similar provision was enacted in NSW in 2006, following several instances of juror misconduct; with Victoria also introducing similar legislation in May 2008.

directions against accessing the internet,²⁹³ with it noted to be, “reasonable to assume that most jurors would not engage in conduct which they had been told constitutes an offence”.²⁹⁴ To the extent jurors undertake internet searches, the existence of such an offence would likely deter jurors from sharing the information with other jurors, in fear of their misbehaviour being reported. However, this mechanism would be difficult to enforce, particularly given the traditional sanctity of the jury room.

4.9 Concluding Comments on Remedial Mechanisms

It thus can be concluded that in conjunction with the preventative mechanisms detailed in Chapter Three, several of the above remedial mechanisms can be utilised to address the risk of prejudicial publications being accessed by the internet. It is likely that some remedial mechanisms will be significantly impacted on by the disseminatory and preservative nature of internet publications. Pragmatic adaptations of the factors to be considered when utilising the other mechanisms in light of the internet will ensure the right to a fair trial is protected. It is likely judicial directions, incorporating an element of persuasion, and working with websites will be the most effective mechanisms to ensure the problems posed by the internet do not prevent a defendant from receiving a fair trial.

²⁹³ For example, Geoff Wilkinson, “Internet Ban Follows Underbelly Storm”, *Herald Sun*, 27 March 2008, Available at: <http://www.news.com.au/heraldsun/story/0,21985,23437580-661,00.html>, (Accessed 12 April 2008); Dorne Boniface, “Juror Misconduct, Secret Jury Business and the Exclusionary Rule”, at p. 21.

²⁹⁴ Virginia Bell, “How to Preserve the Integrity of Jury Trials in a Mass Media Age”.

CONCLUSION

As detailed in Chapter One, a challenge lies in balancing the rights to freedom of expression and open justice with the right to a fair trial. Such a challenge is enhanced in light of the changing media environment, which allows for greater freedom of expression, whilst possibly posing a greater risk to a fair trial due to the characteristics of internet publications as noted in Chapter Two.

In light of the threats posed by the internet to a fair trial, pragmatic adaptation of the preventative mechanisms of sub judice contempt and suppression orders is required. The internet has impacted on several factors considered by courts in contempt proceedings, such as the delay between publication and trial, and the audience size. Adaptation of the factors considered when granting suppression orders is also required as a result of the internet, specifically in terms of determining the extent to which freedom of expression and open justice must be restricted when granting suppression orders, with the internet-specific threats to the right to a fair trial being of importance. However, real problems are posed to the effectiveness of such mechanisms due to the nature of the internet, particularly in regards to prejudicial publications from outside New Zealand's jurisdiction. Due to the difficulties in enforcing preventative mechanisms against internet publications, some prejudicial publications are likely to be available, with remedial mechanisms thus playing a greater role in the changing media environment.

It was noted in *Rickards* that such a changing media environment “suggests that conventional understandings of what constitutes a fair trial before an impartial jury must take into account these new realities”.²⁹⁵ The internet thus requires courts to reassess how to ensure fair trial rights are protected, given preventative mechanisms may no longer be effective. Such a process requires recognition that juries are unlikely to come to their task unburdened by extraneous information, with remedial mechanisms thus playing an important role in terms of ensuring such knowledge by jurors, and access to prejudicial material online does not influence their verdict. Judicial directions may play a larger role in addressing the reality of jurors already possessing knowledge of the case and having the ability to conduct internet searches about the defendant, with persuasion and increased

²⁹⁵ *R v Rickards* (Auckland High Court, CRI 2005-063-1122, 28 November 2005, Randerson J) per Randerson J at para [54].

explanations required in such an environment. In addition, working with websites to address specific instances of prejudice to fair trials may be a valuable mechanism.

In pursuit of the ‘truth’, jurors may be tempted to conduct their own inquiries about defendants, seeking to uncover evidence not admitted at trial. The internet completely transforms the possibility of jurors accessing the “truth”, with the mechanisms discussed in Chapters Three and Four thus requiring adaptation in order to ensure a fair trial is protected, as,

Truth, like all other good things, may be loved unwisely – may be pursued too keenly
– may cost too much.²⁹⁶

²⁹⁶ *Pearse v Pearse* (1846) 65 ER 950, 957 per Vice-Chancellor Knight Bruce.

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APPENDIX ONE

25 Minimum standards of criminal procedure

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

- (a) The right to a fair and public hearing by an independent and impartial court:
- (b) The right to be tried without undue delay:
- (c) The right to be presumed innocent until proved guilty according to law:
- (d) The right not to be compelled to be a witness or to confess guilt:
- (e) The right to be present at the trial and to present a defence:
- (f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:
- (g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:
- (h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:
- (i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.