Bar News

The journal of the NSW Bar Association

Spring 1987

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COVER

D.A. Wheelahan (as he then was) captured the spirit of the ABA Conference in England and Ireland in his swan-song as Bar News' most prolific photographer.

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Bar Notes

Conduct of Counsel as a Ground of Appeal

The duties of counsel to ask particular questions or questions on a particular topic are the subject of the recent judgment of the Court of Criminal Appeal in *R v De Keyser* (unrep. 20 July, 1987). The Court made it clear that, in circumstances where counsel's conduct of the trial is the ground of appeal, the question to be decided is whether the conduct resulted in a miscarriage of justice: "it is not the conduct of counsel which is under consideration, it is the question whether that conduct has in any way resulted in a miscarriage of justice. I stress 'in any way'" (per Lee J at pp.23-24).

The Court said that where a witness has been cross examined generally on his evidence and where the aspects of the evidence material to the question of guilt have been enquired into, it would be rare for the Court to perceive a miscarriage merely because another counsel, who did not bear the responsibility of the trial, contends that the cross examination should have been more extensive.

The judgement of the trial counsel "on the importance of inconsistencies in testimony is one which he must exercise against the overall impression which he seeks to leave with the jury in regard to the witness' evidence." Hence the Court commented that counsel may, very properly, refrain from cross-examining on inconsistencies and they emphasized that it is never the length of cross examination "which is the hallmark of an effective cross examination."

This position of cross examination must be contrasted with the calling of a witness. The latter was discussed by the English Court of Appeal in *R v. Irwin* (1987) 1 WLR 902. In this case the barrister decided not to call two alibi witnesses. He did not tell his client of this decision. It was held that such a situation did amount to a material irregularity and the appeal was allowed. The Court said "The question . . . is not whether counsel was right in thinking the witness should not be called but whether he was entitled to bind his client by his decision". The Court noted that there may be cases where it is not vital to consult the client about the calling of an alibi witness at the time the witness is to be called. Such a situation may arise where there has already been thorough discussion. Nevertheless the Court held in this case clear, and preferably written, instructions were required before the witnesses were not called. All barristers should be aware of the desirability of written instructions in such circumstances.

Frequently where the conduct of trial counsel is attacked counsel is requested to provide an affidavit explaining his conduct. Such a procedure seems inconsistent with the comment that it is not counsel's conduct which is under consideration. It is generally, at very least, undesirable for trial counsel to be required to give evidence either by affidavit or orally in such situations.□

B. Donovan

Unreported Judgments

In **Roberts-Petroleum v. Kenny Limited** [1983] 2 A.C. 192, the House of Lords said that it would, in future, adopt the practice of declining to allow transcripts of unreported judgments of the Court of Appeal (Civil Division) to be cited on the hearing of appeals to the House unless leave was given to do so. That leave was only to be granted on counsel giving an assurance that the transcripts contained a statement of some principle of law, relevant to an issue on the appeal to the House that was binding on the Court of Appeal and of which the substance, as distinct from the mere choice of phraseology, was not to be found in any judgment of that Court that had appeared in one of the generalised or specialised series of reports.

The wake from this case is just hitting Australia.

In September 1986 the Victorian Supreme Court issued a practice note prohibiting the citing of unreported judgments in that Court on substantially the same basis as had the House of Lords, as well as requiring notice that an unreported judgment would be relied upon to be given to the Court and all other parties.

On 22 May 1987 the Chief Judge of the Family Court, Justice Evatt, issued a direction prohibiting the use of unreported judgments in that Court, that direction being in substantially the same terms as that issued by the Victorian Supreme Court.

The Bar Association has written to the Chief Judge requesting that that direction be reconsidered. It supports the proposition that while one should give notice to one's opponents if one intends to cite unreported authority nevertheless it should not be necessary for leave to be obtained before such authority can be cited.

The Council's view is that relevant authority should be cited and that irrelevant authority should not be cited but that the question whether or not an authority is reported ought not to be a consideration. The only difference between a reported case and an unreported case (apart from ease of access) is that the law reporters have determined that an unreported case is not worthy of being reported. The danger of rules restricting the citing of unreported authority is that it places in the hands of the law reporting authorities significant power as to the course taken by the law. For this reason the Bar Council has consistently opposed the introduction into New South Wales of the Victorian rule.□

Domain Parking Station

The Town Clerk has informed the Registrar that the Council has had discussion with representatives of the Police Force. The Police have introduced special hoodlum police patrols of the area around the Domain Parking Station from 6 pm to 2.30 am daily. In addition the area will be patrolled by Police Dogs and Handlers from 6 pm to 2.30 am on Thursday, Friday and Saturday evenings and, occasionally by Police Mounted patrols. In addition, the Council has engaged Sydney Night Patrol Inquiry Services to conduct periodical patrols of the moving footway tunnel.□

From the President

COURT DELAYS

The Bar Council has been concerned about increasing court delays in both criminal and civil lists for some time. The root cause is not hard to find - increasing work without a corresponding increase in judges and ancillary facilities.

The reasons for the increasing work are again fairly simple - more cases, more cases being fought rather than settled, and cases taking longer to fight than hitherto.

Why these things are so is more complex. Contributing factors include increasing population; a rising crime rate; more vigorous detection and prosecution of a range of Commonwealth offences, in particular 'white collar' fraud; an increasing number of drug distribution conspiracy cases and the comparative affluence of those involved; the availability of legal aid; the use of litigation as a catalyst for social or political change by pressure groups; increasing sophistication of the economy; the deluge of information made available by the photocopier, the word-processor, the computer and the fax machine; the open-ended nature of many first instance hearings; increasing awareness of legal rights by the public; and the creation of new statutory rights.

Whether we like it or not these factors are unlikely to go away. The obvious and indeed necessary solution - the appointment of judges and the provision of ancillary facilities in proportion to the increase in work - is unlikely to occur.

There will therefore continue to be pressure for greater 'efficiency' in the judicial system. The Bar should support this without reservation, even if it involves rethinking some attitudes. However, we should be vigilant to ensure that the drive for efficiency is not used to cut away the rights of the citizen, diminish the role of the independent profession, or erode the terms and conditions of judicial office. Once something is lost it will not be regained. There is no necessity that justice be compromised in order that it not be delayed - money and resources can ensure that neither occurs. The executive and the politicans should not be let off the hook easily.

The Bar Council has recently decided to examine two possible avenues for taking some pressure off the judges, even though each will involve a re-examination of previous positions. The first is a system of Recorders, or the equivalent, whereby members of the Bar preside over criminal trials for a short period each year. The second is a court administered and funded system of Official Referees whereby members of the Bar act, in effect, as arbitrators to decide matters or questions referred to them, subject to appropriate appeal rights and the like.

Both of these suggestions have a long history in the United Kingdom. The Council has approved the Recorder proposal in principle and a working party consisting of Barker Q.C., Coombs Q.C. and Salts Q.C. has been established. The Public and Professional Affairs Director of the Association, Yvonne Grant, is preparing a paper on the Official Referee system for the Council.

It is not only the profession which must examine itself. One matter which lies firmly in the hands of the judiciary is the conduct of first instance hearings and supervision of that conduct by appellate courts. It is clear that the length of hearings continues to increase, and that the increase over the last decade or so has been very marked. I venture the view that one of the principal reasons for this has been the increasing unwillingness of judges at first instance to apply basic procedural and evidentiary rules and the lack of support at the appellate level for those judges who do apply the rules.

It is commonplace for parties, without any particular reason or explanation, to be permitted to split cases, re-open issues, recall witnesses and the like. Even more destructive of the economic despatch of business is the refusal by trial judges to rule on objections to evidence, particularly as to relevance. It is by no means uncommon for a trial judge to say that he agrees the evidence is irrelevant or otherwise inadmissible, but that he admits it in case the appeal court takes a different view. The Court of Appeal has, indeed, encouraged this. I do not stay to discuss the consequences of this approach in a comprehensive fashion. Suffice to say that in my opinion, it is unsound in principle (a trial judge should apply the law according to his own view not the view of some hypothetical appeal court), is impossible to explain to a litigant, but above all (for present purposes) is misconceived from a practical point of view. At least the following conditions would have to be met before a procedural or evidentiary ruling would lead to a new trial - the case must proceed to judgment; the party against whom the ruling is made would have to ultimately lose the case *and* would have to decide to appeal; the appeal would have to proceed to judgment; the judgment would have to turn on the ruling; the appeal court would have to disagree with the trial judge; the point must have been important enough to warrant a new trial.

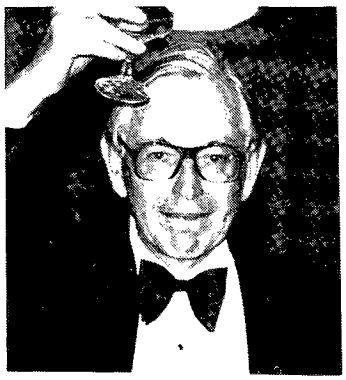
Against these bare possibilities is the certainty that the trial will be lengthened by issues or evidence which the judge regards as irrelevant.□

R.V. Gyles Q.C.

Intercontinental Extravaganza!

The 1987 Bench and Bar dinner was held at the Hotel Intercontinental and was a resounding success. The guest of honour was the Chief Justice of the High Court, the Honourable Sir Anthony Mason, K.B.E. His old floormate "Smiler" Gleeson Q.C. was appointed by the President to laud the Chief Justice, but, at the last moment, succumbed to a bout of stage fright (he said it was laryngitis) and passed the brief to Hughes Q.C. who — as always — rose to the occasion. Frosty's words were lamentably and inexplicably lost to posterity. Mr. Junior, Alan Sullivan, former associate to the Chief Justice, regaled the audience with several inglorious incidents of his term of office, best left unrecorded. The Chief Justice's response was, fortunately, preserved:

Tonight has taught me two lessons: (1) with a close friend of 53 years standing like Tom Hughes I don't need enemies; and (2) I must tighten up the procedures for the selection of future Associates. I am particularly distressed by Hughes' revelation of the dark secret that I am an old convent girl. What will Gaudron J. think of me?



I last spoke at this function more than 30 years ago — as Mr Junior. At that time the intellectual traditions of this Dinner could be traced back through the line of blood sports, the bull ring and the gladiatorial combat to the pagan sacrifices of the ancient world. Judges were seen as ritual victims or evil spirits to be exorcised. One speaker outdid another in reviewing an endless gallery of New South Wales judicial eccentrics. Their names linger on in the law reports, without yielding any clue to the sobriquets by which they were affectionately described by the Bar. "Funnel Web", "The Mad Dog" and "Lord Calvert", later to be joined by "The Tired Lion", were among those who effortlessly achieved immortality in this way.

Lord Calvert closely resembled an aristocratic-looking Englishman who appeared in advertisements constantly demanding a Scotch whisky of that name from a fawning and approving waiter. Unfortunately the Scotch whisky — which was quite a good one — was withdrawn from the market, through no fault of the judge, so that his Lordship was condemned by free market forces to eke out his judicial career bearing a name that had ceased to have any relevance.

My own career at the Bar was more closely connected with the first of the legendary figures I have mentioned. He was a great stickler for propriety, with an analytical mind mainly of a destructive bent, but not wholly so, and a deep-seated suspicion, probably well founded, that counsel was endeavouring to lead him astray. Only the most tightly drawn pleading would survive his searching scrutiny. Advocacy in his Honour's court called for extra dimensions of skill - close attention to punctilio, professions of anxious concern about questions of propriety and a profound knowledge of legal ethics so as to repel allegations of unethical conduct by one's opponent and to support a similar charge against him if the opportunity should offer. It was particularly important to make an immediate disclosure of any possible shortcoming in one's case. On the disclosure of such a difficulty, as if by way of reward for exemplary conduct, his Honour would deploy his constructive ability in circumnavigating the problem and sternly repel the later efforts of one's opponent to improperly exploit the difficulty. In this testing school of forensic skill I thought I did rather well. But I always acknowledged that my contemporary Michael Helsham did better. He had a vast reservoir of matchless cunning and he oozed propriety from every pore. He will need all these qualities and more as he probes that trackless wastes of the Lemonthyme Forest.

In the years of which I speak, the New South Wales Bar was pre-eminent in common law advocacy. The obscene notion that common law counsel might be imported from Melbourne to conduct a major trial in Sydney would not have occurred to anyone, least of all a solicitor conscious of res ipsa loquitur. How times have changed! The poor relations from the South have stolen our clothes. And in a master-stroke of publicity, recorded in "The Australian" last week, the Solicitor-General for Victoria has projected a formidable image that must be the envy of every Law Officer. What Solicitor-General hailing from New South Wales would have dealt with an attractive T.V. reporter in the precincts of the High Court in the manner reported?

Maurice Byers would certainly have put his all-embracing arm around the reporter, but his suggestion would have been much more subtle than that attributed to the Law Officer from Melbourne.

There have been other changes as well that have to do with the Law Officers. Before I was appointed Solicitor-General in 1964, the Commonwealth was almost invariably represented by Counsel from the Bar, even in major constitutional cases. And, although some of the States were represented by a Law Officer or Crown counsel, others were not. Today, in major cases at least, the Commonwealth and every State except Queensland is represented by its Solicitor-General. Of course junior counsel from the Bar are briefed, and sometimes senior counsel as well. But the result is that constitutional work has increasingly become the preserve of Law Officers. And this tendency is not confined to constitutional work as they appear for governments in non-constitutional cases and from time to time for statutory authorities and officials. The present Solicitor-General for the Commonwealth, Gavan Griffith, appears in a larger number of cases than his predecessors. The establishment of the office of Director of Public Prosecutions by the

Commonwealth and by some States is a further extention of this development. By drawing attention to this trend I do not suggest that it is an untoward development. Indeed, it is an inevitable response to the demand for specialization, in particular the requirement of government that it be represented by counsel who has a comprehensive understanding of the complexity of the entire range of problems, legal and non-legal with which it is confronted.

But it may give you some satisfaction to know that it was a Solicitor-General who was the target of the most devastating judicial comment I have heard. One of the State Solicitors-General was addressing the Court in a constitutional case. He ended his first submission with the words "That concludes the first branch of my argument." To which Menzies J. responded "Twig would be a more appropriate word Mr Solicitor, would it not?"

Shortly after I was appointed Solicitor-General, the Attorney-General Bill Snedden asked me to arrange lunch with some junior counsel in Sydney. I invited Rod Meagher among others. On being introduced, Rod proffered his silver snuff box to the Attorney who visibly recoiled before asking "What's in it?" "Snuff, of course" replied Rod dismissively. After the Attorney had indicated that he would forego the privilege, Rod proceeded to dose himself liberally with pinches of snuff, to the accompaniment of much sneezing. Bill Snedden seemed unnerved by this experience for he was not his ebullient self during lunch. I wondered what he might be thinking. The mystery was revealed after we left the Common Room when he asked me "Are many of the barristers in Sydney gay?" So much for the exploits of that other equally famous snuff-taking barrister - James Boswell.

To return to the present. Another respect in which we have seen a significant change is in the manner of presentation of appeals. In the High Court there has been a marked reduction in the time taken in the hearing of cases. If I may give one striking example. A fortnight ago we heard two cases involving a comprehensive re-examination of s.92. The Commonwealth and all the States were each separately represented as parties or interveners. The time taken in argument was a little more than 4½ days. Subject to one potential qualification, all possible arguments were thoroughly canvassed — and some others besides — including the novel contention that the eating in Tasmania of a crayfish caught in South Australian waters amounts to intercourse within the meaning of s.92. This submission reminded me of an episode in the film "The Adventures of Tom Jones".

All in all it was a fine exhibition of the art of advocacy by the counsel involved, concentrating on points of principle, expounding and criticising, and keeping the recitation of passages from judgments to a minimum. In other words, using authorities merely to document and illustrate propositions otherwise made and elaborated. It is interesting to compare the **Bank Nationalization Case** which took 39 days in the High Court and 37 days in the Privy Council, though it involved other important issues apart from s.92.

By way of contrast with counsel's performance in the two recent cases, there was the repetitious counsel appearing before the Supreme Court of Canada who was trespassing on the Court's time. "You have said that before" interrupted the judge. "Have I, my Lord? I am sorry, I forgot" was counsel's rejoinder. To which the judge responded "Don't apologize. It is quite understandable. It was so long ago."

Time taken in litigation and increasing costs, the burden of which is partly borne by government and, ultimately by the taxpayer in the form of legal aid, is a matter of growing public concern. It was one of the reasons assigned by the Senate Constitutional and Legal Affairs Committee for holding its inquiry into the High Court last year. And it is **one** of the factors that lie behind the criticisms recently levelled at the Courts by State and Federal Ministers in recent weeks. Concern on this score is not confined to Australia. At the recent International Appellate Judges' Conference and Commonwealth Chief Justices' Conference the length of court proceedings, especially criminal trials, and rising costs were identified as major problems in common law countries. There is now a general expectation that court procedures should be streamlined and that costs be kept within reasonable limits. Consequently there is a need for the lawyer, whether judge or practitioner, to concentrate on fundamental issues and deal with them expeditiously. Although the adversary system provides the most rigorous means of testing evidence and establishing facts, it is a high cost system of justice. That is why governments in many countries are beginning to examine the possibilities of less expensive systems, such as conciliation and arbitration, at least at the lower levels of dispute resolution.

Proposed alterations to the law as it relates to personal injuries and workers compensation may, if implemented, have a significant effect on the profession, especially on the Bar. I shall not discuss the merits or demerits of these changes except to say that experience shows us that departures from traditional procedures should be approached with caution. But the proposed changes remind us as lawyers that we are mistaken if we assume unquestioningly that the practices and procedures of the past will necessarily satisfy the demands of the future, or even of the present. Unless our performance persuades the community to value the services that we provide, governments and legislatures will feel that they are justified in imposing changes on us. We have to remember that the law is in many respects a service provided to the community by the courts and the profession. In the final analysis it is the community as the user, through its representatives, which makes its judgment on the efficiency and the value of that service.

Of course as one legal door closes another opens. This has happened in New Zealand. The law reports of that country show that personal injury litigation has been partly replaced by litigation involving other and more interesting issues. The result has been that in contract, tort and administrative law New Zealand courts have been exploring issues which have not surfaced to the same extent in Australian courts.

The public perception of the law as highly technical in many of its aspects is an obstacle to a better popular understanding of its role. Though some complexity is unavoidable in a society which is itself complex, there is scope for the elimination of technicality and artificial doctrine. Having listened to argument in two cases concerning the validity of the extraordinarily complicated

Fringe Benefits Tax legislation, I am inclined to support the suggestion that the Attorney-General should begin to recruit English speaking draftsmen. If the community is to understand and value what we are doing, we need to rid the law of its prolixity and unnecessary technicality.

Mind you, we have come a long way since the great days of Parke B. who, though the possessor of a brilliant legal mind, was known as Baron Surrebutter because of his love of technicality. He visited a colleague who was gravely ill, taking with him a special demurrer. "It was so exquisitely drawn", he said, "that it would cheer him to read it". He actually rejoiced when non-suiting a plaintiff in an undefended case, reflecting that those who drew loose declarations brought scandal on the law. The 16 volumes of Meeson & Welsby were his especial pride. However, another colleague remarked that "it was lucky that there was not a 17th volume for, if there had been, the common law world would have disappeared altogether amidst the jeers of mankind".

The stories told by tonight's speakers have improved with the passage of time. However, they have managed to convey an impression, as I have tried to do, of the Bar as it was, a world which to me was both fascinating and exciting, with its companionship and competition, its humour and rumour.

I thank the speakers for what they have said and I thank you all for your support of the toast. Although it is the Annual Dinner of the Association you will forgive me if I regard the large attendance as amounting to a personal gesture of goodwill and as an expression of confidence in, and support for, the High Court. For that my colleagues and I are extremely grateful. □

Letters to the Bar Association

From Judge Phelan:

"Dear Secretary,

.....

Would you please pass on to the office bearers of the Association my sincerest thanks for the hidden work which throughout my years at the Bar has been carried on by the various specialist committees. I am deeply indebted to all members of those various committees who have at no inconsiderable sacrifice to their own freedom and leisure worked on my behalf in so many divergent ways.

That work has so constantly been carried out so efficiently that it seldom if ever comes to notice.

May I, through you, thank all those involved.

Yours faithfully
Peter Phelan"

District Court Dénouement

On 17 August 1987 the swearing-in of the now Judges Levine and Wheelahan took place. Shand Q.C. reports that after the usual lavish praises and recognition had been heaped upon the new incumbents by the Solicitor-General, Keith Mason Q.C. and the President of the Law Society, Kevin Dufty, the much revered Chief Judge Staunton C.B.E., Q.C., adjourned the Court without giving either the opportunity of responding. This was an unfortunate oversight on his Honour's part, especially as Judge Wheelahan's response had been through eight drafts. His Honour's speech was rumoured to require the absolute privilege the venue would have given. This rumour acquired some substance when the Editor, enquiring some days later to obtain same for publication, was told it was into its ninth revision. Perhaps his Honour took some advice from Judge Levine, once the doyen of the Defamation List.

***Bar News** has procured both speeches so that those who were present know what they missed, and those who did not can get the flavour of what will be said at their Honours respective 15 bobbers.*

Judge David Levine, Q.C.

"The honour, privilege, pleasure and indeed excitement of this occasion is, in a very personal way for me, heightened by the fact that this morning I have been sworn in with my Brother Wheelahan. For many years now I have known and admired Dennis Wheelahan as a colleague at the New South Wales Bar which he has served with such distinction; as a friend and as a neighbour; and for completeness, as a fellow officer in the Royal Australian Navy Reserve.

I look forward therefore to serving, in good health and vigour, with him, this Bench and the Community well into the 2lst Century.

Mr Solicitor: your being here adds moment to the occasion and for what you have said I do thank you. I am particularly touched by your references to my father. The Bar I leave of course with regret. Nonetheless there will be social and professional gatherings when I can enjoy the company of friends and former colleagues. However I look forward to observing from the Bench counsel both known and new to me, to receiving their assistance and to being gladdened, I trust, by the fact that the liberties and rights of citizens are fearlessly being championed according to the duties and traditions of what I hope will remain a strong, competitive and independent Bar.

Mr Dufty: I thank you also for your words of welcome on behalf of that branch of the profession which, through you, I thank for the support I received when at the Bar.

As an articled clerk and as a young solicitor I was introduced to and received instruction in the essential and fundamental aspects of legal practice. Among the many important matters I was taught by my Master and employers in relation to one's overall professional behaviour are two tritely stated but vital requisites: punctuality and patience. The former as a matter of courtesy and efficiency; the latter, as a matter of necessity especially when dealing with clients, with counsel, with Registries, with other solicitors and I add with judges. I need hardly say that a reciprocity of adherence to both requirements by myself and others will make judicial life a little easier.

Might I remark on the extraordinary changes to the structure of solicitors' practice in recent years. It is my view that because of the immense resources now available to attorneys and their firms, of whatever size, the citizen should feel less inhibited and more confident that any practitioner or firm can be approached to deal with what is to such member of the community, no doubt an important matter and to deal with it at reasonable cost, with promptitude and courtesy, and with the provision of sound advice and proper direction.

Among the enormous number of members of the profession here today, I am gratified to see so many familiar faces.

Particularly am I pleased to note the presence here of Mr Alec Shand, QC with whom on many occasions I appeared as junior in notable libel actions and from whom I learned so much in the areas of advocacy and court craft.

How nice it is that so many members of my former chambers, Blackstone Chambers, are present. In 1982 Mr Don Grieve, Q.C., whom I have known for 30 years, had the courage, initiative, flair and foresight to establish Blackstone Chambers, the splendid and indeed breathtaking physical environment of which provides a superb home for a superb and talented group of counsel. Not being among them is something I shall miss; having been one of their number is a memory I shall cherish.

There are periods in one's career when the advice, support and guidance of another person can be critical. In that important stage of my career when I was moving into the higher ranks of the Outer Bar I had the good fortune to have as my clerk Mr Greg Isaac of the 12th Floor, Wentworth Chambers. He truly is one of the great Leading clerks in Sydney. I shall always be in his debt for all that he did for me in those special years and ever shall he have my friendship and respect.

Mrs Julianna Harrison is clerk to Blackstone Chambers. She carries out her functions as clerk, administrator, confidante and conciliator with wondrous patience, with charm and efficiency. I feel certain that as the years go by she will have many opportunities to attend such ceremonies as this for the swearing in as judges of persons who like myself have had the pleasure of being in her charge.

This morning's ceremony is of course the happier by reason of the presence of many friends and relatives, for me especially my sister Prudence and her family from Brisbane.

My three children, Naomi, Judith and Aaron have come along. I am proud of them and can promise now to spend more time with them in all their endeavours. They are here to see their father sworn in as a judge. A marvelous excuse of course for not attending other places this morning. To those other places however they shall have to return shortly after the conclusion of these proceedings, and I so Order.

As for my wife, Agnes, I can say no more than that I could have received no more than all she has given me in love, understanding, tolerance and support throughout my career at the Bar during which her bearing as a barrister's wife made my barrister's life the more rewarding and the more enriched.

I am the second generation of my family to have been appointed to this Bench. Indeed, as has been said already, I am the second member of my family to serve during

the tenure of office as Chief Judge of His Honour Judge Staunton. I am slso pleased that the Bench this morning is made up of His Honour Judge Thorley and His Honour Judge . Torrington both of whom served with my father.

My late father, Judge Aaron Levine, was a member of this Bench from 1955 to 1972. During that turbulent decade of the 60s he delivered judgments on the crucial issues of freedom of speech and censorship which displayed an enlightened view well in advance of those times he did not live to see. At the end of his career he made rulings on the law of abortion the consequential liberalisation of which to this day is, in some quarters, the subject of passionate debate.

He had a consuming love for the law as an institution and as a discipline. Hence he had a deep knowledge of it, particularly of the criminal law. His belief in the Rule of Law was unshakeable and his expectation of integrity in professional and personal conduct and in the Administration of Justice was uncompromising. He had great personal: moral and intellectual courage. He had however one quality which made him the ideal judicial figure: a quality nurtured in his family heritage and his faith and anchored in his respect for the dignity of his fellow men: that quality was his compassion - his humanity.

If I strive to follow so fine an example, not only will I do honour to his memory but also, I trust, shall I go far in the proper performance of the obligations of the oath it has been my privilege just now to swear." □

Judge Wheelahan

Chief Judge, Judges, Mr Solicitor, President of the Law Society, members of the profession, ladies and gentlemen and the Redlands contingent.

This event reminds me of award night in the television industry and I have won the gold logie.

I was a steward at a wedding once and I heard the father of the bride say "I have been abundantly clothed in the epaulettes of eulogy."

I am not sure what he meant but I think it has happened to me.

I am confident that the august presence of the Solicitor General for the State is attributable to the fact that Judge Levine is being sworn in, but it has a beneficial consequence for us all. It has spared you, and more importantly me, hearing the hurtful remarks which might have been made by the President or, God forbid, President Emeritus Meagher, the latter who insists on describing what is happening today as my "Coronation".

I am informed that Judge Levine has received a confidential letter from Mr Justice Hunt entreating him not to bring all of Sydney's defamation work to this court.

I in turn, have been invited to revitalise the Chancery Jurisdiction of this Court. This I am willing to do on the basis that the originating process clearly reveals the date and place of accident.

The Bar was always an exciting, vital, varied, rewarding and most importantly, an overwhelmingly worthwhile profession. Simply put, I loved it.

Being appointed provides me with an opportunity to expand and develop my knowledge of and regard for the law.

Justice Samuels, on his appointment, observed that the law was remarkable in that it afforded an opportunity to practitioners to embark on a compelling, useful and exciting career on the Bench at an age when some professions, especially the services, were dispensing with their senior officers.

It is with a great deal of pride that I have accepted an invitation to perform what I regard as probably one of the most important jobs in the country.

It would be inapt, indeed churlish for me not to acknowledge, in broad terms, those who have contributed in large measure to my success at the Bar and, in turn, my elevation to the Bench. Those who are omitted from this litany are and are hereby directed not to be offended.

Bernard Wheelahan Senior had a career in the police force. That combined with his love of the English language provided me with an early interest in the law. The only man who would be happier than I am today, would have been my father. I recall my father imitating Shand Q.C. in the kitchen of the police cottage where we lived in Armidale. The Shand Q.C. referred to is not the show pony who does advertisements for the Wool Corporation and appears on television a lot but his venerated father.

Judge Wheelahan and Margaret Wheelahan

My six brothers and sisters each helped mould and shape my character and provided me with the impetus to complete my university education.

My first clerk, the legendary Harry Peel, guided what he found to be a brash and headstrong young barrister through the difficult and penurious early years.

David Rofe of Her Majesty's Counsel was the most patient and generous of masters and my pupillage with him continued for more than a decade.

Justices Samuels and McInerney provided enormous assistance and guidance in my early years and Meagher Q.C. persuaded me to enter bar politics. Meagher's friendship and leadership led me into what was perhaps my most useful and fruitful 7 years at the Bar.

The Bar Council and the Navy are generously represented today.

The former permitted me to be its secretary and licensee of its fermented and spirituous liquor department the second position for which I was, by experience and inclination, admirably suited.

The Navy - and this is Navy Day on the District Court - makes me wear a ridiculously obvious life jacket whenever on board one of Her Majesty's ships simply because I failed an impossibly difficult swimming test - underwater indeed.

The presence of you both pays Judge Levine and me a great compliment.

I am deeply grateful to all my friends and professional associates who have attended to share this occasion with me. Those deserving a special mention are the collected attornies from the bustling megalopolis of Goulburn who, jointly and severally, tried, alas in vain, for nearly 20 years, to make me wealthy.

The other is my very dear friend and loyal supporter, the former Mayor of Casino who, to my absolutely impeccable recollection, did his very best to make me poor.

I will turn briefly to the ladies.

Margaret Wheelahan Junior has been my best and sometimes only friend. She has been my fiercest defender and someone whose faith in me never permitted me to consider doing anything other than go forward.

There are two ladies who it would be positively dangerous not to mention and they are, of course, my daughters Kellie and Erin.

They are all that I could have ever hoped for even if as a result of their cavalier, egalitarian, neo-populist attitude towards discipline, I will be driven to an early grave.

Then of course is the remarkable Diamond Lil to whom I must have constituted a modest surprise in her 43rd year.

She has been the major influence for good in my life.

But she has never lost an acute appreciation of life's more sordid realities. Over a year ago she took the first enquiring telephone call from the Attorney General. He simply left a message for me to ring him. Lillian, in delivering the message said "Now what have you done this time?"

She reminded me yesterday that she and my father considered having me apprenticed to a tradesman at the conclusion of the intermediate certificate. She blandly observed that she was pleased that she and Dad had made the effort to keep me at school. I think "pleased" is a little vapid Lillian.

Having demonstrated the respect and regard I have for this office and its trappings, may I be permitted a light recollection at its expense and to explain what would otherwise be an obscure reference by Mr Dufty.

When I was a responsibly confident young barrister I was on circuit in Broken Hill. I kitted myself out in an understated velvet suit, a colourful cravat and patent leather shoes.

I decided to do a lap of Argent Street before dinner. I was observed by a lady solicitor who muttered to those within hearing:

"Holy Mother of God, it's the rainbow trout."

If only she could see me now.

I wrote a speech recently. It was wickedly plagiarised by a silk. I will read part of it:

"The Anglicans of Sydney have a bizarre attitude towards mitres. They use them on school crests, on ecclesiastical writing paper, on the gates of archbishoprical residences - in fact, anywhere except where they belong - on a bishop's head. So too, Judges will do anything anywhere except what they are paid to do: To decide the cases in front of them, and otherwise remain silent."

I propose to take my own advice.

I am deeply moved by this appointment. It is the highest honour that anyone could possibly have paid me and I propose to discharge the duties of this office to the best of my skill and ability.□

Mr. Justice Murphy: Reformist? Civil Libertarian? or Reactionary?

David Lloyd examines the late Mr. Justice Murphy's judgments in several important administrative law cases.

I was interested to read "A Personal View of Mr. Justice Murphy" by Sir Maurice Byers Q.C. in the Autumn issue of Bar News, in which Sir Maurice discusses the unconventional approach of Murphy J to judicial art and to constitutional law.

It is said by many that Murphy J was a "great reforming judge" and "a civil libertarian". Whilst this may be an accurate assessment of his views on constitutional law and the criminal law, it does not seem to be true when one examines his judgments in administrative law.

In administrative law Murphy J, far from being reformist or libertarian, was conservative and even reactionary in his views. This is illustrated by his sole dissenting judgments in three well-known cases.

In *Re Toohey, ex parte Northern Land Council* (1981) 151 CLR 150, the majority of the Court held that the courts will examine the exercise of a power granted to a representative of the Crown, a minister or some other person by statute and will determine whether that exercise of power is within the scope of the grant. Gibbs CJ expressed the majority view that "the courts have the power and duty to ensure that statutory powers are exercised in accordance with the law. They can, in my opinion, inquire whether the Crown has exercised a power granted to it by statute for a purpose which the statute does not authorise" (at 193). The majority held that a regulation made by the Administrator under the Town Planning Act 1964 (NT) was not made for a town planning purpose but for an ulterior purpose and was, therefore, outside the scope of the statutory power.

Murphy J, however, held that if the regulation is within the scope of the regulation-making power it may not be invalidated on the ground that it was made in bad faith or for an ulterior purpose, on the ground that courts may not inquire into whether the exercise of a delegated or legislative power is invalidated on the basis that the power has been misused.

In *FAI Insurances Limited v. Winneke* (1982) 156 CLR 342, the majority held that the rules of natural justice applied to a decision of the Governor in Council not to approve the renewal of an approval to carry on workers' compensation insurance business. Gibbs CJ expressed the majority view by stating, "I regard it as clear that, in circumstances such as the present, the exercise of the power to grant or refuse a renewal of an approval will be subject to the common law rule whose effect is that a company that would be affected by a refusal to grant a renewal should be given an opportunity to be heard before a decision is made, unless that rule is either excluded by the Act on its proper construction, or is rendered inapplicable by the fact that the power is vested in the Governor in Council" (at 348).

Murphy J, however, held (without giving reasons) that in the absence of any authorising legislation, there is no power in the courts to inquire into questions of good faith or observance of natural justice or other propriety of an act of a Governor in Council which is otherwise within power (at 373).

Finally, in *Clunies-Ross v. The Commonwealth* (1984) 155 CLR 193, the majority held that the power of the Commonwealth "to acquire land for a public purpose" under the Lands Acquisition Act, 1955 (Cth.) is limited to an acquisiton of land which is needed or which it is proposed to use, apply or preserve for the advancement or achievement of a public purpose, and does not extend to the taking of land for the purpose of depriving the owner of it and thereby advance or achieve some more remote public purpose.

Murphy J, in an extraordinary judgment, held that if it was politically and socially desirable to exclude the plaintiff from his land, then that was a sufficient public purpose for the acquisition of the land (at 206). It will be recalled that the case concerned the compulsory acquisition of the ancestral home of the Clunies-Ross family on Cocos Island. Murphy J said, "The record shows what is in any event notorious, that under a species of colonial feudalism the Islands were held by the plaintiff's ancestors and the plaintiff's title to the house and land are the relics of that feudalism" (at 205). Murphy J also said: "The majority says that the political and social desirability or otherwise of the exclusion of the plaintiff and his family from the territory of Cocos (Keeling) Islands is irrelevant to the proceedings in this Court. I disagree. Of course, capricious acquisition of a citizen's home would not be "for a public purpose". That is not the case here. If political and social considerations indicate a rational purpose for the acquisition of the land, then under the Act, the Commonwealth is entitled to acquire it with just compensation' (at 206). His Honour also said, "It was open to the defendants (the Commonwealth) to decide that acquisition of the former feudal manor to extinguish the taint of feudalism and colonialism from an island territory, was for a public purpose" (at 208).

It seems clear that in the *Clunies-Ross* case Murphy J was, in effect, prepared to hold that land could be compulsorily acquired by the Commonwealth for the simple reason that the Commonwealth did not like that person's politics or held some distaste for the manner in which the landowner or his forebears formerly carried on their activities. This judgment and the other two judgments mentioned above suggest that Murphy J was less concerned with the rights of private citizens than with the power of government and in the area of administrative law Murphy J was far from being a civil libertarian.□

David Lloyd

A letter from the Managing Editor of CCH Australia Limited

Addressing an employee's claim for compensation for a debilitating disease caused by inhaling asbestos fibres, *de Jersey* J. of the Queensland Supreme Court[1] noted that the employer in this case should've been aware of and taken precautions against the dangers of asbestos; his Honour quoted an earlier expressed view that where there is developing knowledge, employers (and needless to say their legal advisers) must keep reasonably abreast of it and not be too slow to apply it.

Which is a long-winded introduction to a series of articles of interest to members of the bar currently being published in our ***Journal of Occupational Health and Safety.*** These articles concern the study of the distribution and determinants of disease in human populations — the term given to which is Occupational Epidemiology.

A good example of how that study operates was provided by a 1969 report which had suggested that pleural mesothelioma was associated with preceding occupationally-determined exposure to asbestos. This was an example of clinical research at its best where astute clinicians, seeing a cluster of cases with an unusual condition, "put two and two together" and came up with a probable causal relationship. A further interesting example in Australia of extension of knowledge, by epidemiological methods, was provided by the studies of asbestos miners who had worked in the Wittenoom Gorge in the Pilbara region.

By July 1978, 6,220 employees of a single operator, Australian Blue Asbestos, had been followed up for an average of 18.5 years from first employment. Over this time mesothelioma had been diagnosed in 26 of the men, a rate of 2.3 per 10,000 person-years at risk.

Since the background rate of mesothelioma occurrence is known to be negligible, an enormously strong association was demonstrated. For the same reason, it could be confidently stated that among the "costs" of blue asbestos mining in this population must be counted 2.3 cases of mesothelioma for every 10,000 person-years of exposure.

Certainly the articles are medically directed but their relevance to the law is obvious even from these introductory examples.

Counsel who, in misreading the response of the court, adds a bad point to good ones runs the risk, according to Michael Albery Q.C. (as quoted in *The Law Lords*), of that argument "being likened to the thirteenth chime of an unsound clock — it contaminates or detracts from all that has gone before."

The message in Chris Branson's article on Transcover in the Winter issue of Bar News is that the wind from that quarter isn't perhaps as ill as was initially apprehended.

It's therefore an appropriate time to push the long explanation of Transcover lately added to our ***Australian Torts Reporter.*** And of course any cases that do touch on this new scheme will be reported in that service with usual CCH expedition.

1. *Andrews v. S.C. Lohse & Co. & Ors* (1986) Australian Torts Reports ¶80-043.

If proof were needed, the publication this year of three general texts on the law of contract in Australia, each from a different publisher, seems to put it beyond doubt that there's no collusion in the legal publishing industry in this country.

The latest in this triptext is ***Law of Contract*** by David Allan & Mary Hiscock. David is the Professor of Business Law at Melbourne University and is long-famous for his contract lectures which start at the other end, that is he discusses remedies first.

However, his and Mary's book (she is a Reader in Law at the same university) starts at the beginning ... in that its first part, the province of contract law, looks at the development of early laws, the place of contract law in society today and at how contract problems arise and how they're solved. Finally — and in proper chronologic sequence — the end of the book looks at the future role of the law of contract.

Certainly these two thoroughly expert and articulate academics have written a thought-provoking book which they admit propounds a new categorisation of the concept of agreement that doesn't always have its counterpart in Ansonian concepts.

This clearly is a book that should be not merely read but rather intellectually savoured by those who find no little fascination in the way our contract law has evolved and is continuing to evolve.

We received a suggestion lately from a member of the Sydney bar that we should widen the case range of the cases reported in full text in our ***Australian & New Zealand Insurance Law Reporter*** by adding cases of commercial causes and maritime law ... in an antipodean imitation of Lloyd's Reports.

Our feeling is that it would be inappropriate to include these further varieties of cases in a service essentially directed at insurance law in all its aspects.

It's an interesting thought, however, and we appreciate ideas and innovative suggestions from the profession ... even if we don't act on every one.

Writing, obviously in a pre-pencil sharpener, pre-women's lib era, on *circumstancial evidence* Mark Twain penned this:

> "Even the cleverest and most perfect circumstantial evidence is likely to be at fault after all, and therefore ought to be received with great caution. Take the case of any pencil sharpened by any woman; if you have witnesses, you will find she did it with a knife, but if you take simply the aspect of the pencil, you will say she did it with her teeth."

If you're interested in seeing any of the publications noted on this page — or indeed any publication from the CCH group — contact CCH Australia Limited (02) 888 2555.

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Australian Bar Association Conference with the Irish and English Bars

London 6-9 July, 1987

At the opening ceremony in the Old Hall at Lincoln's Inn, Sir John Donaldson, the Master of the Rolls complimented the organisers on their prescience in arriving in London in time for Pat Cash's win at Wimbledon and in time for the opening of Harrod' s summer sale.

The conference also coincided with the commencement of Jeffrey Archer's libel case against "The Star", which was being heard a few yards away in The Strand. It was a major distraction throughout the week of the conference. It was also a cruel reminder of how bad working conditions are in courts without air-conditioning during the sticky February weather in Sydney. London was in the grip of a heat wave for the whole week. The court was crowded. Twelve jury men and women were crowded together in their shirt sleeves in a corner of the court. Counsel and Judge perspired in robes and the press sat like vultures at a small table in a corner beside the associate's desk.

Upwards of 300 Australian barristers and their spouses attended the London conference, the first organised by the Australian Bar Association outside Australia.

At ten conference sessions papers of high standard were presented by specialists from Australia and England giving the participants an opportunity to compare and contrast their respective national preoccupations. The papers ranged over administrative law, international commercial disputes, takeovers, negligence etc. It is a pity that copies of the papers were not distributed before the well-attended sessions, but the organisers hope to make them available to those who participated.

Sir Harry Gibbs opened the conference and participated throughout. Those giving papers included Sir Ronald Wilson, Mr. Justice Priestley, Sir Maurice Byers Q.C. and two members of the English Court of Appeal, Sir Michael Kerr and Sir Harry Woolf.

The social life of the conference was not as frenetic as that which was to follow in Dublin. A cocktail party at Gray's Inn enabled those attending the conference to meet one another and representatives of the English Bench and Bar. Most participants lunched at one or more of the Inns and some sampled the fare at Pomeroys Bar (El Vino's) in Fleet Street. Chateau Fleet Street could not be found on the wine list.□

John Trew Q.C.

Ireland 10 - 15 July, 1987

This gathering was an unmitigated success. The Irish are great entertainers in both senses of the word. The quality of the papers was high, the commentary lively and the participation solid and constructive. The only unhappy note was the early departure of (our and) A.B.A.'s President, Gyles Q.C. due to a family bereavement.

After registration, the first major event was a Joint Bars Dinner at the Kings Inns. The hosts would accept no contribution to this function at which Veuve Clicquot flowed. One hundred and thirty Australians and one hundred and twenty Irish attended and the rafters ultimately rang with song. After a fine meal, individual songs, poems and other performances led into community singing led by an Irish Master of Ceremonies. Heads were held and not too high on Sunday morning. A cocktail party at the Kings Inns hosted by A.B.A. eased the pain in the evening, but most opted for an early night.

"Just fake it from the top, Peter."
(Chernov Q.C. acts as M.C.)

On Monday 13 July 1987, after formal openings by Chernov Q.C. and Seamus MacKenna S.C. on behalf of the two Bars, a most entertaining address was delivered by Sir Gerard Brennan K.B.E. He traced the influences of Ireland and Irish lawyers on Australian jurisprudence and upon our judiciary with scholarship and humour.

The second session was led by Paddy McEntee S.C., Q.C. of the Northern Ireland Bar, who spoke entertainingly on extradition, with particular reference to the requirement of the English law that a prime facie case be shown before an order is made. He suggested the obsolescence of this rule. He was followed by Temby Q.C. who spoke on extradition by reference to the complex Australian Federal/State systems and commented on the failure to extradite Trimbole. Justice McCarthy of the Irish Supreme Court and Dwyer Q.C. were precise and informative in their commentary, as well as humorous.

The environmental law segment was led by Ms Yvonne Scammell, who outlined the structure of environmental law in the Republic of Ireland. Of special interest was her description of a system of compensation for disappointed developers! This system, she told us, has led to hopeless development applications being made so as to entitle the 'developer' to compensation for loss of profits on the development. Incredible, but very Irish!

Peter O'Callaghan Q.C. (Victoria) spoke vehemently on the impact of "greenie" pressure on common law rights and progress, to the extent that Hemmings Q.C. felt the need to announce an appearance for the defendant, the environmental movement!

On Tuesday 14 August 1987, sad developments in personal injury compensation were outlined. Barnard Q.C. of Victoria described the remnants of the common law with $15,000 thresholds, non-compensation for pecuniary loss other than statutory weekly payments and limits on the cost of care and general damages. The summation seems to be that very large cases will be better off than in New South Wales under Transcover.

Dermott O'Donovan of the Irish Bar described the Irish situation which is as ours was in the middle 60's: they fear only the abolition of juries, "the death knell" of advocates. Chairman Judge Flannery was quick to point out that the abolition of juries in such cases in New South Wales had improved the plaintiff's position. Others wondered aloud whether the quality of advocacy had been maintained. Flannery's position as the only leprechaun Judge in the English speaking world was maintained, notwithstanding our presence in his ancestor's homeland.

The only leprechaun Judge in the English speaking world.

"I think it was a big mistake to let the Australians start on the Guinness and 'Danny Boy' before your paper on ECC Customs regulations Judge Flaherty."

Judge Frank McGrath delivered a spirited address on the evils of Workcover and Transcover, striking long-term fear into Irish hearts and provoking loud and heartfelt applause from the Australian Bar.

The last session was on media law. John Sackar led debate with especial emphasis on the defence of qualified privilege in its most recent form. He was deft, thoughtful and humorous.

Adrian Hardiman of the Irish Bar was fast, pithy and hilarious, as well as informative. Time prevented more than one joke from the irrepressible Winneke Q.C. (Victoria) and Patrick O'Higgins (truly) rounded the session off with jest and with an invitation to "a large Guinness before lunch".

The dinner dance at the Fitzpatricks Castle Hotel which ended the conference began decorously enough. The piping of the lambs surprised the Scots who expected haggis.

The speeches were mercifully short (at least until the informal intervention of the Townsville Bar) Seamus McKenna S.C. maintained to the very end his determination to call Alec Chernov Q.C., "Peter."

Decorum began to slip at about midnight and of those who were still present at 3.40 am, the least said the better.

A wonderful conference!

John Coombs Q.C.

Community Singing

Decorum began to slip around midnight . . .

Changing Roles

The following people have had their names removed at their own request from the Roll of Barristers to the Roll of Solicitors.

22 May 1987
Samir Benab Dalla
Zigurds Lejins
Raymond William Neale
Bradley Henry Swebeck
Lorraine Monica Sykes
Mariella Lizier
John Hayward Mant
Balbir Singh Sidhu
Joanne Maree Spinks

3 July 1987
Kenneth Hop Shing So
Robert Deniston Strong
Robert Alexander Spence
Robert Angus Cameron
John David Morrison

7 August 1987
Ian Love Dunn
Robert Leslie Deutsch
John Alexander Moses
John Lloyd Scholtz
Wayne John Cooper
Robinah Erina Kiyingi
Thomas Michael Knapp
Roderick Alexander Ian Storie
Michael Robert Aitken
Ian Roy Coleman

Australian Bar Association Cricket Tour to England and Ireland - July 1987

The recent Law Conference in London and Ireland coincided with a Cricket Tour organised by Bill Gillard Q.C. of the Victorian Bar and Stirling Hamman. The tour followed the highly successful tour in 1982 when the Australian Bar Association team was led by Roger Gyles Q.C. The team initially comprised Stirling Hamman, Larry King, Thos. Hodgson and Peter Maiden from New South Wales, Bill Gillard Q.C., Bruce McTaggart and Philip Trigar from Victoria and Judge Bob Hall and Tony Smith from Queensland. Other players joined the touring party over ensuing weeks.

The first week's cricket was based in the West Country around Bath. Four games were played on Village Greens in Gloucestershire and Wiltshire. The local hospitality was overwhelming and the team had great trouble in acquiring the fitness or form that was to be required for the two "Test Matches" to be played against the English and Irish Bars. In the initial games only Hall showed form with the bat. King was suffering with the dreaded flu, but managed to bowl a substantial number of overs. Maiden was stricken down with a back complaint and unable to play. As a consequence Hodgson kept wicket for the first three matches.

The First Test Match against the English Bar was played at Radley College near Oxford. Gyles Q.C., who came virtually straight from Heathrow, captained the side and Callaway Q.C. was included to open the batting. The Australian Bar scored 222 for 8 from 45 overs. The Victorian contingent of McTaggart and Gillard Q.C. scored 50 and 49 respectively, Smith made 42 and Gyles 36. The English Bar Association managed to score 186 in reply with Hamman taking 4 for 39 and McTaggart 3 for 23. Thus the Australian team retained the "Ashes".

The next game on tour was against the South Hamstead club in London for whom Chandra Sandrasegara once played. Co-opted to the game were Rod Peters, John Ireland and Peter Gray. The opposition declared at 7 for 187 leaving the Australian Bar to score the runs in 42 overs in dark and threatening conditions. After a poor start Hamman came to the crease at 3 for 21 and scored an impressive 79. Gillard scored 27 before he was run out for the second consecutive time and at 5 for 137 the prospects of victory appeared slim. Gray (13) and Hodgson (16) kept the scoreboard ticking over, however it was Ireland who emerged as the hero with a swashbuckling 26. A towering six off the second last ball of the match by Ireland gave the Australian Bar a thrilling victory. The only sour note was that Tony Smith who had limped from the field had suffered a serious injury to his leg which caused him to miss the remainder of the tour.

Flushed with success the team travelled to Dublin to play the Irish Bar at the famous Trinity College ground. On the day of the game the team was taken to the University Club at St. Stephen's Green. A magnificent luncheon was provided by our hosts who treated us to some vintage French wines. The demon fast bowler, Larry King, who had imbibed with great enthusiasm was, as a consequence, unfit to open the bowling. Doubtless he was celebrating the announcement, the day before, that he had been appointed a Justice of the Supreme Court of New Guinea.

Taking the field against Capt. Hawkins XI

The Australian Bar declared at 5 for 149 with significant contributions made by Gillard Q.C. (47 not out) and Peter Gray (20). The Irish batted competently and in the last over of the game scored the winning run. They now claim to be world champions. Their hospitality that evening at the Kings Inn was overwhelming and no doubt reflected their victory.

Matches followed at Dumfries (the Bar lost) and Carlisle (the Bar won). Following Carlisle the tour went through the Yorkshire Dales to Harrogate and Lincoln. Unfortunately, however, no cricket was played, because of the inclement weather.

The touring party then travelled to Stratford-upon-Avon where Thos. Hodgson had organised the game of the tour against Captain Hawkins' XI at his privately owned ground near Daventry in Northamptonshire. The oval was so beautiful that the match was delayed as a number of the team behaved like Japanese tourists in taking masses of photographs. This was the quintessential English cricket ground with its thatched roof pavilion surrounded by roses in full bloom. For many to play at this gound was the highlight of the tour. Captain Hawkins' XI declared at 8 for 155. In reply the Bar could only muster 106. The result, however, was of little significance as it was such a grand and memorable occasion.

The final match of the tour was played against Wellesbourne near Stratford. The Australian Bar failed by 20 runs to pass the Wellesbourne total of 156.

In all, notwithstanding the fact that more matches were lost than won, an enjoyable time was had by all. Gillard Q.C. batted with great consistency and top scored on a number of occasions. He is a young player for the future! Hamman and Hall, despite their running between wickets, played some notable innings. Phil Trigar fielded brilliantly and held five catches, one of which at backward point against Wellesbourne was of classic status. The bowling was consistent and honours were spread out amongst the bowlers. The team, however, lacked a real strike bowler.

The tour was punctuated with numerous incidents, the most memorable of which included Gillard Q.C. and Hodgson remaining in the Ladbroke Hotel in Bath for some 30 minutes after it had been evacuated after a bomb scare, having totally ignored the alarm as a "Fawlty Towers" fire drill. Hamman's long distance driving and also his negotiation with a female hotel proprietor to obtain a refund of a deposit; Smith's means of drying his cricket gear from car windows on the way to matches and King's apoplectic fit of laughter after witnessing Hodgson run himself out at Stapleton.

The tour was a great success and all members who are interested in cricket are encouraged to participate in the future. □

Peter Maiden and Thos Hodgson.

District Court (Criminal Jurisdiction) Listing

The Bar Council has been concerned for some time about the running list system introduced in the Sydney District Court on 2 June 1986 in respect to criminal trials. It has made representations concerning the prejudicial effect of the system on accused both because of the uncertainty attending the trial date and the ability to retain counsel, properly briefed, for the day the trial comes on. ***Tony Bellanto*** *spoke to the Chief Judge of the District Court, his Honour Judge Staunton C.B.E., Q.C., about the problems.*

"If I were at the bar I wouldn't like this system, but . . . " — His Honour the Chief Judge.

Practitioners in criminal trial litigation in the District Court will have experienced the frustrations of the "running list".

This system introduced in June 1986 was conceived as a method of dealing with:

(1) An unacceptable number of trials not reached, particularly high priority cases; and

(2) Ineffective utilization of available court time.

The Criminal Procedure Act, 1986 (proclaimed 13.7.87) and regulations, with some minor changes continues the present system.

The Act creates a Criminal Listing Directorate responsible for listing cases before the Supreme and District Courts. The changes provide for the Directorate to list Category C on a Wednesday and in respect of lower category B cases to make a "considered estimate" on the Thursday or Friday of the preceding week and in an appropriate case advise the parties the case will not start until the Wednesday or Thursday of the following week. Hopefully this will operate next year.

It seems therefore that the imprecise listing arrangements are to continue, inhibiting proper preparation of cases — disrupting counsel's preparation of work and inconveniencing clients and witnesses with its inherent uncertainties.

Additionally, the cost to the non-legally aided client and to the community where legal aid is granted is substantial when cases are not reached or where additional days (or weeks) must be put aside to meet the uncertainty of commencement and completion of the trial.

From the Crown point of view Counsel often does not get the brief until shortly before the trial resulting in inadequate time for preparation. This was one of the matters that prompted Crown Prosecutors (according to the Sydney Morning Herald of 29th July, 1987) to "work to rule" and rebel against "major defects in the system".

Is there a solution?

Recent discussions with the Chief Judge of the District Court indicated he stood firm in his view that there should not be a return to the old system of specific trial dates and that the current system of running list will continue with the changes referred to supra.

His Honour made the following points:

(a) The initial reason for changing to the running list was the lack of Criminal Court accommodation in Sydney and the need for custody cases to have priority. There was an ever increasing backlog of cases, limited resources and facilities.

In 1975 in Sydney there were four criminal trial courts with a backlog of 250 cases. Now there are seven courts with a backlog of 1,100 cases.

In the Western District there are 1,300 trials awaiting listing. Statewide there are 3,500 trials awaiting listing.

(b) Cases today are longer.

(c) Commonwealth prosecutions comprise about 7% of cases but consume 25% of Court time.

(d) Proposals for reform

(i) The provision of more Court accommodation in Sydney and Parramatta. The Downing Centre (to be completed by 1990) will house all criminal trial courts (14) plus two additional courts. The Hospital Road complex will hear civil cases only. Courts 15 and 16 Queen's Square are expected to be demolished. Eight District Courts are planned for Parramatta.
(It is significant that the present proposal was put to the Government in 1982 but was rejected due to insufficient funds.)

(ii) The creation of a pool of Judges from the District/Supreme Court to do criminal work in the city and country so that if a Supreme Court trial collapsed the Judge could draw on work in the District Court.

(iii) It is expected Transcover will reduce the overall Court time in civil cases. However this would not free Criminal Court accommodation.

(iv) Streamlining pre-trial procedures by providing for determination of issues in the absence of the jury, eg. admissibility of evidence, inspection of documents, admission of facts, etc.

The Criminal Procedure Act & Regulations, lays down guidelines for listing following committal for trial. Within two weeks for custody matters and six weeks for "bail" cases, the Directorate will make contact with the Prosecution and defence to obtain information to assist in listing pre-trial. The Prosecution will be required to file a "Notice of Readiness to Proceed", within a prescribed time. A copy of the indictment is to be provided at this time.

The Act requires the matter to be brought before the Court within three months in custody cases and nine months in non-custody cases. The Court may inquire as to the the reasons for any delay in filing the Notice of Readiness and may either —

(a) extend the time for filing,

(b) refer the matter to the listing Directorate for the allocation of a hearing date by direction, or

(c) make such other order as the Court sees fit.

These measures may help to stem or even reduce the appalling backlog of criminal cases in the pipeline, however the immediate future looks grim — and one must surely ask how is it that a system of **justice** could be allowed to fall into such a lamentable state of disrepair.

According to statistics published in the Sydney Morning Herald of 20th July, 1987 if present trends continue it is estimated there will be between 6,000 and 7,000 trials outstanding by 1990.□

Obituaries

Graham Anthony Crawford

Graham Crawford died on 25 August, 1987 at the age of 51. He was admitted to the New South Wales Bar in 1972 and had a large Common Law practice.

"Gruff", as he was known to all since his days at Riverview, was first admitted as a solicitor after graduating in Law from the University of Sydney. Thereafter, he acquired a wealth of business experience working for some years for a property developer, in insurance and for McKinsey & Co., management consultants. His skills as an organiser of people and projects were further refined during the 1966 Federal Elections when he tried to wrest the safe Labor seat of Lang from the sitting member. He was unsuccessful, but obtained an 11% swing to the Liberal Party.

The experience he gained in business was put to the service of the Bar generally when he was invited to join the Board of Counsel's Chambers Ltd. in 1977. He served as a Director until his resignation towards the end of 1986. He served also as one of the first members of the Young Barristers' Committee when it was established by the Bar Association.

Gruff Crawford will be remembered as a forceful and effective trial advocate. He meticulously prepared his cases. He combed his briefs for inconsistencies with which to confront his opponents' witnesses during cross-examination.

He was fiercely loyal to his family and friends. He was generous with his time and his kindness. We share the feeling of loss suffered by his wife Kim and their three daughters and four sons.□

John Trew Q.C.

Graham Crawford

Neil Mackerras B.A. LL.B.

The news of Neil's recent sudden and unexpected death comes as a great shock for all of us who knew him during his distinguished years of practice at the Bar in Sydney. In his chosen field in the law of Landlord and Tenant, he made a strong mark both as an advocate and text book writer of renown. Assuming the mantle of Mr. Justice (Bob) Hope and with the assistance of John Dunford Q.C., he produced the only text book in New South Wales which was, and is, in its own right, confined to an annotated consideration of the Landlord and Tenant (Amendment) Act, 1948, as amended. This was produced in 1971 and is still, in spite of subsequent amendments and changes in the law, extremely useful.

When tenancy litigation reduced in the 70's, Neil joined the Aboriginal Legal Service and performed wonders for his clients in the area of Armidale; where he subsequently went into private practice as a Solicitor.

Those who knew Neil as I did, will always remember his courtesy and consideration as an opponent and his charm and delightful sense of humour as a friend and colleague. I was not privileged to know his family personally, but I know it was a large one to whom he was dearly devoted. He was an honest and sincere man with steadfast religious convictions. I recall once when we were opposed in a case, he ear-bashed me over morning coffee about his dialogue with the Catholic Archbishop of Sydney concerning Vatican II. He was both interesting and informative.

I am sure that all of us at the Bar who knew him will join with me in grief at his passing and extend our deepest sympathy to his loved ones.□

Evan Lewis

Book Review

Equity and Commercial Relationships — (Finn (Ed), Law Book Co, 1987. $54)

Professor Finn has produced another volume of essays. This one takes as its theme the modern infusion of select equitable doctrines into the field of commercial law.

Following the success of his *Essays in Equity,* Law Book Co, 1985 a seminar held at the Australian National University and attended by a small group of judges, practitioners and academics provided the basis for this work. The result is a collection of essays of immense practical value to the commercial lawyer.

The book contains a well balanced selection of essays that address the needs of the commercial draftsman, the barrister involved in commercial litigation and even the commercial law reformer. Its variety provides to the busy browser many opportunities for 'cherry picking' novel ideas but its depth will establish it as a sound future reference work. If I were ever foolish enough to take a legal reference book away on a beach holiday this work would be a prime candidate for the journey.

The New South Wales Bar may even take some parochial pride in the numbers of its present and former members whose contributions have been included by the editor. Mr Justice Kearney writes on "Accounting for a Fiduciary's Gains in Commercial Contexts", Mr Justice Priestley on "The Romalpa Clause and the Quistclose Trust" and Dyson Heydon on "Directors' duties and the Company's Interests." Mr Justice McClelland contributes a commentary to a paper by W J Gough "The Floating Charge: Traditional Themes and New Directions."

Interspersed with the to-be-expected discussions about the nature of the constructive trust and its remedial flexibility there are papers to inspire the legal lateral thinker. One that caught my fancy was "Modern Portfolio Theory and the Investment of Pension Funds" by W A Lee, a reader in law at the University of Queensland. Lee points up some of the insights of the 1984 Monaghan Report into the management of the Commonwealth's Superannuation Investment Trust. Dealing with the investment of large trust funds Lee explains how the 'efficient capital market hypothesis' (that the price of a share quoted on the stockmarket reflects immediately all publicly available information concerning that share at that time) has led to 'the modern portfolio theory' of management of such funds. On a long term basis the modern portfolio theory counsels an Australian trustee of a large fund to invest in all the shares in the All Ordinaries Index in proportion to the capitalization of each company. Lee then considers the practical limits on the powers and liabilities of a trustee who wishes to follow the modern portfolio theory by matching its investments to the All Ordinaries Index.

Some of the other more traditional papers deserve special comment. For those who are more than occasionally perplexed by the rules in relation to priorities among charges over company assets, W J Gough's paper provides an invaluable summary of the present priority rules. Gough also discusses the latest designer features of the floating charge and the likely future strategies of its draftsmen. He concludes his paper by pointing out that there is no obstacle in authority to prevent Australian judges using the equitable doctrine of constructive notice to restore the floating charge to a position of greater commercial usefulness.

Most of the judicial contributors to these essays praise the constructive and flexible role played by equity in the commercial context. In his paper Mr Justice Kearney includes an illuminating discussion about the accountability of fiduciaries for gains from activities that are not strictly in breach of fiduciary duty but are indirectly associated with such a breach. He also discusses the capacity of the Courts to apportion property and make allowances to fix the extent of the gain for which a defaulting fiduciary is to be held accountable.

In contrast Professor R.P. Austin's paper "Fiduciary Accountability for Business Opportunities" is more critical. He bemoans the fact that Australian Courts have not yet followed their United States counterparts and established a 'special business opportunity doctrine' applicable to the unauthorized profit-making activities of full-time executive commercial fiduciaries. Austin concludes:

> "But equity and commerce will co-exist in an atmosphere of critical hostility unless equity judges reinforce their broad fiduciary incantations, their 'counsels of prudence' with some more specific rules or themes which will make the application of fiduciary principles more predictable to businessmen and their legal advisers."

Finally, for any barrister needing inspiration in a matter involving joint ventures, trading trusts, shareholder agreements or directors' duties, a few minutes with this book will not be wasted.□

M.J. Slattery

Hockey

Mirabile Dictu!

On Sunday 9th August, 1987 at Queen Elizabeth Reserve, West Lindfield the Bar beat the Solicitors 4-2 (Warburton 3 goals, L.G. Stone 1) in the annual hockey match and regained the coveted Noonan Trophy for the first time since 1973.

The Bar played determined and vigorous hockey throughout and deserved to win. They were significantly assisted by the enthusiastic barracking from, amongst others, the President, the Registrar and Meares Q.C.

Katzmann again was magnificent in goal and she successfully withstood a number of umpire assisted attacks by the Solicitors late in the match involving an extravagance of short corners of dubious necessity. As wing halves Graham Q.C., and Masterman Q.C., were busy and effective. As in the past few years, Warburton was dominant as centre forward and indeed, his was a match winning performance, properly rewarded by the award to him of the Player (formerly Man) of the Match trophy. Warburton was well supported in the forward line by Bellanto and L.G. Stone and G.H. Johnson terrorized the young Solicitors with a vigorous spell on the field in the second half.

The post-match celebrations were joyous and excessive and continued well into the evening. Callaghan remains confident that the Bar will win (again!) next year.□

Brysonalia

Bryson J:
(1) "The real world is only a matter of perception in any event, but the probabilities are that it is also there".

(2) Learned Senior Counsel (after digressing along many tangential branches) "If I may continue with the Affidavit your Honour, and move along forward".

Bryson J:
"Really Mr. (Learned Senior Counsel), you should not offer me such temptations".

Golf

The annual match against the Services was played this year at Elanora Country Club on Friday 17 July 1987. The match had been played for some years past at Royal Sydney Golf Club.

This match was first played in 1933, when there was only one trophy for competition. According to Judge Head, who first played in 1936, all the games before the war were played at the Lakes Golf Club. When the competition resumed in 1946, the matches were played at Elanora Country Club, and later on there was a move to the Australian, and then to Royal Sydney. Two additional trophies were introduced in 1946 and 1949, and since 1949 there have been three separate competitions, first,an A-Grade (with a combined handicap up to 29); secondly, a B-Grade competition (with a combined handicap of 30 and over); and an aggregate competition.

This year, for the second successive year, the Bench and Bar team won all three trophies. 21 matches were played. Although the Services team has completed the hat trick on many occasions, the Bench and Bar team has only achieved complete success before in 1955 and 1972.

Tony Bannon and Peter Barbour had the best score with 47 points. Good scores (in order) were recorded by Judges David Freeman and Brian Wall; Dennis Flaherty and Jeff Ryder; Alan Hughes and Neil Francey; and John Steele and Ian Roberts. Stephen Finch hit the longest drive in the B-Grade competition.

We were all made very comfortable at the Club, and those who had difficulty with the greens could admire the beauty of the course.

A small team is playing a match against the Canberra Bar in October. The next regular match will be the game against the Solicitors at the Manly Golf Club on 28 January 1988.□

Paul Webb Q.C.

ABA V ENGLISH BAR.

Motions & Mentions

Bar Council Discusses Proposed Guardianship Legislation

The N.S.W. Council for Intellectual Disability sought the Bar Council's support for proposed N.S.W. Legislation dealing with the Guardianship of Intellectually Disabled adults. The legislation envisages the establishment of a small tribunal comprising people with formal and informal training to make decisions about the appropriateness of guardianship orders for intellectually disabled adults and to make those orders. Similar legislation generated some controversy in Victoria regarding the question whether it is appropriate to commit such powers to such a tribunal in preference to the Supreme Court.

The Bar Council considered that question. It was not in a position to reach a concluded view because the legislation was not available, however it reached the following preliminary views.

1. There appears to be at present a gap in the law regarding decision-making for intellectually disabled adults who are unable to make their own decisions. In many instances, this is filled on a **de facto** basis, sometimes unsatisfactorily.
2. The proposal is that the gap be filled by the appointment of guardians, plenary or restricted, under the new legislation. In some instances, such as major medical procedures, decisions would be shared by the guardian and the tribunal itself. This proposal obviously raises the questions whether it is more appropriate for such fundamental rights to be dealt with by such a tribunal or by the Supreme Court.
3. The Bar Council is of the view that the Supreme Court is the appropriate repository for the powers to be given to the new tribunal.
   (a) Under the Protected Estates Act, 1983, it is the Supreme Court which, when satisfied that a person is incapable of managing his or her affairs, is given the power to order that the estate of that person be subject to management under the Act. Stipendiary Magistrates and the Mental Health Review Tribunal are given certain powers in relation to persons who come within the ambit of the Mental Health Act, 1983. But if the legislature sees fit to give to the Supreme Court power over an incapable person's money and property then **a fortiori** it should be the Court which has power to appoint a guardian who has much more power relating to an incapable person's person and social habits. The Council is of the view that it is inappropriate to have powers over an individual and over his or her property resting in two separate institutions and, further more, that the only appropriate institution in those circumstances should be the Supreme Court.
   (b) The power which a guardian has over a disabled person would include controlling where the person is to live or work, what education the person is to have and whether the person should have an operation. Whether an individual is so incapable that control over those areas relating to him should be placed in the hands of another is, in the Council's view, a question which is fundamental to that individual's rights and should only be determined by the Supreme Court.
   (c) The cost of establishing and running the proposed Tribunal is not warranted when the Supreme Court can already provide the needed facility.□

Honours Conferred

In May, Macquarie University, celebrating its twenty-first year of teaching, awarded honorary degrees as Doctor of Laws *honoris causa* to Sir Garfield Barwick, A.K., G.C.M.G., and retired District Court Judge, John Lincoln. Sir Garfield was the first Chancellor of the University, serving in that position from 1967 to 1978. Judge Lincoln was one of the moving forces whose work led to the founding of the University and he has served as a member of the University Council since 1963, and as Deputy Chancellor since 1976.

Classified Advertisements

Memorabilia

Judge Wheelahan

Overwhelmed by news of his Honour's appointment and cut by the allegation of plagiarism in his speech, Roderick Pitt Meagher Q.C. burst into prose to celebrate the occasion.

If one asks a citizen of Armidale who are the most famous lawyers associated with the town he will reply at once Mr Justice Kitto (who has long lived there and been Chancellor of its University) and his Honour Judge Dennis Anthony Wheelahan (who was born there 53 years ago, but has never lived, or been game to practise there).

His Honour was in due course banished from the Northern Tablelands to Sydney to be educated (if that is the word) at Cranbrook, where his colleagues found him a trifle precious. This was followed by an LL.B course at Sydney University.

On arrival at the Bar, he read with D.F. Rofe, who became a close friend and idol.

At the Bar he had an enormous practice in the grubbier aspects of common law: motor car cases, industrial accidents, insurance company claims managers *et tout cela.* He particularly enjoyed displaying his talents in these fields in dark places where he went unobserved: Goulburn, for example.

On his rare visits to Sydney, he initially practised from Chambers on the wrong end of the distinguished 8th Floor, where he played bongo-drum music and was tonsured by visiting barbers.

He there became acquainted with Jim Baldock, another friend and idol.

He leaped into public prominence by spending some years on the Bar Council, most of them as its Honorary Secretary. He survived not only the pleasant years, but also a stint under the choleric McHugh and another under the glacial A.M. Gleeson. He narrowly excaped being fed to the fish.

His Honour's knowledge of the law was intuitive and vocal rather than learned and subtle. He was an excellent licensee of the Bar's club premises. He was always flamboyant. He favoured clothes like velvet suits (a la Oscar Wilde), yellow waistcoats, duck trousers, coats in bold checks and patent leather shoes. The whole ensemble was always surmounted by a rose. He gave the impression of trying to be so conspicuous that he could at all times be spotted by overhead aircraft. He will be a liberated County Court version of Lord Denning.

His greatest contribution to the Bar was to organise, last year, a large Ball at Sydney University. One thousand elegant judges, barristers and their glamorous wives dined from lavish food and drank splendid wines in a flower-bedecked marquee, to the accompaniment of never-ending dance music. No felt needs were satisfied; no public purpose was served; the proceeds were not donated to charity. People simply revelled in the fun and elegance.

His Honour was an accomplished sportsman, excelling at cricket, football, hockey, tennis and ping-pong. He boasts of playing better golf than Mr Justice McInerney.

As befits someone who is both a *bon vivant* and a *bon viveur,* he is one of Sydney's leading restaurateurs, one source of his considerable wealth.

He married, above his station, a rich and beautiful heiress, Margaret McDonald.□

Fifty — Not Out

Clive Barker (Dick) Dillon celebrated his 50th year as a Barrister to the New South Wales Bar this year. Members of the Third Floor celebrated his achievement with a dinner in his honour at Tattersall's Club on Friday 29th May 1987.

Many notable guests were in attendance including The Chief Justice Sir Laurence Street, Mr. Justice Slattery, Sir William Prentice, Mr. Justice Perrignon and Alec Shand Q.C. who was representing the N.S.W. Bar Association.

Dick was educated at North Sydney Boys High School, Sydney Grammar School and Sydney University. He served his articles with Faithfull Maddock and Baldock and became associate to Owen J. and Milner Stephen J. Dick was admitted to the Bar on 28th May 1937. He commenced practice in Oxford Chambers, having read with Les Herron.

Dick was commissioned in the R.A.N.R. in 1936 and mobilized in October 1939. He volunteered for service with Britain's Royal Navy and left for war early in 1940. He started his naval career on H.M. Trawler Alouette as a First Lieutenant in the Atlantic and North Sea and in the occupation of the Faero Islands. Subsequently aboard various larger ships he served with the Mediterranean Fleet (where his destroyer Napier was badly bombed during the evacuation of Crete), on escort duties in the Atlantic Ocean and the North Sea in the Eastern Fleet (including the 1942 Easter raid on Ceylon) and on the convoys to Murmansk.

Dick holds Volunteer Reserve Decoration with 2 clasps all campaign stars and clasps (except air crew Europe and 8th Army clasp) all medals including the Greek Medal for Crete and the Russian (Forty years of victory in the Great Patriotic War 1941-1945) medal which was awarded to Dick in Canberra on Friday the 8th May 1987 by the Soviet Ambassador, Mr. Eugeny Samoteikin.

On his return Dick recommenced practice at the Bar and still practices on the 3rd Floor Wentworth Chambers.

Incidentally, in all his war stunts Dick did not suffer so much as a scratch as a result of any action and he was only scared once — "from 1939 to 1945".□

Chief Justice Sir Laurence Street, Dick Dillon and Alec Shand Q.C. presenting Dick with 2 books of the Royal Australian Navy history.