

A PREJUDICIAL MEDIA?

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CJ Miller, *Contempt of Court*

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[265] Questions of open justice were in the news in Australia during late 2000 and early 2001, particularly in relation to committal proceedings for those accused of committing multiple murders at Snowtown, South Australia.² They also were topical in England with the upholding of anonymity for the released killers of James Bulger.³ In both those instances, publication of suppressed material on the internet was discussed in the analogue media — and with perhaps an overly dramatic anticipation, the end of contempt law was canvassed.

The general topic of open justice, as a key issue in the law of contempt, is given detailed academic consideration in the third edition of Professor John Miller's *Contempt of Court*. Since the mid-1970s, the book has been a standard reference in England.⁴ And earlier editions have been very well received in Australia.⁵ The third edition has been substantially expanded, in light of increasing English litigation and media interest, as well as the commencement of the *Human Rights Act 1998* and its introduction into English law of the *European Convention on Human Rights*. The new edition continues the work's clear writing and thorough coverage. Its consideration of Australian, New Zealand and Canadian law has increased, even though it was a

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² *Advertiser Newspapers v Bunting* [2000] SASC 457 (Martin J) (19 December 2000).

³ For example, *Venables and Another v News Group Newspapers and Others* [2001] EWHC QB 32 (8 January 2001); and see, for example, Frances Gibb and Richard Ford, 'Bulger Killers Win Promise of Secret Lives', *The Times* (London) 9 January 2001; Editorial, 'A Bad Judgment: Bad for the Bulger killers, worse for a free press', *The Times* (London) 9 January 2001.

⁴ The first edition was published in 1976, and the second in 1989.

⁵ For example, see reviews of the second edition: Michael Chesterman, 'Review of Contempt of Court' (1989) 12 *University of NSW Law Journal* 307; Geoff Gronow, (1990) 64 *Law Institute Journal* (Victoria) 314; R A Sundberg, (1989) 63 *Australian Law Journal* 647.

notable feature of earlier editions.⁶ The work should be a valuable book for any specialist contempt lawyers in these jurisdictions.

[266] I want to consider two issues here, briefly. Both are important for contempt and are given some attention in *Contempt of Court*. The First concerns sub judice contempt. What does law assume about the effects of media coverage on jurors, and how does law respond to these possible effects? And secondly, what does technological change in media services suggest for contempt?

Anglo-Australian law assumes prejudicial publications harm jurors — the supposition is close to a very old fashioned media studies approach. That is, the media's message exists independently of its audience and threatens to corrupt their pure, unmediated state. It is almost as if law fears the jury will be infected by a virus that is difficult to detect and harder to overcome. Miller shows some scepticism for these assumptions in contempt law. He notes case law support exists for idea that juries are 'robust' and can act on the evidence before them (246) and suggests the point has been put succinctly in Scotland by Lord Prosser: 'Juries are healthy bodies. They do not need a germ-free atmosphere'.⁷ Miller, however, appears to support caution in changing the premise that underlies much contempt law. He notes the New Zealand Court of Appeal has acknowledged there is limited empirical information about the media's impact on jurors, while it concluded:

the absence of current empirical data to support a long-standing assumption embedded in public policy is not, in our view, adequate justification for shifting policy ground [to free speech rather than fair trial].⁸

Miller also notes the difficulties that the *Contempt of Court Act 1981* s 8(1) pose for research in the UK, and notes greater possibilities appear to exist in Australia for

⁶ The Australian coverage is generally excellent, although some minor details may have been overlooked; for example, the privilege against journalists revealing their sources under NSW's 'shield laws' is not discussed, in comparison to the general Australian lack of such provisions, while the Australian Law Reform Commission's *Interim Report on Evidence* is noted (187). The final ALRC report led, eventually, to the NSW and Commonwealth *Evidence Acts*. See generally *Evidence Act 1995* (NSW) ss 126A, 126B, 126C, 126D, 126E.

⁷ *Cox and Griffiths* 1998 SC 267, 276.

⁸ *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563, 574–5 (Richardson J).

research about jurors (628–9). Those possibilities have been taken up in current Australian developments, which offer important material for this issue. In 2000, the NSW Law Reform Commission released its Discussion Paper, *Contempt by Publication*.⁹ And early in 2001, the first substantial Australian research into these questions was published.¹⁰ Michael Chesterman, Janet Chan and Shelly Hampton have found conducted qualitative interviews with jury members, lawyers and judges involved in 41 selected recent criminal trials from Sydney and regional NSW. They found the juries have a relatively successful record of resisting publicity, and that discussing evidence to reach a verdict appeared to override any influence on individual jurors from media publications. Now, the final report of the NSW Law Reform Commission may take the matter further.

As to law's response to situations when jurors may have been influenced by prejudicial media publications, Miller offers a very useful analysis of how the approach may change under the *Human Rights Act* and the *European Convention on Human Rights*. That is, law's remedial responses may move to focussing more on jury selection and questioning (286). Miller also explains US (299–301) and Canadian approaches (301–3). The US situation also has been canvassed well by others,¹¹ but Canadian law may deserve greater attention. The Canadian *Charter of Rights and Freedoms*, and its concerns for free speech as well as fair trials, has moved the traditional common law approach away from its favouring of fair trials over speech interests. Although Miller rightly notes the balance has not moved in Australia under the implied freedom of political communication (303–4), the current empirical interest in law about media effects may provide a basis for reconsidering the Australian law, especially in light of North American and possible UK developments.

[267] As this example suggests, Miller gives good consideration to likely trends in UK contempt under growing European influence. But he pays less attention to technological change. As my opening references suggest, it is increasingly common

⁹ NSW Law Reform Commission, *Contempt by Publication*, Discussion Paper 43 (2000).

¹⁰ Michael Chesterman, Janet Chan, Shelly Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (2001). An outline of US research is provided in NSW Law Reform Commission, above n 9, para 2.59–2.63.

for suppressed material to appear online, usually from outside the jurisdiction. The most recent high profile Australian example is probably CrimeNet, a commercial internet site listing individual's criminal records gathered from media reports and some court records. Early in 2000, material on CrimeNet led to a Victorian murder trial being aborted because it held information about the accused that may have unfairly prejudiced jury members.¹² Chesterman, Chan and Hampton's research on 41 recent NSW criminal trials found two where some of the jury accessed prejudicial information from the internet (without lawyers or the trial judge being aware of that).¹³ These sorts of example have prompted some suggestions that contempt law cannot be maintained in a digital communications era. Instead, apocalyptic predictions of all contempt law disappearing may be too strong, or at least too early. But, what would seem very likely is that the application of existing principles will change in an online environment. So Miller may be right to note the issue, without attempting to predict future technological and media developments in detail. For example, he briefly considers the scope of responsibility for sub judice contempt and internet publication, and suggests the defamation defences for ISPs in the *Defamation Act 1996* (UK) s 1 perhaps should be extended to contempt (460–2). And he suggests future changes are likely to cause problems for contempt law:

[I]t is clear that, whatever the technical position is adjudged to be, modern systems of communication will pose formidable problems for maintaining an effective law of contempt. The proliferation of such diverse means of communication will not only give rise to difficult legal issues. More worryingly, it will almost certainly exacerbate the trend whereby many publishers do not understand or accept the values which underpin the law.

This *is* likely to be a key area for development, should there be another edition of this valuable book. Perhaps the 'values which underpin the law' may be re-evaluated in light of both a new understanding of media effects on jurors *and* new media technologies and everyday media reception. Miller's work, however, remains 'an

¹¹ For example, Michael Chesterman, 'OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt with in Australia and America' (1997) 45 *American Journal of Comparative Law* 109.

¹² See, for example, Editorial, 'The Net Fails a Big Test', *The Age* (Melbourne) 28 May 2000.

¹³ Above n 10, xiv.

immensely perceptive, thorough, successful and valuable analysis of contempt law¹⁴
and a major work of traditional legal scholarship in the general field of media law.

¹⁴ Chesterman, above 5, 309, commenting on the second edition.