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Courage or Contempt

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The preamble to the New South Wales Barristers' Rules reads in part:

"The role of barristers as specialist advocates in the administration of justice requires them to act honestly, fairly, skilfully, diligently and bravely."

"Where it is a legal representative who is alleged to be guilty of contempt, it is important to keep in mind the duty of courage and vigour on the part of legal representatives in the pursuit of the perceived interests of their clients."

Toner v The Attorney General for New South Wales CA 8 October 1991 (Unreported)- surprisingly.

In *Dean of St Asaph* (1784) 21 St. Tr. 847 the famous exchange between Buller J and Erskine, subsequently Lord Chancellor, is repeated. The case involved a charge of seditious libel. Erskine was appearing for the accused. Buller J had directed the jury that the only verdict that they could return was guilty or not guilty of publishing the document which is said to contain the seditious libel. The jury returned a verdict of "guilty of publishing only".

The exchange is recorded as follows: Page 157 – Miller 3rd Ed – *Contempt of Court* at 4.35:

"Erskine: The jury do understand their verdict.
Buller J: Sir, I will not be interrupted.
Erskine: I stand here as an advocate for a brother citizen, and I desire that the word *only* may be recorded.
Buller J: Sit down, Sir; Remember Your Duty, or I shall be obliged to proceed in another manner.
Erskine: Your Lordship may proceed in what manner you think fit; I know my duty as well as your Lordship knows yours. I shall not alter my conduct."

It did not appear to affect Erskine's subsequent career and Buller did not carry out his threat.

I suppose counsel in those days had to be somewhat braver than they need to be today.

In earlier times contempts of court could have ferocious consequences.

A famous contempt was:

"Ject un Brickbat a le dit Justice que narrowly mist."

The consequences to the prisoner were as follows:

"& pur ceo immediately fuit Indictment drawn per Noy envers le prisoner, & son dexter manus amputee & fix al Gibbet sur que luy mesme immediatement hange in presence de Court."

It would appear that the "& son dester manus amputee" was the punishment for the contempt and the balance was for his other felonies.

The outcome seems to represent a reverse of what we would understand to be the law in this country namely that the punishment for contempt is added to the punishment for the substantive matter before the court if there be the need for such punishment.

Early in the last century newspaper editors were apparently a little braver. Howard Alexander Gray published a ripping assault on Darling J. Gray was the editor of the Birmingham Daily Argus and Darling J was sitting as the Crown Court at the Birmingham Spring Assizes. The case is reported as *The Queen v Gray* [1900] 2 QB 36. Unfortunately the report does not contain the article itself. It is worth repeating and along with many delicious moments in the law it is reported by R E Megarry in *Miscellany-at-Law* at page 23:

"…If anyone can imagine Little Tich upholding his dignity upon a point of honour in a public-house, he has a very fair conception of what Mr Justice Darling looked like in warning the Press against the printing of indecent evidence. His diminutive Lordship positively flowed with judicial self-consciousness…No newspaper can exist

except upon its merits, a condition from which the Bench, happily for Mr. Justice Darling, is exempt. There is not a journalist in Birmingham who has anything to learn from the impudent little man in horse-hair, a microcosm of conceit and empty-headedness … One is almost sorry that the Lord Chancellor had not another relative to provide for on the day that he selected a new judge from among the larrikins of the law. One of Mr Justice Darling's biographers states that 'an eccentric relative left him much money.' That misguided testator spoiled a successful bus conductor …".

Dr John Wilson who was a persistent and persistently unsuccessful auto litigant argued a case suggesting that variable interest rates in mortgages had the effect of rendering the contract void for uncertainty. The argument was mounted before Acting Justice Murray. His Honour had reserved his decision and on 5 September 1997 he handed it down.

The only thing that Dr Wilson was realistic about was the likely outcome of the proceedings because he had come equipped with a lever arch file filled with paper. The centre of the paper had been cut out and he had secreted three paint bombs within it. When Acting Justice Murray handed down his decision and announced that Wilson had lost, and with costs, Wilson opened the folder and flung the paint bombs at the Judge, the first of which got him, the second hit his Associate and the court reporter. Wilson was overpowered by court attendants and the third was not flung. It was a case of "ject un paint bomb a le dit Justice que hit". God knows what would have happened to Dr Wilson in 1631.

Sadly Dr Wilson was an obsessive compulsive and appeared for himself before Justice Wood and led no real evidence. I appeared for him in the Court of Appeal. Justice Wood had sentenced him to two years gaol. Heydon JA reduced that to time served which was about six months after we got leave to lead some decent subjective character material on Wilson's behalf.

Wilson v The Prothonotary [2000] NSWCA 23 – 29 February 2000 (Unreported).

Contempt in the face of the court is dealt with by various statutory provisions. In the District Courts. 199 of the District Court Act; in the Local Court s. 27A and s. 27B of The Local Court Act 1982 and in the Supreme Court by Supreme Court Rules Part 55 variously.

The High Court has now authoritively ruled that proceedings for contempt whether they be a civil or criminal contempt require proof beyond a reasonable doubt (*Withan v Holloway* (1995) 183 CLR 525).

Pat Costello was one of my favourite barristers. He was brilliant although erratic. Naturally enough I turn to *The Prothonotary of the Supreme Court v Costello* [1984] 3 NSWLR 201 for the purpose of this paper.

Also I expected to find within it all the sins allegedly committed by Patrick. At the bottom of paragraph (F) on page 203 of the report the following is said:

> ["Their Honours then considered the evidence in relation to relevant incidents and made findings in relation thereto]"

I asked Lisa Allen of the Bar Library if she could find that material for me. I thought I would get a few pages from Lisa. I got a call to say that the material which had been omitted was about 105 pages of the judgment. On your behalf I have read it.
It is clear that Pat did not get on well with some Magistrates including Len Nash and Ron Gentle.

It is also clear that Pat did not know when to stop – he could not resist a good line: to Norton SM:
"Bench: Mr Costello you have been warned, I will not speak to you again about it.

Mr Costello: Thank you your Worship, I'd appreciate it if you didn't".

Still, Patrick was not struck off. He tried harder than most to achieve that result. The one thing he never lacked was courage, however, it was never tempered with discretion.

Another fine barristerial "contempt" was in *Lewis v Ogden* (1984) 153 CLR 682. The contempt is probably known by most but it is worth repeating:

"This trial has been or is going to be just slightly unusual from most trials. Most trials have the situation where there are three very clearly defined roles going on in front of you. There is the defence who are on this side who defend, there is the prosecutor on that side and he prosecutes and obviously this is the arena proper and you have got a judge who judges. Your normally think of a judge as being a sort of umpire, ladies and gentlemen, and you expect an umpire to be unbiased. You would be pretty annoyed if, in the middle of a grand final, one of the umpires suddenly started coming out in a Collingwood jumper and started giving decisions one way. That would not be what we think a fair thing in an Australian sport. It may surprise you to find out that his Honour's role in this trial is quite different. That his Honour does not have to be unbiased at all except on questions of law. On questions of fact, his Honour is quite entitled to form views and very obviously has done so in this trial. His Honour will tell you that any comment that he makes does not bind you. That it stands or falls on its own merits

but that instead you must consider those along with all of the other comments and accept or reject them as you see fit. That is different from his direction on the law. I speak of that, ladies and gentlemen, because as I say, his Honour has given some fairly definite views in this case. They have been pretty adverse to the accused Paul and certainly my presentation of the case on behalf of Paul."

Happily the High Court upheld the appeal and found as follows:
"In conclusion three comments should be made. The first is to recall that the contempt power is exercised to vindicate the integrity of the court and of its proceedings; it is rarely, if ever, exercised to vindicate the personal dignity of a judge (*Ex parte Fernandex (36); Reg. V Castro; Skipworth's Case (37); Bellanto(38*)). The second is that the summary power of punishing for contempt should be used sparingly and only in serious cases (*Shamdasani(39); Izuora v The Queen(40)*). The final comment is that the charge of contempt should specify the nature of the contempt, ie, that it consists of a wilful insult to the judge, and identify the alleged insult."

Of course if you really wish to insult a judge merely preface your remarks in relation to a ruling that he or she has made by saying:

"With the very greatest respect ….".

I think it means what was said by Mr McQuillan in proceedings recently concluded in South Australia:

"His Honour: In this matter both applications are dismissed with costs. I publish my reasons.
Mr McQuillan: Thank you for being an arsehole and thank you for being prejudicial and thank you for being a cunt.
His Honour: That's enough from you.
Mr McQuillan: Hope you have a good fucking retirement you stupid fucking idiot. Thank Christ we are getting rid of a fucking cunt like you."

Public Comment by Lawyers
There has been an increasing Americanisation of lawyers' conduct outside the court relating to their client's position.

I do not want to sound too pompous about this as I have given comments to the press myself in relation to particular cases but I think a word of warning is useful.

Recently I saw on television a lawyer announce outside a Local Court where his client had just been refused bail on a murder charge that his client was: "Innocent". I have always considered that such statements, even such thoughts, are rather bold at such an early stage in the proceedings, if at all.

After the first *Murphy* trial there was a successful appeal which led to Justice Murphy being re-tried. Neville Wran was asked:

"Q. Mr Wran what comments do you have today on the re-trial of Lionel Murphy?
A. I was very satisfied with the Court of Appeal decision. I agree that there was a clear miscarriage of justice and I think the sooner the final step in what's been a very very prolonged and sad affair is taken the better.
Q. So you're convinced he'll be found innocent after this re-trial?
A. I have a very deep conviction that Mr Justice Murphy is innocent of any wrongdoing.
Q. What do you base that conviction on?
A. My knowledge of Mr Justice Murphy and the facts as they emerged in that case.
Q. Are you worried that even if his name is cleared because of the finding of the last trial many people will still feel that he is guilty?
A. Well I sincerely hope not. He's a very unique individual who is admired and loved by hundreds of thousands of Australians and I think most Australians once the matter is finally disposed of will be anxious to restore him to the dignity and status to which he is entitled.
Q. Do you expect him to resume his duties on the High Court?
A. Oh I can't discuss those sorts of matters – that's a personal decision for Mr Justice Murphy.
Q. Have you been able to speak to him since this morning's decision?
A. No I've not."

He was convicted and fined $25,000.00.

Neville Wran was the Premier at the time. The case is reported as *DPP v Wran* (1986) 7 NSWLR 616. At 626 the Court described the test to be applied:

"The constituent elements of the relevant form of contempt are succinctly stated in this passage in the judgment of Glass JA in *Attorney-General for New South Wales v John Fairfax & Sons Limited and Bacon* (1985) 6 NSWLR 695 at 697:
'I am to direct myself that the test of the opponents' liability is whether the publication had a tendency as a matter of practical reality to interfere with the projected trial upon indictment of Sergeant Rogerson. It would have such a tendency if the minds of the putative jurors adjudicating upon the charge might have been influenced by what was published. This question falls for determination in the light of the nature of the material published and of the

circumstances existing at the time of publication.'

The tendency is to be established objectively, by reference to the nature and circumstances of the publication. It is not relevant for this purpose to determine what the actual effect of the publication upon the proceedings has been, or what it probably will be: *Attorney-General (NSW)v John Fairfax & Sons Limited* [1980] 1 NSWLR 362 at 368. If some question arises, the test for determining the meaning of words alleged to constitute a contempt is the effect on an ordinary reasonable member of the community: *Attorney-General for New South Wales v John Fairfax & Sons Limited and Bacon* (per McHugh JA)."

I suppose the distaff side of what Neville Wran had to say is what I recall a District Attorney for New York saying on the steps of the criminal court in downtown Manhattan after a person who was charged with murder had been arraigned. He announced to the press:

"We've caught the killer and he's going to fry."

Bravery

In recent times, particularly since the events of 11 September 2001, there has been a substantial assault, particularly by the Federal Government, upon the rights of individuals in respect to their liberty. Of particular concern to trial lawyers are the restrictions that have been placed upon defence lawyers' access to evidence to be produced by a prosecuting authority or an applicant authority either in a criminal trial or an application for a restraining order of some description against a citizen.

I shall not use this occasion to reprise various papers I have given at various places in relation to the legislation introduced by the Commonwealth which now forms Part 5.3 of the Criminal Code Act 1995. Most of you will be familiar with the scheme of that part of the legislation which restricts material which can be made available to a person who is the subject of an application for a control order or a preventative detention order. You will also be familiar with corrolative State legislation to give effect to orders of that type. As you would know it is almost impossible for lawyers to sensibly resist such orders as access will not be given to the underlying information which bases the statements produced by the police or the security agencies which found that the material upon which the court will make the orders.

As an aside it will be interesting to see what the High Court does in the *Jack Thomas* case.

Importantly the legislation restricts the access of lawyers acting for a person accused of one of the terrorism offences to large parts of the evidence to be led against an accused unless the lawyer has been security cleared to the satisfaction of the Commonwealth Attorney General. There are other outrages within the Commonwealth legislation particularly relating to obligations on the part of lawyers to reveal certain material which might otherwise be regarded as confidential and attract the protections of legal profession privilege.

In part it can said to be an assault on the integrity of lawyers. That no doubt has popular appeal but has never really attracted me given that over the years I have found, overwhelmingly, that the profession is honourable, scrupulous and honest.

Perhaps the language is a little pretentious but the sentiment reflects what I am trying to say: Kitto J in *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 297-8 said the following:

"….The issue is whether the appellant is shown not to be a fit and proper person to be a member of the Bar of New South Wales. It is not capable of more precise statement. The answer must depend upon one's conception of the minimum standards demanded by a due recognition of the peculiar position and functions of a barrister … the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations. If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, he is not a fit and proper person to remain at the Bar."

I am not much of a believer in sacred trusts but I am a believer in honesty, integrity, tact and diligence in dealing with matters of particular sensitivity. In my experience so are members of the profession.

With some adjustments the last words quoted above by Erskine ought to be recited to the Commonwealth Attorney General as a reminder of a proper application of the doctrine of the separation of powers. To restrict access to matters of evidence which go towards the potential conviction of an accused and for that exclusion to be done by the exercise of executive power strikes at the heart of the doctrine of separation of power.

I think in coming months courage will be required by our profession's representation of people who may be regarded as pariahs within our community with trials conducted in an atmosphere of terror generated by those who ought know better.