JOURNALISTS v JURISTS

The Hon Justice Peter Applegarth, Supreme Court of Queensland [1]

Distinguished guests, colleagues and friends, ladies and gentlemen,

Worse things that can happen to a judge than to be vilified and ridiculed by the tabloid press or tabloid television.

Many judges who have been misreported in the media and subjected to unfair and uninformed criticism, still lead comfortable, secure lives.

Other, less fortunate judges have more to worry about: dismissal or loss of tenure at the hands of a dissatisfied government due to acts of independence; threats of arrest; and even violence.

Judges should not be surprised when their decisions are attacked, sometimes unfairly, by governments who lose cases, and by media outlets which favour the government. Governments are frequent litigants in the courts, prosecuting cases, bringing civil claims and responding to applications for judicial review of certain exercises of executive power. In properly exercising judicial power to hold Ministers, officials and public bodies to account the judges are not usurping executive authority.[2] They are applying the rule of law and, as Lord Bingham noted, they exercise a constitutional power which the rule of law requires that they should exercise.

Lord Bingham continued:

> "This does not of course endear them to those whose decisions are successfully challenged. Least of all does it endear them when the decision is a high-profile decision of moment to the government of the day, whatever its political colour. Governments have no more appetite for losing cases than anyone else, perhaps even less, since they believe themselves to be acting in the public interest and, in addition to the expense and disappointment of losing, they may be exposed to the taunts of their political opponents (who might, if in office, have done just the same). This is the inescapable consequence of living in a state governed by the rule of law. **There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live**."[3]

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1 An address to the International Bar Association Conference, Rome, 9 October 2018.

2 Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010) 65

3 Ibid

One might add, there are countries where all judicial decisions are praised by powerful media interests, but they are probably not places where any of us would wish to live.

Judges have to expect harsh criticism. There comes, however, a point when poisonous misinformation about judges and their decisions challenges the administration of justice and the rule of law.

Thirty years ago, when I was a junior barrister doing media law cases (a "Murdoch mouthpiece" if you will), a headline and article like *The Daily Mail's* "Enemies of the People" would not have been published in the UK or Australia due to a concern that it was a scandalous attack that might trigger a proceeding for contempt of court by the Attorney-General. It was seen to be the Attorney-General's or the Lord Chancellor's responsibility to defend the judiciary, which, as an institution, is not in a position to defend itself and its decisions by buying into public debates. We try to let our judgments speak for themselves.

Things have changed, and judges are routinely abused, not only by dissatisfied litigants, but by powerful media organisations. After *The Daily Mail's* scandalous attack on three senior judges, the Lord Chancellor did not spring to the defence of the judiciary. The Lego company did more to defend the judiciary, by deciding to withdraw its advertising from The Daily Mail, than the Lord Chancellor did.

It is important, I think, for the judiciary and the legal profession to see these attacks on an independent judiciary in context, and as part of a broader attack by certain media organisations on supposed "elites". Academics, public broadcasters and others who criticise governments, or simply have a different point of view to those media groups, are attacked as "elitist" and "out of touch". Even other commercial media organisations are vilified as "elitist".

The irony of billionaires like Mr Murdoch accusing poorly paid academics and public broadcasters of being elitist is seemingly lost on his editors. So do not expect a headline like this one any time soon.

As for the judiciary, it is seen by governments and their media supporters as a constraint on the power of executive governments and legislatures to do things. By insisting on due process of law, and by containing government officials to the limits of their lawful authority, judges attract government and media disfavour.

The typical tabloid attack has three elements.

First, the judges are an Elite: I should hope they are.

Second, the judges are Unelected: Most adherents to a sophisticated view of democracy think that is a good thing. The fact that we are unelected makes most

judges respect the boundaries of judicial power. We also look with amazement at the corruption implicit in campaign financing by judges standing for election in the US.

Third, the judges are said to be out of touch: but this really means out of reach.

In 2004, the Chief Justice of Australia, The Hon Murray Gleeson AC stated:

> "Judges live in the community. There is no empirical evidence that, as a group, their general experience of life is narrower than that of most other occupational groups. People who administer criminal justice probably see conduct that most members of the community never imagine. A Family Court judge would have a regular view of domestic relations that would throw many people into despair. When you consider the parade of life that passes before a suburban or rural magistrate, it is difficult to understand why the judiciary, as a class, might be regarded as isolated from reality."[4]

He also wrote:

> "Judges have no techniques for, or expertise in, assessing public opinion. Judges ordinarily do not seek to influence public opinion. As an institution, the judiciary is passive in these respects. Courts ... do not sample community opinion for the purpose of informing their decision-making. And they do not set out to influence wider community values. They are neither followers nor leaders of public sentiment."[5]

So if the accusation that judges are "out of touch" means we do not sample public opinion in order to reach a decision, then the accusation misunderstands the judicial function.

Upon analysis, the accusation of being "out of touch" is a cute way of saying that we are "out of reach". Out of the reach of the influence that powerful media organisations are used to exerting over governments, legislators, businesses and others. If that is so, then it is a good thing that we are out of reach.

Because many politicians, even those holding positions as Lord Chancellors and Attorneys-General, seem beholden to media organisations, the judiciary can no longer expect politicians to defend the judiciary from outrageous attacks and abuse. An independent judiciary increasingly relies on an independent Bar to defend it.

Some might say that unelected, powerful judges are too sensitive to criticism, and that any renewed use of contempt proceedings against scandalous attacks may

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[4] A. M. Gleeson, "Out of Touch or Out of Reach?" (2007)(3) *The Judicial Review* 241 at 242

[5] Ibid

have an excessive, chilling effect on robust public discussion about the judiciary and reduce judicial accountability. However, the laws in most democracies give substantial scope for harsh criticism of the judiciary. In the US you have the first amendment. In other countries there are protections for freedom of speech. In common law countries since 1968, there has been recognition that contempt laws do not apply to even prejudiced and unfair criticism. But the law of contempt does and should reach dishonest and scandalous abuse of the kind displayed in the "Enemies of the People" article and similar attacks on the administration of justice. The law simply is not enforced, and the supposed "right" to engage is this kind of abuse is taken for granted by the media.

What has changed?

Neither the conduct of courts nor the actual law of contempt has changed much in recent decades. What has changed is the face of journalism due to new technology and new media. This has had at least three consequences:

1. The demise of dedicated court reporters, with experienced court reporters retiring or made redundant due to staff cuts.

2. A general decline in-depth reporting: this is partly a function of the way we access news and the relentless 24 hour news cycle. Until fairly recently, court reporters had hours to submit a typical court report for that evening's TV or the next morning's paper

3. The blurring of reporting and commentary. May I develop this last point a little. The law of defamation in common law countries makes a broad distinction between fact and opinion, even though in reality there is a continuum. The theory goes that there is no such thing as a wrong opinion, but the facts are sacred. Reporting of governmental and court proceedings used to be factual reporting, and opinion would be physically separated from it. Today most coverage of trial and appeal courts is a blend of purported reporting of the decision and analysis, in the form of instant commentary. It arises from the rush to be first to publish online, often with commentators asked to comment on a decision they have not even read, let alone carefully reflected upon.

Then there is the rise of the "commentators" in place of journalists, particularly in commenting on court cases. These "commentators" often are unpaid because they come from a think tank or university, and so are good value for media budgets, or are freelancers who are paid a pittance to be provocative.

Many of us probably imagine that a newsroom look like this, with conferences of editors, reporters and legal analysts discussing how a case is to be reported and fairly analysed. This scene is a fiction, from the series "The Wire", which more

than a decade ago depicted the demise in many city newspapers of the dedicated court reporter, and the pressure on professional journalists. Things have gone from bad to worse since then.

Therefore, the problem is not so much one of Journalists v Jurists. We live increasingly in a journalist free zone. Unpaid or poorly paid interns try to report cases, and in haste and ignorance do things like report what is said in the absence of the jury. We have "commentators" instantly expressing opinions based on short and inaccurate reports, having not read the decision they are critiquing.

What is to be done?

If large sections of the media cannot provide fair and accurate reporting of courts, what is to be done?

Is it possible to cut out the conduit and have courts communicate their decisions and proceedings directly with the public?

This is an aspiration, but an unrealistic one, for most courts. Let's face it, most of the cases we hear are boring and of no interest to the general public. The exceptional cases that ignite media and public interest are reported, often in excruciating detail.

Even our highest courts, which livestream their hearings, do not reach a large percentage of the population.

Cameras in the courtroom? For reasons which I and other judges explained in a report we wrote, we do not favour the televising of witness testimony.[6] In my jurisdiction we allow, on conditions, the recording and broadcasting of sentencing remarks.

Courts try to assist reporters and the public to understand our decisions with judgment summaries, and by having court information officers. Some courts in my country even have guidelines and instructional manuals to teach reporters the basics of court reporting: something we used to assume was the subject of training in newspapers.

We would be deluded to think that our modest attempts to train journalists, along with the provision of judgment summaries and the like, will do much to arrest the trend towards shorter, simpler and inevitably misleading reports of cases by both new and legacy media which scramble to be first with the on-line news, written by time poor journalists or interns.

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[6] Supreme Court of Queensland, *Electronic Publication of Court Proceedings Report*, April 2016, https://www.courts.qld.gov.au/about/publications

Courts need to appreciate the time and other constraints under which most professional journalists work. We need to help journalists to fairly report, and then honestly comment upon, the cases we decide and our performance as judges.

However, when poor practices threaten the fairness of trials, or dishonest commentary improperly brings the administration of justice into disrepute, then the remedy should be contempt of court proceedings.

Abusive articles like "*Enemies of the People*", and similar, slightly less toxic versions of it are a calculated attack on the integrity of the administration of justice.

The unjustified loss of public faith in the administration of justice which results makes it easier for authoritarian governments to undermine an independent judiciary, and, as a result, the rule of law, by removing judges from office or removing their security of tenure.

While most judicial officers, especially those in superior courts, feel that we personally can weather the storm of abuse and misreporting that has become a common feature of our treatment by the tabloids, unfair abuse can have its personal toll, especially on judicial officers who toil in high-volume, lower courts, and who have to make difficult decisions about bail and sentencing under enormous pressure. When they make mistakes, or are perceived to have made mistakes, and are unfairly vilified, already distressed individuals can unravel. Recently we have had magistrates commit suicide in my country, one shortly after he was vilified in a Murdoch tabloid. So abuse of judicial officers, especially junior judges, is not a benign sport.

Because pusillanimous politicians do not challenge scurrilous attacks on the judiciary by media proprietors, the judiciary needs the support of an independent and fearless Bar. To its credit, the English Bar defended the judiciary when *The Enemies of the People* article appeared, and when the Lord Chancellor did not defend the judiciary.

Until about the mid-1980's, common law jurisdictions like England and Australia enjoyed what Professor Loader described as "The Rule of the Platonic Guardians": a small network of "politicians, senior administrators, penal reformers and academic criminologists wedded to the belief that government ought to respond to crime (and public anger and anxiety about crime) in ways that, above all, seek to preserve 'civilised values"'.[7] Part of the work of the Platonic guardians was to lead or at least manage public opinion on crime. He wrote:

> "... the governing disposition among Platonic guardians, shared, by government ministers up until the mid-1980s, lies in the express and

[7] Ian Loader, "Fall of the 'Platonic Guardians' Liberalism, Criminology and Political Responses to Crime in England and Wales" (July 2006) 46(4) *British Journal of Criminology* 561-563

> implied view that untutored public sentiment towards crime is a dangerous thing – an object to be monitored and contained, steered down appropriate paths, taken on and argued with where necessary (most obviously, in this period, during the campaign to abolish capital punishment) but not to be followed, still less given governmental endorsement and expression."[8]

In the last few decades, we have seen the Fall of The Platonic Guardians, with government Ministers either joining in media attacks, or saying nothing in response in defence of the administration of justice.

The Bench and the Bar are in this battle together. If unfair abuse by media corporations of the judiciary continues, the security and independence the judiciary is vulnerable to even more sinister attacks. We have challenges to judicial independence in far too many countries.

Persistent abuse of the judiciary by media oligarchs and their favoured commentators creates a fertile environment for a further erosion of judicial independence and the rule of law.

[8] Ibid at 568