Lights, Camera, Cross-Examination: Television Cameras in the Court

Both the Bar Association and the Law Society have opposed the televising of the proceedings of the I.C.A.C. Richard Phillips examines the arguments and comes to a different conclusion.

Barristers who have read the article in this issue by Peter Hutchings and are disconsolate at the thought that lawyers rarely wear the white hats in the movies may soon have the opportunity to appear on the silver screen themselves. In the not too distant future, it is likely that Australian Courts and Tribunals will follow the lead of the American Judiciary and the recent recommendations of the English Bar and allow television cameras to cover proceedings.

Televising ICAC: The First Step?

It is possible that the first step in the process will be the televising of the proceedings of the I.C.A.C.

The Parliamentary Committee upon the I.C.A.C. is currently reviewing the question of televising public hearings of that Commission. Public hearings were to be held on 26th March, 1990. If that Committee reports favourably upon the concept, there will no doubt be increased pressure in Australia to allow televising Court room proceedings. Ian Temby QC declined to be interviewed by *Bar News*, but did pass on, via the Commission's media officer, the following comment: "The Commission has not formed a view concerning the proposal to televise its hearings. The choice lies between not permitting (televising) or permitting it on a very restricted and carefully controlled basis. We look forward to receiving the considerations of the Parliamentary Joint Committee".

Dramatic shots taken during the trial of Joel Steinberg for murder of Lisa Steinberg, aged 6. The trial, in the New York State Supreme Court was filmed by television cameras throughout. Here, Acting Justice Rothwax looks on while Ira London, Steinberg's lawyer questioned a witness, Dr. Aglae Charlot about a photograph of the deceased child. (UPI/BETTMANN NEWSPHOTOS).

Overseas Experience

In England and Wales, since 1925 s.41 of the Criminal Justice Act has made it an offence to take a photograph in any Court. It seems that this ban extends to television and moving picture cameras as well as to still cameras: *Re: St. Andrew's (Consist. Ct.)* [1977] 3 W.L.R. 286, *Re: Barber v. Lloyds Underwriters* [1987] Q.B. 103. The ban continues, although a working party of the English Bar has recently recommended that the law be amended to permit the televising of Courts on an experimental basis: see *Counsel* May/June 1989, 5.

In the United States the ban on photography in the courts commenced in the late 1930s' see Lindsay:-"An assessment of the use of cameras in State and Federal Courts." [1984] *Georgia Law Review* Volume 18, 389.

By the mid-1970s, however, American State Courts began to relax the prohibition on cameras in Court. One important step in this process was a 12 month trial of televising courtroom proceedings in Florida in 1977. By 1985, forty-three of the American States permitted, subject to a range of restrictions, television coverage of appellate and/or trial proceedings on an experimental or permanent basis: see *Gardner*: - "Cameras in the Court room, guidelines for State Criminal Trials". [1984] *Michigan Law Review* 475.

In both the U.K. and the U.S., it seems that the impetus for the prohibition on photography of Court room proceedings was the sensationalist coverage of certain trials. In America, in 1935 the press, including one motion picture camera person, disrupted the trial of Bruno Hortman, who was being tried for the kidnapping and murder of the baby of Charles Lindbergh. As a result, the American Bar Association promulgated Canon 35 of the Canons of Judicial Ethics forbidding the use of motion or still cameras in Court, later amended to include a reference to television. This was followed by most of the American States.

In the United Kingdom and Wales, the publicity surrounding a number of sensational trials between 1904 and 1922, including one photograph in 1912 of a judge at the moment of passing a sentence of death on one Frederick Sedden for murder, seemed to have built up the necessary pressure to bring about the prohibition of the photography of Court room proceedings: see *Dockray*: "Courts on television." [1988] 51 M.L.R. 593.

The Australian Experience

For the most part, it would seem that television and camera coverage of Court room proceedings is prohibited in Australia as part of the Court's inherent power to control and regulate its own proceedings. However, in addition there are some pieces of legislation that also affect the possible televising of proceedings, such as s.68 of the Jury Act, 1977 (NSW), which prohibits the publication, printing, broadcasting or televising of material that might identify a juror.

There are some instances of television coverage of pro-

ceedings in Australia. They include the following.

In 1981, Coroner, Mr. D. Barrett S.M. allowed the televising of his findings in the first Coronial Inquiry into the death of Azaria Chamberlain. He did so, he said:

> "Because of the intense public interest that the Inquest had generated, and because of the prevalence of 'unfounded' rumours that had circulated in relation to the Inquest,: see N.S.W. Law Reform Commission Issues paper, *Proceedings of Courts and Commissions - Television Filming, Sound Recording, and Public Broadcasting, Sketches and Photographs* 1984, (hereafter "NSWLRC") 34.

In 1981, part of the proceedings of a case in the Hobart Court of Petty Sessions were televised. The case concerned Saturday afternoon trading by a major retailer, and the providing Magistrate allowed the opening of the case by the prosecution and defence to be televised over the objection of both Counsel because of the intense public interest in the matter. (ibid)

The A.B.C. programme "Four Corners" on two occasions has televised Court room proceedings. In June, 1981, a programme about the work of Magistrates Courts included footage of proceedings at Sydney Central Court of Petty Sessions, comparing the more usual work of that Court with the so called Security Security conspiracy case *(Commonwealth Police v. Anagnostopoulos)*. On another occasion, in 1981 "Four Corners" in a programme concerning burglary broadcast part of a trial in the South Australian District Court. (ibid)

In addition to the general televising of proceedings, the closed circuit televising of Court has been allowed in Australia for some time. In the trial of *R. v. Chamberlain* proceedings were transmitted via closed circuit television to a separate room where news media were present, in order to avoid the disruption of the actual proceedings of themselves by the presence of large numbers of reporters. (ibid)

The High Court of Australia also has a provision whereby proceedings are televised via closed circuit television, primarily to allow speakers to be identified for the purpose of the transcript, but also allowing proceedings to be transmitted to a nearby press room. (ibid)

Arguments in Favour of Televising Proceedings

The argument for televising or filming proceedings must be found in the principle that the courts should be open to the public. The case of *Scott v. Scott* [1913] A.C. 417 is still the classic authority of that principle. In that case, Lord Atkinson said:

> "The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to be found on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect." (at 463).

Lord Shaw quoted Bentham: "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the Judge himself while trying under trial" (at 477).

In our society, the most effective means of making sure that the Courts are open to the public and that justice is seen to be done is to ensure that the medium by which most citizens get their information about the world - the television screen - relays Court proceedings.

This appears to be the attitude of the Working Party of the Public Affairs Committee of the General Council of the (British) Bar. The Working Party recently considered the issue and concluded that the law should be amended to permit the televising of the Courts on an experimental basis. Among other things, the Working Party concluded that:

> "There is a significant advantage in televising Court proceedings, namely that it would enhance the public's understanding of, and confidence in, our legal system, judiciary and the decisions of our Courts. Television would provide greater public access to the Courts and would permit personal observation, as opposed to second hand reports in the printed media and to television reporters speaking to camera and recounting what happened that day in the Court building behind them. Televising would fulfil an educative and informative function. Objections to televising are based largely on fears which, in practice, are revealed to be unfounded, and in part upon an emotive reaction to television which does not do justice to the skill and responsible attitude of the broadcasters. There is, for example, nothing intrinsically impossible or difficult about achieving a fair and balanced televised Court report."

It will be noted that these rationales include not only the notion expressed in *Scott v. Scott* that public monitoring of hearings has an effective role in making the Courts accountable to the public, but also a broader educational rationale.

In the United States, whilst the Courts have refused to hold that there is a constitutional ban on televising Court room proceedings, it is noteworthy that neither the first amendment (free speech) nor the sixth amendment (the right to a speedy and public trial) had been held to automatically grant access to the Courts by television cameras: *Nixon v. Warner Communications Inc.* 435 U.S. 589, 610 (1978); *Gannett v. De Pasquale* 443 U.S. 368 379-81 (1979). The Courts have concentrated on the guarantees of due process in the fifth and fourteenth amendments. Decisions based on this guarantee are made on the basis of the facts in the instant cases. Thus in *Estes v. Texas* (1965) 381 U.S. 532 the Supreme Court held that the disruption to the procedure caused by the presence of twelve or more camera persons, microphones, cables, wires, etc. disrupted the proceedings and deprived the Defendant of due process. Sixteen years later, in *Chandler v. Florida* (1979) 449 U.S. 560 the Court refused to reverse a trial on the ground that televising it was unconstitutional. The *Chandler* trial was subject to the (fairly minimal) restraints imposed by the Florida guidelines on the televising of trials, and in *Chandler* the Court noted advances in technology had greatly reduced the disruptive effect

of television. Another, perhaps unspoken factor, was that the *Estes* trial was one of great notoriety; "the Defendant, Billy Estes, was a well-known Southern financier charged with swindling and false pretences." (Lindsay, 397).

Following the 12 month trial period in Florida, the Florida Supreme Court conducted a survey of attorneys, witnesses, jurors and court officers, and considered a separate survey of the Florida judiciary. The results were in favour of televising proceedings:

> "The Florida Supreme Court failed to find any of the adverse effects predicted by opponents of the admission of cameras. The evidence indicated no increase in the number of grandstanding lawyers, posturing judges, intimidated witnesses, or distracted or fearful jurors. According to the court's survey, there was no significant reduction in the desire of jurors, witnesses, court personnel and attorneys to participate in a televised trial as compared to a trial only covered by newspapers. The Court concluded that 'on balance there is more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage' ": Lindsay, 411.

Arguments Against the Televising of Courtroom Proceedings

A useful summary of the objections to televising of courtroom proceedings is to be found in the wording of the amended Canon 35 of the American Bar Association, here reproduced in part:-

IMPROPER PUBLICISING OF COURTROOM PROCEEDINGS. Proceedings in Court should be conducted with fitting dignity and decorum. The taking of photographs in the Courtroom, during sessions of the Court or recesses between sessions, and the broadcasting or televising of Court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

This canon illustrates the three categories into which objections to televising Court room proceedings can be divided: First, that televising detracts from the dignity and decorum of Courtroom proceedings. Second, that the use of video equipment in the Courtroom will physically or psychologically disrupt proceedings to the disadvantage of justice. Third, that the alleged educational value may not be as great as is alleged by the media proponents of television in the Courtroom, and that televising may be in fact misleading.

As to the first category of objections, whether you believe that the dignity or decorum of the courtroom will be lessened more by television cameras than by, say, the tape recording devices of sound recordists recording material for the purpose of the transcript, and the interesting exhibits tendered in some proceedings, will substantially depend upon emotional factors and a subjective view of what constitutes dignity and decorum.

More important, on the basis of any rational examination of the proposal, are the latter two categories.

The second category is the disruption of proceedings by the distraction of witnesses and participants. Distraction can take a number of forms. In *Estes* the Court referred to four different types of distraction. First, pressure on, and distraction of jurors caused by the publication of their presence in Court and the presence of equipment. Second, interference with witnesses who may be embarrassed or demoralised, or alternatively may tend to "ham up" their evidence or who may even be reluctant to appear. Third, the impact on the Judge, including the necessity to supervise television crews. Fourth, the impact on the defendant, in a criminal trial, who should arguably not be distracted by public surveillance. Interestingly, that Court did not comment upon another possible problem: the increased pressure on Counsel and solicitors in Court, who may likewise suffer from "mike fright", or, perhaps, from a tendency to over-act.

Hedda Nussbaum, Steinberg's lover, testifies against Steinberg during the trial. (UPI/BETTMANN NEWSPHOTOS)

The third category of objection, that of creating misconceptions in the mind of the public, counters the alleged "educative" function of cameras in the Court room. It may well be misleading to suggest that cameras in the Court room can give an accurate portrayal of a trial, even if lawyers, witnesses, and the Judge and jury are not distracted. Television would be unlikely to portray all of a trial, or even all of the testimony of a particular witness. Television coverage does not permit "personal observation" as the British Working Party would have it; rather it force-feeds a selected and edited account which reflects the subjective opinion of the camera operator and producer on what is salient and relevant.

The television audience, as political operators are well aware, likes to receive its information in the form of very short, often thirty or sixty second "grabs" or "bites". The nature of the competition for ratings will tend to ensure that the more sensational parts of proceedings and indeed of more sensational proceedings, will be televised, perhaps at the expense of the actual substance of the trial. One remembers the media coverage of the Chamberlain trial from outside the Court room, for example, and the emphasis on the clothes worn day by day to Court by Lindy Chamberlain.

Try this test: how many recent newspaper accounts of trials gave an accurate, objective summary of the proceedings, and how many were so-called "colour" pieces concentrating on the personality, foibles, or appearance of the participants?

As Sir Laurence Street has said: "the media has both an inherent limitation in the extent of the cover that can be telecast, as well as an inherent tendency for the form and appearance to overshadow the substance. This latter prospect imports a further tendency to induce those participating in the proceeding to give undue attention to the form and appearance of their part in the litigious process. Being at the expense of substance, this could distort the process of justice itself". NSWLRC, 39.

Controls on Cameras in the Court Room

Even in the home of *LA Law* television cameras are not allowed unfettered access to the courts. All American states that permit televised proceedings do so subject to a range of restrictions: see Gardner, 495ff; Lindsay, 402ff. The following are examples of the issues seen as most needing some form of regulation:

First, should televising be subject to the consent of the parties or of witnesses? American jurisdictions differ on whether a witness can object to being televised, or whether a party (particularly a defendant in a criminal matter) can do so.

Second, whether the jury should be televised. Most American jurisdictions restrict or prohibit coverage of the jury.

Third, should certain types of proceedings be excluded? Many American jurisdictions limit coverage of juvenile matters, matters involving domestic relations, and sexual offences. [Lindsay 419-420; Gardner 500].

Fourth, should televising of courtroom proceedings be subject to a requirement of balanced reporting? Currently, Australian commercial television stations are required by Television Program Standard 15(a) to present news programmes that "present news accurately, fairly and impartially". Readers may draw their own conclusions as to whether this rule (a) has any meaning and (b) has any effect.

Fifth, what technical restrictions should there be on the equipment used in the courtroom? In order to minimise distraction by cameras, lights, personnel and microphones, American state jurisdictions have various rules restricting the equipment used. For example, Florida's Supreme Court requirements include:

* Prohibition of artificial lights;
* Allowing only one camera and one camera technician in court during proceedings (presumably the various networks have an agreement whereby the output is shared);
* Prohibiting the moving of the equipment during the pro ceedings; and
* Requiring the media to use the court's audio equipment, thus avoiding a plethora of microphones and cords.

Conclusion

Despite initial concerns about the effects of television cameras in court, those who have considered the issue overseas seem to have concluded that, on balance the idea is a good one. Although some of the arguments in favour are less than totally persuasive, on the other hand the procedure does not appear likely to destroy our legal system.

At present proceedings are frequently covered second-hand by enthusiastic but often inaccurate reporters from the media. Parties, witnesses and counsel in a newsworthy case run the gauntlet of reporters and cameras on the court steps. It is hard to see how the actual intrusion of unobtrusively operated cameras in the actual court could effect much of a change for the worse.

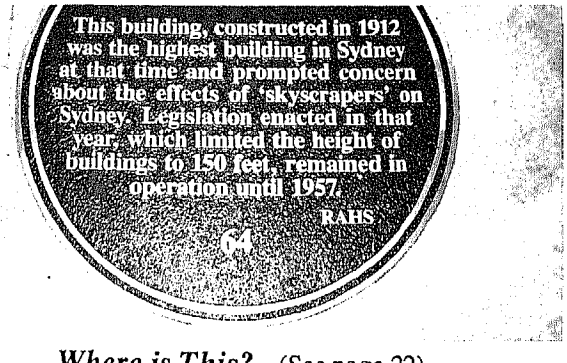
Perhaps a sympathetic view will be taken in Australia, leaving for consideration the real issue: whether it is sufficient basis for an objection to a question in cross-examination that the camera is favouring the opposing counsel's good side.

NOTE: In order to make this piece as readable as the writer's limited ability will permit, references have been kept to a minimum. Readers are referred for further detail on this topic to the sources listed. *Bar News* would like to thank Commissioner Temby and media officer Roberta Parker of the ICAC and Mr. Malcolm Kerr MP, Chairman of the joint Parliamentary Committee on the ICAC and Mr. David Blunt, Project Officer of that Committee, for their assistance. ❑

Judicial Comity?

A Californian Court had to decide whether the appellants were properly convicted of possessing obscene films with an intent to distribute them. The majority of the judges reversed the conviction of the appellants. Associate Justice Hanson dissented. In response to his dissent, Associate Justice Thompson, with whom Judge Lillie agreed, said that they felt 'compelled by the nature of the attack in the dissenting opinion to spell out a response'. They did so, in seven numbered propositions: '1. Some answer is required to the dissent's charge. 2. Certainly we do not endorse "victimless crime". 3. How that question is involved escapes us. 4. Moreover, the constitutional issue is significant. 5. Ultimately it must be addressed in light of precedent. 6. Certainly the course of precedent is clear. 7. Knowing that, our result is compelled'. The initial letters of the seven propositions spelt 'Schmuck' and left the reader of the law report in no doubt as to their view of their dissenting colleague. The judgment added a reference to a German dictionary, in case anyone had missed the point. *People v. Arno 153 Cal. Rptr. 624, 628 n.2 (1979); see Judges, David Pannick, OUP 1987.* ❑

How Well Do You Know Sydney?



Where is This? (See page 22)