Notes for Media Slot Nine To Noon Wednesday 15 May 2013

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Juries and Social Media

1. Media reported recently that there may be an attempt to stop the Jesse Ryder assault case because of publication of material that may damage the accused's right to fair trial. One of the concerns in cases like this is that information will stay on the internet and juries might get access to it later. This really raises the issue of how to apply the sub judice laws to the internet.
2. So today I thought I would talk about a recent study in Australia that has looked at juries and social media. This was a report carried out for the Victorian Department of Justice and published this year. The researchers there looked at what other studies world-wide have shown about what jurors do with social media, and also at what other Commonwealth countries do to address possible prejudice that might arise. This report is only about social media use, not internet use generally, although it must be said that many of the problems identified apply to the internet but perhaps not in such extreme forms.
3. Open justice is threatened if jurors access information outside of what has been shown to them in court, either before or after they retire to consider their verdict. Using outside material to reach a verdict is doing so on information that neither the prosecution nor the defence have had a chance to consider and address. The public are also short-changed because the information has not been disclosed in public which open justice requires.
4. That is why judges instruct juries not to discuss the case with anyone outside the jury or listen to anyone outside giving them their views of it. The case must be decided only on evidence given in court and after hearing counsels' arguments and the judge's instructions.
5. Traditionally the courts have dealt with prejudicial material by targeting the publisher. They can either punish after publication by using contempt laws, or prevent publication beforehand by using suppression or non-publication orders, or both.
6. The authors of the Victorian report suggest that prosecution for sub judice contempt is less likely to deter social media users, many of whom are not familiar with the laws in any event, and most of whom do not have systems of checking which might exist in a media organisation. So the

suggestion is the law has a less chilling effect on these sorts of publishers.

7. The report also suggests it is more difficult to prosecute social media users, first because the prejudicial effect from social media may be cumulative and not arise from one identifiable article. Second, it is not clear in relation to some social media use when and if publication has occurred, - protected publication to only approved followers and friends is one example given. In the UK, the Law Commission has recommended that this be determined on a case by case basis. I think that is a sensible approach.
8. The Australian report also identifies the usual practical problems arising from online publication, such as identifying anonymous publishers, and identifying who to prosecute where hundreds have passed on information. The question of whether intermediaries such as ISPs should be targeted instead is also raised. That raises all the issues associated with the question of whether ISPs should be liable for defamation online, with the main question there tending to be whether there was knowledge of the offending material. The final problem noted here is that of jurisdictional reach – social media publishers may have no present within the court's jurisdiction.
9. The report does point out that prejudicial material which is blogged, tweeted or posted is not like old-fashioned one-off publications. It does tend to hang around, and so can be tracked easily from that point of view.
10. So the report concludes that on balance, sub judice prosecution is less likely to be effective in these cases.
11. The report then looks at non-publication orders, which target material that has no connection with the court proceedings but which might affect future or current proceedings. These orders can prevent publication, or order take-down of material.
12. The limitations the report identifies for these are that Australian law does not allow what we call orders 'against the world at large.' Therefore, the conclusion is that such orders, which might be seen as appropriate for social media, would likely not be made in Australia.
13. The law is less clear in NZ – I think such orders might be possible here and they have been made and are being enforced in the UK - In the United Kingdom, a privacy injunction against 'all the world' has been maintained for years to prevent the disclosure of the identity and location of the two young men who murdered the toddler James Bulger following their release from prison. That was new law, but the order is still being enforced. In February this year, the UK Attorney General's Office announced that it was instituting contempt of court proceedings

against several people who had allegedly published photographs online showing Thompson or Venables as adults.

14. Second, the report identifies other problems with general publication orders. This is because they are not usually granted unless the parties have been given notice of the material and have failed, or deliberately decided not to take it down. But on the internet, even when material is taken down, it may be cached elsewhere. Orders may also not be made by judges who believe they are unnecessary because jurors obey the instructions given them by judges.
15. So the general conclusion in the report is that the sub judice rule is less useful when applied to social media.
16. What do they say about what juries get up to on social media? Well, they conclude that it is a serious issue that has led to aborted trials. The researchers surveyed 62 judges, magistrates, court administrators and other stakeholders in February this year, who identified it as:

> the single most significant challenge that social media poses to the courts. In 2010, Reuters Legal, using data from the Westlaw online research service, compiled a tally of reported US decisions where judges granted a new trial, denied a request for a new trial, or overturned a verdict, in whole or in part, because of juror actions related to the Internet. They identified at least 90 verdicts between 1999 and 2010 were challenged due to juror Internet misconduct. They counted 21 retrials or overturned verdicts in the 2009-2010 period.[41] The Law Commission identified at least 18 appeals in the UK since 2005 related to juror misconduct during criminal trials, some of which involved Internet access or social media use. The section below is an attempt to classify these types of cases, with examples, according to the degree of potential prejudice they pose to a trial.[42]
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> **3.2 Jurors using social media to communicate with parties to the case** Perhaps the most notorious example of misuse of social media during a trial was the case of *A-G v Fraill*.[43] Joanne Fraill was sentenced to eight months prison for contempt of court by London's High Court in 2011 for exchanging Facebook messages with the accused in a drug trial while she was serving on the jury. Fraill also searched online for information about another defendant while she and the other jurors were still deliberating. These activities were undertaken in contravention of a judicial instruction to avoid using the Internet during the trial. While use of social media by jurors to communicate with parties to a case appears to be rare, it is not unheard of.[44]

17. The researchers conclude it is more common for jurors to divulge details of an ongoing trial, such as the lawyer who did not divulge he was a lawyer and blogged for 45 days about a burglary trial while a juror. Also the juror who tweeted during a trial involving a building product to tell others not to buy the product. Not forgetting the juror who tweeted 'Guilty! He's guilty! I can tell!' during a criminal trial. These are all US examples and although they are interesting, no figures are given to support them disclosing a common problem.

18. Other examples given in the report disclose jurors who made friends during trial commenting about the trial on social media after it has ended, which might prompt appeals. Examples are also cited of jurors using social media to

seek response to or advice about a case – in a recent UK case, before juror deliberation it was found a juror had asked her 'Facebook' friends in a poll for advice. She was dismissed and the trial went on.

19. Discussion between friends on Facebook can apparently be taken less seriously. A US example is the five jurors who friended each other on Facebook, and posted on the case, in breach of instructions from the judge. After being admonished by the judge, one juror posted 'F… the judge' on his page. When asked about this, he commented it was just 'Facebook stuff'. This lack of seriousness has actually caused at least one Australian judge to refuse to relocate a trial because of apparent threatening statements about the accused being posted on Facebook. There is legislation in Australia which is yet to come into force which will regulate the behaviour in these examples.

20. As to searching the internet for material that might be of assistance, called 'trial by Google', this is also acknowledged in the paper as possible, with the result that verdicts can be vacated as unsafe. If a strict approach is taken, it is seen as directly contravening open justice. Sometimes, though, the material is looked at and the verdict is allowed to stand if it is seen as not prejudicing the trial, such as in an Australian case where the judge thought definitions found on the internet did not differ greatly from those stated in court.

21. The paper then looks at what is done to control these risks that it has accepted, without any real empirical rigour being applied. These are:

a. Directions from the judge. Some Australian states have now developed model directions on internet use. These assume the jurors are reliable, mature and trustworthy. The researchers suggest this could be flawed, because trials are complex and confusing. Most studies on this have shown judicial directions have limited effectiveness. Written directions are seen as better than spoken. There is some evidence jurors do not like having their freedom limited. ;

b. More judge-alone trials have been suggested. This undermines the important social function of community participation in justice.

c. Penalising independent juror research: special criminal offences have been created in some states;

d. Prohibiting social media use: the effectiveness of this is unclear as yet and there is reluctance to prosecute jurors, especially as internet use becomes socially habitual.

e. Delaying the trial and changing venue. This is rare, as it is unfair to the state and witnesses, and seems to be less effective in the internet age.

f. Juror hotlines to report misconduct: could lead to ill-feeling.

g. Mixed juries: lay assessors and professionals. Undue influence is feared here.
h. Screening the internet: this could be time-consuming and expensive.
i. Removing juror access: confiscating devices. Does not work without sequestration.
j. Sequestering: Expensive and unpopular. We don't do this anymore.
k. Jury selection: Seen as costly, delay and ineffective, but would allow judge to explain things to the jury.
l. Expanded juror training: a simple training session to reinforce prohibitions on social media use and what the role of the juror is.

22. What do the researchers recommend?
    a. 'Don't research' jury written directions referring specifically to social media;
    b. More research on what directions work best;
    c. Jury training pre-trial with examples of misconduct and consequences (one hour on-line). Supplements judge's directions.

23. The report does not really have any empirical evidence supporting the extent of the problem, though it does have colourful examples of problematic behaviour. However, its recommendations are sensible and would be of assistance in any case.

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