BOOK REVIEW

DES BUTLER*

M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of New South Wales 2001) pp i-xxii, 1-239

The recent trial of the man accused of setting the Childers Backpacker Hostel Fire which resulted in the death of several backpackers, once again focused attention on this country's laws relating to pre-trial publicity and sub judice contempt. The accused had been the subject of a manhunt prior to his arrest. During the manhunt several media organisations published photographs of the accused as the man for whom police were searching. Such images were no longer published or broadcast after an arrest was made, at which time the laws of sub judice contempt came into operation. Nevertheless, questions might be raised whether publication of the photographs had any influence on either witnesses or potential jurors involved in the case. Indeed, the publicity that the manhunt generated was a ground relied upon by the defence in seeking a change of venue.

The perennial problem besetting any debate concerning the impact of pre-trial publicity on the conduct of the trial and the effectiveness or otherwise of the sub-judice laws is that rarely if ever is such a debate able to venture beyond mere assertion in the absence of relevant data. This lacuna has now been addressed somewhat by a detailed study of a sample of criminal trials conducted in New South Wales. The results and an analysis are presented in a report entitled *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* by researchers from the Justice Research Centre at the University of New South Wales, led by Professor Michael Chesterman, a figure well known in media law circles.

The report commences by placing the issue of pre-judicial publicity in its proper context in the sense of existing assumptions about the impact of publicity on juries, the ways in which publicity may have an impact, the context in terms of judicial administration in the jurisdiction of the study in terms of restrictions on publicity and remedial measures that are available and the existing research on the impact of media publicity that has been conducted in a range of jurisdictions including Australia, New Zealand, the United States, Canada and the United Kingdom (Chapter 1). This is followed by an explanation of the research methodology adopted during the empirical study including how the trials which were the subject of the study were identified, how they were studied, the extent

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of permission and access granted, how jurors were identified and interviewed and how judges and lawyers were surveyed. The report particularises the research instruments that were used and how issues of ethics and validity were addressed (Chapter 2).

The body of the report then addresses issues such as the extent of jury recall of publicity (Chapter 3), the influence of publicity (Chapter 4), the part played by restrictions on publicity and remedial measures within the trials which were studied (Chapter 5), professional opinions on the effectiveness of publicity and publicity restrictions and remedial measures together with approaches to dealing with generic publicity (Chapter 6) and an examination of jurors' experience of the trial process (Chapter 7). The report then makes a number of detailed concluding observations concerning jury resistance to publicity, the effectiveness of restrictions on publicity and remedial measures, including suggestions for improvement of existing legal doctrine, and suggestions regarding further research that could be undertaken. Full details of instruments used in the study and statistics concerning data collected on juries are also provided. A helpful summary of findings and conclusions appears at the front of the report.

The study resulted in a number of interesting findings. For example, jurors chiefly recall media reports of the commission of an offence but less frequently recall reports of an arrest of the accused or of committal hearings or other pre-trial proceedings. This suggested that there were grounds for believing that counsel and, to a lesser extent, trial judges overestimated the level of recall of jurors. There were, however, three major exceptions where jurors were more likely to recall pre-trial publicity, namely where it related to an accused person who was independently well-known in the community, where it related to offences committed in the area where the jurors lived and where it was not encountered until after the trial began. Further, despite judicial instructions to the contrary, one or more members of a jury were likely to follow newspaper coverage of the trial itself. However, in the trials in the study that were attended by specific publicity very few of the jurors who responded considered that the publicity had influenced them or their fellow jurors. This contrasted with the expectations of defence counsel in particular and of trial judges that the influence would have been much more prevalent.

The report carefully outlines the steps that were taken to ensure that these findings were not merely taken at face value and to ensure the validity of comments from a number of perspectives. In some respects the data in terms of numbers is somewhat small, for example only six non-metropolitan Sydney trials are included in the study, even though it might be expected that differences from metropolitan trials would be evident. Indeed the researchers admit that such a small sample cannot be regarded as representative (see para 159). Such quantitative shortcomings are understandable when viewed in terms of the scope of the funded research. Nevertheless, even on the few occasions when there is a small sample, these are usually balanced by qualitative comments from interested parties, such as trial judges, counsel for the prosecution and/or defence and jurors. For example, when dealing with the effectiveness of remedial measures, the perhaps not surprising result emerges that defence counsel were found to display significantly less confidence in the current situation than the judges or prosecution counsel.

The report concludes that given that high profile trials were selected for study, the proportion in which a verdict was considered likely to have been driven by pre-trial publicity rather than based on the evidence presented was relatively small at 8 percent.

It may be open to interpret such findings as showing a relatively satisfactory level of resistance of juries in New South Wales to publicity (see page xxi). While there would not seem to be grounds for a wholesale dismantling of current legal restrictions on publicity for criminal cases, the report does suggest various improvements that could be made in the law, which are outlined by the authors. Among their recommendations is the suggestion that the sub judice doctrine focus less on the concept of tendency to interfere with the administration of justice and instead seek to address the two separate questions of whether there is sufficient risk of the jury's encountering and recollecting the publication charged, and whether there is sufficient risk that, if it is encountered and recollected it exerts an influence on them (see para 508). The report also suggests that the findings may provide some guidance to a court when considering whether to use one of the available remedial measures. For example, the findings suggested that relatively short delays should be contemplated to dissipate the effect of last minute items of pre-judicial publicity and that there may be justification for a change of venue in cases of serious high-profile offences committed in rural areas (see para 520 and 521).

This is an important study that has been long overdue. It has been conducted in a scientific and thoughtful fashion that challenges the assumptions and suppositions of the past – such as the myth that Australian juries are mere puppets or playthings of the media (see para 542) – with hard data. In turn this data is supported by a qualitative dimension provided by obtaining the thoughts of key players in the system such as trial judges, counsel and jurors. The authors' analysis is comprehensive, well argued and convincing. They are to be commended for a well-structured study which has been careful to avoid mere assertion and which draws its conclusions in considered fashion. It is a study that sets a high benchmark for future research of similar nature. Needless to say it is a work which is deserving of the attention of both practitioners and researchers working in the field.