

# Scandalising The Scumbags: The Secretary For Justice Vs The Oriental Press Group

*“Scandalising the court” is a rare and controversial branch of the law of contempt. It allows judges to punish those who make general criticisms of the legal system or judges, regardless of whether any particular case is affected, or even mentioned. A Hong Kong newspaper, the Oriental Daily News, was prosecuted in 1998 for this offence. The newspaper was heavily fined and its editor was jailed. This paper explores the background to the case and examines its implications for the media in Hong Kong and other Common Law territories.*

**Tim Hamlett**

*Hong Kong Baptist University*

It is a platitude that one of the functions of the media in a free society is as a “watchdog” on the activities of officials and politicians. Disputes over particular criticisms are settled by neutral judges. But what if the target of criticism is the legal system itself? Is it still acceptable to empower judges to punish over-zealous critics? This question is answered in different ways in different places (Barendt 1985:214-223). The law on contempt of court is usually explained as a balancing exercise between free speech and the right to a fair trial. But this clearly cannot explain a law against general criticisms. Many textbook writers regard “scandalising the court” as an antique.

Prosecutions are extremely rare. Hong Kong never had one before the 1998 prosecution of the *Oriental Daily News*. The leading Australian case, *Gallagher v Durac*, dates from 1983, and the judges in that case spent much time on the effects of *R v Dunbabin*, a case decided in the 1930s. In the United States, no prosecution has succeeded since the Supreme Court set a demanding test in *Bridges v California* (Lewis 1992: 97-102), and the offence of scandalising is regarded as effectively dead. It must also be dead, or at least extremely ill, in Canada since *R v Kopyto*, decided in 1987. The last successful prosecution in the UK was in the 1920s (Robertson 1984: 177-179), and the Phillimore Committee recommended that the offence be abolished (Phillimore Committee 1978: 249). The result of this precarious situation is

that the offence has been informally internationalised. Courts are more willing than usual to consider overseas precedents, since the alternative is to consider few or none at all. As a result, judges in jurisdictions where the offence survives may well draw guidance and comfort from its revival in Hong Kong. This is a particular peril for media whose governments seek to combine a tight rein on reporting and comment with traditional legal appearances.

Although in theory the media in Hong Kong were subject in colonial times to the full range of British law, as well as local additions thereto, in practice newspapers were rarely sued and still more rarely prosecuted (Shen 1972: 106-107). Few Hong Kong citizens had any taste for litigation, however grave the provocation. Few journalists on Chinese newspapers had any knowledge of the law applying to their activities and the man in the street knew even less. Government lawyers monitoring the media usually saw their task as to educate rather than to prosecute. Some things happened which shocked editors from other places. This was not a result of excessive daring. Local editors regarded the legal system as a foreign minefield that they wished to avoid entirely. Few newspapers took legal advice before publishing and even the affluent *South China Morning Post* did not have an in-house lawyer. With the arrival of Chinese rule, editorial writers expressed enthusiasm for the rule of law. But there was little understanding of what that meant for newspapers themselves. The position of the *Oriental Daily News* was, for historical reasons, particularly ambiguous.

The *Oriental Daily News* (*Dong Fung* in Chinese or ODN for short) has been the largest circulation newspaper in Hong Kong since the mid-1970s. It pioneered a new style of journalism — popular, locally-focussed and crisply written in the local Cantonese — at a time when other newspapers were almost exclusively interested in a one-dimensional approach to politics, depending on whether they pointed their prayer mats at Beijing or Taipei. *Oriental's* lucrative lock on the mass market enabled the newspaper to pay its staff well and equip them lavishly. In many ways, the ODN is an excellent newspaper in the “tabloid” style. A poll of journalists in 1996 placed it second out of 22 newspapers and also gave it a high rating for credibility (Chan et al 1996: 39-41). The ownership of the group, though, has as one writer put it “a colourful past” (Moriarty 1994: 392). The newspaper was founded by two brothers, surnamed Ma, who shortly thereafter jumped bail on drugs charges and fled to Taiwan, where they have

## The Press And The Courts In Hong Kong

## History Of The Oriental Daily News

lived ever since. The ODN has never quite become part of the establishment. The newspaper has an understandable suspicion that many of Hong Kong's top people disapprove of it. This is probably true.

During the latter half of the 1990s the ODN's suspicions were exacerbated by two episodes. These were the arrival of anew challenge to its hold on the market, and the unhappy history of the *Eastern Express*.

In 1990 a new magazine appeared in Hong Kong called *Next*. This was founded by Jimmy Lai, then better known as the founding genius of the Giordano clothing chain. At that time the ODN claimed 30 percent of the total newspaper readership in Hong Kong, though its share was wilting (Chan 1990). *Next* soon made a big impact with its glossy printing, creative features and investigative news stories. The Oriental group sought to defend its advertising revenues by launching a rival magazine with a similar look called *Eastweek*.

Mr Lai responded in turn by launching a new popular newspaper, *Apple Daily*. This emerged in 1995 and the ODN met the threat by cutting its price from \$5 to \$2. There ensued a general price war in the Chinese newspaper market which killed off several weaker papers. By the time an unofficial truce was declared the following year, the ODN was claiming 45percent of the market but *Apple*, with 31 percent, said it was making a small profit (So 1996). Circulation and profit figures for Hong Kong newspapers are invariably unreliable, but *Apple* had survived. The price war flared up, again inconclusively, for a few months in 1997. As before, several bystanders died. Concerned by the ODN's limited appeal to young readers, the Oriental group has since launched a new title, the *Sun*, aimed at a friskier audience.

*The Eastern Express* was launched, after several delays, in February 1994 as an English-language rival to the *South China Morning Post*. This was an ambitious undertaking and it was commensurately expensive. The paper folded the following year. The Information Coordinator at Government House, Mike Hanson, was said to have played a considerable part in the genesis of the paper, there being at the time fears in top government circles that the then-Murdoch Post was selling out to China. Clearly Mr Hanson provided some advice, not all of it good.

The ODN management, though, thought much more help would be provided. They hoped the government would move its considerable advertising spend from the *Post* to the new title. Even less plausibly, there seems to have been an expectation that the ODN's efforts would be rewarded with some kind of amnesty which would enable its absentee founders to return to Hong Kong without being arrested. In the bitterness which followed the

paper's failure, a sense of grievance developed.

In 1996 the Oriental Press group became involved in two lengthy legal actions. The first concerned pictures printed on a news page. The Obscene Articles Tribunal ruled them indecent. The OAT is a unique Hong Kong institution. Its only function is to classify articles as either obscene, indecent or neither. It is an offence to sell an obscene article. Indecent articles must be wrapped and may be sold only to adults. In practice, by the time a daily newspaper is classified, sales have ceased to be of any interest. Nobody has so far been prosecuted retrospectively. But the ruling was a new departure in that the pictures revealed no female nipples, so according to the existing rule of thumb they were not indecent. The ODN decided to appeal (*Oriental Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authority*). The Court of Appeal was unhelpful. In December 1997, the Court of Appeal also refused leave to appeal to the Court of Final Appeal.

Meanwhile, the group's industrious legal department (see *Eastern Express Publisher Ltd and Oriental Press Group v Mo Man-ching and others*) had begun proceedings against Apple over a photograph. The photograph was taken at the Beijing international airport of a popstar, Faye Wong. The picture was of considerable news importance because it confirmed rumours that Ms Wong was pregnant. It featured on the front page of the ODN's Sunday magazine *Oriental Sunday*. From there the story was lifted by *Apple Daily*, with such alacrity that most readers would have encountered both versions on the same day. *Apple Daily* illustrated its story with a reproduction in miniature of the whole *Oriental Sunday* front page, most of which was occupied by the picture of Ms Wong (see *Oriental Press Group Ltd v Apple Daily Ltd*).

The *Apple Daily* editors seem to have supposed that a "fair dealing" defence would apply, but there is no such defence for pictures or typography (Robertson and Nicol 1984: 146). Consequently when the case came to court, the only issue was the amount of damages. In February this came before Rogers J who awarded Oriental \$8,001. The *Oriental* legal team supposed this to be grossly insufficient, and appealed. Their appeal was dismissed. Godfrey JA, giving the judgement of the Court of Appeal, wandered into some musings on the privacy rights of public figures:

Public sentiment has turned, or seems to be turning, against those who are guilty of invasion of the privacy of public figures by taking their photographs for large sums which reflect the cupidity of the publishers and the prurience of their readers. The time may come when, if the legislature does not step in first, the court may have to intervene in this field... by holding that the

## The Provocations

protection of copyright will not be extended to photographs of public figures taken on private occasions without their consent.

The ODN took this as casting aspersions on the professional ethics of their photographer, and comparing her to the paparazzi who were much in the news then because of the recent death of the Princess of Wales. The ODN moved the argument from the courtroom to its own columns. On September 22 it described Godfrey as "ignorant, unreasonable, ridiculous, arbitrary, prejudicial and arrogant". It said the Oriental group had been persecuted by the police and courts since 1995. In October the ODN's appeal against the OAT's decision was rejected and the newspaper opened fire on the Tribunal. This campaign ran over two weeks and included publication of the names and addresses of all 157 members of the Tribunal, who were described at various points as "scumbags", "dogs and bitches", "tortoises having retreated into their shells", "like a rat in a gutter", and "public enemy of freedom of the press and a public calamity". The newspaper also published a multi-page feature, lavishly illustrated with examples, on indecency in news photography and the OAT's inconsistent judgements of it. The Divisional Court and the Court of Appeal later described this as "a defiance of the court's decision and a challenge to the rule of law". But no prosecution ensued in respect of any of these publications, although they were cited extensively in the eventual hearings (*Secretary for Justice v The Oriental Press Group Ltd and others*; *Wong Yeung Ng v The Secretary for Justice*).

## **The Offending Articles And Actions**

The articles complained of were published on December 1997 and January 1998. Some excerpts from the official translation:

December 11: article headed "The swinish white-skinned judges and the canine yellow-skinned tribunal" accused the OAT and the Appeal Court judges of "attacking the Oriental Press group". It went on: "Oriental does not care if you are yellow-skinned or white or a pig or a dog. In our self-defence, we are determined to wipe you all out." On the same day an article on "Rogers' despicableness and Godfrey's derangement" said:

The crux of the problem is that there exists in the Hong Kong judicial sector a bloc of colonial remnants. They harbour animosity towards Oriental. The Obscene Articles Tribunal is attached to the judiciary system. It is merely a tail-wagging dog outside the judiciary. All of the adjudicators kept by the tribunal are stupid men and women who suffer from congenital mental retardation and have no common knowledge worth mentioning.... The masters of these yellow-skinned canine adjudicators are none

other than the likes of Rogers and Godfrey, the sheltering and condoning judicial scumbags and evil remnants of the British Hong Kong Government.

December 12: An article claimed to have received letters of support for the newspaper's campaign, and quoted one of them:

The justices treat the law as a game.... Someone has had the courage to pull off the tiger's whiskers and remove the dragon's scales.... Someone has torn off their designer briefs that conceal their deficiencies and exposed the ringworm, scabies and syphilis that they have hidden under their solemn black gowns.

December 15: an article commented on reports in other newspapers that the government was considering a prosecution for spreading racism:

Chris Patten attempted to rope *Oriental* in and turn it into his political tool, but *Oriental* rejected him. He nursed hatred in his heart and directed various government departments to harass and provoke *Oriental* non-stop. After July 1 Hong Kong is PRC territory, but centipedes remain supple after death. Having left the corpse of the colonial government, the ferocious demons in the form of the tribunal and the justices have resettled in the body of the SAR government. As before, they treat *Oriental* viciously.

Further articles alleging political bias and persecution were published on January 8, 14 and 15. The ornate style affected by ODN writers in moments of excitement sometimes appears facetious when translated into English. This quality is not present in the original Chinese. The Court of Appeal (at p. 9) summed up the campaign:

The meaning is clear. For the reasons set out it was said the Oriental Press Group was the target of a biased judiciary which was pursuing a conspiracy of political persecution started under the former colonial government. The Oriental Press Group had destroyed the authority of the Obscene Articles Tribunal and would now attack the judiciary in every possible way in order to destroy its authority.

This series of articles was the subject of the first charge. The second concerned what became known as the "paparazzi watch". The *Oriental Daily* expressed the intention of teaching Godfrey J what a paparazzo really was. It sent one of its "puppy teams", usually deployed to watch celebrities, to follow the judge for three days from January 13-15. Because of the accommodation and working arrangements of senior judges in Hong Kong, close surveillance is not very practical. The stunt was covered by other media, and Godfrey stated in interviews that he was neither embarrassed nor inconvenienced by the campaign, which he dismissed as childish. On the other hand some of the coverage in *Oriental*, and the newspaper's rhetorical style generally,

## **The Govt Ponders**

encouraged the view that the intention of the exercise was punitive rather than educational, and it was interpreted in this sense by the courts.

At this point the campaign subsided. This may have been because the ODN's management discovered that it had not exhausted the legal possibilities of the Faye Wong and copyright cases. The Court of Final Appeal agreed to hear both cases, and both appeals eventually succeeded. In the meantime there was a good deal of public controversy about the newspaper. Some surprising people later admitted having pressed for a prosecution, including the local branch of Human Rights Monitor (Buddle 1998) and a leading democrat and former journalist, Emily Lau Wai-hing (Parsons 1998). These events occurred in the six months after Hong Kong's return to Chinese rule. There was a fear in many matters that the world was being made anew, and innovations which were admitted unchallenged might become routine. There was also widespread anxiety about the future of the rule of law. The government faced a dilemma. It did not wish to attack press freedom, but it did not wish the law to be disparaged either. This may explain why the application for committal finally reached the court three months after the first article had appeared. The ODN then asked for time to prepare its defence, and the case was heard in May 1998.

## **The Hearing In The Divisional Court**

The Divisional Court hearing lasted six days and the judgement, helped by extravagant legal typography, ran to 74 pages. For the layreader seeking a clear indication of the legal potholes awaiting comments on court cases, it is disappointing. There is no statement of the precise grounds on which committal was sought. There is an extended discussion of the law applied, but this leaves some uncertainty as to whether the ODN was being convicted of scandalizing the court, of interfering with the course of justice in a general way or of both, or that in the court's view both were the same offence. The precise role of "public confidence in the administration of justice" is also difficult to discern. The court dealt in unceremonious fashion with some of the free speech arguments which tend to arise in cases of this kind. No doubt it was not helped by the claims on its attention made by the prosecution's liberality in the selection of targets. The respondents comprised two companies and four people. Most of them were acquitted. The Oriental Press Group Limited was held to be responsible for the articles but not for the "paparazzi watch", because that was not a publishing activity. The newspaper's editor,

Wong Yeung Ng, was found guilty of both counts.

Sentencing was considered separately a week later. There were now only two defendants. The company was fined HK\$5 million and required to pay most of the legal bill. Mr Wong was jailed for four months.

The hearing in the Court of Appeal took place at the beginning of December, with judgement handed down in February of last year. Matters were much simplified by the elimination of most of the defendants from the early hearing and the decision of the ODN team — now led by Sydney Kentridge QC — to concede that the writings and behaviour complained of were “mala fide, scurrilous, abusive, shocking and reprehensible”. It was also conceded that the “paparazzi watch” was intended to influence the future decisions of judges or the judge concerned. Argument centred on whether the offence of scandalising the court had survived the passage of the Bill of Rights Ordinance (which incorporated the International Covenant on Civil and Political Rights into Hong Kong law) and, if so, what the requirements of the offence were, and whether the admitted conduct of the ODN fulfilled them.

In retrospect it seems clear that the first of these questions was the most important. If a law against scandalising survived then it would surely apply to the facts of this case. Mr Kentridge relied considerably on the Canadian case *R v Kopyto*, in which three of the five judges held that the offence of scandalising the court as traditionally administered in Canada was inconsistent with the Canadian Charter of Rights and Freedoms. The prosecution argued that the Bill of Rights Ordinance had not changed the law in Hong Kong at all, and all the traditional precedents back to *R v Gray* still applied. All three judges wrote separate opinions and took different routes. They rejected both the approaches offered— nobody was willing to follow *Kopyto* but nobody accepted that the law was unchanged either. They all agreed to dismiss the appeal.

Mortimer VP accepted that the Bill of Rights and the Basic Law Article 27 (“Hong Kong residents shall have the freedom of speech, of the press and publication”) had changed the situation. The courts had to consider whether scandalising was a “necessary” exception to the presumption in favour of freedom of expression. He also accepted that *R v Kopyto* was relevant, and that the argument from necessity would need at some point to confront the fact that American law had no such offence and yet “appears not to be under any obvious disability consequent on the absence of this protection”. Pointing to the specific needs of Hong Kong and the “commonwealth tradition”, in contempt of court matters

## The Court Of Appeal



he preferred the minority judgement in the Canadian case, which acquitted the defendant on the facts but preserved the offence. Mortimer said that the Divisional Court had correctly applied the right test: whether there was a “real risk” that the administration of justice would be interfered with. He rejected as a piece of American pollution the alternative suggested by the Canadian judges: “real, substantial or immediate risk”.

Mayo JA also started from the point that the Bill of Rights imposed a new condition which must be satisfied before any restriction on freedom of speech was imposed or continued. He pointed out that the New Zealand Bill of Rights was similar to the Hong Kong one and quoted extensively from cases heard there, notably *The Solicitor General v Radio New Zealand Limited*, and *The Solicitor General v Radio Avon Ltd*. He concluded that the correct test was “real risk, rather than remote possibility” and that this test was satisfied. He pointed out that the ODN’s conduct might have satisfied the Canadian standard as well. Leong JA started with *R v Gray* but seemed to accept that the test of “necessity” should be applied. It should be applied in the light of local circumstances and he thought the Divisional Court was justified in refusing to follow Kopyto.

The appeal against the sentence was also dismissed. The Court of Appeal gave Mr Wong leave to appeal to the Court of Final Appeal, but the CFA refused to entertain the appeal and Mr Wong duly served his jail sentence.

## **The State Of The Law**

It seems that judges are reluctant to abandon the right to punish their critics, even if that right lies unused for long periods. Newspapers should be wary of such comments as Lord Diplock’s in *Secretary of State for Defence v The Guardian Newspaper Ltd* that the law is “virtually obsolescent”. We have heard this before. An optimistic view would be that judges elsewhere could probably be persuaded that the facts of this case were so extraordinary that it had no wider application. They might also not regard the Hong Kong Court of Appeal as a very compelling authority. Still, in view of the international shortage of cases, this one is likely to come up again. It supports the view — already well established in Australia and New Zealand — that the offence of scandalising the court is compatible with modern standards of human rights protection, and that the correct standard to be applied is whether there is a “real risk” of harm. The standard remains arguable, though. Under British law (*Contempt of Court Act 1981 s 2.1*) the criterion for strict contempt is harder to satisfy: “creates a serious risk that the course of justice in particular proceedings will be substantially impeded or prejudiced”. This standard was introduced to satisfy

the requirements set out by the European Court of Human Rights in *Sunday Times v the United Kingdom*. If this were regarded as the standard required by the European Convention on Human Rights and Fundamental Freedoms, then comparisons with other human rights instruments would be possible.

A disturbing, and not discussed, feature of the *Oriental Daily* case is the grouping of a series of articles in a single offence. This is unprecedented. Previous cases have always involved one statement or report. The Divisional Court said that the articles met the requirements of the offence “separately and together”, which is not much help with the question whether a series of articles, individually unexceptional, might be an offence when taken together. Ominous possibilities for the future may also lurk in the judges’ unanimous opinion that the trailing of Godfrey J, though it would have been perfectly legal behaviour in other circumstances, constituted an offence in these. Judges, confronted with *Bridges v California*, all say that the American court erred in supposing that the purpose of the law of contempt was to preserve the dignity of judges. Mortimer VP, though, managed to smuggle dignity back in (at p. 18) as a requirement of the administration of justice.

The offence of scandalising the court is always potentially a political offence. Prosecutions are not automatic. They require the active participation of an Attorney General or some similar official — in Hong Kong, the Secretary for Justice. Consequently from a practical point of view the question will often be not whether a particular course of conduct meets the legal definition of the offence but whether it is actually likely to provoke the relevant official into risking the odium which usually attaches to attempts to muzzle the press. In the ODN case, the official concerned was extremely reluctant, for understandable reasons. Consequently the newspaper was allowed to continue its course to eventual disaster. It might have been kinder to all concerned if action had been taken, as it certainly could have been, much earlier.

In considering the circumstances when action is taken, it is difficult to avoid the conclusion that the unofficial requirements are quite clear and in many cases are more important than the official ones. Mere abuse of a judge will not suffice, because the prosecution would then be open to the complaint that judges were affording special protection to themselves. Mere criticism will not suffice either, because polite criticism of the courts — however scathing in effect — is clearly a legitimate exercise of free speech. Consequently the requirement in practice, which is political rather than legal, is that there should be both abusive and substantive

## Exercise Of Discretion

## Quality Of Justice

criticism. The Daily Worker met both requirements with admirable economy when it described a judge as “a bewigged puppet exhibiting a strong class bias” (Robertson and Nicol 1984: 178).

The Divisional Court spent little time, and the Court of Appeal none at all, on an argument which should perhaps be given more weight in cases of this kind. In the Divisional Court’s summary (at p. 178) the point is: “The fairness of ... criticism should be decided in the court of public opinion; it is not appropriate to modern standards of fairness for judges to be engaged in the unseemly and undignified spectacle of ruling on attacks on their own integrity and impartiality.” Robertson and Nicol make a similar point: “judges... cannot avoid the appearance of partiality as they weigh freedom of speech against the preservation of the administration of justice” (Robertson and Nicol 1984: 181). The Divisional Court’s reply to this argument — that judges cannot respond to criticisms of themselves — is not really relevant.

The point at issue is not the purpose of the law or the fairness of attacks on judicial reputations. The question is whether the reputation of justice can be preserved by proceedings that do not themselves meet the highest standards of fairness. Judges have a legitimate interest in the administration of justice. They are likely to identify with an attacked judge. He is a colleague and perhaps a friend. In a place the size of Hong Kong, the Bench is a small world. In these circumstances you might normally expect a judge to excuse himself from a case. But since all judges labour under the same disability, that is not practical. No doubt judges make sincere and strenuous efforts to exclude such matters from their minds. They believe that they succeed in doing so. But does everyone else?

It is instructive, in this connection, to look at two points where error may have crept in. The first is the publication in the ODN on October 31 of several pages of photographs, including “some which the OAT had previously classified as indecent”. Both the Divisional Court and the Court of Appeal considered this “a defiance of the court decision and a challenge to the rule of law”. There are two objections to this conclusion. The first is that the Obscene Articles Tribunal is not a court (Stone 1994: 187; Hamlett 1998). The second is that the OAT does not classify photographs as such. It classifies “articles” and is required to consider them as a whole. There is also a version of the “general good” defence, so the Tribunal is obliged to consider the purpose and function of the work. A photograph that was indecent when published alone in a newspaper might well not be considered indecent if published as part of a serious discussion of censorship standards. The ODN

was entitled to suppose that the republication of the photographs was permissible in the context. If the authorities did not share that view they could and should have prosecuted. They did not.

The judges and the prosecution went to a good deal of trouble to keep the OAT in the case. It is tempting to explain this in terms of ethnic sensitivities. Most of Hong Kong's senior judges are foreigners (Chan 1996: 21-26). Keeping the OAT at the centre of the case prevented the appearance that the proceedings were simply protecting foreign judges against a local newspaper.

The second point where judicial objectivity seems to have wilted concerns Godfrey JA's remark while giving judgement in the Faye Wong case, quoted above. The Divisional Court said several times that the word "paparazzo" was not used, implying that it was unreasonable of the *Oriental Daily* to resent the term. But this interpretation would not have impressed a judge in a libel case. Godfrey referred to "those who are guilty of invasion of the privacy of public figures by taking their photographs for large sums". This may be compared with the dictionary definition of "paparazzo" which is "a freelance photographer who aggressively pursues famous people in order to photograph them" (Brewer 1993: 461).

The public was well aware of the concept because the media were still full of reports of the death of Diana Princess of Wales. Godfrey's remark was taken by many to be a reference to this topical event. The *South China Morning Post* reported the remark under the headline "Court warning for paparazzi" (Parsons 1997) and made the local connection in the intro, which began "Hong Kong's paparazzi could face the wrath of the courts". Nobody contested the interpretation at the time and the judge has not contradicted it since.

The Court of Appeal said (at p. 3) that the remark was "obiter", meaning that it was not strictly relevant to the case in hand. This is certainly true. The photograph at issue in the Faye Wong case was not taken in a private place. It was taken in an airport. No doubt it would be a pity if judges were pedantically prevented from pondering on matters tangential to the cases before them. But such remarks risk giving a misleading impression. The lay spectator obstinately supposes that a judgement in the Court of Appeal will comprise matter relevant to the case before the court. The judge should have known that his remark would be interpreted as indicating that the ODN's photographer was a paparazzo or, at least, was no better than one.

Neither of these points would have made any difference to the outcome of the case. They illustrate the dangers of having judges sitting on what is in effect their own cause.

## Conclusion

The offence of scandalising the court is in this writer's view an anachronism. It is so regarded in North America and probably in the UK as well. Many have called for its abolition (Walker 1985; Australian Law Reform Commission 1986). Some of them wish for a less objectionable replacement (UK Law Reform Commission 1979: para 3.70; Federal Law Reform Commission of Canada 1982). The offence remains a serious hazard for the media in Asia-Pacific countries with a Common Law background. The danger is particularly acute in those countries where freedom of the press is unloved. It would be unfair to put Hong Kong in this category, at least on the basis of the case discussed here. The Hong Kong media were and remain extremely wary of any attempt to curtail their freedoms. But in this case it is generally, though not universally, accepted that there must be limits and the ODN's conduct placed it outside them.

### CASES AND STATUTES CITED

Basic Law of the Hong Kong Special Administrative Region, Decree of the President of the People's Republic of China No. 26 of 1990.

Bill of Rights Ordinance, Laws of Hong Kong Cap 383.

Bridges v California 314 US 252, 263 (1941).

Contempt of Court Act 1981

Eastern Express Publisher Ltd and Oriental Press Group v Mo Man-ching (aka Claudia Mo) and Secretary for Justice on behalf of the Director of Broadcasting, Final Appeal No 5 (civil) of 1999.

Gallagher v Durack (1983) 152 CLR 238.

Oriental Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authority, Final Appeal No 1 (criminal) of 1998.

Oriental Press Group Ltd v Apple Daily Ltd, Final Appeal No 6(civil) of 1998.

R v Dunbabin, ex parte Williams (1935) 53 CLR 434.

R v Gray [1900] 2 QB 36.

R v Kopyto (1987) 47 DLR (4th) 213

Secretary of State for Defence v The Guardian Newspaper Ltd[1985] AC 339 347A

Sunday Times v the United Kingdom (1979) 2HRR 245

The Secretary for Justice v The Oriental Press Group Ltd and others, HCMP 407 of 1998.

The Solicitor General v Radio New Zealand Limited, [1994] 1 NZKR48.

The Solicitor General v Radio Avon Ltd, [1978] 1 NZLR 225.

Wong Yeung Ng v The Secretary for Justice, Appeal No 161 of 1998(civil).

(Note: Judgments of the Hong Kong Court of Final Appeal are available on-line at <http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/index.htm>. The Laws of Hong Kong may likewise be consulted at <http://www.justice.gov.hk/Home.htm> )

## REFERENCES

- Australian Law Reform Commission (1986), *Contempt and the Media*, Discussion Paper No 26.
- Barendt, Eric (1985), *Freedom of Speech*, Clarendon, Oxford.
- Brewer, Ebenezer Cobham (1993), *Dictionary of 20th Century Phrase and Fable*, Cassell, London.
- Buddle, Cliff (1998), "Judge-bashing editor to serve time", *South China Morning Post*, June 24.
- Chan, Johannes (1996), "To change or not to change: the crumpling legal system", in *The Other Hong Kong Report 1996*, (eds) Nyaw and Li, Chinese UP, Hong Kong.
- Chan Kai-cheung (1990), "The media and telecommunications", in *The Other Hong Kong Report 1990*, (eds) Wong and Cheng, Chinese UP, Hong Kong.
- Chan, Joseph Man, Paul Lee and Chin-Chuan Lee (1996), *Hong Kong Journalists in Transition*, Chinese UP, Hong Kong.
- Federal Law Reform Commission of Canada (1982), *Contempt of Court*, Report Number 17.
- Hamlett, Tim (1998), "When is a court not a court?", *South China Morning Post*, December 27.
- Lewis, Anthony (1992), *Make No Law: The Sullivan Case and the First Amendment*, Random House, New York.
- Moriarty, Francis (1994), "The media", in *The Other Hong Kong Report 1994*, (eds) McMillan and Man, Chinese UP, Hong Kong.
- Parsons, Charlotte (1997), "Court warning for paparazzi", *South China Morning Post*, September 20.
- Parsons, Charlotte (1998), "Four-month term for editor wins broad approval", *South China Morning Post*, July 1.
- Phillimore Committee (1978), *Contempt of Court*, Cmnd 5794.
- Robertson, Geoffrey and Andrew Nicol (1984), *Media Law*, Sage, London.
- Shen C Y (1972), *The Law and Mass Media in Hong Kong*, Chinese UP, Hong Kong.
- So, Clement (1996), "Cut-throat competition and the changing journalistic paradigm", in *The Other Hong Kong Report 1996*, (eds) Nyaw and Li, Chinese UP, Hong Kong.
- Stone, Richard (1994), *Civil Liberties*, Blackstone, London.
- UK Law Reform Commission (1979), *Offences Relating to Interference with the Course of Justice*.
- Walker, Clive (1985), *Scandalising in the Eighties*, *LQ Rev.*, 101, 359.

---

*TIM HAMLETT, PhD is Professor of Journalism at the Hong Kong Baptist University.. Email: hamlett@hkbu.edu.hk*

---