



Contempt of Court and the Legal Profession

By

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Tension between the priests of the law, the judges, and those ministers of the law, the legal practitioners, who appear before the priests of the law. are part of daily life. Zeal on the part of a solicitor or barrister in court is admirable. Excessive zeal on the part of the solicitor or barrister in court in the conduct of a case may lead to what is termed contempt *in facie curiae*, contempt in the face of the court, which renders the advocate liable to sanction and penalties. This article considers cases of contempt in the face of the court by lawyers in the conduct of court cases, examines the sanctions and how, happily, matters are often resolved.

It is not surprising, because of the regular contact between the solicitor or barrister, and a judge, coupled with the nature of man and woman (both lawyer and judge), that the legal profession has played some part in the development of the law of contempt of court. One may start with the duty of

the advocate, well summed up by Rutledge J in Fisher v. Pace 336 US 155 at 168 (1949):

‘Lawyers owe a large, but not an obsequious, duty of respect to the court in its presence.’

So, lawyers have a duty to the court to act in a professional manner and yet have a duty to pursue their client’s case with vigour within the limits of the law.

Contempt in the face of the Court

What is contempt in the face of the court? May CJ, the first editor of The Irish Reports, who subsequently became Lord Chief Justice of Ireland (Queen’s Bench Division) explained the nature of contempt in the face of the court in the following words in the Queen’s Bench Division, Ireland, in Re Rea (No. 2) (1879) 4 LR (IR) 345 at 347:

‘It is plain that no tribunal would be maintained with order and decency unless the presiding judge had the power of dealing with the suppressing of contempts committed in open court. It is for the sake of the administration of justice, and in order to maintain the decency and order of judicial proceedings, that this extensive and summary power is confided to a judge.’

Lord Denning in Morris v. The Crown Office [1970] 1 All ER 1079 at 1081 in the Court of Appeal echoed the words of Chief Justice May in the following passage:

‘The phrase “contempt in the face of the court” has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in these courts. The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power – a power instantly to imprison a person without trial – but it is a necessary power.’

An often quoted case on contempt in the face of the court goes back to 1631 (3 Dyer 188b) when a prisoner (not a lawyer, fortunately) threw a brickbat at the judge of assize. The brickbat narrowly missed the judge; the prisoner’s right hand was cut off and fixed to the gibbet, upon which he was immediately hanged in the presence of the court. Thus was demonstrated the awesome nature of the judicial power.

Balogh v. St. Alban’s Crown Court [1975] 1QB 73 gave the Court of Appeal a further opportunity of examining the law in relation to contempt in the face of the court. The court involved Stephen Balogh, a casual law clerk employed by the defence in a case being tried about pornographic films and books. The case dragged on and the law clerk got bored.

Lord Denning in the Court of Appeal later said he, Balogh, son of a distinguished economist Lord Balogh, planned ‘to liven’ the case up. Balogh had learned about nitrous oxide, a substance called ‘laughing gas’ at Oxford, and planned to put a cylinder of the gas at the inlet to the ventilating system and release the gas into the court. But he was caught. Balogh meant it as a practical joke and apologised – but the judges were not amused. In the court

of first instance, Balogh grossly insulted the judge after a six months sentence was imposed: 'You are a humourless automaton, why don't you self destruct?' Lord Denning in the Court of Appeal in Balogh considered the matter of contempt in the face of the court in the following passage:

'But I find nothing to tell us what is meant by "committed in the face of the court". It has never been defined. Its meaning is, I think, to be ascertained from the practice of the judges over the centuries. It was never confined to conduct which a judge saw with his own eyes. It covered all contempts for which a judge of his own motion could punish a man on the spot. So "contempt in the face of the court" is the same thing as "contempt which the court can punish of its own motion". It really means "contempt in the cognisance of the court".'

'Gathering together the experience of the past, then, whatever expression is used, a judge of one of the superior courts or a judge of assize could always punish summarily of his own motion for contempt of court whenever there was a gross interference with the course of justice in a case that was being tried, or about to be tried, or just over — no matter whether the judge saw it with his own eyes or it was reported to him by the officers of the court, or by others — whenever it was urgent and imperative to act at once. This power has been inherited by the judges of the High Court and in turn the judges of the Crown Court.'

The Judge and the future Judge

There have been some celebrated cases in which solicitors and barristers found themselves in contempt of court. One such case occurred in March, 1947. Thomas A. Doyle, barrister, subsequently a judge of the High Court,

was ordered to be removed from the Naas Circuit Court on Friday, 7 March, 1947 by His Honour Judge Fawsitt. The facts may be set out which illustrate that contempt in the face of the court by lawyers can often be ascribed to a 'misunderstanding' or a 'mistake' on the part of either the judge or the advocate; sometimes the words 'misunderstanding' and 'mistake' are used in such a way that these terms, in a loose sense, become part of the solution. Mr. Doyle held two briefs at Naas Circuit Court on 7 March 1947. The criminal appeals came on early in the morning and after the appeals, certain civil cases were taken. These cases had not concluded at 4.30 p.m. when Mr. Doyle made his third appearance in court and asked to mention the criminal case which the judge had decided four hours earlier. In fact, Mr. Doyle was making a renewed plea on behalf of Private William McGrath (22) of the Curragh Camp who had been sentenced in Kildare District Court to six weeks imprisonment, with hard labour, and a fine of £10, for dangerous driving arising out of a collision with a hackney car, as a result of which James McNamara, the driver, has lost his right arm. Mr. Doyle said he had not got an opportunity to address His Lordship before sentence and he would like the indulgence of His Lordship to bring several matters before his notice, which would, perhaps, affect his decision. The following is the exchange of words, which were widely reported in the media at the time:

Judge Fawsitt – I have given my final decision.... I have rarely listened to more dangerous driving.

Mr. Doyle – I intend to press the case.

Judge – I told you to sit down.

Mr. Doyle – I will not sit down.

Judge – Will the Sergeant come forward.

Mr. Doyle – I wish to point out to you, Sir –

Judge – Remove Mr. Doyle, Sergeant. I have given you every chance.

The sergeant then came forward and put his hand on Mr. Doyle's arm.

Mr. Doyle (turning to the judge) – I protest in the strongest possible manner. You are not behaving in a manner befitting the Bench.

Judge – You have made your protest.

Mr. Doyle – I have not finished my protest.

Mr. Doyle then left the court accompanied by the Garda Sergeant.

Subsequently, the Bar Council issued a resolution to the effect that having considered the circumstances of the case and even assuming that the circumstances were as stated by Judge Fawsitt, the Bar Council was of the opinion that Judge Fawsitt was not entitled to order the arrest and removal from court of Mr. Doyle, B.L. and that the arrest and removal of Mr. Doyle constituted a serious infringement of the rights of counsel. The Bar Council continued that in view of the judge's refusal to apologise for his action, members of the Bar would not practise in his court until such time as an adequate apology to Mr. Doyle in open court was forthcoming.

No barristers attended Trim Circuit Court, where Judge Fawsitt sat subsequently. When a civil action was called, Capt. P. Cowan, solicitor stated: 'Counsel refuses to accept a brief to appear before Your Lordship, and I must, therefore, apply for an adjournment.' 'Mr. S. O hUadhaigh, solicitor, stated that he appeared for the defendant and was in the same position.' Judge Fawsitt said: 'Very well then. I will facilitate you by adjourning the case until next sittings.' Other cases were adjourned.

A stand-off continued until 21 April, 1947 when His Honour Judge Fawsitt invited Mr. Doyle to Trim Circuit Court. Judge Fawsitt stated that the intervention of Mr. Doyle's representative body, the Bar Council, occasioned a correspondence 'which was terminated by them rather abruptly and was

therefore, inconclusive.’ The judge stated that he thought fit, in the public interest, to communicate directly with Mr. Doyle. The judge referred to the facts as above including his order to the Garda Sergeant. The judge stated he was happy to see Mr. Doyle present in court. Judge Fawsitt continued:

‘Now I have asked you to come back here to-day, that I might tell you publicly that I regret and I am sorry for that order. The regret and sorrow which I have expressed are due in the circumstances which I now understand existed that day.’

The judge stated that at the time Mr. Doyle addressed him and insisted upon being heard he (the judge) had not adverted to the real grounds of his application, namely that he (the judge) had refused to hear Mr. Doyle as counsel in the criminal appeal that morning. Mr. Doyle had communicated to the judge that the judge refused to allow him (Mr. Doyle) to speak in the morning on the criminal appeal and that at the close of the evidence when Mr. Doyle sought to address the court, the judge waived him aside. The judge stated he had no recollection of doing either. In the circumstances, he had to accept Mr. Doyle’s statement as being accurate. On the assumption that he, (the judge) did refuse to hear Mr. Doyle in the morning, the judge admitted to making ‘a mistake’. The judge continued:

‘It is a traditional right for a barrister briefed in a case to be allowed to address the court. If you had done in the morning what you did in the afternoon – persist in your application to be heard – you would in that case have been heard. If you had persisted, I would have a recollection of it. I assume you did not, but I accept your statement that you asked me and I refused. I regret that initial mistake. It seems to

me, having regard to the ground of your application in the afternoon but for the initial mistake, what happened could not have occurred.'

The classic solution in most cases of contempt in the face of the court by lawyers, that of misunderstanding, or mistake, followed by regret, have thus been illustrated as part of the solution. More was to follow – the classic assertion of authority of the court.

Judge Fawsitt continued to state that there was no justification for the disobedience of the ruling of the Court in the afternoon by Mr. Doyle. The request which he (the judge) had made to Mr. Doyle to sit down was proper but would never have been made had he, (the judge), not been guilty of the initial mistake. From this it seemed to follow that the order which he made to have Mr. Doyle removed from the Court in the afternoon, although a necessary and correct order at the time and in the circumstances then present, was vitiated by the judge's mistake earlier. There then follows the judicial apology: Judge Fawsitt stated:

'Accordingly, I express my regret and sorrow that I ordered you to leave the court. I have already admitted that the fault was mine in the morning. That was the one ground on which I have expressed my regret. I am glad to see you back.'

One apology deserved another: there follows the classic apology of the advocate. Mr. Doyle addressed the court and said he was grateful to Judge Fawsitt for his generous remarks and he appreciated very much the spirit which inspired them. Mr. Doyle continued:

‘On consideration, I feel that my ultimate refusal to comply with your direction at Naas Circuit Court was a matter of provocation. I am very sorry to have been in any way discourteous or disrespectful to you or to the court. I wish now, therefore, to express my regret here in your Court. I would like to refer to the happy relations which have existed between Your Lordship, as the presiding Judge, on the one hand, and myself as a member of the Bar.’

Mr. Doyle was very glad to think these happy relations would continue.

The next sequence demonstrates a firm assertion of authority by the Court. Judge Fawsitt then addressed general remarks to the practitioners on his Circuit relating to the relations between Bench and the Bar. The judge stated that uniformly these relations were the happiest. He hoped they would continue. But the judge said the view had been expressed that a judge was not entitled, apparently under any circumstances, to order the arrest of a barrister and that to do so constituted a serious infringement of the rights of counsel. The judge stated that was unsound in law and he thought it was right that practitioners on his circuit should know his understanding of the law on the subject. The judge considered that a barrister was no more immune from arrest on a criminal charge than a member of the public. Judge Fawsitt stated he had power when a barrister was guilty of contempt to attach him and if he was guilty of disorderly conduct, the judge, at his discretion, might order his removal from court. A judge would not be worthy of his position if he did not exercise the powers given him for the purpose of maintaining order in his court. So far as Judge Fawsitt was concerned, he would allow nothing to deter him from executing that duty whenever he thought it necessary to maintain order in court. Judge Fawsitt concluded that in view of the recent happenings, it was as well that he (the judge) should state what his

understanding of the law was, and until a superior court over-ruled him, he, (the judge) would enforce it.

Many of the above elements, misunderstanding, mistake and regret, featured in the recent alleged contempt in the face of the court involving Marguerite Fennell, solicitor, and Judge Michael Patwell. [See March Gazette and national media, February and March 2000].

Delicate Balance

Lawyers owe a duty to clients to pursue their case vigorously but often, a delicate balance must be observed. An excellent description of the delicate duty of lawyers in the context of representing clients and the limits to advocacy in the context of contempt in the face of the court, may be found in the comprehensive Consultation Paper on Contempt of Court published by the Law Reform Commission of Ireland (1991). The paragraph is worthy of quotation:

‘Lawyers have to thread warily when representing their clients. They must not be intimidated or browbeaten by the judge and must present their client’s case as strongly as justice and fortitude may require. In doing so they must not forget another cardinal virtue – prudence. They must seek to temper their presentation to achieve the goal of advocacy, which is to convince the listener. But, more urgently, they must ensure that they do not fall foul of the law of *in facie* contempt.’

The Sanctions

There is a specific statutory provision governing contempt of court in the District Court. Section 9 of the Petty Sessions (Ireland) Act, 1851 sets out the authority to commit and fine for contempt of court in the District Court:

‘And if any person shall wilfully insult a Justice or Justices so sitting in any such court or place, or shall commit any other contempt of any such court, it shall be lawful for such Justice or Justices by any verbal order either to direct such person to be removed from such court or place, or to be taken into custody, and at any time before the rising of such court by warrant to commit such person to gaol for any period not exceeding seven days or to fine such person in any sum not exceeding forty shillings.’

It is submitted that at common law, the power to fine and imprison for a contempt committed in the face of the court is a necessary power associated with every court of justice [R v. Almon, (1765) Wilm at p.254]. Due process and the concepts of constitutional and natural justice would demand that a lawyer charged with contempt in the face of the court would be given an opportunity of consulting with solicitors or counsel before a final sanction is imposed by the judge.

It must be stated that the contempt power of judges must not be exercised simply to protect the sensibilities of the judges or to prevent the decisions of judges from being scrutinised publicly. Lord Atkin’s famous dictum in Ambard v. Attorney General for Trinidad and Tobago [1936] AC 322 at 335 have been quoted with approval in this jurisdiction:

‘Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken comments of ordinary men.’

One can conclude with an example of contempt of court, thankfully not by a lawyer, but by a newspaper illustrating extreme discourtesy, characterised by a former solicitor, educated at Castleknock College, Dublin who became Lord Chief Justice of England and Wales, Lord Russell of Killowen CJ, as ‘scurrilous abuse’ of a judge, Darling J who was then holding the local assizes. The case was R. v. Gray [1900] 2 QB 36 in which the editor of a Birmingham newspaper had engaged in abuse of the judge. When proceedings for contempt were taken, the editor duly apologised and the Queen Bench Divisional Court fined him £100 with £25 costs. The words were such that the official law reports discreetly suppressed the language used in the newspaper as did other reports but some other journals reported the words in full:

‘If anyone can imagine Little Tich upholding his dignity upon a point of honour in a public-house, he has a very fair conception of what Mr. Justice Darling looked like in warning the Press against the printing of indecent evidence. His diminutive Lordship positively glowed with judicial self-consciousness ... No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr. Justice Darling, is exempt. There is not a journalist in Birmingham who has anything to learn from the impudent little man in horse-hair, a microcosm of conceit and empty-headedness ... One is almost sorry that the Lord Chancellor had not another relative to provide for on the day that he selected a new judge from among the larrikins of the law. One of Mr. Justice Darling’s biographers states that “an eccentric

relative left him much money”. That misguided testator spoiled a successful bus conductor....’

Words and actions which interfere with, or tend to interfere with, the administration of justice may constitute contempt in the face of the court. Not every case of discourtesy to the court should amount to contempt and the citation for contempt in the face of the court of lawyers should be used very sparingly by the judges.

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