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A Bad Day at the Office

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Whenever we think about judges, we think about old, grey-haired people listening carefully to what is said in court, perhaps nodding sagely, certainly keeping the lawyers on task. Sometimes we imagine judges might get a bit cranky, especially when a lawyer is persisting with a fruitless line of questioning, and wasting the court's time. But generally we expect judges to keep their cool.

But what if things get out of hand in court? What if a person accused of a crime, or even a witness or a member of the public in the gallery throws something at the judge or a lawyer or some other participant in a case? What if someone in court threatens to injure someone else, or shouts out obscenities over and over, preventing the court from going about its business? In our system of law the rules that govern the consequences of outrageous or violent behaviour in court are the rules of 'contempt in the face of the court'.

The rules of contempt in the face of the court have an ancient origin. They emerged in medieval England when the King assembled the courts and before courts enjoyed independence from the government (this was later secured in 1700 by the *Act of Settlement*¹ which guaranteed judicial tenure and secure remuneration for judges). In earlier times, if you insulted the King it was believed that you were also insulting God, because the King was the leader of the Church of England, and was therefore spiritually connected to God. Since courts exercised power delegated by the King, it was only a short step to conclude that insulting a judge was the same as insulting the King, and God, and so on. The criminal offence of contempt emerged.

Over time, the rules governing contempt in the face of the court have been developed and adapted to provide judges with ways of controlling order in the courtroom, ensuring the due and effective administration of justice. These rules enable the court to ensure that people participating in judicial proceedings treat each other with courtesy and respect, so that cases can be resolved in a peaceable atmosphere. The power to punish for contempt is held by all Australian courts.

Contempt of court cases are relatively rare, but not as rare as you might think. In a case in 2003 called *O'Brien v Northern Territory*,² the Northern Territory Court of Appeal made a declaration that a magistrate who ordered a lawyer to the cells for contempt had no power to do so. Peter O'Brien was, at the time, a young lawyer who was representing a juvenile client in the Darwin Magistrate's Court. The presiding magistrate asked O'Brien to enter a plea for his client, who was charged with a property offence. O'Brien tried to explain to the magistrate that he should not have to enter a plea because the police had previously advised that they were prepared to offer a diversionary arrangement for

his client, which would relieve him of the need to go to court at all. The police prosecutor had no knowledge of this arrangement, but it did, in fact, exist. So the magistrate was pressing O'Brien for a plea in circumstances where it was quite unfair that one should be entered. O'Brien criticised the police for failing to ensure that the requisite information was before the court and the magistrate, who believed that O'Brien was defying his instruction to enter a plea, ordered a court officer to take O'Brien to the cells while he sorted out what was going on. At this point, the mother of the accused rose to her feet and explained that O'Brien's submissions to the court had been correct, and that the police had informed her that a diversion would be offered. The police prosecutor then indicated that this might indeed be so, and, after a (possibly embarrassed) silence the magistrate ordered that O'Brien be returned to the court.

O'Brien was brought back up from the cells without his belt or shoelaces, as it is standard practice to remove these items from people who are taken to the cells in case they are used to affect a suicide. O'Brien was standing at the bar table holding his pants up with his hand when the magistrate asked him whether he was ready to proceed with the matter. O'Brien sought an adjournment, and later applied for a declaration that the magistrate had no power to do what he did. The NT Court of Appeal accepted his appeal. The magistrate had behaved unlawfully by sending O'Brien to the cells without a hearing.

More recently, in November 2009, the Full Federal Court upheld the appeal of a person who was charged and punished for contempt of court by a federal magistrate.³ Lesley Noah had brought previously unsuccessful proceedings and was liable for a debt of about \$3,000 in legal costs. The Attorney-General brought enforcement proceedings in the Federal Magistrates Court. Ms Noah, who represented herself in court, was unsuccessful in her application to have the proceedings for debt rejected. This made her upset and Noah, along with a supporter in the public gallery, Mr Leonard Clampett, had the following exchange with the judge:

FEDERAL MAGISTRATE: Now, gentlemen, if you don't be quiet, I'll deal with you. Is that what you'd like? One further utterance from you, madam, and I will deal with you as well.

MS NOAH: In which way?

FEDERAL MAGISTRATE: Yes. Just watch your tongue or I will deal with you as well.

MS NOAH: You already are dealing with me, sir, in not a very fair and equitable way.

FEDERAL MAGISTRATE: Ms Noah, I'll give you one further warning.

MR CLAMPETT: Will that be civil contempt or criminal contempt?

MS NOAH: Yes, that's what I'd like to know. Would that be civil or criminal?

FEDERAL MAGISTRATE: Okay, that's it. What's your name sir?

MR CLAMPETT: It has got nothing to do with you, your Honour.

FEDERAL MAGISTRATE: What is your name?

MR CLAMPETT: I'm [in] the public gallery.

FEDERAL MAGISTRATE: Would you get the – just get the Federal Police along here, thank you, Mr Bailiff.

MR CLAMPETT: They know who I am.

FEDERAL MAGISTRATE: I'm not interest[ed] in – I want to know your name, please.

MR CLAMPETT: Leonard William Clampett. You know very well who I am.

FEDERAL MAGISTRATE: I have no idea.

MR CLAMPETT: That's the reason why you've got a kangaroo on the wall behind you. It's called the Kangaroo Court.

MS NOAH: Yes.

MR CLAMPETT: Both you and Mr Henry are paid by the Commonwealth Government.

MS NOAH: To represent the people, not protect your public [sector] colleagues, conspire with them, to pervert the course of justice.

FEDERAL MAGISTRATE: Anything further you want to add?

MS NOAH: Quite a lot actually, I'd like to appeal this and I don't recognise (indistinct) ---

FEDERAL MAGISTRATE: Well, you'll get your chance to appeal but after I've dealt with you for contempt.

MS NOAH: I don't like ---

FEDERAL MAGISTRATE: Just adjourn the Court for the time being, thanks.

MS NOAH: I want to challenge the jurisdiction of this whole Court actually.⁴

The magistrate charged Mr Clampett with contempt in the face of the court for his remarks. The magistrate found him guilty and ordered him to spend 28 days in prison with hard labour. Mr Clampett appealed to the Full Federal Court, which unanimously allowed his appeal.

Chief Justice Black, with whom Justice Finkelstein agreed, acknowledged that the federal magistrate had the power to punish for contempt but said that the power was historically used sparingly, and only in serious cases.⁵ The discretion to punish for contempt should only be exercised when the conduct is such that it could not wait to be punished or where it was urgent and imperative to act immediately to ensure the authority of the court and the due administration of justice were not undermined. Black CJ observed that:

It is obvious and well recognised that the essential problem with a summary hearing before the judicial officer before whom the contempt was allegedly committed is the conflict with fundamental principles of justice that occurs when, in effect, the roles of prosecutor, witness and judge are performed by one and same person ... Specific aspects of the problem emerge when interruptions said to amount to a contempt of court take the form of insults that may be seen to reflect upon, or be aimed at, the judicial officer who will decide the case and who must then exercise the wide discretionary power to impose a penalty; and

even the more so when the penalty may be (as here) a term of imprisonment.⁶

Chief Justice Black noted that the proceedings against Mr Clampett had unfolded very quickly, and the conduct was not conduct that 'could not wait to be punished'.⁷ Chief Justice Black concluded that the magistrate had not exercised his discretion in accordance with the authorities that reinforced the principle that the power should be used sparingly, and allowed the appeal.

These cases raise some interesting questions. Should judges be given anger management training? Or is it sufficient that every couple of years a superior court delivers a judgment that reminds judges that they need to exercise their power to commit for contempt with caution? Is there some punishment other than imprisonment that could be applied? After all, imprisonment is the most severe punishment that an Australian court can inflict, and imprisonment with hard labour seems particularly draconian in circumstances where a person has merely made a smart-aleck remark about the impartiality of a court that should have been ignored. Clampett's remarks were contemptuous, but it might have been better to adjourn the case while the participants cooled off. O'Brien's remarks were definitely not contemptuous, and imprisonment is certainly uncalled for when a lawyer is merely trying to represent their client!

Contempt in the face of the court is a fascinating area of the law and there is insufficient space here to consider some of the broader issues raised by these cases. There are other issues in this area of the law that need to be explored. But for present purposes all future lawyers should take note: treat judges with respect in case they're having a bad day at the office!

References

- ¹ *Act of Settlement 1700* (UK).
- ² *O'Brien v Northern Territory* (2003) 12 NTLR 218.
- ³ *Clampett v Attorney-General of the Commonwealth of Australia* [2009] FCAFC 151 (28 October 2009).
- ⁴ *Clampett v Attorney-General of the Commonwealth of Australia* [2009] FCAFC 151 (28 October 2009), [7].
- ⁵ *Clampett v Attorney-General of the Commonwealth of Australia* [2009] FCAFC 151 (28 October 2009), [36].
- ⁶ *Clampett v Attorney-General of the Commonwealth of Australia* [2009] FCAFC 151 (28 October 2009), [37].
- ⁷ *Clampett v Attorney-General of the Commonwealth of Australia* [2009] FCAFC 151 (28 October 2009), [44].

What should judges do?

How should judges ensure order in the courtroom?

Should judges have the power to imprison litigants, or should other penalties be applied?