

Notes for RNZ slot from Ursula Cheer (Associate Professor) Canterbury University, 29 February 2011

1. Today I want to look at the recent Court of Appeal judgment in the Clayton Weatherston appeal, which raised issues of when a conviction can be overturned because of statements made in the media during trial. Before I look at the decision in detail though, I want to explain a bit of background to this area of the law.
2. The law of contempt is not the only method of dealing with the prejudicial effect of media comment. Others include discontinuance of a trial, change of venue, and, as in this case, appeal against conviction.
3. Sometimes excessive media comment will cause the trial judge to discontinue the trial and discharge the jury. Generally then, the trial will be held at a later date when the effect of the prejudicial publicity has dissipated, and perhaps at a different venue. In only the rarest case is it ever held that the publicity has destroyed the possibility of a fair trial ever being held.
4. But if there is no discontinuance, or abortion, and, following conviction an appeal is filed, in fact appeals on the ground of adverse media publicity do not often succeed either. The court usually finds in the light of after-events that the publicity did not **in fact** result in a miscarriage of justice. This is what happened in the Weatherston appeal.
5. As everyone no doubt recalls, in 2009, New Zealand media reported extensively on the Weatherston murder trial in which, unusually, Mr Weatherston pleaded guilty to killing the victim, but gave lengthy evidence in his own defence hoping to procure a

verdict of manslaughter. The Court of Appeal in the latest judgment refers to a 'blaze of publicity', in which media broadcast the accused giving grisly evidence about how the killing occurred. The manner in which Mr Weatherston behaved while giving evidence was repugnant to some viewers and disquiet was expressed about repetition of the coverage, in particular by the use of slow motion replay. However that was not specifically the subject of the appeal. Mr Weatherston complained about two other things, which occurred, his counsel argued, against the backdrop of the blaze of publicity I've already described.

6. One was a television interview by Dr Warren Young, the Deputy President of the Law Commission on TVNZ and the other was the publication of two back-to-back articles in the *Listener*, "The Provocation Debate: A law both hated and hailed" on 25 July 2009 and "The final insult" in the same edition.
7. Both the interview and the magazine articles arose from another murder trial which involved the defence of provocation, the Ambach trial. The jury in that case found Ambach not guilty of murder but, because of provocation, guilty only of manslaughter. This followed a string of cases where the defence had relied on provocation and the verdicts had not been well received.
8. In Weatherston, the trial judge, Potter J had dealt with the wall to wall media coverage by warning and advising the jury. She constantly reminded the jury to judge Dr Weatherston exclusively on the evidence heard in Court and not to read or watch anything concerning the trial. Following the Ambach verdict

and the publicity surrounding it, she gave a special direction to the jury about ignoring references in the media or anywhere else.

9. Mr Weatherston's case did not attack any of the directions Justice Potter gave to the jury. It was argued instead that the media comments were so harmful to his defence that nothing short of aborting the trial would have put things right. Because the Judge had refused several applications to abort the trial, the Court of Appeal had to decide whether the comments were so damaging that continuing the trial was unfair. It reached two preliminary conclusions:
 - a. First the interview with Dr Young was on a minor tv channel, TV7, with the only part of it that was picked up on TVOne being about general law reform issues relating to provocation, which the Law Commission had carried out.
 - b. The *Listener* articles did refer to the Ambach case but also a number of other cases where provocation had been raised, sometimes successfully, sometimes not. The Court of Appeal therefore found the articles were balanced, referring to views on both sides of the fence.

10. The Court then found **on the facts** that the publications did not result in unfairness because:
 - a. there was no evidence of any kind that any juror actually saw the Young interview or the *Listener* articles.
 - b. even if a juror had read the *Listener* articles, the articles' tone was balanced and cerebral. They did not comment in any way on the Weatherston trial.
 - c. even if a juror had seen the Young interview, Dr Young, as Deputy President of the Law Commission, would not be seen as an "authority figure" whose view must or should be followed. In fact the Court expressed the somewhat cynical

view that there are today few, if any, "authority figures" whose views are unquestionably followed by anyone! It also noted that Dr Young was not in any way counselling juries to ignore the existing law.

- d. The Court expressed great confidence in the robustness and integrity of juries. It did not accept that the jury might have ignored the judge's directions. There was nothing in the record to indicate such disobedience, nor had the foreperson indicated any problems had arisen. The Court endorsed the view that

'The criminal system proceeds on an assumption that judges' directions are faithfully followed by juries: throw away that assumption and every verdict becomes suspect. We acknowledge immediately that some concerns might be so significant that the court (either the trial court itself or an appellate court) feels uneasy about dealing with those concerns by way of direction. In those cases, aborting the trial and starting again becomes the only safe solution. But this is not a case which crosses that threshold.'

- e. The Court also endorsed how the Judge had summed up for the jury. Justice Potter had given the jury a questionnaire which they had to follow which left no room for the jury to meditate upon or express a view on the defence of provocation. By using three step, fact-specific questions, the jury were given no latitude to 'wander off-task.' EG: Did the accused lose the power of self-control? If yes, go to...' The summing-up also emphasised repeatedly the need for the jury to apply the law as the Judge directed them, solely on the evidence, not on external information, comment, or speculation, and not to access any information about the trial or about any matters touching on the trial in the media, on the internet, on Facebook or any other source.

f. the fact that some aspect of the criminal law may be controversial did not mean that verdicts in those controversial areas are suspect. Jurors take an oath to apply the existing law and, in the absence of evidence they have breached their oaths, there is no reason to doubt the outcome.

11. Finally, the Court dealt with an argument about an address Potter J delivered at a conference of Australian Supreme and Federal Court judges held in Wellington in January this year. Despite the address being marked "Confidential: for conference delegates only", it was leaked to Mr Weatherston's counsel, who then argued that the Judge herself thought that "the response of the public to the trial was that they grew to 'despise' Clayton Weatherston and that his use of the provocation defence to put Sophie Elliott on trial was not right". In short, this argument was that the Judge thought that the media's coverage was highly prejudicial.
12. The Court of Appeal rejected this, and found that the Judge's views arose from the evidence at trial, Weatherston's evidence and the way he gave it, and the fact the trial was televised. So the opinion had nothing to do with the Young interview or the *Listener* article, neither of which the Judge had mentioned.
13. All of which meant the statements made in the media during the trial did not render the trial unfair and this ground of appeal was therefore rejected.

Conclusion:

14. This aspect of the case reflects a consistent view of the courts that the integrity of the justice system depends on juries being trusted to get it right and to follow instructions. See eg: the recent Frail case in the UK where the Lord Chief Justice,

Lord Judge, and two other senior judges used the case of Joanne Fraill, 40, a juror who admitted chatting with an acquitted defendant on Facebook, thus causing an ongoing trial to fall over, to warn jurors generally not to undermine the country's "precious jury system" by discussing or researching their cases online.

15. This is a view that is under some pressure currently in relation to contempt generally - it is seen as relying on a fiction, especially in relation to use of the internet. But the Court in *Weatherston* made it clear that the onus is on a defendant arguing that the jury has been led astray to put forward some actual evidence that this has happened. It is not for the Crown to show that as a matter of fact the jury did behave as instructed by the judge and did have integrity. You can see why. This would require examination of juries and invasion of the jury room after the event, which might inhibit the free and open discussion which is necessary for verdicts to be arrived at.