

**DETERMINING CONTEMPTS BY IMPROPER PRESSURE ON A LITIGANT: AN
OBJECTIVE OR SUBJECTIVE TEST?**

ROY BAKER¹

ABSTRACT

[19] This paper concerns the form of contempt committed by public dissemination of matter that puts improper pressure on a litigant to discontinue or otherwise alter the course of proceedings. In determining what constitutes improper pressure, the test could be either subjective (considering the vulnerability to pressure of the particular litigant) or objective (considering the effect of the impugned pressure on a hypothetical litigant of ordinary fortitude). The paper examines whether the law in Australia and England has settled on which approach to adopt. It also considers which of a subjective or objective approach best realises four outcomes that seem self-evidently desirable: certainty; extending special protection to those litigants most vulnerable to media pressure; maximising freedom of media expression; and, disposing of accidental contempts more leniently than the deliberate contemnor.

Introduction

In 1979 Lord Diplock commented that all criminal contempts ‘share a common characteristic: they involve an interference with the administration of justice either in a particular case or more generally as [20] a continuing process’.² In dealing with most contempts by the media, the court’s attention will be very much on the former problem. Thus, typically, a media report might reveal prejudicial information about a forthcoming trial that would be inadmissible before the jury. The concern is for those particular proceedings: the effect of such conduct on other litigation is likely to be negligible, at least if the contemnor’s punishment is such that others are deterred from behaving likewise.

For other forms of contempt the court’s apprehension will relate to the ongoing administration of justice. In the case of scandalising the judiciary, for instance, this

¹ LLB Hons (Brunel, London); LLM (British Columbia); LLM (NSW); Program Director, National Defamation Research Project, Communications Law Centre, UNSW (rbaker@comslaw.org.au). Thanks to Aleardo Zanghellini and Michael Chesterman for their helpful comments on this paper.

² *A-G v Leveller Magazine Ltd* [1979] AC 440, 449, cited with approval in *Australasian Meat Industry Employees’ Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 106.

may be its only concern: for example where a judge is criticised in a context that has no bearing on any particular litigation.

Then there is a third category of contempts where the court's attention will be more or less evenly spread between a concern for the particular case and a concern for the machinery of justice generally. Into this category fall those contempts in which improper pressure is placed on a party to court proceedings through the public dissemination of material. Such material might consist of threats, or it may contain misrepresentations about, or criticisms of the proceedings or the party in question. The immediate concern is that the particular litigant will be deterred from seeking vindication of its rights through the proceedings it is prosecuting or defending, perhaps through fear engendered by the threats, an anxiety to avoid further publicity in the same vein, or concern that the publicity has tainted witnesses who may otherwise have been supportive of that litigant's case. At the same time the law also has an eye to litigants in other matters, as well as all who may wish to bring or defend future litigation.³ The fear is that they, having observed harsh media treatment⁴ of a particular party to proceedings, might be dissuaded from seeking curial protection of their own rights.

This duality in the law's concern presents it with a dilemma. In determining whether improper pressure has been brought, should consideration be given to the effect of the media coverage on the litigant who is the subject of the publication, or should it be given to the effect on some hypothetical litigant? If the sole concern were for the current litigant, then only the effect on that person would be relevant. No justice would be served in punishing publications that have not the slightest effect on a litigant of robust strength. Alternatively, special protection might seem desirable for the unusually vulnerable. The suitable test as to whether improper pressure had been exerted would be subjective. That is not to say that the matter would be determined by whether pressure on a litigant to alter their position had been successful. Improper

³ *Harkianakis v Skalkos* (1997) 42 NSWLR 22 (see especially Mason P, 28E); *A-G v Times Newspapers Ltd* [1974] AC 273 (see especially Lord Diplock, 310F-H).

⁴ Obviously impugned material need not be promulgated by those organs normally termed the media, but the focus of this paper will be on instances where this form of contempt is perpetrated by such institutions.

pressure might be put on a litigant who nevertheless does not buckle.⁵ But evidence would be admitted as to how the litigant experienced the media pressure, the question being whether he or she had endured pressure of a type and magnitude that the court considered improper, taking into account the litigant's unique vulnerabilities, emotional and otherwise, to the conduct impugned as contemptuous.

If, on the other hand, the law were to have regard only for the deterrent effect of media pressure on litigants (current and potential) *other* than the person subjected to that pressure, the argument for a subjective test becomes far less categorical. Then, evidence of the effect of the publicity on the specific litigant would serve no more than as an example of how one particular litigant has fared. A subjective test would not lose all appeal: the knowledge that the law adopts such an approach might itself embolden future litigants, particularly the vulnerable, who would gain confidence from the fact that the [21] law is to that extent tailored with their particular sensitivities in mind. On the other hand, a subjective approach would presumably result in greater media pressure on robust litigants, thus deterring the more timid litigant unaware (or unconvinced) that the court might afford them greater protection if they were to find themselves subject to similar publicity. To that extent the result would be that the law would fail to extend protection to those most in need of it. The correct test might therefore be objective: what effect would such publicity have on a hypothetical litigant? The fortitude imputed to that imaginary person would depend on the degree of protection the law wished to extend to litigants: that of the 'ordinary person' might be thought appropriate.

Given that the law must look to both the immediate litigant who is the object of publicity and all those who are currently engaged, or may in the future engage in litigation, which approach is the more appropriate, the subjective or the objective? One purpose of this paper is to determine how satisfactorily this issue has been resolved in England and Australia. In assessing the comparative virtues of the two tests, it is assumed that the following outcomes are desirable from this area of the law: (1) there should be certainty in the law;

⁵ There are clear authorities in England and Australia that unsuccessful pressuring of litigants might still constitute contempt: *Harkianakis v Skalkos* (1997) 42 NSWLR 22, 29D; *Smith v Lakeman* (1856) 26 LJ Ch 305, 306. A *tendency* to interfere with the course of justice is sufficient.

- (2) restrictions on freedom of media expression should not extend beyond what is necessary;
- (3) less protection should be afforded to the litigant impervious to media pressure than to the vulnerable litigant, thus maximising freedom of comment on the first;
- (4) the law should treat with greater severity the deliberate contemnor than those well-intentioned but hapless publishers who accidentally commit contempt.

The Position in Australian Law: North Australian Aboriginal Legal Aid Service v Bradley

Consideration of this issue is particularly apt now, given its role in four cases heard in Australia during the last three years, all relating to contempt of this kind.⁶ First came *Vajda v Nine Network Australia Ltd*,⁷ the facts of which are discussed later in this article. In that case Bell J observed that the trend of authority favoured an objective approach,⁸ which, it is argued below, is what she adopted.⁹

Within weeks this approach was confirmed by Western Australia's Court of Appeal in *Resolute Ltd v Warnes*.¹⁰ A company had brought proceedings against an individual. The latter then threatened to circulate defamatory material concerning the company and its prosecution of the proceedings. Ipp J was prepared to find contempt despite there being no evidence as to the ability of the victim of the impugned pressure to withstand it. He declared he would approach the matter as if it were a litigant of 'ordinary' [22] fortitude.¹¹ In support he cited *Fry v Bray*¹² which required that the

⁶ For reasons that are not immediately obvious, contempts by improper pressure on litigants by public dissemination seem to be considered far more often in Australia than England, with at least five reported cases in the last five years alone: *Harkianakis v Skalkos* (1997) 42 NSWLR 22; *Hamersley Iron Pty Ltd v Avon Francis Lovell* (1998) 19 WAR 316; *Resolute Ltd v Warnes* [2000] WASCA 359 (unreported, Kennedy, Ipp and Miller JJ, 21 November 2000); *Vajda v Nine Network Australia Ltd* [2001] NSWSC 840 (unreported, Brownie AJ, 26 September 2001); and, *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2001) 188 ALR 312. England, on the other hand, has produced only a couple of reported prosecutions in the last 30 years where particular concern was for improper pressure. It should be noted, however, that a clear distinction cannot always be drawn between contempts by improper pressure and those that involve the publication of material likely to prejudice the mind of the court in determining the issues before it. Especially where the contempt takes the form of a publication critical of a litigant, the concern will be both for the pressure exerted on that party to withdraw as well as the impact of such criticism on the minds of those charged with determining the case, in particular potential jurors.

⁷ [2000] NSWSC 873 (unreported, Bell J, 31 August 2000).

⁸ *Ibid* 14.

⁹ The defendants were subsequently found not to have committed contempt: *Vajda v Nine Network Australia Ltd* [2001] NSWSC 840 (unreported, Brownie AJ, 26 September 2001).

¹⁰ [2000] WASCA 359 (unreported, Kennedy, Ipp and Miller JJ, 21 November 2000).

¹¹ *Ibid* 18 (Kennedy and Miller JJ concurring).

court must ‘ascertain whether the publication is such as may affect the minds of reasonable men’.¹³

The following year the Federal Court visited the same issue in *North Australian Aboriginal Legal Aid Service Inc v Bradley*.¹⁴ Its decision resulted in the conviction of Denis Burke, then Chief Minister and Attorney-General of Australia’s Northern Territory of contempt arising out of comments he made at a press conference to the effect that proceedings currently brought against his government were a waste of taxpayer’s money.¹⁵

Considering Mr Burke’s comments in isolation, it is far from obvious that a contempt has been committed. Imagine, for instance, that the proceedings were being brought by a powerful multi-national corporation with barely no links with Australia. A contempt only emerges when some consideration is given to the nature of the party being criticised. In this case it was the North Australian Aboriginal Legal Aid Service (NAALAS) which, in finding contempt, Wilcox J identified as a voluntary organisation subject to Northern Territory law.¹⁶ He noted that it would be within the power of the Territory’s Parliament, controlled by Mr Burke’s political party, to terminate its existence.¹⁷ Furthermore, NAALAS was apparently dependent on public funding. Even if it did not receive money directly from Mr Burke’s government, Wilcox J thought the organisation might reasonably see the Chief Minister as influential in Commonwealth government decisions concerning institutions such as itself.¹⁸

Given that Wilcox J thought these factors relevant, was he employing an objective or subjective test? When an issue is determined by reference to a person’s subjectivity, this clearly involves an exploration of that person’s unique characteristics. Wilcox J

¹² [1959] 1 FLR 366.

¹³ *Resolute Ltd v Warnes* [2000] WASCA 359 (unreported, Kennedy, Ipp and Miller JJ, 21 November 2000) 19, citing *Fry v Bray* [1959] 1 FLR 366, 376.

¹⁴ (2001) 188 ALR 312.

¹⁵ The proceedings being brought by NAALAS consisted of a claim that the circumstances of the appointment of the Northern Territory’s Chief Magistrate by the Territory’s government gave rise to concerns about his susceptibility to undue government influence.

¹⁶ *NAALAS v Bradley* (2001) 188 ALR 312, 333 [73].

¹⁷ *Ibid.*

¹⁸ *Ibid* 333–4 [74].

was prepared to consider the particular circumstances which NAALAS found itself in. Indeed he went so far as to take into account that one year earlier Mr Burke had commented publicly that 'a lot of these Aboriginal legal aid organisations' should be closed down to avoid 'frittering away money on a witch hunt.'¹⁹ Wilcox J thought that Mr Burke's impugned comments must have 'triggered recollection' within NAALAS of what was tantamount to a threat to its survival.²⁰

Wilcox J claimed he had 'looked at the position of NAALAS itself, rather than taken the hypothetical litigant of "ordinary" fortitude'.²¹ But he thought the distinction immaterial: '[t]he hypothetical litigant must surely be one that shares the major characteristics of the actual litigant.'²² With respect to Wilcox J, the distinction does matter, and I suggest he did consider 'the hypothetical litigant of "ordinary" fortitude', albeit one with those 'major characteristics of the actual litigant' that he considered relevant.

The test he employs seems to be this: how would the 'hypothetical litigant of 'ordinary' fortitude' fare under the impugned pressure, given that the pressure is exerted by a representative of government, the [23] hypothetical litigant is dependent on government for its survival, and has already been 'threatened' with closure by the same government officer on the basis of the same criticism which constitutes the impugned pressure?

While there are difficulties (explored below) in distinguishing objective and subjective criteria, I suggest this test is best considered objective. If Wilcox J had employed a truly subjective test, he would have needed to hear evidence as to the impact of the impugned words on those within NAALAS charged with deciding whether to discontinue the proceedings against the government. It is entirely conceivable, for instance, that those people were satisfied that in reality Mr Burke was in no position to do the organisation harm, that his words were pure bluster. They may not have been in the least bit deterred in pushing their claim. Yet Wilcox J was

¹⁹ Ibid 333 [72].

²⁰ Ibid 334 [75].

²¹ Ibid 334 [78].

²² Ibid.

prepared to hold that, beyond reasonable doubt, a contempt had been committed, without hearing any such evidence.²³

A similar approach was adopted by the NSW Court of Appeal in *Bhagat v Global Custodians Ltd*.²⁴ The appellant had written letters to individuals, understood by him to be pensioners, warning them of possible liability for costs and damages should they continue with proceedings against him. The letters suggested that the pensioners were in danger of losing their homes in order to meet those liabilities. The appellant concluded with a threat of criminal proceedings against the recipients if they tendered false evidence on oath. Upholding the appellant's conviction for contempt, the court saw no basis for this threat, and thought that the vulnerability of the recipients, of which the appellant was aware, was such as to be a material consideration when determining the degree of impropriety involved.²⁵

Ipp AJA referred to the preference he expressed in *Resolute Ltd v Warnes* for an objective approach.²⁶ Nevertheless both Ipp AJA and Spigelman CJ²⁷ distinguished cases involving communications between parties to proceedings from those concerning publications to the broader community. Ipp AJA thought that, at least as regards the former, regard should be had to the subjective characteristics of the recipients of the communications. In clarification he said:

That is to say, there should be an objective assessment of the relevant materials, having regard to the subjective characteristics of the recipients of the communications.

This seems to be saying that the issue is not the extent to which the recipients of the letters in fact felt pressured, which I suggest would be the truly subjective test, but whether the letters constituted undue pressure, considering a hypothetical recipient of ordinary fortitude, given the major characteristics of the pensioners.

²³ *Ibid.*

²⁴ [2002] NSWCA 160 (unreported, Spigelman CJ, Ipp and Brownie AJJA, 29 May 2002).

²⁵ *Ibid* 44, 45 and 49–50 (Spigelman CJ) 54–5 and 56 (Ipp and Brownie AJJA concurring).

²⁶ [2000] WASCA 359 (unreported, Kennedy, Ipp and Miller JJ, 21 November 2000) 19.

²⁷ [2002] NSWCA 160 (unreported, Spigelman CJ, Ipp and Brownie AJJA, 29 May 2002), Brownie AJA concurring with Spigelman CJ.

This approach seems not only in line with *NAALAS*, but also broadly with that of the other judges in *Bhagat*. In the case of private communications between parties, Spigelman CJ²⁸ saw no reason why the particular vulnerability of a party should not be a material consideration when determining whether the pressure was improper. In applying this to the facts before him, and characterising the very thrust of the appellant's letters as being to dissuade the plaintiffs with threats and false allegations, he felt it permissible to take into account the vulnerability of the recipients when determining whether the pressure was improper.²⁹ He added:

[24] At least in such a context, I do not see why the Court must choose between an objective and a subjective test. Both dimensions may be pertinent when formulating the judgment about impropriety.³⁰

As in *NAALAS*, there is no indication that evidence was heard from the plaintiffs as to the extent to which they felt constrained. Once again I suggest that the court chose an objective test, albeit with consideration of the characteristics of the parties.

In all four of the above cases, for a summary of the law the courts resorted to the judgment of Mason P in *Harkianakis v Skalkos*.³¹ Mason P felt that the dual concern of the law referred to above³² suggests that an objective approach is correct.³³ Even so, he felt that he had no need to resolve the issue in the instant case. That involved a newspaper being sued for defamation by the Archbishop of the Greek Orthodox Church in Australia. Nevertheless it is clear that he employed an objective approach when he found contempt on the part of the newspaper when it published further allegations against the Archbishop, accusing him of misuse of church money and high-handedness. Mason P's decision was not determined by evidence as to whether the Archbishop had in fact felt pressured to vary his conduct of the defamation action, evidence which would have been crucial if a subjective test had been adopted. Although Powell JA dissented, he did so only in the outcome of the application of the

²⁸ [2002] NSWCA 160 (unreported, Spigelman CJ, Ipp and Brownie AJJA, 29 May 2002), Brownie AJA concurring.

²⁹ [2002] NSWCA 160 (unreported, Spigelman CJ, Ipp and Brownie AJJA, 29 May 2002) 50.

³⁰ *Ibid* 49.

³¹ (1997) 42 NSWLR 22.

³² That is concern for the litigant in the immediate proceedings and concern for litigants in other proceedings, whether they be current or future.

law to the current facts rather than the law itself, and he expressed a preference for an objective approach.

The Position in English Law

While Australian judges favour an objective over a subjective approach, in England there has been some support for the latter. In considering a charge that an article in the London Evening Standard was likely to cause a plaintiff to discontinue an action, Latey J is reported to have said in 1969 that ‘it would be unreal to apply the purely objective test, ignoring personalities’.³⁴

Before exploring whether England has continued to adopt a subjective approach, it is necessary to first mention how English law treats contempts differently, depending on whether they are deliberate or accidental. In large part this difference in treatment was brought about by a case concerning contempt by improper pressure on a litigant. *Attorney-General v Times Newspapers Ltd*³⁵ involved a *Sunday Times* article arguing that the pharmaceutical company Distillers should be more generous in settling claims brought against it on behalf of children disfigured by its drug thalidomide. Their Lordships divided as to whether the article in question put improper pressure on Distillers and so constituted a contempt. Lord Diplock thought it held Distillers up to ‘public obloquy’³⁶ and Lord Simon considered it ‘execration’.³⁷ Lords Reid³⁸ and Cross,³⁹ and apparently Lord Morris,⁴⁰ disagreed, characterising the article as ‘fair and temperate criticism’. Such matter, it was held, was permissible even though likely to deter a party from litigation. Contempt, however, would be committed where threats, abuse or unfair and material [25] misrepresentation are involved.⁴¹

³³ *Harkianakis v Skalkos* (1997) 42 NSWLR 22, 29G–30A; 69F (Beazley JA concurring).

³⁴ *Re Duncan, The Times*, 20 May 1969, 113 Sol Jo 526, cited in C J Miller, *Contempt of Court* (3rd ed, 2000) 400 [8.51].

³⁵ [1974] AC 273. This was in fact the first time the House of Lords had considered the contempt jurisdiction in any depth since *Scott v Scott* [1913] AC 417.

³⁶ [1974] AC 273, 313.

³⁷ *Ibid* 321.

³⁸ *Ibid* 298.

³⁹ *Ibid* 326.

⁴⁰ Lord Morris described as acceptable a hypothetical article which I suggest resembles the article in question: *ibid* 307.

⁴¹ *Ibid* 295 and 313 (Lord Reid); 326 (Lord Cross).

In another drug related class action, this time in 1987, Hirst J warned in the High Court against a campaign of newspaper advertisements and press releases issued on behalf of the plaintiffs accusing the drug company of cynicism.⁴² His Honour said these 'might be thought to be not far from the dividing line between legitimate comment and illegitimate pressure'.⁴³ Interestingly it is apparent that Hirst J was aware that the *Times* had said in a leading article that the drug company's refusal to settle 'looks like extreme cynicism which ought to be made to rebound' on the company.⁴⁴ Surprisingly these comments, which surely constitute greater pressure than that exerted by the plaintiffs themselves, received no criticism from Hirst J in his judgment.

Partly as a result of the *Sunday Times* case,⁴⁵ the *Contempt of Court Act 1981* (UK) reformulated the law applying in those cases of contempt arising out of media publications⁴⁶ where there is no evidence of intent. In such cases prosecutions are governed by the strict liability rule as set out in that Act.⁴⁷ Contempt will only be committed in cases where evidence of intent is absent where the publication creates a substantial risk that the course of justice *in the proceedings in question* will be seriously impeded or prejudiced.⁴⁸ As argued above, if the sole concern is for the immediate proceedings, logic requires that a subjective approach be adopted.⁴⁹

As for cases where there is evidence of intent to prejudice the administration of justice, the 1981 Act preserves common law contempt.⁵⁰ Where there is evidence of

⁴² *Davies v Eli Lilly & Co and Others*, *The Times* 23 July 1987, *The Independent* 23 July 1987, available on Lexis. The case involved the arthritis treatment Opren.

⁴³ *Ibid.*

⁴⁴ Apparently the newspaper had also said that if no compensation was forthcoming 'all future applications by the company to market its products in Britain should be considered very carefully': *ibid.*

⁴⁵ [1974] AC 273. The case resulted in a successful appeal by the newspaper to the European Court of Human Rights, which held that the House of Lords' judgment breached art 10 of the *European Convention on Human Rights* as a restriction on freedom of expression that was not necessary in a democratic society for maintaining the authority and impartiality of the judiciary: *Sunday Times v UK* Series A No 30 (1979) 2 EHRR 245. However this did not affect their Lordship's decision concerning contempt by improper pressure, but was concerned with that part of their judgment dealing with the doctrine of prejudgment.

⁴⁶ As defined in *Contempt of Court Act 1981* (UK) c 49, s 2(1).

⁴⁷ *Contempt of Court Act 1981* (UK) c 49, ss 1–7.

⁴⁸ *Contempt of Court Act 1981* (UK) c 49, s 2(2).

⁴⁹ This view is supported by Miller, above n 34, 399 [8.51].

⁵⁰ *Contempt of Court Act 1981* (UK) c 49, s 6(c). It has also been argued that, despite that Act, evidence of recklessness might suffice for common law contempt: Miller, above n 34, 222 [5.32].

intent, therefore, the prosecution has a choice: use the common law, or the new statutory contempt. Under the common law, prejudice to the ongoing administration of justice, as well as that to the immediate proceedings, has a bearing.⁵¹ Thus, as argued above, there are justifications for an objective as well as a subjective approach.

Attorney-General v Hislop

The only English authority to give any meaningful consideration to which test is appropriate is *Attorney-General v Hislop*,⁵² in which the Court of Appeal considered comments published in the satirical publication *Private Eye* concerning Sonia Sutcliffe, wife of the 'Yorkshire Ripper' serial killer. At the time Mrs Sutcliffe was suing the magazine over allegations that she had sold her story to the press. Around [26] three months before a possible trial date, the magazine published a suggestion that the proceedings would involve Mrs Sutcliffe being cross-examined on allegations that she provided a false alibi for her husband and defrauded the Department of Social Security.

The court was unanimous in considering not only that these comments were abusive, threatening and untrue,⁵³ but also that they were intended to deter Mrs Sutcliffe from pursuing her libel action. Thus the paper's publisher and editor were found guilty of both common law and statutory contempt.

As for statutory contempt, Nicholls LJ preferred to express no view as to whether the approach should be subjective or objective. In the common law context, however, he was not persuaded that, had there been evidence that Mrs Sutcliffe was unusually tenacious and unlikely to be deterred from continuing with her litigation, that would have been an end of the matter. In other words, he supported an objective approach. Similarly Parker LJ supported an objective approach, but it seems he was speaking of common law contempt. McCowan LJ expressed no opinion as regards either form of contempt. All three judges, however, united in one observation. The judge at first instance was presented with no cogent evidence as to Mrs Sutcliffe's ability to

⁵¹ *A-G v Times Newspapers Ltd* [1974] AC 273, 310F-H (Lord Diplock).

⁵² *A-G v Hislop* [1991] 1 QB 514.

⁵³ Parker LJ said he 'could imagine nothing more improper': *ibid* 527E.

withstand media pressure. As Nicholls LJ expressed it, 'perforce the matter falls to be judged objectively in this case.'⁵⁴

Whether the outcome would have been different if cogent evidence had been pleaded, and whether an objective or subjective test applies, might be considered a matter for conjecture. I suggest, however, that the issue is more settled by *Hislop* than might at first appear. In that case the magazine was convicted beyond reasonable doubt. As argued above in the context of *NAALAS* and *Bhagat*, if a subjective approach were required, then no conviction would be possible in the absence of cogent evidence of the effect of the pressure on the particular litigant. This is because a doubt would remain outstanding that perhaps that litigant had exceptional fortitude which enabled him or her to withstand publicity.

The conclusion might therefore be reached that as regards English common law contempt involving improper media pressure on a litigant, an objective approach is appropriate. Conversely, there is nothing in *Hislop* to detract from the deduction that in the case of statutory contempt a subjective approach must be employed.

Assessing the Comparative Advantages of Objective and Subjective Approaches

Distinguishing between deliberate and accidental contempts

Earlier was posited as a desirable outcome of the law that it should treat deliberate contempts more severely than those committed accidentally. If the last paragraph summarises English law correctly, has this been achieved?

It will be obvious that in cases involving pressure on robust litigants, the media will be disadvantaged by an objective approach: evidence of peculiar resilience to publicity will be inadmissible. As for abnormally vulnerable litigants, the press fares worse under a subjective test: proof of their unusual weakness can be considered.

In the case of the deliberate (and possibly also reckless) contemnor, assuming all the other conditions can be met, the prosecution will be able to choose between committing for trial on a statutory basis (involving a subjective approach) or on a

⁵⁴ Ibid 532A.

common law footing (with objective considerations), depending on which is most likely to secure a conviction. In the case of the accidental contemnor, statutory proceedings are the only possibility. Provided the well-meaning but hapless publisher can produce evidence of extraordinary resilience to its impugned conduct, it will be at a considerable advantage over the deliberate contemnor where, in such circumstances, the prosecution could switch tack to common law proceedings.

How does Australian law perform in this regard? Mason P's summary of the law on this form of contempt in *Harkianakis*, adopted in subsequent cases, is that intention to interfere with the due [27] administration of justice is not necessary to ground a contempt.⁵⁵ It is sufficient to show, to the criminal standard, that the publication had 'as a matter of practical reality, a tendency to interfere with the course of justice in a particular case'.⁵⁶ Where intent is proved, however, this has usually been sufficient to sustain a prosecution.⁵⁷ Clearly Australian law disadvantages the deliberate contemnor, as seems to be the case in England.

Extending special protection to the particularly vulnerable litigant

How do the two countries' laws compete as regards another criterion I posit, namely that extra protection should be afforded to unusually vulnerable litigants? Obviously these are best served by a subjective approach. Since it is possible that England sometimes adopts this (that is, in the case of accidental contempts) and the indications from Australia are that that country's law never does, English law appears preferable in this regard.

⁵⁵ (1997) 42 NSWLR 22, 28A. Mason P cites in support *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650, 673–6 (where authorities are discussed by Hope JA); *Director of Public Prosecutions v Wran* (1986) 7 NSWLR 616, 625–6; *Hinch v A-G (Vic)* (1987) 164 CLR 15, 46–7 and 85.

⁵⁶ *Harkianakis* (1997) 42 NSWLR 22, 27E. Mason P cites *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 372.

⁵⁷ *Ibid* 28B. Mason P cites as examples *Smith v Lakeman* (1856) 26 LJ (NS) Ch 305, *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242, 248–9; 54 WN (NSW) 98 at 99; *Hinch v A-G (Vic)* (1987) 164 CLR 15, 43; cf *Lane v Registrar of the Supreme Court of NSW (Equity Division)* (1981) 148 CLR 245, 258. He then adds: 'It is not self-evident why this is so. Two possible explanations are that the court is applying the principle that a person who does an act with such intent is admitting a belief that he or she has a reasonable chance of success, with this admission being used as evidence of the fact [Mason P cites *A-G v Hislop* [1991] 1 QB 514, 535 (McCowan LJ) and, as to the general principle, *Australian Woollen Mills Ltd v F S Walton & Co Ltd* (1937) 58 CLR 641, 657] or that such a case involves an inchoate offence in the nature of attempt, where intent plus preparatory acts will be sufficient to sustain the charge.'

Achieving certainty in the law and maximising freedom of expression

There remain, however, two outstanding outcomes that are desirable in the law governing this form of contempt. The first is that, as always, there should be certainty. The second, very much related to the first, is that the media should not be inhibited more than is necessary to protect the administration of justice. When weight is given to these considerations, problems with admitting consideration of the peculiar characteristics of the victim of the impugned media pressure become apparent.

These problems are well demonstrated by the recent case before the New South Wales Supreme Court: *Vajda v Nine Network Australia Ltd*.⁵⁸ Bell J was urged on behalf of a litigant, who had allegedly fallen victim to improper media pressure, to adopt the subjective approach.⁵⁹ In response Bell J cited an observation from a major tome on the law of contempt that a subjective test 'increases the uncertainty of the law in an area where uncertainty has a restrictive effect on freedom of speech'.⁶⁰

The facts of *Vajda* illustrate the point. Mr Vajda had commenced defamation proceedings against Nine Network television after a documentary alleged that in 1951, while an officer in Hungary's State Security Authority (AVH), he assaulted a prisoner. Some five years after the start of these proceedings, Nine Network broadcast a further documentary presenting what was claimed to be fresh evidence that the plaintiff, Mr Vajda, had behaved violently and oppressively while in the AVH.

Mr Vajda argued that this second program constituted a contempt, since it put him under undue [28] pressure as regards the defamation proceedings. Part of his argument was that interviewees in the second program were biased against him. In support the plaintiff filed a lengthy affidavit, much of which set out the basis for his belief in that bias. The defendants succeeded in having this material struck out of the affidavit as irrelevant.

This decision to strike out the evidence of bias is, I suggest, hard to reconcile with *NAALAS*. In *Vajda* the alleged contempt was the airing by a broadcaster of remarks

⁵⁸ [2000] NSWSC 873 (unreported, Bell J, 31 August 2000).

⁵⁹ Mr Vajda's motion claiming contempt of court by the defendants was subsequently dismissed: *Vajda v Nine Network Australia Ltd* [2001] NSWSC 840 (unreported, Brownie AJ, 26 September 2001).

defamatory of a plaintiff already engaged in defamation proceedings against that broadcaster. There is considerable authority that this is not in itself a contempt.⁶¹ If Channel Nine were committing a contempt then there must, to adopt an expression of Wilcox J in *NAALAS*, be ‘something more’.⁶² In *NAALAS*, that ‘something more’ was the fact that Denis Burke, a senior government officer, was in effect putting government pressure on a litigant with peculiar susceptibility to government pressure.

Part of Mr Vajda’s case in contempt against Nine Network was surely that because the latter was employing against him testimony from witnesses he believed were disposed against him, he could expect those witnesses to reappear at the trial of his defamation proceedings, thus prejudicing his chances of success, and in turn pressuring him into dropping his defamation claim. Mr Vajda’s argument, therefore, is that in his case the ‘something more’ was his belief in the witnesses’ bias.

In *NAALAS*, I have argued, consideration was given to the effect of Denis Burke’s conduct on a hypothetical litigant of ordinary fortitude, albeit one with a ‘major characteristic’ of the actual litigant being pressured, namely the peculiar vulnerability of *NAALAS* to government pressure. To be consistent, Nine Network’s conduct should also be considered vis-à-vis a hypothetical litigant of ordinary fortitude, but one with Mr Vajda’s ‘major characteristics’.

Surely it could be argued that one such characteristic is a belief held by Mr Vajda, even if unfounded, that Nine Network’s witnesses were biased against him. If so, it becomes incumbent on the court to consider evidence as to Mr Vajda’s perception of bias, the very evidence contained in Mr. Vajda’s affidavit.⁶³ In striking out that evidence, Bell J did not accept that ‘the court might have regard to the personal characteristics, including the background and beliefs, of the litigant’, words that stand in striking contrast to Wilcox J’s approach in *NAALAS*.⁶⁴

⁶⁰ N V Lowe, *The Law of Contempt* (3rd ed, 1996) 209.

⁶¹ See, eg, *Harkianakis v Skalkos* (1997) 42 NSWLR 22, 30E (Mason P).

⁶² *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2001) 188 ALR 312, 335 [82].

⁶³ It would not, on the other hand, have involved hearing evidence of the litigant’s particular susceptibility to the pressure being exerted. In this case, for instance, it would not admit evidence that Mr Vajda was not in fact deterred in his litigation by the defendant’s conduct, either because he was impervious to further defamatory broadcasts, or because he was confident that he would succeed in his defamation action regardless of any malice on the part of his opponent’s witnesses.

⁶⁴ [2000] NSWSC 873 (unreported, Bell J, 31 August 2000) 15.

If Australian law were such that Nine Network committed a contempt on the basis of Mr Vajda's perception of interviewee bias, the resulting uncertainties for the media would be obvious. How is a broadcaster to foresee that a program it intends to broadcast, one which concerns someone who is suing it in defamation, will excite that person's apprehension of witness bias? How could Nine Network know Mr Vajda's subjective perceptions? Faced with such difficulties, the outcome would inevitably be the silencing of publicity concerning a plaintiff in defamation proceedings. A defamation writ would then gag the media, something the law rightly seeks to avoid.⁶⁵

The problem is partly resolved if the *NAALAS* approach is understood to permit consideration of characteristics of the litigant which might be termed objective, while excluding subjective perceptions. Thus in Mr Vajda's case, he would be required to prove that the interviewees were in fact biased against him. It can be argued, after all, that a broadcaster should in any event investigate the possibility of bias [29] before airing an interviewee's defamatory comments. But if the test is formulated in this way, what of the litigant who is well known to have an emotional character rendering him or her unusually susceptible to media badgering? Surely that person's anxiety is a 'subjective perception', and surely the nervous litigant is the very person the law most wants to protect.

Conclusion and Recommendation

This paper characterises the test applied in recent Australian cases, including *NAALAS* and *Bhagat*, as objective, since no consideration is given to evidence as to how the litigants in question experienced the impugned publicity. Even so, it can be seen that the *NAALAS/Bhagat* test is in fact something of a hybrid between a purely objective and a purely subjective approach,⁶⁶ since it admits some consideration of the party's peculiarities. It might be hoped to combine the best of the purely subjective and the purely objective approaches.

Certainly it has some of the attraction of the former: greater protection is extended to the vulnerable litigant than to the robust. The advantages of a purely objective test

⁶⁵ See, eg, *Harkianakis v Skalkos* (1997) 42 NSWLR 22, 30E (Mason P).

that excludes consideration of a litigant's peculiar characteristics is, in theory at least, greater certainty in what conduct constitutes a contempt, which in turn frees up media expression concerning litigants. However, an application of *NAALAS* to the facts in *Vajda* calls into question whether the *NAALAS* test shares any of the purely objective test's quality of certainty.

Given the dual concern of this area of contempt law for the immediate litigant and for other actual and potential litigants, and given the dilemma this creates as regards choosing between an objective and a subjective approach, it is clear that no solution is going to be perfect. A workable compromise is a development to the *NAALAS* test, applicable in cases where there is no evidence of intent to interfere with the administration of justice. Its starting point is correct: the effect of the impugned conduct on a hypothetical litigant of 'ordinary' fortitude. It is also right that that hypothetical litigant should be imbued with the major characteristics of the actual litigant. Those characteristics should, however, be limited to those of which the alleged contemnor either had knowledge, or should have had knowledge.

This would permit consideration of the susceptibility of *NAALAS* to government interference which, quite correctly, played a role in determining that Denis Burke's conduct constituted a contempt. Yet it would have excluded consideration of Mr Vajda's belief in bias on the part of Nine Network's interviewees, unless the broadcaster had actual knowledge of such belief, or can have imputed to it constructive notice of the same.

This is not to say that if the broadcaster had actual or constructive notice then it would automatically be guilty of contempt. It would still be necessary to adjudge the pressure improper, using, I suggest, the formulae recommended by Mason P in *Harkianakis*.⁶⁷

⁶⁶ It might be termed objective-subjective, a term coined by Madame l'Heureux-Dube who suggested a similar test in the area of equality in her dissenting decision in the Canadian case of *Egan v Canada* [1995] 2 SCR 513, 545-6.

⁶⁷ For example, there would still remain open to the alleged contemnor the so-called '*Bread Manufacturers* "defence"' (from *Ex parte Bread Manufacturers, Re Truth and Sportsman* (1937) 37 SR (NSW) 242 and a justification defence. See *Harkianakis v Skalkos* (1997) 42 NSWLR 22, 42 (Mason P).

Roy, 'Determining Contempts by Improper Pressure on an Litigant'

It is of course quite conceivable that what is suggested above is precisely how Wilcox J intended his comments in *NAALAS* to be understood. Whether this is the case or not, his decision is to be welcomed as bringing the law a step nearer to resolving the complex issues that arise when the interests of the media and litigants collide.