Book Launch – *CONTEMPT*

9 November 2023, Perth

The Hon Robert French AC

This book was launched in Sydney by the Chief Justice of New South Wales, the Honourable Andrew Bell and, although former Prime Minister Paul Keating once observed that if you are not in Sydney you are camping out, this is a Federation. A launch in Sydney does for Sydney and maybe even for Melbourne and Canberra. But you still have to have a launch in Perth if you want your book to be read on the western side of the continent. It is particularly important to make this point in a week in which the High Court has become occupied by four Sydneysiders: Chief Justice Gageler, Justices Gleeson, Jagot and Beech-Jones.

The author of this very considerable text is a professor at the University of Sydney Law School, specialising in media law. He is a co-author of the 13th edition of *Gatley on Libel and Slander* and the 7th edition of *Cases on Torts*. For many years he was the editor of the *Sydney Law Review.* He has a very substantial list of journal publications to his credit. This text, of which he has sole authorship, is an unusually thick one for the publisher, Federation Press, which is to be congratulated for bringing it to the market.

I had no inkling that a major Australian text on the Law of Contempt was under preparation until sometime last year when another major legal publisher approached former Justice Arthur Emmet and me to co-author an Australian version of *Borrie and Lowe on Contempt*. What was contemplated was a very considerable work. However, it was at about this time that a friend in the law mentioned that David Rolph might be doing something on this. I spoke to David Rolph and soon discovered that he had completed a substantial part of a text on the Law of Contempt. He might have said something about being 400 pages into it. As it turns out, his book runs for 831 pages. Arthur Emmett and I quietly vacated the field. David Rolph's work is a major piece of Australian legal scholarship and will be a reference book for students, practitioners and judges for many years to come. It is likely to more than satisfy market demand for the foreseeable future.

The book is a journey through the history, content and public policy considerations attaching to the various forms of contempt of court which have evolved since the judgment of

Lord Hardwicke LC in *Roach v Garvan* in 1742.[1] Lord Hardwicke identified three different kinds of contempt:

1. Scandalising the court.

2. Abusing parties who are concerned in causes in the court.

3. Prejudicing mankind against persons before the cause is heard.

That sounds clear enough, but like so many areas of the law, the taxonomy is not straightforward. There is a distinction between civil and criminal contempt — the former concerned with breaches of orders, injunctions and undertakings; the latter concerned with all other forms of contempt. The boundaries are fuzzy. There is overlap between the categories. David Rolph describes the various attempts at the classification of contempt as 'seeking to impose order on a disparate jurisdiction'.

His excellent introductory chapter delineates the general landscape of the topic, including the definitional difficulties. It also identifies what the author calls 'a unifying characteristic'. He puts it this way:

> the common feature of all forms of contempt of court is that they involve an actual or threatened interference with the administration of justice.

The unifying purpose of the law of contempt of court is the protection of the administration of justice. That is not only a matter of interest to individual litigants. There is a public interest in the proper administration of justice. Professor Rolph says the law of contempt is integral to the rule of law. I would perhaps have used the word 'incidental' rather than 'integral', but that may be a taxonomical quibble. On any view, it is an exceptional jurisdiction and requires care in its exercise. As Rolph observes, the case law is replete with judicial reminders that a court's power to deal with a person for contempt of court should not be exercised lightly, but should rather be exercised sparingly and only with great caution. The contempt jurisdiction of a superior court of record is unlimited and so may be susceptible to abuse and arbitrariness.

An early example of a robust approach to contempt in the face of the court, exemplifies the horrors of the bastardised linguistic hybrid known as 'law French'. A report of the case

---

1 [1742] 2 Atk 469; [1742] ER 684–85

appeared as a marginal note in a 17th century English Law Report. The note explained that a prisoner, convicted of felony before Chief Justice Richardson in the Common Bench of Assizes at Salisbury in the summer of 1631:

> … ject un Brickbat a le dit Justice, que narrowly mist.

As a result:

> Le Prisoner, et son dexter manus ampute et fixe al Gibbet, sur que luy mesme immediatement hange in presence de Court.

For those who have never studied French or law French, the prisoner's right hand was amputated and fixed to the gallows upon which he was immediately hung in the presence of the Court.[2] It is not clear from the quoted passage whether the hanging followed upon his conviction for felony in any event and the amputation of his right hand was a punishment for criminal contempt. Donald Trump, in a civil fraud case in New York, may perhaps be thankful that draconian responses of the kind applied by the Common Bench of Assizes at Salisbury in the 17th century are not applied by the Judge whom he has repeatedly taunted in the course of the hearing at which he has been giving evidence. Perhaps he is trying to elicit a response from the Judge which might support an appellate challenge for apprehended bias. There are many examples of contempt in the face of the court which is discussed in depth in Chapter 7 of the book.

A significant purpose for control of that species of contempt is to ensure that the authority of the court is vindicated and respected. It is a contempt that may be dealt with summarily. It is an incident of the power of the judge to control the proceedings. It has been accepted, however, that it is a power to be used with restraint. It may take a number of forms and they are discussed exhaustively in Chapter 7.

Professor Rolph identifies the source of the power of a superior court of unlimited jurisdiction to deal with contempt as 'the inherent jurisdiction'. As is apparent from his treatment of that topic, this is not so much jurisdiction — which is authority to decide — as the implied power necessary to make the exercise of the court's jurisdiction effective. In statutory courts, it is referred to as an implied incidental power.

---

2 David Franklin, 'Pardon my Law French – terms of art – occasional dispatches from the intersection of language and law' 2d 421 (1998–1999).

Professor Rolph acknowledges the tension between some aspects of the law of contempt of court and freedom of speech. As he observes, while contempt of court has long been recognised as a legitimate restriction on freedom of speech, its principles should not restrict that freedom more than is reasonably necessary to protect against real prejudice to the administration of justice. It should not be used to stifle fair criticism. Indeed, I would, with respect, go further and say that in the ordinary course it should not be used to punish or stifle unfair criticism. What is fair and unfair may be a matter of debate. What is manifestly unfair may answer Lord Macaulay's description of 'that kind of condemnation which is vulgarly said to be no slander'.

The tension between freedom of speech and the proper protection of the authority of the judicial system is explored in Chapter 4 of the book dealing with that form of contempt quaintly titled 'Scandalising the Court'. An explanation of the rationale for that not often invoked form of contempt was set out in the judgment of Dixon J in *R v Dundabin; Ex parte Williams*, where he said:

> It is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon Courts of justice which, if continued, are likely to impair their authority.[3]

For the most part courts must accept that they will be the subject of sometimes abusive criticism, particularly where their decisions may adversely affect the interests of particular groups.

After the *Wik* decision in 1996, the Member for Kalgoorlie, went on national television and described the Justices of the High Court as a bunch of pissants. No thunderbolt issued from the heights of the Canberra building. It may be that the Judges were giving the Member the benefit of the doubt on the possibility that he really meant to say 'puissant'. Those adversely affected by the *Wik* decision, particularly in the pastoral and mining industries, would be unlikely to have thought, on account of the Member's comment, any less of the High Court than they already did.

When the Court made a decision in the case of *Zentai*[4] effectively blocking his extradition to Hungary for an alleged war crime, the Court was described by a Victorian

---

3 (1935) 53 CLR 434, 447.

4 *Minister for Home Affairs of the Commonwealth v Zentai* (2012) 246 CLR 213.

Member of the Commonwealth Parliament as 'blockheads'. It is very easy to characterise that sort of denunciation as unfair, but it would be ludicrous to suggest that it required a remedial or punitive response from the Court. The judicial power is to be exercised with restraint and appropriate focus. As the High Court said in *Dupas v The Queen*[5] there is much to be said for the view that the contempt power is an attribute of the judicial power provided for in Ch III of the *Constitution.* In the *Malaysian Declaration Case* in 2011[6] the Court held that a declaration made by the Minister for Immigration under the *Migration Act 1958* (Cth) that Malaysia was a place to which asylum seekers could be removed pursuant to an agreement between Australia and Malaysia, the Court held that the power was not validly exercised. That was because certain preconditions to the exercise of the power had not been satisfied. The decision was politically embarrassing to the Government of the day. The Prime Minister chastised the Court publicly for missing an opportunity to send a message to people smugglers. In so doing, she seriously misrepresented the judicial function. In the event, the point was made repeatedly by critics of the Prime Minister's comments and debate was properly joined on their propriety without the need for any response or other form of intervention on the part of the Court.

Contempt principles, as explained in relation to scandalising the Court and perhaps also *sub judice* contempts, are to be read subject to the implied freedom of political communication. There is an interesting discussion about that potential interaction in the introductory chapter to the book. The existence of that implied freedom was first argued on behalf of the *Australian* newspaper in *Nationwide News Pty Ltd v Willis.*[7] It was a case of what could be called 'statutory contempt'. The paper was prosecuted on account of an article critical of the Industrial Relations Commission of Australia. It was prosecuted under a section of the *Industrial Relations Act 1988* (Cth) which provided that a person shall not by writing or speech use words calculated to bring a member of the Industrial Relations Commission or the Commission into 'disrepute'. The High Court held the section invalid. Three of the members of the Court held that it infringed an implied freedom of political communication derived from the text and structure of the *Constitution* relating to representative democracy and the election of parliamentary representatives by the people. The implied freedom was fully established in

---

5 (2010) 241 CLR 247, 243

6 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

7 (1992) 177 CLR 1.

Australian Capital Television Pty Ltd v Commonwealth[8] which invalidated provisions of the *Broadcasting Act* seeking to prohibit political advertising during an election period.

I have made reference to the Introduction to the book and to substantive chapters dealing with contempt in the face of the court and scandalising the court. The other substantive chapters following the Introduction, begin with a discussion of 'The Principle of Open Justice' in Chapter 1. Professor Rolph considers the constitutional dimensions of the principle and looks to the common law and statutory derogations from it. It examines the closing of the court, which is the most significant departure from publicity and explores non-party access to court files as a means of facilitating reporting on court procedures. It considers emerging challenges to the principle of open justice, privacy and public health. It does this in part through the prism of the application of contempt to breaches of various forms of non-disclosure or confidentiality rules or order. The operation of closed courts at common law and pursuant to statute is considered and the issue of access to documents in criminal and civil jurisdictions around Australia. All of these elements are linked to the law of contempt as a mechanism for the enforcement of departures from the open court principle.

Chapter 2 explores the difficult distinction between civil and criminal contempt. The difficulty of the distinction was acknowledged by four Justices of the High Court in their joint judgment in *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* where their Honours said:

> that very great difficulty has been experienced in maintaining the distinction between civil and criminal contempts and, in particular, in elaborating a precise and certain criterion which divides one class of contempt from the other.[9]

In the same case, the principal theoretical basis for the distinction proposed by their Honours was that disobedience to process and the orders of the court in civil proceedings was a civil wrong — a matter between parties to litigation. The wider concept of impeding the administration of justice encompassed public wrongs. A second basis for the distinction was said to be that 'the main purpose of sanctions for disobedience in civil proceedings is coercive

---

8 (1992) 177 CLR 106.

9 Rolph, 137 citing *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 108 [20] (Gibbs CJ, Mason, Wilson and Deane JJ).

rather than punitive'.[10] There have been criticisms of the distinction and anomalies identified. These are discussed in Chapter 2.

Chapter 3 deals with the topic of 'Sub Judice Contempt' which is a topic of increasing significance in today's age of digital media. The author describes *sub judice* contempt as a form of contempt by publication. The principles which govern *sub judice* contempts seek to balance on the one hand the protection of the administration of justice, in particular, a party's right to a fair trial and, on the other hand, freedom of speech and freedom of the press. This chapter also deals with the impact of *sub judice* contempt upon juries. *Sub judice* contempt as a species of contempt goes back a long way. It has not always resulted in a punitive judicial response. In 1770, Lord Mansfield in *R v Wilkes*[11] pushed back against media clamour for a conviction in the case. He said:

> [a]udacious addresses in print dictate to us, from those they call the people, the judgment to be given now, and afterwards upon the conviction.

He announced to 'the whole world' that all such attempts are in vain. He said:

> The Constitution does not allow reasons of state to influence our judgments. God forbid it should! We must not regard political consequences how formidable so ever they might be: if rebellion was the certain consequence, we are bound to say 'fiat justitia, ruat caelum.'[12]

Mansfield did not waste his time seeking out the perpetrators of the media outcry, he merely reasserted the fundamental principle of the rule of law. This is a restrained approach which courts, certainly courts consisting of judges sitting alone, tend to follow. Different questions may arise where juries are involved. The distinction between *sub judice* contempt in relation to proceedings heard by a judge or judges on the one hand, and proceedings involving juries on the other is discussed with nicety in this chapter.

The leading authority on the topic discussed by Professor Rolph was the judgment of Jordan CJ in *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd*:

> 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,

10 *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, [15]
11 (1770) 98 ER 327.
12 (1770) 98 ER 327, 347.

> this Court will exercise its jurisdiction to punish summarily the criminal offence which is constituted by the contempt …[13]

A robust court may simply metaphorically flip the bird to media commentary about pending proceedings. That was Lord Mansfield's approach.

The chapter on *sub judice* contempt offers a close examination of the principle and the relevant case law in an area of contemporary concern, having regard not only to crusading commentators in mainstream media, but more importantly perhaps in the difficult to control world of social media.

Chapter 4, 'Scandalising the Court', has already been mentioned. Again this is a form of contempt by publication and is a form of criminal contempt. It does not have to relate to a particular proceeding. Its origins are said to be obscure. The author observes that from the middle of the 18th century, the history of this type of contempt is one of fitful invocation, rather than continuous usage.

Chapter 5 deals with the 'Disclosure of Jury Deliberations'. The author observes that the common law position as to the secrecy of jury deliberations is grounded in public policy. That facilitates full and candid discussion within the jury room. Courts have been concerned to ensure that jurors are not harassed for their verdicts. Quite apart from the common law, there are specific statutory offences directed at disclosure of deliberations. Chapter 5 analyses the treatment of disclosure of jury deliberations as a form of common law contempt and considers specific statutory offences which have been introduced in Australia to address disclosure of the identity of jurors and the disclosure of publication and solicitation of jury deliberations.

Chapter 6 concerns 'Interference with and by Persons Involved in the Administration of Justice'. The author observes that the imposition of liability for this form of contempt of court is informed by a unifying principle identified by Bowen LJ in *Re Johnson*[14] where he said:

> The principle is that those who have duties to discharge in a Court of justice are protected by the law, and shielded on their way to the discharge of their duties, while discharging them, and on their return therefrom, in order that such persons may safely have resort to courts of justice.[15]

---

13 (1937) SR(NSW) 242, 248-49.
14 (1887) 20 QBD 68.
15 Rolph, 343 citing *Re Johnson* (1887) 20 QBD 68, 74.

One interesting area of contemporary relevance explored in the chapter is the case of jurors conducting internet searches about matters relating to the case they are hearing. This happened recently in the Australian Capital Territory though it does not appear that any penalty was imposed, although the trial had to be aborted. Professor Rolph notes that there is now authority that independent research by a juror outside the courtroom constitutes contempt at common law. He notes there are also statutory offences proscribing that conduct in a number of jurisdictions.

Chapter 7 which deals with 'Contempt in the Face of the Court' has already been mentioned. Chapter 8 deals with refusal by journalists to disclose their sources. This is the most common way in which journalists may be liable for contempt in the face of the court. Professor Rolph observes:

> Given the distinctive policy considerations underpinning this form of liability and the differing approaches taken to it at common law and now under statute in Australia, disclosure of journalists' sources warrants separate treatment.[16]

This is no doubt qualified by the existence of so-called shield laws in various Australian jurisdictions. The statutory privilege created by those laws can be overturned if identification of the source is found to be in the public interest.

Chapter 9 deals with 'Civil Contempt'. Chapter 10 with 'Frustrating or Subverting Court Orders', Chapter 11 with 'Contempt of Particular Bodies', Chapter 12 with 'Suppression and Non-publication Orders', Chapter 13 with 'Procedure' and Chapter 14 with 'Penalties and Relief'.

The reader wishing to consult this substantial work has the benefit of a detailed Table of Contents, which maps, under each heading, the various subheadings dealt with. That is absolutely necessary as each chapter is a very substantial treatment of its topic from a variety of angles.

The entry to the book is graced by a thoughtful Foreword on the part of the newly appointed Chief Justice, Stephen Gageler. He describes this first Australian text dedicated to the law of contempt of court as 'long overdue and extremely welcome'. Professor Rolph, as

---

[16] Rolph, 467.

he points out, has had the courage to forge a path through a legal thicket where many others would fear to tread.

I could echo the well-worn words of Sir Edward McTiernan in a number of judgments in which he said, 'I concur and have nothing to add'. In this case I do have something to add. That is, with great pleasure, to declare this book to be launched in Perth, Western Australia.