CONTEMPT OF COURT – THE SUB JUDICE RULE

MR JUSTICE LOCKHART*

As there is a special issue of the University of N.S.W. Law Journal this year on Media and Communications, I thought it would be appropriate to say something about one aspect of the media which is important, namely, what is sometimes called the sub judice rule or, more finely expressed, the rule that contempt is committed by conduct (usually by publication) calculated to impair or prejudice the fair trial of a case that is pending or on appeal. Contempt of court can, however, have its lighter moments. When rising to leave the court in 1877 at the termination of the day's business in the course of a case a man in court threw an egg at the Judge. The missile passed close to His Lordship's head and broke against the wooden panelling behind his seat. Mr Glasse QC was in court at the time. The following interchange thereupon took place between the Judge, the QC and the man, whose name was Cosgrave. The Judge had that morning made a decree against him.

Judge:	What was that?
Glasse:	An egg.
Judge:	Where did it come from?
Glasse:	A hen, I presume.
Judge:	to Cosgrave who had been seized by the usher:
	Did you throw that egg?
Cosgrave:	Yes my Lord.
Judge:	Why did you do it?
Cosgrave:	Because you insulted me in a case this morning.
Judge:	I never insulted anyone in my life.
Glasse:	Your Lordship doesn't propose to argue the question with the man?[1]

In Australia the basic means for controlling prejudicial publications is the law of contempt. For contempt to be established the court must be satisfied that the publication not merely has a tendency to prejudice the trial but has a

*The Hon. Mr Justice Lockhart delivered this address at the 1986 Annual Dinner of the University of New South Wales Law Journal on 28 October 1986.

1 See Sir John Charles Fox, "The Practice in Contempt of Court Cases" (1922) 38 *LQR* 185.

real and substantial tendency to do so. The test is whether the mind of the judge or the jury might be affected and whether the publication is likely or would tend to prejudice a fair trial. The tendency must be judged at the time of the publication and not at the time of trial. Recognition of the importance of a free and unfettered press is acknowledged by the courts in that publication is not a contempt where the risk of prejudice is slight.

The law of contempt does not prevent discussion in the press or on radio or television of matters of public interest merely because they may arise whilst cases are pending. The question is whether the publication tends to prejudice the fair conduct of the proceedings. Examples of acts that may constitute contempt are: comments on the bad character of the accused or on his criminal record; the publication of confessions, of the results of private investigations, of interviews with witnesses or the accused, of photographs of the accused before trial or of matters tending to arouse sympathy with an accused while his trial is pending so that the prosecution's case may be prejudiced.

The present law of contempt in Australia has been criticised on various grounds. The most commonly expressed criticisms are:-

1. it unduly restricts freedom of speech and of the media;
2. its rules are unclear and imprecise; and
3. its procedures are unfair.

There are those in our community who think that the law of contempt should be codified by statute. The Australian Law Reform Commission is currently considering this question. Those considering change will be looking to overseas experience as a guide. It will be helpful therefore if I briefly examine the courses adopted in the United Kingdom and the United States to deal with prejudice to the fair conduct of proceedings arising from publication.

I. UNITED KINGDOM

The Phillimore Committee in its report in 1974 on contempt of court concluded that it was "necessary to preserve the principle of the law of contempt, as a means of preventing or punishing conduct which tends to obstruct, prejudice or abuse the administration of justice". The Committee concluded that substantial reforms were necessary. The United Kingdom Parliament passed the Contempt of Court Act 1981, some seven years after the Phillimore Report. The legislation was precipitated by the judgment of the European Court of Human Rights, the effect of which was to draw attention to the fact that the House of Lords' judgment in the *Sunday Times* case did not perhaps lie easily with the European Convention on Human Rights. The Contempt of Court Act 1981 deals primarily with criminal contempt. It presents a series of piecemeal reforms. The Act went some way to meeting objections to procedural anomalies by providing maximum penalties of imprisonment and extending legal aid to persons subject to contempt proceedings. The Act purports to make two major changes to the sub judice rule. It reformulates the grounds on which material will be held to

be objectionable and defines more precisely the period during which proceedings are sub judice.

A decision of great importance on the United Kingdom Act is *Attorney-General* v. *English*.[2] The consequence of the construction placed upon the Act by the House of Lords is that in the United Kingdom someone may publish material which creates a substantial risk that the course of justice in a proceeding then alive will be seriously impeded or prejudiced, but that publication will not constitute contempt of court if that substantial risk is merely incidental to a discussion in the publication in good faith of public affairs or other matters of general public interest. "Merely incidental to the discussion" was held to mean "no more than an incidental consequence of expounding the discussion's main theme". This judgment of the House of Lords provides some support for the view that the United Kingdom Act places the right of free speech above the right of a person to a fair trial. A newspaper may publish an article about some matter of general importance, namely, the need for stronger police powers to combat growing violence in the community which happens to coincide with the trial of a man in newsworthy circumstances for killing a policeman; or perhaps even an article on the habits and propensities of dingoes coinciding with the trial of Mrs Chamberlain. Neither article must of course name the accused expressly or probably by necessary implication, but it is not difficult to imagine a case where the accused's fair trial may be put seriously in jeopardy. Provided that risk is no more than an incidental consequence of expounding the main theme of the article it seems that there is no contempt in the United Kingdom. I do not criticise the decision in the *English* case. If there is a fault it lies with the United Kingdom Act itself, not with the judgment of the House of Lords. But I suggest that the Australian Government should be slow to introduce a Contempt Act modelled on the United Kingdom Act, both because of its rather unusual form and the fact that it may place the right of free speech above the right of a person to a fair trial.

II. UNITED STATES OF AMERICA

In the United States the law of contempt has been largely abandoned as a means of controlling prejudicial pre-trial publication. In *Bridges* v. *California*,[3] the majority of the Supreme Court held that the power of all Courts, Federal and State, to deal with contempt was limited by the First Amendment asserting rights of freedom of speech and of the press said now to be incorporated in the Fourteenth Amendment. In the United States the primary safeguards against prejudicial pre-trial publications fall broadly into three categories: first, the availability to the defendant of various procedural

2 [1983] AC 116.
3 314 US 252 (1941).

protections at trial; second, limitations on statements made by lawyers, court officers and law enforcement officers; and third, what are called Bench-Bar agreements.

Turning to the first safeguard, the principal measures designed to safeguard the rights of a defendant against pre-trial publicity are:-

1. Change of venue and continuance. Where the court is satisfied that there is a reasonable likelihood that prejudicial news before trial will prevent a fair trial the judge may adjourn the case until the threat abates or transfer it to another jurisdiction where the publicity has not penetrated.
2. Voir dire procedures permit lawyers to challenge potential jurors who hold firm views or who are unable to put impressions or views out of their minds. A limited number of potential jurors may be dismissed without cause on pre-emptory challenge.
3. Sequestration. When a highly prejudicial matter appears likely to come to the attention of the jury the court may order sequestration of the jury, that is their isolation during the period of the trial to ensure that they are not exposed to prejudicial publicity.
4. Waiver of trial by jury. Some jurisdictions permit a defendant to waive a trial by jury.
5. Instructions by the judge. A judge may admonish the jury only to consider evidence adduced at trial in determining guilt or innocence.
6. Control of courtroom. Limitations may be placed upon the number, position and activity of the press in the courtroom and also upon the interaction between the press and those involved in the trial. As to this see *Sheppard* v. *Maxwell*.[4]
7. Pre-trial hearing. In some States of the United States defendants have the right to move that all or part of the preliminary hearing or bail hearing be heard in camera if there is a reasonable possibility that evidence inadmissible at the trial may be introduced at the preliminary hearing and therefore reported in the press, radio or television prejudicing the right of the defendant to a fair trial.
8. New trial and appeals. A court's failure to use procedural protections to prevent a defendant from being prejudiced at trial may constitute a denial of due process and invalidate his conviction. He may move for a new trial or appeal from the conviction.
9. Cautioning of the press. A judge may caution the press against reporting certain matters.

These procedural devices sometimes protect the defendant from pre-trial publicity but they may result in him suffering other disabilities. For example, change of venue may be costly and inconvenient for both the defendant and

4 348 US 333 (1966).

witnesses. Waiver of a jury trial may result in the forfeiture of the right to trial by one's peers.

The second safeguard against adverse pre-trial publicity is a limitation on sources of adverse information about the defendant.

Certain States of the United States have standards regulating the information which may be released to the press by attorneys, court officers and law enforcement officers prior to committal. These standards are enforced either through local Bar Associations' disciplinary procedures, rules of court or internal disciplinary procedures of law enforcement agencies. This approach was based upon research which demonstrated that the overwhelming preponderance of potentially prejudicial material emanated from lawyers, court personnel and law enforcement agencies. Lawyers, court personnel and law enforcement officers are required not to authorise the release of statements concerning:

1. a defendant's prior criminal record;
2. the existence of, or content of, any statement or admission made by him;
3. the result of any tests or examinations (for example, lie detector tests) or the failure of the defendant to submit to such tests or examinations;
4. the testing of the identity or credibility of any witness;
5. any information relating to a plea or plea negotiation; or
6. any opinion as to the defendant's guilt, innocence or the merits of a case.

The rules governing these matters are embodied in rules of some courts and codes of ethics of Bar Associations. Their violation constitutes grounds for judicial and Bar Association reprimand, censure or disbarment. As to the police, in some States there are departmental rules, violation of which is a ground for discipline.

These procedures are attacked by the press in America on the ground that they suppress journalistic sources. It is said that the decision as to what to publish should rest with the press not private individuals. There is substantial criticism in America as to the success of this method of restricting adverse pre-trial publicity.

The third approach to the regulation of pre-trial publicity is based on agreements between the Bench, the Bar, the press, radio and television. This approach is by regulating reporting in the press, radio and television through agreements formulated by joint committees representing those bodies. They are voluntary agreements and place responsibility for adhering to the decisions on the self regulation of the bodies concerned. The committees are ongoing bodies which address themselves to any issues or problems that may arise. At least twenty three States have Bench/Bar Agreements in operation.

Additionally the press, radio and television are urged to carefully consider whether to publish a defendant's prior criminal record. The press is also asked to avoid sensationalism. Court personnel and law enforcement officers should not encourage but should not prevent the photographing of defendants in public places outside the courtroom. Photographs of suspects

may be released provided that a valid law enforcement purpose is being served. So much for the United States approach to the problem.

I have almost gone on too long. Incidentally, I heard the other day that the best way to keep awake during an after dinner speech is to deliver it.

I propose to conclude my comments with some general observations on matters which in my view must be kept firmly in mind when changes are being considered to the law relating to contempt of court:-

1. The preservation of individual liberty is of paramount importance. Everyone has the right to freedom of expression. Everyone has the right to a fair hearing, by courts and tribunals, of any criminal charges against him or, in a civil case, of any matter involving his rights or obligations.
2. Obviously these rights sometimes compete with each other and on occasions collide. It is unfair for the right of freedom of expression to be misused so as to prejudice a person's prospects of obtaining justice before courts or tribunals.
3. The International Covenant on Civil and Political Rights itself provides that the right to freedom of expression mentioned in Article 19 carries with it special duties and responsibilities and may therefore be subject to certain restrictions provided by the law including those necessary for respect of the rights or reputations of others. Article 14 provides that everyone shall in the determination of any judicial proceeding be entitled to a fair trial.
4. If legislation is to be enacted in Australia relating to contempt of court, although the United Kingdom Act of 1981 will of course be considered in the drafting process, care must be exercised before applying its provisions to this country. Also, it would be most unwise for Parliament to convert the present common law of contempt into a series of statutory offences. The administration of justice requires that judges control their courts and are able to deal speedily and fairly with contemptuous conduct whilst the relevant events are fresh in the minds of all.
5. The right of a person to a fair trial is, in my view, inevitably interwoven with the right of courts to conduct their proceedings without unacceptable interference in the performance of their duties. Unfavourable publicity concerning an accused or a trial may not only operate adversely to the accused but place the courts themselves in an invidious position; so may unduly favourable publicity about the accused. Unfavourable and often uninformed publicity may lead members of the community to form views about the accused, his trial and the court contrary to findings or rulings by the court or the verdict of the jury thus bringing the judicial system itself into disrepute. Prejudicial press coverage is limited generally to reporting 'sensational' crime. But these are often the controversial cases which test most acutely the ablity of the judicial system to provide a fair trial before an independent court. They test the fabric of the judicial system by placing the most stress on it.

6. A free press can play a valuable and important role in promoting public respect for the law and its reform. Newspapers, television and radio stations are business organisations seeking to make a profit. The saying of Coke must not be forgotten: "Sometimes, when the public good is pretended, a private benefit is intended".[5] There is no shortage of people including civil liberties organisations, representatives of press, radio and television to stress the importance of the right to freedom of speech. It is right and welcome that this is so but, curiously to my mind, there appear to be fewer and less vocal champions of the right to a fair hearing. I think that lawyers, whether we be judges, barristers or solicitors, by our training and experience, are best able to contribute to discussion on problems relating to the adjustment of the rights of free speech and to a fair trial. We must be vigilant lest the noble intentions of some and the self interest of others triumph and lest the right of a person to a fair trial, the capacity of the judicial system to ensure it and the confidence of the community in its judges is eroded.

Thank you for your patience. I am relieved that you did not feel constrained to do what a disgruntled litigant did early in December 1938 before the English Court of Appeal. Just as the Court was rising the litigant threw tomatoes at the Judges. He was more fortunate than he would have been many years before for, although he was committed to prison, he was released after a relatively short incarceration, in recognition, no doubt, of the approach of Christmas and his failure to secure a direct hit.

5 10 Co Rep. 1426.