THROWING STONES:

A cost/benefit analysis of judges being offensive to each other

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We can give offence without intending it. But judges, of all people, ought to know the meaning of their words. Sometimes the sting is intended, especially in a reserved judgment. Sometimes it is personal.

This paper explores the motivation of studied harshness, when it is legitimate, and its impact upon the effective working of the judiciary. I am unaware of any previous writing on the topic in Australia.

A judge is entitled to speak freely during the hearing and is expected to make frank disclosure of the true reasons that support his or her proposed orders. Within an appellate court, circulating reasons in draft invites the concurrence or reasoned dissent of one's colleagues as well as their assistance in removing unintended infelicities. Sharp edges of language, fallacious reasoning and overlooked arguments may thus be detected before it is too late. But when a judge's reasons are published they speak to the world at large. With the internet they pass instantaneously across the city and across the globe without hope of retraction.

The more strident a rebuke in a judgment the more likely it is to be picked up by the legal public, reported by the media (usually out of context), and viewed as a slight on the reputation of the person rebuked. The substance of the decision may be

ignored. The media coverage of Sackville J's recent ***C7*** judgment containing criticism of a lawyer associated with one of the winning parties is an example of what I am talking about.

When a judge adopts strong language to condemn a party's criminal or corrupt conduct, a witness's perjured testimony, or a legal practitioner's incompetence there are well-established rules about procedural fairness and standards of proof that the judge is first expected to apply. And there are avenues of recourse for those affected or the parties associated with them.

When a judge adopts sarcasm or worse to gibe a colleague in a collegiate court, the recipient will know in advance what is coming. The odd unseemly public spat between judges on appellate courts may lower the standing of those judges and their court, but at least the recipient(s) get fair warning and an opportunity not to turn the other cheek.

When a judge chooses to chastise the judge whose decision is under appeal, such criticism will invariably strike a target who was uncharged and unrepresented and who has no recourse. This will be the case whether or not the criticism was justified in its content or in its terms. Is this part of the inevitable cut and thrust of the judicial system? In what circumstances is strong language appropriate? Is it possible to develop standards or conventions as to when such criticism is in order and as to acceptable methods of expressing it?

My topic addresses the relationship between appellate and lower courts in the language of their public discourse. I am not concerned with what passes as judicial humour, except where it is sarcastic and directed at the court or judge below. From my perspective as President of an intermediate appellate court, I perceive that our senior judiciary has a problem that calls to be acknowledged and analysed. The chosen title ("Throwing Stones") acknowledges that I may be both the most and the least qualified to speak.

I am unaware of the extent of the problem as regards appeals from Local Courts to the District or County Court or in relation to appeals to single judges of the Supreme Court. In any event, the dynamics are different where courts of appeal or the High Court of Australia are involved. Studied criticism in a reserved and published judgment by a senior court bears an institutional sting, if only because of the intended likelihood of its republication.

Some readers will consider the problem to be inevitable in a system that highly values free speech and judicial independence and in which an appeal court has the duty to correct material errors. They may share the view of Field Marshall Montgomery who, when asked how he justified war, referred the questioner to Maeterlinck's **The Life of The Ant**. Montgomery's point was that war casualties are part of the natural stuff that happens.

Others will think it better that judges kept silent because they should never throw stones at each other!

In defence of this paper, I suggest that most Australian judges will know at once what I am talking about. The High Court and intermediate courts of appeal occasionally adopt personally offensive language when detecting and correcting error below.

In my opinion, the topic also deserves attention because offensive discourse undermines the mutual respect that should exist as between the different layers of the judicial hierarchy. It promotes an *"us/them"* mentality. It reinforces unhelpful perceptions that the higher court lacks understanding of the dynamics of life in the trenches. And it saps the institutional morale of the lower court, especially if reportage of a rebuke attributes fault to the court as a whole. Fear of a second personal attack may provoke inertia by stemming the flow of judgments by nervous judges. These consequences apply whether or not the content or language of the reproof was justified.

Like casualties of war, these harmful impacts are justifiable only to the extent that they are inevitable.

Successive Chief Justices of Australia have written about the corrosive impact of attacks by the media or the Executive branch upon the Judiciary. But we see only half of the problem if we exclude the impact of judges attacking each other. Our voracious media thrives on reporting conflict, error and disfunctionality. Public accountability is an essential aspect of the appellate process, but doing so by means of abusive language has a cost that needs to be weighed by those responsible.

It is always open for a judge to decide a case by stating that the issues were X, that the submissions were Y, and that the decision is Z because the answers to X and Y were XA, XB etc, YA, YB etc. In an appellate court this exercise may entail disagreement with the reasons of the court below or the processes whereby its decision was reached. Sometimes a submission that the lower court misconducted itself in some way also falls to be addressed.

In 99 times out of 100 the submissions of counsel in an appeal choose language that does not attribute personal fault to the judge below. Advocates focus upon errors, not the actor who made them, the sin and not the sinner. An appellate judge must address all such issues without fear or favour, but also without affection or ill will. The choice to castigate the sinner is almost always the unprompted decision of the appeal judge.

Sometimes an appeal court encounters judicial misbehaviour that calls for firm denunciation. A few months ago, the Queensland Court of Appeal strongly critised a judge's conduct towards an unrepresented litigant, describing it as impatient, rude and overbearing. This would have stung the judge deeply, but was part of the proper vindication of the appellant's rights that had been trampled on by the very conduct justly complained of. The Court of Appeal's judgment drew forth a public apology by the Chief Justice to the litigants concerned. Geoff Davies, a former judge of the Queensland Court of Appeal, has written that this incident shows why other jurisdictions should have a Judicial Commission like that in New South Wales to address these matters more systematically.[1] But he also stressed the obligation of

[1] **The Australian** 14/9/2007.

an appeal court to speak firmly when firmly satisfied about miscarriages stemming from judicial misbehaviour. I agree.

Indeed I see nothing wrong with an appellate court noting that a significant error has occurred repeatedly in successive decisions by an identified judge who has ignored previous appellate reversals. A few years ago the New South Wales Court of Criminal Appeal recorded the many instances of studied disregard of sentencing standards and appellate reversals by a named judge of the District Court. The New South Wales Court of Appeal has done likewise with repeated infractions by a judicial officer of his duty to provide adequate reasons and to grapple with the real issues presented at a trial.

This admittedly extreme resort is fairer to the lower court as a whole than a broadside directed to it *en masse*. In situations like this, a calm recounting of the judicial record may be more effective than vituperative language.

I recognise that some courts (including the Victorian Court of Appeal) have a policy of not identifying the judge appealed from, at least in certain situations. In my view, this risks the appearance of judges protecting each other. It is also impracticable, in that the profession will always know who is involved if it matters. Furthermore, other judges on the court below are entitled to be excluded from the criticism.

A court's reasons must address the winning and losing parties and the main arguments advanced on their behalf during the hearing. A judgment may also speak to the profession, the academic community, those involved with the enforcement or

making of the law, and the public generally. It is an acknowledged role of an appellate court to expound general principles for the guidance of the profession and others.

Nothing in this paper implies that appellate courts should hold back from their painful but necessary supervisory role (sometimes called their visitorial jurisdiction). Since appellate decisions are forward-looking as well as backward-looking, there will be situations in which deterrent policies are properly in play.

Making the appellate judge feel good for getting something off the chest is not, however, a proper aspect of the judicial function. The obligation to act without fear or favour does not authorise the venting of personal spleen even where error is clearly established. In Roscoe Pound's words, *"the opinion of* [a judge] *should express his reason, not his feelings"*.[2]

All of us speak from the heart at times, believing that it is necessary to do so in the particular circumstances. Each judge is free to choose the language and tone of his or her discourse. Sometimes we adopt rhetorical forms. Some of us are brusque by nature. Sometimes strong language is used unconsciously. At times, we persuade ourselves (some more than others) that the "time to speak" has arrived and that our voice deserves to be heard in a particular matter.

Not all of us have wisdom or sensitivity that matches our perceived capacities. All of us will make mistakes, sometimes in the very act of perceiving them in others.

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[2] Roscoe Pound, "Cacoethes Dissentiendi: The Heated Judicial Dissent" 39 **Amer B Assn J** 794 (1953) at p797.

An appeal court's reasons will interest the judge under appeal. They are meant to do so. Lessons are to be learnt and mistakes avoided in the future. It will be expected that the judge's co-workers will read what is written as well. If there are blows to individual or collective self-esteem, they will not be kept secret in our system of open justice.

The court whose decision is challenged has no means of controlling the arguments presented on appeal or responding to their perceived inadequacies, let alone the perceived deficiencies of the appeal judgment. Alone of the world, the judge or judges who are overturned must accept reversal without public questioning, not even (or especially) in a later judgment. They can complain to colleagues, grumble to their spouse or kick the cat. But a public response is for others to make.

Most judges adopt the policy of never speaking privately about their own decisions to those above or below them in the judicial hierarchy. For them, the answer must be as Pontius Pilate's (*Quod Scripsi Scripsi*). Those who breach this convention may unconsciously rub salt into a wound, sometimes their own. And if it is the senior judge who initiates the discussion, he or she may provoke a frank response that may be as unwelcome as it is unhelpful.

Australian law, unlike that in India,[3] does not give a judge standing to move the higher court to correct or expunge its own unjustified error.

[3] For a review of the cases see ***Re 'K', a Judicial Officer*** [2001] 4 LRC 622, [2001] 2 LRI 411.

I do not suggest that we follow the Indian precedents that recognise an inherent jurisdiction to permit application for the expungement of objectionable remarks from the court record. But there is a most useful statement about the principles I am advocating in a 1990 decision of the Indian Supreme Court:[4]

> *Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this humility of function should be [the] constant theme of our judges. This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary. Judicial restraint in this regard might better be called judicial respect, that is, respect by the judiciary. Respect to those who come before the court as well to other co-ordinate branches of the state, the executive, and legislature. There must be mutual respect. When these qualities fail or when litigants and public believe that the judge has failed in these qualities, it will be neither good for the judge nor for the judicial process.*

These considerations mean that an appeal judge should weigh most carefully the cost/benefit of choosing to go beyond what is necessary for deciding the appeal and attacking the judge or judges appealed from, or their court generally. The appeal judge wields a mighty weapon if he or she chooses to add a personal rebuke. The temptation to do so will be strongest in a context involving clear error, but the kick is always a free kick.

Appellate courts are necessarily subject to little or no external restraint. They alone are the collective guardians of their own discourse. In reality, one member of the court cannot stop another from saying what he or she chooses. Of course, we do not have to concur in reasons with which we disagree and we are free to dissent from them in our own terms.

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4 ***Mathur v Gupta*** [1990] 2 SCR 110 at 117.

The double entendre of my chosen title ("Throwing Stones") acknowledges that the problem of strong language is not confined to the way the High Court of Australia sometimes addresses intermediate courts of appeal. From my perspective in New South Wales I am aware of considerable (and sometimes justified) resentment from other courts in New South Wales about the language of the reasons sometimes emanating from the Court of Appeal. I base myself on ten year's attendance at the annual conference of District Court Judges in this State, and upon welcomed, though sometimes painful, feedback from the President of the Industrial Relations Commission and the Chief Judge of the District Court. I have written or joined in judgments offending the standards that I now propound and this is a cause for regret.

In recent years when attending the District Court Judges' Conference I have been questioned about the tone of criticism found in certain *"judgments of the Court of Appeal"*. I point out that mine is a busy Court without infinite opportunity to check and recheck the language of its judgments. I explain the educative role of the Court of Appeal. I indicate that no one is perfect (intending thereby to include judges of the Court of Appeal as much as judges of the District Court). I also explain that occasional excessive language is the price paid for free speech values. I tell the Conference that no appellate judge assumes responsibility for a colleague's reasoning unless joining with that reasoning with unqualified assent: this at least attempts to answer the blanket criticism of the Court of Appeal. I also tell the District Court Judges that stronger language is sometimes chosen deliberately because of perception of a recurring problem.

That is about as far as I can go by way of explanation and justification to my judicial colleagues in the District Court. The rest lies with the individual and collective self-discipline of the Court of Appeal. At my request, the District Court judges provided me with a bundle of cases of concern. The material was considered at a meeting of the Judges of Appeal. In some instances, we perceived our brethren from the District Court to be overly sensitive. In others, we recognised room for our own improvement.

There has for some time been significant concern within the New South Wales Court of Appeal about the cases (numerically small, but costly to litigants and the State) in which a new trial is ordered because the trial judge has not wrestled adequately with the issues and/or exposed his or her reasoning to an acceptable degree. While I hasten to absolve the great majority of District Court judges from this comment, there is sometimes a perception that the problem of absence of reasons stems from more than simple oversight.

Everyone has his or her own *betes noires*. But there are recurring situations that appear to trigger offensive language from time to time. I am not at this stage justifying or condemning the language. For the present, I merely flag the situations that tempt some appellate judges to “let rip”.

Appeal judges appear to get angry when they perceive recurring yet avoidable problems, instances of high-handed bullying and wasted costs. The temperature may rise even higher if the identified error concerns a field of intellectual interest to

the appellate judge concerned or if the judge below is thought to have wilfully disregarded binding precedent.

The High Court may get touchy about intrusions upon areas in which it perceives itself to have a monopoly in developing the general law. It is also solicitous for the plight of trial judges who have been unjustly reversed by an intermediate court of appeal.

Scenarios that call for a strong, but not necessarily offensive, response include repeated infractions of established principles of judicial method, disregard of binding authority, and mistakes involving well-known legal principles. Even here, caution is strongly advised. Errors may be the product of the way the case below was conducted. Slips and omissions in the language of reasons of busy judges do not always betoken substantive errors.

Indeed, the very talk of "error" may be inapt and therefore offensive. An appellate court that decides a case is entitled to pull rank by preferring one interpretation of a statute over another, or adopting one field of academic discourse in preference for another in a contentious area. But considerably more is required to be shown before it may justly brand the opposite view as erroneous. One recalls Jackson J's aphorism about the Supreme Court of the United States:[5] *"We are not final because we are infallible, but we are infallible because we are final".*

[5] ***Brown v Allen, Warden*** 344 US 443 (1953) at 540.

An appellate court can expect to be asked by at least one of the parties to find error in the decision below. If error there is, the court must identify it (at least so far as this is necessary) and expose it by demonstrating superior reasoning process. So far so good. But when, if at all, is it, necessary or productive to go further? I have in mind reasons that:

- grade an error as “serious”, “very wrong” or “fallacious”
- state or imply that the error was the product of gross ignorance about a basic legal principle without first addressing and rejecting the possibility of poor expression in the reasons of a busy judge
- seize upon an obvious slip in one portion of a judgment without acknowledging a correct statement of principle elsewhere in the reasons
- state or imply that overlooking of precedent was wilful, without squarely addressing the basis for such a conclusion
- include comments *ad hominem* directed at the judge or the judge’s scholarly associates
- state or imply that the overruled judge was on a wilful frolic contrary to the judicial oath to do *“justice according to law”*
- castigate the lower judge in circumstances where a split decision in the appellate court reveals some of the rebuker’s colleagues to have found absence of error in the court below. Might consistency not mean that the rebuker should add his or her colleagues to the list of the benighted if silence is not the preferred option?

It could be useful for a forum such as the JCA to start a project for identifying further categories of offensive discourse that should be avoided according to best practice.

Any judge who itches to get stuck into another errant judge or who writes in anger should pause and consider the advice of Benjamin Cardozo:[6]

> *Write an opinion, and read it a few years later when it is dissected in the briefs of counsel. You will learn for the first time the limitations of the power of speech, or, if not those of speech in general, at all events your own. All sorts of gaps and obstacles and impediments will obtrude themselves before your gaze, as pitilessly manifest as the hazards on a golf course. Sometimes you will know that the fault is truly yours, in which event you can only smite your breast, and pray for deliverance thereafter.*

It would be quite wrong for anyone to infer that this paper is connected with my decision to retire from the Bench in the new year. I have been thinking about these matters for a considerable time. I do admit, however, that the imminence of judicial retirement affords me some liberty to speak my mind. In doing so, I would hope that I have not caused offence to any judicial colleague. If I have, he or she is welcome to reply with stones thrown in my direction.

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6 Cardoza B, *Law and Literature*. Published in (1939) 39 **Columbia Law Review** 119 at 122.