Networked Knowledge Book Reviews

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This review and page set up by Dr Robert N Moles


Review

Graham commences by setting out the stark details of this moral and legal dilemma. On the face of it, an up-and-coming business executive (Henry Keogh) has murdered the woman who loved him (Anna Cheney) just weeks before they were due to be married. He did so by drowning her in the bath at the home they shared together. If that were true, then Keogh would rightly be judged as one of the most wicked people imaginable. An attractive and professional woman, a lawyer, done to death by the one person she loved and trusted. And he did it just because she was ‘inconvenient’ to his other relationships. He even thought he could make some money out of it by cashing in her insurance policies. Could anything be more repulsive?

By the time he has been tried and convicted, we can all shed a tear for the loss and re-affirm our sense of virtue by purchasing newspapers (as we did in those days - 1995) and watching television programs about this ‘treachery’ this ‘vile and wicked deed’. The author of this book knows more about the way the media works than many others in Australia. By the time people began to express concerns about the outcome in this case, Graham had worked for the ABC, Channel 9 and Channel 7 television stations in Australia. He was then the producer of one of the prime-time early evening news and current affair programs in South Australia for Channel 7.

When he agreed to take up the cudgels for the possible wrongful conviction of Henry Keogh he certainly knew it was not going to be an easy option. Most of his viewers would have believed that Keogh was the incarnation of evil and that the legal system by-and-large worked pretty well to protect them from such monsters. As Graham states, his major concern was not just the possible wrongful conviction of Keogh, but the possible systemic failure involved in this tragic case.

Over the years Graham studied the transcripts of many trials (not just Keogh’s) and numerous forensic science reports. He skillfully presented many programs (more than 60 to date) to illustrate the many flaws in the evidence given at the trials. He enlisted the support of many forensic and legal experts from around Australia and overseas. His appreciation that this was not just about Keogh but more about an entire legal system which had lost its way grew in intensity.
At the heart of the problem was a chief forensic pathologist who was not properly qualified to do the job. By the time his errors were being publicly uncovered he was coming towards the end of his career. There is no doubt that the powers that be thought that the best solution was an early retirement and to let sleeping dogs lie. Graham set about rousing them from their slumbers. He worked very closely with all of those who were advocating on behalf of the Keogh case. As an academic lawyer, I was one of them.

Graham explains in great detail how this hand-to-hand battle was fought out, in the courts, in the medical tribunals and – importantly – by him in the media. The feedback from the lawyers and the politicians was intense. He was portrayed as a maverick, a loose cannon, unprincipled and ill-informed. At the head to the management of Channel 7. He was personally prosecuted by the Solicitor-General in the magistrates’ court for a criminal misdemeanor arising from one of his programs. Although he doesn’t mention it in his account of that incident in this book, I was there on the day when the national head of news and current affairs for Channel 7 stood with him at the court.

Throughout those long years, in addition to doing his own thing, Graham had to deal with numerous people who had, for various reasons, decided to champion the cause of Keogh. I and my wife Bibi were there working as academic lawyers alongside other pro-bono lawyers and forensic specialists of many descriptions. There were other volunteers and contributors. For the most part, we were all independent specialists, working for a common cause, but often with significantly differing views about the best way to go about things.

On the other hand, there were the government lawyers, the judges and the politicians. They maintained a united front. The case, to them, was an abomination. We were being insensitive and cruel to the memories and the loved ones of the deceased. We should stop it – go away.

Gradually, as the story unfolded, the balance shifted. More and more was being revealed about the shortcomings in the case and about the system that put him there. The pathologist was not qualified – he had made egregious errors in other cases – many of them, it was revealed. He had also made errors in the Keogh case – more and more it seemed that the evidence that convicted him had been false and misleading. Graham’s programs gradually exposed them case by case.

Yet, at every stage, the various attempts to enlist the legal process to correct the grievous error of the Keogh case were rebuffed by those who should have known better. Graham skillfully sets out the various means by which they each failed in their duties to uphold the rule of law.

The real breakthrough came when the parliament decided, after much lobbying, that the criminal appeal system was at fault. Legislation was passed to create a new right of appeal. A
truly historic change. After nearly 20 years, those who supported Keogh had the opportunity to put their arguments to the court.

At that stage, Graham Archer had directly intervened in the management of the case for the first time in all those years to ensure that a new legal team would be engaged to conduct the appeal. They were stunned to be given a forensic report, produced nearly a decade earlier by the Crown, to say that the forensic evidence did not support a murder conviction. The court had little choice but to allow the appeal and overturn the conviction.

They did what they could to ensure a ‘soft landing’ for the prosecutors, saying that Keogh could be put on trial again for murder – even if it seemed that no murder had occurred. It took nearly another 12 months for them to acknowledge that this was a hopeless mission and they eventually pulled the plug on the new trial.

As a person involved throughout this process I can vouch for the fact that Graham’s book is an authentic account of what had occurred. No doubt if a version had been written by any of the other people who had been involved (including myself) it would have been different. I very much doubt that it would have been better. I am sure we can all give a glowing account of our own contribution to such a struggle – being mindful of what it may have cost us along the way. It is a different thing to give a fair and even-handed account of what had transpired.

On the one hand, this is a ‘warts and all’ account of an untidy but uneven struggle. An unofficial and un-resourced group of people who had a strong desire to tackle an injustice and to build a new sense of respect and commitment to a fractured legal system. On the other hand, there were some who were handsomely rewarded by that system, but who failed to respect and uphold its core values – a respect for the rule of law and a commitment to due process.

There is no doubt that Graham’s report is far from being the final word on this bruising encounter. As he indicates towards the end of his book there are other cases coming forward which will prove to be equally as shocking as those of the Keogh case. The legal system of South Australia will take many more years, perhaps decades, to right the wrongs which it has inflicted upon those who sought and relied upon its protection.

What cannot be doubted is that Graham Archer’s account of the social history of this struggle to date is an important part of the contemporary record. In due course, his contribution as a television presenter, and now as an author, will be upheld as one of the finest contributions to investigative reporting in modern Australia, and indeed internationally. I am not aware of any other comparable case where a journalist has made such an important contribution to the legal
analysis as well as to the public perception of it over so many years.\(^1\) To gain a better appreciation of that contribution, one would (after having read this book) to go to his programs to gain an appreciation of much which is not recorded there. The transcripts and links to many of his programs are available at the Networked Knowledge website.

For example, it is noted by Graham that Dr Manock changed his account of whether the bruises to the leg, said to have been ‘the one indication of murder’ had been inflicted by a right-hand or left-hand grip. The determination of this depended upon their number and distribution.

At the trial, it was said to have been a right-hand grip. At the medical board, some years later, it was said to have been a left-hand grip. In June 2003 Graham had broadcast a program in which he had declared that Dr Manock’s evidence on this point at trial was ‘impossible’. He said, ‘But that too was impossible. A right-hand grip didn’t fit the pattern of bruising.’ He had used computer graphics to illustrate the point. It was only in December of that year that Dr Manock appeared before the Medical Board to declare that if the transcript at trial showed he had said a right-hand grip, that must have been taken down wrong. Perhaps it was Graham’s program showing that it was in fact ‘impossible’ that had influenced this re-think of the evidence. There were many other examples over the years where his painstaking inquiries had been of assistance to the ongoing forensic investigations.

My hope is that his contribution to these inquiries will be studied on journalism and law courses, especially those dealing with the ethics of those two important professions. As one lawyer who has been intimately involved with this case and with Graham Archer over the years, I can confidently state that without his prodigious input, it is unlikely, in my opinion that Keogh’s conviction would ever have been overturned. Whilst the change of law to permit further appeals may be seen at the technical fix to get Keogh’s case back to the courts, the transformation of public perception to the point that something needed to be done, was equally as important.

At the time Keogh was convicted there could be no doubt, as Graham explains, that Keogh was universally reviled. Some years later as I sat in a taxi returning home from the airport, I asked my taxi-driver what he thought of the case. He said it was a shocking case. It had something to do with an expert who was not properly qualified. It was clearly a wrongful conviction and that, he said, was a widely-held view. I knew then that Graham’s programs had an important effect upon the public, if not upon the judiciary and other lawyers.

It is my hope that his experience will rub off on other journalists. They can understand from this experience that their job is not just to reflect public opinion but sometimes to guide it. It

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\(^1\) In this context it is important to note the contribution of Harold Levy in Toronto who made a most important contribution to the discovery of the fatal flaws in the work of disgraced forensic paediatric pathologist Dr Charles Smith.
might be that Graham’s early training as a teacher informed his later work as a journalist. His programs, and now this book, provide important insights into the institutional failures which have occurred in South Australia.

**Some detailed comments on the text**

Bob Moles was born in Belfast … (p109). Whilst I did obtain my law degree in Belfast I was actually born in Norwich in England. I transferred to Northern Ireland in 1969 when sent there by the Norwich Union Insurance Company.

The bomb in the High Street ‘killing and maiming’ innocent bystanders (p 109) No one was actually killed but many were injured. It did have a big impact upon me, especially as I had been within 90 seconds of being killed in the explosion. I had just walked up the stairs where the bomb had been placed. As I often say, if I had stopped to suck the lemon in my gin and tonic at lunch, I would have been the first person to have been killed in this first daylight bombing in Belfast. As Graham states, the experience had a profound effect upon me.

The dean of the faculty was ‘Michael’ Detmold, not ‘Malcolm’ (p 111). There is a reference to his ‘imminent retirement’. He was actually going on sabbatical (study) leave.

Bob was ‘sacked’ (p113) – actually my 3-year contract came to an end. Although the law school advertised a significant number of positions to be filled, I was given legal advice to lodge an application. It was rejected without interview.

Reference to the Moles book ‘Controversies and Models in Paediatric Forensic Pathology’ (p113). It is actually an expert report, to a judicial inquiry in Toronto: Bibi Sangha nad Robert Moles, ‘Comparative Experience with Pediatric Pathology and Miscarriages of Justice: South Australia’.

Graham refers to Bob Moles’ literal view of legal interpretation – what was written must be followed in its literal form (p 113). This is not correct. My view is that legal interpretation is a purposive activity and any particular interpretation will depend very much upon the context in which the interpretation takes place. This can be seen from my book on jurisprudence *Definition and Rule in Legal Theory*, Blackwell, Oxford 1987 especially chaps 5-8.

Graham cites my use of the rule on circumstantial cases and then adds, ‘not too many practicing lawyers would rely on that proposition’ and even prison inmates would not agree. The rule that Graham attributes to me is a perfectly standard expression of the rule which is routinely stated in that form in all circumstantial cases from Van Beelen (early 1970s) to David Eastman more recently in the ACT. In fact, Graham cites the same rule as set out by the judge in Keogh’s first trial at p 61.
At p 253 in referring to Justice Debelle’s statement in court the judge is reported as saying ‘I won’t reply on them’. It should say ‘won’t rely’ on them.

At p 255, Graham refers to the court’s refusal to admit the Forensic Science Society Code of Conduct in relation to the conduct of Dr James. It might be helpful to note that Dr James had in fact been a joint author of that Code.

At p 262, it should be noted that after having been defeated in a defamation action by what many would consider to be the unreasonable actions of the court, Graham very boldly and deliberately repeated the ‘defamatory’ comments on air. I think we should reflect upon the significance of his doing that.

Graham refers to the argument that all of Dr Manock’s evidence should be excluded because he was not an expert and in effect did not have the status to give it (p97). This would mean that when Dr Manock stood up in court to say that he was an expert, it was a mis-statement – and if he knew it was wrong - it would have been a fraudulent mis-statement.

At p 268 Graham refers to Bob’s naïve but attractive view of proceeding with an application on the basis of fraud. He explains that it might be barred by the Grierson case which prevents the appeal court from hearing more than one appeal. As a point of clarification, it should be said that fraud is an exception to the rule in Grierson which excludes the possibility of a second or further appeal. The application is made by way of an ‘originating summons’, and it is not therefore an appeal. It also by-passes the need to obtain the permission of the Attorney-General for a further hearing. Now that South Australia has a new statutory right of appeal it may not be so important there, but the fraud application procedure could still be relevant in those Australian jurisdictions which do not have such a right of further appeal. Of course, Graham also makes the point that whatever the facts, the court may not have been prepared to find fraud in cases involving Manock. I have said that the basis for the claim should not be on the evidence he gave at the Keogh trial, but the fact that he claimed to be an expert. In the earlier civil proceedings, the state itself had said that he was not qualified as an expert. They had given that evidence several years after Manock had been awarded his Fellowship, in doing so, recognizing that it had not conferred upon him the status of an expert (it has not been attained through ‘study or training’). So therefore, the subsequent claims to expertise were contrary to the earlier sworn evidence of the state.

At p 290, Graham says that when the parliamentary committee refused to back the idea of a criminal cases review commission, ‘Bob Moles’ dream had bitten the dust’. That was not entirely correct. In addition to a new right of appeal which Graham mentions, the committee had also recommended that there be established a Forensic Review Panel with the power to

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2 This is why I have included a chapter on fraud in each of the last two books we have published on these issues.
refer cases back to the courts on the basis of deficient forensic evidence. That was like a CCRC but restricted to forensic issues. It also recommended the establishment of an inquiry into the use of expert evidence in criminal trials. Those last two recommendations were very important, gave us much of what we had asked for, and could still provide a basis for future action.

At p 293 Graham refers to a dispute which I had with Kevin Borick over who could be credited with the breakthrough in establishing the new right of appeal. I regret that I found it necessary to send a complaint to the professional conduct committee of the Law Society about this. Soon after I went to meet Kevin, we agreed that we could both claim some responsibility for having brought it about (as Graham suggests) and I was then able to withdraw my complaint on the understanding that Kevin and the others would not be sending off any more complaining letters. We have continued on good terms since then.

At p 318 Graham reports on the decision to set about a retrial. An important comment was made by the DPP on the day of the re-arraignment (reading of the charge to the accused and taking a plea). The DPP said that he had in the previous week received a file on the case from the major crime unit of the police but hadn’t as yet had time to read it. That being the case, the re-arraignment should have been delayed as the DPP should satisfy himself that there is a case to answer before laying further charges.