

[Print Page](#)[Close Window](#)

Court and Media Relationships

National Judicial College, Beijing, Conference - 30 October to 4 November 2005

COURT AND MEDIA RELATIONSHIPS

The Honourable Justice John Basten[1]

Last year my colleague, Justice Ipp, spoke to a distinguished audience at this College about the duties of a trial judge from the point of view of an appellate court, the idea of "judicial activism" and the principles of judicial impartiality and its antithesis, judicial bias. In this paper I will talk broadly about the relationship of the court and the media. Although it may not seem obvious, there is a common theme which links our various topics. That link is the accountability of judges in relation to the performance of their judicial functions, a topic which cannot be properly addressed without an understanding of the proper role of the judiciary in our respective societies.

Obviously I will speak from my experience in Australia, but the issues which I want to raise will, hopefully, resonate with judges from many countries around the world, although I am obviously more familiar with the literature which comes from English speaking countries. To the extent that the issues seem strange or unexpected to you, interesting questions will arise as to why that may be so.

One theme which I wish to identify at the outset is that in all the countries with which I am familiar, although to degrees which vary from time to time, there is tension between the courts and the media. Generally speaking, a level of tension is healthy and acceptable as part of a lively relationship between two active institutions in a modern society. However, the tension can be unhealthy if either party forgets that any exercise of public power must be constrained by a sense of responsibility, so as to avoid abuse of power.

Open justice

Principles of open justice play an important part in the operation of our courts. There are, of course, exceptions, but generally speaking justice is administered in an open court to which the public has ready access. Of course, courtrooms can accommodate only a small number of spectators and, in most cases, few people beyond the immediate parties, and the occasional law student, attend. Nevertheless, the principle of openness is important because it promotes public confidence in the administration of justice. And, importantly for present purposes, those who do not attend can read about significant cases in the newspapers and hear about them on the radio and on television.

If a case involves a newsworthy story, the journalists and reporters are often keen to report what happens in court. That is partly because they enjoy qualified privilege in relation to defamation in reporting court proceedings. As a result, they can report terrible things said about one of the parties by a witness which, if not said in court, would be unreportable because it would be defamatory and the party might sue the newspaper which published the comment, for damage to reputation.

Although the media occasionally publish reports of the evidence given in cases involving sensational crimes or involving individuals with a high profile, in most cases they have a greater interest in the outcome and report judgments which they consider may have some general appeal. Because reporters who cover trials often move from one court room to another during the course of a day, they may obtain only an incomplete picture of what is happening in any particular case and, even if they stayed for the whole of the day, they would have to condense the story into a few paragraphs for publication. As a result, newspaper reports can be misleading.

Similarly, when they report the judgments of a court, they often have to reduce quite complex matters to a short and pithy paragraph or two. Again, with inadequate time to come to grips with the whole of the judgment, and possibly a limited understanding of the legal issues in a case, the results may be misleading or unhelpful.

How the media report cases is a matter of some public importance. As judges, we give reasons for our decisions, not only so the parties may understand the result, but so that others who are interested may learn what the law is, or at least how it applies in particular circumstances. In some circumstances, though not all, the work of appellate courts may be of greater public interest and sometimes involve technical issues which are difficult for non-lawyers to read and digest. For this reason, most of the higher courts in Australia now employ public information officers who prepare short (one or two page) summaries of what the court has decided. Journalists usually like to tell a story with some human interest, so they rarely quote these summaries. Nevertheless, the fact that a short summary is available will often help a journalist to get the basic facts and the result correct.

The fact that the public have access to the courts and should be able to learn of activities in the courts, has not yet led us to allow unfettered access to the courts for television cameras. It is not uncommon for television stations to take pictures inside a courtroom before the case starts, but, at least in Australia, it is very unusual for television cameras to be allowed to record the progress of a court hearing.

Television coverage is more common in other countries, including New Zealand. As Justice Keith, a judge of the Supreme Court of New Zealand, explained in a recent paper [2]:

“Our basic rule is that TV or radio coverage is deemed approved unless within three days a party objects. It is then for a judge to decide but so far there has been no issue. As some of you ... may know, court proceedings in New Zealand, including jury trials, are televised if the trial judge, applying non-binding guidelines developed in consultation with the media, so decides. The value of this practice has been the subject of surveys, but is still disputed.”

In New Zealand, as in the High Court of Australia, transcripts of the hearings are publicly available on the court's website within, generally speaking, a day or so of the hearing. There are, of course, exceptions to the availability of court proceedings to the media. In some civil cases, such as commercial disputes, there may be confidential information which the parties do not wish to put into the public arena. Indeed, in some cases, one party may wish to rely upon confidential information about its operations which it does not even want the other party to the proceedings to know about. In commercial disputes, the courts are used to making arrangements which prevent such evidence becoming available in a way which would breach legitimate concerns about confidentiality. Those cases do not often give rise to tension between the courts and the media, because the public at large has little interest in the detail of confidential information about patents, intellectual property and such matters.

Of greater concern in our system is the publication of evidence about sensational crimes. In serious criminal cases, we rely heavily upon juries, made up of 12 members of the community, to decide the innocence or guilt of a person charged with a crime. Any person charged enjoys a presumption of innocence which can only be displaced where the jury is satisfied beyond reasonable doubt, on the evidence placed before it at the trial, that the person is indeed guilty of the charge. Although judges, by their training and experience, learn to disregard material which is irrelevant to the case before them, we do not assume that members of the community without legal training who become jurors have a similar ability. That is not to say that they cannot focus on the evidence properly before them, but simply that there is a greater risk that they will take into account, irrelevant matter, in a prejudicial way. For that reason, our rules of evidence tend to exclude from the material which goes to a jury much evidence that might be misused. For example, we do not tell jurors that the person charged before them has previous convictions, even if that is the case. In particular, we try to avoid trials in circumstances where there has been sensational adverse publicity about the accused, in the public media, shortly before the trial. Nevertheless, even in this area as our Court of Appeal recently held, it would be an extraordinary case in which the media were restrained from publishing the conviction of a person of a serious crime, even where there was a future trial which might be affected by the publicity. [3]

We are also conscious of the fact that more and more jurors have ready access to the internet and may be able to seek out publicity about an accused person, during the conduct of the trial. [4]

The response of judges running criminal trials has been to direct jurors not merely to confine their attention to the evidence presented in court and to ignore other matters, but to direct them specifically not to search for material on the internet.

Criticism of the courts

In the first part of this discussion, I have attempted to show how there is a symbiotic relationship between the courts and the media: each places significant reliance on the other in carrying out its work. Interaction is not, however, always based on circumstances of co-operation. For example, when a defamation case is brought against a newspaper publisher or television station, the court hearing the case will need to decide whether the particular media outlet which published the allegedly defamatory material has acted wrongly and, if so, what damages it should pay to the individual who has been defamed. In such cases, the particular media organization becomes a litigant.

More importantly, though, news reports and commentaries published in the media may be directed to the operation and management of the court itself. Judges like all people vary in their abilities and attributes. Many of the cases we decide are difficult and a choice has to be made as to which party wins. Judgments of the trial judge are accepted, graciously or grudgingly. Nevertheless, we acknowledge the possibility of error by providing courts of appeal, so that parties who are aggrieved by their lack of success at trial, may obtain a further consideration of their case.

Appeals are not always the answer: sometimes a judge behaves badly in a manner which may not give rise to a right of appeal or may simply demonstrate a problem with the character or health of the judge. In New South Wales we have a Judicial Commission which deals with complaints about judicial behaviour. These range from rudeness in court, to more serious matters. Potentially, they could include complaints of corruption, though I am happy to say that few such cases have arisen in Australia in modern times.

Despite these mechanisms for ensuring that judges are accountable in a public way, both for their behaviour and their judgments, judges may also be the subject of public criticism in the media. Some of that criticism raises issues of public importance and is presented in a fair and balanced manner; other criticism is based on ignorance and is sometimes spiteful or malicious in its intent.

Where criticism is unfounded and malicious, and particularly where it is directed to a particular judge or court, it may constitute a contempt of court, for which the organization responsible can be punished. However, prosecutions for contempt or scandalising a court are rare in recent times. One view is that it is better to ignore such ill-founded criticism, rather than draw greater attention to it by prosecution, with the possible effect of drawing further attention to unfounded criticism and providing a public opportunity to the person concerned to seek credibility for his or her views. Despite the strength of that consideration, if ill-founded criticism becomes too frequent, it may begin to undermine public confidence in the administration of justice, unless it is answered.

Let me deal briefly with three areas in which our courts tend to be criticised, we think inappropriately, in the media.

First, a legitimate area for public concern is the way in which judges sentence offenders convicted of criminal charges. (Although the jury convicts, it is the judge who determines the sentence.) The most common criticism of sentencing is that judges are too "soft" or lenient. The Chief Justice of Australia recently noted that he was only aware of one recent case in which a sentence had been criticised for its severity and that was a case involving a politician who had been convicted of an electoral offence. [5] Criticisms of leniency are frequently made by politicians and published in the media, but they may also be found regularly in the letters written to editors and published in newspapers, especially following a well-publicised trial in relation to a sensational crime.

Those who make such criticisms often claim to be reflecting "community opinion". In that they may be right: but the community opinion on which they rely is often opinion created by the media themselves, which tend to concentrate on the scandalous and outrageous in their reporting. Thus, as we all know, the picture of a crime presented in the newspapers may be quite different from the picture presented to the trial judge, on which he or she bases the appropriate sentence. The accused is entitled to be sentenced in accordance with the law, and on the basis of the evidence presented at trial, and not according to some assertion as to community opinion, or the expressed views of politicians. Further, the sentence in a particular case should reflect, as far as possible, the comparative severity with other cases which have been the subject of sentences in the past. One of the functions of our Judicial Commission is to try to ensure that sentencing courts have access to accurate information about the range of sentences imposed across all common offences. Trial judges generally give careful

consideration to this material, something which is rarely looked at by the critics.

Secondly, judges are criticised for being unaccountable and therefore irresponsible. Thus, when some aspect of judicial misconduct is identified, there will be complaints that there is no independent mechanism for dealing with such misconduct because the Judicial Commission, which is the responsible body in our State, is itself comprised of judges. Similar complaints are made about judges attending overseas conferences and even about the fact that average court hours are only five hours per day. In response to such criticisms, the President of the Bar Association in New South Wales recently responded that scrutiny of judges could be avoided if they would only work seven days a week, accept no pay, take no holidays and never make a mistake on or off the Bench. Overseas travel, he added, should be avoided if at all possible. [6]

These kinds of complaints are difficult to rebut, because they have an underlying factual basis. However, that factual basis reflects a constitutional principle of critical importance, namely the independence of the judiciary. If judges are not in control of their own work practices and are not able to deal with complaints about their colleagues, such control must be placed in a government authority of some kind.

Independence is not a simple concept; it is not either granted or withdrawn in some absolute manner. It is a matter of degree and circumstance. Judges are appointed by government and some at least have expectations of promotion. Their salaries, holidays and travel entitlements are fixed by government. On the other hand, subject to committing some quite serious offence, they cannot be removed from office until they reach retirement age. Nobody checks the time at which they arrive at court, nor the time they leave in the evening. Their pay is not dependent on how many cases they decide in a year, nor how they decide the cases nor how often they are overturned on appeal.

The danger of criticism as to the behaviour and practices and control over the judiciary is that it tends, in an incremental way, to encourage reduction in the independence of the judiciary. It does so by undermining public confidence in the responsibility and integrity of the judiciary, so as to create an atmosphere in which governments think it either desirable or necessary to impose additional controls. This can be an insidious process. Yet, those in the media who criticise judges as too independent and irresponsible, might well have a different view if they need to go to court to challenge a tax assessment made by a government officer or to resist a charge that they have been guilty of breaking the law. They will then be anxious to know that the judge is as independent of government and external influences as possible.

A third area in which the judiciary is subject to criticism in the media is that of appointments. In a sense, this topic mirrors that of removal. Whilst, however, some critics accept that judges should be free from the risk of removal by the government of the day, they are less convinced that the government should have an unfettered power of appointment. Given the power that judges exercise in determining disputes and applying the law, some feel they should be answerable to the community by being chosen by way of popular election, rather than by appointment by the government of the day.

As you may be aware, most of our judges, at both local court, intermediate court and appellate court level are appointed from the ranks of the legal profession. A handful have been university law teachers, or politicians prior to appointment. There is, from time to time, criticism that judges are chosen on the basis of connection with the political party in government at the time of their appointment, but it is only in the rarest cases that there is a suggestion that the person appointed was not within a group whose seniority, experience and ability were sufficient to make its members appropriate appointees. Indeed, it is only in relation to our seven member High Court, the ultimate court of appeal in Australia, that there is any great attention paid to appointments. In relation to that Court, concern is often expressed that the appointments come from too narrow a class and that the process of selection is not sufficiently transparent, but rarely is there a suggestion that those appointed are not of sufficient ability. Further, Australia being a federation, there is pressure from the smaller States to achieve some level of "representation" for appointments from the legal profession or judiciary of those States to the national High Court. Similarly, there is pressure for appointment of more women to the Court.

There is a tendency, sometimes criticised, and with some justification in my view, for governments to appoint judges who are not necessarily of a particular political persuasion, but are seen to share the views and values of the government of the day. Nevertheless, the level of criticism of appointments is not such as to undermine public confidence in the courts and can be seen by the courts as little more

than an occasional irritation.

Response to public criticism

There used to be a convention in Australian political life that judges not answer public criticism. That role was expected to be undertaken by the Attorney-General of the day, being the government minister responsible for the administration of the courts. However, in recent years, that custom has slipped into disuse to the extent that we are more likely to see the Attorney-General criticising a court than answering criticism of it.

Some see this development as no bad thing: it has at least the effect of demonstrating the independence of the courts from the government.

On the other hand, unanswered criticism may, if it is more than sporadic, diminish confidence in the administration of justice. Especially in circumstances where the criticism is misconceived or unjustified, it is desirable that it be publicly rebutted. On the other hand, most judges feel great reluctance about entering a public debate, particularly in defence of themselves.

In cases where criticism is directed at the decision in a particular case, the parties themselves (or the successful party at least) may be willing to defend the judgment. Further, where criticism is directed at judicial personalities or the structure of the courts, leaders of the practising profession sometimes take it upon themselves to respond to that criticism. On the other hand, these are not comprehensive or reliable means of responding to what, in some parts of the Australia media, has become a regular stream of criticism.

The answer to this dilemma is to be found in the creation, over recent decades, of a number of organisations, to represent judges. Amongst the better known in Australia are the Judicial Conference of Australia and the Australian Institute of Judicial Administration. There is also a National Judicial College of Australia. These bodies have slightly different interests, with which I need not trouble you. However, to a large extent it is these organisations which have taken over the role of responding to public criticism of the judiciary on a timely basis.

Conclusions

In conclusion I would say that the relationship between the media and the courts in Australia is generally co-operative and uncontroversial. For the most part, the activities of the courts are reported and commented on by the media in a responsible and valuable fashion, in the public interest. As judges, we may feel irritation at the inadequacy of public reporting, especially in relation to cases in which we are involved. But the media need to engage, interest and entertain the public: these are not our goals. Any generalized irritation on our part can usually be subdued in part, at least, by acknowledging to ourselves the important function of the media in promoting freedom of speech and conveying information of public importance, and recognising the constraints under which the media operate.

Within that area of co-operation, the media must enjoy freedom to comment on and criticise the what the journalists see in court.

On the other hand, reporting may be so bad as to be misleading and detrimental to the interests of the court, and criticism may be little short of scandalous.

The courts (and governments) must openly acknowledge the need for the judiciary to be protected against ill-informed or scandalous criticism. There should also be a mechanism available for correcting reports which are simply wrong, as a matter of law or fact. The important principle which should be given practical effect, is that judges should not be expected to defend themselves publicly by giving interviews to the press or writing to the press to justify their conduct. Nor should they be responsible for seeking to explain their judgments.

The best form of correction is often early intervention. For that reason, our courts, institutionally, have set up public information officers, who are kept informed of cases which are likely to be of public interest and are available to provide appropriate information to journalists. Similarly, where, for

example, a journalist publishes an article which contains mistakes, the court's information officer may invite the journalist to publish a correction. In this way, judges are protected from direct contact with the media.

Beyond the specific court organizations, as I have noted, there may be associations which represent judges and seek to respond to attacks on individuals or criticism of judicial conduct more generally.

These institutional initiatives provide an appropriate means for maintaining contact between judges and journalists with the least possible risk to individual judges. These organizations should have governmental support.

May I close with an example which has caused concern amongst many judges, lawyers and thinking people in Australia. A number of Australians have been arrested recently in Indonesia and charged with drug offences. These people may face the death penalty under Indonesian law, being a punishment we do not use in Australia. As a result, there has been much publicity in the Australian media and expressions of concern as to whether the accused will face fair trials and will be sentenced according to principles which would apply in an Australian court. On occasion, Indonesian judges have apparently felt compelled to comment to the media, about the procedures which have been adopted in court and the course the trial or appeal will take. Why the judges took that course, I do not know, but it is fair to say that some of the criticism of the Indonesian courts in Australian newspapers has been ill-informed and intemperate. Particular judges may have become aware of that and felt it desirable and appropriate to provide some level of public explanation. That may have been the correct judgment in the circumstances and I do not wish to join the ranks of the ill-informed critics. My only point is that, as an Australian lawyer and judge, I would be very wary of engaging in any public communication with journalists whilst conducting a trial, unless such commentary were essential for the purpose of ensuring that a trial proceeds fairly and properly.

END NOTES

1. A Justice of Appeal of the Supreme Court of New South Wales, Sydney, Australia.
2. K. J. Keith, "Challenges in Media Relations", paper delivered to the Sixth Worldwide Common Law Judiciary Conference, Washington DC (USA), 29 May – 3 June 2005.
3. See *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344; [2004] NSWCA 324.
4. The Hon V. Bell, "How to Preserve the Integrity of Jury Trials in a Mass Media Age", (2005) 7 The Judicial Review 311.
5. The Hon A.M. Gleeson AC, "Out of Touch or Out of Reach?" (2005) 7 The Judicial Review 241 at 243.
6. See *Lawyers Weekly*, Friday 30 September 2005, p.1.