THE LAW OF CONTEMPT AND THE POLICE

By *R.C. WEBSTER*,* **First Deputy Director of Public Prosecutions**

THE media's intrusion into our daily lives is ever increasing. As one comic put it: 'I mounted a mirror on my TV so I could see my family again!'

And the area in which we see the greatest expansion of activity is that of current affairs and 'human interest' reporting. At the peak of human interest is the reporting of crime.

Whatever our personal attitudes to this development it is a reality that we as people intimately involved in the law enforcement process must accept and learn to live with.

The British Prime Minister Stanley Baldwin may have been exaggerating a mite when he suggested that what the press barons of the day were 'aiming at (was) power without responsibility — the prerogative of the harlot through the ages'.

But there was surely a kernel of truth in what he was suggesting. Unlike the other great pillars of our democratic society — the Supremacy of Parliament and the Rule of Law, Freedom of Expresion in as much as it is realised through the media is part of the private enterprise system (or in the case of the ABC, competes directly with it) and to succeed it must excite interest in the public.

In its survival in the marketplace, it owes no natural loyalty to those whose activities it reports on apart from that which might derive from its need to protect its longer term interests. That is why it is critical that those of us who work in highly responsible but newsworthy areas must exercise great care in our relationships with the media. We must never be its willing dupes, its vehicle for cheap, irresponsible, sensational publicity.

As another great statesman said: 'The men with the muck-rake are often indispensible to the well being of society, but only if they know when to stop raking the muck'.

Because we are the possessors of the information the media so often want we play a role in ensuring they do not rake too far.

The Courts stand at the apex of the institutions which play a part in ensuring that the Rule of Law prevails and they have, through the law of contempt, developed a mechanism for dealing with conduct which is deleterious to the proper performance of their functions and the administration of justice generally.

Conduct

While the area we are here concerned with is that of undue publicity, it is to be observed that the law of contempt generally extends to conduct which is disruptive to court proceedings — contempt in the face of the Court ranging from verbal abuse to assault.

Contempts which fall within what is commonly known as the sub-judice rule must be distinguished from those which interfere with the due course of justice as a continuing process. The latter, which are less frequent, generally arise out of attacks on the competence or impartiality of a judge or a Court in general. An example is the case of **A-G of NSW v. Mundey (1972) 2 NSWLR 887** in which Bill Mundey, secretary of the NSW Builders Labourers Federation, said of the judge who imposed a fine against the union's president and another for damaging the goalposts on the pitch for the visiting South African rugby team: 'It showed that the judge himself was a racist judge...'

And further:

> '... the spontaneous action of workers walking off jobs stopped the racist judge from sending these two men to jail: that's the real position.'

Again the risk of the police being involved in such contempts is limited, though it could occur when public criticism by police of light sentences went beyond fair comment. This could arise where the comment focussed excessively on the sentence handed down in a particular case or on the judge concerned.

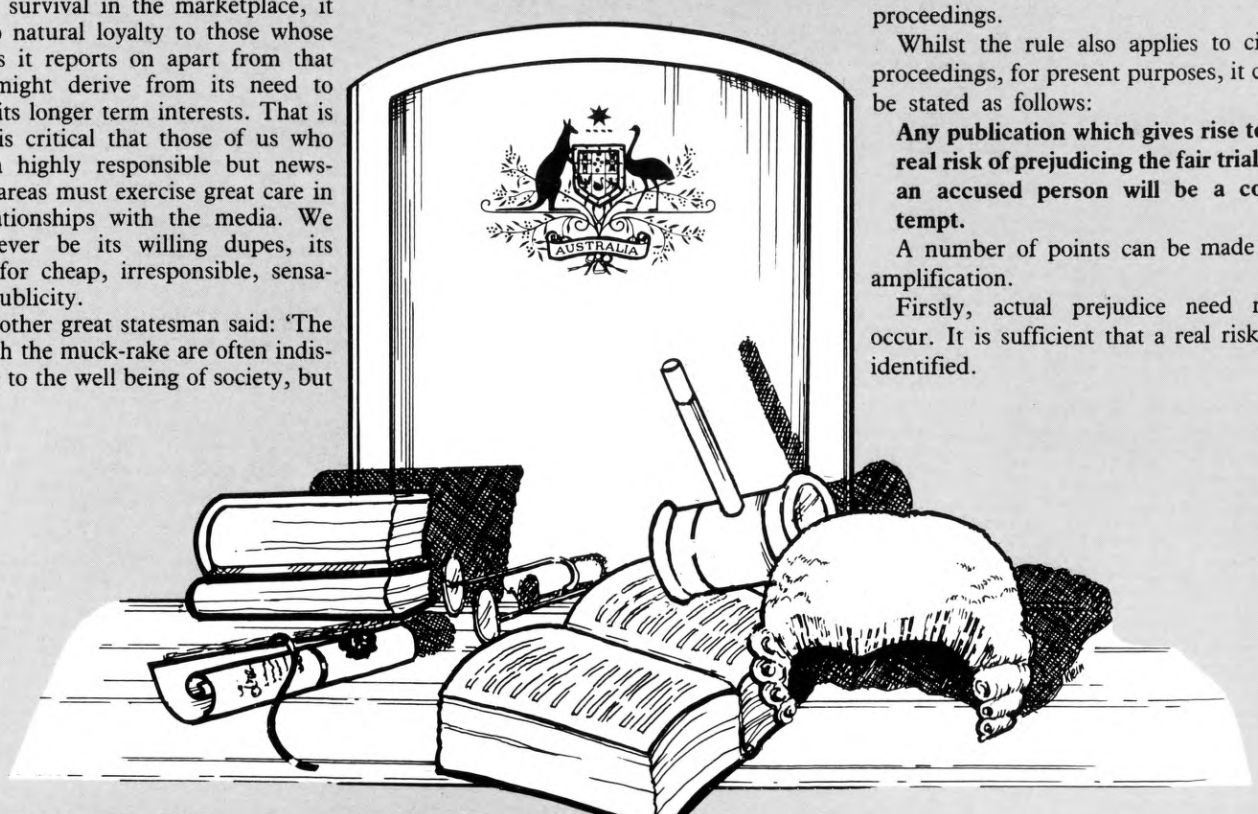
I now turn to the sub judice rule. The term sub-judice means literally 'under judicial consideration'. In the context of the law of contempt, the rule is used when referring to those publications which are prejudicial to particular proceedings.

Whilst the rule also applies to civil proceedings, for present purposes, it can be stated as follows:

Any publication which gives rise to a real risk of prejudicing the fair trial of an accused person will be a contempt.

A number of points can be made in amplification.

Firstly, actual prejudice need not occur. It is sufficient that a real risk is identified.



Secondly, the risk is assessed as at the time of publication. It is thus irrelevant that the accused is subsequently acquitted.

Thirdly, liability is strict so that it is unnecessary to show an intent to prejudice. Of course, a demonstrated intent to prejudice would be regarded far more seriously and this would be reflected in penalty and similarly, where the publication can be regarded as reckless. This can be seen from recent heavy fines handed out to Mr. Neville Wran and Nationwide News in relation to statements asserting the late Mr. Justice Murphy's innocence prior to his retrial.

Fourthly, a publication intended to prejudice a fair trial could constitute a contempt even if it did not give rise to a real risk of prejudice at all.

Fifthly, the Courts may find there is no contempt, even though the publication clearly gave rise to a risk of prejudicing a fair trial, where they considered that there was an overriding public interest in the particular subject matter being made public. The case of the Melbourne radio personality, **Derryn Hinch,** involved this issue. Hinch gave publicity to a Catholic priest awaiting trial for child molestation because, he claimed, the priest remained the custodian of young boys to whom he was a danger and his employers would not act to remove him. The public interest argument has considerable relevance to the position of the police in other contexts.

Sixthly, the effect of the sub-judice rule upon publications is not to prohibit them but to postpone them till the conclusion of the appeal process and any retrial. Of course, upon the conclusion of proceedings the possibility remains that the publication could constitute a contempt in the same manner as the Mundey case.

For the most part police will not have cause to make statements relating to particular cases whilst persons are awaiting committal or trial, let alone during.

Risk period

The risk period is, it seems to me, prior to and shortly after arrest and charging.

Another situation — and one which gives rise to perhaps even greater risk because it is necessarily closer to trial — is during the escape from custody of persons awaiting trial. For it is at these times that the police will feel most in need of calling in aid the powerful weapon of publicity to catch the fugitive and to gain further valuable evidence and information.

That is when, pre-eminently, you and your colleagues will be cast into your dangerous courtship with the media.

I can, however, offer you some words of comfort. The period from the date of commission of the crime to that of arrest and charging is, by definition, the most distant in the criminal process from trial. Thus the argument that by the time of trial any risk of prejudice will have abated is always available and, given the delays in the court system in most States, is likely to succeed.

The sub-judice rule does not come into play until proceedings are pending. In Australia that has been regarded as not arising until:

- a complaint is laid and a summons issued;
- a person is charged; or
- a person has been arrested with a view to his being charged.

The leading case in relation to this is that of **James v. Robinson (1963) 109 C.L.R. 593.** There, prior to arrest, the Perth Sunday Times published several accounts of two killings by a 'wild gunman' in Perth, identified him as one Robinson and described how, after killing the two and threatening others, he had secreted himself in a pine plantation 20 miles away. They related that a 'manhunt' was under way, featured photographs including one of Robinson and were headlined 'TWO MURDERED... (etc.). That they were prejudicial of Robinson's fair trial was, the majority of the High Court considered, clear — a matter which was admitted. However, it was insufficient for a contempt that proceedings were imminent — as they obviously were if Robinson was apprehended. Until this occurred (or, it would seem, process had issued for his apprehension) Robinson was not a party to a criminal proceeding and thus, curiously, a contempt could not yet arise.

In England and Scotland the position is different, but in the view of one judge, Windeyer J., the crime of perverting the course of justice, which does not turn upon such niceties may have been open. Also, at a time when the Courts are showing a willingness to entertain applications for stays of criminal trials on the ground that their continuance would amount to abuse of process, it is quite conceivable that pre-arrest publicity, if sufficiently prejudicial, could result in a trial being stayed either for a period or, if the prejudice was such that a fair trial could not be held in the foreseeable future, forever. In retrospect, the Chamberlain case may have been one such.

It should also be remembered that the publication of material which is clearly wrong about an identifiable suspect who proves to be innocent will leave those responsible open to be sued for libel.

Returning to **James v. Robinson,** it is instructive to look at Windeyer J.'s judgment on the prejudicial aspects of the article. He considered that the publication of the name and photograph would not alone have created the requisite risk of prejudice 'because there was no question Robinson was the assailant'. Nor was the fact that the victims were described as 'murdered' as distinct from 'shot dead'. It was the overall effect of the articles which gave rise to the risk. He ascribed particular significance to the featuring of statements of potential witnesses containing inadmissible material.

In the light of this, I sense that the reporting of the recent killings in the A.C.T. allegedly by a Thai, which included name and photograph, must have been somewhat borderline. In that case, as I understand it, no real issue of identity was likely to arise, but the description of the events was quite vivid and as the assailant was of Thai origin and was known to be wounded, one is driven to ask whether publication of the name and photograph was necessary.

I do not know to what extent the AFP played a role in these disclosures, but the case does offer food for thought, as it is by no means certain, in my view, that the High Court would affirm **James v. Robinson** in an extreme case of prejudicial pre-arrest publicity.

Conclusion

I am confident the Courts will always strive to protect those who act bona fide in the public interest and, indeed, as I have already pointed out, the law of contempt already recognises that at times an overriding public interest can render an otherwise contemptuous publication immune. Where the police have a significant concern for the safety of the public, for example, they should feel confident that the release of detail which can reasonably be regarded as relevant to the apprehension of the fugitive, will be regarded as in the public interest.

They should also feel confident that the Courts will always be mindful of the public's right to be informed and will not too readily conclude that there is a risk of prejudice particularly upon issues which are clearly beyond dispute. They will, however, more readily reach this conclusion where the publication contains matter which would normally be prohibited from disclosure at trial — I speak here of prior convictions, other matters relative to bad character or inadmissible comment form witness.

Of the public's right to be informed, the late Sir Samuel Griffith, speaking for the High Court in 1912 in the case of **Packer v. Peacock (1912) 13 C.L.R. 577,** said:

'In our opinion the public are entitled to entertain a legitimate curiosity as to such matters as the violent or sudden death or disappearance of a citizen, the breaking of a house, the theft of property, or any other crime, and it is, in our opinion, lawful for any person to publish information as to the bare facts relating to such a matter.'

The question remains in every case, however, as to what additional facts can be disclosed and it is at that point that questions of prejudice to fair trial and other, possibly overriding, public interest factors have to be considered.

* *Mr Webster delivered this address to an AFP officer's course as part of their training on media awareness.*