Media Law

Exam notes

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Open justice

The principle of open justice

The principle of open justice is a fundamental tenet of the common law: unless strictly necessary, court proceedings must be conducted in open court.

The principle of open justice is so critical for media lawyers because most of the public are unable to personally attend court. The public therefore rely on the media to provide them with reports of what has taken place in court.

While some take the view that journalists are an indispensable part of open justice (see Lord Denning in *The Road to Justice* below) others debate whether the media only focus on what are regarded as 'newsworthy' cases.

Road to Justice, Lord Denning

'A newspaper reporter is in every court. He sits through the dullest cases in the Court of Appeal and the most trivial cases before the magistrates. He says nothing but writes a lot. He notes all that goes on and makes a fair and accurate report of it. He supplies it for use either in the national press or in the local press according to the public interest it commands'.

'He is, I verily believe, the watchdog of justice. If he is to do his work properly and effectively we must hold fast to the principle that every case must be heard and determined in open court. It must not take place behind locked doors. Every member of the public must be entitled to report in the public press all that he has seen and heard'.

'The reason for this rule is the very salutary influence which publicity has for those who work in the light of it. The judge will be careful to see that the trial is fairly and properly conducted if he realises that any unfairness or impropriety on his part will be noted by those in court and may be reported in the press. He will be more anxious to give a correct decision if he knows that his reasons must justify themselves at the bar of public opinion'.

Corollaries of the principle

Butler and Rodrick identify a number of important corollaries of the principle of open justice:

1. No member of the court may seek anonymity (*Felixstowe Justices ex parte Leigh*);

Felixstowe — 'The role of the journalist and his importance for the public interest in the administration of justice has been commented upon on many occasions. No one nowadays surely can doubt that his presence in court for the purpose of reporting proceedings conducted therein is indispensable. Without him, how is the public to be informed of how justice is being administered in our courts?' (Watkins LJ)

2. Magistrates and judges must pronounce their decisions in open court, and publish their reasons (*Wandin Springs v Wagner; Soulemezis v Dudley*);

Mayas — a lower court magistrate ordered that nothing be published that would lead to the identification of a victim of an alleged sexual assault.; defendant company published the victim's name; AG brought proceedings for contempt; main issues were whether the magistrate had the power to make the order, and what level of knowledge was required to bind the defendant company.

On the question of whether the order was valid:

Mahoney JA held that magistrates and other inferior courts have the power to make in camera and non-publication orders.

On the question of the effect of such orders:

Mahoney JA held if the circumstances warranted an order closing the court, the existence of the power to make an in camera order 'would justify the making of a non-publication order'. This is a minority view.

McHugh JA held that the power to bind the world at large is a legislative power, which is not validly exercised by the court.

Types of orders

	In Camera	Concealment	Pseudonym	Non-Publication
Description	Closes the court entirely: only the parties, their legal representatives and the judge (see *McPherson*) Most serious departure from principle of open justice.	Limits the availability or extent of availability of evidence to those in court. A pseudonym order is simple a breed of concealment order.	Prevents the publication of the names of the parties to the action, or the names of witnesses.	Prevents the publication of what took place in court (see *Scott*).
Requirements	• Must be 'necessary' in the interests of the proper administration of justice (*Mayas*, Mahoney JA). • Must be the only way to secure the proper administration of justice; if alternative mechanisms are available, an in camera order cannot be made.	• Must be 'necessary' in the interests of the proper administration of justice (*Local Court*)	• May be made to protect an informer (*Cain v Glass*; *Police Tribunal*). • May be made in blackmail cases (*R v Socialist Worker Printers*). • May be made in cases involving national security (*A v Hayden*). • May also be made where the 'very openness of court proceedings would destroy the attainment of justice in the particular case … cases generally … or would derogate from even more urgent considerations of public interest' (*Local Court*, Kirby P (dissent)). • In Victoria, see *ABC v D1* below.	• May be made 'for the purpose of making effective the exclusion of the public' (*Mayas*, Mahoney JA) • May be made to protect an informer (*Cain v Glass*; *Police Tribunal*) • May be made in blackmail cases (*R v Socialist Worker Printers*). • May be made in interest of national security (*Mayas*, Mahoney JA).
Power (Superior Ct)	Yes: inherent jurisdiction.	Yes: inherent jurisdiction.	Yes: inherent jurisdiction.	Yes: inherent jurisdiction.

General contempt of court

Overview

Contempt of court is a well-established part of the common law. The preservation of the integrity of, and public confidence in, the administration of justice has been a long-standing concern of the common law.

Contempt of court is concerned with conduct which interferes with the administration of justice. Interference may be to particular proceedings to to justice more generally. Contempt is the result of a balance between interests in the proper administration of justice and the interest in freedom of expression.

Dunbabin — Dunbabin was convicted for publishing what was regarded as a contemptuous article about recent decision of the High Court. Rich J held that the article was calculated to damage public confidence in the Court.

Munday — Munday alleged that the trial judge was racist after he was convicted of an offence in relation to a protest against Apartheid. Court held that Munday's statement was not an allegation of bias, but amounted to contempt.

There are many different types of contempt of court, but the three most likely to be committed by members of media organisations are: (1) contempt by publication; (2) disobedience contempt; and (3) sub judice contempt.

Courts protected by contempt

All courts are protected by contempt of court law, but only superior courts of record have jurisdiction to punish for contempts that are committed *outside* the courtroom. The power to punish for contempt is part of the inherent jurisdiction of a superior court of record.

Bodies that are *not* courts of record (such as the Administrative Appeals Tribunal) *may* punish for contempts that take place *within* the court ('insult a member in the course of proceedings'), but are unable to punish for contempts *outside* the court. This is typically the result of a statutory provision.

Inferior courts of record are protected under a superior court of record's supervisory jurisdiction.

Bodies that have the 'form and structure' of conducing judicial proceedings *may* be protected by contempt of court law (*Civil Aviation*).

Civil Aviation — Kirby P held that the law of contempt would protect a coronial inquest, even though it was not strictly a judicial proceeding because of '*the form and structure of the proceedings and their affinity to the general judicial system*'. Kirby P's focus on 'form and structure' means that the principles in this case may not be applied to all other inquisitorial bodies.

Sub judice contempt

Overview

Sub judice contempt serves as a tool to prevent the media and publishers from threatening proceedings that are on foot.

The test for sub judice contempt is whether a publication has the tendency to interfere with the administration of justice. It does not require that the publication *actually* interfere with the administration of justice.

Ex parte Bread Manufacturers — Jordan CJ held: 'It is a well established general rule that **any publication which has a tendency to interfere with the administration of justice by preventing the fair trial of any proceeding in a Court of justice is a contempt of court**, and that if it is shown beyond reasonable doubt that such interference was either intended or likely, this Court will exercise its jurisdiction to punish summarily the criminal offence which is constituted by the contempt.

Elements

Sub judice contempt requires three elements: **(1) the (*intentional*) publication of material**; **(2) while proceedings are 'sub judice'**; **(3) that have a tendency to interfere with the administration of justice *in those proceedings***.

There is no requirement that the accused *intends* to interfere with the administration of justice. Similarly, the accused will not avoid liability by denying knowledge that proceedings were 'sub judice'.

1. (Intentional) Publication

Publication requires publication to the general public, or a section of the public that is likely to have a connection with a particular case. For example, if material is published outside the relevant jurisdiction, it will not constitute contempt.

In the context of the internet, material is said to be 'freshly' published each day the material is available online (in contrast to defamation, where material is 'published' each time it is downloaded).

Publication must be intentional: if someone steals information from a person's desk and publishes it, the author did not 'intend' to publish it.

2. Sub judice period

The 'sub judice' period is different in criminal and civil cases. Arrest being imminent is not sufficient.

Liability for defamation

Defamation and reputation

Defamation is the area of civil liability that most impacts the media: it is a well-established area of law, can be readily committed, and sounds in damages at large.

The media are major players in defamation law. In a survey conducted by Kenyon, more than half of the decision decided under the NUDL involved media companies.

It involves the balancing of competing interests: the right to reputation and freedom of expression. Australian defamation law strikes the balance in favour of the protection to reputation, whereas the United States favours the freedom of expression.

What is reputation?

In contrast to the concept of freedom of expression, the notion of 'reputation' has been comparatively unexamined. The most famous definition of reputation was provided by Lord Denning in *Plato Films*:

> *'A man's 'character' it is sometimes said, is what he in fact is, whereas his 'reputation' is what other people think he is'.*

In other words, 'character' pertains to the private life of an individual, as well as notions of dignity and self-esteem. On the other hand, 'reputation' relates to an individual's public image or social standing.

Uniform defamation law

Prior to the development of national uniform legislation, each state and territory operated its own system of defamation law.

- In Victoria, South Australia and Western Australia, the common law applied unaffected by statute.
- In Queensland and Tasmania, defamation law was codified.
- In New South Wales, the common law applied but with significant statutory modification.

In an era of national broadcasters and national newspapers, a regime of fractured defamation law was particularly challenging for media proprietors.

In 2004, the Commonwealth government announced it would pursue its National Uniform Defamation Law (NUDL) for defamation law, and by 2006 the laws came into effect.

Defamation defences

Overview

If the plaintiff makes out the defendant's liability for defamation, the onus shifts to the defendant to make out a possible defence.

Each defence must respond to a specific imputation. An article may contain a number of imputations, all of which must be defended (either all with the same defence, or more likely, a patchwork of different defences) to avoid liability entirely.

Defence	Description	*Defamation Act* (Vic)
Justification	Prove the substantial truth of the publication; meaning the words themselves and their substance. Where publications consist of multiple defamatory stings, a complete defence requires proving each sting substantially true.	s 25
Polly Peck	Prove the substantial truth of a 'common sting', at a higher level of abstraction, from the plaintiff's pleaded meanings.	*N/A*
Lucas-Box	Deny the meaning pleaded by the plaintiff, plead an alternative meaning, and prove the substantial truth of that alternative meaning.	*N/A*
Hore-Lacy	Similar to *Polly Peck*; prove the substantial truth of a 'common sting' that is not substantially different from or more injurious than the pleaded meaning.	*N/A*
Contextual truth	Propose an alternative meaning ('contextual imputation') that is such that, if ultimately proved substantially true, the defamatory imputations complained of by the plaintiff will not harm their reputation; then prove the contextual imputation substantially true.	s 26
Fair comment or honest opinion	Prove that the allegedly defamatory remarks are opinion (as opposed to fact); that the opinion is based on facts that are either stated, referred to, or generally notorious; and prove the substantial truth of those facts.	s 31
Innocent dissemination	Prove that defamatory material was disseminated by those with no control over the *content* of the material.	s 32
Triviality	Prove that the material has 'no real chance' of harming reputation.	s 33
Absolute and qualified privilege	See 'Defamation Privileges' below.	ss 27, 30

Appendix: Open Courts Act

General principle

Open justice is fundamental tenet of the common law: the administration of justice must take place in open court. Since *Scott v Scott*, numerous courts have affirmed this principle (Russell v Russell, Gibbs J; News Digital Media v Mokbell, Warren CJ and Byrne AJA; Hogan v Finch, French CJ; *Police Tribunal*, McHugh JA).

The Open Courts Act captures this principle in s 4 (which establishes a presumption in favour of disclosure) and s 28 (which creates a presumption in favour of hearing proceedings in open court).

At common law, a court is deemed 'open' when members of the public have a right of admission, and that the media are also entitled to communicate to the whole public what that public has a right to hear and see (*Chief Commissioner*, Winneke P, Ormiston and Vincent JJA). Open justice is said to have a number of benefits.

Exceptions

Because the open justice principle is founded on the proper administration of justice, there are times where the court must derogate from the principle in order to achieve the objective of the proper administration of justice. Derogations are limited and strictly confined (*Local Court*, Kirby P).

Common law

At common law, the principle of open justice may be abrogated only where it is necessary in the interests of the administration of justice.

There are three approaches to interpreting 'necessity':

1. **Mahoney JA's 'broad' view**: will there be 'unacceptable circumstances' if the order is not made? (*Local Court*)
2. **Kirby P's 'middle' view**: is an order necessary to secure the attainment of justice in a particular case *or in cases generally*, or to protect urgent considerations of public interest such as national security (*Local Court*)?
3. **McHugh JA's 'narrow' view**: is an order necessary to secure the proper administration of justice *in the instant proceedings*?

Open Courts Act 2013

Under the Act, three different types of orders may be made. The fourth type of order (pseudonym orders) are beyond the scope of the Act.