

The Same Old Lawyers Guns and Money – the life of a new judge in the criminal courts – is it better?

The great Dick McGarvie – Chairman of the Victorian Bar for a time, silk, Supreme Court judge and Governor of Victoria once told me that the thrill of being appointed as Queens Counsel (as it then was) was far superior to everything, including appointment to the bench. I am not so sure about that.

Is being a criminal trial judge better than being a barrister? Is my life now better than the 34 years I spent at the Bar?

Regrettably, I have to tell you, the answer is unquestionably “yes”. Some wit once said that good lawyers know the law but great lawyers know the judge. May be that is why.

In truth, part of the reason is that I never found being at the Bar an easy job. I always struggled with the need to remain distant from the client’s dilemma and treat it only as an intellectual exercise. I got better at that but as the cases got harder the effort required increased dramatically. I also encountered a few judges over the years who made an art form out of making life as difficult as possible for young lawyers and, apart from the power and control it demonstrated, I never understood the professional utility of it. I know – well I think – I am not like that.

As barrister Dyson Hore-Lacey (known to many of you as having spent time in the Territory) said to me a few years ago when he was appointed a acting Coroner – “you have no idea of the pressure you are under as a criminal defence lawyer until someone takes it away”.

And he was absolutely right about that.

Those of you who defend in criminal trials day in and day out have my everlasting admiration. The pressure on performance is significant; the pressure from the client likewise and the rewards are never as good as they should be. So Dyson was right, not because the condition of the criminal justice process is terminal. It is simply because we work under very significant pressure.

I have seen criminal law systems that are in that terminal condition – in Sierra Leone for example or, even for that matter, Guantanamo Bay Cuba under the previous Military Commission system and we are not anywhere near that category.

So the lawyers are basically the same; the guns are still in use and I am over worked and underpaid.

For me it is great to be here among criminal lawyers, particularly including Julian Burnside QC and Rex Wild QC. Burnside and I met 42 years ago at Monash as we commenced our respective unremarkable law degrees.

Wild and I met 36 years ago in Tait Chambers, Lonsdale Street. I smoked Marlboro – he smoked Rothmans. And, topically, as junior counsel at the Costigan Royal Commission in the 1980s we had a bird’s eye view of Malcolm Turnbull doing then

on behalf of Kerry Packer what he has done on behalf of the Federal Opposition – rushing to public judgement on no credible information.

Being here amongst criminal lawyers makes me very nostalgic – perhaps for the first time in the 20 or so months since I have been a judge. Here I am with people of great principle. People who live for the rule of law and the defence of unpopular causes.

(Humorous Woody Allen type story about being offered a big prosecution brief).

I have now dealt with the topic in the programme but I thought that, given the theme of the conference, I would return to one of my favourite topics which is the media and the criminal law.

In May of this year in Canberra I delivered the Blackburn lecture which is an annual event in memory of the first Chief Justice of the ACT Supreme Court.

The topic concerned the assertion, often made, that judges are out of touch with the community. There was a time when I might have been sympathetic to that view but I have seen the light.

A Canberra Times journalist, Crispin Hull, who was present for the lecture and reported it in the paper the following Saturday, reminded me by a reading of his article that those of us who had a little to do with the media should not be too quick to claim expertise. I am certainly in that category.

As he pointed out, contrary to what I had said in the lecture, the role of the media is not to inform the public – it is to report the news. My views were, he thought, “... *desperately misguided. News he said is not selected merely by importance but by a number of other factors which excite attention and readership. Impact (financial and otherwise) and importance are news values. That is why the budget gets such big coverage, for example. But they are joined with values such as emotional reaction, conflict, novelty, celebrity, proximity, pictorial impact and timeliness. With news, the particular gets more coverage than the general.*

The difference is significant and I take his point and it is perhaps in this respect that we as lawyers struggle with the idea of anything other than an objective and dispassionate reporting of the criminal justice – and, perhaps, we are being unrealistic because criminal cases are emotional, involve conflict, sometimes novel or bizarre and occasionally involve celebrity even if it is football commentator Rex Hunt punching a cyclist.

So when it comes to media and the criminal law, particularly involving offences which the community regards as of particular interest we can expect a substantial cross section of reporting. And there are two forms of reporting criminal cases. The first is the report of what actually happened in Court, constrained to some extent by the contempt laws and the risks that involve causing a jury to be discharged.

But the other form of reporting is commentary, perhaps involving a particular case, in which the system comes under scrutiny. Those most often under scrutiny are judges – because they impose the penalties – and very often counsel for the accused. Acting as

Counsel for the unpopular cause can, in particular cases be a difficult job (see my 2006 Law Week Oration at Melbourne University!).

There have been cases where the media reporting of a case has generated such public interest that laws have been changed. For example, the execution of Ronald Ryan in February 1967 was such a case. Ryan and his accomplice escaped from Pentridge and a warder was killed in the process. There was man hunt. Then a capture. Then a trial. Then an appeal. Then an execution in the full glare of publicity. The community began to think pretty hard about whether they wanted a system where, to punish someone for killing someone else, that person would themselves be killed. The case developed into a public debate led by the great Barry Jones and within 7 years capital punishment was gone and no-one else was executed in the meantime.

A case which perhaps did not do the media so much credit was the case of Lindy Chamberlain and the death of her daughter Azaria. The child died in 1980. The legal process lasted for 15 years until the open finding at the final Coronial Inquest in 1995. The case was sensationalised by the media and when, in 1982, the Chamberlains stood trial before the Northern Territory Supreme Court, it is difficult to imagine that there was any adult in Australia who did not hold a media-based opinion on whether they were guilty or not.

In my own experience two cases stand out in terms of media impact on the popular perception of unpopular causes. Primarily, the case of Van Nguyen in Singapore. That was a case in which, in the very early days, I was assured by the then Foreign Minister Alexander Downer that the Australian public would not be much interested in my client's fate. After all, he was a drug trafficker. Well, there was.

Thanks to the media, the case became iconic on two topics – the death penalty generally and proportionality of punishment. It just seemed unfair for this young boy to die for what he had done – but die he did.

There was a media pack in Singapore. And “media pack” sounds pejorative for they were no pack. They were determined to get their story but they were discreet and respectful. On the afternoon before Van died he was visited by his family and after those visits were finished the stress his family was under was palpable. You could see it and you could hear it. And the Australian media watched on silently, sympathetically and respectfully. Hard bitten journalists like Steve Butcher from The Age who have seen plenty were nonetheless affected by the situation. The media were kept outside a fence at the new Changi prison visitor centre.

There were tears; some solid consumption of alcohol and a breath taking level of understanding. Plus, they knew they were in Singapore – a place where the freedom of public discussion we take for granted has, for a long time, been severely curtailed under the domination of the Lee family.

A profile was raised by that case and it could not have been done without the media. It may happen again. There are three young Australians in here in Bali. They have been on death row now for a number of years and await the outcome of the legal process. They are supported by a team of lawyers – all working for nothing – effectively led in

Australia by Julian McMahon. They have, I think, the support of the community for the work they are doing.

Another case is that of David Hicks. A far more political case. If you examine the politics and the media of those early days after it was known that David Hicks had been swept up in Afghanistan, you would find not much sympathy for his plight. Indeed – none. The Government of the day's position was that since there were retrospective laws at Guantanamo that we did not have here, they would not bring him home because if they he could not be charged with anything here. That was 2005.

In that case, there was a massive shift in public opinion because, I think, the public got interested and they saw an unfairness in imprisonment without trial and even retrospectively criminalising conduct regardless of the political rationale.

Their interest was also heightened by the public performance of a man known to many of you - Marine Corps Major Dan Mori – defence counsel. You know him from this conference – he is now a military judge.

There are numerous other cases which highlight the bond between the media and the criminal justice system. If we ventured overseas to the US we could talk for hours about cases like Rubin “Hurricane” Carter or John Lennon’s assassin Mark Chapman. Or John Gotti, the so-called Teflon Don in 1992. Or O J Simpson or even Martha Stewart. There are some cases that generate phenomenal public interest and a media frenzy. I could not leave this topic without at least referring to the so-called Melbourne gangland war and the resultant Underbellies 1 and 2.

I agree with the criticism of that series that it has eulogised many career criminals who were thoroughly undeserving of the romanticisation of their activities particularly their killings. None the less, Melbourne developed a fascination with the whole saga and many sought to benefit from it.

So, to come back to my trip to Canberra, let me come back to the slightly more mundane. The are issues in our cities in the way crime is reported but most of those issues concern not so much the individual cases as the general public discussion about the criminal justice system.

They do report the news but they way they report it shapes opinion. Is the person in the dock to be described as the accused or the prisoner or is he better to be described as a “monster” or a “sex fiend”?

Are keys to prisons really only for throwing away? Do we understand rehabilitation and redemption? Do we agree that the most accurate measure of our own civilisation is how we treat our worst? I am sure we do.

The public is helped and informed by a disciplined approach to its coverage of criminal sentencing in particular. The power of a judge to take away someone’s liberty is an awesome responsibility.

Sentencing **should** be criticised and discussed in public but it should be criticised fairly, and in such a way that assists in educating the community about sentencing principles. Leaving out, or under-reporting on critical aspects of sentencing laws misleads the community and undermines the integrity of the judiciary. However, of course, we judges cannot expect the media to do all the work for us.

It seems to me that judges, among others, have a role to play in helping the community understand what judges do and what is involved in our work. We are unelected but we are nonetheless responsible to the community who have a legal, moral and financial stake in the operation of the courts.

The community would benefit enormously from an expansion of the explanations on how it works and we need the media to help us to do it.

In the Victorian Supreme Court we have discussed how we can make our process more accessible as well as judges being prepared to discuss what they do and educate the community on how the system works. More effective liaison with the media and pre-planning to help the journalist under pressure get to the information they need to report accurately.

Web casting is a possibility in significant cases. At the moment, for example, you can watch the Bushfire Royal Commission live on the internet. I am, not sure that is the answer for criminal trials but it is an interesting experiment.

Despite the numerous benefits of media interest and reporting to our legal system and the community, unfettered media coverage cannot be put before an accused's right to a fair trial or the right to privacy. With the ever-faster media response to and coverage of both the crime and the punishment, protecting both pillars of our law can be a conundrum. This is of course where suppression orders and orders for closed court come in. Judges do not make such orders lightly.

A further consideration which has already become difficult to deal with in this digital age is the impact of information freely available to members of the public over the internet. A judge in any State can only make orders which affect those in that jurisdiction. The internet is thoroughly international and anonymous in many cases.

It opens up the possibility for the jury to 'investigoogle' information about the accused. This investigation process is against the law: section 78A of the *Juries Act* prohibits jurors from researching trial matters by any means. In many cases trial judges direct juries in criminal trials not to do any internet searching regarding the accused or the circumstances of the case upon which they have been empanelled. The risk is that such a direction will put the idea into a juror's head but the only way the process can work is if we assume that when a judge gives a jury a direction, they comply with it.

These are the challenges that lie ahead for the relationship between the criminal law and the media. There are challenges for judges. As they say, "as at present advised" I enjoy being one.

Thank you.