...Of judges and journalists

Mr Justice Gleeson, Chief Justice of NSW addressed the relationship between the judiciary and the media in his speech at a dinner following the recent Annual General Meeting of CAMLA.

As many of you will know, there is a very contentious issue as to the range of subjects which it is proper for judges to address on occasions when they find themselves invited to speak in public.

An English journalist, Mr Bernard Levin, has had some pointed observations to make about this matter. He wrote an article in the London Times after some substantial publicity had been given to pronouncements made by an English judge named Judge Pickles. Judge Pickles made some public remarks which led to a rebuke and, indeed, threat of removal, by the Lord Chancellor. Mr Levin weighed in on the side of the Lord Chancellor. He wrote expressing his horror at the possibilities that might result if conduct such as that engaged in by Judge Pickles were encouraged.

He said:

"Just as politicians, eager to get themselves before the public, will answer any question from a reporter who telephones them, so the judges will be reported as saying what they think of the post office, Gower's cricket captaincy, or Dennis Thatcher's feelings about a possible third term for his spouse."

He went on to say:

"The full horror of the plan will be seen on television. They will infest question time and drive poor Robin Day into an early grave with their opinions; they will take walk-on parts as themselves in sitcoms, like Harold Wilson; they will interview talking dogs and sing with Des O'Connor in Christmas specials; and, most dreadful of all these dreadfulnesses, they will appear on chat shows, where they will make puns, essay risque jokes, fawn on pop singers whose knuckles brush the ground as they walk, and ask Selina Scott, with a roguish smile, what she is doing after the show."

He concluded as follows:

"However much and however often I have criticised judges, I have never wavered from my belief that a visibly impartial and independent system of law is crucial to a free society. But this includes an essential element of remoteness, even of inhumanity, in the judges and their work."

Bearing those considerations in mind I came to the conclusion that it might not be inappropriate, since I presume the invitation was extended to me by reason of the fact that I have recently been appointed to head the Supreme Court of New South Wales, if I were to say something which some of you may find of interest about the Supreme Court of New South Wales and its relations with the press.

As some of you will know, the present Supreme Court, whose existence was continued by the Supreme Court Act of 1970, was established under an instrument called a Charter of Justice in 1823. The original territorial jurisdiction of the Court included what are now the States of Queensland and Victoria, and indeed there was a time in the early 1840's when it also included New Zealand.

Apparently, nice conceptions concerning the separation of legislative, executive, and judicial powers were not uppermost in the minds of those who established the Colony, and the Supreme Court. The first Chief Justice, Francis Forbes, was also a member of the Legislative Council and, indeed, had a kind of power of veto in connection with legislation to which I shall later refer.

Relations between the judges of the court and the media have not always accorded with their present state of quiet harmony. Strange as it may seem journalists were not always as respectful towards judges as they now are. As it happens, one of the most prominent barristers in the early history of the Colony was also a media proprietor, and a vigorous controversialist.

There early developed an issue as to the freedom of the press in the Colony. The first issue of the newspaper "The Australian" appeared in October 1824, and Governor Brisbane reported to the Colonial Secretary:

"These gentlemen (referring to Wentworth and Wardell) never solicited my permission to publish their paper, and as the opinion of the law officers of the Crown coincided with my own that there existed no power to interpose to prevent it without going to the Council, I considered it most expedient to try the experiment of the full latitude of the freedom of the press."

That experiment seems still to be underway. It did not continue uninterrupted, however. The government of the Colony used the mechanism of prosecutions for criminal libel as a method of endeavouring to control the press, and such prosecutions were for several years a large part of the work of the Supreme Court.

Sir Victor Windeyer writes:

"The Court was used as a forum for political controversy and propaganda. The unrestrained language against the government which Wardell and Wentworth used when addressing juries and which was eagerly reported in the opposition newspapers, as they no doubt intended it should be, was at times beyond the bounds of fair and decorous advocacy, or would be so considered today. Whatever may be urged for them as the champions of a free press, this is not really an edifying chapter in the history of the Bar."

One of the early judges of the Court wrote:

"The Supreme Court has constantly been the scene of most difficult, painful and disagreeable discussion."

Sir Francis Forbes, the first Chief Justice, was not in favour of an unrestricted press:

"An unrestricted press," he wrote, "is not politic or safe in a land where one half of the people are convicts who have been free men, and the other half of the people are free."

However, when Governor Darling attempted to bring down a Bill requiring all publishers of newspapers to take out an annual license revocable at any time by the Governor on the advice of his Executive Council, the Chief Justice declined to certify that the Bill was not repugnant to the law of England.

"By that law," he wrote, "every free man has the right to use the common trade of printing and publishing newspapers. By the proposed Bill, this right is confined to such persons as the Governor thinks proper. By the law of England, the liberty of the press is regarded as a constitutional privilege, which liberty consists in exemption from previous restraint; by the Proposed Bill, a preliminary license is required which is to destroy the freedom of the press and place it at the discretion of the government."

Although Forbes had refused to certify the clauses relating to the resumable license, the rest of the Bill, imposing registration and requiring recognisance to pay fines that might

continued on p6

...Of judges and journalists

from p5

be imposed for blasphemous or seditious libel passed into law on 25 April 1827.

The Gazette, the Gleaner and Moniter criticised it as an unnecessary restraint on liberty.

The Governor then attempted to bring down a second Bill, which imposed a stamp duty on newspapers which would have effectively taxed the newspapers out of existence. Forbes withheld his certificate again, on the grounds that it was ostensibly imposed to defray printing costs while its real purpose was to suppress the publication of newspapers in the Colony.

Chief Justice Forbes' refusal to certify that Governor Darling's Bills were not repugnant to the law of England infuriated the Governor, who sought repeatedly to blacken the Chief Justice's character to the Imperial authorities and when that failed, resorted to social revenge. Lady Forbes wrote:

"If we gave a dinner party, General Darling would issue invitations, at the last moment, to our guests, for the same evening, his invitations being headed, 'the Governor commands your attendance at dinner', etc and our promised guests would arrive at our house to make their excuses so that they might obey His Excellency's mandate. In order to save ourselves, and our friends from this humiliation, we felt sure of our guests, as the members of the Bar were not subject to government control."

However, fines and imprisonment for libel proved inadequate as a means of suppressing the outspoken comments of editors such as Edward Smith Hall, of the Monitor and Hayes of The Australian. Both Hall and Hayes had been imprisoned for seditious libel, but that did not prevent them from continuing to pen further criminal libels from the security of the Parramatta Gaol.

In order to silence Hayes and Hall, but particularly Hall, Governor Darling induced the Legislative Council to pass unanimously a new press law based on one of the repressive Six Acts of 1819. This made it mandatory for the Court to impose a sentence of banishment on any person convicted for seditious libel for the second time. The Australian bitterly condemned the Act, as "this Gagging – Strangling – Press extinction" but nevertheless refrained from publishing editorials. In the Monitor, the freedom of the press was mourned by means of a figure of a coffin with a Latin epitaph.

However, the irony of distance meant that Darling's Act reached London at the very time Parliament was in the process of repealing those sections of the 1819 Statute that related to banishment. The colonial act thereby became inconsistent with English law and Darling had once again been defeated.

Governor Darling's unsuccessful attempts to suppress the press of course inspired violent criticism, dominated by Wardell of The Australian, who was charged with criminal libel on seven occasions, for his allegations of incompetence and other insults directed at the Governor and at the hapless Saxe Bannister, the Attorney-General. When, in 1828, the Governor refused to initiate proceedings for criminal libel against Wardell, Bannister had recourse to more direct methods, and challenged Dr Wardell to a duel. The duel was fought at Pyrmont. Shots were exchanged, but neither party was hurt. This seems to have been the only duel between lawyers fought in Australia.

The judges of the Supreme Court found themselves caught up in the recurring controversies concerning the division of the legal profession into two branches, and the rights of solicitors concerning the matter of audience before the court.

Generally speaking, the judges supported the position of the barristers. This earned them robust vilification.

The judges gave practical support to the position of the Bar by procuring or promulgating rules of court, and the validity of those rules was then unsuccessfully challenged before the same judges.

There appeared in "The Australian" an article in the following terms:

"We have heard that the learned judges of the Supreme Court deny that the rule for the division of the Bar was procured by their means. Now this is either true or false. If the former, we regret being under the necessity of charging them with a gross neglect of duty – for, seeing that the division is a question of expediency as well as legality, it especially behoved the court to have given to His Majesty's advisers in England the best data for deciding in a matter so deeply involving private and public interest. This is one horn of the dilemma – we shall forbear pressing upon the public attention the unfortunate predicament in which an escape from it leaves the court."

Styles in journalism appear to have changed. Modern writers in newspapers seem very rarely to forbear from pressing upon the public attention a point they desire to make.

The proprietors of The Australian at the time that article was written were two solicitors; Francis Stephen, a son of John Stephen, the judge, and George Robert Nichols, who was also its editor – which of course explains their attack upon the judiciary.

That article, among others, in fact led to the first recorded Australian case of scandalous "libel" on a Supreme Court. In the opinion of the Supreme Court, the article was "highly offensive and in contemptuous derogation of the authority of this Court." Stephen was adjudged guilty of contempt, fined fifty pounds and placed on a two year good behaviour bond. No doubt the gravity of his offence was exacerbated by his status as an officer of the Court, although that factor was not mentioned by the Court.

Of course, the Court has grown enormously in size since those days. For some reason which I have never heard satisfactorily explained New South Wales seems to be by far the most litigious state in the Commonwealth, even allowing for population differences. As one would expect, leaving aside the Family Court, the Supreme Court of New South Wales is by far the busiest superior court in the Commonwealth. However, the degree by which the extent of its business exceeds that of other superior courts is not easy to explain. Of particular concern to media lawyers is the fact that it is by far the court which deals with the most defamation work, although it should be added that, in terms of the number of defamation cases that are actually fought out to the finish in court, there is relatively little of such work. I have the strong impression that whilst there is a good deal of activity at an interlocutory stage in relation to defamation matters, the number of such cases that are actually fought out to a conclusion at trial is quite small.

The Supreme Court of New South Wales seems to lead the Commonwealth in terms of the size of verdicts that are awarded in defamation actions, where the defendants are usually newspapers or broadcasters. However, the size of those verdicts is by no means extravagant when compared with the sums which one sees have recently been awarded, or agreed to be paid, by English newspapers in libel actions. I have been told by those older in the profession than me that up until about twenty or twenty-five years ago defamation actions in New South Wales were generally regarded as "backyarders" and verdicts relatively small. I have an impression, which may be able to be confirmed by others here, that it was the verdict in **Hopman v Mirror Newspapers** that constituted something of a great leap forward.

The impression I gained when I was in practice at the Bar was that the growth area in communications and media law was not so much that of defamation, which is within the province of the Supreme Court, but rather in relation to administrative law which is, by and large, more within the province of the Federal Court.

Nevertheless, the Supreme Court and the media will, I have no doubt, continue to be of interest to each other.