

## Legal Ethics in Court Practice—Commentary

*Marie Dyhrberg*

*President Criminal Bar Association*

I would like to discuss two of the matters raised by Justice Teague in his illuminating address, namely the public's perception of judges and lawyers, and the dilemma of the indefensible case.

### Judges and lawyers

Justice Teague has commented on the differing public perception of judges and lawyers, the former at the apex of public esteem, the latter near the bottom. I propose to explore this paradox. Speaking first to the judges.

#### 1 *Judges*

Perhaps one of the most obvious hallmarks of the judiciary is their independence from political interference. Regardless of the government's role in his or her selection, once appointed, a judge is presumed to be free from political allegiance, influence and persuasion. I would suggest that such independence is an important element in the public's favourable perception of the bench. The connection is conveniently expressed by de Smith and Brazier:<sup>1</sup>

It is clearly of great importance that justice be dispensed even-handedly in the courts and that the general public feel confident in the integrity and the impartiality of the Judiciary. Where the Government of the day has an interest in the outcome of judicial proceedings, the court should not act merely as a mouthpiece of the Executive.

The judiciary must therefore be secure from undue influence and autonomous within its own field.

The need for independence from government and the various arms of the executive is further magnified in jurisdictions where courts are empowered to strike down legislation. The United States of America comes immediately to mind, and within the Commonwealth, Canada is an example. This role has assumed significance in Canada since the enactment of the Charter of Rights and Freedoms, 1982.<sup>2</sup> Justice McLachlin of the Supreme Court of Canada describes independence as a necessary requirement for a judiciary that must be ready to review a wide range of government action.<sup>3</sup> Although courts in New Zealand may not have such sweeping powers in pronouncing upon the validity of legislation,<sup>4</sup> they are nevertheless seen as a check against the excesses of

1 *Constitutional and Administrative Law* (6th ed, 1989) p 368.

2 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982 (being Schedule B of the Canada Act 1982 (UK)).

3 "The Role of Judges in Modern Commonwealth Society" (1994) LQR 260, 264.

4 *Simpson v Attorney-General* [1955] NZLR 271; *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

executive action. I would suggest that while the public's confidence in the legislative and executive functions may be changeable, the judiciary is regarded as a stable and constant force in our lives.

Judicial immunity from government interference is also reinforced by judicial-political protocol. For example, Standing Orders<sup>5</sup> of the House of Representatives prohibit members from passing unbecoming comments in respect of individual judges. Again, appointment to judicial office is for life<sup>6</sup> and incumbents can only be dismissed in very limited circumstances.<sup>7</sup> These elements combine to establish an essential requirement for credibility, impartiality and freedom from influence.

At this point, I would like to mention two related matters: the profile of judges in the community and the resumption of Bar practice by former judges.

Turning to the first. Upon appointment to the bench it has long been considered appropriate for a judge to assume a degree of social isolation. Whether this should be viewed as a mandate of the position is, however, questionable. While this may be seen as a concomitant of impartiality and independence, it is perhaps something of a two-edged sword. There is the corresponding thought that judges, as enforcers of our social values, should be more visible in the community. Traditionally there is little direct involvement between judges and the media and consequently the human face of the judiciary is often unknown to the average person. In the United Kingdom, two relatively recent high level judicial appointees, Sir Thomas Bingham MR and the Lord Chief Justice, Lord Taylor, have moved to establish a new openness in this regard, to the extent of participating in a televised public discussion.

With regard to the second matter, there is a school of thought that as a reflection of its collective commitment, members of the judiciary should remain in office until retirement. As Chief Justice Eichelbaum commented recently:

We cannot have future candidates regarding the judiciary as a bus on which lawyers may take a short trip in the course of the journey through professional life.<sup>8</sup>

Yet I would suggest that this has to be balanced against other factors. The role of a judge is a singular one for which there can be little adequate preparation. With the best will in the world, a judge may tire of the routine, its demands, pressures and privations. It is unrealistic to impose the expectation that incumbents will remain in office until retirement, regardless of their personal wishes. Such a commitment is unrealistic and there is little profit in tethering individuals to a job that requires a high degree of motivation. In jurisdictions where the judiciary are more numerous, such as the United States, it is accepted that in the normal course of events, there will be attrition from the bench. In Canada some provinces regard this as a perfectly acceptable phenomenon, imposing modest restrictions upon a former judge's right of audience.

5 Clause 179.

6 Subject of course to stipulated retirement.

7 New Zealand Constitution Act 1856, s 65.

8 "Chief Justice at the Privy Council: Interview with Sir Thomas Eichelbaum" [1994] NZLJ 86.

I believe that judges should have an unqualified right to resume practice at the Bar. I also believe that any concerns are, upon closer examination, illusory. The Bar accepts that collegiality and impartiality can function side by side. For centuries members of the same chambers have regularly acted for opposing parties in litigation. Again, some senior counsel may enjoy close social contact with members of the judiciary. There is no suggestion that this should disentitle them from appearing before those judges. By the same token, the same may be said where a judge changes status, to practise as counsel.

Furthermore, the very credibility of the bench is founded upon its impartiality. Judges are heirs to a long tradition in which personal feelings are set aside in fulfilment of the administration of justice. It takes little imagination to assume that judges may be confronted with civil litigants and criminal defendants whom they might regard as unprepossessing. Indeed, they may have little sympathy for some of the causes that are urged before them. Yet whatever the case, there is a clear expectation that the issues will be heard in a fair and balanced manner. It is perhaps a testimony of this, that despite a variety of controversial issues heard before our courts, there is rarely any suggestion of personal bias.

## 2 *Lawyers*

Much has been said about the public perception of lawyers and I would like to make a few brief remarks on some of the recent factors contributing to loss of confidence in the profession. The following words of Justice Temm are most apposite:

Recently the profession has been badly served by some of its members. They have acted dishonestly and they have been expelled from its ranks. The profession guards its reputation jealously because it knows that it can only be harmed from within and never from without.<sup>9</sup>

If I may venture to identify two internal elements that lead to that harm. One, I would suggest, is the pressing factor of economics. Whilst law is of course a means to a livelihood, the concept of practising a profession in its older and more venerable sense, is often overtaken by the fact that it is also a business undertaking. In this connection, the impact of advertising on the legal profession has no doubt affected public perceptions. Overt marketing invites the public to compare services, and to view itself as a “consumer” of those services. With this, a more discriminating attitude prevails.<sup>10</sup> I do not believe that this is a bad thing, but the profession must be prepared to be judged by that standard.

A second, and obvious point, is that the well documented trust account frauds by certain solicitors have severely undermined public confidence. The failure of the fidelity fund to provide a complete safety net has also made people more guarded in their attitude towards the legal profession. At the same time, it must be remembered that the profession has absorbed substantial additional levies to meet these claims, and it is hoped that this will also be given due weight in the overall equation.

I will now turn to the second issue: the indefensible case.

<sup>9</sup> Northern Law News, June 1994, p 3.

<sup>10</sup> In the same spirit, it is now not uncommon for government and industry to require law firms to competitively tender for their legal services.

### The indefensible case

This is an extension of the previous discussion on the status of judges and lawyers. Justice Teague posed the question: “Is it that judges do not have to bear the burden of the advocate of the perceived amorality of defending the indefensible?”<sup>11</sup> As a practising criminal lawyer, I would like to consider the idea of the indefensible case and to ask whether such a principle is compatible with criminal jurisprudence. The question meshes with what I believe is a popular misconception that gives rise to an unwarranted criticism of the Bar. Again, I can do no better than to quote Justice Teague: “To the public, acting for a confessed criminal was seen as unethical....”<sup>12</sup>

For the lawyer, I believe, the issue is understood quite differently and is presented in an entirely different context. It arises in relation to the class of civil proceedings which are categorized as frivolous, vexatious or an abuse of process. Yet from a lay perspective, the distinct features of the civil and criminal process are not always distinguished, resulting in a misapprehension of the role of the Criminal Bar. In principle and in purpose, the contexts are fundamentally different and I would like to take the opportunity of laying this misapprehension to rest.

If I may start at basics, in civil litigation, a party commencing an action may be accused—with complete justification—of engaging the court and the defendant in a frivolous exercise which the plaintiff cannot realistically hope to win.<sup>13</sup> In contrast, in criminal proceedings, such views are applied *not* to the party initiating the action, *but* to the accused, for “defending the indefensible”. Not only are the parties different as between civil and criminal proceedings, but so too are the essential dynamics. It is indisputable that a person accused of an offence is entitled to two things: a defence under the law and the right to put the Crown to the proof. As the burden of proof lies on the Crown, a plea of not guilty in its most limited sense invites the prosecution to prove its case. The initial premise on which our system of justice rests is that the accused is innocent until proven guilty. And if I may dwell on fundamental principles, guilt must of course be established beyond a reasonable doubt. The accused is entitled to do nothing and see if the Crown can satisfy the court as to his or her guilt. In this setting, the notion of an unwinnable case (or more accurately, “a defence”) is not readily transposed into the criminal sphere.

I should mention another consideration with respect to public perceptions of criminal proceedings. Where the facts clearly indicate guilt, public outrage towards the perpetrators of serious crimes is understandable. Yet there is common confusion as to guilt as an inference from known facts, and guilt as a judicial pronouncement. The latter is arrived at through a process governed by strict rules of evidence and procedure. Guilt in the first sense is distinct from guilt in the second. A related thought is that no matter how objectionable the offence, it is equally objectionable to deny the right to representation. In this sense, there are no indefensible cases.

11 Page 5.

12 Ibid.

13 Teague J cites his own experience advising clients in regard commencing libel proceedings, where the intended plaintiff may be motivated by a hidden agenda or other non-legal motives.

The boundary in civil proceedings, between legitimate assertion of rights and an abuse of process, cannot therefore be related to criminal proceedings.

My previous comments suggest some of the bases upon which the accused's interests may be defended. It should also be remembered that defence counsel are officers of the court. If they become aware that their client proposes to mislead the court, counsel understand their duty not to call the accused as a witness, to thwart any possible perjury.

If I may end as I began, I would like to express my thanks to Justice Teague for his thought-provoking address, which has encouraged me to respond to a few of the ethical issues he has raised.