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"The New Zealand Perspective and Experience"

INTRODUCTION

New Zealand has had Court proceedings televised since 1994, although the discussions which led to its introduction started three years before that in 1991.

I think it would be fair to say that after 20 years of operation we have all become used to having expanded media coverage of our Courts and in my view, and in the view of the majority involved in the Court work which cameras are now allowed to capture, it generally works well. There are, of course, the occasional lapses but the media now understand what the rules are; what the acceptable parameters and limits are; that access to the Courts in this way is a privilege and the consequence of a breach of that privilege is that they may be ordered out of the Court room while their competitors are able to continue to cover the case. That reputational, strategic and commercial reality tends to keep them in check.

Although my comments so far have focused on television I should clarify the position by making it clear that the rules governing expanded media coverage in New Zealand also extend to radio and the taking of still photographs by the print media. But the primary focus, at least up until now, has tended to be on television. For reasons I shall develop, that is changing.

BACKGROUND

Since its introduction in 1994 there have been a number of reviews of the processes. I will discuss those later in this presentation. But the most recent is significant.

In August 2013, our Chief Justice announced a review of in-Court media coverage. There have been previous reviews but this one is much more comprehensive. An interbench panel has been established tasked to examine how the current guidelines are operating and to examine whether the safeguards actually ensure that the interests of the participants and society are met and whether any changes should be made to the present regime.

The panel is due to report back to the Chief Justice before the end of this year. My sense is that it is unlikely there will be recommendations for radical change but there may be some practical changes to reflect the fact that over the last 20 years there has been a monumental level of evolution in media technology, modes of publication and the identity and qualification of those who now report and comment on news stories.

To a not inconsiderable extent the latest review recognises that the guidelines have been in operation for 20 years and since their advent there has been a bewildering level of technological development which now enables the media to communicate electronically directly from Court to editors or websites at the press of a button. Smartphones and immediately accessible and readibly changeable websites have repainted the media landscape. Technology and content convergence is developing between print and audio visual media with the effect that traditional television channels have websites which look like newspapers and newspapers have websites which look like TV. It is the same with radio; websites with podcasts and video footage. The internet and the new media environment brings enormous potential for more accessible reporting and with it significant new risks for the Courts given the fact that whatever is published digitally is not practically erasable and is instantly retrievable, virtually permanent and ubiquitous.

The traditional sharp lines of demarcation between the various media forms are now blurred to the point of being barely visible.

In this presentation I shall deal with the following:

1. History and Background to in-Court expanded media coverage
2. How it works in practice
3. General observations
4. Contravention and consequences
5. 2014 Review

HISTORY AND BACKGROUND

Given the audience I thought it might be of interest to explain how New Zealand got to where we are.

1991 Working Party

The initiative was judicially inspired. In 1991 a Working Party chaired by the President of our Court of Appeal was set up by the then Chief Justice to examine whether expanded media coverage of Court proceedings should be allowed and, if so, what the operating principles should be.

I am not quite sure now what the impetus for this was but my sense is that there were three main reasons:

(a) the promotion of public accessibility to the Courts;

(b) the educative element; that media access to the Courts would enhance the public's understanding of the legal process;

(c) the need to control and mitigate the unseemly media scrums which we have all seen outside Courthouses where parties and witnesses are bustled and harassed as they move in and out of the Court precincts.

There is a fourth element which, although not published anywhere, was probably the most influential of all the imperatives. In my view it is no accident that the innovation was judicially inspired. The senior Judges at that time recognised expanded in-Court media coverage of the Courts, particularly by television, was inevitable. Unless the Judges assumed control over the processes and protocols, the requirement to give television access to the Courts would be forced upon the judiciary, probably by way of legislation. By pre-empting the imposition of externally imposed rules, the Judges were able to not only determine their own processes but also ensure that whatever principles and policies were adopted were flexible enough to manage the operational systems and be adaptable enough to meet the demands of a rapidly changing media environment.

This, in my view, is the single most valuable product of the Judge-lead initiative to allow cameras into the New Zealand Courts.

Against this was the obvious concern that, television particularly, is an entertainment medium and in-Court coverage would trivialise and sensationalise proceedings. This was about the time of the OJ Simpson trial and so the concerns had some factual comparative foundation.

3 Year Pilot

The working party's recommendation was that the best way forward was to conduct a 3 year pilot project which would allow television and radio recording for broadcasts and the taking of still photographs.

Draft rules were formulated and circulated to interested parties for comment.

There was vigorous and predictable opposition from all elements of the legal profession, victim support groups, rape crisis. Ironically, the media also opposed it for not going far enough.

Despite this, draft rules were prepared. Two provisions, in particular, were designed to meet the opponents' concerns. These were:

1. A "two minute rule" which required material obtained from the expanded media coverage to be presented in a way which gave a balanced and impartial coverage of the proceedings, with the requirement that any broadcast was to be of at least two minutes duration without editorial comment.

2. The material obtained could not be used other than for normal news programmes without the prior approval of the trial Judge.

The first trial was televised in 1994 and I was prosecuting counsel.

What I particularly recall was the amount of Court time taken up both before and during the trial dealing with media coverage issues. Before the trial we spent at least a day dealing with witnesses who did not want to be filmed. We had arguments about whether professional witnesses, such as Police officers and forensic scientists, should be permitted to be exempt from filming. But generally the experience was positive and the process worked reasonably well.

Over the next three years about 30 trials were covered by the media under the pilot's rules. The coverage of each was closely examined by the working group.

At the end of the pilot an independent research team evaluated the coverage and concluded that access to the Courts by television had minimal impact on jurors and witnesses but was regarded as distracting and stressful to Judges.

Most of those spoken to in the course of the review felt that cameras in the Courts were educating the public but this could be improved by more in-depth, longer and continuous coverage. Media complained that some of the restrictions, particularly those in relation to witnesses' rights not to be filmed, were unreasonable. However, the media was generally of the view that changes to the guidelines, wider access to the Courts and the types of cases involved, would enhance in-Court coverage.

The reviewers also concluded that throughout the pilot project there had been general compliance with the guidelines. It was recommended that expanded media coverage in the Courts should be continued with some modifications. A new set of guidelines were promulgated and a voluntary code of conduct for the media introduced. These were implemented in 1999.

2003 and 2012 Amendments

Over the next few years there were successive reviews of the programme resulting amendments to the guidelines in 2003 and 2012.

In 2003

(a) guidelines not to have legislative force and were not to be construed so as to create expectations;
(b) notice period for applications extended from 4 to 10 days;
(c) 2 minute rule abolished.

In 2012

Further amendments were made to recognise the distinction between media representatives and members of the public with the former, only, being permitted to take written or electronic notes without the Court's leave. Other changes included:

(a) electronic communications were brought within the guidelines;
(b) definition of "member of the media" was given the same meaning as s 198(2) of the Criminal Procedure Act 2011 so as to bring media representatives within the discipline of the Press Council or the Broadcasting Standards Authority (this was designed, at least in part, to exclude bloggers from having the same rights as accredited media representatives);
(c) the 10 minute delay was extended to electronic communications from Court. In other words no material taken in Court could be broadcast within 10 minutes of its recording.

HOW IT WORKS IN PRACTICE

The guidelines recognise the importance of judicial autonomy and independence. It is well understood that it is for individual Judges to manage their own Courts. So, for example, some Judges will not permit any photography or filming of themselves.

Applications

If the media wish to cover a trial they are required to make written application 10 working days before the start of the trial. The Court then forwards the application to counsel for the parties to consent or object. Consent may be subject to special conditions. The Judge then makes or declines the order on the papers.

Obviously, in a high profile case where a defendant's first appearance may be within hours of their arrest, the lower Courts are required to waive the 10 working day rule and judicial practice varies widely as to whether first appearances or later remands may be covered, particularly where there may be ongoing issues around identification.

One camera only

If more than one television network wishes to cover the trial they are required to share a single camera. Only one television camera is permitted in Court and because the guidelines prohibit the filming of jurors or members of the public, the camera is usually positioned beside the jury box or somewhere else in the Courtroom where it is least obtrusive.

Where still photography is used, Judges will often impose a condition that only a limited number of photographs may be taken of the accused within the first five minutes of the Court sitting. This is to avoid the distraction of the noise from motor driven cameras.

Protections from filming

Often, Judges will also stipulate that the accused may not be filmed other than in the first five minutes of the hearing day.

Witnesses who do not wish to be filmed may, as of right, seek that protection. In practice this means that while their identifying features are distorted by pixilation, the viewer can still hear their voice and their name is not suppressed. Only their image is.

There are three exceptions to this principle:

(a) "professional witnesses" are expected to submit to being identifiable;
(b) Witnesses who do not wish to be filmed at all may apply for an order they not be filmed; and
(c) those witnesses whose names and identifies have been suppressed in the usual way are, obviously, protected.

Other protections

There are other protections. For example, defendants being sentenced are not permitted to be filmed, although in practice the Court may make an order generally permitting filming in the first five minutes but at no other time, including the delivery of sentence.

GENERAL OBSERVATIONS

I also make some other general observations about how the system works:

1. There is no doubt that relationships between Judges, lawyers and the media has been improved through this process. There is a much better understanding of our respective roles.

2. The unseemly media frenzies outside Courthouses are greatly reduced. Witnesses and parties are not harried to the same extent outside the Courthouse. We still have Courthouse door-step interviews with the families of murder victims complaining about verdicts and sentences.

3. I am unconvinced that the public is better educated but certainly the Courtroom has been brought into people's homes.

4. Predictably, almost all of the trials covered under the guidelines are criminal cases and those rare civil trials covered almost always have some criminal component.

5. It is now rare for time to be spent on pre-trial media applications. They are almost always dealt with on the papers and the Crown will present the Court and the media with a list of its witnesses noting whether they seek protection or not.

CONTRAVENTION AND CONSEQUENCES

Inevitably there have been some issues with the media's conduct.

Aborted trials

Relatively early in the process a murder trial was aborted after the two television networks broadcast footage which the trial Judge decided was so prejudicial of the accused's fair trial rights that the jury should be discharged. It involved an accused who, in an attempt to end his own life, drove his car at speed head on into another killing the driver and the front seat passenger. On the evening news the Crown prosecutor's opening address was covered but supplemented by historical footage taken from the carnage of the crash scene which showed emergency services cutting the victims out of the mangled wreckage. The trial was aborted and both networks were unsuccessfully prosecuted for contempt.

Just two months ago, a national politician faced trial for electoral fraud. Predictably, the case attracted enormous media attention not only because of the prominence of the politician in question but also the fact that the consequence of conviction would likely mean the government would lose its majority in the House.

In the course of the coverage, an unedifying clip showing the defendant picking his ear and examining the product of that exploration was broadcast on a national television channel's evening news. The trial Judge's reaction was swift. The network's right to broadcast from the Courtroom was immediately cancelled with the effect their competitors enjoyed the commercial advantage of being able to continue to cover this nationally significant trial.

LATEST REVIEW

As mentioned earlier I do not imagine that much will change with the latest review although it has specifically invited submissions on the following:

- fixed camera with a set view of the Courtroom;
- no photographing of witnesses or defendants;
- reduction of protection for witnesses and defendants;
- a return to the two minute rule;
- creation of a monitoring body;
- Court control – the Court would operate the coverage;
- audio recording only.

SOME FINAL OBSERVATIONS

Judges' Poll

The Law Commission has also continued to monitor expanded media coverage. They undertook a survey of the Judges in December 2013. Some of the statistics emerging from the 166 Judges polled may interest:

- 67% of Judges did not consider that television coverage affected the way they acted in Court;
- 74% considered television coverage affected the way counsel appeared in Court;
- 70% did not perceive any effect on witnesses;
- 80% of Judges considered the media representatives conducted themselves with courtesy and decorum. Of the 20% who did most complained about sloppiness of dress, the clicking of cameras and a failure to abide by directions;
- 93% of Judges reported that coverage had not resulted in a fair trial issue arising;
- most Judges estimated they spent about 5% of their time in Court on media issues in a recorded trial;
- 4% of Judges terminated media coverage during a hearing;
- most Judges felt that coverage was too short and amounted to "sound bites" only.

CONCLUSION

Twenty years of experience of expanded media coverage in the New Zealand Courts means that it is now regarded as routine and unremarkable. That is not to say it is a reality which is embraced with high levels of enthusiasm. But the competing interests and the compromises made by the interested parties have resulted in a sensible and workable solution. The pilot was commissioned in recognition of the ubiquitous and pervasive nature of the media, particularly television and the artificiality that while the print media was able to report Court proceedings verbatim other forms of the media were restricted in their ability to utilise their technology in the most effective way.

It was against that background that the inevitability of greater media access was appreciated as was the need to ensure that the judiciary maintained its control over its own processes. For that reason the foresight of the judicial proponents 20 years ago deserves acknowledgement because we now have a process which the Judges have designed, is flexible enough to meet changes in technology and criminal procedure and, generally, operates well.