SA Press Club

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"AND THEN OF COURSE THERE'S SENTENCING"

The Hon John Doyle AC, Chief Justice of South Australia

The topic reflects my uncertainty about the subject matter for this occasion.

As the topic indicates, one could always fall back on sentencing of offenders by the Courts. But I doubt whether there is anything new to be said on the topic. I am willing to answer questions, but I have decided not to make sentencing my focus.

I have decided to talk about three loosely related topics.

First, the impact of information technology on some aspects of the work of the Courts. Second, the problem of increasing complexity in the law. Third, some aspects of what we call "problem solving courts". I am willing to answer questions about any of these matters, and in fact about anything related to the administration of justice on which it is appropriate for me to comment.

Information technology is so pervasive, and its effects spread so far and so fast, that we can overlook its capacity to transform our environment, including our professional working environment. The changes in the modes and speed of transmission of information in my time in the law have been extra-ordinary. I think the pace of change is increasing. We need to be aware that these changes that result from advances in information technology require us to be alert to what I call the transformative effect of information technology advances. For present purposes I single out two things in particular. First, the ability of individuals to disseminate information very widely, in a manner which in the past could be achieved only by the media. Second, the ability of

individuals and the media to transmit information far more quickly than could ever have been done in the past. Taken together, these are potent influences on the work of the courts.

There is a tendency to think that what is happening in our time has never been experienced before. The invention of the printing press transformed life in early modern Europe. Closer to our time, I suspect that when the use of the telephone first became widespread it also had a similar transformative effect.

Be that as it may, there is no doubt that we are going through a phase in which information technology advances are having a dramatic effect on our society, on our economy and on our professions.

As you know, we have a regime of statutory prohibitions, coupled with the power given to courts to make suppression orders, that together limit the ability of the media and others to publish certain details of court proceedings. The regime is found in the Evidence Act.

The statutory prohibitions, and suppression orders, prohibit the publication of certain material. The prohibition has been understood to mean a prohibition on the dissemination of material to a substantial part of the public. The legislative regime does not prohibit the public from being present in court, from hearing what is said, or even from speaking to other individuals about it outside the court. What is prohibited is, as I said, dissemination of material to a substantial part of the public.

This regime was enacted at a time when it seemed sufficient to control the publication of material by the media – radio, television and the print media. That was how the general public learned about what was happening in court. The system was able to cope with the few individuals who published prohibited information. In part, this was because their ability to do so was

limited. Today's information technology was not available. Only the media could reach a substantial part of the public. The media knew the rules, and by and large observed them, even though their opposition to the system is well known. The system worked, meaning that it did prevent the general publication of prohibited material, at least within South Australia.

Information technology has transformed the environment in which the Evidence Act operates. It is undermining the basis of the regime. It is doing so because individuals are able to transmit information before anything can be done to stop them, and they are able to transmit information far and wide. So the existing regime is being outflanked by changes in information technology.

Is this a good thing or a bad thing? Many here will think it is a good thing. But bear in mind that if the existing regime collapses, there will be a cost to the administration of justice and to the public interest. There will be trials that will be aborted because of the publication of information that makes a fair trial impossible. Some individuals will suffer unfairly, because they will not get the benefit of the statutory protection. Some witnesses may be reluctant to give evidence, because their identity cannot be protected. Some victims will be reluctant to report offences.

There is no point wringing our hands about what is happening now. It is impossible to turn the clock back. The question for the Courts and for the Government is, "what happens next?".

I doubt whether the existing regime can be maintained by prosecuting twitterers, tweeters and others. I do not actually know, but I suspect that there are too many of them for this to be practical. Also, if the information is coming from outside the State, it will not be practical to prosecute the sources of that information. I doubt whether the prosecution of selected individuals will deter others. I anticipate that if that were done, the media would mount a

massive campaign in their support. I doubt whether any Australian Government would have much appetite for prosecutions.

The underlying issue of policy is how to respond to this situation. It is ultimately a matter for the Government.

What are the possible responses?

One, as I mentioned, is a vigorous program of prosecution of offenders under the existing law. I doubt whether that is a viable option. Another would be to legislate for heavier penalties. At present, breach of a suppression order attracts a maximum punishment of a fine of $10,000 or two years' imprisonment. For a body corporate the maximum fine is $120,000. Similar penalties apply to the statutory prohibition against identifying persons charged with sexual offences and victims of such offences. I doubt whether increasing penalties will, of itself, eliminate the problem.

Maybe a technological solution will emerge, some system of blocking offending transmissions. I doubt whether any such solution will emerge. I am not competent to pronounce on that. Another option is to sit tight and see what happens. The problem is that in cases involving prominent people, identities and other information will be widely circulated. The system will lose its credibility.

A related problem is that of the vilification of persons charged, coupled with the publication of prejudicial information about them. This has the potential to result in harm to the individuals charged from vigilantes, as a result of them being identified and their addresses being disclosed. This is to say nothing about the impact on the requirement that the court provide a fair trial.

I anticipate that we will have difficulty providing a fair trial from time to time, until a satisfactory response to the situation is identified.

News Limited in particular has launched a campaign against the use of suppression orders. That campaign, as well as the existing regime, is being overtaken by the new information technology. The campaigners can probably rest on their oars, and let events take their course. It is a difficult policy issue for any government. And it is a real problem for the courts.

Before I leave this topic, I want to refer briefly to twitterers and tweeters in court. By this I mean those who use mobile phones and other devices, in the courtroom, to transmit information about what is happening contemporaneously in the courtroom.

As far as I am aware this has not yet surfaced as a problem in South Australia. But the technology is there now. The English Courts have distributed an issues paper, raising the issues that this technology poses, and raising possible ways of grappling with it. I have decided to await the outcome of the English inquiry before doing anything here. I see no need for us to cover the same ground. I mention two aspects of this phenomenon that are worth considering. First, it is not uncommon for an application for a suppression order to be made a few minutes after evidence is given, as the significance of the evidence can take a little while to sink in. If someone is twittering or tweeting in court, the information might have gone out by the time the court considers an application for a suppression order. Second, twittering and tweeting could be used as a none too subtle means of intimidating a witness. It could be used to create the impression that someone is watching what the witness says. It could also be used to relay to another person outside court information about how the present witness's evidence is progressing. There are a number of other issues that need consideration. They will not be easy to resolve.

I turn now to television cameras in court, a matter that surfaces from time to time. Nothing much has been said about it in recent times.

The electronic media, television channels mainly, wish to be able to film court proceedings and then to use clips from the proceedings. I realise that a clip from in court is much better, as backing for a news story, than a shot of the presenter standing outside the court, speaking to the camera. So far the courts have refused to allow this on a regular basis, although on some occasions it has been permitted, here and in other States.

My attitude is that the public interest is the key here. It will be in the public interest to allow the public to see film of court proceedings if this will improve public understanding of the court process. On the other hand, there is no public interest in a 20 or 30 second clip of vision to back up a standard television news item. The public learns nothing from that about the court process.

If television channels were willing to broadcast substantial parts of a court hearing, perhaps with the use of a “voice over” or text on screen to explain what is happening (eg X is currently being cross-examined) that sort of thing might warrant the courts making an effort to make it possible.

I want to emphasise that allowing cameras in court require considerable effort by the judge, court staff, the prosecution and sometimes the defence. I am assuming that it will almost always be a criminal case that the media want to film. If particular proceedings are to be filmed, the judge has to consider and then rule on any objection by prosecution or defence, plaintiff or defence in a civil case. The judge may have to consider a request by a particular witness not to be filmed. Any other complications from filming that might arise need to be considered, such as protecting the identity of undercover police officers. All of this has to be done before the trial begins. Someone has to keep an eye on what is being published. New Zealand presently allows cameras in court, and has fairly detailed rules about what can and cannot be filmed, and how the material can be used. For example, the accused can only be filmed

at certain stages of the trial. I know from talking to New Zealand judges that this can amount to a significant amount of pre-trial work for the judge.

I have made some informal enquiries about the New Zealand system. My understanding is that by and large the material is used only on news clips. There is no public benefit in this. The input required from judges and others is significant and in my opinion is not warranted.

On that basis, at present I remain unpersuaded that the courts should make the effort required to allow television cameras in court.

The Victorian Bushfire Royal Commission "streamed" its proceedings live to the web. The picture was not high quality. I understand that the cost was not great. These proceedings were not as complex an event as a trial. But based on the Victorian experience my preference is now for the court itself to stream cases to the web with an explanatory voice over or text on screen. In this way we can ensure that the public would be able to see the complete proceedings. I would not limit the streaming to criminal cases. Indeed, my aim would be to stream a mix of civil and criminal, appellate and trial. I think it may be worthwhile the courts setting this up. I hope that in a few years it will come to pass. At this stage we are looking into the feasibility in a preliminary way. The idea will proceed only if we can get funding.

However, even this has some complications that need to be addressed.

I am sure that improved technology will emerge quickly. We would need to think about the amount of explanatory material that is provided while the proceedings are running. There is also the question of what cases are to be streamed. While I anticipate that the court would retain control over this, I would not want it thought that the choice of cases reflected some agenda being run by the court. We would need to think about how that is managed.

We would also need to consider how we would handle requests by the media to take clips from this material.

I think that the debate about cameras in court will be overtaken by advances in technology. The fact that courts can now without great difficulty stream material to the web, means that the courts can take charge of the process, and do it themselves. Another example of technology outflanking something.

I turn to a more general aspect of information technology. We now have the technology that enables us to create the "virtual courtroom". The judge could be in one place with a screen. Counsel could be in their offices with a screen. The witness could be in yet another place with a screen. I put aside the issue of a jury for the moment. In other words, instead of assembling in a building, and in a particular room in that building, the parties could deal with the proceedings entirely on screen, from different locations. Now that this has become possible, it is likely that there will be pressure on courts to use the virtual courtroom. Arguments will be based on the convenience of witnesses, and on the efficiency of breaking the proceedings up perhaps into small blocks, dealt with at times convenient to everyone involved, rather than, as happens, starting one day and running non-stop until the case finishes.

If this is to occur, I think it will transform the role of barristers. Our system is based on confrontation in the courtroom, and on orality, by which I mean evidence and argument given orally. The judge's observation of witnesses is also an important part of many cases. All of this can happen on the screen, but I have no doubt that doing it on the screen, through a virtual courtroom, would affect in quite fundamental ways the manner in which proceedings are conducted, and the manner in which barristers function.

It would also impact on public and media scrutiny. Many witnesses and other participants would probably prefer to give evidence from a remote location. There would be no chance to film them coming and going.

The possibility has a particular relevance to appeals. At present an appeal court is limited in its ability to reverse findings of fact made by a trial judge, when they rest on the assessment by that judge of the demeanour or appearance of a witness. The trial judge has a distinct advantage over the appellate judge. If all of the proceedings are recorded electronically, as will soon be the case, an appeal court will be in as good a position as a trial judge to decide issues based on demeanour and credit. The appeal court will be able to see and hear the witness for itself. This is going to require a reconsideration of this aspect of the role of an appellate court, once the traditional advantage of a trial judge no longer exists. To my mind the last thing we want is for an appeal to become a re-run of a trial, with all of the evidence being scrutinised afresh by the appellate court. This is another challenge that faces our system, due to advances in information technology.

The fact is, in this and other respects, we are going to be challenged to do things differently because information technology makes that possible, and for no other reason. In other words, the argument will not be that what we are doing now is deficient, it needs to be improved, how can it be improved? The argument will be, we can do things differently, why aren't you doing them differently? It calls for careful consideration of the benefits from change, and also of any adverse impacts.

What I have been saying so far is merely an illustration of this more general issue or challenge from information technology.

I turn now to problem solving courts. I mean courts like the Drug Court, the Aboriginal Court, the Domestic Violence Court. In the Higher Courts, when we sentence a drug user, for example, we use the sentence, to the extent we can, as a means of encouraging change, and as a means of encouraging the offender to stop abusing illicit drugs and to rehabilitate himself or herself. A sentence is a rather blunt and undiscriminating way of trying to do this. We

do not do anything that could be called “treatment” of the underlying addiction.

In the Drug Court, the court is used as the focus for treatment, with the court supervising the administration of that treatment. Over a period of time the offender, assisted by professionals, is helped to grapple with the underlying addiction. The court tries to solve the problem that led to the offence, not merely to punish the offence. This approach has had considerable success. It is an approach that is capable of much wider application. For example, it could be used in cases where abuse of alcohol is the underlying problem, it could be used in cases where the underlying problem is violence by young males.

Problem solving courts are fairly costly, because they rely on a costly court system as the way of supervising the administration of treatment. But the evidence does suggest that for certain categories of offenders, this system gets better results than the traditional punishment approach.

I expect that there will be pressure to expand the “treatment” or therapeutic role of courts. Doing so requires some caution. Judges and magistrates are not trained for this. A treatment court operates in a manner not compatible with our normal method of court proceedings. And as I mentioned, it is an expensive way of treating an underlying problem. Treatment courts or problem solving courts are not a panacea. They offer prospects of improved outcomes, but need to be deployed with considerable care. They need to be used only in carefully identified aspects of court work.

I support what the Magistrates Court has done and is doing in this area. I have noted the arguments for expanding treatment courts to sentencing more generally. I agree that the existing approach to sentencing has limited prospects of success in relation to certain categories of offender, and that

treatment courts may work better. All I can say is that my own approach is one of cautious acceptance of the underlying merit of the idea.

Finally, and briefly, I want to turn to the issue of complexity in the law. The law, particularly statute law, has become more complex in my time, although often we hear it said that the law is being simplified. I do not believe it is.

There are a number of factors at work. First, Parliaments, especially the Commonwealth Parliament, are tending to enact more complex legislation, and longer enactments. Parliaments often enact measures that can be enforced by individuals making a claim for damages. These statutory claims often are available concurrently with common law claims, and sometimes with other statutory remedies. The trial judge in a civil case often has to consider a long list of alternative claims and remedies, based on common law, State legislation and Commonwealth legislation. In this way civil cases are tending to become more complicated.

The criminal law has also become more complicated. Under the banner of being tough on crime, governments here and elsewhere have promoted legislation to create new offences, with additional penalties, and often with gradations of the offence that reflect degrees of seriousness. So we have crimes such as “aggravated serious criminal trespass”. These additional elements of “aggravated” and “serious” all have to be explained to a jury, and applied by a judge in sentencing. In the 60s and 70s we went through an era in which a lot of old statutory provisions, enacted to deal with specific problems, were repealed. The legislation was simplified. Then we moved to the current phase in which Parliament started, once again, creating specific offences and other provisions to deal with specific social concerns. We have ended up with criminal legislation more complex than it was in the 1950s.

Perhaps there will be a counter trend. Who knows? But the fact is that the law has got more complex.

There is another factor, sometimes called the individualisation of justice. When I first entered the law, there was general acceptance that the law should comprise general rules which were reasonably clear. It was accepted that there would be cases in which the general rule would produce an unfair result. But that was accepted as the price of a general rule, to cover a multitude of cases. In the 70s and 80s a sentiment developed that this was unsatisfactory. Parliament, and to some extent the courts, wanted judges to be able to fashion remedies and results in the individual cases that were seen as fair in every case. This has led to increased emphasis on judicial discretions, and to the conferring of powers on Judges to avoid what might seem an unfair outcome from the application of a general rule.

In my opinion, these tendencies have gone too far. This is a generalisation about the end result of two or three different processes, that I have referred to already. But I think the end result is that judges are struggling to explain the law to juries in reasonably simple terms, and sentencing is becoming too complicated. Civil cases have got more complex than in the past, which adds to the cost, already too high.

Somehow or other, we need to start on a process of winding back, or simplifying. I do not mean going back to where we were originally, but to eliminating some of the complexities.

I do not suggest that this is an easy task. The only sensible way is a gradual approach.

There is an obstacle that one can see immediately to this. Any government that embarks on this process of simplification in the criminal law runs the risk of being accused of being soft on crime. The accusation will be made because, of necessity, existing provisions in the criminal law would have to be repealed and replaced by simpler provisions. It will be easy to paint that as

intended to reduce the punishment that offenders receive. A similar problem applies in the area of the civil law. Any simplification agenda can be painted as depriving individuals of remedies that they now have.

I believe that in time society will look back on the 90s and the first decade of this century as an era of increasing complexity in the law, attributable to good motives, but taken to a degree that became counterproductive.

They are the aspects of our work in the courts that I wanted to bring to your attention.