

May 2005

Setting the table doesn't mean the guests will come to dinner: Televised courts in Australia

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This paper will focus on the relationship between the courts and one medium in particular – television. It will provide an overview of the developments and current context of this interface in Australia, while also comparing this to experiences in the United States, Canada and New Zealand. Indeed, in all these countries this relationship and the dialogue associated with it have been under question for some time. These countries have all experienced change in the court/television relationship, particularly during the past decade, however in Australia little has been done to determine how the media feel about issues of access and vision. Thus, the paper also seeks to find answers to the question: does the television media want to advance its coverage of courts, through increased camera access? It provides some insights into this question by presenting preliminary research on how this segment of the media in Australia sees its role in covering the courts and how, in reverse, the courts see the role of televised court proceedings.

It further suggests that the court/media interface might be best considered alongside laws of free speech, which underpin the journalistic culture and practice. Australia remains one of the few common law jurisdictions without explicit constitutional provisions protecting the free speech rights of its citizens and media. This sets it at odds with these three other countries which all have a Bill or Charter of Rights. In the absence of a Bill of Rights in Australia the use of television cameras in the daily coverage of courts has occurred in a markedly different manner to these other countries. I do not seek to argue the case for a Bill of Rights in Australia in this paper -- rather I address this issue in order to establish a context for the relationship between television and the courts.

While discussion of a Bill of Rights is more commonly associated with defamation and protection of reputation than coverage of court, I have taken the unusual step of linking the Bill of Rights with court reportage as it should be seen to equally apply to news coverage within all parts of the democratic process.

Background

In Australia, the inclusion of television cameras in court is still quite unusual. The advances that have been made occurred primarily in the 1990s, spilling into the early part of this decade. In bringing together television cameras and the court system, we often saw an uncomfortable alliance of the old and the new. On the one hand, it is argued, courts still operate according to some 19th century traditions (Stephen in Stepniak, 1998b, appendix 71: 8). On the other hand, television is a relatively new medium, commonplace for less than 50 years in Australia. Technology and tradition have taken their time to find common ground. Gamble and Mohr (in Parker, 1998: 22) note:

The nature of society and or communications have changed so much between the eighteenth and the twentieth centuries that the traditional means of the courts' communications with the public is (now) badly out of step.

They argue that courts, once modelled on a face-to-face model of participation, consistent with Habermas's original public sphere communications model, no longer exist. Rather, society gains its understanding of courts through the mass media: newspapers, radio, television and the most recent addition, the internet. But Parker (1998: 22) explains: "This is not an area which can be left to develop at its own pace in the hope that 'truth' will somehow prevail".

As far back as 1983 Justice Michael Kirby (then of the New South Wales Court of Appeal) said that television would ultimately enter the courtroom (in Ball & Costello, 1996: 9). A decade later, analysts again predicted this move as inevitable (Sydney Morning Herald, 1994). But, apart from a list of isolated televised events, this has not occurred. Early reports on the subject of cameras in court were undertaken by the New South Wales Law Reform Commission in 1984 and the Access to Justice Advisory Committee in 1994. These reports were followed by Daniel Stepniak's *Electronic Media Coverage of Courts*, commissioned by the Federal Court and published in 1998. This report provided a cautiously progressive approach to allowing the broadcast media access into the Federal Court (Stepniak, 1998a). Significantly, Stepniak noted (1998a: 233): "while much has been written about the experiences of

various American jurisdictions...Australian public debate also reveals how little is known about electronic media coverage of Australian court proceedings.

In Australia the televising of courts has tended to be the exception rather than the rule. Australian authorities have remained cautious about moves to open the courts to the broadcast media (NSW Law Reform Commission, 1984; Sackville, 1994; Stepniak, 1998a). The body of literature which addresses this topic, from within Australia, Canada, and the United States, has canvassed the positive and negative effects of cameras (and radio microphones) in court (Cohn & Dow, 1998; Linton, 1993; Linton & Gerace, 1990; Nettheim, 1981; R. Phillips, 1990; Stepniak, 1998a). Some of these points apply less and less as technology, and hence cameras, become more sophisticated.

The risks include:

- Physical disruption brought about by the cameras;
- Distraction by the cameras to participants;
- Interference with the dignity and decorum of the court;
- Generating prejudicial publicity and affecting the administration of justice;
- Invading the privacy of participants;
- Distorting and creating misconceptions about the judicial process

The benefits include:

- The educative value of courtroom proceedings;
- The informative function that the televising provides;
- Allowing viewers to personally observe;
- Providing positive effects on participants;
- Making the legal system accessible to the public.

In addition, the broadcasting of courts is believed to deter deviant behaviour. It has been argued that publicity itself can be a punishment which can be more punitive than the sentence of the court (Braithwaite, 1989; Ericson, Baranek, & Chan, 1989: 87). The contrasting view, however, is that public humiliation does not serve the function of imprisonment (Frankel in Surette, 1998: 94). Indeed, for some, the televising of

courts could represent an opportunity to gain their Warholian “15 minutes of fame”, so the deterrent effect could be reversed as they seek publicity through television exposure. There is a further argument that real or true depictions of courts are seen to balance the public’s misconceptions about courts based on fictitious cases and television dramas (Cohn & Dow, 1998; Stepniak, 1998a). However this argument too can have its pitfalls. Canadian researchers Linton & Gerace (1990) found documentaries are not true to time frame, change order of appearance in court, include omissions, rearrangement and dramatic emphasis. But while documentaries include these elements of selection, omission and drama, it is reasonable to assume they still present a more realistic portrayal of courts than fiction.

Comparisons with the United States, Canada and New Zealand

While much analysis of Australian broadcast media accessing the courts has been done in the light of the American experience, to compare the two countries approaches must be considered alongside their different legal and cultural environments. The Public Information Officer (PIO) of the Victorian Supreme Court notes: “The Australian environment is in significant respects quite different from the American environment, and I believe it would be a mistake to equate the television access here with what some see as excesses to be avoided in the United States” (Innes, 1999a: 17).

One major difference is that Australia, unlike the United States, Canada, the UK, South Africa, Papua New Guinea, and New Zealand, has no Bill of Rights or Charter of Rights that enshrine citizens’ freedoms. The U.S., Canadian and New Zealand experience of televised court proceedings therefore differ from that of Australia because of a Bill of Rights in New Zealand and the United States and a Charter of Rights and Freedoms in Canada which define specific guarantees to freedom of expression and public hearings (Stepniak, 1998a). In these countries the adoption of a Bill or Charter of Rights, as part of their constitution has enshrined the free speech doctrine within their laws. In Australia, such a Bill of Rights has been proposed and debated at length, most recently in the context of changes to national security laws (Lawyers Weekly, 2004). Indeed, the Australian Capital Territory has recently adopted a Bill of Rights, reinvigorating the argument for a national Bill of Rights.

Nevertheless, one has not been adopted, although a decade ago the High Court did accept the defense of an implied right to Freedom of Speech in the Federal Constitution. The High Court argued that political communication could be implied in the Constitution through *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 184, but even this “brief flowering of a theory” (Power, 2000: n.p.) of an implied right to free speech was replaced in the subsequent *Lange* case under which the common law defense of qualified privilege was extended rather than the Constitutional defense.

The lack of an explicit free speech provision has resulted in a conservative approach to media freedoms, and arguably, a more conservative media, which is sometimes characterized by a “chilling effect”. Thus, in Australia, the balance between free speech and fair trial tends to fall toward fair trial and the balance between free speech and protection of reputation leans in favour of reputation. Media lawyer Lesley Power argues that because laws of contempt are inconsistently applied, described as “a bit of a lottery” (2000: n.p.), this reinforces the argument that in the absence of a guarantee of free speech, the media are unsure of their rights.

The American experience

In the 1990s, the issue of televising courts in many countries came under scrutiny in the aftermath of the OJ Simpson criminal trial, widely regarded and often described as “a media circus”. Los Angeles attorney Charles Lindner wrote during the trial:

Television has turned the Simpson trial into a throwback to the Roman Colosseum...a gladiatorial contest surrounded by profiteering charlatans. Television has paraded gossip writers, fortune-tellers, mind readers, fashion critics and, most recently, dog psychiatrists before its audience. Before the trial is over, a dancing bear will undoubtedly cross the screen (in Cohn & Dow, 1998: 4).

Despite ‘Simpson-vision’ replacing soap operas during daytime television, the trial polled badly, with 74 per cent of Americans thinking it was a bad idea to televise trials. This constituted a near complete reversal of a finding 12 years earlier (Cohn &

Dow, 1998: 3). While the case was described as “an aberration” it is nevertheless argued that it turned back the clock in terms of camera acceptance and resulted in calls for more research into the issue (Cohn & Dow, 1998: 12). Lois Heaney of the National Jury Project in the United States argued that studies into televised trials were scientifically incomplete and should be further developed (in Cohn & Dow, 1998: 13).

American history of televising court proceedings dates back to 1917 when the first application for newsreel footage of a trial was refused. In 1925, in Dayton, Tennessee, a judge allowed a trial to be broadcast over radio, creating court-media history. The Lindbergh case, in 1935, in which German immigrant Bruno Hauptmann was charged with the kidnap-murder of the baby son of famous aviator Charles Lindbergh, was covered by still and newsreel photographs and attended by celebrities. Like the Simpson trial, it was to develop a reputation as a “media circus” (Cohn & Dow, 1998). As a result, the American Bar Association and the Judiciary Conference of the USA successfully tightened access to the courts by the broadcast media and by the 1950s only four states had moved toward even limited camera access (Cohn & Dow, 1998: 18).

Also controversial was the trial of *Estes v State of Texas* in 1962. Television and still photographers were allowed access into the trial and the conviction for swindling was appealed and overturned on the grounds that the media coverage had deprived the accused of a fair trial (Cohn & Dow, 1998; Nettheim, 1981; Ramsey, 1993). The proceedings were found to be in violation of the 14th Amendment, which provides for the right to a fair trial. These violations included the effects of cameras on the jury, witnesses, the judge and the defendant (Nettheim, 1981). The five-four decision on appeal in 1965, while in *Estes*' favour, noted that it was “not a blanket constitutional prohibition” and camera access should be reviewed when technological advances permitted (in Cohn & Dow, 1998: 20). Surette (1998) identifies a turnaround by the courts almost 20 years later in the 1981 decision to allow cameras into the case of *Chandler v Florida*. He notes: “Television was now seen as promoting both crime control and due process, and thus was now a positive addition to a proceeding” (Surette, 1998: 99).

While 48 of the American states allow access to some trials, there is no blanket acceptance. Stepniak (1998) divides American states into four tiers: those which allow most substantial coverage (25 states); those states which have restrictions on certain types of cases (8 states); those that allow appellate coverage only (15 states) and those which allow no coverage at all (3 states). In addition, the United States' Federal Courts did move to loosen restrictions for camera access following a history of prohibition in this area (Judicial Council of California appendix 14 in Stepniak, 1998b). However, currently Federal Court rules ban television cameras from courts (Dalglish & Gauthier, 2003).

The New Zealand and Canadian experience

In New Zealand, a three-year pilot program of four courts took place between 1995 and 1998. It involved selected proceedings in four courts: the High Courts of Auckland, Wellington and Christchurch and the District Court in Auckland. A parallel pilot of allowing access for radio and still photography was also undertaken during that period. The rules regulating broadcast media included a stipulation that material should be used for news programs only, should be a minimum two-minutes duration and that a single camera only should be used with fair distribution of coverage to all media outlets (Stepniak, 1998a).

During the pilot period, surveys found that public acceptance of televised court proceedings increased from 25 per cent at the beginning to 39 per cent midway through and toward the end of the period. Stepniak (1998a: 25) notes that "support increases as the public personally experience and become accustomed to electronic media coverage of courts". By mid 1999, televised coverage of courts had become "an everyday thing" (Billington cited in Johnston, 2001). Billington argues that cameras in court add depth to reportage rather than the "relentless superficiality of coverage" (in Johnston, 2001) which comes from camera coverage outside the courtroom rather than from within it.

Televised court proceedings in Canada appear in many ways to be similar to Australia, although to date, more formalised pilots have been undertaken. A two-year

Federal Court experiment from 1995 and 1997 was extended to 1998 (Stepniak, 1998a). In addition, the Provincial Court of Appeal of Nova Scotia ran a two-year pilot program from 1996 that was also extended, until 1999. The two-year pilot provided “virtually trouble free camera coverage” (Stepniak, 1998a: 122). Yet, in Canada the situation with televised courts is not universally trouble-free. Ontario has a statutory ban on televising court proceedings, which followed one particular incident in 1973. In this incident, a television crew tried to film participants in a child custody case as they were leaving the court. The Chief Justice objected to the incident and subsequently recommended a ban on filming in and around the courts (Stepniak, 1998a: 122). This case illustrates that, while there may have been a general move toward camera acceptance in courts, the news media cannot take this for granted and there is no universal acceptance of the move.

In Canada, since 1995, more than 100 Supreme Court cases have been televised by CPAC, a subscription channel which covers courts during parliament’s downtimes of evening, weekends and summer (Stepniak, 1998a). In contrast, in Australia, there is no cable channel which televises either parliament or courts.

The Australian Experience

The OJ Simpson trial provided a basis for reflection for more countries than just the U.S. In Australia, Innes (1999a: 17) argues that “legal ethics would curb many of the excesses which Australian judges recoil from in American cases, such as press conferences on the courtroom steps and in court corridors by lawyers during their cases”. She also notes Australia has in-built controls which represent differences between the two systems. Without the First Amendment to ensure the media’s access, the Australian media will always rely on the permission of the court and this, in itself, is a formidable control (Innes, 1999b). In Australia, access to courts by television cameras is on a case-by-case basis, with applications to the trial judge. Thus, access is entirely subject to this permission. In addition, as noted earlier, Australia’s defamation and contempt laws are more restrictive than the United States. “Under US defamation laws, there is virtually no pressure on either the interviewee or the news program to ensure anything they say is accurate” (Lyon, 1994: 18).

The 1990s saw some significant developments in Australia which were, to a large extent, spearheaded by the newest court in Australia, the Federal Court (established 1976). The Federal Court appears well placed to be steering the move to television access partly because the lack of jury involvement reduces potential complications. This would seem to make this court an ideal testing ground. A similar case has been put to allow broadcast access to the High Court because without witnesses there are less risks or concerns of conflict (Stephens in Stepniak, 1998b).

Between 1993 and 2004 the Federal Court listed in excess of 60 cases in which its proceedings had been recorded (B. Phillips, 2000, 2004). This list includes such key cases such as the *Cubillo Gunner* (or *Stolen Generation*) judgment which was broadcast live via different media (ABC television, radio, the Internet and Sky channel) during the afternoon of 11 August 2000. Prior to this, in April 1998, The “*Docks Dispute*” (or MUA case) broke new ground because it went live to air. At the end of that year Stepniak made his recommendations to the Federal Court:

The option, which this report recommends, does not call for a radical departure from the Court’s current practices. While the incremental approach would continue, the current ad-hoc electronic media coverage would become structured, governed by Court policy and guidelines, and systematically monitored and evaluated (1998a: 223).

This trial approach would bring Australia in line with other countries which had already trialled camera access: Canada, New Zealand and the U.S.

The Australian Federal Court also took other initiatives in the area of court-television access. For example, in the planning phases of the Federal Court’s new building in Melbourne, television engineers from stations 2, 7, 9 and 10 were consulted (B. Phillips, 2000). Phillips concluded that television was considered in the planning though it would be wrong to say that all courtrooms are set up for mainstream broadcasting (2000). Similarly, other jurisdictions have moved toward developments within court buildings and procedures to accommodate cameras. In at least one other new court building, the Magistrates Court in Adelaide, provision has been made for

cameras. The South Australian Chief Magistrate said in 1997 “televised court cases could soon become a reality” (in Stepniak, 1998a: 154).

Stepniak (1998a: 42) noted that another jurisdiction, the Victorian courts, had been at the forefront of reforms and innovations in the field of televised coverage prior to the Federal Court. The most publicised case to be televised from this state was the sentencing of convicted child murderer Nathan John Avent (*R v Nathan John Avent*) in May 1995. Avent appealed his sentence on three grounds, two based on the televising of the sentencing. This case, described as a modest experiment which “nevertheless ruffled feathers” (Ball & Costello, 1996: 9), drew mixed responses from a range of people. The Victorian State premier Jeff Kennet noted in *The Australian*:

Knowing the media, they are only going to take a 30-second grab or a minute grab, so it’s not going to be able to be used to explain the system of the court ...I am worried about where it may all lead (in Ball & Costello, 1996: 9).

An argument in favour of televising the case was put in the *Sydney Morning Herald*’s editorial, praising the move:

Above all ... broadcasting allows greater scrutiny of what judges and lawyers do and so provides an important mechanism for making the justice system more accountable (which was) perhaps the strongest argument of all for continuing in this new direction (in Ball & Costello, 1996: 10).

Notably, during the 1990s there was a range of televised coverage, including documentaries made in several states. The Melbourne Magistrates Court produced a documentary called *Court One – TV on Trial* in 1995. In South Australia a criminal trial was recorded for ABC Radio’s *Law Report* in 1996 and *Today Tonight* broadcast an hour-long documentary called *Tell my kids I’m sorry* in 1997 (in Stepniak, 1998a: 153). There was also coverage of inquiries, commissions, civil proceedings and other documentary-style programs from several Australian jurisdictions. In addition, access to the judiciary has moved ahead in many courts. One report notes (Johnston, 2001: 116): “In one year in South Australia alone, judges, magistrates, the State Coroner and senior court staff gave around 20 radio interviews and several television interviews”.

This represents significant increases in access to all broadcast media. In 2001 the Western Australian Court of Criminal Appeal went live to air with the start of the appeal by John Button against his 1963 conviction for the manslaughter of his girlfriend Rosemary Anderson.

Nevertheless, televised court proceedings in Australia have tended to be the exception rather than the rule, and not all experiences have been positive. In Queensland, courts have opposed broadcasting of proceedings attributed, in part at least, to an incident in 1998 by Channel 9's *A Current Affair*. In this incident, District Court Judge Hall was interviewed about his supposed leniency in sentencing. Judge Hall had publicly invited members of the public to phone him and arrange to observe his sentencing but he subsequently withdrew this offer after what he called an "unscrupulous and unprincipled ambush" by the *Current Affair*'s interviewer (Stepniak, 1998a: 165). He was reported in the *Gold Coast Bulletin* as saying: "I believe that this conduct has set back, possibly forever, any prospect that existed for good relations between the judiciary and the electronic media" (Turner in Stepniak, 1998a: 165).

Cameras in Australia's courts: who wants them?

In the analysis of the Australian courts and televised access, one issue had, for the most part, been ignored: did Australian television media want camera access to the courts? The question had been raised by Linton (1993: 23) who argued that, in contrast to America and Canada, Australian media had not put forward a strong case:

It is in the media's own self-interest that such a right of privilege be attained, and if that institution is not eager to achieve it, there is little chance that other segments of society can be convinced that the effort is important enough to warrant support.

These words were echoed at a conference on the Courts and the Media in 1998 by Justice Teague (the judge who allowed the broadcast of the Avenel sentencing in 1995). He (1999a: 113) noted: "(I)f the right kind of collective action were to be taken, there are potentially major gains for the electronic media". However, he further observed during that conference that no request for television access had been more

than “a polite request”. Justice Teague (1999b: 112) said it was “time the electronic media engaged more with the courts about increasing its access”.

The lack of television cameras in court was highlighted by their presence in parliament which had occurred as a result of unified pressure by the television media and political parties (Steketee, 2000: 6).

Suggestions had thus indicated a reticence, even a reluctance, on the part of the television media to gain camera access, however there was no empirical data to support this. It was thus determined that the television media, and those within the courts, needed to inform this question.

Method

The investigation was part of a broader research project which considered changes to court process and policies in the interface with the media. Media and court personnel across seven Australian jurisdictions, over 28 months, were interviewed to determine their views of camera access. At the end of this time frame, court respondents were all asked an additional question to update the position of television camera access.

Between October 2001 and February 2004, 32 in-depth interviews were conducted across Australia with two groups: a courts group, made up of 12 PIOs and judges and a media group, made up of 20 print and television journalists and television News Directors. Of the media, 13 were from television. While not a sufficient sample to be considered representative, it did nevertheless indicate trends in both groups.

A specific breakdown of respondents is noted in Table 1. The research locations were Melbourne, Adelaide, Perth, Sydney, Brisbane and Canberra.

Table 1
Table of Interviews

	Brisbane	Sydney	Canberra	Melbourne	Perth	Adelaide
Judges	1	-	-	2	1	1
PIOs	-	1	1	2	1	2
News Directors (TV)	1	1	-	2	2	-
TV Reporters	1	5	-	-	-	1
Court Reporters (n' paper)	1	1	1	2	1	1

It was necessary to gain an understanding of a range of practice, policy, philosophical and perspective issues in order to not only establish **what** currently occurs, but **why** it occurs. The research sought to inform the following questions:

1. Had television media pushed for camera access?
2. What was the future of televised court proceedings in Australia?

Indeed, following the American experience it was of interest to determine whether television would become the dominant medium in news and current affairs coverage of courts.

What the research found

The over-riding issue raised by television reporters was the lack of vision available to them in the courts. This was the most immediate response by those working in the television media and the biggest single contributor to **what** issues the television media faced. There was an overwhelming response that without vision court stories were severely limited, could rarely make it to the front of the bulletin, and provided the reporters on the round with a significant level of frustration as they tried to cover their round effectively. One Sydney television reporter explained an example of seeking access to materials and of the frustration in being denied access over and over again:

I remember sending a lengthy submission – this is why it is tiring on an individual basis – to the judge involved to get access to the tapes ... the judge said I would need the consent of the DPP and the police because it is their property once the case is over. So after a lengthy submission to DPP I got back this high camp vitriol ... he employed a publicity officer ... invariably putting up smoke screens so as not having to deal with us at all.

However, more significant in this research, was **why** this issue was a problem. Individually, the television reporters were passionate about their round, wanting greater access to allow for better balance, however there was no sense of any unity of approach. Indeed moves had been made, as noted above, only on “an individual basis” and this lack of unity became a central issue for the lack of access.

Several members of the court group said television, in general, had not pushed its own case and that the process of allowing cameras into courts had stalled, primarily due to the lack of interest by television itself. Two judges who had both allowed cameras into their courts, and been highly in favour of increased camera access, were quite outspoken on this issue. One noted that he believed if greater camera access was to occur “a concerted effort carried out in a constructive way” would be required. He further noted: “The only reason why it hasn’t happened more is because television journalists don’t go about it the right way”. Another judge noted that camera access would require planning and organisation by the TV media.

(We’re) well behind my vision of having camera access every day. The more coverage the better. I don’t know that they (the media) realise what a treasure trove there is in the courts ... they don’t push enough in respect of cameras. Myopic and reactive, they don’t think much beyond the next bulletin.

A third judge said the television media had not pushed hard for camera access, that they had “politely raised issues” but their only interest had been in seeking a “license to film criminal sentencing”.

In general, the PIOs agreed with these sentiments and tended to be critical of the media apathy in this area. One explained the frustrations of trying to explain the situation to the television media:

I'm disappointed how little relatively speaking has happened and I'm very critical of the media for failing to push. I've told them this again and again. If they took a different approach, showed far more interest in civil cases, and developed a situation of trust with judges they'd help themselves enormously. ... The other thing that the media doesn't do and again I say to them you will succeed here, they do not ask publicly for the access and force a judge to justify a refusal.

This sentiment was echoed by another PIO who summed up group feeling:

...we were talking about cameras in courts and the PIOs that were there – and most of us were – agreed that while we were ready to deal with applications for cameras in courts, media weren't pushing it. They're not making applications, not doing it themselves, so why were we going to do it?

She noted how one jurisdiction had forged ahead with media guidelines, for cameras in court, following the New Zealand experience: "We got the table set but nobody came to dinner, so don't talk to us about how nasty we are about cameras in courts because you actually never make a concerted effort". At the conclusion of the two-year data collection period this position had not changed:

Television outlets have no coherent policy or approach. They tend to request camera access on a same-day, off-the-cuff manner. We are certainly on a plateau with the TV experiment. With few exceptions there has been no great effort by the TV industry to push the issue.

Another said there had been no effort on television's part to initiate coverage, except in occasional cases that were generally notorious. However, one PIO was more hopeful that earlier interest and momentum would resume, noting, "two of the current

crop of television reporters are showing greater signs recently of wanting cameras in court”.

Interestingly, some news directors agreed that television media had not pushed enough for access, while being sympathetic to the position of the more proactive judges. The following excerpt offered an important insight:

...we probably haven't pushed as hard as we might. We get caught up in the day to day running of things ... one judge, having been a pioneer himself, he probably feels his media mates have let him down a bit and he's probably right. It takes a lot of time and effort. The issue is still on the table and it keeps getting raised but probably at the high end of the media business we haven't put enough pressure on. Because I think it has been suggested to us that the only way at the moment, apart from continuing to debate this in the committee, is to actually go along and make an application for every case that we think we want to be in.

Question: So it just gets to the point where you become part and parcel of the case?

Answer: That's right. And that's fine from a legal side but we would have to be briefing lawyers every day and that's time consuming.

Question: So that's formal applications that they would expect?

Answer: Yes to the point where we wear them down and it's expensive and it's a very legal way to change things around. Even the big media organisations haven't got the money or the executive effort to put into doing that. But their argument, is that constant water dripping gradually wears away a stone. You finally get to the point where they will agree because they have heard it so many times.

Another news director said his newsroom had pushed, but noted that other networks in his city had not: “We certainly have in this newsroom. We've been very active”. But, he added, there had been no combined effort to push for access. Another noted:

I guess we want the best of both worlds. We like to have access when we want to have it. But I think it is important that we have a dialogue that allows

the judges to understand our problem and us to understand theirs. That is the key to it. And to be fair that has gone on and is going on. It will be a long while before it is over.

One television reporter suggested that the “high end of the newsroom,” that is news directors, would never be the ones to lobby for camera access and that the reporters would have to provide the push:

He has to rely on his operatives to lobby. You will never in practical terms have an executive or a news director with time to persevere in a general sense for courts to be opened up for example. It will never happen and courts can rest easy on that basis.

Television reporters, however were quite damning of the courts’ position. Some put the blame entirely on the courts:

They have pushed enough but they’re not pushing anymore because they know it’s a lost cause. The only people that will get into the courts are the odd person that makes a documentary and they’ve got to jump through 15 hoops of fire and sign their lives away. Day to day news and current affairs has got no hope.

And another said she had given up without really trying “because we know our limitations. We wouldn’t ask for something we know we haven’t got a chance in hell of getting.”

If the debate was reinvigorated, and access to cameras was relaxed, would it be taken up by television? News directors were generally more conservative than reporters about how often they would take up this option. One news director noted: “Sometimes...but resources would be a major reason. Just can’t afford to tie up a crew all day when it might make a 20 second grab. And there are a limited number of cases you would want to do it on”. Another commented: “Sometimes, because obviously in some courts it wouldn’t be suitable, take into account intrusions into grief and privacy (and limit accordingly)”. Another noted that cameras in court would

“would remove the need to have reporters doing pieces to camera which is distracting”.

Reporters were generally enthusiastic about the prospect. One noted: “It’s always a struggle for TV journos to get footage to go with a story. They’d welcome the ability to film in court.” And another said if access were generally eased she would have to pursue it. “Well **we** would because **everyone else** would. It’s the whole competition thing.”

Newspapers’ ownership of the round

However, one judge though said even if television did lobby for camera access, it would have another, major stumbling block to overcome. “I suspect that it would face such stiff opposition from the printed press that it’s not likely to succeed...the printed press now do 99 per cent (of courts). Why should they give up any of their territory?”

Historically, the print media’s “ownership” of the round dates as far back as the 1500s, and was clearly entrenched by the 1800s when the first court reporters were hired. Courts were a staple form of news for newspapers by the 1900s, with a focus of colour and entertainment in the North American press. Traditions have thus been well established in the printed press.

The judge noted that at the time of the *Avent* sentencing in Melbourne, which was televised, newspaper articles were essentially critical, putting forward one-sided views as to why coverage was inappropriate: “And they created such a furore in the end it was designed to minimise the prospect that television would ever get hold of court reporting”. Below is an excerpt from his interview, which explains how newspapers have undermined television in this area.

You understand because I worked so closely with all different kinds of media the print media used to always complain about that the electronic could get away with murder because it was spoken but when it came to contempt of court you could study what the newspapers said and they were much more

likely to be prosecuted. Where as what appeared on television was fleeting and it was rarely that they got prosecuted. Now people that were putting together news used to get furious about those sorts of things. That kind of competition within the media always has to be regarded as a relatively important ingredient...it would take persistence on the part of television journalists to claw any area for themselves and there are not enough cases overall that would warrant doing it. And the limitations that I mentioned of time and the need for visual content mean that probably overall there is not enough in it to make it worth their while unless they just had a passion for it.

The issue of deadlines and competition must also be considered in the print versus television argument and television has immediacy in its favour. Hence, if television covers a story on the evening news, then it has already been reported by the time the next day's newspaper is printed and the newspapers must do more and do it better than television. Thus, we must assume a degree of professional rivalry and this is more likely to increase, rather than decrease, as the print media clings to its traditional rounds in the face of a rapidly expanding range of electronic media.

Why the television media didn't come to dinner...

It appears then that the television media are not, in any real way, driving the issue of camera access. Indeed, the most senior television newsroom personnel are not really interested in the prospect of increased camera access. These decision makers do not see it as an important enough issue on which to spend a great deal of resources. Conversely, it would appear that courts personnel, both PIOs and judges, are pushing the agenda of cameras in courts. Comments like "the courts are a treasure trove of stories" did not come from the media but the courts. Those television reporters who passionately sought increased access to vision were those reporters who, understandably, wanted to enhance their own stories with appropriate vision to bring them to the front of the news bulletin. The news directors, who oversee all rounds and thus have a more dispassionate view of the courts, were not so driven.

It is not surprising that the PIOs were outspoken, as they were most involved with the media in the daily supply of their needs. Three of the judges concurred that the media had not pushed enough to gain access. Indeed, there seemed to be a sense of disappointment, particularly by the two judges who had been proactive in this field. Reasons which were suggested for the lack of push were the media culture of dealing with issues on the same-day basis rather than planning ahead, that the current access was sufficient for the limited grabs needed, and that the “fight” for greater camera access, in terms of funding and resourcing, would not be worth the increased benefits that television would receive.

The PIOs were generally in favour of the media covering civil proceedings rather than criminal trials: here there are no juries and fewer witnesses. There had been success in televising the civil proceedings of *Gutnick* and others, but the media’s general interest in civil cases remained limited. One PIO lamented this because she had tried so often to interest the media in civil trials: “If they took a different approach, showed far more interest in civil cases, and developed a situation of trust with judges they’d help themselves enormously.” However, in general, news directors viewed civil cases as particularly dull. Here, there is a significant divergence in the types of court cases television would choose to cover with cameras and the types of cases the courts would choose to cover using cameras.

The research also showed that with some exceptions, the media tend to be the more passive partner in the relationship with the courts, often generally accepting the status quo. It is not clear why this is the case. Possibly it is due to the perceived dominance of the courts and that the concept of challenging participants within it is too daunting. On a day-to-day basis we must remember that, despite its ownership concentration in Australia, the media is not one homogeneous group (indeed one reporter suggested that the media should not be seen as a “monolithic blob”). Rather, the media is made up of individual reporters navigating their way through their chosen round and news directors, who were once reporters, most of whom go through their professional career trying to **avoid** the law rather than engaging with it let alone facing or confronting it head on.

In the absence of a Bill of Rights, it is argued there is uncertainty about the media's rights to these aspects of the democratic process and, some argue, a degree of timidity in the Australian media results. While Australia's Federal Constitution constrains authority by separating power across the legislative, executive and judiciary, the media receive no such explicit rights.

In contrast, Justice Gleeson notes (Big Ideas, 2003: n.p.) the American Bill of Rights contains:

Constitutionally entrenched guarantees of certain rights that are enforceable in the courts. They limit the law-making power of parliament and control the executive. The Australian Constitution, as a plan of government for a Federal union, is more concerned with pragmatism than with ideology.

However, it would seem that ideology is at the heart of the free speech debate. Journalists are probably the world's best pragmatists, yet fundamental rights must surely stem from ideology. As Konner notes of journalists in America: "Ideals bridge the gap between what is and what should be...If truth is the ideal we seek, then the First Amendment is our Holy Writ" (1992: 7).

Conclusions

The findings clearly showed significant problems still existed for developments in camera coverage in Australian courts. The television media tended to bracket these into two areas: either courts were dull and not worthy of additional resources (news directors); or that access was too difficult and some had tended to give up ever advancing this need (television reporters). The court personnel had a common response: that they had tried to develop this area but the television media had not pushed hard enough to improve the camera access. So while there have been some examples of cameras in court, the findings showed that there was a sense that developments in this area had, most recently, slowed to the point of stalling.

The first of the underlying questions discussed earlier could be easily answered: No, there had been no real push for camera access. The television media had, in no unified

way, pushed for camera access, particularly at the management, or news director level. Since this is the level where policy is determined, enthusiasm on the part of working television journalists was largely frustrated. It was not absolutely clear why such a push had not occurred: suggestions included media apathy, a day-to-day focus rather than planning ahead, the time commitment would be too great, that there was no coherent policy or approach. In addition, it was found that the print media had undermined the television media's moves to increase access.

What of the second question? What was the future of televised court proceedings in Australia? Televised court proceedings in Australia appeared not only to have lost momentum but, perhaps more significantly, PIOs and judges appeared to have become irritated by the lack of television interest or responsiveness. This means that for any future development in this area, the situation might have regressed beyond the early 1990s when the experimental process began. Any ground gained during the past decade may well have been lost. It seems likely that the courts will be less enthusiastic in the future in facilitating this area of media access.

An immediate response might be to lay blame on the television media for not seeking further access to this part of the democratic process, as they have done with parliament. Yet, television's apparent apathy in this context must be questioned alongside broader questions of how the media work in a democracy. Whether one accepts the argument that this can be attributed to a media culture that is permeated by uncertainty, or if it is indeed, simply apathy on the part of the media, it seems there will be no further advances in televised courts in Australia in the immediate future. We should not exclude the possibility that this may be simply an illustration of a broader problem of media activity in an environment that has no constitutional guarantee of free speech.

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