

Should judges use social media?

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Introduction

In *Valentine v Eid* (1992) 27 NSWLR 615 at 621 Grove J, lamenting the “potential for disorder” caused by the almost total unavailability of NSW District Court judgments, even for other judges and magistrates, stated:

“A Local Court learning of a decision in the District Court would seem to depend largely upon chance”.

Thanks to the Internet and social media, this has completely changed. Judgments are now not only available to other courts, but are Lawlinked, hyperlinked, blogged, Twittered, stumbled upon and liked/unliked on a global scale. Moreover, these judgments are analysed and commented upon with a lack of respect that would have been unthinkable even by the tabloids during pre-social media times².

Two specific problems arise from this explosion of electronic commentary:

- (a) The potential conflict between open justice and the use of social media by jurors, witnesses and journalists tweeting from the courtroom; and
- (b) The impact upon judicial standing, and possible perceptions of bias, arising from judges using social media.

Although I have briefly summarised some concerns about the use of Twitter in the courtroom, this discussion paper deals only with the second of these issues. The potential for social media to jeopardise the right to a fair trial has been the subject of inquiry by, among others, the Standing Council on Law and Justice (SCLJ), which set up a working group to consider model guidelines and protocols to prevent the publication of prejudicial material by members of the public.³ These proposals do not, however, provide guidance about the use of social media by judges.

The questions to ask

¹ <http://lexisnexis.com.au/author-profiles/authors.aspx?id=5> .

² Tabloid criticisms of judges, such as the UK *Sun's* “Off their Heads!” (<http://www.thesun.co.uk/sol/homepage/news/3496327/Judges-No-jail-for-dealers-caught-with-50-heroin-wraps.html>), seem almost polite when compared to, for example the Twitter outbursts in response to Tugendhat J's finding (in *McAlpine v Bercow* [2013] EWHC1342) that Sally Bercow's Twitter about Lord McAlpine was defamatory.

³ See the SCLJ Communiqué of 5 October 2012. The activities of the working group are outlined by James Farrell in the *Alternative Law Journal* (2012) 37(4) AltLJ 282 : <http://www.altlj.org/news-and-views/downunderallover/duao-vol-37-4/448-social-media-and-the-law>.

The most common use of social media by a judge would be to Twitter, express an opinion (legal or otherwise) in a blog, or to “friend”⁴ or “like” someone on Facebook. This raises three questions:

1. Should courts, or judges, should use social media at all, or is the role of the judge or court so sacrosanct that social media is inappropriate?

Although I have raised this issue as the first line of inquiry, it really is too late for judicial regulatory bodies or courts to be imposing such a requirement. Too many courts and judges are already using social media. The better question would be what use is acceptable. What social media should they be able to use, and for what purpose? Should courts release recordings of offenders being sentenced⁵, or is a judicial Twitter address the first step on the rocky downhill road to judgments being delivered at “@Justice-R-us”, complete with a “like” button for the result?

2. This leads to my second question, namely the wider issue of what judges (or courts) should be able to say if they are using social media. Is it appropriate to participate in discussions of law-related issues, such as law reform, adequacy of sentencing (law and order being a popular election issue) and perceived injustices or inconsistencies in the law? Should a judge be able to complain in a blog column that Court of Appeal judgments in “highway” personal injury cases have her puzzled – and if so, should that judge agree not to hear any such cases? Decisions of the NSW Court of Appeal in relation to apprehended bias paint a sombre picture of the entitlement of judges to express views about work-related issues.
3. The third question is whether judges should be permitted to use social media in their private activities. Should judges, by reason of their professional responsibilities or standing, be denied the right to Twitter and Facebook, or to appear on television? How important is judicial status - is an appearance on Master Chef injudicious?

The principal difficulty in answering these questions is that the role of the judge has changed profoundly over the past few decades. Judges today are more in touch with the community than they were during the 19th century (when, significantly, many judges were not even legally qualified)⁶. Judges today don’t just write judgments, or

⁴ *Above the Law* 20/08/2010: <http://abovethelaw.com/2010/08/in-defense-of-a-woman-some-thoughts-on-the-judge-gertner-book-controversy/>

⁵ It may be too late to complain about Twitters of this kind, as the Victorian Supreme Court is issuing such tapes, as well as commentary. See, for example, the Twitter 26/04/2013 entry for Supreme Court of Vic @SCVSupremeCourt:

“Listen to Justice King sentence Veronica Hudson, to 6yrs jail, saying Hudson’s life reads like a horror story”, <http://bit.ly/15ToSOp>

Here is another of my favourite quotes from the Victorian Supreme Court Twitter page: Supreme Court of Vic @SCVSupremeCourt17 May:

“Remember, Courts Open Day is on again tomorrow 10am to 3pm, full program <http://bit.ly/15RpoxE> Note, dungeon tours are fully booked out.”

⁶ While development of equity, contract and commercial law principles during the 19th century aided the merchant class, the state of the legal system during much of the 19th century in the United

even legal texts; they write books about all aspects of life in our society⁷. They don't just write books and articles; they also speak at conferences, often with judges and lawyers from overseas countries, and participate in community activities ranging from the local precinct committee to law reform bodies. This may include making public statements about the cases they hear (perhaps in the form of a media release at the front of a judgment) and (particularly in the case of heads of jurisdiction) about court-related issues such as access to justice.

There are three areas that I would like to discuss:

1. The “snapshot thinking” mistake of thinking the role of the judge has always been what it is today needs to be put aside. It is important to look at the role of the judge in a historical context, and to examine the role of the judge in the common law system before social media was invented. Did early commentators consider that judges should never express any views, or are they in fact obliged, in order to perform their job properly, to participate in community activities? The answer may be surprising.
2. The next issue to determine is the current climate in the appellate courts in relation to judges who express opinions about a variety of social or legal

Kingdom would best be described as Dickensian. For example, 59% of the judges appointed as magistrates and criminal court judges in the 18th and much of the 19th centuries were failed or former politicians, often appointed after performing favours: D Duman, “The Judicial Bench in England 1727 – 1825”, 1982, p. 78; V A C Gattrell, “The Hanging Tree”, Oxford University Press, 1994, chapter 18. The “mediocrity” of even the most senior judges was the subject of comment during the 19th century (see “Law and Lawyers, or Sketches and Illustrations of legal history and biography”, A Polson, 1840; “The Bench and the Bar”, J Grant, 1837. The average age of circuit judges in 1825 was 65; their health was poor, and their temper worse. Between 1770 and 1830 these judges condemned approximately 35,000 people to death, a significant number given that the population by over the same period increased from 7 to 14 million people; by comparison, between 1530 and 1630, 75,000 are thought to have been executed. The changes effected by the 1832 *Reform Act*, abolition of barbaric practices such as public hanging (in 1868) and social reform were the catalysts for change, but change was slow. In Australia, the harsh criminal law system the colonists brought with them from England “had in certain respects altered little over the previous century”: G Woods, “A History of the Criminal Law in New South Wales: The Colonial Period 1788 – 1900”, Federation Press, 2002 at p. 427. These statistics are helpful reminders that our legal system progressed from being comparably worse to most third world countries only over the past century or so, and that the principles of law we hold dear are neither ancient nor immutable.

⁷ Justice Kyrou recently published a book about his own family history:

<http://m.theage.com.au/victoria/lauded-greek-migrant-pays-homage-to-his-heroes--mum-and-dad-20121127-2a65t.html>. As to controversial judicial memoirs, see

http://www.boston.com/news/local/massachusetts/articles/2010/08/19/federal_judges_upcoming_book_raises_some_eyebrows/; Judge Gertner's memoirs were asserted to have an “unjudicial” title and to demonstrate potential bias against prosecutors and defendants in sex discrimination suits.

However, nobody complained when retired Federal Court Judge Herbert J Stern wrote a book about his days as a prosecutor:

http://www.northjersey.com/news/crime_courts/Retired_US_attorney_wrote_the_book_on_fighting_NJ_corruption.html. Less controversially, Judge Sandra Day O'Connor wrote “Lazy B: Growing up on a cattle ranch in the American South West”

(<http://www.amazon.com/gp/product/0812966732?ie=UTF8&tag=undetheirobe-20&linkCode=as2&camp=1789&creative=390957&creativeASIN=0812966732>)

. Judge Sotomayor's book on her early life, “My Beloved World”, came out in January 2013: http://www.amazon.com/My-Beloved-World-Sonia-Sotomayor/dp/0307594882/ref=pd_sim_b_4. Judge Posner, who has written over 40 books (about the common law system, and not about his early life), probably holds the record for the most books written by a judge.

issues. When does the expression of extra-curial views risk being seen as a pre-determined opinion? Some of the cases on apprehended bias suggest that judges who write or speak on legal issues may do so at their peril. This does not augur well for a judicial blog column or Twitter page.

3. Finally, there is the difficult question of the need for open justice. The limits of this paper do not permit a discussion of this topic, but I have briefly noted concerns about journalists' Twitter from the courtroom.

1. The role of the judge in the common law system.

According to Blackstone⁸, judges did not simply listen to lawyers; they played an active role in identifying social mores and reflecting these values in their decisions. It was by identifying the general customs that judges would then guide and direct their courts. Judicial decisions are therefore “the principal and most authoritative evidence, that can be given of the existence of such a custom as shall form part of the common law”.

More recently, Oliver Wendell Holmes has emphasised the judge's role as the identifier of society's customs. In “Codes, and the Arrangement of the Law” (1870) 5 Am L Rev 1, Holmes argued that the development of the common law was driven by judicial (as opposed to governmental) responses to public policy issues presented by cases, and that the ability of the common law to adjust appropriately to external needs derives from the judiciary's role as representative of the community. This meant that the judiciary was better equipped than the legislature to articulate appropriate rules.

Similar opinions about the role of the judge as a recogniser of social trends can be seen in the writings of two of the 20th century's most famous judges, Lord Denning MR and Judge Richard Posner.

Lord Denning MR tended to the apocryphal in his approach (his famous statement that “Someone must be trusted – let it be the judges”⁹ is a typical example), but his willingness to see the judge as a social innovator knew few bounds. In one 1953 case he stated:

“What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both.”¹⁰

Judge Richard Posner has been particularly active in his extra-curial writings concerning use of the common law to maximise efficiency in the society whose views and customs they represented. Judge Posner not only identified the role of the judge as interacting with the society for which he devised rules, but explained how the common law was able to create economically efficient rules as a result, by

⁸Sir William Blackstone, *The Commentaries on the Laws and Constitution of England*, 1796. Quotations are from the University of Chicago Press edition, 1979; this definition is found at p. 48.

⁹“What Next in the Law”, 1982, p. 30.

¹⁰*Packer v Packer* (1953) 2 All E R 127 at 129. This quotation is very popular on Facebook pages, Twitter sites and blogs, which is itself an intriguing phenomenon.

comparison with civil law systems where statutes are the source of economically inefficient rules.¹¹ Professor Nuno Garoupa explains:

“In short, Posner provided a structure for the Holmesian evolution of the common law, one that pushed the common law toward efficient rules through judges’ mostly unconscious internalisation of efficiency as a value, and through public choice theory, to explain why statute law was inferior”.¹²

This means the common law is efficient because judges’ values find their way into judges’ decisions where those values are related to, and promote, efficiency.

How, then, do judges come to hold, and share, these critical sets of values? Different selection methods (for example, by election in the United States) and different cultural values (for example, the role of women) may create different incentives for judges as to just whose views they are reflecting. However, the fundamental role of the judge is clear: he (or she) is to represent the values of the community, and to apply those values to the solution of issues in the proceedings of which he/she is the adjudicator.

This sounds as if judges should be out and about in society, absorbing the customs and applying them to the resolution of disputes. In fact, the general view seems to be that the reverse is the case. Publications such as the Judicial Commission’s “The Role of the Judge” counsel judges to use caution in their interaction with members of the community. Decisions of appellate courts on the dangers of extra-curial pronouncements tend to enforce this view.

While there are no specific guidelines about the extent to which judges may participate in extra-curial activities such as social media in which they express views, some guidance may be obtained from decisions of the NSW Court of Appeal about apprehended bias. This is because the principal problem seems to be the perception that the judge may say or do something which indicates holding a particular point of view. I have dealt with this issue in Point 2 below, but I should first set out some of the commentary in the United States and the United Kingdom concerning the use by judges of social media.

Judges and social media in the United States

Since social media originated in the United States, it is unsurprising that many examples of the problems, and much of the discussion, are to be found in American judgments and ethics rulings. Academics, courts, judges, lawyers and even television dramas have discussed the problems arising from the use of social media by judges. In “When Everyone is the Judge’s Pal: Facebook Friendship and the Appearance of Impropriety Standard”¹³, Daniel Smith summarises the ethical issues as follows:

¹¹Richard A Posner, “Economic Analysis of Law”, 1st ed., 1972.

¹²Nuno M Garoupa and Andrew P Moriss, “The Fable of the Codes: The Efficiency of the Common Law, Legal Origins & Codification Movements”, <http://ssrn.com/abstract=1925104>.

¹³ Vol 3, *Journal of Law, Technology and the Internet*, p. 2:
<http://law.case.edu/journals/JOLT/IDocuments/Smith%20-%20new.pdf>.

“Members of the judiciary, as arbiters of fairness in our society, are held to a higher standard of ethical conduct than even attorneys. Beyond avoiding unethical behavior, judges and justices are required to avoid the mere “appearance of impropriety.” However, the actual facts underlying a member of the judiciary’s behavior are not dispositive. Behavior that causes a reasonable observer to subjectively perceive impropriety where none actually exists can still be grounds for sanction. This standard reflects our society’s imperative to not just ensure the integrity of individual judges, but to also preserve the image of the judiciary.”

Attached to this paper is a copy of Formal Opinion 462 from the American Bar Association (February 21, 2013) setting out issues of relevance to use of social media by judges in the United States. While some of the matters of concern (such as the use of social media in an election campaign) may be viewed by Australian viewers as rather startling, the conclusion of the Formal Opinion, namely that “judicious use” of electronic social media can benefit judges in both their personal and professional lives, is one that reflects a degree of common sense. (It is unclear whether the reference to “judicious use” is intended to be a pun.)

In a recent episode of “The Good Wife”, the members of the law firm where most of the series takes place were desperately seeking to obtain an adjournment. After all their (rather good) reasons for an adjournment fail, they are able to have the trial aborted when they discover that the judge had become a Facebook “friend” of one of the jurors. Would this happen in real life?

The answer, in the United States, may vary from State to State. The difficulty for judges in some jurisdictions, as the judge in “The Good Wife” revealed, is that part of their election campaign requires them to be a “friend” on Facebook. There are electoral law provisions in America permitting a judge or judicial candidate to engage in political or campaign activity, but these do not address or restrict the judge’s or campaign committee’s method of communication.

Whether or not a judge facing election can use Facebook for electoral purposes, should a judge use Facebook at all? What if a judge is contacted on Facebook by someone connected to a trial? This problem occurred in *Youkers v The State of Texas*, Court of Appeals Fifth District of Texas at Dallas, 15 May 2013. Youkers was convicted for tampering with evidence after he was indicted for assaulting his pregnant girlfriend. He entered into a plea bargain, which the State later sought to revoke. The trial judge accepted these submissions and sentenced Youkers to eight years in prison, rejecting his request for a new trial. One of the issues Youkers raised on appeal was that the trial judge was a Facebook friend of the victim’s father and that the victim’s father had sent the trial judge an ex-parte communication in the form of a Facebook message.

The Appeals Court considered none of these activities rose to the level of improper bias. This was, however, because the communication in question was actually favourable to Youkers, in that it sought leniency. The trial judge had, wisely, placed the communication on the record, warning the victim’s father that such communications were not allowed.

In addition, the court held that the mere fact of Facebook friendship did not show bias. The court said:

“Allowing judges to use Facebook and other social media is also consistent with the premise that judges do not “forfeit [their] right to associate with [their] friends and acquaintances nor [are they] condemned to live the life of a hermit. In fact, such a regime would... lessen the effectiveness of the judicial officer.” Comm. On Jud. Ethics, State Bar of Tex., Op. 39 (1978). Social websites are one way judges can remain active in the community. For example, the ABA has stated, “[s]ocial interactions of all kinds, including [the use of social media websites], can... prevent [judges] from being thought of as isolated or out of touch.” ABA Op. 462. Texas also differs from many states because judges in Texas are elected officials, and the internet and social media websites have become campaign tools to raise funds and to provide information about candidates. *Id.*; see also Criss, *supra*, at 18 (“Few judicial campaigns can realistically afford to refrain from using social media to deliver their message to the voting public. Social media can be a very effective and inexpensive method to deliver campaign messages to the voting public.”).”

The Court reviewed the code of judicial conduct and, on the question of mere Facebook “friending” warranting recusal, said:

“Merely designating someone as a “friend” on Facebook “does not show the degree or intensity of a judge’s relationship with a person”. ABA Op. 462. One cannot say, based on this designation alone, whether the judge and the “friend” have met; are acquaintances that have met only once; are former business acquaintance; or have some deeper, more meaningful relationship. Thus, the designation, standing alone, provides no insight into the nature of the relationship... Further context is required.”

As Youkers was unable to produce additional evidence of an improper relationship, the appeal was dismissed.

This is not the first time that the courts have made the startling discovery that judges are human beings and that social networks should not be off limits to them simply because they are judges. A similar finding was made in *Quigley Corp. v Karkus*, No. 09-1725, 2009 U.S. Dist. LEXIS 41296 at 16, n. 3 (E.D. Pa. May 19, 2009) where the court said:

“[T]he Court assigns no significance to the Facebook “friends” reference... Indeed, “friendship” on Facebook may be as fleeting as the flick of a delete button.”

Different views had been taken by other courts; in Florida, a judge was disqualified over his Facebook friendship with a prosecutor. In South Dakota, however, the Supreme Court recognised the obvious, namely that a happy birthday message on Facebook did not mean anything more sinister: *Onnen v Sioux Fall Independent School District*, Case No. 25683 (SD S.Ct., Aug. 3, 2011).

In *Onnen*, the Supreme Court of South Dakota accepted that a “major witness” who posted an entry on the judge’s Facebook did not disturb the judge’s impartiality where the judge had not invited the posting and testified that it did not affect his decision making. Judicial Ethics Advisory Board in Florida and Oklahoma had stated that a person who appears regularly in the judge’s court, such as a lawyer or police officer, should not be listed as a “friend” on a social networking site, but New York, South Carolina, Kentucky and Ohio consider there is no validation in the judge having Facebook “friends” so long as the judge does not indicate such a “friend” exerting any special influence.

In *People v Carter*, 117 P. 3d 544, 564 (Cal. 2005), where the judge was acquainted with the defendant because the defendant had performed heart surgery on the judge's mother, the Texarkana Court of Appeals held that:

"The proper performance of judicial duties does not require a judge to withdraw from society and live an ascetic, antiseptic and socially sterile life."

It should be noted, however, that a different, and stricter, test in relation to the recusal of judges applies in the United States. In *Youkers*, the State's Reply described these tests as being "clear evidence" of actual bias (*Bracy v Gramley* 520 US 899 at 904) and where there is an appearance of impropriety, judge's impartiality must be judged by any reasonable person with possession of all the facts in the case "in the light of the facts as they existed, not as they were surmised or reported" (*Cheney v US District Court for District of Columbia*, 541 US 913, 914 (2004)). One of the problems in comparative law generally is that a ruling on an issue such as Facebook friends and its impact on a criminal case needs to be seen in the light of the relevant country's legal system. For example, in the United States, as the State's Reply sets out, a trial judge cannot err in failing to grant a new trial on an issue never presented to it: *Clarke v State* 270 SW 3D 573 at 580 (Texas Criminal Appeal STX. CRIM. Opp.); by contrast, in New South Wales, matters not raised at the trial are raised on appeal in 40% of criminal appeals, according to Judicial Commission statistics. Similarly, the issue of use by judges of Facebook (and to a lesser extent Twitter and other social media) is complicated by the fact that judges in certain US States are elected, and Facebook is one of their means of communicating with persons whose votes they seek. Consequently, these cases need to be viewed with caution.

Facebook is, primarily, a social media tool for keeping in touch with friends. The same cannot be said of Twitter, which is increasingly used for the purpose of exchange of newspaper articles, academic papers, breaking news and social polemic. Facebook may raise the problem of a person being seen as the judge's "friend", but Twitter raises issues about the actual views a judge may have on a wide variety of issues, depending on the nature and extent of the judge's tweets, such as @JudgeDillard's mix of personal and work-related comment.

Use of Twitter by Australian and English courts

It should first be noted that many courts, such as the Victorian Supreme Court, the US Supreme Court, and the UK Supreme Court already have their own Twitter site. Some of the tweets that they provide are simply links to cases, but a few courts take a much more proactive stance. Perhaps the most interesting is the Victorian Supreme Court. It is possible through their Twitter website not only to read judgments, but to hear the actual spoken words of a judge sentencing an offender. The Twitter entry for 26 April 2013, reads:

"Supreme Court of Vic

Listen to Justice King sentence Veronica Hudson to six years jail, saying Hudson's life reads like a horror story."

An audio file of the sentence is attached.

Other tweets on the site advise when trials are starting, that a jury has come back and is about to return a verdict, and answer questions from people who tweet information to them, such as an error or oversight in relation to information.

In the United Kingdom, guidelines were handed down stating that judges should not refer on Twitter or Facebook to their judicial activities or cases in which they were involved.¹⁴ It was acceptable to have a Twitter page if the judge was not identified as a judge. Judges were also warned not to participate in inappropriate activities, such as appearing on “Masterchef”. Unfortunately for the author of this guideline, and for the new Chief Justice, Lord Neuberger, there was a mass revolt by “two Supreme Court judges, three Lord Justices, four High Court judges and 26 QCs”, who appeared on a special (judicial?) edition of Masterchef¹⁵.

This brings me to a consideration of how use of social media by a judge in New South Wales could result in concerns that a judge expressing views would, when called upon to determine the issues in a case, be unable to put those views aside.

2. Extra-curial opinions and apprehended bias

The main objection to judges using social media is likely to be that they may express views indicative of prejudgment of an issue of fact or law.

In the December 2002 issue of LexisNexis’s “Direct Link”, the author of this regular bulletin on legal issues, Judge Sidis, discussed three recent decisions of the NSW Court of Appeal, under the catchy headline “Trilogy of Tragedy”. Her Honour was at the time the permanent judge in the NSW District Court’s Newcastle Registry and widely recognised as one of Australia’s experts on torts law. In the course of the article her Honour referred to a “firming of approach by the Court of Appeal to claims against highway authorities” and added:

I do not take issue with the sentiments of the Court of Appeal in requiring all plaintiffs to take some responsibility for their own welfare, but I have difficulty reconciling these decisions with those of the High Court in cases such as *March v E & M H Stramare Pty Limited ...* and *Webb v State of South Australia ...*. This humble District Court judge will go on contemplating.”

The defendant in a highway case heard in the Newcastle sittings, relying upon this publication, asked her Honour to disqualify herself from hearing the case, on the basis of prejudgment against his highway client. Her Honour refused and the defendant appealed, both on this ground (unsuccessfully) and on other grounds (successfully): *Newcastle City Council v Lindsay* [2004] NSWCA 198 (Giles, Tobias and McClellan JJA).

¹⁴ “Judges banned from blogging or tweeting about cases”, *the Telegraph*, 15 October 2012, <http://www.telegraph.co.uk/news/uknews/law-and-order/9477275/Judges-banned-from-blogging-or-tweeting-about-cases.html> .

¹⁵ The Masterchef episode is available at <http://www.bbc.co.uk/programmes/b01cmd4r> . Appeals Court Justice Stanley Burnton made an adverse credit finding against the mango passion dessert, holding that he “didn’t detect the mango and there was not enough passion”: <http://www.telegraph.co.uk/news/newstoppers/lawreports/9149326/Lord-Neuberger-criticises-fellow-judge-for-appearing-on-MasterChef.html> .

The NSW Court of Appeal viewed, with seriousness and care, the relationship between apprehended bias and extra-judicial publications:

“29 The relationship between apprehended bias on the one hand and extra-judicial publications of judges on the other was recently the subject of an application by a defendant to set aside the judgment of a recorder who was a well-known member of the English Bar, a specialist practitioner in personal injury cases who had, by regular contributions to specialist literature, shown consistent support for claimants in obtaining damages from defendants and their insurers. In *Timmins v Gormley* [2000] QB 451, the English Court of Appeal (Lord Bingham of Cornhill C.J., Lord Woolf M.R. and Sir Richard Scott V.-C.), in a joint judgment, said this (at 495 [85]):

“It is not inappropriate for a judge to write in publications of the class to which the recorder contributed. The publications are of value to the profession and for a lawyer of the recorder's experience to contribute to those publications can further rather than hinder the administration of justice. There is a long established tradition that the writing of books and articles or the editing of legal textbooks is not incompatible with holding judicial office and the discharge of judicial functions. There is nothing improper in the recorder being engaged in his writing activities. It is the tone of the recorder's opinions and the trenchancy with which they were expressed which is challenged here. Anyone writing in an area in which he sits judicially has to exercise considerable care not to express himself in terms which indicated that he has preconceived views which are so firmly held that it may not be possible for him to try a case with an 'open mind'. This is the position notwithstanding the fact that ...there can be very real advantages in having a judge adjudicate in the area of law in which he specialises. But if this is to happen it must be recognised that his opinions as to particular features of the subject will become known. The specialist judge must therefore be circumspect in the language he uses and the tone in which he expresses himself. It is always inappropriate for a judge to use intemperate language about subjects on which he has adjudicated or will have to adjudicate.”

30 Their Lordships referred to a number of the recorder's articles in which he made clear that he was very sympathetic to the position of claimants who were pursuing claims for personal injuries. However, it was not considered that those articles posed any difficulty. The problem arose because it was considered that the recorder had crossed the "*ill-defined*" line referred to by Brennan, Deane and Gaudron JJ in *Vakautu v Kelly* (1989) 167 CLR 568 at 571, beyond which the expression by a trial judge with predefined views about a particular issue could threaten the appearance of impartial justice. In the case at hand, the complaint was that the recorder had made it clear that he was a committed advocate of the cause of injured plaintiffs and that as a consequence, he was particularly critical of the tactics and conduct of insurers in resisting those claims.

31 Their Lordships concluded in these terms (at 496 [89]):

“We have found this a difficult and anxious application to resolve. There is no suggestion of actual bias on the part of the recorder ... The views he expressed in the articles he relied on are no doubt shared by other experienced commentators. We have, however, to ask, taking a broad commonsense approach, whether a person holding the pronounced pro-claimant anti-insurer views expressed by the recorder in the articles might not unconsciously have leaned in favour of the claimant and against the defendant in resolving the factual issues between them. Not without misgiving, we conclude that there was on the facts here a real danger of such a result. We do not think a lay observer with knowledge of the facts could have excluded that possibility, and nor can we.”

See also Mason P, "*Unconscious Judicial Prejudice*", 75 ALJ 676 at 683-684.”

Although Tobias JA considered her Honour's "mild criticisms" of the Court of Appeal to be "circumspect" (at [36]), this judgment is a warning about the dangers of extra-

curial writing. It must exercise a significant chilling effect upon judges expressing opinions outside the courtroom. The problem seems to be the expression of the point of view, rather than the holding of it.

The Court of Appeal has held that not only will such applications be entertained regardless of whether the judge actually showed bias in the proceedings, but that leave to appeal will be granted unless the charge is “not patently tenable”: “It will frequently be appropriate to grant leave to appeal, assuming the challenge is not patently untenable and where a long and costly trial would be avoided if the decision below were incorrect”: *Barakat v Goritsas(No 2)* [2012] NSWCA 36 at [64]. It is a pessimistic note to end on, but a “not patently untenable” barrier is a very low barrier indeed.

3. Private use of social media by judges

The American Bar Association Formal Opinion 462 (see the link at the end of this discussion paper) and the guidelines issued by Lord Justice Neuberger CJ both accept the use of social media by judges for private purposes. As cases like *Youkers v The State of Texas* show, this is the problem area. Social media preserves in aspic the evanescent off-colour remark or disparaging comment and the “not patently untenable” barrier for bringing an apprehended bias application is at risk of becoming a swinging door for applications for recusal.

A Postscript: Open Justice and Twitter in the Courtroom

The third area, which I would like to touch upon briefly, relates to the issue of open justice, the right to report on and comment about what happens in the courtroom, and how this has been changed by social media. What role does the judge play here?

During the nineteenth century, interest in trials was so great that courtrooms were larger and the seats for members of the public frequently filled, as some of the court illustrations demonstrate. From the early twentieth century, as court architecture demonstrates, attendance at court has significantly dropped¹⁶. These days, the ‘presence’ of the public is the presence of the media¹⁷ and what Leslie J Moran calls the “citizen journalist”¹⁸.

Instead of gaining information about our legal system from going to court, most people now learn about the legal system from the mass media. A 2003 survey showed that “personal experience” came below television, newspapers and tabloids as a source of knowledge about the criminal justice system¹⁹.

¹⁶ L Mulcahy, “Legal Architecture: Justice, Due Process and the Place of Law”, Routledge, 2011, Chapter 5

¹⁷ Lord Judge LCJ, “Speech by Lord Judge Lord Chief Justice of England and Wales: Society of Editors Annual Conference”, London, Judiciary of England and Wales Tribunal Judiciary, 2009)

¹⁸ L J Moran, “Mass-mediated ‘open justice’: court and judicial reports in the Press in England and Wales”, [2013] Legal Studies 1-24

¹⁹ B Page, R Wake and A Ames, “Public Confidence in the Criminal Justice System”, Home Office Findings 223 (London: Home Office, 2004)

However, this does not mean that the public has lost interest in the legal system. To the contrary, there are now entire television channels devoted to crime and courtroom reporting, and judgments likely to attract particular interest.

There is one aspect of Twitter of concern to judges, and that is its use in court. Journalist Kate McClymont²⁰, who tweeted evidence during a long-running ICAC hearing this year, observed this problem as follows:

“There are witness who are sitting outside who aren’t meant to know what evidence is being given. Is this going to have an impact on the course of justice by tweeting the minutiae of what is happening in within the courtroom? It’s an interesting consideration.”

The issues raised by Ms McClymont have been the subject of a series of expressions of judicial views during the course of one of the most highly publicised proceedings in world media (and social media). The proceedings brought by the Swedish Authorities against Julian Assange attracted not only international attention but conflicting rulings. Journalists were permitted to cover the bail hearings before District Judge Howard Riddle. However, in *Swedish Authorities v Assange* [2012] [2010] EWHC 3473 (Admin), Ouseley J said that Twitter could not be used:

[1] There have been a number of enquiries from media organisations, including the BBC and the Times, as to whether I would permit the use of “Twitter” in this court. Senior District Judge Riddle did permit the use of Twitter (that is, short text messages via web enabled facilities, such as a mobile, Blackberry or suitability equipped laptop). I am not going to permit Twitter. I make it clear for the media, domestic and foreign, that there is to be no use of mobile phones, Blackberrys or laptops other than by the parties and court staff. So those are to be switched off, if they are not switched off already.

[2] In so requiring, I am following the practice of what happens in the 7/7 Inquest, which is held in court, but not the practice of what happens in the annex where the press usually are located. I am aware that the equipment from which tweets are sent is likely to have sound recording, even photographic, facilities. Their use would be a contempt of court, but it is very difficult to prevent such a use when the recordings would be posted directly to the web. I do not consider it practicable, at least today, for all that equipment to be examined to ensure either that it is not web enabled, which would defeat the whole purpose, or sound disabled. I do not consider it practical simply to take it, with all the additional media here, that the normal trust that rules would be followed and that facilities which are on will have that sound capability disabled will necessarily apply. There has been some indication, I go no further into it, that an attempt was made to use sound recording at the Magistrates’ Court.

[3] I recognise the scope for debate about the use of Twitter in Administrative Court cases in particular. I do not and cannot make a general policy statement. The issues involving Twitter go beyond the possible relationship to sound recording, and may include the potential for distraction and disruption to the appropriate atmosphere of the court – what might be termed, perhaps a bit pompously, its dignity.

[4] A considered policy decision is necessary, which I do not wish to pre-empt by my decision. But I have to make a decision today. I do so without taking submissions, as I recognise, but I do so, so that the court can proceed with the business in hand, which is the appeal by the Swedish Judicial Authority.”

Ouseley J no doubt had in mind the warnings of the Chief Justice, Lord Judge, who had warned that Twitter and the Internet were subverting justice.²¹

²⁰ <http://mumbrella.com.au/journalist-use-of-social-media-in-court-an-issue-155942>

²¹ <http://www.theweek.co.uk/technology/twitter/9775/twitter-and-internet-subvert-justice-says-judge>

On 20 December 2010, the Chief Justice changed his position, stating that technology was welcome “provided that we are its masters and that it is our tool and servant.”²²

Concluding remarks

There is no doubt that Twitter has changed journalism²³, which means that court reporting and interest in judges and their judgments have undergone profound changes. The question is how judges are to respond to these changes. Judges who do not participate in social media will be unable to understand changing social values, and unfamiliar with issues of concern to members of the community.

In 1995 Bill Gates described the Internet as a tidal wave²⁴. Today that seems like a statement of the obvious. Social media is such a fundamental part of daily communication that its use by judges cannot simply be discouraged or prohibited. Appropriate rules need to be drawn up; judges who do not communicate on, or use, social media risk total social isolation which, for the reasons explained by Blackstone, Holmes and Posner, undermines the vital role judges play in the common law system. Whatever the future holds, I suspect that any reader of this article in, say, the year 2025, would be bemused by the level of concern about judges participating in such an everyday activity.

31 May 2013

ATTACHMENT

American Bar Association Formal Opinion 462: Judge’s Use of Electronic Social Networking Media (February 21, 2013).

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf

²² <http://www.theweek.co.uk/technology/9001/senior-judge-approves-use-twitter-court>

²³ <http://www.forbes.com/sites/benkerschberg/2012/01/13/the-new-way-twitter-will-dominate-online-journalism/>. When asked what medium she could not live without, the 7.30 Report’s Leigh Sales told Encore: “Probably Twitter. It collates all the different sources of information – newspapers, magazines, blogs, TV and radio – and puts them in one place for me to sift through. It saves me a huge amount of time and delivers me a lot of information I wouldn’t otherwise find”: <http://mumbrella.com.au/leigh-sales-157476>.

²⁴ <http://bildt.blogspot.com.au/2005/11/coming-web-20-tsunami.html> .

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