NOTES AND TOPICS

SCANDALIZING THE COURT

BY TONY CAILLARD*

INTRODUCTION

Gallagher v. Durack[1]

On 11 May 1982 Keely J. of the Federal Court of Australia held the Federal Secretary of the Builders Labourers' Federation, Norm Leslie Gallagher, guilty of contempt of court and sentenced him to two months' imprisonment. The Full Court of the Federal Court upheld his appeal on 21 July 1982. In an interview with a television reporter, Mr Gallagher stated that

> I'm very happy to the rank and file of the union who has shown such fine support for the officials of the union and I believe that by their actions in walking off jobs . . . I believe that that has been the main reason for the Court changing its mind.

This was given further coverage by major newspapers the following day. Mr Gallagher was once again tried for contempt of court and convicted. His application for special leave to appeal to the Full Court of the High Court of Australia was refused on 15 February 1983, with Murphy J. dissenting.

Apart from the fame of the applicant, the case is of note because it involves a species of contempt often termed 'scandalizing the court'. This differs from other contempts in that it does not relate to a matter *sub judice*. Rather, it exists to protect a court's respect in the community from attacks on the court or judges of the court.

THE COMMON LAW

Legal recognition of the offence of scandalizing the court has a long history. It was well established in 1765,[2] and recently both the High Court[3] and the Privy Council[4] affirmed its existence. In *R. v. Gray*[5] Lord Russell C.J. defined the offence as constituted by

> [a]ny act or writing published calculated to bring a court or a judge of the Court into contempt, or to lower his authority, is a Contempt of Court.

At one time it had become so rarely prosecuted that the Privy Council was tempted to suggest that it had become obsolete in England.[6]

Australian courts embraced this concept of contempt at an early date. Indeed, Australian courts have heard charges of such a contempt of court in a number of cases. The two leading cases before *Gallagher v. Durack* were *R. v. Dunbabin; ex parte Williams*[7] and the *Attorney-General for New South Wales v. Munday*.[8]

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1 (1983) 57 A.L.J.R. 191.
2 *Roach v. Garvan* 2 Atk. 469; 26 E.R. 683.
3 *Gallagher v. Durack* (1983) 57 A.L.J.R. 191.
4 *Lutchmeerparsaid Badry v. D.P.P.* [1983] 2 W.L.R. 161.
5 *R. v. Gray* [1900] 2 Q.B. 36, 40.
6 *McLeod v. St Aubyn* (1889) 14 App. Cas. 549, 561.
7 (1935) 53 C.L.R. 434.
8 [1972] 2 N.S.W.L.R. 887.

R. v. Dunbabin was a decision of the High Court of Australia. The contempt consisted of an article containing criticism of two High Court decisions, suggesting that they were the result of antagonism towards the Federal Cabinet. The Court was further accused of 'hair splitting' in an attempt to find the relevant Acts of Parliament invalid. The general tone of the article was one of sarcasm and irony. The leading judgment is considered to be that of Rich J., who said that contempt

> may also arise from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.[9]

This decision has been criticized as too restrictive of freedom of speech.[10] It is suggested that much of this criticism is derived from excessive attention to the last phrase of the test propounded by Rich J. Hope J.A. in *Attorney-General for New South Wales v. Munday* stated

> [t]he mere fact that criticism has some effect in impairing public confidence in a court or judge cannot be the sole test of whether it amounts to scandalizing contempt.[11]

He went on to suggest that to the extent that *R. v. Dunbabin* went beyond cases such as *R. v. Gray* it should be limited to its particular facts. It is suggested that the question is not whether a comment attacks the impartiality or integrity of the courts. The basis of the offence, as suggested by Dixon J. in *R. v. Dunbabin*, is

> whether, if permitted and repeated, it will have a tendency to lower the authority of the Court and weaken the spirit of obedience to the Law to which Rich J. has referred.[12]

This was recognized by the majority judgment in *Gallagher v. Durack*. The essence of this form of contempt is that the harm to public confidence in the courts outweighs the possible harm to freedom of speech.[13]

SENTENCING

The sentence of three months imprisonment accorded Mr Gallagher is by no means unique.[14] In theory, there is no maximum term of imprisonment.[15] This is to some extent counterbalanced by the ability of a court to release a contemnor from prison at any time. Nonetheless the usual sanction has been the imposition of fines. Mr Gallagher received a sentence to imprisonment rather than a fine in part because of the Court's belief that the fine would not be paid by him or the Builders Labourers' Federation but by employers. The majority of the High Court held that this was a valid consideration because the aim of a penalty is to discourage repetition of such statements. It was emphasized however that it was only one consideration and that the primary consideration should be the gravity of the contempt.[16] It should be noted that Mr Gallagher neither explained nor apologised for his statement, and that the majority also felt this was a valid consideration. Murphy J. would have allowed special leave to appeal against sentence to allow the High Court to consider this question in more depth.[17] He suggested that it could gravely affect newspaper editors whose fines are paid by the newspaper company. He also raised the question of whether the lack of prosecution of the media should have affected the question of sentencing.

[9] (1935) 53 C.L.R. 434, 442.
[10] Borrie G.J. and Lowe N., *The Law of Contempt* (1973) 159; *Gallagher v. Durack* (1983) 57 A.L.J.R. 191, 194 *per* Murphy J.
[11] *Attorney-General (NSW) v. Munday* [1972] 2 N.S.W.L.R. 887, 910.
[12] *R. v. Dunbabin* (1935) 53 C.L.R. 434, 447.
[13] (1983) 57 A.L.J.R. 191, 192.
[14] For example *R. v. Bolam and Others, ex parte Haigh* (1949) 93 Sol.Jo. 220; *Re Wiseman* [1969] N.Z.L.R. 55; *R. v. Skipworth* (1873) L.R. 9 Q.B. 230.
[15] *Enfield London Borough Council v. Mahoney* [1983] 1 W.L.R. 749, 755.
[16] (1983) 57 A.L.J.R. 191, 193.
[17] (1983) 57 A.L.J.R. 191, 196.

DEFENCES

The principal defence is that of honest criticism. The clearest exposition of this defence is to be found in the Privy Council decision of *Ambard v. Attorney- General for Trinidad and Tobago*:

> But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.[18]

ADVANTAGES OF THE PRESENT LAW

The principal advantage of the present law is that it allows a court to protect its authority and respect within the community. The acceptance of the authority of the courts by the community is the basis of obedience to the law.

DISADVANTAGES OF THE PRESENT LAW

The primary disadvantage of the present law is the threat it poses to freedom of speech. It is for this reason that it does not form part of the American common law.[19] The High Court acknowledges this risk in *Gallagher v. Durack*.[20] Despite statements that this power will be used sparingly,[21] it is the potential for abuse that has led to several calls for its abolition.[22]

Further problems include the propriety of courts sitting in judgment in their own cause. It also appears that intention to bring a court into contempt is not a necessary ingredient of the offence. No trial by jury is necessary to judge the issue.

ALTERNATIVES

One option open to the Federal and State Parliaments would be to abolish the common law charge of scandalizing the court. The supporters of this approach suggest that public opinion provides a sufficient shield. It is suggested that while most abuse of the courts would be (and usually is) left to the derision of the public, certain individuals require a more pressing penalty.

Another alternative would be to allow the present situation to continue. It is suggested that some limitations should be placed upon a potentially dangerous infringement of the right to freedom of speech.

Finally, a compromise may be struck. It is suggested that the present situation in England provides an acceptable option, perhaps preferable to intended legislation. The English Contempt of Court Act 1981 does not abolish this form of contempt. It does however limit the ability of a court to sentence a contemnor to a period of imprisonment of not more than two years.[23] This allows English courts to

[18] [1936] A.C. 322, 335.
[19] *Bridges v. California* (1941) 314 U.S. 252, 284, 287.
[20] (1983) 57 A.L.J.R. 191, 192, 194.
[21] *R. v. Commissioner of Police of the Metropolis; ex parte Blackburn (No. 2)* [1968] 2 Q.B. 150, 155; *McLeod v. St Aubyn* (1889) 14 App. Cas. 549, 561.
[22] United Kingdom, *Report of the Committee on Contempt of Court* (1974) Cmnd 5794, 69; Bailey S.H., 'The Contempt of Court Act 1981' (1981) 45 *Modern Law Review* 301, 314. Note that the Australian Law Reform Commission is presently reviewing the law in this area. See [1983] *Reform*, 94.
[23] S.14(1).

protect their authority but limits the possible penalty to a definite and acceptable period. Any longer period would have little more impact upon a contemnor, and could potentially harm the authority of the courts.[24]

CONCLUSION

It is suggested that a statement may be in contempt of court if its harm to public confidence in the courts outweighs its possible harm to freedom of speech if the author is convicted. A maximum period of imprisonment of two years should be introduced, subject to a right to order an earlier discharge.

[24] For example *Enfield London Borough Council v. Mahoney* [1983] 1 W.L.R. 749.