Prejudicial Publicity: When Will it *Ever* Result in a Permanent Stay of Proceedings?

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Abstract

The Queensland Court of Appeal's decision to overturn a District Court judge's decision to permanently stay criminal charges because of adverse publicity against a man accused of child sex offences has again highlighted the importance of the right of an accused to a fair trial. Australian courts have traditionally accorded the fair trial principle primacy over other considerations.[1] Fairness is not a selective concept; it applies to the accused as much as it does to the prosecution, for the public has an interest in ensuring not only that justice is done but that it is done fairly. However, there does not appear to be any definition by the courts of how much or what type of prejudicial publicity will lead to a permanent stay of proceedings.

Introduction

It has long been recognised that Australian courts have the power to stay an indictment permanently on the grounds of prejudicial publicity rendering a fair trial at any time to be impossible. But apart from the unique case of *Tuckiar v The King*[2] there has been no instance in the judicial history of Australia of an accused's conviction being quashed and a verdict of acquittal entered on the grounds of prejudicial publicity.[3] While there is ample case law to suggest courts have acknowledged the possibility that media publicity *may* create a situation in which an accused will not be able to have a fair trial, the exceptional case has yet to arrive.

Last year, as a result of a Queensland judge's ruling, there was a prospect a second case would join *Tuckiar* in Australian legal history.[4] District

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[1] *Jago v The District Court of New South Wales* (1989) 168 CLR 23, 56-7 (Deane J)

[2] (1934) 52 CLR 335.

[3] There is one other instance of a superior court granting a permanent stay on the grounds of prejudicial publicity *Glennon v R* (Unreported Court of Criminal Appeal Victoria, McGarvie and Nathan JJ; Southwell J dissenting 1990) however, the decision was subsequently overturned by the High Court *R v Glennon* (1992) 106 ALR 177.

[4] *R v Ferguson* (2008) QDC 136 (Botting J, unreported).

Court Judge Hugh Botting ruled that a notorious sex offender, Dennis Raymond Ferguson, would have charges against him permanently stayed because of a combination of pre-trial publicity and a weak prosecution case. It would be no exaggeration to describe the damaging type of prejudicial publicity that attended Ferguson before and after the trial as unprecedented in recent Queensland and possibly Australian legal history.

However, within six weeks of Judge Botting's ruling the permanent stay was overturned by the Queensland Court of Appeal.[5] The quick decision was the result of a statement by the Chief Justice Paul de Jersey that the Supreme Court of Queensland dealt with matters of major public concern in a timely manner and would expedite the appeal process.[6] Given relevant case law, however, the Queensland Court of Appeal's decision was not surprising. There is no doubt that in Australia the bar is set exceedingly high for an application for a permanent stay of proceedings based on prejudicial publicity either pre-trial or in-trial. But also given the fact that Australian courts do recognise the possibility that media publicity may create a situation in which an accused will not be able to have a fair trial the question must be asked; when, if ever, will prejudicial media publicity lead a superior court to confidently permanently stay a trial on these grounds?

Tuckiar's case

The history of Tuckiar's trial was set out in the joint reasons of his appeal to the High Court heard by five justices.[7]

Tuckiar was a Yolgnu man convicted of the murder of a white policeman named Albert McColl. The only evidence against him at his trial was of confessions which he was alleged to have made. One was to another Yolgnu man, Parriner, and the other to an Aboriginal boy named Harry. Tuckiar spoke no English and the evidence was given through an interpreter who relayed it to the court in pidgin. Tuckiar was alleged to have told Parriner that he (Tuckiar) had hidden in the bushes and given a signal to a woman (described as one of "Tuckiar's women") handcuffed to Constable McColl to move away and that when she did so he had speared him. Harry's evidence was that Tuckiar said he had seen Constable McColl having sexual intercourse with his wife and that, after

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[5] *R v Ferguson; ex parte A-G (Qld)* (2008) QCA 227

[6] Jason Gregory, Robyn Ironside & Rosemary Odgers, 'Dennis Ferguson appeal to be fast-tracked' *The Courier-Mail,* 2 July 2008

[7] *R v Tuckiar* (1934) 52 CLR 335

this, McColl had seen Tuckiar and fired at him. It was in this context that Tuckiar had thrown the spear.

The Protector of Aborigines arranged for counsel to appear for Tuckiar. At the conclusion of Parriner's evidence, the judge asked counsel in front of the jury whether he had obtained instructions from Tuckiar about what Parriner had to say. Counsel said that he had not. The judge adjourned the trial so that counsel could speak with Tuckiar. On the resumption of the trial, counsel asked if he could speak with the judge in chambers. There followed a further adjournment during which counsel and the Protector of Aborigines conferred with the judge in chambers. The trial resumed. No evidence was called on Tuckiar's behalf.

The jury was troubled by the lack of evidence and they sent a note asking, "if we are satisfied that there is not enough evidence, what is our position?" The judge answered their question, saying among other things, that they should not be swayed if they thought the Crown had not done its duty, he reminded them that if they brought in a verdict of not guilty Tuckiar would be freed and could not be tried again no matter what evidence may be discovered in the future.

In his summing up the judge told the jury, "you have before you two different stories, one of which sounds highly probable, and fits in with all the known facts, and the other is so utterly ridiculous as to be an obvious fabrication". He went on to comment that Tuckiar had not given evidence and that the jury could draw any inference that they cared to draw from that circumstance. Tuckiar was convicted and sentenced to death. After the jury returned their verdict, Tuckiar's counsel informed the Court that he had spoken with Tuckiar putting to him that he had told two different stories and asking him which one was true. Tuckiar had said that the true account was the one he had told Parriner.

Tuckiar appealed to the High Court. The case was heard by five justices. Their honours observed that for more than one reason the verdict could not stand. In the ordinary course one would have expected the Court to order a new trial. However, the publicity given to the statement made by Tuckiar's counsel had been widespread throughout the Northern Territory and in the extraordinary circumstances of the case it was considered that it would not be possible to afford Tuckiar a fair trial. The Court directed that a verdict and judgment of acquittal be entered. This was a landmark decision in Australian criminal law as it represented the first instance of an accused's conviction being quashed, and a verdict of acquittal being

entered, on account of the potential prejudicial effect of pre-trial publicity.

Facts in Ferguson's case

Ferguson had been convicted of many offences against children. Between 1998 and 2003 he was imprisoned for such offences. On 10 November 2005 he was arrested and charged with three further offences. On 31 March 2008, two of the three new charges against Ferguson were tried in the District Court. One count was of indecent treatment of a child, referred to as K, and one count was of indecent treatment of a child referred to as B. At the conclusion of the Crown case, the trial judge ruled that there was no evidence to support the second count. The Crown prosecutor entered a *nolle prosequi* and the respondent was discharged in relation to that count. The jury were then discharged, with Ferguson remaining in custody pending his retrial on the count concerning the child K.

A few days before the retrial, set down to start before a different judge in early July 2008, Ferguson applied for a permanent stay of the proceedings against him. This application was advanced on two bases: first, pre-trial publicity meant that he could not receive a fair trial; and, secondly, the Crown case was very weak. The weakness of the case against Ferguson related to the real possibility that the child victim was mistaken as to the identification of the offender. That application was upheld by the primary judge who made an order permanently staying the prosecution of this count. (Ferguson originally applied for a permanent stay of the charges in August 2007 but his application was dismissed by another judge).

Judge Botting, in his judgment, referred to a widespread, so-called "debate" about Ferguson which started before his release from prison in 2003 and which has continued to this day.[8] For example, widespread reporting of:

- the fact of his numerous convictions of and imprisonment for sexual offences committed against children;
- unattributed reports of his expressing an intention to have sex with children upon his release from prison; and
- expressions of opinion, usually to the effect that the accused should not be at large in the community or would constitute a real risk to children *if* allowed at large in the community.

[8] *R v Ferguson* (2008) QDC 136, 4 (Botting J, unreported).

Such opinions had reportedly been expressed by Ministers of the Crown, Federal politicians, State politicians, City Councillors and by others who might perhaps be described in the language of Brennan J in *Glennon*[9] as: 'Persons who affect to convey the moral conscience of the community and to possess information, insights and expertise in exceptional measure'.

Of even greater significance was nightly coverage over a period of weeks on national television news over a prolonged period of what can only be described as 'lynch mobs' hounding Ferguson from various residences at a number of Queensland communities including Murgon, Ipswich, Mitchell and Carbrook where 24-hour police protection had reportedly cost taxpayers more than $250,000. At one stage, the Government was providing a Christian organisation with $1000 a day to house Ferguson while he was awaiting trial.[10]

In September 2008, Ipswich District Court ruled that Ferguson was entitled to criminal compensation after a mob confronted him outside his former home and threatened to kill him.[11] This resulted in Ferguson being named no.18 in an Australian magazine's 50 'Most Hated people in Australia' list.[12] The television footage of Ferguson invariably depicted him lashing out at the media in a disturbed and demented fashion while members of the public bayed abuse in the background. These images were repeated on National television networks. As a result of this publicity there would scarcely be a person in Queensland who would not view Dennis Ferguson in a negative light.

In relation to the adverse effects of pre-trial publicity on the respondent's prospects of a fair trial, his Honour conceded that in his experience most jurors accept their duties responsibly, try to follow judicial directions faithfully, and often will struggle hard to be entirely objective in their assessment of the evidence. However, in the circumstances of the Ferguson case, 'it was impossible to conceive that a jury could be empanelled, all of whose members would be able to bring the dispassionate judgment which the law requires to a consideration of the evidence.' To pretend otherwise, he said, would in his opinion be 'disingenuous'.[13]

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[9] *The Queen v Glennon* (1992) 173 CLR, 611.

[10] 'Accused paedophile wins compensation', *The Australian,* 20 September 2008, 3

[11] 'Ferguson wins compo case', *Townsville Bulletin,* 20 September 2008, 9

[12] 'Zoo Weekly's Top 50 People We Hate List', *AAP* 22 September 2008.

[13] *R v Ferguson* (2008) QDC 136, 6-7 (Bottting J, unreported).

An appeal was then launched by the Attorney-General against the order pursuant to s 669A (1A) of the *Criminal Code* 1899 (Qld).[14]

Court of Appeal's conclusions

In essence the Court of Appeal was critical of the trial judge for, in its opinion, coming to a premature conclusion largely on the basis of, what it described, as 'speculation'.[15] According to the QCA, s 47 of the *Jury Act* (1995) afforded a better basis for reaching an informed view on the prejudicial effect the pre-trial publicity would have on the jury. Section 47 is a special procedure where a judge, on application by a party in the proceedings, may authorise the questioning of persons selected to serve as jurors when the court reaches the final stage of the jury selection process.[16] The purpose of the questioning is to find out whether the juror can bring an impartial mind to bear on the issue. The effectiveness of this remedy is debateable. Australian courts historically prefer judicial instructions to juries to overcome the effects of prejudicial publicity instead of allowing challenges for cause.[17]

While there has been little research about the effectiveness of a *voir dire* as a means of identifying prejudice[18] what research has been carried out in America suggests that jurors tend neither to speak out during voir dire nor to admit to their true prejudices and preconceptions.[19] Jurors may also be unaware of their prejudices. Another danger in questioning jurors as to whether they have encountered publicity is likely to be that some members of the jury may be reminded of the prejudicial publicity, perhaps in manner suggesting that they ought to be prejudiced against the accused.

Social influences may also cause a *voir dire* to be ineffective. For instance, it is highly unlikely that someone will admit publicly to being a bigot. There is also a risk that reluctant jurors will use confessions of prejudice as a convenient method of avoiding jury duty. Therefore, a

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[14] For the purposes of this paper I shall only be referring to the pre-trial publicity finding.

[15] *R v Ferguson; ex parte A-G* (Qld) (2008) QCA 227, 22.

[16] *Jury Act* (1995) s 47.

[17] Les A. McCrimmon, 'Challenging a potential juror for cause: resuscitation or requiem?' (2000) 23(1) *UNSW Law Journal* 137.

[18] Bronson E J, 'The Effectiveness of Voir Dire in Discovering Prejudice in High-Publicity Cases: An Archival Study of the Minimization Effect' (1989) (paper prepared for the 25th anniversary meeting of Law and Society Association noting lack of social science literature on general effectiveness of voir dire).

[19] See Broeder, 'Voir Dire examinations: An Empirical Study,' 38 *South California Law Review* (1965), 503 and 528.

challenge for cause does not overcome the problem posed in cases like Ferguson's where there has been constant prejudicial coverage.

Delaying the start of a trial

The Court also criticised the judge for not adverting to an adjournment of the trial for a few months as a remedy to defuse potential prejudice from pre-trial publicity. The theory behind a delay is that jurors will be more likely to forget the prejudice with the passage of time. The difficulty with this measure, sometimes referred to as the 'fade factor'[20] is judging how much time is needed to dissipate the prejudice. In the United Kingdom the 'fade factor' phenomena was first referred to in *R v Reade, Morris & Woodwiss* (unreported) at the Central Criminal Court on 15 October 1993. In staying proceedings against three West Midlands Police officers, Garland J took into account the adverse publicity generated, but recognised that local prejudice may be temporary and may have an element of 'fade factor'. But where prejudice becomes nationwide and does not abate, he said, a stay may be appropriate.

For example, the start of the trial of the accused in the notorious Anita Cobby murder was delayed for just one week following media publicity surrounding the earlier guilty plea of a co-accused. In that case the jury was discharged on the grounds that the reference in the media to the accused, Michael Murphy, as a prison escapee would result in unfair prejudice to him. When a new jury was re-convened a week later an application was made to adjourn the trial for a further six months following another media reference to Murphy as a prison escapee.[21]

Rejecting the application, Maxwell J said the trial would always attract great publicity despite the effluxion of time and that the problem could be overcome by adequate and repeated directions to the jury. In upholding the judge's decision the NSW Court of Criminal Appeal said His Honour had properly weighed the interests of the accused on one hand and the public interest in the due administration of the criminal law on the other. This view was subsequently shared by the High Court.[22] The decision was made before the advent of the Internet therefore in view of the

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[20] *Ex Parte B* Central Criminal Court (Unreported, Scott-Baker J, 17 February 1994).

[21] *R v John Raymond Travers; Michael James Murdoch; Leslie Joseph Murphy; Michael Patrick Murphy; Gary Stephen Murphy* (Unreported, Supreme Court of New South Wales, Maxwell J,16 June 1987).

[22] *Murphy v The Queen and, Murdoch v The Queen and Murphy v The Queen* (1989) 167 CLR 94.

technological advances in communication since *Murphy;* Courts may be placing too much reliance on the 'fade factor'.

For example, the Internet now affords easy access to information in the form of web sites and blogs which often include unflattering details of an accused, especially public figures, including prior convictions and other prejudicial material. While there is a judicial presumption that prejudice caused by publicity is only of a temporary nature, its volume, intensity and continuing nature may produce a cumulative effect so that the consequent prejudice is fuelled and continued. In Ferguson's case the publicity was continuing and intense.

As recently as November 2008, news media were reporting on community concern about Ferguson's whereabouts.[23] Under these circumstances it is arguable that the presumption that the fade factor is successful in allaying memories of prejudicial material is rebuttable. It is also worth noting that a lapse of some two years in *Hinch's*[24] case was held to be insufficient to ameliorate the prejudicial effect of his prejudicial broadcast. Therefore, it appears the durability of the prejudice is the determinative issue for courts when deciding the length of delay in starting proceedings. This is something of a 'case by case' test given there does not appear to be any mathematical calculation that can be applied in determining the length of time that will overcome different types of prejudice. This is a highly unsatisfactory situation especially when an accused's liberty is at stake.

Suppression orders

Suppression orders are of little effect in cases like Ferguson's because he was the subject of considerable publicity before he was charged with his latest alleged offence. In this situation the media are exempt from *sub judice* restrictions and are at liberty to not only identify a suspect but also to speculate on the suspect's character and alleged crimes. The media do, of course, risk defamation proceedings should the suspect fail to be charged or have charges dropped but this prospect does not appear to act as an inhibiting mechanism for the tabloid press in particular. However, what the prejudicial pre-trial publicity does is pre-empt an accused's right to apply the court for a suppression order because once the accused's identity is known a subsequent suppression order would be of little benefit.

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[23] *ABC Radio News*, 'Deception Bay Community Meeting', Queensland, 26 November 2008, 7:03pm

[24] *Hinch v Attorney-General* (Vic) (1987) 164 CLR 1.

Change of venue

Another remedy, a change of venue, referred to by the Court of Appeal in *Ferguson* is also, arguably, of limited value in cases like Ferguson's. A trial judge generally has power by statute to order a change of venue.[25] Ordinarily the place of trial is the jurisdiction within which an element of the alleged crime takes place.[26] But while s 557(9) of the *Queensland Criminal Code* permits a trial of a person with his or her consent in any jurisdiction, this does not permit the defence, even with the acquiescence or consent of the prosecution nominating a place of trial. Ordinarily, trials will be heard in the district in which the alleged crime occurred. However in, *R v Yanner* Pincus J said:

> In some instances it may be relatively easy to obtain a change of venue – for example where the charge is one of a grave crime, it appears that there is considerable local hostility to the accused, and there is a much better chance of justice being done if the venue is changed. [27]

These remarks however, were quoted by counsel, without success (at least initially) in support of an application for a change of venue in *Long's*[28] case where, by any analysis, a grave crime existed.[29] Eventually, following an appeal to the Supreme Court, the Queensland Court of Appeal, and an application for special leave to appeal to the High Court, the Chief Justice intervened, this time acceding to the original submission that *Long's* trial take place in Brisbane.

The reluctance of Australian courts to change venue seems to be echoed in the United States where it was noted that even in the case of Jack Ruby, where by the time of trial every citizen of Dallas might have been expected to have seen the television film clip of Ruby shooting Lee Harvey Oswald, the trial judge refused to grant a motion for a change of venue.[30] One recent exception was *US v McVeigh*,[31] the Oklahoma bombing trial, in which the venue was changed to Denver. Explaining his decision to move the trial, Judge Matsch said extensive publicity before trial did not, in itself, preclude fairness because properly motivated and

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[25] See e.g. *Supreme Court Act* (Qld) s 223.

[26] *Criminal Code* (Qld), s557; also *R v Giddings* [1916] VLR 359.

[27] [1998] 2 Qd R.

[28] *R v Long: ex parte A-G* (Qld) (2003) QCA 77

[29] Long was charged with and subsequently convicted of the murder of two of the 15 people who died in the notorious Childers Backpacker's hostel fire in June 2000.

[30] Belli, M, *My Life on Trial* (1976), 260-261.

[31] *US v McVeigh*, 918 F Supp 1467 (1996).

carefully instructed jurors can and have exercised discipline to disregard prior awareness of publicity. However, he went on to say that:

> Trust in their ability to do so diminishes when the prior exposure is such that it evokes strong emotional responses or such identification with those directly affected by the conduct at issue that the jurors feel a personal stake in the outcome. That is also true when there is such identification with a community point of view that jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience.[32]

The media pre-trial exposure in Ferguson's case would create something of a parallel with the *McVeigh* case. As detailed above, the emotional response invoked was of a highly prejudicial nature. Also, as noted above, developments in technology, especially the Internet, mean that changes of venue may no longer work in the way they once did. The ease of accessibility of information on the Internet, which may include details of prior convictions and other conduct about the accused, could largely render a change of venue futile. Also, a change of venue may be of value if the risk of prejudice has predominantly been caused by local publicity, but if the prejudicial publicity is national, as in Ferguson's case, there is no other neutral venue available.

Trial by Judge alone

Another remedy for cases where the level of prejudicial material is so strong that it cannot be overcome by a judge's instructions to the jury, is trial by judge alone. The rationale is that a legally trained judge would be less likely to be swayed by prejudice generated by the media. Last year Queensland joined some other jurisdictions[33] in making provision for this remedy by amending the *Criminal Code* (Qld).[34] This remedy is only available with the accused's consent.[35] However some trial judges have expressed concern about the idea that the trial of a major indictable offence may take place without a jury.[36]

In *R v Marshall*, the first murder trial in Australia to be conducted by a judge alone, the trial judge expressed misgivings about shifting many important value judgments from jury to judge.[37] Indeed he felt so

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[32] *U.S. v McVeigh*, 918 F.Supp. 1473 (1996)

[33] *NSW Criminal Procedure Act*, (1986), s32, s33; *Western Australia Criminal Code*, Ch LXIVA; *ACT Supreme Court Act* (1933), Pt VII; *South Australian Juries Act*, s7.

[34] *The Criminal Code 1899* (Qld) Chapter division 9A Trial by judge alone.

[35] *The Criminal Code 1899* (Qld) S 615.

[36] *R v Marshall* (1986) 22 A Crim R 432.

[37] *R v Marshall* (1986) 22 A Crim R 479.

strongly about it he recommended that the South Australian *Juries Act* be amended so as to exclude trial by judge alone in trials for treason and murder.[38] In his judgment, White J said that while there may be value in opting for trial by judge alone in complicated fraud and commercial cases, even judges would have difficulty in putting to one side, in a case as serious as murder, the kind of prejudicial material which is often introduced into a *voir dire.*[39] Furthermore, he said, the values of the community are so deeply involved in the many value-judgments which have to be made in the course of a trial that a trial without a jury on a charge of murder would be in danger of becoming a quite different legal process than it has been traditionally.[40] There is also the *dictum* of Deane J in *Brown v The Queen*:

> [T]he deep seated conviction of free men and women about the way in which justice should be administered in criminal cases, namely that, regardless of the position of the particular alleged offender, guilt or innocence of a serious offence should be determined by a panel of ordinary and anonymous citizens, assembled as representative of the general community at whose hands neither the powerful nor the weak should expect or fear special or discriminatory treatment. [41]

Nevertheless Ferguson made application and was granted an order for a trial by a judge sitting alone[42] which defence counsel obviously preferred given the apparent weakness of the prosecution's case against him. It proved successful. After a three day hearing in the District Court at Brisbane Ferguson was found not guilty of one count of indecent treatment of a child under 16 years with a circumstance of aggravation.[43] To what extent the tactical decision, to put Ferguson in front of a Judge sitting alone rather than a jury, proved decisive is impossible to know but it is certainly a development that will not have escaped the notice of lawyers defending unpopular clients in the future.

Judicial instructions

The Court of Appeal also referred to judicial instructions to the jury as a further safeguard to a fair trial. Judges regularly instruct jurors to ignore prejudicial publicity while they are deliberating on a case. The warning

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[38] Ibid.

[39] Ibid 480.

[40] Ibid 482.

[41] *Brown v The Queen (*1986) 160 CLR 269.

[42] Pursuant to the order of Robin QC DCJ on 23 February 2009; *Criminal Code,* Chapter division 9A; Tony Keim, 'No jury for Ferguson – Judge to decide on sex abuse' *The Courier-Mail* 24 February 2009 p. 4

[43] *R v Dennis Raymond Ferguson* [2009] QDC 049 Wolfe CJDC 6 March 2009.

usually refers to matter published before the trial as well as during the trial. It usually takes the effect of the judge instructing the jury to decide according to the evidence put before them and the law alone and to put all other considerations out of their minds. There is no conclusive evidence as to how satisfactory this measure is. This has been acknowledged in the High Court in *Gilbert v The Queen*[44] by Gleeson CJ and Gummow J who said that while the system of criminal justice requires the assumption that juries follow and understand directions given by the trial judge it does not involve the assumption that their decision-making is unaffected by possible prejudice. According to a New South Wales report,[45] the instruction, especially concerning in-trial publicity, is often ineffective, at least in relation to newspaper coverage of the trial. While some jurors obey it, others do not.

Furthermore the Australian Law Reform Commission's report on Contempt[46] refers to a newspaper report of a jury's deliberations on a case, that when told their case had been discussed in the press and that they should ignore the press reports, their response was to make a special effort to find out what had been said in the press and to discuss its significance among themselves. In earlier times it could be assumed judges in their admonitions were referring to television and newspaper reports. Over the past decade the Internet has provided easy access to news events and information about a defendant's prior criminal record. For example, there is a dedicated site known as CrimeNet[47] in which, for a small fee, one is able to access a person's prior criminal record and other details. This site has led to one judge in Victoria discharging a jury after it was revealed the jury may have had access to the accused's prior criminal record.[48] Retrials were ordered in New South Wales after jurors became aware via the Internet of the accused's criminal history[49] and after two jurors conducted their own inspection of the site of the rape offence being tried.[50] It is also a problem for the courts because courts now, almost automatically, publish on their own websites or through services such as *austlii.edu.au.* In one case the issue arose because a jury

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[44] *Gilbert v The Queen* (2000) HCA 15.

[45] Chesterman M, Chan J and Hampson S, *Managing Prejudicial Publicity: An empirical study of criminal jury trials in New South Wales* (2001) 207.

[46] Australian Law Reform Commission, *Contempt,* Report No 35 (1987), [163].

[47] http://www.crimenet.com.au.

[48] *R v McLachlan* [2000] VSC 215; *R v Cogley* [2000] VSCA 231 was similarly a case involving an application to discharge a jury when concerns arose as to whether one or more members of the jury may have seen an entry on the Crime Net Internet site.

[49] *R v K* [2003] NSWCCA 406.

[50] *R v Skaf* [2004] NSWCCA 37.

could, theoretically, access rulings made by the court, and posted on the court website, during the course of a second trial. These rulings remained accessible by jurors sitting in the second trial.[51]

A television broadcast or a newspaper article may appear only briefly and then is relegated to archives that often not only require substantial effort to research but also can require significant payment. In contrast, Internet sites easily retain accessible information allowing a prospective or actual juror to retrieve it at will. It is not clear whether or not juries should be directed not to access the Internet, as this may encourage some to secretly do so. In Queensland, by 69A of the *Jury Act 1995*, a juror would commit an offence if he or she were to make inquiries about the defendant in the trial. The word 'inquire' is specifically defined to include searching an electronic database. In 2008, the Victorian Parliament amended the *Juries Act 2000* (Vic) creating the offence of a juror or jury panel member making an inquiry 'about a party to the trial or any matter relevant to the trial'. Also, as a result of the decisions in *R v K*[52] and *R v Skaf,*[53] the New South Wales Parliament introduced amendments to the *Jury Act 1977* making it an offence for jurors to conduct their own investigations concerning a trial.[54]

Judicial instructions have also been criticised in American jurisdictions. Justice Learned Hand described instructions telling the jury to ignore information learned outside the court as a 'placebo'[55] requiring of a jury 'a mental gymnastic which is beyond, not only their powers but anybody's else [sic]'.[56] Another American judge put the issue more bluntly, 'the naïve assumption that prejudicial effects can be overcome by instructions to the jury all practising lawyers know to be unmitigated fiction'.[57] Nevertheless most judges in Australia consider that directions to a jury to ignore prejudicial publicity remain an effective remedy.[58] This is despite there being no credible study that indicates that judicial instructions limit the effects of prejudicial media bias.

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[51] *DPP v Weiss* [2002] VSC 153.

[52] *R v K* [2003] NSWCCA 406.

[53] *R v Skaf* [2004] NSWCCA 37.

[54] *Jury Act* 1977 (NSW) s 68C.

[55] *United States v Delli Paoli* (1956) F.2d 319, 321.

[56] *Nash v United States* (1932) 54 F.2d 1006, 1007.

[57] *Krulevitch v US* (1949) 336 US 440, 453

[58] Chesterman, M Chan J and Hampson, S *Managing Prejudicial Publicity: An empirical study of criminal jury trials in New South Wales* (2001) 207; Les A. McCrimmon, 'Challenging a potential juror for cause: resuscitation or requiem?" (2000) 23 (1) *UNSW Law Journal* 137.

Indeed there is some doubt about the ability of jurors to understand, remember, and apply the legal principles explained by the judge, especially in fraud trials or where there are several defendants or a multiplicity of counts.[59] As the author of a Victoria Law Reform report into jury service put it:

> For two to three hours he (the judge) reads to 12 laymen enough law to keep a law student busy for a semester. Twelve individuals selected more or less at random, sit there, unable to take notes or ask questions. Somehow, just by listening, it is presumed everything spoken by the judge will take root in their collective intelligence. [60]

And, according to one authority 'the most serious problem that jurors encounter in their efforts to get things right appears to be an inability to apply instructions correctly'.[61] Much of the research undertaken on the effect of a judge's instructions to jurors has been contradictory. Some research indicates that jurors do respond as intended to instructions[62] while others have found that instructions are often ignored.[63] In reality it is difficult to assess whether judges directions effectively overcome the adverse effect of the jury hearing prejudicial and inadmissible evidence against an accused.

Therefore, in the absence of convincing evidence that jurors will not be affected by prejudice, it is submitted the more prudent practice would be for judges to err on the side of caution in cases that have attracted prejudicial publicity and not simply rely on judicial instructions to jurors to ignore the publicity.

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[59] James (Sir), A; 'What judges say to juries, from the point of view of juries and of the Court of Appeal (Criminal Division)', eds., Walker, N and Pearson, A *The British Jury System;* Papers presented to the Cropwood Round-Table Conference, University of Cambridge Press, Cambridge, 1975, 56-63.

[60] Cowie, M, Victorian Law Reform Commission, *Jury Service in Victoria,* Final Report, Volume 3 (1997), [2.202].

[61] Charrow R.P. and Charrow V.R., 'Making legal language understandable: a psycholinguistic study of jury instructions', (1979) 79 *Columbia Law Review* 165.

[62] NSW Bureau of Crime Statistics and Research, *Juror understanding of judicial instructions in criminal trials,* September 2008; E. Borgida and R Park, 'The Entrapment defence' (1988) 12 *Law and Human Behaviour* 19; K.L. Pickel, 'Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help (1995) 19 *Law and Human Behaviour* 407.

[63] S. Tanford and M. Cox, 'The Effects of Impeachment Evidence' (1988) 12 *Law and Human Behaviour* 477.

Permanent Stay of Proceedings

As noted above, there is a power to stay an indictment permanently on the grounds that no direction from the trial judge could be expected to diminish the impact of prejudicial publicity rendering a fair trial at any time to be impossible. It has been recognized by the High Court in *R v Glennon*[64] and the Court of Appeal in Queensland in *R v Lewis*[65] and *R v Long,*[66] but apart from *Tuckiar v R*[67] there has been no reported case in Australia of an accused's conviction being quashed and a verdict of acquittal then entered on the grounds of the potential prejudicial effect of pre-trial publicity.

There has been speculation by some commentators however, that a permanent stay of proceedings as a result of prejudicial pre trial publicity may have been granted for the second time in Australian judicial history had infamous Australian corporate fugitive, the late Christopher Skase, been brought to trial in this country.[68] Skase was the subject of enormous prejudicial publicity in Australia during the 1990s while he was residing in Spain fighting extradition. Certainly it could be said that Skase was a person who needed no introduction to Australians in the most negative sense imaginable due to the news media and successive Federal governments' sustained campaign against him over the course of several years. This then would have raised problems in selecting a jury who could fairly be said to be impartial had his trial for criminal charges gone ahead. It would have been almost certain that an application for a permanent stay of proceedings would have been the first plank of any defence platform mounted by his lawyers in the event of a trial in Australia. Had a permanent stay of proceedings been granted, one could only imagine the public and political outrage such a decision would have engendered.

Notwithstanding the separation of powers, the pressure that would be brought to bear on the court responsible for such a decision is clear. This again raises the question; could the subject of such prejudicial pre-trial publicity ever be tried fairly? An English judge at Harrow Crown Court answered this question in September 1995[69] where he ordered a stay of

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64 (1992) 173 CLR 592.

65 (1992) 1 Qd R 613.

66 *R v Long*; *ex parte A-G* (Qld) (2003) QCA 77.

67 (1934) 52 CLR 335.

68 Giddings, J, 'Would Christopher Skase Receive a Fair Trial?' (2000) *Criminal Law Journal* 24, 281

69 Corker D and Levi M, 'Pre-trial Publicity and its Treatment in the English Courts', *Criminal Law Review,* (1996), 622

the proceedings against a defendant Geoff Knights on the ground of prejudice caused by pre-trial publicity alone. This is believed to be the first case in the United Kingdom where prejudicial pre-trial publicity has been the sole reason for abandoning a trial. Knights was the well-known de facto husband of a 'soap' star, one Gillian Taylforth, and following his arrest for the alleged assault and unlawful wounding upon Taylforth's driver, some newspapers published hostile comments impugning his character, including information about previous convictions and brushes with he law which would have been inadmissible at trial. In this case the Judge said during his ruling:

> The reporting was unlawful, misleading and scandalous. Certain reporters were determined to run a hate campaign against Knights unchecked by their editors and without any regard to the interests of justice. I have absolutely no doubt that the massive media publicity in this case was unfair, outrageous and oppressive. [70]

Although the Attorney-General failed in subsequent proceedings against five newspapers for contempt of court resulting from the prejudicial publicity this was due to the disadvantage any Attorney-General in the UK has in bringing prosecutions under the *Contempt of Court Act 1981*. The statutory test requires the Attorney to satisfy the court that a particular article or broadcast itself (in isolation from any other media report) has created a substantial risk of serious prejudice. As the Corker & Levi article points out, in reality the risk of prejudice arises most frequently from the cumulative or 'snowball' effect of publicity over a period of time not from a single article or broadcast.[71] This is precisely the situation Ferguson found himself in.

More recently the High Court of Fiji put a permanent stay on the trial of businessman Ballu Khan accused of conspiring with nine others to assassinate key members of the interim government in that country.[72] One of the grounds successfully argued to stay the proceedings against Mr Khan was that pre-trial publicity about him was sufficiently prejudicial to justify a stay; and two, the publicity was generated with the purpose of prejudicing his interests.[73]

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[70] *The Times*, August 1, 1996.

[71] Corker D and Levi M., 'Pre-trial Publicity and its Treatment in the English Courts", (1996), *Criminal Law Review*, 627.

[72] 'Ballu Khan is now a free man', *Fiji Broadcasting Corporation,* 12 November 2008, http://www.radiofiji.com.fj/print.php?id=15820

[73] Ibid.

Special leave refused

Ferguson appealed to the High Court for special leave against the Queensland Court of Appeal's decision not to permanently stay proceedings but it was denied for grounds other that of the impact of prejudicial publicity.[74] Although the prejudicial publicity argument was not put in oral argument it is highly likely that even if it had been it would not have been successful. The last application to the High Court for a permanent stay on the grounds of prejudicial publicity by the man convicted of the Childers Backpacker murders Robert Paul Long did not succeed. During the course of argument by Long's counsel, Gleeson CJ said a judge 'should stop long and hard' before reaching the conclusion that an accused could not get a fair trial as the result of prejudicial publicity.[75] The Chief Justice was firmly of the view that the giving of appropriate warnings and directions to juries to decide the case according to the evidence was sufficient to ensure a fair trial.[76] As a consequence the special leave application was dismissed.

Conclusion

The presumption of innocence is a fundamental principle of the common law and has been enshrined in international covenants.[77] The most significant effect of the presumption is the requirement that the Crown bear the burden of proving all elements of the charges but a logical extension of it is an accused should suffer no detriment as a result of being charged with an alleged crime. There does not appear any reason why this principle should be disturbed for some greater public interest. This presumption of innocence was most certainly ignored concerning Ferguson as a result of the 'trial by media' that occurred before his case had even been heard.

To come back to the original question: when will prejudicial media publicity lead a superior court to confidently permanently stay a trial on the grounds that no direction from a trial judge can be expected to diminish its impact rendering a fair trial impossible?

The answer in Australia, at least, seems to be almost never or not until a truly exceptional case arrives. As argued above, the advent of the Internet

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74 *Ferguson v The Queen* [2009] HCA transcript 16 (13 February 2009)

75 *Long v The Queen* [2004] HCA transcript 232 (23 June 2004).

76 Ibid.

77 "The golden thread": *Woolmington v DPP* [1935] AC 462, 481 (Sankey LC); *International Covenant on Civil and Political Rights,* Art 14.

and the media revolution generally, means the public, including prospective jurors, receive far more information than was the case in the 1930's when *Tuckiar's* case was decided. It is interesting courts acknowledge the dangers of prejudicial publicity concerning a fair trial when trying the media for contempt of court but they are reluctant to take the next step and order a permanent stay of proceedings because of the same concerns.

However, although the 'truly exceptional case' is difficult to characterise many would believe the *Ferguson* case would come within that category. As noted above, the publicity attending Ferguson was constant and prejudicial to the extent that is hard to conceive of more damaging publicity concerning an accused.

Given these circumstances and the possibility of repeat episodes it is now timely for superior courts or the Legislature to give a clear indication as to when enough is enough as far as prejudicial material is concerned and to develop guidelines that will avoid the disturbing spectacle that preceded the trial of Dennis Raymond Ferguson.