

## Selden Society Lecture

Supreme Court of Queensland, 28 November 2017

### *"Judicial Courage and the Decorum of Dissent"*

**The Hon Susan Kiefel AC  
Chief Justice of Australia**

Lord Atkin's biographer observes that the case of *Liversidge v Anderson*<sup>1</sup> was decided by the House of Lords in late 1941 when the Second World War was at a low point for England. Germany had taken the Balkans and Crete and had invaded Russia. The Japanese army was menacing Singapore and the Malayan peninsula. The United States had not yet joined the Allied Forces<sup>2</sup>.

It is times such as these that extraordinary powers are given to government officials. The power in question in *Liversidge v Anderson* was Regulation 18B of the *Defence (General) Regulations* 1939 (UK) by which a person could be detained if the Home Secretary had "reasonable cause to believe" the person to be of "hostile origin or associations". It was made under legislation the purpose of which was, among other things, securing the public safety and the defence of the realm<sup>3</sup>.

"Robert Liversidge" was an alias used by Mr Jack Perlzweig, a British citizen born to Russian Jewish parents<sup>4</sup>. He was described as a "somewhat shadowy and mysterious figure"<sup>5</sup>, who had become a wealthy businessman by the late 1930s<sup>6</sup>. In May 1940, while serving as a volunteer Pilot Officer in the Royal Airforce, he was detained in Brixton prison under Regulation 18B and he claimed that his detention was unlawful.

The Home Secretary, Sir John Anderson, defended the claim by asserting that he believed Mr Liversidge to be a person of hostile associations. Mr Liversidge sought particulars of the grounds on which the Home Secretary had reasonable cause for that belief. The courts below refused to order the Home Secretary to provide those particulars. Mr Liversidge appealed to the House of Lords.

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<sup>1</sup> [1942] AC 206.

<sup>2</sup> Geoffrey Lewis, *Lord Atkin* (Butterworths, 1983) at 132.

<sup>3</sup> *Emergency Powers (Defence) Act* 1939 (UK).

<sup>4</sup> Alfred Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (Oxford University Press, 1994) at 333.

<sup>5</sup> Lord Bingham, *Lives of the Law: Selected Essays and Speeches: 2000-2010* (Oxford University Press, 2011) at 203.

<sup>6</sup> Alfred Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (Oxford University Press, 1994) at 334.

There was no issue about the validity of the Regulation. Lord Atkin himself did not doubt that delegated legislation made under the *Emergency Powers (Defence) Act 1939* was capable of conferring unlimited power on the Executive Government<sup>7</sup>. The question was whether Regulation 18B did so. The answer to the question lay in the words “has reasonable cause to believe”.

The Home Secretary’s argument in the House of Lords was that his decision could not be called into question in a court of law. So long as he swore that he had reasonable grounds for his subjective belief it could not be challenged. Mr Liversidge’s case was that the words “has reasonable cause” require an objective assessment of whether there exist reasonable grounds for the Home Secretary’s belief.

All of the members of the House of Lords hearing the case, save for Lord Atkin, held that the Home Secretary’s opinion was unchallengeable and that he was only required to act in good faith.

The senior Law Lord was Viscount Maugham, the elder brother of the novelist Somerset Maugham. He reasoned that the discretion given could not possibly be subjected to the “criticism and control of a judge in a court of law”<sup>8</sup>. Lord Romer took a similar approach<sup>9</sup>. Lords Macmillan and Wright considered that the standard of reasonableness was a personal standard to be set by the Secretary himself<sup>10</sup>. Lord Macmillan’s speech emphasised the wartime nature of the Regulations. He said that when “the life of the whole nation is at stake” it might be given a meaning which the courts would be slow to attribute to it in peace time<sup>11</sup>.

Lord Atkin accepted that in time of war a judge might not favour the liberty of the subject. Nevertheless in his view a judge could not go beyond the natural meaning of words, which remained unchanged. He said<sup>12</sup>:

“I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. ... In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see

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<sup>7</sup> *Liversidge v Anderson* [1942] AC 206 at 239.

<sup>8</sup> *Ibid* at 220.

<sup>9</sup> *Ibid* at 279.

<sup>10</sup> *Ibid* at 251, 270.

<sup>11</sup> *Ibid* at 251.

<sup>12</sup> *Ibid* at 244.

that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I".

Lord Atkin's dissent has been described as one of the most significant constitutional speeches from the House of Lords in the last 100 years<sup>13</sup> and the most famous and celebrated dissent in UK jurisprudence<sup>14</sup>. Eminent jurists such as Lord Bingham have been more than generous in their praise of it. Lord Bingham said that "even in that extreme national emergency there was one voice, eloquent and courageous, which asserted nobler, more enduring values"<sup>15</sup>.

Lord Atkin's view about the meaning of the Regulation may have been consistent with earlier authority which held that "reasonable cause" requires more than mere belief; there had to be a basis in fact for the belief<sup>16</sup>. However, academic opinion about the decision in *Liversidge v Anderson* was, at the time, divided. Sir William Holdsworth and Professor Goodhart, for example, supported the majority view<sup>17</sup>.

Whatever views were then held, many commentators thought Lord Atkin had gone too far in his use of extravagant language. The editor of *The Law Journal* at the time said that "it is difficult to answer the cogent reasoning of the dissentient Law Lord" but added "[i]t is a pity that Lord Atkin saw fit to add to his forcible judgment ... matters which were not necessary to his reasoning and therefore added nothing to its strength"<sup>18</sup>. Justice Applegarth, in a speech about Lord Atkin<sup>19</sup>, put it more directly. He said that it was unfortunate that Lord Atkin took "an unnecessary swipe at his colleagues". Justice Applegarth and the editor of the *Law Journal* were referring to Lord Atkin's borrowing from Alice in Wonderland to describe his colleagues' reasoning. Lord Atkin said<sup>20</sup>:

"I know of only one authority which might justify the suggested method of construction: 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty,

<sup>13</sup> Brigid Hadfield "Constitutional Law" in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords: 1876-2009* (Oxford University Press, 2009) 501 at 503.

<sup>14</sup> Lord Neuberger, "Some Thoughts on Judicial Reasoning Across Jurisdictions" (Speech delivered at the 2016 Mitchell Lecture, Edinburgh, 11 November 2016) at [9]; Lord Brown, "Dissenting Judgments" in Andrew Burrows, David Johnston and Reinhard Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press, 2013) 29 at 35.

<sup>15</sup> Lord Bingham "The case of *Liversidge v Anderson*: The Rule of Law Amid the Clash of Arms" (2004) 43 *The International Lawyer* 33 at 38.

<sup>16</sup> *Liversidge v Anderson* [1942] AC 206 at 228-232 and cf *Roberts v Hopwood* [1925] AC 578.

<sup>17</sup> "Notes" (1942) 58 *Law Quarterly Review* 1 at 2, 6.

<sup>18</sup> "Obiter Dicta" (1941) 91 *The Law Journal* 409 at 410; referred to in Geoffrey Lewis, *Lord Atkin* (Butterworths, 1983) at 154.

<sup>19</sup> P D T Applegarth, "Lord Atkin: Principle and Progress" (Speech delivered at the Banco Court, Supreme Court of Queensland, 15 October 2015) at 2.

<sup>20</sup> *Liversidge v Anderson* [1942] AC 206 at 245.

‘which is to be master – that’s all.’ ... After all this long discussion the question is whether the words ‘If a man has’ can mean ‘If a man thinks he has.’ I am of the opinion that they cannot, and that the case should be decided accordingly.”

Lord Simon, the Lord Chancellor, had not sat on the case but came to hear about the Humpty Dumpty reference and sought to persuade Lord Atkin to “join the majority or, at least, tone down his dissenting opinion”<sup>21</sup>. It might seem strange to some that a judge who disagrees with the majority opinion might nevertheless join with them, but it was then a well-established tradition that judges refrained from dissenting unless a case was of particular importance. Lord Radcliffe said that when he joined the House of Lords in 1949 a dissent was “a serious thing”<sup>22</sup>. The justification for the practice appears to have been that the exposure of differences of opinion might detract from the authority of the House of Lords.

Lord Simon was sufficiently concerned about the matter that he wrote to Lord Atkin asking him whether he really thought that the “very amusing citation from Lewis Carroll” was necessary. He said “I fear that it may be regarded as wounding to your colleagues who take the view you satirize, and I feel sure you would not willingly seek to hold them up to ridicule”. Lord Atkin’s biographer thought that Lord Simon might be criticized for attempting to edit Atkin’s speech<sup>23</sup>. For my part I consider it perfectly proper for a senior judge to seek to persuade another judge to remove references of this kind. Lord Simon himself explained to Lord Atkin that he was principally concerned about the dignity of the court. The likely effect on the feelings of Lord Atkin’s colleagues was no doubt another means by which to persuade him.

Lord Atkin was not persuaded. In his reply to Lord Simon he said that if he had not had the “highest esteem” for his colleagues he would have used “very different language” to what he had used (one can only speculate as to what literary texts might have been employed if he had not regarded his colleagues well). He did not think he was ridiculing them, but rather the method which they had employed in construing the Regulation. He concluded:

“I consider that I have destroyed [the majority view] on every legal ground: and it seems to me fair to conclude with a dose of ridicule.”

He would not alter the opinion. Lord Simon tried once more and pressed Lord Atkin to “omit the jibe”<sup>24</sup> but it was to no avail. The response of the other members of the House of Lords was to refuse to speak to Lord Atkin or to lunch with him for a considerable time. In English parlance he was “sent to Coventry”.

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<sup>21</sup> Allan Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (Cambridge University Press, 2012) at 128.

<sup>22</sup> Alan Paterson, *The Law Lords* (Springer, 1983) at 103.

<sup>23</sup> Geoffrey Lewis, *Lord Atkin* (Butterworths, 1983) at 140.

<sup>24</sup> *Ibid* at 140.

It is difficult to find examples of speeches in the House (or later, in judgments of the Supreme Court) which approximate the disdain in the tone of Lord Atkin's dissent. This may in large part be due to the fact that it was not then, and is not now, considered to be good form to be discourteous in a judgment about the reasoning of the other members of the court. It is not generally considered necessary to expressing disagreement or refuting another's argument. Generally speaking, judges in England (and in Australia) maintain courteous relations towards one another. Of course there have been exceptions.

Lord Reid's dissent in *Shaw v Director of Public Prosecutions*<sup>25</sup> has been described as one of the more "vigorous" dissents in the House of Lords<sup>26</sup>. The question before the House was whether "conspiracy to corrupt public morals" was a common law misdemeanour. The majority held that it was and that the courts had a "residual power ...to superintend those offences which are prejudicial to the public welfare"<sup>27</sup>. Lord Reid did not approve of the courts being guardians of public morals. He said that "where Parliament fears to tread it is not for the courts to rush in"<sup>28</sup>. The consequence of holding that such an offence exists, he said, is that "this branch of the law will have lost all the certainty which we rightly prize in other branches of our law"<sup>29</sup>. By comparison with Lord Atkin's dissent, this is but a gentle rebuke.

Perhaps closer to the mark is Lord Bridge's speech in the *Spycatcher* case in 1987<sup>30</sup>. The question was whether injunctions against newspapers publishing allegations from the book should be continued given that the book had been published in the United States and the UK Government had announced that it would not prevent its importation. Nevertheless the majority continued the injunction. Lord Bridge said<sup>31</sup> that it was "nonsensical" to speak of preventing disclosure "once information is freely available to the general public". His conclusion was even stronger. He said "I have had confidence in the capacity of the common law to safeguard the fundamental freedoms essential to a free society including the right to freedom of speech ... My confidence is seriously undermined by your Lordships' decision ... Freedom of speech is always the first casualty under a totalitarian regime"<sup>32</sup>. One can almost hear his colleagues' sharp intake of breath as they read this for the first time.

It has been suggested that "impassioned dissents" are not the norm in the High Court of Australia because the Court's "steady constitutional diet, being largely limited to the generally drier questions of the distribution and separation of

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<sup>25</sup> [1962] AC 220.

<sup>26</sup> Louis Blom-Cooper and Gavin Drewry, "Towards a System of Administrative Law: The Reid and Wilberforce Era, 1945-82" in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords: 1876-2009* (Oxford University Press, 2009) 209 at 213.

<sup>27</sup> *Shaw v Director of Public Prosecutions* [1962] AC 220 at 268 (Viscount Simonds).

<sup>28</sup> *Ibid* at 275.

<sup>29</sup> *Ibid* at 282.

<sup>30</sup> *Attorney-General v Guardian Newspapers* [1987] 1 WLR 1248.

<sup>31</sup> *Ibid* at 1284.

<sup>32</sup> *Ibid* at 1286.

powers in a federal polity, seems not to ignite much in the way of passionate prose<sup>33</sup>. This did not prevent Justices Gavan Duffy and Rich from suggesting that a construction of the defence power that extended to fixing the price of bread during war would “paralyze the States during wartime”. Invoking Aesop’s Fables, they said “[t]he defence of the States would be the defence which King Stork extended to the frogs who invoked his assistance”<sup>34</sup>.

The term “great dissenter” is said to have been first used to refer to Justice Harlan of the US Supreme Court. Sir Isaac Isaacs was the first to be called a “great dissenter” of our High Court, but as we know he was not the last. Even if one were to take the view that literary allusions and extravagant language should not be employed in judgments, an exception could surely be made for one in which Justice Isaacs dissented.

The appellant was a woman who brought an action against another woman for the loss of her husband’s affections<sup>35</sup>. The majority held that whilst such an action was clearly available to a husband, it was not to a wife. They reasoned that the common law has always recognised the dominion exercised by the husband over the wife and the husband’s action is based upon an interference with that dominion. A wife, on the other hand, never had such power.

Isaacs J, after quoting some passages from *The Taming of the Shrew*, said:

“There is no need of antiquated reasons springing from a primitive state of civilization originally impressed into service to attain justice, later abandoned in favour of better reasons and today utterly repugnant to the present conditions of society. Still less is there any justification for rummaging among the ruined and abandoned structures of the past to find materials for erecting a barrier against the wife’s claim for redress, when a clearly recognized principle of law admits it”.<sup>36</sup>

In an article about the case in a women’s magazine, a “woman solicitor” observed that “all the Judges except Sir Isaac Isaacs declared that sauce for the gander was not in this instance suitable as sauce for the goose”<sup>37</sup>.

In more modern times it is to the late Justice Scalia that one turns for outstanding examples of a “no holds barred” approach to dissent and the use of flamboyant language. He referred to the majority’s interpretation of the *Patient Protection and Affordable Care Act* as “pure applesauce” and “interpretive jiggery

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<sup>33</sup> Andrew Lynch, “Taking Delight in Being Contrary, Worried About Being a Loner or Simply Indifferent: How do Judges Really Feel About Dissent?” (2004) 32 *Federal Law Review* 311 at 327.

<sup>34</sup> *Farey v Burvett* (1916) 21 CLR 433 at 465; [1916] HCA 36.

<sup>35</sup> *Wright v Cedzich* (1930) 43 CLR 493; [1930] HCA 4.

<sup>36</sup> *Ibid* at 503-4.

<sup>37</sup> “The Right to Your Husband’s Company: The Way Our High Court Views It” (1930) 6(23) *The Australian Woman’s Mirror* 13.

pokery” involving “somersaults of statutory interpretation”<sup>38</sup>. Perhaps he too, like Lord Atkin, thought that this was not a personal attack but was simply mocking their methods. There may of course be other motivations. In another dissent, he took aim at his colleagues’ judgment which began with a rather dramatic flourish about the Constitution promising liberty. He said if he had joined in such a judgment he would “hide my head in a bag” and that it showed that the Supreme Court had descended from disciplined reasoning to “the mystical aphorisms of the fortune cookie”<sup>39</sup>.

How refreshingly unremarkable are most dissents by comparison. In the past, but less so now, a feature of a polite dissent was that they were expressed at the outset with regret and humility. Whether the words were always sincere is perhaps another question. Lord Reid’s dissent in *Shaw v Director of Public Prosecutions* began with an expression of “regret” that he was in “fundamental disagreement” with the majority. Justice Isaacs often prefaced his dissenting opinions with remarks such as “I have the misfortune to differ from my learned brethren” or “I regret that I cannot come to the same conclusion”. In another case he added that he was “fully conscious of the weight of judicial opinion opposed to my own, all of which I unfeignedly respect and value”<sup>40</sup>.

Justice Ninian Stephen was a most courteous judge even in dissent. On occasions he would express regret at having the misfortune to disagree with other members of the court<sup>41</sup>. In other cases he would merely commence his judgment in very simple terms such as: “In my view the doctrine of restraint of trade is not applicable on the facts of this case ... My reasons for this conclusion may be stated quite shortly but the considerations which I regard as supporting those reasons require some greater elaboration”<sup>42</sup>. So stated, no expression of regret is necessary. This aligns most closely with contemporary practice.

Like Lord Atkin’s dissent in *Liversidge v Anderson*, Sir Ninian Stephen’s dissent in *Henry v Boehm*<sup>43</sup> was later vindicated<sup>44</sup>. Unlike Lord Atkin’s, the dissent has been said to exhibit “no histrionics, no passionate appeal to the intelligence of a future day, no bitter regrets at being unable to agree”<sup>45</sup>.

Words such as “courageous” are often employed to describe a lone dissent, or the judge who wrote it, perhaps by way of acknowledging that it may sometimes be difficult to stand apart from other members of the court or to

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<sup>38</sup> *King v Burwell*, 136 S Ct 2480 at 2500-1, 2507 (2015).

<sup>39</sup> *Obergefell v Hodges*, 135 S Ct 2584 at 2630 fn 22 (2015).

<sup>40</sup> *Ross v The King* (1922) 30 CLR 246 at 256; [1922] HCA 4.

<sup>41</sup> See e.g. *R v Federal Court of Australia; ex parte WA National Football League (Inc)* (1979) 143 CLR 190 at 217; [1979] HCA 6.

<sup>42</sup> *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288 at 322; [1973] HCA 40.

<sup>43</sup> (1973) 128 CLR 482; [1973] HCA 32.

<sup>44</sup> *Street v Queensland Bar Association* (1989) 168 CLR 461; [1989] HCA 53.

<sup>45</sup> Michael Coper, “The ‘Intelligence of a Future Day’: The Vindication of Justice Stephen’s Dissent in *Henry v Boehm* (1973)” in Andrew Lynch (ed), *Great Australian Dissents* (Oxford University Press, 2016) 150 at 168.

express an unpopular view, one contrary to strong public opinion, which Lord Atkin's view in *Liversidge v Anderson* may well have been.

It may be accepted that a dissent is an act of independence. It shows a strength of will which may, or may not, be commendable. But surely these are qualities which we expect of judges, particularly those sitting on our highest courts. Judges make unpopular decisions. They would not become judges if being popular was important to them. Can a dissent realistically be considered as an act of courage?

Some distinguished judges have doubted that it can. Lord Radcliffe<sup>46</sup> observed that no one "tried to send Lord Atkin to prison for dissenting from the majority of the Law Lords in *Liversidge v Anderson*". He considered epithets such as "heroism" and "gallantry" to be "comically inappropriate". "The time has not come in this country," he said, "when a judge has to summon up any reserves of heroic quality in order to express a novel opinion on a constitutional matter or one possibly unwelcome to the executive of the day".

Former Chief Justice Murray Gleeson<sup>47</sup> is of like mind. He suggests "[o]nly someone given to mock heroics, or lacking a sense of the ridiculous, could characterise differences of judicial opinion in terms of bravery". He said that there may be "occasions when a judge needs to show moral or even physical courage" but "[b]y and large, judges operate in an environment which is uniquely secure, and which rarely tests their resources of heroism, no matter how exciting it may be to think otherwise".

It should also be observed that it is not always the dissentient who makes the unpopular decision. Chief Justice Latham's dissent in the *Communist Party Case*<sup>48</sup> may have been described as "lone, vehement and incredulous"<sup>49</sup>, but it was the majority who, at the height of the Cold War, held invalid legislation which purported to declare the Communist Party to be an unlawful association and empowered the Governor-General to declare further bodies to be unlawful associations.

There is an aspect of a dissent which involves an attack upon fellow judges which may tell against courage. It may usually be expected that there will be no response to the attack. It would be a rare occasion for those in the majority to join in the fray. There is after all no reason to convince the reader of the view which prevails. More importantly, it would not promote a good image of the court as an institution.

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<sup>46</sup> Lord Radcliffe, "Final Appeal – A Study of the House of Lords in its Judicial Capacity. By Louis Blom-Cooper and Gavin Drewry" (1973) 36 *Modern Law Review* 559 at 564.

<sup>47</sup> Murray Gleeson, "Judicial Legitimacy" (Speech delivered at the Australia Bar Association Conference, New York, 2 July 2000).

<sup>48</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; [1951] HCA 5.

<sup>49</sup> Zelman Cowen, *Sir John Latham: and Other Papers* (Oxford University Press, 1965) at 45.



There may be more than one motivating force behind a dissent which uses overblown language and literary references and is harsh in its criticism of the other judges. In some cases it may be that the author considers it necessary to be provocative so that the dissent is not overlooked in the future, when other like-minded judges will correct the error of the majority. Our High Court has accepted that "[a] dissenting judge will often see his or her judgment as an appeal to the brooding spirit of the law, waiting for judges in future cases to discover its wisdom"<sup>50</sup>. Yet one can see from the example of Sir Ninian Stephen in *Henry v Boehm* that an appeal is possible without being impolite.

Some dissents may provide entertainment. We may all be amused from time to time by a witty dissent, at least when they are not directed at us. Law students pore over them, though their time may be better served analysing the more mundane majority opinion. Legal commentators like to quote them. There are even collections of them published under titles such as *Great Australian Dissents*. And of course they are useful for speeches about judging.

On the other hand some may consider that a judge's surrender to a desire to entertain the reader or to seek popularity is somewhat self-indulgent, given the serious nature of the task which judges undertake when deciding a case. It is possible that the losing party might feel a moment's exhilaration at the method of attack on the majority, but then again he or she might also feel that his or her case is belittled by the humour.

As for Lord Atkin's motivations, some of the language employed might suggest that he wished to be seen to speak with moral authority. Yet, as earlier mentioned, in conversations with one of his daughters<sup>51</sup> it would seem that he did not doubt that in wartime a judge should not lean toward the liberty of the subject.

It must be understood that by this time Lord Atkin was almost 74 years of age and had been a judge for 28 years. A measure of annoyance can be detected in his dissent but what is most clearly conveyed is the high level of confidence in the correctness of his view. This is a common feature of dissents of the kind in question. By contrast, Sir Ninian Stephen is said not to have subscribed to the view that every legal question admits of only one right answer<sup>52</sup>. It would seem that acceptance of the possibility that one might be wrong may serve as an encouragement to humility.

Lord Atkin was clearly aware of the likely response from his colleagues. The day before he was due to give his dissenting speech he said to one of his daughters that he hoped they would be speaking to him afterwards<sup>53</sup>. No one has

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<sup>50</sup> *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 314; [1987] HCA 34 (Mason CJ, Wilson, Dawson and Toohey JJ).

<sup>51</sup> Geoffrey Lewis, *Lord Atkin* (Butterworths, 1983) at 133.

<sup>52</sup> Sir Anthony Mason, "Justice of the High Court" in Timothy McCormack and Cheryl Saunders (eds), *Sir Ninian Stephen: A Tribute* (Miegunyah Press, 2007) 3 at 6.

<sup>53</sup> Geoffrey Lewis, *Lord Atkin* (Butterworths, 1983) at 138.

suggested that he was ill-mannered or impolite to his colleagues, which suggests that he weighed the effect of his speech upon his colleagues against the impact it would have more widely.

It is important that the relations between judges be courteous and generally speaking, they are. It is especially important for final appellate courts which comprise a small number of judges who work closely together. The work of these courts requires a level of collegiality for the efficient discharge of their work. But in the end it is the court as an institution which matters most, not the hurt feelings of judges. A judgment which ridicules other members of the court cannot but detract from the authority of the court and the esteem in which it is held. A humorous dissent may provide the author with fleeting popularity, but it may harm the image the public has of the court and its judges.

You will recall that Lord Wright was one of the majority in *Liversidge v Anderson* and so one of the targets of Lord Atkin's jibe. Yet his obituary of Lord Atkin has correctly been described as "forgiving"<sup>54</sup>. He referred to Lord Atkin's judgment in *Liversidge v Anderson* as showing his "habitual courage and independence"<sup>55</sup>. He concluded the obituary by saying that the value of Lord Atkin's work "will not be found to lie in particular judgments (valuable and important as they are) but in the animating motive force which inspired him".

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<sup>54</sup> P D T Applegarth, "Lord Atkin: Principle and Progress" (Speech delivered at the Banco Court, Supreme Court of Queensland, 15 October 2015) at 43.

<sup>55</sup> Right Hon Lord Wright, "In Memoriam: Lord Atkin of Aberdovey 1867-1944" (1944) 60 *Law Quarterly Review* 332 at 334.