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Judgment Summaries: Pragmatic Reform at the Nexus of Law and Media

Fiona Ring won the 1998 CAMLA Essay Prize with this paper, which examines judgment summaries as a practice developed by the Courts to improve communication between the law, media and the public.

The inclusion by some courts of a summary in the judgments delivered in highly politicised or publicised cases is a technique that has been increasingly employed in recent years. The Federal Court has now used them routinely for the last four years, notably in the delivery of its two judgments during the Super League dispute¹. This emerging innovative practice by the courts, to improve communication between the fields of law and media, warrants a preliminary investigation into its impact on the process and outcomes of media reporting.

This is the argument that is developed in this paper through a consideration of the judgment summary as a mechanism to mediate the localised incompatibilities between the two fields of media and law. There are two components in this process. The first component is to fragment the pre-theorised relationship between the judiciary as the third branch of government, and the media as the fourth estate², in order to preclude the exaggeration of the impact of the judgment summary on this relationship. On the basis of this analysis, the second component will be to evaluate the ability of the judgment summary to mediate the localised incompatibilities between the two fields. As a methodological note, the aim of this paper is not to critique the standard of journalism in Australia, but to identify the institutional circumstances that are specific to the media field and to evaluate the impact of the judgment summary on these circumstances.

From this preliminary investigation it would appear that, at this early stage in its development and use, the judgment

summary is having a positive impact on the process and outcomes of media practice.

FRAGMENTING THE RELAYS BETWEEN LAW AND MEDIA

In order to isolate the pragmatic function of the judgment summary, it is first necessary to fragment the theoretical relationship that is presumed, by some, to exist between the media and law. For instance, in his lecture discussing the relationship between the judiciary, as the third branch of government, and the media, as the fourth estate, Sir Gerard Brennan presumes a highly theorised relationship between the two institutions. The relevant passage from Sir Gerard Brennan's lecture reads as follows:

I venture to suggest that... the well furnished legal journalist... who is familiar with the jargon, the procedure, the statutes, and the precedents will find much to report and comment upon in the work of the court and their fidelity to the rule of law, including the legitimacy of the techniques which the courts employ in interpreting and developing the law³.

This statement presumes that the media will scrutinise legal decisions according to their legitimate deployment of techniques of legal reasoning. Against this high normative standard, Justice Kirby judges the media reporting in Australia to be of a "debased standard"⁴. He has stated that

"generally speaking, the media are not now really interested in

communicating information in a neutral and informative way... Issues are now personalised, politicised and trivialised"⁵.

Speaking from positions of authority within the legal field, both Sir Brennan and Justice Kirby construct a normative standard for the media, as an instrument for the critical evaluation of the law (according to standards of legal technicality). While such methods may be suitable in their own work, the imposition of these standards onto journalistic analysis involves an over-theorisation of the link between media and law which subsumes the reality that the media is a field distinct from the law. As recognised by Justice Nicholson⁶, there are a multiplicity of discourses operating at the nexus of law and media and it is problematic to critique the method of one field (the media) according to the technical strategies of another (the law). As Justice Nicholson argues

"the methodology of the law is offended by the methodology of the media, yet each considers the search for justice is best served by the method which it employs"⁷.

In practical terms this means that rather than being furnished with legal skills and attributes, the "well furnished journalist" will be equipped with training and experience in the methodology of the media. This methodological distinction impacts on the process and outcome of media reporting, and structures the relationship of the media to law so that it is incidental, rather than instrumental (as is suggested by Sir Brennan). It means

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that the aspect of the court system that is most scrutinised by the media is not legal process or technicalities, but the outcome of court decisions and how they affect the parties concerned. The process of media reporting is organised according to the principle of "newsworthiness" and not according to the techniques of legal reasoning which are particular to the field of law. As a legal affairs writer for *The Australian* newspaper, Janet Fife-Yeomans⁸ reflects this methodological distinction in commenting on the fact that her primary responsibility is to report accurately, and is not structured by an additional or external duty to the courts. This comment is substantiated by the *Australian Journalists Code of Ethics* that prescribes that:

[Journalists] shall report and interpret the news with scrupulous honesty by striving to disclose all essential facts and by not suppressing relevant, available facts or distorting by wrong or improper emphasis⁹.

While this standard encompasses a responsibility for accuracy, there is no prescription of a direct responsibility owed by the media to the law.

Moreover, the imperatives of time and space restraints that are common to all media practitioners distinguish the structure of the discursive practice in this field from the process of legal reasoning and analysis. As Fife-Yeomans recounts:

We (print) journalists must condense a 500-page judgment or a full day's hearing into 500 or 600 words. Radio journalists with half-hourly deadlines have to pick up the gist of even the most legally and factually complicated judgments or hearings in a matter of minutes. If we miss anything, we face the wrath of our boss and our own disappointment. If we make a mistake, we face the much more serious wrath of the courts. We can face contempt of court charges or be sued.¹⁰

This passage is included not to defend media practice, but to offer an explanation of the institutional circumstances that structure the discursive practices of media practitioners in highly particular and technical ways. Journalists across all mediums are subject to regulation by the immediacy of the mediums through which they communicate, by the audience or readership for which they report and

by the law, in the form of contempt. These are the imperatives that must structure the process of media reporting and outcomes of those reports, not the normative standards imposed by legal practitioners. Accordingly, it is in reference to the successful negotiation of the institutional circumstances of the media, and not the law, that the effectiveness of the judgment summary should be assessed.

In this context, it is appropriate to distinguish the purpose of the judgment summary from that of the full reasons for decision. As emphasised by the Full Federal Court in its judgment summary for the *Super League Case*:

The Full Court's reasons for judgment constitute the authoritative pronouncement on the appeals. This document is merely a brief and necessarily incomplete summary, which is intended to assist in understanding the principal conclusions reached by the court¹¹.

This passage suggests that the immediate purpose of the executive summary is to "avoid misunderstanding [and] to state accurately the effect of the decision of the

court"¹², a function which explicitly excludes the level of technicality appropriate for in-depth legal analysis. It follows that the acceptance of the methodological validity of the judgment summary depends on a recognition of its function as distinct from that of the judgment proper. The judgment summary is thus located at the external limits of the field of law, for consumption and use within a multiplicity of non-legal discourses, particularly within the media field.

ISOLATING THE PRAGMATIC IMPACT OF THE JUDGMENT SUMMARY ON MEDIA REPORTING: SUPER LEAGUE - A CASE STUDY

The identified priorities and institutional circumstances that structure the discursive practices of the media provide a context for the next section of the paper: an investigation of the impact of the judgment summary on those practices. This investigation will use the judgment summaries published in the Super League decisions as a case study. It is structured according to the anecdotal evidence of the media reporting of those cases provided by Bruce Phillips¹³, Director of Public Information for the Federal Court, and by Janet Fife-Yeomans¹⁴. As leading cases in which judgment summaries have been used effectively, this account should provide a preliminary indication of their actual impact on media reporting.

During the Super League dispute, the delivery of the judgments of Justice Burchett¹⁵, in the first instance, and the Full Federal Court¹⁶, on appeal, were effected by distributing about 250 copies of the judgment summary to journalists and interested members of the public. The demand for the summaries was described by both Fife-Yeomans and Phillips as extraordinary¹⁷. As one journalist described it to Phillips, they were attacked by the journalists "like they were jackals after the last piece of meat on a bone"¹⁸. This desperation reflects the enormous pressure on journalists to get a copy of the judgment summary in order to file a story quickly. In fact, in that case, Phillips¹⁹ observed that electronic journalists (from radio and television) immediately filed stories by reading the last sentence of the judgment into the phone, before leaving the court building. The impact on print media was equally direct. In addition to extensive coverage by a range of specialist reporters (including legal affairs reporters, communications correspondents, sports writers and business journalists) copies

of the judgment summaries written by Justice Burchett and the Full Federal Court were extracted in both *The Sydney Morning Herald*²⁰ and *The Australian* newspapers²¹.

For these types of highly 'public' decisions, Phillips²² suggests that it is the responsibility of the federal courts to be "proactive and anticipate what the needs of the journalists are going to be". The anecdotal evidence compiled in reference to the process of media reporting, and the newspaper articles examined, as evidence of the outcomes of media reports²³, suggest that this pragmatic goal is indeed being facilitated by the employment of the strategy of distributing judgment summaries. The description of events surrounding two such prominent cases that have included summaries serves to illustrate the highly specific techniques of deployment of judgments by the media. It accurately demonstrates the range of impacts of the summaries across a number of different reporting techniques within the field of media.

The primary function of the judgment summary is seen by Phillips²⁴ to be "to maximise accuracy and minimise mistakes". This accords with the self-acknowledged ethical imperative on journalists to report the news accurately²⁵. In the case of electronic media reporters, who lack extensive legal training, this impact of judgment summaries can be quantified according to the ability of journalists to file stories immediately and to report on the outcome of the case and essential issues without misrepresenting the complexities of the legal decision. While accounts of electronic media reports of the *Super League Cases* are not included in this paper, the same-day broadcast²⁶ of Justice North's judgment summary in *Maritime Union of Australia v Patrick Stevedores No 1 Pty Ltd*²⁷ provides evidence of an even more dramatic employment of the summary. The immediate transmission of the court's decision by a judge to the public necessarily excludes the journalist from the process and precludes the possibility of inaccurate information. In cases where there is no "talking judgment" but the summaries are instead distributed to journalists (as is generally the case), Phillips²⁸ suggests that the reports filed by electronic journalists from the courtroom may not be complete, but they are less likely to be inaccurate. This reflects the localised impact of the judgment summary on media practice, as structured according to the self-acknowledged imperatives of the media to publish accurate information and

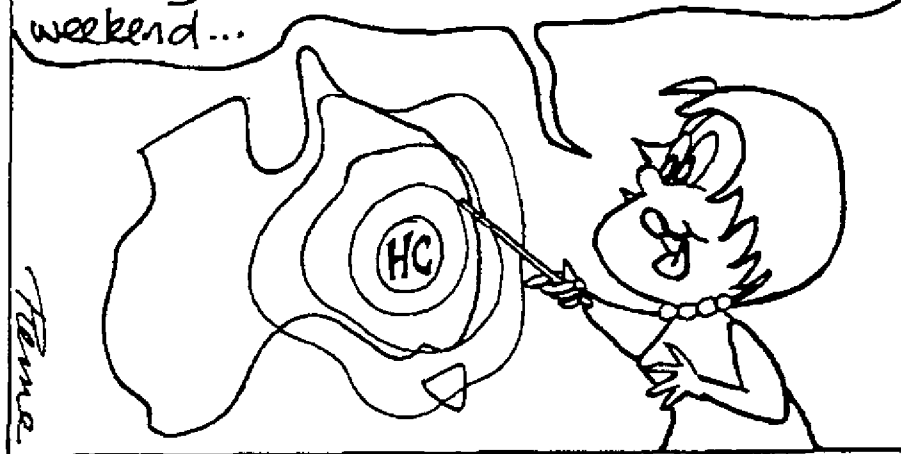
contrasts with the normative standard of the media as the fourth estate that is imposed by Sir Brennan.

Phillips²⁹ also points to the explanatory function of the judgment summary. The summary in the *Tasmanian Dam Case*³⁰ was taken as an opportunity for the High Court to express the view that "the Court's judgment does not reflect any view on the merits of the dispute". This statement indicates that it is another function of the judgment summary to explain the limitations of the legal decision, as well as to set out legal outcomes. This function is demonstrated in the Super League case by the structure of the coverage in *The Australian* newspaper. A number of articles considered the impact of the Super League decisions on a range of external matters, including the organisation of the rugby league competition in Australia³¹ and the implications for subscription television³² (in terms of profitability and viability) without presuming that the decision adjudicated those specific issues. The inclusion of extracts of the summaries³³ allowed the public to realise the limitations of the decision while the media coverage explained its consequences. The particular deployment of the summary by a number of specialist reporters (including specialists in the field of sports, communication, business and legal journalism) demonstrates the practical impact of summary (outlining the outcome of a complex legal decision) which serves as the starting point for specialised investigations of the implication of the decision outside the legal field.

Finally, the articles by *The Australian's* legal correspondents, Janet Fife-Yeomans and Jody Scott, indicate a distinct function of the summary as an organisational tool, for those journalists who will use it, in conjunction with the full reasons for decision, to extract and analyse more technical legal issues. In the coverage of the Super League cases, the two journalists considered the legal positions of the parties³⁴, the basis on which the decisions were reached³⁵ and the appeal options available within the legal system³⁶. While Fife-Yeomans³⁷ considers that extensive practical experience in reporting on legal decisions leaves specialist legal reporters well equipped to extract newsworthy issues from legal decisions, she also recognises and advocates the judgment summary as an organisational tool to facilitate the analytic practices of journalists.

WEEKEND JUSTICE FORECAST

...Tomorrow the High Court System over Canberra will produce a summary judgment... followed by a light summary judgment summary Media storms developing producing light drivel and hot air along with patchy summary judgment summary summary... Summary conditions for the rest of the weekend...



This description of the multiple deployments of the judgment summary by media reporters suggests that, even at this early stage of its use, the technique is having a positive impact on pragmatic aspects of the discursive processes and practices of the media.

CONCLUSION

The specific purpose of this paper has been to consider the ability of the judgment summary to mediate the localised incompatibilities of the fields of law and media. This has involved considering the methodological distinctions between law and media and specifying that the judgment summary should be developed and used in ways that accommodate the specific institutional circumstances of the media field. The investigation in this area indicates that judgment summary has a significant role to play as pragmatic reform, anticipating the needs of journalists and thereby improving the efficiency of media reporting and the accuracy of media reports.

- 1 *News Limited v Australian Football League Limited* [1996] ATPR 41-466 and *News Limited v Australian Football League Limited* [1996] ATPR 41-521 (*The Super League cases*)
- 2 Sir Gerard Brennan, 'The Third Branch of

Government and the Fourth Estate'. The second lecture in the series, *Broadcasting, Society and the Law*, Faculty of Law, University of Dublin, April, 1997.

3 *Ibid* (emphasis added).

4 Hon Justice Michael Kirby, 'Judiciary, Media and Government' (1993) 3 *Journal of Judicial Administration* 63, 70.

5 *Ibid*.

6 Hon Justice R D Nicholson, 'The Courts, the Media and the Community' (1995) 5 *Journal of Judicial Administration* 5.

7 *Ibid*.

8 Fife-Yeomans, Personal Communication (1998) Legal Affairs Writer for *The Australian* newspaper.

9 Media, Entertainment and Arts Alliance (MEAA), Australian Journalists Association's Code of Ethics. Internet Address: <http://www.alliance.aust>

10 Janet Fife-Yeomans, 'Fear and Loathing - the Courts and the Media' (1995) 5 *Journal of Judicial Administration* 39, 40.

11 *Super League Case (No 2)* (1996) ATPR 41, 521.

12 Hon Sir Daryl Dawson, 'Judges and the Media' (1987) 10 *UNSW Law Review* 17, 24. This comment was made in reference to the case of *Tasmania v Commonwealth* (1983) 158 CLR 1 (*The Tasmanian Dam Case*), but it applies equally to the *Super League Cases*.

13 Bruce Phillips, Personal Communication (1998) Director of Public Information for the Federal Court.

14 Fife-Yeomans, Personal communication, above n 8.

15 *The Super League Case (No 1)* [1996] ATPR 41-466.

16 *The Super League Case (No 2)* [1996] ATPR 41-521.

17 Phillips, above n 13; Fife-Yeomans, Personal Communication, above n 8.

18 Phillips, above n 13.

19 *Ibid*.

20 *Sydney Morning Herald* (Sydney) 24 February 1996; *Sydney Morning Herald* (Sydney) 5 October 1996.

21 *Weekend Australian* (Sydney) 24 and 25 February 1996; *Weekend Australian* (Sydney) 5 and 6 October 1996.

22 Phillips, above n 13.

23 For print journalism, at least.

24 Phillips, above n 13.

25 MEAA, above n 9.

26 The delivery of Justice North's judgment was not a live broadcast but the turn around was so quick that, according to Phillips, it was "as good as live".

27 [1998] 378 FCA (21 April 1998).

28 Phillips, above n 13.

29 *Ibid*.

30 (1983) 158 CLR 1, 59.

31 D.D. McNicoll, Trudy Harris and Stephen Lunn, 'Arthurson absolves rebels as League celebrates victory', *The Weekend Australian* (Sydney) 24-25 February 1996; Stan Wright, 'There's One Comp in '96', *The Weekend Australian* (Sydney) 24-25 February 1996; Janet Fife-Yeomans and Jody Scott, 'Super League wins football war', *The Weekend Australian* (Sydney) 5-6 October 1996; D.D. McNicoll, 'Two competitions likely unless rivals strike peace deal', *The Weekend Australian* (Sydney) 5-6 October 1996.

32 Deborah Brewster, 'Optus claims win in battle of the broadcasters', *The Weekend Australian* (Sydney) 24-25 February 1996; Deborah Brewster, 'Foxtel hits pay-TV tryline', *The Weekend Australian* (Sydney) 5-6 October 1996.

33 Justice Burchett, 'Burchett spells out detail of decision', *The Weekend Australian* (Sydney) 24-25 February 1996; 'Summary of the Full Court's Decision', *The Weekend Australian* (Sydney) 5-6 October 1996.

34 Janet Fife-Yeomans, 'Dishonesty tag to stick: ARL', *The Weekend Australian* (Sydney) 24-25 February 1996; Jody Scott, 'Judge finds News acted unlawfully, dishonestly', *The Weekend Australian* (Sydney) 24-25 February 1996.

35 Jody Scott, 'Agreements were unlawful', *The Weekend Australian* (Sydney) 5-6 October 1996; Jody Scott, 'Court dismisses bans on freedom grounds', *The Weekend Australian* (Sydney) 5-6 October 1996.

36 D.D. McNicoll, 'We will appeal - Cowley', *The Weekend Australian* (Sydney) 24-25 February 1996; Trudy Harris, 'ARL vows to fight on to High Court', *The Weekend Australian* (Sydney) 5-6 October 1996; Janet Fife-Yeomans, 'Few options left to stop News juggernaut', *The Weekend Australian* (Sydney) 5-6 October 1996.

37 Fife-Yeomans, Personal communication, above n 8.

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