

# CAN 'DR DEATH' RECEIVE A FAIR TRIAL?

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*Identification of a person suspected of a heinous crime before being charged risks prejudicing a fair trial. The identification of rogue former Queensland surgeon Dr Jayant Patel is but one recent example. Present laws place this type of negative publicity outside the reach of sub judice contempt. This article argues there should be a change in the law making it an offence for the media to publish the fact that a person is under investigation until the person has been charged.*

## I INTRODUCTION

It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased.<sup>1</sup>

The genesis for this article arises from a number of recent criminal cases involving high profile people, and others, accused of heinous crimes.<sup>2</sup> Dr Jayant Patel is the latest to suffer sustained negative media publicity since complaints related to his medical competency were first raised in 2004 and early 2005. These complaints, as well as others relating to other medical practitioners and Queensland Health administrators, led to the establishment of the Queensland Public Hospitals Commission of Inquiry.

At the conclusion of its public hearing the Inquiry recommended Dr Patel be the subject of further investigation by the Queensland Police Service in relation to fraud, assault, assault occasioning bodily harm, grievous bodily harm, negligent acts causing harm and manslaughter.<sup>3</sup>

In November 2006 a Queensland magistrate signed warrants for these charges which, at the time of writing, are in the hands of the Federal Attorney-General's department which will assess whether they meet extradition treaty requirements and should be

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<sup>1</sup> *R v Parke* [1903] 2 KB 432.

<sup>2</sup> Although this article draws from a wide range of jurisdictions the reader will note a Queensland bias. This is because the basis of the article, that the media be restrained from publishing prejudicial material before the judicial process begins, was most recently suggested by a Queensland lawyer. The suggestion came after a number of sensational cases in that state involving prejudicial pre-trial publicity.

<sup>3</sup> Hon Geoffrey Davis, *Queensland Public Hospitals Commission of Inquiry Report* (2005) Queensland Government 191 <<http://www.qphci.qld.gov.au/>> at 29 March 2007.

pursued.<sup>4</sup> Dr Patel has not returned to Australia since his departure in 2005 and he continues to attract considerable interest from the Australian media while living in Portland, Oregon.

This article considers whether Dr Patel will receive a fair trial if he returns or is extradited to return to Australia. It will be argued that there are significant obstacles to ensuring the fairness of any criminal trial which Dr Patel may face. Prejudicial publicity in relation to Dr Patel may be such that an Australian court would find it impossible to ensure that Dr Patel was not tried unfairly. Similar parallels have been drawn from the situation involving the late, disgraced businessman Christopher Skase.<sup>5</sup> As with Skase, the question is not whether Dr Patel is guilty or not – that is an issue for the court. Rather, the question considered here is whether or not a jury trial involving Dr Patel would contain the elements of a fair trial in which his guilt or innocence could be determined.

A particular element of a fair trial that would be at risk would be the impartiality of a jury which would be drawn from a potentially prejudiced population. The question thus becomes whether the extensive pre-trial and pre-charge publicity that Dr Patel has been subjected to would prevent him from receiving a fair trial, and what action can be taken to alleviate that unfairness.

## II FREEDOM OF SPEECH

The media often define freedom of speech as ‘the right to know’. This article acknowledges that right. But it also recognises there are occasions when the public’s ‘right to know’ has to be curtailed in the wider public interest such as the proper administration of justice. For example, as this article argues, prohibiting the naming of a suspect and any other prejudicial material before charges are laid. A suspect in this context is, to use the Macquarie Dictionary definition, ‘a person suspected of a crime, offence or the like’. In media terms this is usually someone identified by police as a ‘suspect’ regardless of whether charges are about to be preferred. Most people recognise the desirability of freedom of speech. But how does one define it? Perhaps the shortest definition would be the expression of thought through spoken word. The Australian Law Reform Commission has said there is no doubt that freedom of expression is one of the hallmarks of a democratic society, and has been recognised as such for centuries.<sup>6</sup> Butler has succinctly described free speech as ‘speech that is not subjected to regulation by the State’.<sup>7</sup> According to the celebrated English jurist Lord Denning it means that everyone should be free to think his own thoughts and to have his own opinions and to give voice to them so long as he does not speak ill of his neighbour or incite anyone to violence.<sup>8</sup> A common example given for the reasons for restrictions on free speech is the scenario where a person shouts, without justification, ‘fire’ in a crowded theatre thereby causing panic and potential injury. In those circumstances most people would

<sup>4</sup> Paul Osborne, ‘Patel Marathon Reaches a Milestone’, *Australian Associated Press*, (Australia) 24 November 2006.

<sup>5</sup> J Giddings, ‘Would Christopher Skase Receive a Fair Trial?’ (2000) 24 *Criminal Law Journal* 281.

<sup>6</sup> Australian Law Reform Commission, *Contempt*, Report No 35 (1987) [242]. See also *Hinch v Attorney General* (1987) 164 CLR 57 (Deane J): ‘Freedom of public discussion of matters of legitimate public concern is, in itself, an ideal of our society’.

<sup>7</sup> D Butler and S Rodrick, *Australian Media Law* (Lawbook Co, 2<sup>nd</sup> ed, 2004) 3.

<sup>8</sup> Sir A Denning, *Freedom Under The Law* (Hamlyn, 1949) 35.

agree that the law should prohibit an action such as that. Australia, under its Constitution, does recognise the right to trial by jury.<sup>9</sup> But it does not have a written Bill of Rights guaranteeing freedom of speech. However, Australia has ratified the *International Covenant on Civil and Political Rights* (ICCPR) of which Article 19 declares:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include 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 of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputation of others;
  - (b) For the protection of national security or of public order, or of public health or morals.

However, Article 19 is qualified by other rights such as the right to reputation, Article 17 and Article 14, the right to a fair hearing before the courts which conflicts with the right to freedom of speech. Therefore by exercising one's right to freedom of speech one can conceivably threaten another person's right to be presumed innocent until proved guilty according to law which goes to the heart of my argument. The problem when rights are granted in absolute terms, the legal process of determining how and in what circumstances they are to apply is carried out in a vacuum. When the 'whole' of a right is granted by a Bill of Rights, the text gives no guidance about the priorities that are to be reconciled or that govern, when one right conflicts with another. For example, the battle between the First Amendment<sup>10</sup> and the Sixth Amendment<sup>11</sup> of the United States Bill of Rights has been waged in the courts and seemingly won by the First Amendment. According to at least one legal commentator that victory has enabled the media to exert a corrupting influence over trials and has had a pervasive and detrimental effect on the rights of accused persons.<sup>12</sup> One need not look far to see several examples of the veracity of this assertion in the trials of people like O.J. Simpson, Michael Jackson, William Kennedy Smith and the Menendez brothers which were all attended with massive and manifestly prejudicial pre-trial publicity. Such cases lead to the conclusion that from a justice point of view, prevention is better than a cure. In summary, what all commentators acknowledge is that there is a broad range of legitimate opinion about which interest should prevail in the various factual circumstances that arise for decision. However, the weight of judicial authority is that measures that are clearly necessary for due process of law should take precedence over freedom of speech. This is particularly true in relation to criminal trials where an individual's liberty is at stake and where the public have an interest in securing the

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<sup>9</sup> *Australian Constitution* s 80.

<sup>10</sup> The First Amendment relevantly provides: 'Congress shall make no law abridging the freedom of speech or of the press'.

<sup>11</sup> The right to a fair trial arises under the Sixth and Fourteenth Amendments. The Sixth Amendment relevantly provides: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed'. The Sixth Amendment is applicable to the States by virtue of the Fourteenth Amendment.

<sup>12</sup> D J O'Callaghan, 'The United States Experience of Unfettered Speech and Unfair Trials: A Case Against an Australian Bill of Rights' (1998) 72 *Australian Law Journal* 958.

conviction of persons guilty of serious crime. The Law Commission of New Zealand in supporting this position made the following comment:

When a conflict arises between a fair trial and freedom of speech, the former has prevailed because the compromise a fair trial for a particular accused may cause them permanent harm (for example, because a conviction has been entered wrongly) whereas the inhibition of media freedom ends with the conclusion of legal proceedings.<sup>13</sup>

This comment reinforces the argument of this article that publishing a suspect's name before a charge is brought threatens a fair trial and therefore the freedom of speech principle should yield to the proper administration of justice.

### III A FAIR TRIAL

Truth like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.<sup>14</sup>

New South Wales (NSW) Chief Justice Spigelman J said recently restraints on the processes for determining truth are multi-faceted:

They have emerged in numerous different ways, at different times and affect different areas of the conduct of legal proceedings. By the traditional common law method of induction there has emerged in Australia's jurisprudence the principle of a fair trial. It is reflected in numerous rules and practices and manifests itself in virtually every aspect of legal practice and procedure, including the laws of evidence.<sup>15</sup>

It is interesting Spigelman refers to the 'principle of a fair trial' and not a *right* (my emphasis) to a fair trial. While there are other jurisdictions where a right to a fair trial is enshrined either in a Constitution or in a statute this is not the case in Australia. Although two former Justices of the High Court (Deane and Gaudron JJ) have concluded, albeit in obita dicta, that the right is constitutionally guaranteed.<sup>16</sup> Furthermore the significance of the principle of a fair trial has been characterised in numerous High Court judgments in recent years as 'the central thesis of the administration of criminal justice',<sup>17</sup> as 'the central prescript of our criminal law',<sup>18</sup> as a 'fundamental element',<sup>19</sup> and as an 'overriding requirement'.<sup>20</sup> This leads to the question of what are the attributes of a fair trial? On close examination it would be difficult to describe the almost infinite variety of situations where a trial has been so deprived on the quality of fairness that a miscarriage of justice has occurred. Of course a number of identifiable issues have arisen over the years and led to similar judgments as to the effect on the fairness of proceedings. Lord Bingham said in *R v H; R v C*: 'The achievement of fairness in a trial on indictment rests above all on the correct and conscientious performance of their roles by judge, prosecuting counsel, defending

<sup>13</sup> New Zealand Law Commission, *Juries in Criminal Trials: Part Two*, Preliminary Paper No 37 (1) (1999) [289].

<sup>14</sup> *Pearse v Pearse* [1846] De G & Sm 12, 28-9; 63 ER 950, 957.

<sup>15</sup> J Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (4<sup>th</sup> Gerard Brennan Lecture, Bond University, Gold Coast, Queensland 2003).

<sup>16</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J), 362 (Gaudron J).

<sup>17</sup> *McKinney v The Queen* (1991) 171 CLR 468, 478

<sup>18</sup> *Jago v The District Court of New South Wales* (1989) 168 CLR 23, 56-7 (Deane J).

<sup>19</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 299 (Mason CJ and McHugh J).

<sup>20</sup> *Ibid* 330 (Deane J).

counsel and jury’.<sup>21</sup> To that he might also have added: ‘and the media’ because ‘trial by media’<sup>22</sup> by its very nature detracts from the notions of what the law describes as a fair trial. That is a trial free from prejudice. A trial where jurors already have preconceived notions of the guilt or innocence of the accused can hardly be said to be ‘a fair and impartial trial’ as defined in *The King v MacFarlane; ex parte O’Flanagan and O’Kelly*.<sup>23</sup> Much of the evidence tendered by the Crown in a criminal trial is prejudicial to the accused in the sense that it implies guilt. Some evidence which is highly prejudicial however, is not disclosed to the jury. Rules of evidence have developed with respect to various classes of evidence governing the question whether such evidence should be admitted in certain circumstances or not at all, and limited the general discretion of the judge in certain ways. Even where evidence is apparently admissible, the presiding judge has discretion to disallow it if its admission ‘would operate unfairly against the defendant’.<sup>24</sup> Thus the judge may exclude illegally obtained evidence which is technically admissible.<sup>25</sup> Evidence ought to be excluded ‘if its prejudicial tendency outweighs its probative value in the sense that the jury may attach undue weight to it or use for inadmissible purposes’.<sup>26</sup> Yet none of these rules restrain the media when they undertake to ‘try’ accused persons before they have appeared in court through expositions of their ‘bad’ character. This surely would put at risk an accused’s likelihood of receiving a fair trial whatever remedies were put in place to ensure that he or she did. It may well be the so called ‘free speech cases’ which recognised an implied freedom of political communication in the Australian Constitution that have encouraged the media in Australia to push the boundaries in regard to pre-trial prejudicial publicity.

In *Nationwide News Pty Ltd*,<sup>27</sup> and *Australian Capital Television Pty Ltd*,<sup>28</sup> a majority of the High Court of Australia had distilled from the provisions and structure of the Australian Constitution, particularly from the concept of representative government which is enshrined in the Australian Constitution, an implication of freedom of communication. Subsequently in *Theophanous v Herald & Weekly Times Ltd*,<sup>29</sup> and *Stephens v WA Newspapers*,<sup>30</sup> a majority of the court extended the operation of the implied freedom doctrine into the field of defamation law. The operation of the common law and State statutes was modified by the creation of a new ‘constitutional’ defence based upon the implication of freedom of political discourse. Ultimately in *Lange v Australian Broadcasting Corporation*,<sup>31</sup> all seven justices of the High Court rejected the existence of any freestanding constitutional defence, but confirmed the availability of an expanded defence of qualified privilege in cases of political discussion. The *Attorney General (NSW) v X*,<sup>32</sup> judgment by the NSW Court of Appeal in which the Chief Justice opined that the courts must, as a result of the High Court cases, now attribute greater

<sup>21</sup> [2004] UKHL 3, [13].

<sup>22</sup> ‘Trial by Media’ is a phrase made popular in the 20<sup>th</sup> century describing the impact of media coverage on judicial proceedings by creating a widespread perception of the guilt or innocence of the accused regardless of the jurisdiction or findings of a court of law.

<sup>23</sup> (1923) CLR 518, 541-2.

<sup>24</sup> *Callis v Gunn* [1964] 1 QB 495, 501 (Lord Parker CJ).

<sup>25</sup> *R v Lee* (1950) ALR 517.

<sup>26</sup> J D Heydon, *Cross on Evidence* (Butterworths, 2<sup>nd</sup> Australian Edition, 1979) 30.

<sup>27</sup> (1992) 177 CLR 1.

<sup>28</sup> (1992) 177 CLR 106.

<sup>29</sup> (1994) 182 CLR 104.

<sup>30</sup> (1994) 182 CLR 211.

<sup>31</sup> (1997) 189 CLR 520.

<sup>32</sup> *Attorney-General (NSW) v X* [2000] NSWCA 199.

weight to the freedom of public discussion when conducting a balancing test would also not have gone unnoticed.

#### IV ANALYSIS OF PRESENT SUB JUDICE CONTEMPT LAW

The term *sub judice* means ‘in course of trial’.<sup>33</sup> It is also often referred to as being ‘under a judge’. The object of the law is to prohibit the publication of material that might prejudice civil or criminal proceedings while those proceedings are pending. The word ‘pending’ is a key word and will be analysed in greater detail further on. The difficulty is determining the exact time a matter becomes *sub judice* or ‘under a judge’. Because this paper concerns criminal proceedings, the law as it relates to civil proceedings will not be examined further. Publications are regarded as contemptuous because their tendency is to place at risk the due administration of justice concerning a particular proceeding.

##### A *Elements of Sub Judice Contempt*

To constitute *sub judice* contempt of court it must be established:

- (a) that publication took place while proceedings were *sub judice*;<sup>34</sup> and
- (b) either that:
  - i) there was an intention to interfere with the administration of justice in the proceedings;<sup>35</sup> or
  - ii) the publication of the material had that tendency.<sup>36</sup>

The principal aim of *sub judice* contempt is to prevent publications that may damage a fair trial *before* any damage is done. It is therefore necessary to frame liability in terms of the likelihood of prejudice, rather than punish after prejudice has occurred in order to deter the media from publishing prejudicial material and encourage them to exercise proper care. It should not be thought contempt law is unique in its application to prevent an infraction of the law before it occurs. An analogy can be given of legislation regulating industrial safety and road safety. Employers and drivers may be punished for maintaining an unsafe workplace or driving unsafely even though no one is injured. In this way the law imposes a positive duty to prevent injury from arising rather than waiting for injury to occur. In this case the injury would be to the accused who would be deprived of his or her right to a fair trial free of prejudice. However, as one commentator has said, to speak of contempt as preventative would be misleading; it is more properly a deterrent, and it does not always prevent jury prejudice.<sup>37</sup> Indeed this is the thrust of my article that the present contempt of laws do not go far enough in deterring the media from prejudicing potential jurors by their publication of prejudicial material before an accused is charged or brought before the judicial process. The chief aim in punishing ‘prejudicial’ publications is to uphold the public interest in the administration of justice as well as the individual’s right to a fair trial. Although some legal experts argue the chief aim is in fact public interest rather than the fair trial argument.<sup>38</sup>

<sup>33</sup> *Osborn’s Concise Law Dictionary* (Sweet & Maxwell, 8<sup>th</sup> ed, 1993) 315.

<sup>34</sup> *James v Robinson* (1963) 109 CLR 593.

<sup>35</sup> See the discussion in *Harkianakis v Skalkos* (1997) 42 NSWLR 22, 28 (Mason P).

<sup>36</sup> *R v David Syme and Co Ltd* [1982] VR 173 (Supreme Court of Victoria).

<sup>37</sup> A Ardill, ‘The right to a Fair Trial’ (2000) 25(1) *Alternative Law Journal* 3.

<sup>38</sup> Borrie and Lowe, *The Law of Contempt* (Butterworths, 3<sup>rd</sup> ed, 1996) 248.

## B *When are Proceedings Sub Judice?*

The restrictions *sub judice* places on publicity apply from the time when the procedures of the criminal law have been set in motion. This means when a person has been arrested or charged or if a summons or information has been issued.<sup>39</sup> The New South Wales Law reform Commission recommends the starting point for *sub judice* in that state begins with:

- (a) the arrest of the accused;
- (b) the laying of the charge;
- (c) the issue of a court attendance notice and its filing in the registry of the relevant court; or
- (d) the filing of an *ex officio* indictment.<sup>40</sup>

The decision of the High Court in *James v Robinson* established that, in Australia, proceedings are not *sub judice* unless they are pending. In this case, a Perth newspaper known as the *Sunday Times* published two accounts of two killings by a 'wild gunman'. The articles clearly identified Robinson as the gunman and it was related that after killing two named persons in public places and threatening others he had secreted himself in a pine plantation not far from Perth. The reports appeared in the newspaper on Sunday 10 February 1963. It was not until Tuesday 12 February 1963 that complaints were sworn alleging two murders by Robinson and that on the following day he was charged and remanded in custody. Subsequently the Supreme Court of Western Australia imposed penalties for contempt of court upon the publishers of the newspaper. The publishers then successfully appealed the decision in the High Court.

The appellant's argued there was no reported case in England or the Dominions in which it has been held that a statement made out of court amounted to a contempt of court in the absence of a pending cause. They did concede however, there was a Scottish case, *Sterling v Associated Newspapers Ltd*,<sup>41</sup> which was contrary to the appellants submissions. For their part the respondents argued 'pending' can refer to a matter in which action is intended to be taken but has not commenced. The determination of the police to apprehend Robinson on a charge of unlawful killing amounted to setting the criminal law in motion. To distinguish the case where an arrest is 'imminent' from the case where an arrest has actually been made is to draw an artificial line. The prejudice is there because it is almost certain that proceedings will very soon be instituted. The decision of the High Court in *James v Robinson* has been criticised in *Borrie & Lowe*,<sup>42</sup> who point out that the common law decisions in England at the time were not committed to the idea that proceedings had to be 'pending'. The Australian media, in particular, argue moving the test of when material comes under *sub judice* rules from 'pending' to 'imminent' poses problems of certainty for them. This is a fair point. However, this article argues if a statutory ban on naming a suspect before they have been formally charged in court is introduced then the uncertainty problem would be overcome for the benefit of all concerned.

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<sup>39</sup> *James v Robinson* (1963) 109 CLR 593.

<sup>40</sup> New South Wales Law Reform Commission, *Contempt by Publication*, Report No 100 (2003) Recommendation 13 [7.27].

<sup>41</sup> [1960] SLT 5.

<sup>42</sup> *Borrie and Lowe*, above n 38, 248.

## V INJUSTICE OF A SUSPECT IDENTIFIED BUT NOT CHARGED

It is now pertinent to identify some cases where suspects have been named before they have been charged. As mentioned above Dr Jayant Patel's case is but one example. In *R v Long*,<sup>43</sup> a suspect was not only identified in a newspaper but his alleged former criminal acts (some of which were invented) were also published.<sup>44</sup> Former Queensland Member of Parliament, Bill D'Arcy was named in the media as being under investigation over child sex allegations before he had been charged and even before police had interviewed him.<sup>45</sup> Not surprisingly the media's actions were swiftly denounced by D'Arcy's lawyer who accused journalists of 'trashing' his client's presumption of innocence.<sup>46</sup> The media responsible for the publication pointed out they had not broken any law in naming the MP and were in fact advancing 'the interests of the public'.<sup>47</sup> Finally, a suspect in a recent notorious Brisbane triple murder has been subject to prejudicial material even more damaging than that endured by Long and D'Arcy. To take one example, *The Courier-Mail* devoted six columns to an analysis of the suspect's website.<sup>48</sup> The article claimed the man (who at the time of writing has yet to be charged) listed 'cars, girls and death' on his website and they also revealed his personal dislikes including 'liars and unfaithful people'. A photo of his website was also published.<sup>49</sup> Also included in the article was a full record of his previous convictions and the details of the illegal activities he was alleged to have been involved in that led to his convictions plus the fact that he had served a nine-year sentence for arson. Should the man ever be charged it would not be difficult to imagine that at least one jury member drawn from the Brisbane area or anywhere in Queensland would have read or heard this material. Of course a suspect named by the news media as being under investigation does have the civil remedy of defamation available should the matter not go any further or, if in the event of being charged, the charges are later dropped. A defamation action may not however, restore the person's reputation.

A *Police/Media Co-Operation: An Unholy Alliance*

Another reason for not identifying suspects before being charged is to prevent the insidious technique which police use in building pressure on a suspect. Police claim their motive is to assist any investigation by possibly alerting more potential witnesses to the suspect's alleged crime to come forward. But by naming the suspect to the media and allowing them to detail the suspect's alleged crime it also primes potential jurors with information that could help the police's aim of securing a conviction.

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<sup>43</sup> (2002) QSC 054.

<sup>44</sup> Paula Doneman and Rory Callinan, 'Wanted Drifter May Have Record for Attempted Arson', *The Courier-Mail* (Brisbane), 26 June 2000, 5 where Long was reported to have previously been found guilty of attempted murder. Long's criminal history tendered in court during sentencing submissions did not disclose any conviction for attempted murder.

<sup>45</sup> **Author**, 'MP Will Not Quit Over Sex Claims', *The Courier-Mail* (Brisbane), 4 September 1998, 1.

<sup>46</sup> Terry O'Gorman, 'The Issue of Naming Rights', *The Courier-Mail* (Brisbane), 5 September 1998, 27.

<sup>47</sup> Chris Mitchell, 'Media's Reply Should be Aired', *The Courier-Mail* (Brisbane), 5 September 1998, 27.

<sup>48</sup> **Author**, 'Triple Murder Suspect's Personal Interests: Cars, Girls and Death', *The Courier-Mail* (Brisbane) 10 April 2004, 3.

<sup>49</sup> *Ibid*.



A case in point is the on-going investigations into Perth's Claremont serial killer. The case involves the disappearance and murder of several young Perth women in the 1990's which understandably has frightened and outraged the community who in turn have brought great pressure on police to find and prosecute the alleged offender. The body of one of the missing women was found in 1996. Police told the media vital clues had been gained from the crime scene but the details of the clues were not revealed. In April 1998 police detained a man who was later revealed to be their 'chief' suspect. In August 1998 ABC Television revealed the man's name and the fact that he had been given and failed a lie detector test. Western Australian Director of Public Prosecutions, Robert Cock, was one of several judicial figures unimpressed with police leaking such juror-sensitive information. He said he could not imagine a situation in which the results of a test, which are not admissible in proceedings, could ever be justified.<sup>50</sup> According to the President of the Australian Council for Civil Liberties, Terry O'Gorman, by using the media the police were able to escape responsibility for revealing information they knew they were prevented from talking about in the public domain.<sup>51</sup> Since then another suspect has accused Western Australian police of threatening him with media exposure and relentless police scrutiny.<sup>52</sup>

## VI REMEDIES FOR OVERCOMING THE EFFECTS OF PREJUDICIAL PUBLICITY

There are a number of options which courts take into account when examining remedies to overcome the effects of prejudicial pre-trial publicity. These include but are not limited to: delaying the start of a trial, changing the venue, the issuing of judicial instructions to ignore prejudicial publicity, discharging a jury, challenging juries for cause and a trial by a judge alone. This article argues that many of these remedies would be unnecessary if the media were prevented from naming a suspect before they have been charged. In addition, it is argued, some of the above remedies may in some circumstances cause more harm than good to the accused's prospects of receiving a fair trial. For example, a new trial can increase the strain and hardship suffered by the accused who may be in custody. The remedies may also cause inconvenience and emotional upset to other parties involved, witnesses and jurors especially when a jury must be sequestered for part or all of the trial. Similarly, a change of venue causes inconvenience and expense to all those involved in the trial. It is also of negligible effect in cases where the crime has attracted national or international attention as with Christopher Skase and Dr Patel. Where a conviction must be quashed and a new trial ordered or, in extreme cases, permanently stayed due to prejudicial publicity, the public interest in the administration of justice is frustrated. The victim of crime is left without having his or her suffering and outrage aired and without seeing retribution. Nevertheless fairness to the accused and the integrity of the trial means these costs should be borne by the State in the interests of justice. Of course, each case will turn on its own facts. As has been noted by leading Western Australian criminal barrister, Mark Trowell QC<sup>53</sup> there will be cases where the publicity has been so prejudicial that it would deprive the accused of a fair trial. In that circumstance a suggestion might be that judges should be inclined to be more flexible and prepared to exercise their discretion in

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<sup>50</sup> Radio National, *Background Briefing*, 25 June 2000, transcript.

<sup>51</sup> Ibid.

<sup>52</sup> Paige Taylor and Amanda Banks, 'I'm Being Framed For Murder: Cabbie', *The Australian*, 23 September 2004, 3.

<sup>53</sup> Mark Trowell QC, 'The Media and the Criminal Law', (Paper presented at the *LAWASIA Downunder 2005*, Gold Coast, 23 March 2005.

favour of an accused rather than placing their absolute belief that a strong direction to a jury will solve the problem. The argument by this article that there be a ban on the identification of a suspect before being charged in the interests of fairness would, if the *Long* and *D'Arcy* cases are any guide, reduce the number of applications made to the court to remedy the effects of prejudicial publicity as well as the resultant costs and other factors.

## VII ANALYSIS OF DATA

United States research supports the hypothesis of this article that jurors exposed to negative pre-trial publicity are significantly more likely to judge a defendant guilty compared to jurors exposed to no negative pre-trial publicity.<sup>54</sup> It is also worthy of note that pre-charge publicity where the media is not constrained by *sub judice* contempt is especially damaging to an accused.

The first application in Australia of a case study methodology on the topic of prejudicial publicity was carried out by Chesterman, Chan and Hampton in New South Wales.<sup>55</sup> The study looked at 41 selected criminal trials held in NSW between mid-1997 and mid-2000. Jurors, judges and the principal counsel on both sides were asked to participate in structured interviews conducted after the trial was concluded. The interviewees were asked about their impressions of how prejudicial media publicity associated with the trial might have affected the perceptions of the jurors and verdicts reached. They were also asked about a number of associated matters, such as what steps, if any, were taken within the trial process to prevent or mitigate any prejudice potentially arising from publicity. Independent research into the scale and nature of the media publicity associated with each trial was also carried out. The underlying aim was to complete a set of 41 case studies from which insights into the effects of prejudicial publicity on criminal trial juries might be obtained.

The principal findings on the incidence of jury recall of pre-trial publicity were as follows:-

1. Jurors chiefly recalled media reports of the commission of the alleged offence. They less frequently recalled reports of the arrest of the accused. They recalled reports of committal hearings or other pre-trial proceedings even less frequently. In 53 per cent of the trials in which some form of pre-trial publicity was recalled by at least one juror, the publicity was discussed in the jury room.<sup>56</sup>
2. Jurors were more likely to recall pre-trial publicity – for example, reports of pre-trial proceedings – in three situations. These were when:
  - a. it related to accused people who were independently well-known in the community;
  - b. it related to offences committed in the area where the jurors lived; or
  - c. they did not encounter it until after the trial began. Other familiar explanations for pre-trial publicity being recalled – for example, that it appeared unusually

<sup>54</sup> N Mehrkens Steblay, J Besirevic, S M Fulero and B Jimenez-Lorente, 'The Effects of Pre-trial Publicity on Juror Verdicts: A Meta-Analytic Review' (1999) 23(2) *Law and Human Behavior*, 219.

<sup>55</sup> M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of NSW, 2001).

<sup>56</sup> *Ibid*, xiv [1].

close to the start of the trial or was especially prominent – were also discernable.<sup>57</sup>

These findings seem to suggest that of particular relevance to jury recall is the extent to which the case has captured public attention of which the ‘Dr Death’ scandal is but one of many examples.

### VIII PREFERRED APPROACH

The presumption of innocence is a fundamental principle of the common law and has been enshrined in international covenants.<sup>58</sup> The most significant effect of the presumption is its requirement that the Crown bear the burden of proving all elements of the charges but a logical extension of it is an accused should not suffer any detriment as a result of being charged let alone merely suspected. There does not appear any reason why this principle should be disturbed for some greater public interest. The public interest, in this context, means more than prurient desire to know the identity of accused persons. Also publishing the name of an accused before they appear in court pre-empts their right to apply to the court for a suppression order because once the accused’s identity is known a subsequent suppression order would be of little benefit. If the media are allowed to name an accused and the details of his or her alleged crime there is a risk that potential jurors will be made aware of, and be influenced by, material that is not subsequently admitted as evidence in a trial. This conclusion is supported by Chesterman’s study which found jurors chiefly recalled reports of the commission of an alleged offence rather than reports of the arrest of the accused. Unfortunately, for an accused, the decision to publish a person’s name before they are formally charged is not in contempt of court. Therefore to close this gap it is recommended:

**Publication of identifying details of a person charged or suspected of an offence before they appear in court should be prohibited unless the person consents or it is necessary to ensure the safety of a person or the community and/or to help locate the suspect.**

This recommendation closely follows Queensland’s *Criminal Law (Sexual Offences) Act 1978* which is the only Queensland Act that contains a restriction on the publication of information that may identify an adult accused.<sup>59</sup> Children under the age of 17 also enjoy the protection of the *Juvenile Justice Act 1992*.<sup>60</sup> Interestingly, anonymity for defendants in sexual offence matters was repealed in the United Kingdom in 1988 following a recommendation by the Criminal Law Revision Committee (1984). One of the reasons was the injustice of singling out alleged sexual offenders for special protection ‘while

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<sup>57</sup> Ibid, xiv [2]-[3].

<sup>58</sup> ‘The golden thread’ (Sankey LC) in *Woolmington v DPP* [1935] AC 462, 481; Article 14 *International Covenant on Civil and Political Rights*.

<sup>59</sup> Section 10 of the *Criminal Law (Sexual Offences) Act 1978* (Qld) prohibits a person from making or publishing a statement or representation that reveals the name, address, school or place of employment of:

- (a) a complainant (defined as a person who is alleged to be the victim of any offence of a sexual nature) at any time; and
- (b) a defendant charged with only certain sexual offences before the defendant is committed for trial or sentence.

<sup>60</sup> Legislation in all Australian States and Territories protects the identity of a juvenile accused of a criminal offence.

other defendants, including those accused of the more heinous crime of murder, could be identified'.<sup>61</sup>

In Australia there is the absurd situation in most jurisdictions where a person charged with the murder of a child can be named whereas a person accused of a sexual crime cannot. This is especially true where by naming a person accused of a sexual offence there is a risk of identifying the complainant or complainants. This then leads to the question of equity. Why should a complainant enjoy protection from identification when an accused, especially when they have not been charged, be exposed to the full blast of publicity?

For the sake of completeness, the ban on identifying particulars should also apply during official inquiries such as inquests or Royal Commissions where evidence emerges suggesting the guilt of a 'suspect'. Often such evidence adduced may be inadmissible in any future criminal trial so until an accused has been charged then this article argues the ban should also apply during official inquiries in the interests of a fair trial.

Some criminal lawyers have suggested suppressing the publication of material suggesting guilt, rather than the identity of the 'suspect', would be a more effective remedy. However, as noted above in Chesterman's research, jurors are more likely to recall pre trial publicity when it relates to accused people independently well known in the community. That is, the identification of a person is more likely to trigger memory of alleged offences than the offences themselves.

It may be argued this recommendation would only be of relevance to very high profile cases such as 'Dr Death' and Christopher Skase, for example. Certainly, people well known in the community suffer most from negative publicity but in the interests of equity as well as practicality the ban on the publication of identifying details should apply to all 'suspects' regardless of their station in life.

It must also be acknowledged the Internet, because of its easy accessibility and world wide reach, poses special difficulties as far as devising an effective prohibition on prejudicial pre trial publicity. It is too early to say whether the Internet will render the *sub judice* rule unworkable however, at least one trial in NSW was aborted after jurors' accessed incriminating information on the Internet about an accused despite judicial instructions to the contrary.<sup>62</sup> Therefore, while a full examination of the special problems of the Internet is beyond the scope of this article it is certainly worthy of further research.

## IX CONCLUSION

To end at the beginning; if the notorious Dr Jayant Patel is ever extradited to Queensland there will be grave doubts concerning the circumstances in which he could ever be tried fairly. If the media had been banned from revealing his name until his appearance in court (assuming this will in fact occur) there would be at least a chance

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<sup>61</sup> Home Office, Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences (2002) [19] <[www.homeoffice.gov.uk/documents/protecting-the-public.pdf?view=Binary](http://www.homeoffice.gov.uk/documents/protecting-the-public.pdf?view=Binary)> at 2 April 2007.

<sup>62</sup> *R v K* [2003] NSWCCA 406.

that the usual instructions by a judge to ignore prior prejudicial publicity would have some effect. That is because his name until then would not have been connected with the reportage of his allegedly criminal acts. It is difficult to understand how the public interest would not be served by a mere delaying of an accused's name until he or she actually appears in court. Or to put it another way, how is the public interest served by publishing inadmissible material before a trial? A law banning publication of an accused's name until charged would go some way to re-dressing what is arguably an imbalance between freedom of speech and a fair trial.