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COURT OF APPEAL

RECORD SHEET

NATURE OF JURISDICTION: Contempt of Court - appeal from ruling of District Court (Lloyd-Jones DCJ)

FILE NO/S: CA 40101/91; DC 8879/90

DELIVERED: 19 November 1991

HEARING DATE: 8 October 1991

PARTIES: TONER v ATTORNEY GENERAL FOR NEW SOUTH WALES

JUDGMENT OF: Kirby P; Clarke JA, Hope A-JA

COUNSEL:

Appellant: J Poulos QC/C J Birch/L McCallum

Respondent: T J Anderson

SOLICITORS:

Appellant: Helliars

Respondent: H K Roberts, Crown Solicitor

CATCHWORDS: CONTEMPT - face of court - barrister shouts at judge - convicted of contempt and rebuked - appeal - mere discourtesy is not contempt - statutory procedures not followed - finding of contempt revoked - charge dismissed without costs.

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THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40101/91
DC 8879/90



KIRBY P
CLARKE JA
HOPE A-JA

TUESDAY 19 NOVEMBER 1991

TONER v ATTORNEY GENERAL FOR NEW SOUTH WALES

CONTEMPT - legal practitioners - barrister - contempt in the face of court - dispute as to whether barrister objected to tender of unserved medical report - judge holds barrister did not object - barrister contends that he did and shouts at judge - judge holds barrister in contempt of court and reprimands him - appeal - held: (1) In proceeding against the barrister for contempt the judge did not, as required, both by s 199 of the *District Court Act* 1973 and the common law cause the contemnor to be informed of the contempt charge; require him to make his defence; and hear him before determining the charge. *In re Pollard* (1868) LRPC 106, 120 (PC); *Coward v Stapleton* (1953) 90 CLR 573, 580; *Lewis v Judge Ogden* (1984) 153 CLR 682, 693; *Macgroarty v Clauson* (1989) 167 CLR 251 applied; (2) Discourtesy (as by shouting) did not of itself amount to contempt in the face of the court. *Lewis v Judge Ogden* (1984) 153 CLR 682 applied; *Parashuram Detaram Shamdassani v King-Emperor* [1945] AC 264 considered;

(3) The conviction of contempt revoked and the charge of contempt dismissed but without costs.

District Court Act 1973, ss 199, 200, 201, 202.

County Court Act 1958 (Vic) s 54A.

District Courts Act 1967 (Qld) s 105.

ORDERS

1. Appeal allowed;
2. Revoke the ruling of his Honour Judge Lloyd-Jones that the appellant was guilty of contempt of court; and
3. In lieu thereof, dismiss the charge of contempt.

THE SUPREME COURT
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JUDGMENT

THE COURT: This appeal, pursuant to s 201 of the *District Court Act* 1973 (the Act) is brought to the Court to challenge a decision of a judge of the District Court (Lloyd Jones DCJ) in convicting the appellant of contempt of court.

A barrister is convicted of contempt

Mr Robert Toner (the appellant) is a barrister. On 5 February 1991 he appeared for the defendant in a case heard by Lloyd Jones DCJ in the civil jurisdiction of the District Court in Sydney. The case was unremarkable, being brought by one Cecil Hill against the Government Insurance Office of New South Wales (GIO) for damages for personal injuries arising out of the alleged negligence of the driver of a motor vehicle insured by the GIO. Liability in negligence was denied. The GIO's case was that Mr Hill had proceeded through a red light and had himself caused the accident.

Lloyd Jones DCJ ultimately determined that issue against the GIO. Evidence addressed to the resolution of the issue was complicated by an apparent misunderstanding which arose between his Honour and a police witness interposed in Mr Hill's case. Another complication derived from the acknowledgement that Mr Hill had a number of pre-accident conditions which made the identification of his compensable disabilities the subject of contest. However, save for these issues of controversy, the case was straight-forward.

The difficulties which gave rise to the present proceedings arose out of the tender by Mr Hill's counsel of a report by a Dr Taylor which had not been served on the solicitor for the GIO as required by Part 28 Rule 8 of the District Court Rules. It appears that only one report by Dr Taylor had been served. In that report, reference was made to the preparation of an addendum. This attracted his Honour's attention. He pressed counsel about the addendum. He was given certain information about it by Mr Hill's counsel which later proved incorrect. By the time the true position was discovered, Dr Taylor was unavailable to give oral evidence. This caused his Honour to express some highly critical remarks to counsel for Mr Hill:

"I extended to you the courtesy I extend to members of the profession by saying I am prepared to accept what you say from the bar table. Small wonder Judges reach the stage where they regard the profession with scepticism. You have just told me something out of the blue which was totally false and you should not have done it because you had not satisfied yourself it was correct. That is not the way for barristers to behave. You do not mislead a court intentionally or unintentionally. You do not say things randomly which you do not know are correct."

After this exchange a short adjournment ensued. During the adjournment discussion took place between the appellant and his opponent concerning the proposal of the latter to tender Dr Taylor's unserved report. Without objection by either party, there was read before this Court a number of affidavits placed before us for the purpose of elaborating the record contained in the official transcript of the proceedings, which was also tendered. The affidavit of the appellant deposed to the fact that he told his opponent:

"I will object to this report. If it goes in I will seek an adjournment."

The affidavit of opposing counsel agreed:

"Mr Toner indicated to me prior to the hearing re-commencing that he would formally object to the tender of the document ... I indicated to Mr Toner that I would seek the Court's leave to tender the report for completeness and I understood that Mr Toner would object to such tender."

When the court resumed after the short adjournment the following exchanges took place, as recorded in the transcript:

*"*COUNSEL: Seek leave to tender a report dated 9 July 1990 which is the addendum from Dr Taylor to my Instructing Solicitor together with a copy of the report of Dr Marsh; neither of those documents has been served."*

MR TONER: No objection.

HIS HONOUR: Thank you for that Mr Toner. Report from Dr Taylor will be part of Ex C together with report on the X-ray of Dr Marsh dated 9 July 1990.*

MR TONER: Application for adjournment.

HIS HONOUR: Noted that this addendum to the report of 9 July 1990 was admitted without

objection; no foreshadowing of any application for an adjournment on the basis of that was made prior to that being admitted (sic).

(*to* read out by Court Reporter).

HIS HONOUR: I accept the fact - and I will have it noted - that you allowed it to be admitted without objection.

MR TONER: I did not - I said I object - I am arguing with your Honour for the simple reason I recall what I said and what I said is I object.

HIS HONOUR: Those last remarks of counsel were shouted at the top of his voice at myself, as a Judge of the District Court; shouted at the top of his voice and I will give you an opportunity to have yourself heard as to whether or not you should be treated as being in contempt of this court.

MR TONER: Thank you your Honour.

HIS HONOUR: And where that leaves you as to where you stand for the remainder of this matter is another matter. You will have to concede you shouted at me.

MR TONER: I do and I apologise for that and I apologise for the offence I have given to your Honour and to this court.

HIS HONOUR: I hold you in contempt of this court and in the circumstances, because you obviously lost control in an arrogant and truculent manner, I will simply take no action other than to reprimand you in the strongest of possible terms and have that referred to the Bar Council.

MR TONER: Would your Honour also note that I in fact objected to the tender of the document?

HIS HONOUR: No, I do not accept that you objected to the tender. The way in which you put it and that was noted by the shorthand writer and myself as being without objection and I am satisfied that was the situation.

MR TONER: Does your Honour conclude from that - I do not cavil with your Honour - that I in fact lied to this Court? I seek leave to withdraw from this matter.

HIS HONOUR: If you do, other counsel will have to be here at ten o'clock in the morning to proceed with it.

MR TONER: Would your Honour let me seek a short

adjournment to seek instructions from my solicitor?

HIS HONOUR: I will remain on the bench.

MR TONER: Would your Honour allow me to leave the court to seek instructions? (Short adjournment) I have been requested to continue by my Instructing Solicitor and I shall do so. I withdraw my application.

HIS HONOUR: I might say I propose to refer the transcript of what occurred to the Bar Council, not by way of complaint, but for whatever comment they may choose to make to you in relation to it.

MR TONER: In light of that your Honour ...

HIS HONOUR: Show some more discretion and self-control in future in your behaviour, you have to remember as a member of the Bar you are in the eyes of the public as well as of the profession.

MR TONER: Can I indicate that my solicitor advises me that he heard me object as well and if your Honour wishes I can call him to give evidence to that effect.

HIS HONOUR: The matter of objection is closed - whether you objected or not I propose to admit it. In fact, although I have already admitted it as evidence and once it is admitted as evidence, it cannot, as I understand it, be withdrawn. So it is now in evidence. No doubt this matter will now go to the Court of Appeal at great costs to the parties and what have you. Pettiness often takes over commonsense regrettably in lodging appeals but it is now in evidence and you seek an adjournment. I do not see in that X-ray report any basis for you seriously being prejudiced. I would have thought any Barrister of any merit or capacity at all would be able to cope with that in the light of the remainder of the medical reports ..."

There were further exchanges. Counsel addressed. In the course of the appellant's address his Honour made further remarks about the behaviour of the appellant. However, as these followed the conviction of contempt they are not pertinent to the appeal now before us.

The record is supplemented on appeal

As we have said the appeal was conducted upon certain premises which it is unnecessary to review. The first was that the Attorney General was the appropriate respondent to the appeal. In a number of like cases in other jurisdictions the judge or court appealed from are named as respondents. However, as the Attorney General appeared to contest the appeal and sufficiently put all arguments in support of the conviction of the appellant for contempt, it is appropriate to determine the appeal upon the basis that it has been properly conducted so far as the parties are concerned. It will also be assumed that it was appropriate to supplement the record with additional evidence as each party asked the Court to do.

So far as the appellant's case was concerned it included two affidavits by himself, an affidavit by his solicitor and one by opposing counsel. The solicitor confirmed that he heard the appellant say, when Dr Taylor's report was tendered "I object". The affidavit contained the opinion:

"I do not believe the appellant lost control or addressed words to Judge Lloyd-Jones in an arrogant and truculent manner."

It records that his Honour later handed down judgment in favour of Mr Hill in which he stated that:

"... he accepted Dr Taylor's first report and noted the addendum did not add to the plaintiff's case."

Opposing counsel's affidavit, in addition to recording the indicated intention of the appellant formally to object to

the tender of Dr Taylor's unserved report went on:

"When the hearing was resumed I sought leave to tender the document which had not been served.

Mr Toner then appeared to say, 'No objection'. The statement, however, was quite unclear and I was surprised to hear the words 'No objection'.

His Honour then thanked Mr Toner for raising no objection, whereupon Mr Toner said to his Honour that he did object to the tender of the document.

Thereafter, the transcript records from page 34 onwards what occurred at the hearing and had Mr Toner called upon me to indicate that there had been a conversation during the adjournment, I would have informed his Honour of such conversation. However, events moved rather quickly ..."

In addition to the foregoing, a letter was received into evidence containing an admission on the part of the appellant. This was that the words to which his Honour took objection were "shouted at the Judge". However, the appellant, by a second affidavit, denied that he had spoken in an arrogant or a truculent manner.

The Attorney General read two affidavits. One was by Lloyd-Jones DCJ's associate. In this, she stated:

"I have never heard any other Counsel raise their voice to the same level as Mr Toner. At the time that Mr Toner shouted at his Honour I observed that Mr Toner's face was completely red.

At no time ... did I hear his Honour speak in other than his normal tone of voice."

Also read was an affidavit of the court reporter who was recording the transcript of the proceedings in his Honour's court. This contains the following relevant statements:

"After [counsel] made that statement I thought I heard Mr Toner say the words 'No objection'.

However, I had a small doubt in my mind as I had not heard him clearly and I was just about to ask him what he had said when his Honour, Judge Lloyd-Jones said 'Thank you for that Mr Toner'. The said statement by his Honour confirmed my understanding that Mr Toner had said the words 'No objection'.

Mr Toner spoke more loudly than he normally would have when he said 'I did not - I said I object ...' However, although he raised his voice, I would not have described the level of his voice as shouting. I have heard other Counsel address judges with their voices raised to the same level as that of Mr Toner. On some of those occasions I have heard a judge admonish the Counsel in question by way of remarks such as 'Just a minute'. On other occasions, I have known the judge to raise his voice to a level above that of Counsel in question. I did not interpret the fact that Mr Toner raised his voice as an attempt to insult his Honour or the dignity of the Court. However, I can understand that a judge might think that the level of his voice was inappropriate in court proceedings."

Although much of the foregoing material expands the record of the transcript and contains argumentative and opinion evidence which extends beyond statements of pure fact, it is appropriate for the Court to take such material into account. Each party has placed some additional matters before the court. Neither has objected to the receipt of any of it. No witness was cross-examined. All of the deponents, in varying respects, may be taken to be familiar with the normal practices of courts. As no sound recording was taken of the proceedings, the material placed before the court was accepted by both sides as appropriately taken into account so that this Court could attempt to recapture the circumstances which were dealt with by his Honour. Those circumstances occurred in the space of a few minutes. Whilst this Court is unable to estimate the precise decibels of the appellant's admitted shouting or the inflection of tone of voice which his Honour found offensive,

the circumstances boiled down to one of those unfortunate incidents which occur from time to time in the conduct of contested law suits. It is in just such incidents that temperate conduct on the part of the judiciary and legal representatives is essential for the performance by each of their functions necessary to the due administration of justice.

Procedure for contempt charges must be strictly followed

The requirement of a high degree of specificity in proceeding against a person for contempt of court is deeply embedded in the procedures of the common law. The strictness of the applicable procedure has been emphasised in cases old and new. *Coward v Stapleton* (1953) 90 CLR 573, 580. See also *R v Hill* [1986] Crim LR 457, 458 (CCA Eng) and *Ex parte Stewart; Re Fellows* [1972] 2 NSWLR 317, 327 (CA). The Privy Council in *In re Pollard* (1868) LR PC 106, 120 expressed the opinion:

"No person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it be given to him."

Their Lordships in that case held that they were not satisfied that a distinct charge of the offence was stated by the Chief Justice of Hong Kong nor that he had offered to hear the contemnor's answer before passing sentence. They therefore remitted the fine of \$200 which had been imposed upon the contemnor.

The necessity of such a clear indication of the "gist of the accusation" has been held many times in the courts of this country and of other countries of the common law. It

was stated most recently in the High Court of Australia in *Macgroarty v Clauson* (1989) 167 CLR 251, 255. It really does not require elaboration for it is nothing more than a recognition of a fundamental requirement of due process and fair proceedings where a person stands accused of an offence criminal in nature.

There is a particular reason why care must be taken to follow strict procedure in the exercise by a judge of the power to deal summarily with a contemnor for alleged contempt in the face or hearing of the court. Such proceedings are criminal in nature, yet the judge may rely on the evidence of his or her sight or hearing, makes decisions usually reserved to an independent prosecutor, decides the case with unusual swiftness and often has extremely large powers in the imposition of punishment. Considerations of this kind have led to various proposals for the reform of procedures of contempt cases. See eg the Australian Law Reform Commission *Contempt*, ALRC 35, AGPS, 1987, 448 ff.

It was doubtless to achieve some of the objectives of the reform of this branch of the law that Parliament in 1979 added ss 199-201 to the *District Court Act* to regulate, in part, the treatment of cases in the District Court where a contemnor was alleged to be guilty of contempt of court warranting summary procedure. Relevantly, s 199 provides the procedure which is to be followed by the District Court judge:

"199(2) Where it is alleged, or appears to the Court on its own view, that a person is guilty of contempt of court committed in the face of the Court or in the hearing of the Court, the Court may -

(a) by oral order direct that the

contemnor be brought before the Court; or

(b) issue a warrant for the arrest of the contemnor.

(3) Where the contemnor is brought before the Court, the Court shall -

(a) cause him to be informed orally of the contempt with which he is charged;

(b) require him to make his defence to the charge;

(c) after hearing him, determine the matter of the charge; and

(d) make an order for the punishment or discharge of the contemnor.

Various powers are provided for holding the contemnor in custody (ss 199(5) and (6)). A limit is provided to the fine which may be imposed, viz \$2,000 (s 199(7)). Section 200 provides for the payment of a fine and for its recovery. Section 201 provides for an appeal from any order save from an order discharging the contemnor. The powers of the Supreme Court upon such appeal are provided in s 201(3):

"201(3) In an appeal under this section, the Supreme Court may affirm, vary or revoke the ruling, order, direction or decision appealed against or may substitute its own ruling, order, direction or decision."

Provision is made for a stay of an order by s 202.

It was not contested in the appeal that whatever had occurred happened in the face and hearing of the Court as constituted by Lloyd-Jones DCJ. Nor was it contested that the appellant was a "contemnor" within the meaning of that expression as defined in s 199(1) of the Act, being a person "alleged to be guilty of contempt of court". Nor was it

disputed that he was before Lloyd-Jones DCJ at the relevant time. However, upon the basis of the transcript of proceedings, as supplemented by the affidavits read without objection, the case of the appellant in opposition to his conviction of contempt was three-fold:

- (a) That he had not been afforded the procedural protections required by s 199(3) of the Act;
- (b) That he had not, in any case, upon the proper view of the facts, been guilty of contempt of court as contemplated by the Act and as provided by common law; and
- (c) That his Honour had failed to give any or any sufficient reasons for his conviction and the order for his punishment.

It is convenient to deal with each of these arguments in turn.

The procedural requirements were not complied with

It seems clear to us that Lloyd-Jones DCJ did not follow the course required by Parliament before convicting the appellant of contempt and punishing him by imposing upon him a reprimand "in the strongest possible terms".

First his Honour did not, as s 199(3)(a) of the Act requires, cause the appellant to be informed orally, and with precision, of the contempt with which he was charged. A high degree of precision is required. See *Macgroarty* (above) at 255f. It is not a mere matter of form or procedure. It is fundamental that:

"... if the person charged is to be informed of the elements of what is alleged against him and

afforded an adequate opportunity of answering the charge."

Whilst conceding that the proceedings were somewhat telescoped, counsel for the Attorney General sought to sustain what had occurred by stating that the appellant, as a barrister, would have been sufficiently aware of the "gist" of the accusation being made against him. There are some early authorities which support the proposition that this is all that is required. See eg *Chang Hang Kiu v Piggott* [1909] AC 312, 315. See also *Ex parte Bellanto; Re Prior* (1963) 63 SR (NSW) 190, 205 (FC). It was suggested that, by indicating his complaint that the remarks of the appellant:

"... were shouted at the top of his voice."

his Honour had sufficiently informed the appellant of the contempt with which he was charged. He had made this clear when he had gone on to give the appellant the opportunity:

"To have yourself heard as to whether or not you should be treated as being in contempt of this court."

Whilst allowing for the advantages which the trial judge enjoyed in appreciating the tone of the appellant's voice and the character of his conduct, the transcript, as elaborated, does not make plain either the charge which was made nor the requirement upon the appellant to make his defence to the charge. His Honour promised the appellant that he would give him an opportunity to be heard. The appellant thanked him for this promised opportunity. The appellant conceded that he had shouted. He apologised. Then, instead of proceeding

in the deliberately formal way which s 199(3) of the Act envisages, his Honour convicted the appellant. As we read the transcript, he did so without:

- (a) Precisely defining the contempt alleged;
- (b) Clearly requiring the appellant to make his defence; and
- (c) Without hearing him before determining whether he was guilty of the charge.

As the steps required by s 199(3) were not followed, the conviction entered by his Honour cannot stand. Such a conviction, being of an offence criminal in nature, is not to be treated lightly. It is especially serious for a barrister who owes duties to the Court and to the administration of justice. This Court is empowered by s 201(3) to revoke or vary the decision appealed against or to substitute its own decision. In order, therefore, to determine what it should do, it is necessary to deal with the second of the appellant's points.

Mere discourtesy is not contempt of court

The appellant conceded that, in shouting at the judge, he had acted discourteously and incorrectly. For that he had apologised. But he disputed that his conduct amounted to contempt. This contest was joined by the Attorney General. He suggested that the appellant, as a barrister, had no entitlement to persist in his contest of the ruling which Lloyd-Jones DCJ had made. Cf *Bellanto* (above) 195. As a barrister, he ought to have known that his correct course was not to shout at the judge or to persist with disputing his ruling but to have his objection noted. If, later, it proved important for the resolution of the case, it could be raised

on appeal. Instead, the appellant pressed on in acting in a manner calculated to lower the authority of the judge and of his court. This amounted to contempt for which the appellant was liable to be punished.

The principles applicable to the resolution of this dispute are not in doubt:

1. It is the duty of counsel and judicial officers to conduct themselves in a temperate manner. It is the nature of court proceedings that they will often be charged with emotion. Only by observing restraint will the legal representatives of parties, and judicial officers be able to ensure the orderly, proper and expeditious disposition of the proceedings in which they take part. *Lewis v His Honour Judge Ogden* (1984) 153 CLR 682, 693; cf *Prothonotary of the Supreme Court of New South Wales v Costello* [1984] 3 NSWLR 201, 209 (CA); *Escobar v Spindaleri & Anor* (1986) 7 NSWLR 51, 52 (CA);
2. In some cases, statute will provide for the circumstances which constitute contempt. In such cases it is fundamental that the terms of the statute should be strictly measured against the facts found. Cf *Macgroarty* (above) at 255; *Skouvakis v Skouvakis* [1976] 2 NSWLR 29, 34 (CA). In both *Lewis* and *Macgroarty* provisions respectively of the *County Court Act* 1958 (Vic) and the *District Courts Act* 1967 (Qld) were under consideration. In each of those provisions a necessary ingredient for the form of contempt charged was wilfulness on the part of the offender. No such requirement exists in s 199 of

the *District Court Act* 1973. Instead, that Act is intended to operate in conjunction with the common law of contempt in the face or the hearing of the court. By the common law, that behaviour is contempt which is "such as would interfere or tend to interfere with the course of justice". See *Parashuram Detaram Shamdasani v King-Emperor* [1945] AC 264, 268 (PC). Cf *Lewis* (above) 688. It is not necessary in this case to determine whether, in this form of contempt (apart from statute) wilful conduct or an intention to insult the judge is necessary. So much is suggested by the observations of Cockburn CJ in *Ex parte Pater* (above) (at 310, 846) cited with apparent approval by the High Court in *Lewis*. There are many authorities both of the High Court and of this Court which negative that proposition. See eg *John Fairfax and Sons Pty Limited v McRae* (1955) 93 CLR 351, 370; *Attorney General for New South Wales v Dean* (1990) 20 NSWLR 650, 655 (CA).

3. The test, expressed in words of considerable generality, must be applied to the conduct stigmatized, bearing in mind the inevitable stresses which are imposed upon all participants in litigation from time to time. Where it is a legal representative who is alleged to be guilty of contempt, it is important to keep in mind the duty of courage and vigour on the part of legal representatives in the pursuit of the perceived interests of their clients. See *Ex parte Pater* (1864) 5 B & S, 299, 310; 122 ER 842, 846; *Lewis* (above) 688. But "courage and courtesy

should go hand in hand". (per Lord Denning, cited in *Lewis* at 689);

4. Mere "acts of rudeness", discourtesy or even extreme discourtesy on the part of legal representatives will not of itself constitute contempt. The courts have emphasised time and time that:

"It is not every act of discourtesy to the court by counsel that amounts to contempt, nor is conduct which involves a breach by counsel of his duty to his client necessarily in this category. ... [T]he ... conduct [may be] clearly discourteous, ... but ... it cannot properly be placed over the line that divides mere discourtesy from contempt."

See *Izuora v The Queen* [1953] AC 327, 336 (PC).

Discourtesy can be dealt with, in a practical way, by a judicial officer, rebuking the practitioner concerned for the perceived discourtesy without the formal steps inherent in a conviction for contempt. See *Lewis* (above) 693. A too ready use of the summary power to deal with contempt in the face of the court against legal representatives would enliven the risk of diminishing the courage of those representatives in the defence of their clients' causes. It is well to keep in mind Lord Denning's advice in *Balogh v St Albans Crown Court* [1975] QB 73, 86 that:

"Insults are best treated with disdain - save where they are gross and scandalous."

In the case of perceived discourtesy by a legal practitioner, the summary power to deal with contempt should be used sparingly and only in serious cases. See *Lewis* (above) 693. In *John Fairfax and Sons*

Pty Limited v McRae (1955) 93 CLR 351, 370 the High Court explained why this was so:

"[B]ecause of its exceptional nature, this summary jurisdiction has always been regarded as one which is to be exercised with great caution, and, in this particular class of case, to be exercised only if it is made quite clear to the court that the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case. A penalty will not be imposed in its exercise 'unless the thing done is of such a nature as to require the arbitrary and summary interference of the Court in order to enable justice to be duly and properly administered without any interruption or interference'. Per Cotton LJ in Hunt v Clarke (1889) 58 LJ (QB) 490, 493 quoted by Lord Russell CJ in Reg v Payne (1896) 1 QB 577, 581."

"Interference with the course of justice" is not confined to a physical disturbance of particular proceedings in a court which actually prevents the court from attending to its business according to law. It extends to an interference with the authority of the court, in the sense that there has been a distraction from the influence of judicial decisions and an impairment of confidence and respect for the courts and their judgments. See *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434, 442; *Ex parte Tuckerman; Re Nash* [1970] 3 NSWLR 23, 27 (CA).

5. Nevertheless, courts will not tolerate the conduct of legal representatives who cross the line and go beyond the vigorous assertion of their clients' causes to personal insult and disrespect of the judicial officer who constitutes the court. If such were to become a general rule, or even common, it would change the conditions in which our courts have traditionally and

beneficially functioned. It would run the risk of substituting for calm and orderly procedures the ranting and intimidating harassment that is sometimes seen in television portrayals of the courtrooms of other countries;

6. Appellate courts will be conscious of the fact that in judging the degree of insult, and the impact of it upon a fair-minded observer, the judicial officer presiding at the trial, will ordinarily be in a position of superiority. He or she is more likely to obtain a true appreciation of the conduct of the contemnor than an appellate court reading the cold print of transcript even (as here) elaborated by admitted additional evidence. The manner of expression, the conduct and body language of the contemnor, matters peculiar to the manner and tone of voice and other elements of the behaviour unrecorded on the printed page will be properly taken into account by the judicial officer at first instance. Of necessity, such considerations can rarely be recaptured by the appellate court. Cf *Ex parte Bellanto* (above) 196; *Reece v McKennar*; *ex parte Reece* (1953) St R Qd 258, 264; *Dow v Attorney General* (1980) Qd R 58, 62. *Brutus v Cozens* (1973) AC 854, 862; and
7. In the end what is involved is a matter of judgment. That judgment will, quite frequently, be difficult. See *Lewis*, 692. In making it, due allowance will be given by the appellate court to the advantages enjoyed by the judicial officer at first instance. But the appellate court must also perform its function. It

may enjoy the advantage of removal from the heat and fire of the emotional circumstances in which the suggested contempt arose. As Priestley JA observed in *Costello* (above) a passage of time quite frequently takes the edge off the passion which was at first seen as contempt:

"The courtroom is a place where conflicts of many kinds are intended to take place and, at the end of the process, to be decided. In the progress of the case towards decision it is part of rather than interference with the proper administration of justice that opposing views are expressed. It is inevitable that expressions of view sometimes become very forceful and, when met with opposition cause heat between the people putting the differing views forward. Heat leads to sharp words and sometimes rude exchanges. These things are regrettable and usually regretted by the participants. In the overwhelming number of cases it never occurs to anyone that these incidents constitute interference with the proper administration of justice. They are part of it. When matters become extreme the power to punish for contempt is available. The comparative rarity of the use of this power in contrast to the innumerable incidents of heated behaviour in courtrooms shows how fully accepted it is that conflict in court is part of the ordinary routine of the proper administration of justice. Whether behaviour in court goes so far beyond a tolerable degree of heat and conflict as to justify the description of interference with the proper administration of justice will be a question of fact in each case."

In the present case it is tolerably clear that there was a simple misunderstanding between the appellant and his Honour. Whether or not he finally did so, the appellant certainly intended to object to the tender of Dr Taylor's second report (and the radiologist report which accompanied it). He thought he did object. So did his solicitor. His opponent expected him to do so. The court reporter was not sure. But she was led into believing he had not objected by

his Honour's intervention thanking him. The appellant thought that was a sarcastic remark. In the circumstances of what had gone before, these mistakes can all be understood.

At least this much is clear. The appellant was not seeking to insult the judge. There was nothing personal in the conduct directed at the judge or at his relations with the judge. What was said and done occurred in the appellant's pursuit of the interests of his client. It was in no way a personal cause. These considerations distinguish this case from what was found to have occurred in *ex parte Bellanto* (above).

There was nothing "arrogant" or "truculent" in the actual words used. As recorded, they are perfectly appropriate and not disrespectful. The perceived contempt of court, arrogance and truculence must therefore be ascribed to the appellant's shouting at the judge in contest of his earlier ruling, and nothing else.

Having regard to what was said and the circumstances in which the shouting took place, we do not consider that it was calculated to bring the court, or his Honour into contempt or to lower the judge's authority or that of this court.

Allowing for the wisdom that can accompany hindsight, it is clear that a circumstances such as the foregoing should have been met by Lloyd-Jones DCJ in quite a different manner. First, his Honour should have attended more closely to what it was that the appellant was striving to say to him. Whilst there are duties of courtesy imposed upon legal representatives as a corollary of the privileges they enjoy as advocates, there is a correlative duty in judicial officers to listen patiently and carefully and to retain self

control at all times. See *Coward v Stapleton* (1953) 90 CLR 573, 580. This does not reduce the judicial officer to a silent receptacle for anything which legal representatives choose to say. Far from it. But had his Honour been more patient, it would have soon emerged that either a mishearing or a misunderstanding had occurred. Thus, had he simply asked opposing counsel, it seems likely that the record would have been amended by consent. His Honour would then have been in a position to determine the objection to the tender of the reports and what, if anything, followed from it.

Secondly, in circumstances of heat and emotion it is usually preferable to adjourn the proceedings, if only for a short time, to allow tempers to cool. What seems vitally important in the heat of shouted exchanges, may seem less important in the scheme of things after even a few minutes for reflection, in which a better sense of perspective can be achieved.

Thirdly, the procedures laid down by the common law and later by s 199 of the Act are designed to provide the appropriate stages at which a proceeding for contempt may be disposed of in a just manner. Instead of following those procedures, the telescoped proceeding recorded in the transcript and elaborated in the affidavits allowed a determination to be made which was not the subject of fair procedure and mature reflection. What happened brought little credit upon the administration of justice or the participants in their important functions. One can only imagine what the plaintiff, Mr Hill, and any citizens observing his trial must have thought about the storm which blew up over such an apparently trivial cause. Perhaps it is

a reflection of the advantage of time for reconsideration that (as the court was informed by agreement) his Honour did not, subsequently, proceed to refer the transcript or report the matter to the Bar Association. It would appear that, sensibly, he simply let the matter rest.

Conclusions and orders: ruling of contempt revoked

The foregoing provides sufficient reasons for the orders which this Court will make disposing of this appeal. It is not necessary to deal with the third ground of complaint, which referred to the suggested lack of reasons given by his Honour for the conviction of contempt and the punishment of reprimand which followed.

The proper procedures required by s 199 of the Act were not followed. For that reason alone a conviction of contempt on the part of the appellant cannot stand. Exercising the powers of this Court, we do not believe that the circumstances shown in the evidence warrant a conclusion that the appellant acted in contempt of court. We should emphasise that our conclusion in this case relates to the particular facts of the case. In other circumstances shouting, and in particular persistent shouting, may well constitute contempt of court. Cf *Dow v Attorney General* (1979) Qd R 58. It would be inappropriate for this Court to substitute its own decision of contempt for that reached by irregular procedure by Lloyd-Jones DCJ. At most, the appellant's conduct in shouting at the judge was rude. But there were many ways, short of a charge of contempt of dealing with that conduct. This decision joins a line of recent authority (including *Lewis* and *Macgroarty* in

the High Court of Australia) which emphasise both the care that must be observed in the exercise of the summary power to deal with contempt in the face and hearing of the court and the particular care that must be observed in using that power as a means of dealing with legal practitioners who are thought to have acted rudely or offensively.

Because the appellant has conceded discourtesy, in that he shouted at the judge, it is not appropriate to award him costs. But the conviction entered against him must be set aside.

The orders of the Court will therefore be:

1. Appeal allowed;
2. Revoke the ruling of his Honour Judge Lloyd-Jones that the appellant was guilty of contempt of court; and
3. In lieu thereof, dismiss the charge of contempt.