

BLAW10002
Free
Speech and
Media Law

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Reporting the Courts

Contempt of Court (p.128 - 129)

- **Contempt** is words or actions which **interfere with the proper administration of justice** or constitute **disregard for the authority of the court**
- Does not just apply to journalists
- Balancing exercise between:
 - **Freedom of expression**
 - Public's right to be **informed about legal/political processes**
 - Journalist's interests in protecting **confidentiality**
 - Effective **administration of justice**

Historical Contempt

- Original purpose was to establish and **maintain the authority of the court by punishing those whose actions were disrespectful**
 - Party failing to appear before the court (12th century)
 - Direct physical or verbal threats to the authority of the court (Middle Ages)
 - Assaulting clerks, jurors, witnesses or opposing parties
 - Writing letters deriding judges
- Historical developments and changing social developments have introduced new considerations
 - e.g. rise of media publications

Types of Contempt

- Sub judice contempt (see below)
- Scandalising the court (see below)
- Revealing the deliberations of juries
- Contempt in the face of court - improper behaviour during a hearing
- Disobedience contempt - failure to comply with a court order to undertaking given to a court

Distinguishing features of Contempt

- **A special summary mode of trial**
 - When contempt occurs, judge has power to decide punishment
 - **Judge's role can be complex** as they are acting as a:
 - Judge
 - Victim if the contempt is directed at them
 - Prosecutor by bringing about charges for contempt
 - Witness in attesting the contempt
 - Jury in deciding penalty
- **Unlimited sentencing power**
 - **No limit of penalty** in Supreme Court or above
 - Designed to coerce a person to give information in court
 - Controversial issue as a journalist may be jailed for their actions sometimes because of an attempt to protect someone else or expose wrongdoing
- **Requirements of mens rea**
 - Mens rea = criminal acted with a guilty intention
 - Only intent required for contempt is **intend to publish or broadcast**
 - No need for **intent** to interfere with the administration of justice
 - No excuse that publication was by **mistake** or **reasonable steps were taken to ensure material was not prejudicial**

Sub judice contempt of court (p.130-131)

- **Criminal offence to publish material** which 'has a **tendency to interfere with the administration of justice**' in proceedings 'under a judge'
 - **Only under a judge** when proceedings in court begin
- Applies to both criminal and civil proceedings
- **Balance the competing rights and interests** of those involved in court cases and those reporting
 - Necessary to avoid '**trial by media**' where free speech interfere with the usual safeguards of the legal system
- Ensures no 'poison of the fountain of justice before it begins to flow' (*Parke 1903*)
 - Jury's judgement or witnesses' testimonies not tainted by media
 - Media should not become a second-rate criminal investigative body

When will proceedings be 'under a judge' (sub judice)?

- **Criminal cases:**
 - **Begins:** **arrest or summons** to appear; fact that arrests is 'imminent' is not sufficient
 - **Ends:** **until accused is convicted or acquitted** and the time for lodging an appeal has lapsed
- **Civil cases:**
 - **Begins:** when a writ, statement of claim or other **initiating process** has been issued
 - **Ends:** when **judgement has been delivered** by the court, even if the time for lodging an appeal has not yet lapsed

ABC v O'Neill (2006) 227 CLR 57

- Injunction lodged against ABC against documentary that implied O'Neill killed children
- "It is not for the public benefit that the media should publicly allege a person has committed a crimes of which he or she has been convicted"
- "The responsibility owed to the public with regard to the investigation of crime is entrusted by our society to the police"
- "If there is evidence available that might assist the authorities to investigate, it should be made available to them"

Issues with sub judice contempt

- **Ill-defined** - journalists are unsure of what can be published in particular circumstances
- **Enforcement is infrequent and unpredictable** - tempts journalists to publish as prosecution may be unlikely

Attorney General v Times Newspapers Ltd [1974] AC 273

- Drug made for morning sickness resulted in babies with birth defects, Times wrote a series of articles
- No official action or complaints initially, until Times warned of the imminent publishing of a particularly hard-hitting article
- Drug company obtained an **injunction on the grounds it was sub judice**. Appealed by Times. Injunction remained because:
 - The media should not be allowed to **prejudge** a case
 - **Public interest** - not sufficient enough to allow publication
 - **Justice better served** by postponing journalistic discussion
- International Court later disagreed with judgement, but decision not binding

- Courts and journalists often have very different ideas about what is in the **public interest**
 - Journalism should be approach **without any pre-case judgement**

Publication

- Contemptuous material must be 'published'
- Publish = **making 'it available to the general public or at any rate a section of the public which is likely to comprise those having a connection with the case'**
 - E.g. publication in NSW about VIC case - not considered 'published' as jurors not selected from NSW
 - **Problem: interent communication**
- Media is published each and every day that is available for download is the relevant jurisdiction
- Different publication laws to defamation as for defamation, information is only harmful when received
- **Responsibility for publication = any person involved in publication**
 - Journalist
 - Editor of newspaper
 - Owner of newspaper
 - Anyone that assists in distribution
 - But, ISPs are protected
- Innocent dissemination
 - Some disseminators will be protected if a defence available

When will a publication have the relevant tendency?

- Must be a **'real or clear tendency, as a matter of practical reality to interfere with the administration of justice'** in the particular case
- Courts **only enforce contempt of court in serious cases to ensure freedom of the press**
 - A remote or theoretical possibility is not sufficient
- **Judged objectively** by reference to the **ordinary reasonable recipient**
 - Inherent nature of the publication: words used, sensational or serious form, who is saying it, credibility of who published
 - Circumstances of the publication: to whom it is published, manner of publication
 - Timing of the publication: early in proceedings - fade factor - time to trial from arrest is often long - may not have the relevant tendency
- Interference of publication considered **at the time of publication**, rather than at a later date
 - For example, even if publication stated the accused was guilty and this was the result, it can still be held in contempt.
- Factors taken into account:
 - **Prominence** of the item printed or broadcasted
 - **Images** accompanying the publication
 - **Time lapse** between publication and the trial
 - **Social prominence** of the person making contemptuous statements
 - The extent of **existing pretrial publicity**
 - **Extent** or **area** of publication

Sub judge contempt in the US

- **First Amendment** protecting free speech makes US more lenient
- Sub judge contempt can only be punished if it constitutes a **"clear and present danger"** to the functioning of the court

Specific Examples

1. Who might be prejudiced:

• Judges/Magistrates

- Not considered to be influenced by publications due to being **legally trained**
- Know they need to dismiss prejudicial material and decide based on facts presented in court

• Jury

- Juries said to be particularly **vulnerable**
- Courts say juries are robust and will listen to the judge if they tell them to disregard external publications
- Jurors are usually able to perform this role and decide entirely on the material put before the court
- However there is **inevitably some tipping point where jurors' robust nature cannot stop prejudice**
- Often this line is particularly hard to navigate

• Witnesses

- Journalist going to crime scene and **interviewing potential witnesses may effect evidence is court**
- Witness may give **embellished account** to the media and in the witness box they may be compelled to tell the same story - may not be a true testimony
- Exception when witness is professionally trained - looks at things in a scientific lens and are likely to give an honest account
- Media may still publish if bare facts described by witness

A Current Affair (2003) (p.139-140)

- Program aired **prejudicial witness interviews** on the day a hung jury verdict was returned for murder trial
- Nine Network fined \$80,000, WIN TV QLD fined \$10,000 for airing even though **retrial would occur some months after** jury was discharged
- Still a "real and definite tendency as a matter of practical reality"

• Parties themselves

2. How might a trial be prejudiced:

• Prior convictions

- If jurors know of 10 prior rape convictions and person is facing another rape charge - sufficient prejudice
- Caution around parole or bail when crime was committed - depending on offences same/different whether prejudice or not

The Age (2006) (p.140)

- Newspaper published an accused man's **prior convictions** before trial
- Convictions previously **not in the public domain** and **directly related** to offences currently being tried, therefore likely to prejudice
- The Age fined \$75,000

- **Publication of statement as to guilt/innocence**
 - Especially if published by someone credible be equally prejudicial
 - Statements of guilt or innocence can
- **Criticising or disparaging the accused**
 - Casting the accused in a negative light could influence the jury

Laws (1998) (p.139)

- John Laws, radio presenter said man being tried for murder was “**absolute scum**” and **guilty**
- Convicted on sub judice contempt, fined \$50,000, 2UE station fined \$200,000
- However Judge Meagher said Laws should have been jailed for some months and fined \$250,000 as \$50,000 ‘is about the amount he would spend on a small cocktail party”

- **Creating sympathy for the accused or victim**
 - Sympathy can influence the jury
- **Publishing confessions**
 - Tantamount to publishing a statement of guilt
 - During trial, the confession may not be committed into evidence if confession was made under duress or proper requirements to record confession not met
 - E.g. video of accused showing police the crime scene
- **Publishing photographs of the accused**
 - Identity may be an issue - not formally identified
 - Likely to effect witnesses - displacement effect - witness may have seen image which could cause a false positive identification
 - Witness account may be ruled inadmissible

Adrian Bailey

- Photo published on front page of newspaper upon arrest
- Appealed one rape conviction
 - **acquitted based on displacement effect** due to photo being published
 - claimed victim was influenced by publicity and image in her identification of him
 - media not charged with contempt but did **interfere with judicial process**

Attorney General

- Role used to be as a protector of the courts
 - **Court would bring action for sub judice contempt on behalf of Attorney General**
- Not role is much more political
- **Now courts refer sub judice to DPP** and advise if proceedings should commence
 - **Prosecutions on the decline** (media more willing to publish) **due to limited resources of the DPP**

Defences

• Public interest defence

- Balancing approach: public interest in protecting the administration of justice v other competing public interest/s
- Defendant raises public interest, onus is on the prosecution to prove otherwise
- Appears difficult to establish - very large public interest required

Hinch v Attorney General (Vic) [No 2] (1987) 164 CLR 15 (p.146-160)

- Hinch, in a series of radio broadcasts, commented on allegations regarding a priest
- Made comments day after charges laid - within period for contempt to be relevant
- **Revealed prior convictions** - may effect jury's view
- Hinch believed it was in the **public's interest of safety** to reveal information
- Although prejudice was unintentional, it was believed there was a "substantial risk of serious injustice"
- Judge had to balance considerations in the administration of justice
- Concluded that the **recollection of the broadcast would predispose the jury to arrive at conclusions unfavourable to the accused**

• Fair, accurate and contemporaneous report of judicial proceedings but only material heard in front of the jury

- Bail hearing - can publish material about reasons for bail - prior convictions, whether accused was on bail when crime committed etc.
- Trial with a jury - defence only available if heard before a jury - sometimes jury asked to leave the room - this information cannot be published
- Any report must be contemporaneous if published after

Bread Manufacturers Ltd

- Defamation case existed against Bread Manufacturers Ltd
- Newspaper published article that accused BM of manipulating bread prices, **charged with contempt**
- Contempt dismissed as newspaper **did not intend** to influence the jury, and there was an **overriding public interest** in publishing the article
- Also protected against sub judice contempt as element of the publication was only a **minor part** of the public discussion of a predominant issue

• Prior publication

- Highly prejudicial information - if reproduced from prior publication may be prejudicial at the time - giving renewed prominence has relevant tendency
- Past material published online - information does not have the relevant tendency as jurors would have to search extensively - judges tell jurors not to search
- Court must have faith that jurors do not search archives
- Difficult as jurors are more likely to be digital natives today
- Jurors may try to abide by rules but may receive unsolicited information from family/friends

• Freedom of political communication

• Time lag

Hinch v Attorney General (Vic)

- Judge granted a suppression order for information about Adrian Bailey
- Hinch charged of breaching suppression order
- Charged with sub judice contempt for having information on blog
 - Took material down after contacted
 - Not found guilty due to narrow readership, fade factor as rape trial not for 9 months, other media outlets also published

Defences not available

- A media outlet reporting the **contemptuous content of others**
- **Police or other official sources** provided the sub judice material
- Even if **innocence** rather than guilt is suggested, this can still interfere with the trial
- Other media organisations **already reported** the contemptuous content (but this does effect relevant tendency)
- Pressure of **deadlines** for a story - legal requirements come first
- **Lack of knowledge** - newspapers and electronic media expected to check for themselves
- Sub judice information turns out to be **true**

Journalist's Contempt Mistakes

- Very commonplace to see extensive pretrial reports that err towards sub judice contempt.
- Due to frenzied **media competition**, **pressure** of circulation and sales and **enthusiasm/self-serving attitude** of law enforcement agents
- Brennan J: "Sometimes the holding of a press conference or the issuing of a press release **wears the appearance of corporate advertising** of the work of an agency solving a crime

Selim (2008) (p.140)

- Fairfax published reports that Pan Pharmaceuticals founder Selim had failed to "derail" an imminent retail of criminal charges against him
- Retrial already in progress, but judged **not to be in contempt** as jury had been discharged.

Hamilton Spectator Newspaper (1999) (p.139)

- Newspaper sent junior reporter to cover rape trial, published in detail the submissions that had been made to a judge in the absence of a jury
- Justice Eames: criticised the newspaper's editor and management for **lack of court report training** and **poor checking mechanisms** in place
- Managing director and editor of the newspaper charged \$1000 each, \$12,000 overall fines for other parties. Reporter convicted but discharged without penalty

Mason (p.139)

- Mason confessed to murders, media filmed Mason walking around scene of murder and police issued the media details of his confession - they published
- Some months later, Mason killed himself
- However, 2 newspapers and 4 TV channels **convicted of sub judice contempt**
- **Defences rejected** - Police had a watertight **case and certain conclusion existed**, fade factor as trial would not be for a considerable amount of time
- Court said everyone deserved a full and fair trial
- Coverage so great that it would risk influencing jurors

Burnie Advocate (2008) (p.140)

- Newspaper published two days before trial that the accused was **facing other charges** of wounding, aggravated assault and sexual assault
- Newspaper fined \$5,000 and trial was aborted

The Gangland cases (2008) (p.140)

- On second day of criminal trial, a **graphic was published** that linked the accused to Melbourne's Gangland Wars
- Pressure of time and high copy flow considered - **conflict between deadlines and legal compliance** - deadlines must give way
- The Herald and Weekly Times fined \$10,000, The Age fined \$10,000, The Age Online fined \$2,000

The pedophile case (2001) (p.139)

- Channel 9 broadcast photos of "entwined naked bodies" in a report about pedophile
- Fined \$20,000 for serious contempt as **pictures were not part of the evidence** at the trial

Perth Radio (1999) (p.139)

- 17 y.o. girl charged for violence, *voir dire* (trial within trial) entered to determine whether evidence was admissible
- Radio 6IX **broadcast details of evidence** while *voir dire* was proceeding
- Station fined \$2500 (even though evidence was actually ruled inadmissible)

Blackburn (p.138-139)

- Blackburn, a police officer accused of a series of rapes
- Blackburn was '**walked**' past press after being arrested and questioned, on his way to being charged
- **No presumption of innocence** - media published photographs and footage and assumed guilt. Charges eventually dropped based on alibis.
- **Journalist's ignorance of contempt and defamation laws** - willing to sacrifice reputation of innocent people for a good story

Scandalising Contempt

- Material that is calculated to **undermine public confidence in the judicial process or to lower the authority of a judge or court**
 - Lowers public confidence in the administration of judgement
- Can be committed at any time
- Generally two categories:
 1. **Scurrilous abuse**
 - of judges and the courts
 2. **Allegations of partiality or impropriety**
 - regarding the courts
- recent terrorism case in court of appeal - ministers criticised judges for ideological disposition
 - suggests extraneous influence rather than judges acting judicially