A Name, A Face: A Contempt?

'Reporters did more than their usual job of reporting the news of the Port Arthur killings,' writes **Robert Pullan.** 'In their saturation coverage they have been therapists to the national psyche.'

In the aftermath of the worst crime by an individual in our history, the journalists were giving us the first thing we needed to recover from the shock: information. The facts were essential to our effort to put the tragedy in context.

The reporters were meeting an urgent community need, a hunger for information. Though he mumbled it indistinctly, I felt relief when I heard Kerry O'Brien finally give the gunman a name on the *7.30 Report* on Monday 29 April, more than 24 hours after the killings.

But at least--a name. Pictures in Tuesday's newspapers gave him a face-- an unusual twist to the coverage of an unprecedented story: print scooped television on the visuals. I felt relieved again: when we hear of an anonymous gunman shooting people sitting at cafe tables, the psyche pushes us to get a picture. It shows us pictures of monsters. The same day, Damian Bugg QC, the Tasmanian Director of Public Prosecutions, warned all media outlets that he would prosecute for contempt any broadcaster or newspaper which published material tending to prejudice the fair trial of Martin Bryant.

He warned about photographs identifying Bryant, and reports about Bryant's mental health.

The NSW DPP, Nicholas Cowdery QC, said on ABC radio on Wednesday morning that he agreed with Bugg '100 percent'. To publish Bryant's photograph, with the headline 'Face of a Killer', as *The Australian* did on Tuesday, was 'reprehensible'. On Friday 3 May, Bugg advised *The Australian*, *The Mercury*, *The Age* and ABC television news by letter that he would proceed against them for contempt. After Supreme Court mention the following week, the proceedings would be adjourned till after Bryant's trial.

To constitute contempt, published material must tend to interfere with a fair trial: the tendency must be 'real and substantial'. Reporting which facts breaks the law? The call varies from case to case. Says former ABC lawyer Bruce Donald: 'these are terribly hard areas of the law.' Everyone, not only Derryn Hinch, knows that publishing prior convictions is contemptuous, but beyond that, what does the law require? Said a Sydney lawyer: 'contempt is what the court says it is.'

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The law is not quite unintelligible, but it is imprecise--so imprecise, said Justice Lionel Murphy, in his famous 1983 High Court dissent in the Norm Gallagher case, that it was 'an oppressive limitation on free speech. No free society should accept such censorship.'

The law is said to 'balance' the public right to know against the right to fair trial. Journalists, trying to comply under deadline pressure with an uncertain law whose application varies from story to story, run the risk of unnecessarily censoring stories or photographs, to readers' cost.

Journalists are entitled to know what we can be prosecuted for when we are deciding what to publish: it's too late when we hear from the DPP.

Judges balancing free speech against fair trial tend to trivialise free speech. When he lifted the injunction suppressing Channel 7's telecast of the *Witness* program involving John Marsden, Justice David Levine found no fault with Marsden's counsel's assertion that the suppression was `a mere programming inconvenience' to Channel 7. The 'chilling effect' of prosecutions is rarely recognised in NSW courts: for much of the NSW bench, 'chilling effects' are an American fantasy.

What impact do broadcasts or newspaper reports have on juries? It is still true that as Elizabeth L. Eisenstein observed in 1983 in The Printing Revolution in Modern Europe, 'despite all the data being obtained from living responsive subjects; despite all the efforts being made by public opinion analysts, pollsters or behavioural scientists; we still know very little about how access to printed materials affects human behaviour. A glance at recent controversies on the desirability of censoring pornography shows how ignorant we are.'

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lack reliable research on how news reports affect juries. Although it has become a tribal myth that the media wrongly convicted Lindy Chamber-

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lain, in NSW it is illegal for jurors to reveal their deliberations to anyone.

In his 1988 research for the Australian Law Reform Commission, Ian Freckelton sought permission from the NSW Attorney General to interview the jurors in one case, on condition that the interviews remain 'entirely confidential'. He interviewed seven jurors; he kept his promise. Freckelton then reviewed the extensive U.S. research. We know more about prejudicing juries in Wisconsin and Missouri than we do about prejudice in NSW.

Governor Gordon Samuel, then a Supreme Court judge, said in 1985 that there was a 'speculative core' about the capacity of ordinary men in legal doctrines. Some thought ordinary people capable of 'almost divine prescience' others thought 'extreme obtuseness' closer to the mark. Said Samuel: 'Assessments of the possible or probable conduct and responses of juries fall within much the same category and are equally speculative.'

Of the suggestion that 'jurors, as ordinary members of the community, have developed defences or analytical filters by which to repel or dilute the remorseless assaults of the media' Samuel said: 'I have no idea whether this is so or not.'

Nobody does.

Could the Port Arthur gunman's identity really be a trial issue? With survivor eyewitnesses? Said an interstate prosecutor, who did not want to be identified: `The identity issue is likely to be pretty much a formality.'

Why is it prejudicial to publish material about Bryant's mental health? We are all speculating about his mental state, about why he did it? We'll keep worrying over it: it's one of our ways of coping. There's nothing the law can, or should, do about that.

If his lawyer raises the defence of insanity--we don't yet know how he'll plead--the jury will have to consider psychiatric evidence about Bryant's

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state of mind. An interstate DPP says the danger is that speculation about Bryant's mental health might lead a jury to a mistaken verdict of insanity instead of guilt. He also thinks Bugg's warning to the media `cautious--overly cautious'--but would not say so publicly.

Was the Launceston Examiner editor, Rod Scott, right to black out Bryant's face from the photograph? He worried about it next day on ABC radio: `We were the only newspaper in Australia that didn't publish a photograph of Bryant.

How do you explain that away? How do you explain it to readers?' The decision depressed the Examiner staff. There has not been a crime like this, with coverage like this, before. Journalists and their lawyers are improvising. But few journalists and fewer lawyers believe the contempt prosecutions are fair dinkum.

'In effect he [the Tasmanian DPP] is wagging his finger at the media, saying 'okay, you've had a pretty good go, but that's far enough' said a Sydney lawyer. Most expect the prosecutions to fold after Bryant's trial.

Can 12 jurors randomly selected from Tasmanians fairly try Martin Bryant? Because of the emotional temperature created by the killings, the unprecedented media coverage and the relatively short time between the crime and the trial (whenever it is), the question is troubling.

But to assume a jury cannot fairly hear, analyse and evaluate evidence about the killings is to despair of jurors' capacity to put aside news reports and render a verdict on the evidence.

Well, yes. But still, can a jury do it?

Would the jury be better able to do it had Bryant's photograph not been published in Tasmania?

Would the prospects of a fair trial

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have been enhanced if the law of contempt were as clear in what it forbids as the law of homicide is?

Would a fair trial be enhanced if potential jurors could be questioned about what they have heard and read about the killings and excused if their answers reveal prejudice?

Journalists, media lawyers and the DPP are together creating what all hope will not be of use: a precedent.❑

Robert Pullan is the author of Guilty Secrets: Free Speech and Defamation in Australia (Pascal Press 1994).