

Atticus flinch

From *To Kill a Mockingbird* to Stockwell Day, defence lawyers still feel the sting of public contempt

BY JAMES HARBIC

The debacle over Stockwell Day's settlement of a defamation suit has forced me to reflect on the tarnished reputation of my profession.

In April 1999, Mr. Day publicly criticized a lawyer for his constitutional defence of a pedophile. In his letter, Mr. Day confused a lawyer's personal beliefs with his duty to raise fearlessly every legitimate defence on behalf of his client.

It is almost inconceivable that a person with a clear lack of understanding of the adversary nature of our legal system almost became prime minister, with the power to create laws and appoint judges. But Mr. Day's ignorance is a reflection of the low esteem in which defence lawyers are held by the public.

As a youth, I dreamed of defending the rights of society's outcasts. In the old public library in Ottawa South, I first read about humanity's struggle for liberty, and I began to understand that humanity's most noble achievement was the development of human and civil rights. I was fascinated with how the law of nature, which says that might is right, evolved into the law of humanity, which says that all persons are entitled to equality before the law.

I read that the development of human and civil rights was due in part to the pleadings of defence lawyers on behalf of clients. I read of Hyperides and Demosthenes, Cicero and Marcus Quintillian. I read of Sir Thomas More, who refused to violate the sanctity of his oath and was executed by King Henry VIII. I read how Thomas Jefferson helped draft the Declaration of Independence, proclaiming that all men were equal under the law. I learned that a young Sir John A. Macdonald defended men accused of treason during the 1837 rebellion.

As a 12-year-old delivering the *Citizen*, I read articles about Nelson Mandela's fight against Apartheid from behind bars. (In 1999, I watched as Mr. Mandela was honoured at the Human Rights Monument on Elgin Street.)



OTTAWA CITIZEN

Gregory Peck, above, as the publicly criticized defence lawyer Atticus Finch in Harper Lee's *To Kill a Mockingbird*. Ottawa defence lawyer James Harbic, right, says misguided criticism continues to this day.

In Ottawa, during the darkest days of the Cold War, Joseph Sedgwick secured an acquittal for his client, an alleged communist, by reminding the jury that unlike the Queen in *Alice in Wonderland*, our justice system requires the Crown to prove its case beyond a reasonable doubt.

In 1964, as parliamentary correspondent for the *Whitehorse Daily Star*, I interviewed John Diefenbaker, a defence lawyer who went on to become prime minister and convince Parliament to enact the Canadian Bill of Rights, which recognized Canadians' right to a lawyer upon arrest.

In 1968, I stood in the Ottawa Civic Centre as Pierre Trudeau, who had defended the Quebec asbestos miners' right to strike in the 1950s, promised a new era for our country. In 1976, his government abolished the death penalty. In 1982, he enshrined the Charter of Rights and Freedoms in the Canadian Constitution.

I remember, while working as a part-time orderly in a hospital to help finance my studies, meeting a veteran who had lost his limbs during the Second World War. My job was to flip him over periodically to minimize pain from his bed sores.

In my youthful insensitivity, I asked him "if it was worth it." I'll never forget his answer. "Our sacrifices in the trenches of Europe helped preserve freedom," he said. When he found out I was a law student he said, "Well, you'll be fighting for somebody's freedom someday too." I knew somehow that my generation would never be asked to make the sacrifices that brave soldier had made.

During my graduating class' scall to the bar ceremonies, I remembered how years earlier my grade school teacher, Mrs. Brown, told us to work hard towards making our dreams come true. I was one of her fortunate students who realized his dream. I believed that on becoming a lawyer, I was being given an opportunity to contribute, in some small way, to the advancement of human rights.

I have represented more than 5,000 people in our courts. Many of them were desperate, others destitute, some were even despised. They were all part of the human family. I always attempted to defend them fearlessly and with dignity.

In the 1980s, I began to notice that the public's perception of defence lawyers was deteriorating. I was lecturing a law course, and I was disheartened that few of my students were interested in becoming criminal lawyers. They preferred taxation, corporate or property law. Today, few lawyers are prepared to stand between the state and the accused. Perhaps it takes a sense of history and a love of humanity to pursue a career as a criminal lawyer, instead of pursuing the riches of Bay Street, the security of the civil service or the glamour of Silicon Valley.

This change in public perception has also affected juries. I am not the only defence lawyer who has seen the faces of 12 ordinary people in the jury box in the 1970s replaced today by those of 12 angry people. You can see the cynicism in their eyes when you address them.

Opportunistic politicians know that it is safe to criticize the criminal justice system — after all, no one is in favour of crime. Though violent crime has been decreasing for years, politicians exploit the suffering of victims and the fears of the public, and court the police lobby by taking unfair shots at the defence bar.

But when a Canadian closes the door to her home, uses her telephone, mails a letter, talks to her doctor, lawyer or confessor, she does so with the full confidence that her privacy will not be invaded by the state without due process of law. This is because a defence lawyer will challenge the state if it should attempt to present illicit evidence in a court.

Perhaps the loneliest and most frightening moment an individual may experience is when he finds himself in the docket charged with a crime, facing a prosecutor who is committed to convicting him. Often, he has al-

ready been condemned by the media and abandoned by friends and family. Only one person stands by his side — his defence lawyer, who must use all of his skills to ensure his client's constitutional rights are protected no matter how heinous the allegations against him.

As defence lawyers, we have failed to explain to the public our constitutional duties in the administration of justice.

Mr. Day recently settled out of court, thereby avoiding a trial which could have enlightened Canadians of the important role of the defence lawyer in a free society.

During the federal election, I was offended when Mr. Day's religious beliefs were maligned. Although I do not share his fundamentalist faith, I would not hesitate to defend his right to practise the religion of his choice. Is it too much to expect that he respect the constitutional rights of others to be defended in a court by a lawyer?

No honours awaits a defence counsel: Governments seldom give medals to those who have challenged the powers of the state. Rarely are the rewards of a career at the defence bar tangible: like the more important things in life, they are subtle.

Last summer, after a lengthy trial in Perth, a 20-year-old client — whose innocence I never doubted — was acquitted of two counts of murder. After the verdict was announced to the hushed court, my client put his trembling hand on the prisoner's dock near mine. Tears streamed down his face. As the court erupted in anger, he whispered to me, "Thanks for giving me my life back."

I rejected the constable's offer to leave the court through a secure side door. As I walked out of the courtroom, I stared down the stunned glares of some of the police officers who, I believe, blinded by zealotry, had inadvertently manufactured evidence against my client. As I approached the exit, I ignored the taunts of the throng who, in their grief, were hostages to the state's theory of the case.

As I made my way out into the mid-day sunlight, I heard the bells of a distant church ringing, and I recalled the words of John Donne:

*No man is an island, entirely unto itself;
any man's death diminishes me,
for I am involved in mankind;
and therefore
never send to know for whom
the bell tolls;
It tolls for thee.*

Perhaps those bells outside the Lanark County courthouse were tolling in celebration, and perhaps every innocent life saved from condemnation enhances the lives of every one.

James Harbic is a defence lawyer in Ottawa.