Bar News

The journal of the NSW Bar Association

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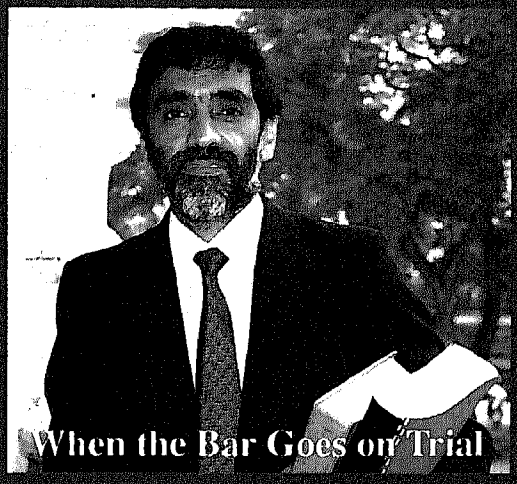

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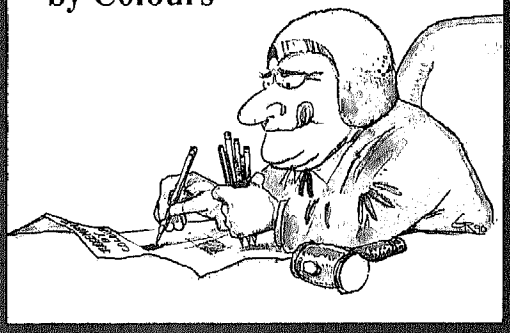

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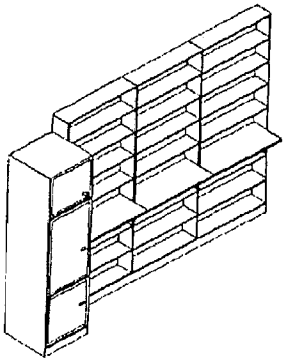

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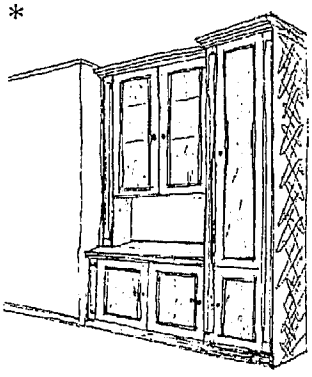

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in this issue.....

Bar Notes

The 1990 ABA Conference

The Fourth Australian Bar Association Conference was held in Darwin from 7-12 July. The conference is a biennial event; the three previous conferences being held in Surfers Paradise, Alice Springs and Yulara and Townsville respectively. The conference was attended by about two hundred barristers, judges and accompanying persons but such is the conservatism of the bar that every accompanying person was of a different sex to the accompanying delegate. This is certainly not the case at international law conferences and future organisers may well have to consider whether this indicates some breach of the anti-discrimination legislation.

The four days of sessions covered four main themes. The first was Independence of the Judiciary, with particular emphasis on the problems associated with professional misconduct and removal of judges. The second concerned the erosion of the protection against self-incrimination before Tribunals and courts. In the course of these discussions a particularly horrifying account was given of the procedures of the new Victorian Guardianship and Administration Board which, applying procedures which would make an old-line Chinese communist proud, makes decisions which read like the script of "A Streetcar Named Desire" in relation to the less competent members of the community.

The third day was devoted to problems associated with long civil and criminal trials and the management techniques which barristers and judges need to develop in relation to them. Young J. of our Supreme Court was able to point out that, although a number of long cases had been set down before him, no proceedings in front of him had ever run more than three weeks. Differing views are held as to what this indicates.

The final day was devoted to three aspects of a barrister's practice: the need to develop alternative dispute resolution techniques, the acquisition of proper skills in the leading of evidence and cross-examination and a paper enticingly entitled "What Every Barrister Needs to Know About Capital Gains Tax and Income Tax". The main message from this last paper was that attending law conferences is still tax deductible.

The Darwin Bar provided an enjoyable, if somewhat alcoholic, social programme of which the highlight was the final banquet on 12 July. Each state and territory was required to act out a short sketch. A bench comprising Toohey J., Handley J.A. and Judge Gunning of the District Court of Western Australia listened to sketches by New South Wales, Victoria, Queensland, Western Australia, the Australian Capital Territory and Darwin. Tasmania was not represented and the South Australians declined to perform. The bench unanimously decided that all of the sketches presented were of negative merit and accordingly that the winners were South Australia, zero being the highest score. This result was somewhat surprising in the face of a sophisticated attempt by the New South Wales team to corrupt the Bench by bribery.

In accordance with tradition, it is likely that the conference will make a loss which will be paid for by the Bars of Australia. This is considered to be appropriate on the basis that those who do not attend ought to be subjected to a financial disadvantage in order to encourage them to attend in the future.

The next conference will be in 1992, probably in Broome or Cairns. On the basis of precedent, it should be worth attending. ❑ D.M.J. Bennett QC

Cameras in ICAC: The Committee Reports

Readers with a high boredom threshold may recall the article "Lights, Camera: Cross Examination" in the last issue of *Bar News*, which dealt with proposals for televising of ICAC and, by extension, courtroom proceedings.

Subsequent to the writing of that article, in a report published in June 1990[1] the Parliamentary Committee on the ICAC recommended that ICAC proceedings not be televised, but that the Attorney General appoint a working party to report on means of improving electronic media coverage of court proceedings in NSW.

The Committee differentiated between the ICAC and court proceedings by focussing on the investigative, pre-trial role of ICAC and especially the power of ICAC to compel answers to questions which would be inadmissible in subsequent proceedings.[2] The Committee said "what may be a 'balanced and fair report' of an ICAC hearing may be a report of evidence totally inadmissible in a subsequent trial and the sensational nature of and wide publicity given to many ICAC hearings may well prejudice a potential jury accordingly".[3]

On the other hand, the Committee did not see similar problems arising in the case of televising of actual trials, and found that, given the British Bar report recommending televising of trials, that the televising of NSW courts should be examined in detail.[4]

A number of bodies, including the Bar Association, and some individuals made submissions to the Committee. Although no new arguments for or against televising proceedings appear to have been canvassed, a succinct summary of the problems the proposal poses was given in a written submission by noted media academic Professor Henry Mayer. Professor Mayer, as paraphrased by the Committee, said that "television was a 'very poor provider of accurate information', and that televising hearings would therefore detract from, rather than contribute towards, a factual or rational understanding of the work of the ICAC".[5] ❑ Richard Phillips.

1 Parliament of New South Wales Committee on the ICAC, *Report of an Inquiry Into a Proposal for the Televising of Public Hearings of the Independent Commission Against Corruption* June 1990, 32.
2 op. cit., 27.
3 ibid.
4 ibid. 28
5 op. cit., 9.

From the President

Independence of the judiciary has again emerged as an issue with which our legal system has to be concerned. In order for Judges to be independent, as our society expects and is entitled to expect, they must be free from political and executive pressure. In the Federal sphere the rejection of the recommendations of the Remuneration Tribunal, which was set up to take the fixing of judicial salaries out of the political arena, highlights the fragility of the position of Judges and emphasises the power of the Executive arm of government to exercise control over the system.

The recent appointment as head of the National Crime Authority of a Federal Court Judge undermines the public perception of judicial independence by conferring the title and office of Judge on a member of the executive, whose function is to investigate and prosecute. The roles of the Judge and of the policeman/prosecutor are very different and they should not be confused by dual appointments of this kind. If the object of appointing the head of the National Crime Authority as a Federal Court Judge is to ensure security of tenure after he relinquishes his position as head of the Authority, then that can be done quite simply in the statute by providing for the appointment of such person, if otherwise qualified, to membership of the Federal Court at the conclusion of his term of office as head of the National Crime Authority.

The current proposals for the abolition of the Industrial Commission of New South Wales and its replacement with a two-tier system of the kind which the Commonwealth instituted in the 1960s for constitutional reasons raises considerations similar to those which arose in relation to the Tribunal of which former Mr. Justice Staples was a member. Also the administrative arrangements proposed in the Bill would to a large extent have the Court under the supervision of an administrative body on which the Department, which is one of the principal litigants before the Court, would be a member.

At the present time the Bar is under close scrutiny. The Cost of Justice Inquiry is proceeding and hearings in Sydney took place at the end of August. The New South Wales Bar appeared before the Committee and stressed that a number of the practices which have been called into question by the Committee, for example the two Counsel Rule, limitations on where barristers may establish Chambers etc., have either never formed a part of the practices and traditions in New South Wales or have not applied for many years.

Professor Baxt of the Trade Practices Commission is proposing to conduct a parallel inquiry into the professions. This will examine the effect of current practices regulating competition in the market for professional services and whether any adverse consequences for efficiency and consumer choice are to be compensated by identifiable public benefits. The Commission has indicated that the study will take approximately two years and that the legal profession will be studied in detail during 1991. The Bar Council has been assured that "this study is not a witch-hunt or an attack on elite professions" - a curious form of protestation. The Bar Council is concerned about the constitutional basis of the inquiry into the Bar in New South Wales, since barristers are not, and may not be, incorporated.

Work on the Downing Centre at 302 Castlereagh Street is proceeding. When completed it is anticipated that there will be 90 courts in the complex. It will be necessary for the Bar to give consideration to the provision of accommodation for members in or in close proximity to the Centre. This is a matter which will occupy a considerable amount of time over the coming months. The form of the accommodation and its location, as well as the vehicle for obtaining it, will need to be discussed widely by the members of the Bar.

The new Reading program commenced at the beginning of August. The program has been completely re-vamped and now includes an initial period of three weeks during which the Readers are involved on a full-time basis and engaged in a variety of "hands-on" activities. The reaction of the Readers at the end of the first week of the programme was very positive. The participants were tired - much like any busy barrister on a Friday evening, but they were also stimulated and felt that they had learned a lot during that first week.

The Reading Committee is to be congratulated on the revised course. Whilst it is usually undesirable to single out any one member of a Committee for mention, I think it appropriate to make an exception in respect of Philip Greenwood, who has put his all into making the revised course a success. In addition, I would like to thank the members of the Judiciary (10 in number) and the members of the Bar (more than 50 in number), who have been engaged in this first phase of the new program. Without their co-operation it could not have proceeded. With their co-operation it seems assured of success.

The program is intended to assist in ensuring that the Bar will continue to serve the needs of the people of New South Wales with ability, skill, integrity and with independence in fulfillment of the precepts enshrined in our motto, "Servants of all and yet of none". ❑

B.J.S. O'Keefe QC

O'Keefe travels to South America

Supreme Court Annual Review

The Supreme Court has embarked on the bold course of presenting an annual review of its activities designed both as an aid to the efficient management of its affairs and to provide to the community information in which it has a legitimate interest. The issue dealing with 1989 was launched by Chief Justice Gleeson on 18 July 1989. In the introduction the Chief Justice remarked:

"The primary concern of the members of the Court is, and must always be, with the quality of decision making in individual cases. A court's main interest is in due process and correct decisions rather than output. Concepts of productivity, which are relevant to an organisation whose objective is optimum output of goods or services, are difficult to relate to the operations of a court, whose members' duty is to make just and accurate decisions in cases brought before them for resolution... [T]he modern approach to the judicial function requires that [Judges] take an active role in relation to the management of the work of the Court and of the flow of pending cases. Undue and avoidable delay is itself a form of injustice and the manner in which the Court as an institution deals with its business is in some respects as important an aspect of the administration of justice as the way in which individual judges decide particular cases."

The Annual Review deals in great detail with the organisation and operation of the Court as a background both to the statistics contained in the report and for the purpose of later Reviews.

As might be expected, a great deal of the Annual Review is devoted to the effect of the case management procedures adopted in various Divisions of the Supreme Court. Thus it is pointed out that the effect of the delay reduction program in the Common Law Division has been to increase Court disposals in 1989 by over 100% and to reduce the waiting time for hearing from 4 years in December 1988 to 2 years and five months in December 1989. The Acting Judge program by which members of the Bar become Acting Judges for periods ranging from six weeks to three months has apparently played a significant part in the results.

The waiting time in the Equity Division for matters in the General List is about 2 1/4 years.

The case management procedures adopted by the Commercial Division have led to the remarkable statistic that of the active pending cases waiting in the list at 31 December 1989, 1% had been commenced prior to 1988, 10% had been commenced during 1988 and 89% had been commenced during 1989. Somewhat surprisingly, of the cases in the Commercial Division which ran to judgment, the majority involved amounts between $100,000 and $499,999. Only 8% were for amounts of $1,000,000 or more.

Similarly the case management techniques employed in the Building and Engineering List administered by the Judges of the Commercial Division have proved very attractive to litigants in the construction area, with 72 matters being commenced in the 10 months ending 31 October 1989.

The figures for the Court of Appeal are also impressive. By the end of 1989 the minimum time between the filing of a Notice of Appeal and the hearing of the appeal was approximately 13 months. If expedition had been granted an appeal could be listed within a week. In the year ended December 1989 754 new appeals were lodged in the Court of Appeal and 550 appeals were disposed of.

The Annual Review details changes introduced in the Court of Criminal Appeal during 1989. The previous procedure of the Court sitting for a varying number of days every week has been replaced by a system where the Court sits every day for two weeks in each month. The purpose of the changes is to achieve a greater concentration of judicial activity both in the work of the Court of Criminal Appeal and in the work of the Common Law Division, from which most of the judges who sit in the Court of Criminal Appeal are drawn, although Judges of Appeal do now sit from time to time as members of the Court.

The Annual Review also points out that during 1989 filings in the Court of Criminal Appeal increased by 30% over the number in 1988, the increase being said to be the inevitable consequence of substantial increases in first instance criminal trial activity in the Supreme Court and the District Court. Those increases are in turn a direct consequence of the activity at trial level to deal with the backlog of criminal cases.

The section of the Annual Review devoted to the Court of Criminal Appeal points out the misleading sense in which the expression "court delays" is used i.e. as meaning delays on the part of the Court. This criticism is apposite and, as the Annual Review generally indicates, reflects a sore point. As the section of the Review dealing with the Common Law Division points out, there is only a limit to the extent to which "court delays" can be reduced by the Court's efforts. "In the end, the resources available to the Court and the volume of business brought to the Court by litigants are the primary factors which will continue to determine the length of court delays."

The Chief Justice has established a Policy and Planning Committee which meets monthly to assist in making decisions concerning the administration of the Court, the formulation of policy and to plan for the future. Its members, apart from the Chief Justice, are the President of the Court of Appeal, Mr Justice Samuels, the Chief Judge in Equity, the Chief Judge of the Commercial Division, the Chief Judge at Common Law and Mr Justice Wood.

The Annual Review also points out that the Court and the Attorney General's Department are currently considering the degree to which the Court should have control over its administration as opposed to members of the Attorney General's Department. The notion of "institutional independence of the Tribunal with respect to matters of administration bearing directly on the exercise of its judicial function", says the Review is included in the concept of the independence of the judiciary. ❑

Managing the Long Civil Trial

An outline of a speech delivered by Mr Justice Young at the ABA Conference in Darwin on 10 July 1990.

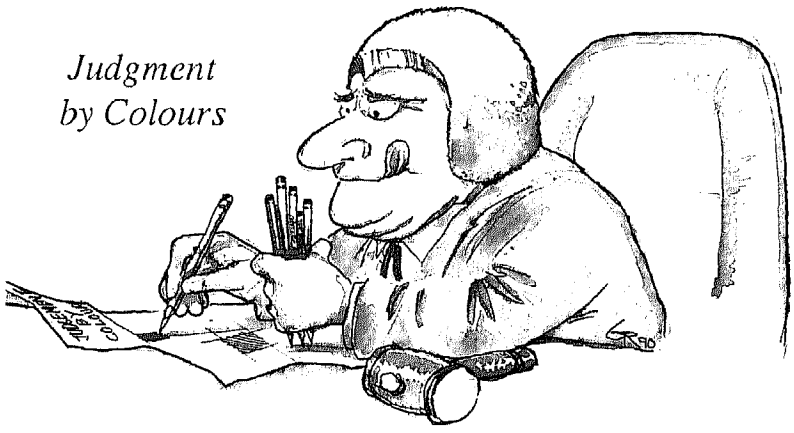
1. Almost all literature is written from a particular person's point of view. Thus Red Riding Hood's account of what happened in the woods or in her grandmother's house would be quite different from an account from the wolf's point of view. These remarks are presented from a Judge's viewpoint. Counsel's viewpoint may well be different and a solicitor's viewpoint different again.

2. This paper is concerned with a more or less historical account of a particular civil trial being an application for extension of a patent by a drug company. Accordingly, it was a case where the issues were complex, the stakes were high and the resources available to the parties fairly considerable. These matters must be borne in mind if one is to use these remarks in connection with other civil trials.

3. Civil trials can be broken down perhaps into three categories:

(a) the ordinary;
(b) the complex;
(c) those which need to be expedited.

Different procedures may well have to be employed for each type of case. With a complex case again different procedures may have to be devised for a case involving relatively poor people without the benefit of legal aid on one end of the scale, and multi-national corporations playing for high stakes at the other end. To illustrate, it is a great time saver for the Judge to have bound volumes or lever arch files filled with affidavits and exhibits in some logical order. The compilation, and indeed, even the photocopying of such bundles costs a significant sum of money. It may be oppressive to burden poor litigants with that expense, but where expense is not a problem it should be done in the interests of efficiency. Sometimes, however, justice requires that one has to do this.



4. The next thing to consider when tailoring a programme for the efficient trial of proceedings is the identity and personality of the lawyers involved in the case, especially counsel. On the solicitors' level, it is sometimes over-optimistic to expect a one-man firm to be able to meet deadlines which involve the production of a large amount of material even though the Judge may strongly hint that the solicitor will need to put on extra professional staff. Again, there are some counsel who (a) can never get organised, no matter how much time is granted them; (b) are incapable of seeing the real issues; and/or (c) are incapable of conducting a concise cross examination. With such counsel it is virtually impossible to do anything except let the case run and run and run, though one will be reluctant to give it any priority.

5. Again there are occasions where it is to counsel's client's interest to be as technical and as dilatory as the Court and opposing counsel will allow. Bitter experience suggests that it is again very difficult to conduct such proceedings expeditiously or efficiently.

6. In the case with which I am going to deal, not only were the parties persons of substance, but also all counsel were efficient and had a desire to proceed with the proceedings in the most expeditious way without, of course, sacrificing any real matter of principle.

The case on which I am focusing is reported as *Bayer AG v. Minister for Health (1988) 13 IPR 225*. The case is No. 3141 of 1983. It was tried for 15 days, being the weeks commencing 5, 12 and 19 September 1988 and a lengthy (150 odd pages) judgment was handed down on 10 November 1988.

7. The fact that the case took five years to come on for hearing was not surprising. It really had nothing to do with the state of the lists of the NSW Supreme Court because patent cases are put on a separate track and are fixed for hearing as soon as they are ready. This is because it is most usual for the parties to have to spend two or three years formulating the issues and getting extensive amount of evidence from overseas expert witnesses. What tends to happen is that the matter is made returnable before a Judge and then stood over for six months or a year with directions. It is usually difficult to keep to time limits because the witnesses involved are all busy people and are outside the parties' control. It is not unusual for three or four years to pass collecting material through no fault of any of the parties.

The background of patent extension proceedings is that drug companies need to patent their invention as soon as possible. It is not practicable to market a drug in Australia without very long drawn out testing by the health authorities. In the first instance a patent endures for 16 years. It may well be that the first 10 years of a patent's life will be taken up in testing so that it is only earning money on the market for four years. The Court has a discretion to extend the patent for up to a further 10 years. The patentee will be seeking as long as possible an extension because a monopoly on a popular drug will secure a

large amount of money. On the other hand, the Commonwealth, whose funds provide large medical benefits for persons using the drug, will save millions of dollars if the term of the extension is cut down or the application is refused. Almost always a generic drug manufacturer will also be interested in opposing the application. This is because if it does not have to pay royalties to the patentee, it will be able to produce the drug at a great profit to itself and sell it to the public at a cheaper rate. This cheaper rate is possible because the generic manufacturer will not have had to expend any moneys on research and development of the drug.

8. Although the pretrial directions went on for some years, I will take up the story on Thursday 16 June 1988. The trial was to be by affidavit and at that stage virtually all the affidavits that each party wished to read at the trial had been filed. In New South Wales the tradition has been that affidavits are read out loud almost in full to the Judge at the trial and that as counsel commences to read a particular paragraph of an affidavit, opposing counsel stands and objects to any material which is inadmissible. This system which developed in the leisurely past sometimes means that a week can be taken up merely in reading affidavits.

The efficient way of dealing with this matter is to obtain the consent of all parties for the Judge reading the affidavits prior to the hearing. Accordingly, more or less by consent, on 16 June 1988 I made the following directions:

(a) Direct that each party serve on the other a list of affidavits which it or he intends to read at the hearing on or before 30 June 1988.
(b) Direct each party to serve on the other a list of objections that will be taken to the opposing affidavits and a list of those deponents required for cross examination on or before 14 July 1988.
(c) Each party may serve supplementary affidavits to cure matters referred to in the list of objections on or before 28 July.
(d) Note that Professor O'Rourke's affidavit in reply is to be served by 28 July but otherwise all plaintiff's affidavits have been served and all defendant's affidavits other than replies to two of them have been served.
(e) Direct that each party leave with my Associate no later than 28 July 1988 an indexed collection of all the affidavits intended to be used at the hearing.
(f) Note that there is no objection to me reading affidavits prior to the hearing.
(g) Note that the exhibits to affidavits or a copy thereof shall similarly be left in indexed files with my Associate by 28 July 1988.
(h) Leave to the parties to uplift file documents for the purpose of preparing indices.
(i) Stand over for further mention on 29 July 1988 at 9.50.

9. The directions then secured two things (a) that there would be identical paginated lever arch files containing the court documents such as the summons, the affidavits and the exhibits which would be in the possession of the court and all counsel. Any objection as to form in which opposing evidence was presented could be dealt with by solicitors and counsel before the hearing and that other objections to the evidentiary material would be isolated before the hearing. The Judge would then have about six weeks to read the material (it went into some seven or eight lever arch files) before the hearing.

Paragraph 9 of the directions was set because experience shows that sometimes with the best will in the world some time limits can't be met and it is necessary to monitor the case as soon as possible after the last deadline.

10. A directions hearing was held on Friday 29 July but everything was going to programme so no further directions were made.

11. On 5 September 1988 the trial began. Ordinarily opening addresses are not encouraged in my court but in a complex matter they can be time-saving in the long run. The whole of the first day was occupied by opening address of counsel for the plaintiff. As he proceeded he would refer me to documents and, of course, all these documents were already in my possession and I had already at least glanced at them. I was able accordingly to note in my notebook a page number to each document as counsel referred me to it and to put an identifying coloured post-it note on the document so that I could easily recover it.

12. As counsel took me through the leading cases which supported his case I identified the passages which appeared to be basic statements which almost certainly would need to be referred to in the reasons for judgment. I marked these with a post-it note flag and had my tipstaff (my research assistant) photostat those pages.

During Counsel's address I also numbered the issues that I thought would arise.

I should digress and deal with numbered issues. The NSW Supreme Court is not yet in a situation where it can have the evidence of a case digested by computer. However, many of the Judges have taken on board some of the processes that it would be necessary to employ if this were done. In the old days (ie five years ago), the system was that plaintiffs' exhibits were given a letter, and defendant's exhibits were given a number. Nowadays, all exhibits have numbers, all exhibits have the letter "X" in them so that they can be recalled and listed by a computer. Plaintiff's exhibits are "PX", defendant's exhibits are "DX". If there is a third party or second defendant in a different interest, those exhibits are in the "TX" series, a fourth party in the "FX" series, a fifth party in the "VX" series (note the classsical influence of Roman Law). Documents tendered by consent I usually use "AX". If there is an exhibit that is to be admissible only on some interlocutory motion, I usually start a new numeric series beginning with 1001 or 2001 as the case may be. Issues can then be similarly isolated by describing them, for instance, as "PI 01" being the first issue raised by the plaintiff etc. When the system is fully developed witnesses should be numbered so that one's computer can tell one that plaintiff's witness 11 (PW 11) gave evidence about plaintiff's

issue 3 (PI 03) on transcript p. 153 (T 153) and exhibits PX 72, PX 88 and PX 97. Even without a computer, numbering the issues will enable this sort of exercise to be done manually and will assist preparation of the judgment.

13. If one looks at 13 IPR 231-2, one can see the way in which the issues were nominated. This is the final version, it went through many drafts. The judgment is set out in seven sections, viz A. Introduction; B. The Facts; C. Inadequate Remuneration (sub-paragraphs 1 to 21); D. Section 93 of the Patents Act (subdivisions 1 to 9); E. Defences (subdivisions 1, 2 and 3); F. The Terms of the Extension (subdivisions 1 to 7); and G. Miscellaneous and Conclusion.

Accordingly, as each piece of evidence was being given I would classify it in C, D, E and F as the case may be.

14. As the trial was going on, I would commence the skeleton of the judgment. Section A which involved noting for posterity what was the application of the relevant sections of the Statute, the basal authorities, could be written in semi-final form merely from the plaintiff's opening address and it was so done in draft form at an early stage. After the key scientific evidence had been given from the plaintiff and those witnesses had been cross examined the skeleton outline of the facts also became fairly clear so that these could be summarised and the common facts noted and the area of factual dispute also noted and identified.

For each of issues, C1-21, D1-9, E1-3 and F1 to 7, the dispute had to be identified. For instance a key matter in the case is what was meant by the expression "The profits of the patentee as such". This eventually became issue C3. Some cases had been cited by the plaintiff in opening and the key passages of these had been photostatted and were put in a ringed folder under guidecard C3. These cases threw up references to other cases and I perused these and again had my tipstaff photostat the relevant pages and we assembled these in the ringed folder under the appropriate headings. We did the same thing with standard textbooks.

15. The evidence proceeded in what I would think was the normal way with two exceptions. There was an English expert. He flew out from England to give evidence, but unfortunately his plane was detained in Hong Kong as a result of which his schedule was thrown out. He was scheduled to give evidence at 10 am on a Friday and to fly out of Australia back to England on the Friday night so that he could resume work in England the following Monday. He did not arrive until 3 pm on the Friday. I made arrangements with the court reporting service for his evidence to be taken between 4 pm and 6.30 pm and he was then taken back to Mascot to go back to London. All he saw thus of Sydney on that trip was the taxi trip between Mascot and the Court. Despite this, he was able to give his evidence in a very clear and impressive way and did not appear too tired to combat well thought out cross examination.

16. The other expert witness was an American who would not or could not come out from Boston. His evidence was taken by satellite via the OTC network. At 8 am one morning (when it was, I think, 6 pm the previous night in Boston), counsel and I proceeded to the OTC headquarters in Sydney where we sat (without robes) at a semi-circular table. There was a screen in front of us on which the image of the witness was projected. He was sworn in according to the law of Massachusetts and counsel in Sydney examined and cross examined him. The witness had some documents with him by arrangement. Documents which he did not have in his possession could be put on a screen in Sydney and displayed in Boston. The reverse process could also be effected. However, we found that these were a little hard to read. The backup service was a fax machine so that documents could be faxed from Sydney to Boston or vice versa. The examination took about an hour and a half. I understand that in 1988 the rates were something like $5,000 an hour for America but considerably higher to Europe. There was doubtless a saving in costs and time if one had to take the whole team to the United States to hear the witness's evidence, and I do not think that with an expert witness anything was lost in having his evidence taken by satellite. It may be different if credit were at issue because it is rather like seeing an actor or singer on television as opposed to a live performance: one misses out some of that personality which can only be caught in a live performance.

" ... I have devised a colour code system for making notes of both evidence and addresses."

Addresses began on the final day, day 15. I sat for an extra hour that day to ensure that addresses would finish and counsel were very good in keeping to the time with an outline of their argument and speaking to it.

17. I should say that I have devised a colour code system for making notes of both evidence and addresses. I use blue ink for plaintiffs, black ink for defendants and purple ink for additional defendants appearing by different counsel. I have also handy green, brown, pink and orange felt-tipped pens in case there are a multiplicity of parties, but seldom one has to use these. I find that it is useful to produce notes which make it spring readily to mind who has said what. In preparing this paper I can see that page 101 of my notebook has three different kinds of ink as towards the end of the addresses each set of counsel just thought of one or two more points that they wished to put after their formal addresses were finished.

18. Very often in the Supreme Court of NSW there is no time at all available for writing judgments. It is expected that some cases will settle and that some of this time will be used to write reserved judgments. In this particular case, because it had taken

(cont. bottom first column page 8)

Judicial Criticism of Barristers' Fees

At the recent Australian Bar Association conference in Darwin, each State and Territory was required to present an irreverent skit during the Dinner and Dance held on the last evening.

The following is the contribution made by Robert O'Connor QC of the Western Australian Bar. It was inspired by comments at the conference made earlier in the day by a Queensland silk in response to a suggestion by a Queensland Judge that barristers should act on a gratis basis in alternative dispute resolution matters.

In the light of that Judge's comments and the other occasions where Judges, immediately on elevation to the Bench, have taken the opportunity to criticise the level of barristers' fees, Mr O'Connor looked into his crystal-ball and speculated whether, in line with the trend, the Queensland silk himself would make the following speech if and when he is appointed to the Bench.

"Your Honours, ladies and gentlemen.

To the ladies and gentlemen of the Press, I hasten to let you know that, if you miss anything I say, don't worry - pop around to my chambers and I'll gladly give you a full copy of this speech.

I thank you all for attending this Court ceremonial sitting today to mark my appointment as a Judge of this Honourable Court.

I must offer my profuse apologies to my learned brother Mr Justice X for the gross ignorance I displayed when I made observations regarding him at the Australian Bar Association Conference in Darwin way back on 12 July 1990.

The problem is that I did not know then that, immediately upon my swearing-in as a Judge of this Honourable Court today, I would be suddenly the beneficial holder of great wisdom, foresight and compassion, and that when I was a barrister I did not really possess any of those virtues.

How was I to know that a leopard could change its spots, or a poacher turn gamekeeper?

Please disregard the fact that I exercised my free choice to cease being a barrister and have opted to take judicial office - with security for the rest of my working life, on a comfortable salary, generous superannuation entitlements, and an office which gives my wife and me the greatest status, prestige and privilege which cannot be measured in money terms.

While 99% of the community feels that as a Judge I will be overpaid, what I just cannot stand is that money is money, and that henceforth some barristers may be earning almost as much as I have been receiving over the past 20 years.

Let me say, barristers should not earn so much.

I ask you to ignore - their many years of study; their long hours of work; their early starts; their rushed lunches; their late evenings; and sacrifices to family life, all in the interests of their clients, and to put their cases to the Judges in the most presentable form.

Ignore also their expenses for - chambers accommodation; technological equipment; library; salaries of clerk and secretary.

Further, ignore that up to one-half of their net income goes in paying tax.

As well as lower earnings, barristers should do pro bono work, i.e. act for free. Some say 50 hours a year. It's a matter of degree - I say: why not 52 weeks a year?

Finally, ignore - legal aid work done at reduced rates; deserving cases done for nothing; work done on Barristers' Board, Bar Association; work done on committees in relation to legal education, ethics, complaints, and presenting papers to the various professions, and writing professional articles, all for nothing.

Ignore also the other charitable and community work done for free by barristers.

I am proud to have left the real world. Like some of my brethren, I can now pontificate on the financial circumstances of a professional group of which I was a fully participating member until yesterday.

I thank God that today I have been blessed with the great gift of being the source and repository of all wisdom and knowledge." ❑

Managing the Long Civil Trial

(continued from page 7.....)

three weeks, I was allowed, I think, three days to write the judgment. I had already put together in my ring folder copious notes together with photostats from the law reports under the appropriate guidecard. I also had summarised the witnesses by either writing a summary immediately after they had given evidence and having my Associate type it up and insert it in the relevant part of the ring folder and/or photostatting pages of the witness's affidavit or statement or exhibit and similarly positioning it in the folder. Accordingly, if my memory serves me correctly, by the end of those three days I had the first draft of a judgment that was eventually to go to 152 A4 pages with my Associate. This took some time to type up and then it needed some more time spent on polishing it and minor adjustments. We then had to prepare about 25 copies of the judgment to go to the various parties and legal publishers etc., an exercise which itself takes time. The judgment was handed down on 10 November 1988, just over six weeks from the last day of hearing. I allowed an extension of the patent for roughly six and a half years. This appears to have been regarded as a satisfactory solution by the parties because no appeal was ever lodged. ❑

NB that statutory provisions as to extensions of patents have been changed since the hearing of the Bayer case.

When the Bar Goes on Trial

Nick Cowdery QC reports on the trial (and tribulations) of Vice-President of the Malaysian Bar, Manjeet Singh Dhillon

Members of the Bar Council might well shudder at the prospect of facing goal sentences for acts done as the Bar's representatives - but that is precisely the present position of the Vice-President of the Malaysian Bar, Manjeet Singh Dhillon.

Malaysian Bar

The Malaysian Bar differs from ours in that it is a statutory body corporate pursuant to the Legal Profession Act 1976 having a statutory Bar Council, office holders, rights and duties. It comprises every advocate and solicitor in the country (where there is a fused profession): about 2,600 members.

The Malaysian Bar has been singularly courageous in its defence of basic principles which we in Australia take for granted:

. The doctrine of separation of powers
. The rule of law
. The independence of the judiciary
. The independence of the Bar -

phrases which roll off our tongues like the unthinking recitation of a liturgy, but which to our Malaysian neighbours and brothers and sisters in law are ideals to be kept daily to the fore in the face of constant threat from politicians.

The events giving rise to the proceedings against Manjeet Singh Dhillon illustrate the added difficulties facing practitioners in such an environment.

Manjeet Singh Dhillon

Dismissal of the Judges

On 26 March 1988 the Lord President of the Supreme Court (equivalent to our Chief Justice of the High Court) wrote a letter to the King with copies to the nine hereditary Rulers and all Supreme Court and High Court judges. The letter had been approved by a meeting of 20 Supreme Court and High Court judges. It was couched in respectful terms and drew to the King's attention the judges' concern at continuing public criticism of the judiciary by the Prime Minister. It gave rise to the following events:

. the King, on the advice of the Prime Minister, suspended the Lord President and appointed a tribunal to investigate and report upon what were to become 5 allegations of misconduct against him. (The Attorney-General framed the allegations and assisted the tribunal which was chaired by the next senior judge, Tan Sri Abdul Hamid Omar).
. upon the recommendation of the tribunal the Lord President was dismissed.
. Tan Sri Abdul Hamid Omar became Lord President.

In the meantime, however, on 2 July 1988 (while the tribunal was still sitting) Tan Sri Abdul Hamid Omar, then Acting Lord President and chairman of the tribunal, on notice that an urgent application was about to be made for an order for Prohibition against the tribunal, directed the Supreme Court staff:

. to keep the court rooms closed;
. not to assist in convening any court sitting;
. not to sign any order that might be made;
. to keep the Seal of the Court under lock and key.

Despite this action a bench of 5 judges did sit and ordered the tribunal not to report to the King until further order. The order was served on the tribunal which complied with it.

On the representation of the Acting Lord President to the King the 5 judges were then suspended and a second Tribunal was appointed to hear allegations against them said to have arisen out of the convening of the special sitting.

Another full court (including the chairman of the second tribunal - who later disqualified himself from sitting on it) then set aside the order of 2 July 1988.

Upon the recommendation of the second tribunal 2 of the 5 judges (including Tan Sri Wan Suleiman who had presided on 2 July 1988) were dismissed.

Implications

It is clear even from this cursory account that there are significant questions about:

. The Prime Minister's motives for recommending to the King the suspension of the former Lord President and the establishment of the first tribunal merely on the basis of the letter.
. The propriety of the present Lord President's refusal to disqualify himself from sitting on the first tribunal, considering that he had been at the judges' meeting which approved the sending of the letter, and that if the former Lord President were dismissed he, as the next senior judge, could expect to succeed to that office. (The Lord President had insisted he was appointed to the tribunal by a Royal Command which he was not at liberty to disobey: surely a mediaeval notion, out of place in a modern constitutional monarchy and democracy operating under the rule of law).
. The motives of the Lord President for and the propriety of his actions on 2 July 1988, particularly since he was a party to the intended application.
. The Lord President's motives for recommending the suspension of the 5 judges and the establishment of the second tribunal.

The Bar's Role

The Malaysian Bar has for many years, in a consistent and principled fashion, resisted assaults by politicians upon the foundations of a true democracy. At considerable cost to its members it has spoken and acted fearlessly, as a corporation and individually, in constant defence of basic principles.

It came forward without reward in defence of the former Lord President, the suspended (and dismissed) judges and the independence of the judiciary. Such is its commitment to integrity in practice that certain senior advocates, whose appella to work was the mainstay of their practices, have refused to appear in the Supreme Court while the Lord President remains in office. The professional and financial costs can be imagined.

Dato' Param Cumaraswamy, a past president of the Malaysian Bar and a human rights lawyer of world stature, has been tried and acquitted on a charge of sedition for a moderate criticism of action by the local equivalent of the Parole Board. The government sought to deal with him under the Internal Security Act. In sympathy, Singapore has barred him from entry, even in transit.

At general meetings of the Bar on 9 July 1988, 18 March 1989 and 22 April 1989 it was resolved (almost unanimously) that contempt proceedings be instituted by the Bar in the Supreme Court against the (now) Lord President for his actions on 2 July 1988. Manjeet Singh Dhillon on 25 April 1989 affirmed an affidavit which was filed in support of the application, expressly as (then) Secretary of the Malaysian Bar and on its behalf. It was the Bar's application, not his. In the affidavit Manjeet Singh Dhillon recited the relevant events of mid 1988 and of 2 July 1988 and stated the way in which it was alleged those actions of the Lord President amounted to contempt of the Supreme Court.

The paragraphs later complained of were:

"7. The Respondent on the 2nd day of July 1988 did commit contempt of the Supreme Court by attempting to prevent, frustrate and interfere with the sitting of the Supreme Court in connection with the application by the Lord President for the abovesaid Injunction as follows:..." (There followed a recitation of factual allegations).

"9. The facts in paragraph 6 [sic - it should be 7] above disclose that the Respondent being a party to the proceedings initiated by the Lord President and any appeal or application therefrom to the Supreme Court abused his official position as Acting Lord President of the Supreme Court by taking the actions particularly described in paragraph 6(a) and (e) [sic] to prevent, frustrate and to interfere with a sitting of the Supreme Court to hear a matter in which the Respondent himself was a party thereto. As such the aforesaid action of the Respondent constitute [sic] contempt of court of the grossest imaginable. [sic] Contempt apart, the aforesaid conduct of the Respondent also constitutes misbehaviour within the meaning of Article 125 of the Federal Constitution deserving his removal from office."

"11(c) I further verily believe that, if the allegations set out above are established as a fact, the abovenamed Respondent has sought to deny justice and the recourse to legal reliefs and remedies available to all persons under the law as enshrined in the Federal Constitution and his conduct as aforesaid is therefore an affront to the dignity and impartially [sic] of the Courts.

(d) These acts of the abovenamed Respondent, constitute the most flagrant and gross contempt of Court in that they amount to an exercise of powers for improper motives and an interference with the course of justice. I verily believe that they were intended to deny access for and to prejudice the rightful remedies of Tun Dato' Haji Mohamed Salleh bin Abas in this Honourable Court."

It was alleged that these paragraphs scandalised the Lord President. The paragraphs quoted were said to be improper expressions of conclusions and opinions by the Respondent going beyond legitimate and permissible criticism and expressed with malice.

The application against the Lord President was made and argued and eventually dismissed on 29 April 1989 on "technical grounds" - the merits were not decided. A similar fate befell a similar application by Tan Sri Wan Suleiman (who had presided on 2 July 1988).

On 18 May 1989 the application was made against Manjeet Singh Dhillon: but it was in reality a move against the Malaysian Bar.

The Trial

I attended the trial from 4 to 7 June 1990 as observer for Lawasia, the International Commission of Jurists, Australian Section, the International Bar Association and the Commonwealth Lawyers' Association. I also carried motions from our Bar Council which were delivered to the Malaysian Bar Council and placed in its records. They read:

"This Council deplores any action on the part of the Government of Malaysia which in any way prejudices or subverts the independence of the Malaysian judiciary, the Bar of Malaysia or the rule of law in Malaysia; and supports the said Secretary, the Malaysia Bar Council and the Bar of Malaysia in resisting, in accordance with law, any attempt on the part of the Government of Malaysia to in any way prejudice or subvert the independence of the Malaysian judiciary, the Bar of Malaysia, or the role of law in Malaysia."

There were 3 other observers at the trial: Margrit Benton for the American Bar Association, Makhdoom Ali Khan for the International Commission of Jurists, Geneva, and J.B. Jeyaretnam for the Regional Council for Human Rights in Asia. Ms. Benton is a lawyer and the wife of an American lawyer practising in Singapore; Mr Khan is a lawyer practising in Karachi; and Mr Jeyaretnam is a former lawyer and politician from Singapore.

The Attorney-General, Malaysia (Tan Sri Abu Talib Othman) argued the application himself. He appeared with a junior (T.S. Nathan) but had no other obvious support.

The Respondent was represented by:

- Raja Aziz Addruse, immediate Past President of the Malaysian Bar (who had acted for the former Lord President in 1988 and for Dato' Param Cumaraswamy in 1985/6).

- Cyrus V. Das, Member of the Bar Council (who had also appeared in the earlier proceedings).
- Darryl Goon, a Member of the Bar Council.
- Jagjit Singh, a Member of the Bar Council.
- Tara Sidhu, a past President of the Malaysian Bar, Member of the Bar Council and immediate Past President of Lawasia.

The argument was divided between the quietly spoken and scholarly Raja Aziz and Cyrus Das, an articulate and forceful advocate. The standard of advocacy on that side of the record was extraordinarily high.

The President of the Bar (S. Theivanthiran), Ghazi Ishak (who argued an unsuccessful application by 307 lawyer would-be interveners) and others lent assistance.

The press gallery was full. The public gallery was full for most of the time. Security outside of the court, initially strict, was relaxed as the hearing proceeded - and after the observers had been photographed.

Observers at the trial
(l to r) Makhdoom Ali Khan, Margait Benton, Nicholas Cowdery QC, J.B. Jeyaretnam

The trial was heard by Tan Sri Harun Hashim (who had once declared UMNO, the Prime Minister's political party, illegal), Datuk Mohamed Yusof and Datuk Gunn Chit Tuan. The trial to all appearances was conducted with fairness, propriety and impartiality, as all agreed. However, in a unique case the test for justice and the rule of law will be in the final decision.

It is a unique case - neither side was able to produce a precedent which even approached the context in which the statements were made, the nature, form and purpose of the statements, or the capacity in which the maker was acting.

Side Issue

The former Lord President (Tun Salleh Abas) has written with journalist K. Das a book about his experiences entitled "Mayday for Justice". The book is an intensely personal account of Tun Salleh's experiences and the recitation of events is coloured by his subjective interpretation. Nevertheless, it is a powerful work and a damning indictment of those whose actions resulted in his dismissal.

A further publication in book form entitled "Judicial Misconduct" by P.A. Williams QC of New Zealand, has been published. It is obviously an apologia in reply to "Mayday for Justice". It is appallingly written and highly selective in its treatment of the events of 1988 and 1989. Although Mr Williams puts himself forward as a leading Queen's Counsel of international reputation his name may well be unfamiliar to many, if not most, readers. The book was published by Pelanduk Publications (a Malaysian organisation) and contains a disclaimer by the publisher who states that the contents of the book are entirely the personal views of the author and "expressly disclaims all and any liability to any person arising from the printing, sale or use of the materials in the book". Enough said. ❑

Footnote:

Not quite enough said.

In July 1990 there was published in Malaysia an answer to Mr Williams' book by Raja Aziz Addruse entitled "Conduct Unbecoming: in Defence of Tun Mohd Sallah Abas". It is a detailed and tightly argued rebuttal of the Williams whitewash by one who was there.

Young Ones

Episode 1 *(Counsel was George Thomas)*

Cor: *Young J*

Counsel: *"Is your Honour going to sleep?"*

Young J: *"No Mr. Thomas. I promised to hear you without interruption and that's what I'm doing."*

Counsel: *"Well has your Honour got to do it with your Honour's eyes closed?"*

Episode 2

Cor: *Young J*

Oakes: *(Sotto voce, but audible) "You need a Young loading for coming up here."*

The Contingency Tea Party

A close look at the introduction of contingency fees in Australia, by Mr Justice J.B. Thomas of the Queensland Supreme Court.

The question is whether the lawyer should be able to take a slice of his client's cake (usually a third) for helping to bake it. The slice is called a contingency fee. This has recently been floated as an attractive idea by certain solicitors in Australia. A friendly reception has been extended to the idea in certain solicitors' magazines (e.g. Proctor (April 1990)). However, a wider view is necessary.

The contingency fee system is the American method of financing litigation, and it still applies in some American States to non-litigious business (such as administration of estates). Generally speaking profit-sharing arrangements with clients are more tolerantly viewed in the U.S. than they are in Australia. The current debate concerns litigation. The idea is to legalise arrangements for lawyers to share the proceeds if the client wins and to make no charge if the client loses. Commonly the agreement is for one third. It may be more, it may be less.

Such a system gives the lawyer a direct financial interest in his client's case. It gives the strongest possible incentive to win. Whilst that sounds desirable, the in-built problem is human weakness. The temptation to win at any cost is too often irresistible. When the inducement to bend the truth, suppress embarrassing documents, mislead the opponent, assist the adverse witness to disappear, or hoodwink the court becomes too strong, the system disintegrates. It is at present held together by a very frail ethical fabric.

Consider a lawyer retained with a 30 per cent interest in a $1,000,000 claim. He stands to gain $300,000 if his client wins against the carrying of his own costs if he loses. It is difficult to envisage all such attorneys insisting upon the strict observance of their duty to the court in relation to adjournments, citation of authority, discovery of documents, or indeed at all. Once the honest practitioner sees his opponent bending the rules, little incentive remains to disadvantage his client and himself by obeying them. Thus the system breaks down.

One of the good things about litigation in Australia is the trust that exists between the court and the practising profession. One can come into court with relative confidence that the solicitors have not suborned witnesses, encouraged production of spurious documents, or, in a word, played dirty tricks. Even under our present system one sometimes discerns a certain amount of coaching of witnesses but this is of controllable proportions, and generally speaking the ethical rules are respected. It could not remain so under the financial pressures and incentives of the contingency system.

I notice with interest the attempt in the Proctor article to demolish in advance any unfavourable comparisons that might be drawn with the "litigation syndrome" which has plainly overtaken United States society. It is true, as the article notes, that in many U.S. jurisdictions damages are not reduced for contributory negligence, future economic loss is calculated without discount, and there is a propensity to award punitive damages . While this may help explain some of the strange decisions and enormous awards given in that country, it hardly explains the U.S. disease of suing anyone for anything, or the flood of litigation in that country. This is not explained either by the fact that in the U.S. there is less social security and compulsory third party cover than we have here. The truth is that at the heart of the litigious society that has developed in the United States lies the contingency fee system.

People will sue others for practically anything, with no holds barred. There are now about three quarters of a million practising lawyers in the States, and about 30,000 graduate lawyers joining their ranks each year. Why not? The spoils make it a growth profession, even if it is a non-productive industry. Most of them make a very good living. It is the world's most litigious society.[1]

Let me describe the stage it has reached by mentioning a few recent examples. Some of them are a little hard to believe.

A New York man, tired of living, decided to end it all by leaping into the path of a subway train. The train driver was exceptionally alert and managed to stop without killing the gentleman, although it was impossible to avoid hitting and injuring him. The attempted suicide then sued the railway company. What do you think happened? A British journalist[2] upon hearing of this law suit assumed it must be based on some fancy cause of action such as frustration of the plaintiff's democratic right to make away with himself. He was quite surprised to discover that the claim was actually for damages for personal injury, and even more astounded to hear that the plaintiff won the case and was awarded $600,000.

Another man gave a party on his birthday in the course of which he became drunk. He climbed into the swimming pool enclosure of the block of flats where he lived declaring that he could walk under water from one end of the pool to the other. Neither his wife nor any of the 15 guests tried to stop him from carrying out this ambitious plan. They watched him enter the water. He did not complete the course. In fact he drowned. The grieving widow thereby lost the benefit of his support. She sued the owners of the flats. Did she win? Of course she did.

A New York gentleman (Mr Febesh) was stung by a wasp when sitting outdoors at his country club. He suffered a serious reaction from anaphylactic shock, sued the club for negligently allowing unaccompanied wasps into the grounds, and collected $1.5 million in damages.

An American gymnast injured himself whilst practising on his exercise mat. He sued the manufacturers of the mat and collected $14 million. What would most solicitors be prepared to do to ensure that the contingency fee in that case was won?

Partygivers kind enough to supply their guests with alcohol have been sued by the same guests who chose to drive home and who collided with another vehicle on the way. The party hosts have been sued not only by the guest but by the other driver. Private hosts are not the only ones at risk. The owners of a cafe in Michigan had to pay $1 million because one of their patrons drove away and injured himself.

A man has been ordered to pay damages to the lady who purchased his house. He had failed to disclose to her that 12 years previously someone had been murdered in the house.[3]

A message starts to emerge as the cases unfold. A passenger on an aeroplane took a rise out of his fellow passengers by declaring that the aircraft was going to crash. One of the passengers thereby suffered severe emotional distress. She successfully sued *the airline* for damages and obtained an award more than sufficient to settle any jagged nerves.

The terrible risks now taken by doctors, or anyone who is foolish enough to try to render aid to injured persons in public, are well-known and the prospect of their being sued by patients if anything happens to go wrong is equally unsettling. The

enormous insurance premiums to cover such claims are prohibitive. Some doctors now have notices in their surgery stating "I have no insurance". If sued they simply go bankrupt. Such posters are merely a symptom of the voracity of the American legal system.[4] Some public reaction is now starting to simmer.

Why would anyone want such a system in Australia? To some the potential financial reward (the "hip pocket argument") presents the obvious attraction. But some are promoting the idea professing the highest ideals. It is of course a common ploy to promote self-interest under an idealistic label. All you have to do is find a problem in the present system and offer a new scheme to solve the terrible problems of the old. In the haste to eliminate the old problem, the greater problems inherent in the so-called "reform" are readily overlooked. They are never so visible as the present ones that we wish to remove.

The advocates of the contingency fee system disclaim profit as their motive. They only want to remedy the problem of the high price of litigation, by making it accessible to all. They say that their case is purely altruistic and that the contingency fee system will enable little people to take on the giants or, for that matter, anybody. They aver that the risk of failing to win will discourage solicitors from taking on flimsy cases. No doubt they also have in mind that even if the case is not very good, there is a reasonable chance that a defendant will settle out of court just to get the lawyer off its back. Such settlements in, say, only 20 percent of flimsy claims can make the overall exercise quite worthwhile for the lawyer, especially when it is recognised that neither the client nor the lawyer is under any jeopardy of having to pay the other party's costs.

" The temptation to win at any cost is too often irresistible. "

It is sometimes overlooked that the traditional English system of "losing party pays" is the best known disincentive to flimsy litigation. When the risk is properly explained by the solicitor any party must think twice before taking a case to court. The jeopardy in relation to the other side's costs is commonly the catalyst that produces settlements. Without the strong disincentives provided by the present "losing party pays" system the volume of litigation would be quite unmanageable. Courts could not cope with it. Human beings will always be willing to air their grievances in a public forum such as a court, especially if they have little to lose by doing so.

In the United States this lesson has been learned too late. It has recently been observed that "contingent fees have fostered an atmosphere of a no-cost lottery for clients." [5]

Under our system there is a general prohibition upon arrangements which give the lawyer a pecuniary interest in the result of his client's litigation. With a few well-recognised exceptions, it is simply unlawful. The law would have to be changed by Parliament before a contingency system could be adopted. It is to be hoped that the government would not give its approval to a measure that would be against the best interests of the administration of justice and, in the end, of the community.

The origin of the common law rule, like so many of our rules, is in the need to avoid conflict between interest and duty. A good solicitor needs to advise his client with a clear eye and unbiased judgment. He is an officer of the court who is bound to present the case with fairness and integrity. A legal advisor who acquires a personal financial interest in the outcome of the litigation may find himself in a situation in which that interest conflicts with those obligations. The last three sentences are not my own. They are a paraphrase of words written by Buckley L.J. in 1975.[6]

There is of course a well-recognised exception in relation to speculative actions which solicitors commonly undertake for clients. If the solicitor does not promote the litigation himself, and is satisfied that his client has a good cause of action, he may agree not to charge in the event of losing, and to charge a proper fee in the event of winning. The term "proper fee" is perhaps in danger of erosion or, more accurately, accretion. There is a case for saying that if a solicitor takes the risk of receiving nothing at all, he ought to be compensated by receiving something more than the normal fee in the event of success. That is another way of saying that because the whole practice is a bit of a gamble, it is fair to provide some odds for the winning cases; otherwise the practice of taking speculative actions might be unprofitable on the whole and fail from want of sufficient incentive. It is difficult to evaluate the argument because questions of degree are involved each time a solicitor decides whether to take on a "spec". However, it is an argument that deserves fair consideration. If there is to be any provision for an increment above the normal proper fee in such cases, it would need to be very carefully specified and closely supervised. It should not be the toe in the doorway that leads to the room where the spoils are shared.

We should be careful in following practices that come from the American legal system. In the U.S. litigation is a commodity, and presumably the more one can promote and sell it the better. I am by no means sure that the encouragement of litigation and the promotion of a litigious society is in the best interest of Australians.

If we are stimulated by the vision of creation of disputes where none formerly existed, ambulance chasing, sharing of the spoils, the promotion of litigation as an industry, witness tampering and the other unethical practices that have inevitably crept into the over-competitive American system, by all means let us follow their example. If we are interested in preserving our more modest system which depends heavily on trust between bench and legal practitioner as well as between solicitor and client, then we should be very careful before relaxing our traditional suspicion of contingency fees. The rules are not relics of a bygone age. They are fundamental to the preservation of a trusted profession. ❑

1 Figures cited by George Gordon - New York correspondent, *Courier Mail* 13th June 1988.

2 Bernard Levin - *The Times* 16th May 1988

3 Some of the above examples are referred to in *U.S. News and World Report*, "The National Lottery" 27th January 1986, "Why Lawyers are in the Doghouse" 11th May 1981, and "The Urge to Sue: Getting out of Hand?" 5th July 1976; and in Mr Levin's article (above).

4 Michael Becket, U.S. correspondent, *Courier Mail*, 22nd June 1988

5 U.S.N. & W. Report 27th January 1986

6 *Wallersteiner v. Moir* [1974] 1 W.L.R. 991; [1974] 3 All E.R. 217.

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Justice Maxwell Retires

Justice Maxwell has retired, after many years of devoted service to the law, both at the Bar and on the Bench. A ceremony was held in the Banco Court on 26 July to farewell his Honour. After speeches from Chief Justice Murray Gleeson, the Attorney-General, John Dowd, and President of the Law Society, Mr Roberson, his Honour responded:

Chief Justice, Mr Attorney, Mr Roberson, of the New South Wales Law Society, my brother judges,

I thank you for your kind words and the extravagance of your praise of my performance as a judge of this Court. I have enjoyed my sojourn on the bench but my non-compensable motor car accident a few years ago constrained me to venture a little prematurely into retirement. There is abroad a rumour that I will not be replaced. This is not, in terms of measuring success, a pleasing feature of my retirement as I was, with due modesty, anticipating being replaced by at least four judges.

A retiring judge at his farewell is entitled to refer to those who have helped him on his way in the legal profession and on the Bench. Therefore, I seize the opportunity of thanking a few. Time and space do not permit of specific reference to all. However, at the top of the list are my wife and family. My wife has been the power behind the throne, so to speak, and has given me great support when support was needed. She and my family accepted with grace my many absences on circuit both as a judge and barrister. She also has been of great comfort when I was presiding over some protracted and emotionally charged criminal cases - one in particular which lasted for a year and called for the provision of close security. To see my children, including one daughter who lives in Japan, and my grandchildren here today adds greatly to my pleasure. I would also like to express my appreciation of the help over the past fifteen years of my associate, Beverley Dalley, and her devotion to duty. Such is her efficiency and tenacity that she is rightly known as my computer. I must, of course, make mention of Fred de Saxe, who was my clerk at the bar and is still my close friend. I also express thanks for the assistance of all those officers and clerks of the Court and the Common Law and Criminal Divisions who afforded me great help over my sixteen years as a judge of this Court. I am also grateful for the presence of so many of my friends. Finally, I would express my appreciation of the assistance over the years of the many court reporters who have been attached to my Court.

I have had the honour of serving under three Chief Justices - Sir John Kerr, Chief Justice Sir Laurence Street, and Chief Justice Murray Gleeson. Suffice it to say that in my view each of them has contributed much in different ways to the status and efficient functioning of the Court.

It is beyond doubt that even during the sixteen years since my appointment, let alone the much longer period since my first acquaintance with the judicial system, there has been a very considerable change in the expectations and attitudes held by the community in relation to the judiciary.

There is also, of course, an important element of continuity in that regard. The community has always expected, and continues to expect, judges to be fearlessly independent, although I am sure that many people have only a rather hazy idea of exactly what is involved in judicial independence, and not all of those who do understand it always relish it. Nevertheless, I am quite sure that the community has a general understanding and acceptance of the importance of the idea that the judiciary is independent of the other two branches of government, that is to say, parliament and the executive.

Furthermore, judges always have been and still are expected to be learned in the law. It has been, and remains, the expectation of the community, and of the legal profession in particular, that leading practitioners will be willing and available to make the very substantial sacrifices involved in accepting appointment to the superior courts. I have not observed any lowering of the community's expectations in that regard, although certain aspects of them are only rarely acknowledged. The health of our entire judicial and legal system has always depended, and continues to depend, upon the willingness of successful lawyers to give up their practices and devote a large part of their working lives to the service of the community and the administration of justice. I am very proud that I, like my father before me, participated in that honourable tradition.

" ... the community has come to expect judges to attend not only to making right decisions in individual cases, but also to ... large problems of administration"

Finally, judges have always been expected to be people who submit to very strict standards of personal behaviour and integrity. That is the way it should be, and it is the way the community is entitled to expect it will continue to be.

However, there are important changes, imposing new, and in some respects challenging, burdens on judges. In recent years the community has come to expect judges to attend not only to making right decisions in individual cases, but also to the large problems of administration which arise as the courts have become increasingly burdened with additional work. Whilst the community has this general expectation I doubt that there are very many people who yet have any clear idea as to exactly how this additional responsibility ought to be discharged. I have no doubt that we are living in a time of change in relation to a number of aspects of the administration arrangements relating to the operation of courts and I expect that the next ten years will see a good deal of change in that regard. With the modern emphasis in all aspects of public affairs on management and administration, people are beginning to realise that attention needs to be paid to the enormous increase in the demands that are being made upon the court system and to the resources made available to cope with that demand.

A lot of work is being done by the judges and those concerned with the administration of the courts in that respect. It is important that people realise the extent of the problems and

the nature of the responses that are being made to those problems. For example, the workload of the Common Law Division of the court in which I have been involved has increased enormously in recent years. The number of cases disposed of by the Common Law Division in 1989 was approximately double the number of cases disposed of in 1988. The number of appeals filed in the Court of Criminal Appeal in 1989, in which I regularly sat, exceeded the number of appeals filed in 1988 by 30 per cent. I understand that it is projected that the number of appeals filed in 1991 will exceed the number of appeals filed in 1990 by a further 30 per cent. This is nothing more than the inevitable result of extra activity at the level of first instance criminal trial work. But the number of judges available to deal with criminal appeals has not increased. The existing judges are simply on an ever-increasing workload.

I suppose that in a perfect world judges would be able to lead a scholarly and reflective life, taking all the time they need to decide over cases in a calm and unhurried fashion. I can remember when it used to be something like that, but I doubt that it will be like that again in the lifetime of anybody present today. Modern judges work, at least in this court in this State, under a great deal of pressure and the modern judge is a long way removed from the idea that many people have of an elderly semi-retired barrister spending the twilight years of his life patiently sorting out the problems of disputing citizens.

Finally, may I adopt and echo the words uttered by my learned father some thirty-five years ago on the occasion of his retirement from this Bench after twenty-one years service upon it. I quote:

" It is well that we remember that the judges come essentially from the ranks of the bar and, to some extent, from those of the solicitors. With that in mind, may I be allowed to address to them words, assuredly not of admonition, but of encouragement. The legal profession is an honourable one, with great traditions and high standards. We bear reminding that the members of both branches of the legal profession are all part of the machinery of the law and all bound to help in administering that justice to the members of the community to which they are entitled under the law of the land. For the efficient administration of justice the courts expect, and they need, the co-operation of both bar and solicitors. It is permissible to say that to the attributes of learning, integrity and high-mindedness should be added that of fearlessness - fearlessness not only in court but by resistance to improper pressure outside the courts, from whatever source. But rudeness is not to be mistaken for fearlessness, nor is courtesy the badge of timidity. It has been wisely said that the administration of justice is not a machine, however hallowed by antiquity, for the purpose merely of earning a livelihood, and perhaps a little more, for the members of the legal profession, but that it should be kept as the well tempered and sharp instrument of doing business of the community. Members of both branches are entitled, and indeed obliged, to appreciate that their first duty is to their clients, but not to the exclusion of every other obligation".

I recall, once again, that I concluded my remarks on the occasion of my being sworn in as a judge of this Bench that if there were present upon my retirement as many people as were then present I would be content.

I am content and I bid you all farewell. ❑

The American Way of Advocacy

Paul Elliott reports on the National Institute of Trial Advocates, Philadelphia USA

"Running a good trial is like having an orgasm". So said the robust black female instructress. I was in Philadelphia. This was not the Full Court of the Supreme Court of Victoria. This was the National Institute of Trial Advocates - America - the US of A. But it did make me think. Either I had never run a good trial or if I had then I had never...

The National Institute of Trial Advocates is America-wide. It is extremely well organised. It runs conferences for trial advocates (their sort of equivalent to barristers) at all levels. The courses vary from two weeks to a few days and are very intensive. There are many video sessions on "directs and crosses", which translates into evidence in chief and cross-examination. Full mock trials are organised. Everyone must put in, both as advocates and witnesses. I was sent a mass of material to consume before I attended the Eastern Region Conference held at Temple University, Philadelphia in March of this year. I was to "audit" the conference in that I was to observe their advocacy methods along with the teaching methods, although, inevitably, I did take part as a witness and, when asked, did a bit of Australian cross-examination.

" Running a good trial is like having an orgasm. "

The most stimulating part of the course was the opportunity to actually talk and think about the techniques of advocacy with a large group of practitioners. Often barristers are so busy running cases that we don't sit down and analyse how we have presented the case, how we have cross-examined, or how we have addressed. Getting the case organised, mastering the facts and the law is often the major concern.

It was dogmatically asserted by Professor Tony Bonnici, the leader of the course, that you must never, ever ask a non-leading question in cross-examination. The actual question is very important. You *should* know the answer. Just think about this. Did you do that in your last cross-examination? Did your opponent? Is this a really correct view of cross-examination?

We tend to write off American law as L.A. Law. American advocates are a bunch of braces-snapping prima donnas, strutting around the court room, staring eyeball to eyeball into the faces of cringing witnesses. They are fat men from Hawaii, good ol' Southern boys who appear as thick as a slice of mom's apple pie but really are as sharp as tacks. They are beautifully coiffured women, with marvellously cut suits, and Gucci briefcases, who have had to work extra extra hard to beat the men, but underneath have a heart of gold and an insatiable sexual appetite. They are Robert Redford and Paul Newman. Boozy Irishmen from Boston on their last legs, or slick L.A. lawyers with extremely complicated partnerships and personal lives. Every one of them spends most of their days approaching the bench.

This, in general, is not true. In some of the counties in Pennsylvania the lawyers do not even stand to cross-examine, let alone pace up and down in front of the jury. The recording microphone is set on the bar table which anchors the advocate to his chair.

Observing the participants did not reveal any histrionics or hyperbole. It was very professional. It was very well organised.

Of course there are great differences. The manner in which they object to evidence is an art form which I never understood. The principles of evidence were similar but the manner of stating an objection usually took a recognised form, which the judge either upheld, over-ruled and then noted for the "record" in the event of an appeal. Also there was a great deal of striking from the record.

Much more latitude is given in allowing in the background or personal evidence of parties. Whether the person was married, had children, was a good family man, went to college, worked hard - (the puritan work ethic being very important), was a WASP etc. was stressed to be of importance in presenting evidence in chief (direct evidence). We were told that an advocate had to paint a picture of his client. Sympathy and prejudice were important.

A lot of commercial cases are tried by juries in various state jurisdictions. As part of the course we had to prepare a very large contractual dispute over computers. Much evidence was introduced and cross-examination proceeded as to the character of the parties. The plaintiff was painted as a large heartless multi-national computer company manned by ruthless and ambitious executives who delegated important decisions to secretaries. The defendant (with a counterclaim) was depicted as a small friendly company started by an all-round nice guy genius, whose only mistake was to employ a failed close friend who "goofed" on this particular deal. The plaintiff's advocates made them out to be incompetent criminals. I had prepared the case on the basis of it containing very fine points on the existence of a contract (Americans seem to have a different view as to the doctrine of consideration) with elements of waiver and estoppel. No, said our instructor. Don't bother with all that law. A jury never understands any of that. Just paint a picture of the good guy and the bad guy because that's how the jury will decide the case. Therefore the small company would win so long as it did not pursue its greedy counterclaim for loss of profits. Introducing juries, on this basis, would certainly enliven the Supreme Court Commercial List.

Meeting lawyers from all parts of America was another great advantage of the course. Personal injuries cases were held in high regard, even above commercial cases. But then again their system of personal injuries is very different. Over dinner some hard-nosed New York lawyers asked me to assess a recent decision in their fair city. A black civil rights worker had been wrongly arrested by the police. He had been beaten up, suffering broken ribs, bruising, a black eye, the usual assault-type injuries, but nothing permanent. "How much?" they said. I submitted that in Melbourne there would be an initial problem in succeeding against the police at all - but I assessed the claim at $7,500. They laughed. The jury awarded $76,000,000 (US) - $40,000,000 being for punitive damages and general damages amounting to a mere bagatelle of $36,000,000. Of this award the plaintiff's lawyer was to receive 50 per cent plus disburse-

ments. Bring on contingency fees!!! On the downside a surgeon's professional indemnity insurance runs at about $180,000 (US) and a lawyer's $90-$100,000 per year. Surgeons are refusing to perform operations, especially gynaecologists.

Americans are extremely friendly - especially in their home country. Australians pride themselves on friendliness. But in relation to tourists and visitors this is somewhat of a myth. It was a great experience to meet Southerners from South Carolina, hard-nosed New Yorkers, Bostonians, Washingtonites and lawyers from Lancaster County, Pa - the home of the Amish. I was invited to stay with a Pennsylvanian practitioner in the town of Media. She assured me that life in the towns and counties of Pennsylvania was much different to Philadelphia and the other east coast big cities. Indeed Media was very picturesque, a large town with the traditional white clapboard buildings of the east coast.

Each county in Pennsylvania had its own *elected* judges and varying systems of law. I met one of their County Court judges who was about to empanel a rape jury. It was all refreshingly informal. We entered the large Georgian-style court which was filled with the jury panel and lots of people in various uniforms with guns - even the tipstaff seemed to have a gun. We just walked past them all, knocked on the door of the judge's chambers and went in. He was a charming judge of Irish descent. We chatted about the forthcoming St. Patrick's Day Parade and Irish Australians. He was not concerned about keeping the jury panel waiting at all. He then ascended the bench and gave a marvellous oration on justice, America and the jury system.

The empanelling of the jury *was* different to Australia. Those who even knew or were friendly with any police were asked to raise their hands. Those who considered themselves racist (the accused being black) were asked to raise their hands - and many did without a blink. Finally both counsel were asked to approach the bench with their challenges. Suddenly a strange electronic noise filled the court; both counsel were talking to the judge but no-one in the court could hear what they were saying. The judge had thrown his "white noise" switch. In order to avoid juries going in and out of court while counsel argue points of law, judges in Pennsylvania have switches behind the bench which create "white noise" to black (or white) out counsel's arguments to all but the judge. I'm certain many judges in Victoria would love a white noise switch, perhaps even to block out the dulcet tones of certain members of counsel.

Whether or not you admire the content of American advocacy, the organisation, the thought, and the efficiency of their approach to advocacy must be admired. Mr Justice Hampel is a great proponent of the advocacy teaching techniques employed by NITA. He has attended many of their courses and introduced some of the methods on the present Readers Course. It was on his and Douglas Salek's (who attended the Western Conference - see his article in an earlier Bar News) advice that I decided to attend. I thoroughly recommend the NITA courses as being stimulating, informative and a good way to meet interesting and friendly fellow practitioners of the art of advocacy. ❑

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Words Fail Me

Keith Chapple calls for a return to simple English....

I think it was the late Emperor Hirohito who laid the strongest claim to being the master of understatement. This apparently sensitive man was a world expert on marine biology and headed his country for decades. On the rare occasions that he communicated publicly with his people, his messages were delivered in a unique style that used to move carefully and obliquely to the point. In August, 1945 when the gamma rays were whistling around what was left of Hiroshima and Tokyo lay devastated, he softened the blow of impending surrender with the immortal words: ".....the war situation has developed not necessarily to Japan's advantage".

I was reminded of this recently while reading a Record of Interview between a man from the North Coast and the local police. At first sight the whole confession read quite well and was covered with the usual mass of scrawled signatures. There was a lot of to-ing and fro-ing for some hours and a chronic over use of the phrase "I have reason to believe...." Eventually it got to Question 109 which was the evergreen: "Have the answers which you have given etc. etc. been given of your own free will? " the response to which ran something like: "Yes - except for the fact that I've been handcuffed to the desk the whole time". With that comment the boy from the bush also deserved to grace the world's stage and blew the old marine biologist's claim right out of the water.

Statements to the police are in a class of their own and contain all sorts of amazing things. One began with a witness filling out the appropriate blanks at the top in this way: "*Address:* Her Majesties Prison, Maitland. *Occupation:* Inmate." A police officer's statement described a person as "...wearing a white "T" shirt with a motive (sic) of Jimmy Barnes." Another one which took me some time to get through had a sentence which began: "I proceeded to commence my daily routine work duties..."

Arrest seems to bring out the author in everyone. Another young man who's currently "breaking rocks in The Iron Hotel" had me reeling as I read the start of his handwritten statement, and it can't be said that I reel easily. He wrote that "on the day in question" he had been drinking "quite heavily" with a couple of his mates while engaged in what I had always thought was the healthy pursuit of watching Rugby League. He continued thus:

"While we were at the football we drank 4 or 5 bottles of Scotch, 3 flagons of wine and 2 casks of wine. After the game was finished we headed for the hotel to continue drinking so on the way to the Toxteth we got another bottle of Scotch and a cask of wine. And proceeded to get paraletic (sic)."

On a charge of sexual assault you may well have guessed that he was laying the groundwork for the classic defence of "scientific impossibility", a defence some people might say was developed not necessarily to his advantage.

Speaking of the Iron Hotel, in the United States the slang expression for prison is The Grey Bar Hotel. I noticed in the *Sydney Morning Herald* recently that the sheriff in Nebraska wanted to trap some fugitives with outstanding warrants and decided on one of those schemes that have become popular with law enforcement authorities and television viewers alike. Over 60 people were enticed by an offer mailed to them of a free pair of joggers to be collected from the bogus Grabar Athletic Footwear Store ("a new concept in shoe stores for people on the run"). The most poignant comment came from one hopeful as he was led away: " I knew this was too good to be true. I've never won anything!"

The West Australian Police Force employs one or two laconic people. The man who believed in safety in numbers, John Friedrich, before he "assisted police with their enquiries" was picked up by detectives in Fremantle waiting for a cab he'd booked. One of them told the taxi base: "Don't worry about the fare, we've got it".

At least you could understand all these people when they said something. Not so the man who could be in two places at the one time, Colonel Oliver North. I remember spending hours of torture (before I finally gave up) trying to follow the steel-grey web he wove. North used phrases like "plausible deniability" for lies and "non-log" documents instead of destroyed. Richard Nixon had probably suggested to him to "...make one thing perfectly clear".

One group often accused of a lot of double-talk are lawyers and the ultimate verbal high-wire act would have to be a lawyer interpreting an Act of Parliament. When arguing about legislation, especially those pieces which don't quite seem to work, a barrister can be excused on occasion for engaging in the legal equivalent of "taking a dive". But make sure that the referee doesn't see it. A former Chief Justice of New South Wales spotted it a mile off in: *Ex Parte Ryan, Re Bellemore:* (1945) 46 State Reports (NSW) 152. The entire judgment of Jordan, CJ is worth reading to see what happens when you pass legislation that no-one has apparently ever read, including the person who wrote it. Suffice to say that the case involved consideration of the *National Security (Prices) Regulations* which fixed maximum wartime prices for, amongst other things, fruit. The particular fruit involved was bananas - ripe bananas. After what had obviously been a fair amount of slippery argument his Honour declared at page 156 that there had been a casualty on one side over this question of cost:

"At this point, counsel for the prosecution was firm. He said that it should be apportioned on a reasonable basis; but on being pressed for greater particularity - whether it should be, for example, according to relative weight, cubic content, or value - he declined respectfully but positively, and, I think, wisely, to commit himself to anything more definite."

The last word on Acts of Parliament and those who pass them belongs to Viscount Simon who said in *Hill v. William Hill (Park Lane Ltd):* [1949] AC 530 at 546:

"...though a Parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed".

The Expert Witness may be expert at some things but not necessarily clear and concise communication. Once we set out to prove something that I had naively thought was pretty simple. Namely, when do you turn the lights on; when's the end of the day; when can vampires wake up. You know - what time's sunset. If in doubt, call the expert, who delivered a statement the relevant part of which read this way:

"*Sunset* is defined as the instant in the evening, under ideal meteorological conditions, with standard refraction of the sun's rays, when the upper edge of the sun is coincident with an ideal horizon that is at the same height above sea level as the observer."

After that, all I can say is that I'm almost lost for words ..er, in a manner of speaking. ❑

Bench and Bar Dinner Held at the Opera House on

Law and Literature Conference

Simon Petch and Penelope Pether from the Department of English at Sydney University describe the inaugural "Literature and Law Conference".

John Bryson, former member of the Victorian bar, and author of *Evil Angels*, was the keynote speaker at Australia's first conference on "Literature and the Law". This conference, held at the University of Sydney on 21-22 April, was a joint initiative of the English Department at the University of Sydney and the Faculty of Law at Monash. Bryson was one of several participants who came from interstate for this conference; among others were Nicholas Hasluck from Perth, and Professor Louis Waller from Monash. In his address, "Notes Lost Underfoot on the Clapham Omnibus", Bryson traced some links between legal thought and its expression, and maintained that subconscious thought rather than formal thought could bring literature into being *within* the law.

This inspired a lively discussion of law in relation to culture and focused the purpose of the conference, which was to explore relationships between law and literature. Based on the assumption that the meeting-place of law and literature is language, our aim was to bring lawyers, writers, and literary and legal academics together to talk to each other about their languages and methodologies. Talk they did, professionally, academically, and just about everywhere in between. Although we organised the conference from the literary academy, we kept the needs and interests of the legal profession firmly in mind. A well-attended mandatory continuing legal education seminar, accredited by the NSW Law Society, was run in conjunction with the conference. Featuring Ian Barker QC, Malcolm Macgregor QC and Alex Jones, Senior Lecturer in English at the University of Sydney, its subject was voice identification and written discourse analysis.

The conference grew indirectly from our devising an English course called "Legal Fictions", which is being taught for the first time at Sydney University this year, and which covers literary texts from Shakespeare to Tom Wolfe. Our inspiration for this course came from the American Law and Literature movement, a significant Law Reform movement in the United States which emphasises jurisprudence as an essentially literary activity. Two interdisciplinary journals associated with this movement, *Cardozo Studies in Law and Literature* and the *Yale Journal of Law and the Humanities*, have suggested to us some ways in which law and literature can talk to each other.

Many of the conference papers exemplified this dialogue. Geoffrey Lehmann spoke on poetry as a forensic art, Arthur Glass discussed interpretive practices in law and literary criticism, and Ken Horler, president of the NSW Council of Civil Liberties, looked wittily at some abuses of language by lawyers. At times the talk was heated. The most contentious paper, which was broadcast on the ABC Law Report on 15 May, came from David Fraser (of the Sydney University Law School). He argued that the lawyer is a truly alienated being living through professional fantasies of power and myths of expertise, and that such images of lawyers get incorporated into our lives through "interactive" television programmes like L.A. Law. The most contemporary critique came from Rosemary Huisman (of the Sydney University English Department), who focused on the relationship of mutual incomprehension that exists between Aborigines and the law. She maintained that discourse analysis, as a technique practised in contemporary linguistics, could help clarify this crisis of unintelligibility in contemporary Australian society. Her suggestion, that our language legislates our world and determines our social structures, would surely have been appreciated by Shelley, who described poets as the unacknowledged legislators of the world.

If the frontiers between law and literature were tentatively explored during the first day of the conference, they were positively stormed at the dinner, at which, miraculously, no actionable nuisance was committed. The singing started before dessert was served (the caterers had thoughtfully provided a piano), and was appropriately continued during Neville Turner's paper, "The Legal Wit of W.S. Gilbert", on the Sunday morning. We regained our composure on the Sunday afternoon, which featured a forum on the Writing of Judgments. The panel was made up of Justice Michael Kirby, President of the NSW Court of Appeal, Appeal Court members, Justices Meagher and Priestley, NSW Supreme Court Justice P.A. Young, and Professor Michael Chesterman of the University of NSW. The forum was chaired by Sir Laurence Street, who set the social agenda for the discussion by asking the crucial question of who a judgment is written *for* : who comprises its implied or notional audience? Speaking from the floor, Professor Waller pushed the judicial opinion in the direction of literature by arguing for its emotional effect. Other significant contributions from the floor, about sexist language, were made by Justice Jane Matthews, of the NSW Supreme Court, and Elizabeth Handsley, Visiting Fellow in Law at the University of NSW.

We hope to publish the proceedings of this conference as the inaugural issue of the journal of the Australian Law and Literature Association, which was founded at a business meeting early on the Sunday morning (another miracle). Mr Justice Priestley has graciously accepted an invitation to be our patron. We hope that the association will, like the conference, provide opportunities for the law and the humanities to talk more to each other, for each other's mutual benefit. 160 people registered for the conference, and we are hoping for similar success at a similar event to be held at Monash sometime during the second half of next year.

Expressions of interest in this next conference from all interested parties — writers, lawyers, *littérateurs*, poets and novelists *manqués*, expert witnesses, or mere innocent bystanders — should be addressed to J. Neville Turner, Faculty of Law, Monash University, Clayton, Vic. 3168. Enquiries about the association (for which we are soliciting institutional as well as individual membership) should be directed either to the President, Dr Simon Petch, English Department, University of Sydney, NSW 2006 (DX 1154 Sydney, phone (02) 692 3791) or to the Secretary, Francois Kunc, Allen Allen & Hemsley, MLC Centre, Martin Place, Sydney NSW 2000 (DX 105 Sydney, phone (02) 229 8710). ❑

Ken Hall - Clerk of Many Colours

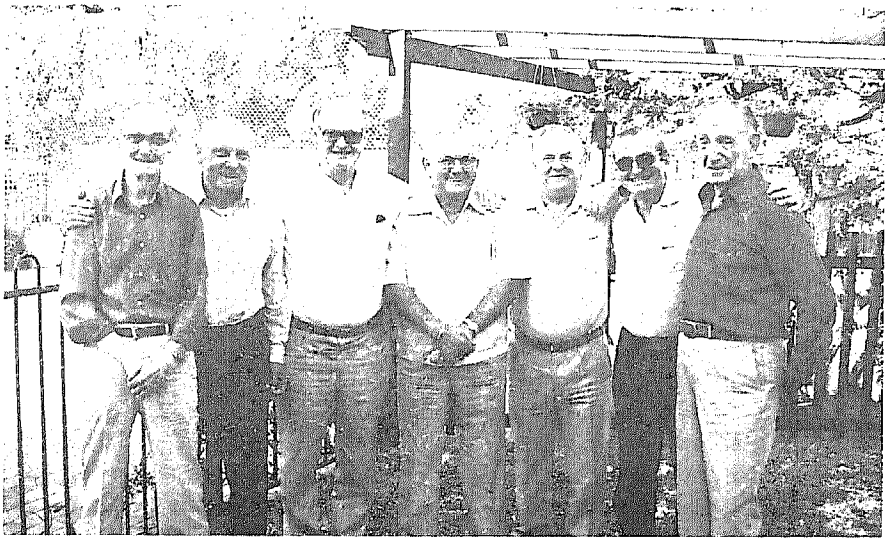
On 15 June 1990, at the annual Clerks Dinner, Bill McMahon (clerk to Eighth Floor, Selborne Chambers) spoke in honour of Ken Hall, (Tenth Floor Wentworth) who has been a Barrister's Clerk for fifty years.

My brief tonight is to make an announcement and speak briefly thereto. The announcement is that 1990 marks the 50th year of distinguished service by our very esteemed President, Ken Hall, to the Independent Bar of New South Wales. The announcement is made publicly in the presence of his friends and peers to honour him as he truly deserves to be honoured.

The epoch of Ken's service is like a travelogue through the legal history of Australian Law itself and the personalities who gave substance and colour to its development and practice.

Since Sir Francis Forbes was appointed Chief Justice of New South Wales in 1823 he has to this day had 14 successors. Ken's service has been during the times of 7 of them. He has served during the times of 5 of the 9 Chief Justices of the High Court. His service preceded the birth of the present Court of Appeal, the Family Court, the Land and Environment Court and the Administrative Appeals Tribunal and the Federal Court.

He has clerked for Sir John Kerr a former Chief Justice of New South Wales who later became Governor General of the Commonwealth, Sir Nigel Bowen who became Attorney General of the Commonwealth and now Chief Justice of the Federal Court, Sir Maurice Byers who became Commonwealth Solicitor-General, Gough Whitlam who was Prime Minister from 1972 to 1975, Athol Richardson who became Colonial Treasurer. He has been Clerk to 5 Bar Presidents, Sir John Kerr, Sir Nigel Bowen, Sir Maurice Byers, Trevor now Mr. Justice Morling and Ken now Mr. Justice Handley and for 19 other barristers who have become judges; and, if you think that an impressive life's work, he said to me only the other day that he feels that he is just getting into his stride.



258 years of clerking!....
(l to r) Ken Hall (50 yrs) Ernie Stanhope (21 yrs) Bill McMahon (27 yrs) Fred de Saxe (55 yrs) Greg Isaacs (33 yrs) Les O'Brien (21 yrs) and Harry Peel (51 yrs)

If he were tonight being judged on the dictum that "by their fruits will you know them" there would be no need to say another word. But tonight's celebration demands that I go on.

Before I do so I feel that this is the correct time for me to get something off my chest. I was pretty chuffed at the honour bestowed upon me when Nick Tiffen asked me to speak tonight. Bob Horne punctured my ego no end when he said we asked you because we had to get an <u>old</u> clerk who had known Ken for a long time. Old indeed - thanks very much. I can easily understand how it was prudent not to ask Greg Isaac and run the risk of the consequences that would run from someone so old that he could be suffering from Alzheimers disease but they could easily have asked Brian Bannon or Les O'Brien if they wanted somebody really old!

My first memory of Ken's sagacity was in my very early days as a clerk when I sought his counsel. I was told by a clerk who has long departed the scene that if I was to succeed in my new profession I must always remember that the relationship between a barrister and his clerk was an upstairs-downstairs one and that I must always keep my place. As this was contrary to my short experience I spoke to Ken about it. I well remember his comments because he delivered them with such emotion and conviction - "Don't ever allow yourself to think, whatever the reality may be, that any barrister at all is an inferior person to you as his clerk - not even a junior barrister. You must concentrate on treating each and every one of them as your equal no matter how difficult at times it may be to do so". I have tried to live by this creed of Ken's. There is no doubt but that he was dead right about the difficult bit.

In the wider society it is now part of history that Germaine Greer somehow heard of Ken's philosophy of equality and founded a religion on it that now claims to have more committed adherents than all the other religions in western civilisation put together. Ken looks beyond this development to when he says the female will, as a logical consequence, come to realise that they have a responsibility to think kindly of we males and to speak and treat us kindly as well. I warned him that he was treading on dangerous ground. He was tampering with the natural order. Consider what happened to the fate of other notable meddlers, Lucifer, Adam and Eve and Hitler. They all came to sticky ends. He seemed unconcerned, his vision impaired. I contented myself in telling him that he and I will never be around to see it.

If one were to try to assess the capacity for thought, for work and the ambivalence of the personality of Ken Hall one has only to think that he clerked for John Kerr and Gough Whitlam all at the one time. What is more, there were no public displays of disagreement or petulance when they were under Ken's jurisdiction. Paul Webb said to me that they would not have dared.

I asked Ken if he had much contact with Gough Whitlam during his reign. He said that apart from Floor Dinners he had spoken to him on only two occasions. The first was when Ken

phoned him to seek some help for the distressed aged wife of a very ill retired lawyer as she could not get him into a hospital. Within half an hour the lady phoned Ken back to thank him for his assistance, the ambulance arrived and a hospital bed had been found. And, said I, what was the second occasion. A funny thing about that, said Ken, he phoned me the very next day and you would have to be stupid not to guess what about. I made several guesses, all wrong ones. When Ken told me he phoned to know how Ken was getting on collecting the balance of those long outstanding fees owing to him I said to him, "Verily I am stupid just like you said".

During 1975 anyone who perused the Vice-Regal notices in the Herald as I did would have seen that the daily appointments of the Governor General, Sir John Kerr, included the names of The Rt. Hon. E.G. Whitlam, The Hon. M.F. Fraser, Sir Garfield Barwick and, I kid you not, the other name that appeared more frequently than any other, that of Mr K.M. Hall. I can remember meeting Ken in Phillip Street on his way to Admiralty House to one of those appointments. He was not particularly happy. He said to me that it is not only ex-barristers who become judges who fail to appreciate that, although their changed circumstances have given them more leisure, your circumstances have not changed at all. You still have a busy practice to run. Ex-barristers who become Governors General fail to appreciate your position as well.

Why do you get so many of these calls I asked. Well, said Ken, John Kerr always liked to keep up with the news of the Floor and of Phillip Street and, as he did when was at the Bar, he used me as a sounding board to have what he called a layman's commonsense opinion about things.

Anyone who was around during those days is aware how worried we were about a 6 billion dollar deficit. In 1990 we have an overseas debt on which the yearly interest exceeds 6 billion dollars. We listen to and read what the politicians and the economic gurus say and write about how we are going to resolve this current crisis. They all say we must lower production costs and increase exports and no doubt they are both important elements in the resolution.

One cannot help but be worried about the resolution of the current crisis. This time there is the absence of the input of the most important consultative advice due to the fact that Bob Hawke and Bill Haydon didn't know Ken Hall.

One can only conjecture what the historians of the future will make of all this when sufficient time has elapsed to allow secret documents to be released for public scrutiny. The books that will be written and the titles thereof. There will be "Ken Hall and Sir John Kerr", "Ken Hall and Gough Whitlam", "Ken Hall and the Chief Justices".

In the book "Ken Hall and the Chief Justice of N.S.W. in 1990" how the debate will rage as to how and when and why the Chief Justice acquired amongst his other titles the one of "The Smiler". Whatever the historians agree or disagree about concerning this charming aspect of his personality, it is certain that they will all agree that it became an omnipresent feature of his countenance on and after the evening of 15th June 1990 when, at dinner, he was the honoured guest of, and sat next to, Ken Hall. ❑

Legal Education: Putting Heads Together

In late June, the Law Foundation held a 3 day live-in colloquium (i.e. "talkfest") at the Mona Vale training centre. Forty representatives from the profession, academia and government attended, including the Deans of all the New South Wales Law Schools and Professor Bezdek from Maryland University.

The colloquium started with a frank (i.e. openly hostile) criticism by some employers about what the Law Schools and the College of Law were producing. Then the representatives from the Law Schools and the College of Law replied. Everyone got a lot off their chests. As Professor Bezdek commented at the social function that evening:

"I couldn't believe how rude you all were from the start. It was great. Usually it would take us a day and a half to get to that point."

Such a start to the colloquium seemed to reflect reality. There are obvious tensions between the profession and the institutions which have resulted in the past in relatively little communication and sharing of views.

Thereafter, there was a far better understanding by each side of the other's concerns and interests. It was then possible to constructively discuss the way ahead.

Of course, views about the way ahead differed widely and the respective merits and demerits of integrated and unintegrated "skills" courses and "clinical training" courses were canvassed. For a while we seemed to disappear into a chasm of jargon and ideology with individual specialists pushing individual barrows.

But what became apparent was that the students' perspective was being entirely overlooked and we did not ever seem to come to grips with the difference between the educator's perspective and the student's perspective. They are worlds apart. **The goals which educators set will <u>never</u> be achieved unless the students also share those goals.**

There was an interesting session discussing the role of ethics within legal education. The discussion seemed to demonstrate the lack of consideration that has been given in the past to injecting the notion of ethics throughout a legal education. This is obviously an area that needs greater exploration to ensure a consistent and continuing approach. Presently, we just add on a topic of "legal ethics" or "professional responsibility" which is regarded by students as a "soft subject" and divorced from "real law".

I came away from the conference rather inspired by the fact that everybody had left their initial positions and come together as a group of colleagues with common interests working together to solve a tricky problem. By the third day, perhaps even the second day, the label of "academic", "solicitor from a big firm" or "barrister" seemed to lose significance. I hope that that situation can continue in the future.

The message for the Bar was clear. As a significant body of lawyers, the Bar must play a greater role in the legal education process than at present. The Bar, and the profession generally, has a vested interest in law students and to that extent it should protect that interest.

The way to do that is more complex. Clearly, the Law Schools require greater funding support than they presently receive. Clearly also, they desire and require greater input from the profession in the teaching process. In many ways, this latter aspect is the most challenging for the Law Schools and the profession alike. It deserves greater consideration on both sides. ❑

Philip Greenwood

Success at the Bar: Lessons from Literature and Prosopography

An up-dated version of Lee J. W. Aitken's fascinating paper, originally published in the Australian Bar Review.*

Nemo repente fuit turpissimus[1].
"Muir [2] for facts, Avory [3] for law, Gill [4] for brass."[5]

According to Dickens, "while Mr Stryver[6] was a glib man, and an unscrupulous, and a ready, and a bold, he had not that faculty of extracting the essence from a heap of statements, which is among the most striking and necessary of the advocate's accomplishments".[7] Certainly, such a power of synthesis and selection is vital to success at the Bar. So, too, is the ability to seek out the underlying principle in any matter and bring it to the attention of the Court.[8]

Perhaps, however, mere physical attributes may count for more.[9] Good looks will go a long way: Sir Edward Marshall Hall[10] "was a very handsome man, with a noble head and a most expressive face, and F.E. Smith's comment is not to be bettered: 'Nobody could have been as wonderful as Marshall Hall then looked.'"[11] On the other hand, Viscount Haldane had a singularly undistinguished and portly frame and a thin voice ill-suited to advocacy. The explanation for the apparent paradox may be that Marshall Hall argued predominantly before juries, while Viscount Haldane specialised in elucidating "great questions before supreme tribunals". A small build and insignificant appearance need not preclude success in a nisi prius practice since psychological forces often compensate. Horace Avory K.C. was physically unprepossessing but he compensated for this, as Sir Patrick Hastings records, by "a personality which was infinitely forbidding".[12]

Stamina[13] and a good digestion[14] are indispensable. So, too, is the capacity for unremitting hard work. Lord Denning

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1. "No-one becomes an absolute rogue overnight", the apocryphal explanation, in Scotland, for the long period of time involved in the novitiate of a Writer to the Signet, as quoted by Lord Macmillan, *A Man of Law's Tale* (1952) p.33.

2. Sir Richard Muir, Senior Treasury Counsel and the most formidable of prosecutors because of his gradgrind attention to detail. In his autobiography he records with regret the acquittal of a murderer whom he was prosecuting because of his failure to take his customary view of the scene of the crime due to rain. A good example of his masterly exposition in opening a case may be seen in the Crippen murder, his notes for which are in Blom-Cooper, *Law as Literature* p.14. He is the model for the Crown Prosecutor, Sir Heyman Drewer in Ernest Raymond's novel, *We, The Accused* (1934). For a less than flattering description of his methods, see, *Stinie, The Murder on the Heath* (1988) which describes his approach in the Stinie Morrison murder.

3. Sir Horace Avory, famous prosecutor and subsequently the pre-eminent criminal judge in England. For an encomiastic biography, see Jackson, *Mr Justice Avory* (1935).

4. Charles Gill Q.C., a leading counsel in controversial cases and Sir Patrick Hastings' pupil-master.

5. The proverbial recommendation on the choice of counsel at the English Common Law Bar at the end of the nineteenth century; see Jackson op.cit. p.91. The successful counsel would display all the characteristics and abilities of this trinity.

6. A happy choice of name for the character, rivalled, perhaps, in appropriateness only by the real life Lord Braxfield, the famous Scottish hanging judge (1721-1799) who was himself the subject of R.L. Stevenson's *Weir of Hermiston* (1896).

7. Charles Dickens, *A Tale of Two Cities* Chapter 5, "The Jackal".

8. Viscount Haldane of Cloan, *Autobiography*.

9. "... Success at the Common Law Bar depends largely on the impression made on solicitors who see a man in court or moving about the halls and corridors of the Law Courts. ... a man of insignificant appearance has always a hard battle to fight": (1921) 66 Sol. J. 135 quoted in R.F.V. Heuston *Lives of the Lord Chancellors 1885-1940* Vol. I. p.12 (Hereinafter Heuston Vol. I or *Lives of the Lord Chancellors 1940-1970* Vol. II).

10. Sir Henry Dickens noted, however, that "he had not that gift of far-seeing discretion which is required of a great advocate": Dickens, *The Recollections of Sir Henry Dickens* (1934) p.244.

11. Norman Birkett, *Six Great Advocates* (1961) p.12 quoted in H. Montgomery Hyde, *Norman Birkett* (1964) p.87.

12. "It is no exaggeration to say that he could sentence a man to death with as little display of emotion as a magistrate fining a drunk half a crown": Jackson op.cit. p. 16. Avory was also, however, a man of great generosity. When appointed to the Bench he allowed Hastings to use his chambers rent free for a long period of time when Hastings took them over, along with Sir Harry Poland's chair. Characteristically, he would not allow Hastings to take his library as well.

13. For a good example of what can be accomplished over lunch, see the effort of the Attorney-General, Sir Reginald Manningham-Buller, in analysing completely new evidence in the lunch break and re-examining upon it immediately thereafter: Devlin, *Easing the Passing* (1986) p.70 giving an "insider's view" of the Bodkin Adams murder trial.

14. "It was well said of him (Lord Campbell), in explanation of his success, that he lived eighty years and preserved his digestion unimpaired." Lord Russell of Liverpool, *The Royal Conscience* (1961) p.115.

without immodesty baldly recalls: "I was called to the Bar and worked as hard as anyone ever has done".[15] Lord Kilmuir could be in conference from 9 a.m. to 10.30 a.m., in Court until 5.15 p.m., on the London train from Manchester by 5.45, in the House of Commons from 9.00 p.m. until 11.30 and "then back on the midnight train to the North".[16] It is important to keep up your health. Sir Isaac Isaacs, no trencherman, was devoted to cups of tea[17] and continued to run long distances late into middle age.[18] At the age of 47, when Lord Chancellor, the Earl of Birkenhead, after dinner and still in his dinner jacket, won a handicap race around Tom Quad at Christchurch, Oxford against a Blue more than 20 years his junior.[19]

Very great intelligence may be more a hindrance than a help. Lord Hailsham has noted that "of all the Lord Chancellors in history,... only Lord Birkenhead got a first class in law; and the others who did study law as their first degree did not, if fact, achieve first class honours."[20] Horace Avory obtained a third as did Lord Halsbury. Sir Patrick Hastings was largely self-taught. Marshall Hall without affectation, insisted on his junior arguing any point of law.[21] Hebetude enables the advocate to withstand the inevitable tedium which any great practice entails. As Mr. Micawber once rightly observed: "to a man possessed of the higher imaginative powers the objection to legal studies is the amount of detail which they involve."

Of course, one can take devotion to duty so far as to be unpleasant. At the end of *Re Boundary Between Canada and Newfoundland*[22] which had lasted fourteen days in the Privy Council, Walter Monckton and the other juniors were about to go off and have a celebratory lunch.

"We were debating whether to ask (Sir John) Simon to join us when we heard him say to his clerk: What is the next thing, Ronald? and we were deterred".[23]

Equally useful is "l'abilite de fixer les objets distants longtemps"[24], a particular trait Churchill ascribed to F.E. Smith K.C. who when summoned to London in the Leverhulme libel action found a stack of papers nearly four foot high awaiting him at the Savoy. "He ordered a bottle of champagne and two dozen oysters and began to read the papers. They were of great length and complexity, and he worked on them for eleven hours, all through the night." His terse, unequivocal opinion[25] and its subsequent vindication by the largest damages award made to that date[26] are well-known.[27]

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15. Denning, *Family Story* (1981) p.84.

16. R.F.V. Heuston, *Lives of the Lord Chancellors* Vol. II p.164. Viscount Dilhorne "was known to have left the House at 3 a.m. and by 9 a.m. to be ready for a conference with devils, at which he showed a detailed knowledge of his brief".

17. One may usefully contrast his abstemiousness with the bibulous behaviour of other great advocates. Dickens, for example, says of Stryver and Carton that they "drank enough to float a king's ship": *Tale of Two Cities*. The Earl of Birkenhead was often worse for wear for drink; see, Campbell, *F.E. Smith, First Earl of Birkenhead* (1983) passim.

18. Z. Cowen, *Isaac Isaacs*.

19. The incident is recorded in Campbell, *F.E. Smith, First Earl of Birkenhead* (1983) pp. 705-706. Birkenhead bet Milligan, the Olympic miler, fifteen pounds to five pounds that he could run four laps of Tom Quad, Christchurch before Milligan could run eight. Before they began F.E. made one more condition. "The bets are laid" the witnesses protested. "The one condition is", F.E. insisted solemnly, "that I have one more whisky and soda".

20. Lord Hailsham in Bos and Brownlie, *Liber Amicorum for Lord Wilberforce* (1987) p.4.

21. Perhaps it might better be said that it is most useful not to seem too intelligent. Lord Birkett once expressed surprise at the lack of success at the Bar of Phillip Guedella, a brilliant Cambridge contemporary. "It is one of the fascinating questions why men succeed or fail at the Bar. Guedella with every gift - brilliant in speech, highly intelligent, industrious - and yet he failed. My own view is that he was too clever and gave the impression of being a little superior to the ordinary run of men": *Lord Birkett of Ulverstone*. Lord Diplock was advised not to mention certain high academic achievements when he commenced in practice. In this, as in many other things, *ars est celare artem*. The different respect accorded to purely academic achievement may be noted in the number of Melbourne advocates who rejoice in an academic doctorate and the similar number of their Sydney counterparts, similarly qualified, who do all they can to suppress mention of their degrees for fear it will be bad for business. I once gently reproved the judge to whom I was Associate for failing to recognise the Ph.D. of a barrister before him, to be told that only an LL.D. would receive any accolade in his court! On this restricted basis, only Dr Spry would be recognised.

22. 137 L.T. 157 (P.C.)

23. Birkenhead, *Walter Monckton* (1969) p.78. This lack of humanity, perhaps, led to the famous couplet concerning Sir John:

"Sir John Simon isn't like Timon,
Timon hated mankind, Sir John doesn't mind".

On the other hand, when Simon became Lord Chancellor he left his extensive library to his Inn to replace books destroyed in the bombing during the early part of World War II.

24. W.S. Churchill, *Great Contemporaries* describing F.E. Smith.

25. "There is no answer to this action for libel, and the damages must be enormous".

26. Fifty thousand pounds, since surpassed by several recent awards such as that to Mrs. Sutcliffe against "Private Eye"; but see now the decision of the Court of Appeal in *Sutcliffe v. Pressdram Ltd.* [1990] 2 W.L.R. 271 which greatly reduced the jury award and laid down rules as to the assessment.

27. Heuston Vol. I p.363. And see H. Montgomery Hyde, *Their Good Names* (1970) p.195 "The Soap Trust Libel".

An "artificial" memory helps.[28] In 1906 Lord Halsbury's son was shown a brief of his father's delivered in 1855 by a Chester solicitor. There was nothing on it except that on the last page "there was written, in my father's handwriting, the times of 3 trains to London." Upon his return to the capital, his son asked Lord Halsbury about the case.

"He remembered every single witness, he told me what they said, he told me which broke down and which were believed, he told me of the two important letters which won the case; he remembered the judge and every detail of the case".

Perhaps Hardinge Giffard was an exception; Lord Alverstone once said that to succeed at the Bar you must have a mind which can remember and a mind which can forget. Lord Macmillan has remarked, "as each case was concluded it was wiped off the slate to make way for its successor...".[29]

A certain insouciance under pressure undoubtedly helps. Lord Halsbury "never read a brief a second time, and rarely a first". Such an approach accords with that of Sir Patrick Hastings who made a point of never making a note upon his brief. When F.E. Smith K.C. argued before Mr Justice Darling it was wonderful to see "which of two great minds coming entirely afresh to the consideration of the question at issue would be the first to grasp the points."[30] Examples of sang froid and even impertinence are legion. Who now would respond as Danckwerts K.C. did in reply to Lord Alverstone C.J.'s comment, "I would have put that somewhat differently Mr Danckwerts" with a simple and enigmatic: "You would"?[31]

For appellate work, an understanding of judicial psychology is especially useful. Owen Dixon K.C. would often play one member of the High Court off against another. [32] In *Afternoon Light* Sir Robert Menzies records an illuminating incident. Dixon, opposed by Latham K.C. in the High Court, was being pressed on a particularly difficult point. Rather than respond immediately, he gave a laugh[33] "which chilled [Menzies'] blood" and said that he would wait to hear what Sir John had to say. Sir John began to lecture the Bench with his usual didacticism, speedily put it off side, and allowed Dixon to win almost by default.

Similarly, Viscount Haldane "knew the judges in the House of Lords and Privy Council so well that I could follow the workings of their individual minds".[34]

Above all, a good advocate possesses his own style. In Galsworthy's *The Silver Spoon* [35] Soames briefs Sir James Foskisson K.C. on Fleur's behalf in a libel action brought against her by Marjorie Ferrars.

"Since selecting him Soames had been keeping his eye on the great advocate; had watched him veiling his appeals to a jury with an air of scrupulous equity; very few - he was convinced - and those not on juries, could see Sir James Foskisson coming round a corner."[36]

This is the same quality Sir Owen Dixon lauded in Sir Frank Gavan Duffy. "He had the odd and forgotten theory that what mattered most in courts was advocacy, and he had thought about it a lot and he had practised it with extraordinary success. I had a room in Selborne Chambers at that time which fortunately was almost the last room before you got on to Bourke Street, and in the niceness of his disposition he used to come in to me and say, 'Dixon, come up and see what I am going to do in such-and-such a court'. And it was worth going up to see what he did, I can assure you. If ever there was a man who could make bricks without straw in open court, it was Sir Frank Gavan Duffy."[37] This ability not to be seen coming round a corner, to make bricks without straw, exists and is easily recognisable but cannot be defined.

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28. Viscount Haldane could remember facts and legal principles without effort but "by some curious mental freak he had a poor memory for verse or prose." Heuston Vol. I. p. 168.

29. Lord Macmillan op. cit. p.115

30. Lord Macmillan op.cit. p.126

31. Dickens notes: "Unfortunately both for himself and the profession, he [Danckwerts] had a violent and uncontrollable temper, which quite unfitted him for the position of a judge." *The Recollections of Sir Henry Dickens* (1934) p.245.

32. "He would with diabolical skill set one judge against another in dialectical combat in the course of persuading the majority to decide in his favour." Sir Douglas Menzies's memoir in (1973-1974) 9 M.U.L.R.1.

33. Sir Owen Dixon's laughter was, apparently, a feature which people always noted. For example, in his note, "Sir Owen Dixon: An Intellectual Man of Passion" (1986) 15 M.U.L.R. 579, 581 Peter Ryan describes it as "harsh cackling laughter".

34. Heuston op.cit. Vol. I. p.189.

35. (1929) Book II of *A Modern Comedy*.

36. One can only regret that Galsworthy does not give more details of another great lawyer, Bobstay Q.C., employed by Soames's uncle Swithin in an earlier slander action brought against him by a member of the Walpole Club. "Swithin had called him in public 'a little touting whipper-snapper of a parson'. He remembered how he had whittled the charge down to the word 'whipper-snapper', by proving the plaintiff's height to be five feet four, his profession the church, his habit the collection of money for the purpose of small-clothing the Fiji islanders. The Jury had assessed 'whipper-snapper' at ten pounds - Soames always believed the small clothes had done it. His Counsel had made great game of them - Bobstay Q.C. ... Bobstay would have gone clean through this 'baggage' and come out on the other side."

37. (1963) 110 C.L.R. xiii.

To succeed it is also vital to perceive and seize the main chance. Lord Haldane did so when briefed overnight to appear in an important Privy Council case on behalf of the Canadian government, Sir Patrick Hastings when left by Lord Carson to conduct an important fraud trial on his own [38], Lord Goddard by being able to advise in a banking matter late on a Saturday morning when there was no other counsel in the Temple.[39]

Equally, it is vital to be able to withstand the vicissitudes of the first few years at the Bar. Viscount Maugham remembered that: "The necessity of getting briefs, especially if one has a wife and child to support, is of a very poignant kind ... the waiting for work is a terrible drawback to a young barrister's life and tends to sour his whole existence. I shall never forget those unhappy days."[40] Sir John Rolt often complains in his autobiography of his straitened financial circumstances, "res angustae domi". Sir Garfield Barwick was bankrupted on a guarantee given for his brother's petrol station and left with nothing but his chair! Rufus Isaacs had been "hammered" on the Stock Exchange. Sir Patrick Hastings found that brown paper was a satisfactory substitute for shoe leather. Despite these difficulties all ultimately succeeded because they were prepared to take a risk. Hastings once had to pawn his watch to raise the train fare to go on Circuit but he "never liked a game that is played for safety". Dr Evatt's astringent comment to Sir John Kerr is completely in point. When the latter hesitated on risking the Bar, Dr Evatt replied: "What do you want me to do? Make out a deed poll guaranteeing you six hundred pounds a year?"[41]

Relationships with solicitors, and the appropriate professional treatment of them count for much. Lord Denning urged the neophyte to demonstrate "good sense and a pleasing manner".[42] Lord Simon put it simply.

"You must cultivate the faculty, in your early days, of giving professional advice, when consulted by people older than yourself, with firmness and without either pomposity or apologies."

It is possible, within bounds to publicise: "To get his name on the title-page of a useful law book has always been recognised as one of the few legitimate methods of publicity open to an aspiring member of the Bar".[43] Sir Patrick Hastings took this method to extremes by writing a turgid monograph on money-lending over the Summer Vacation in order to secure a seat in Charles Gill's chambers by dedicating the work to him!

Of course, it is no disadvantage to be the scion of a great legal house or have other legal connections. As the odious clerk in C.P. Snow's *Time of Hope*[44] observes to the hero, a newly called barrister, about to commence pupillage: "I want to know what strings you can pull, sir .... Some of our young gentlemen have uncles or connexions who are solicitors. It turns out very useful sometimes. It's wonderful how the jobs come in". Certainly, it must have assisted Sir Henry Winneke's career to be the son of a judge and the son-in-law of a prominent solicitor. Examples could be multiplied.

In the end, however, success flows from enjoyment of practice. In *Time of Hope* the smug hero spends many hours excoriating his pupil-master, Herbert Getliffe but recognises in the end that:

"Getliffe's mind was muddy, but he was a more effective lawyer than men far cleverer, because he was tricky and resilient, because he was expansive with all men, because nothing restrained his emotions, and because he had a simple, humble, tenacious love for his job."[45]

This devotion to the law is amply demonstrated when Getliffe decides to take silk in the very middle of the Great Depression. Getliffe is a miserly specimen "so mean that, having screwed himself to taking one to lunch, he would arrive late so that he need not buy a drink beforehand."[46] Why then does he seek advancement?

He does so because of "his delight in his profession, his love of the legal honours not only for their cash value but for themselves. If ever the chance came ... he would renounce the most lucrative of practices in order to become Getliffe J., to revel in the glory of being a judge."[47] It is a sad testimony on the times, and the esteem and respect now accorded to judicial officers generally, that such worthy motives are insufficient in the present economy to attract barristers onto the Bench or to dissuade them, once appointed, from leaving it. ❑

* Solicitor of the Supreme Court of New South Wales.

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38. He had been briefed with Carson to defend a libel action brought by Robert Siever and Carson was called away to Ireland on political business. Hastings said: "When Carson went to Ulster he brought me fortune": H. Montgomery Hyde, *Carson* (1953) pp. 45-46.

39. F. Bresler, *Lord Goddard* (1977) pp.50-51.

40. Lord Maugham, *At the End of the Day* p.59.

41. Kerr, *Matters for Judgment* (1978) p.46.

42. *Family Story* p.92.

43. Lord Macmillan op.cit. p.55. I once propounded this theory to the judge to whom I was Associate, suggesting a book on Company law. He looked at me sardonically and said: "Yes, and they will send you nothing but cases on the Dog Act"!

44. (1949) Penguin p.241.

45. C.P. Snow op. cit. p.247.

46. C.P. Snow op. cit. p.314.

47. Ibid.

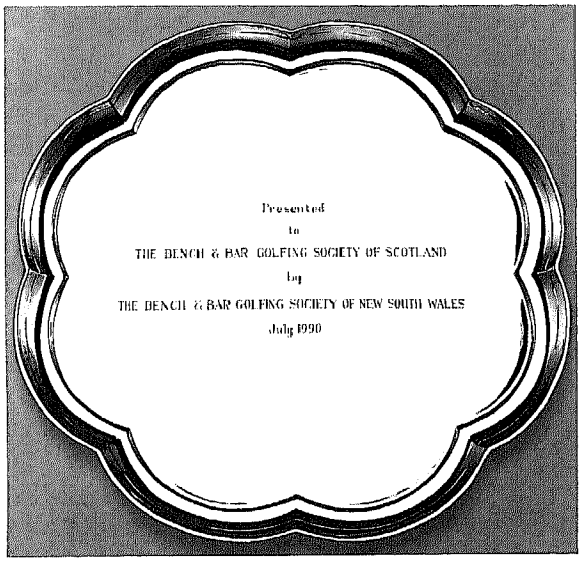
Golf - Bar Tours Highlands

In July an elite, hand-picked team of Bar golfers and sundry others putted their way around golf courses in Scotland and Ireland. John Maconachie reports.

In July a small contingent of golfers made up of McClellan QC, Maconachie, Callaway (the younger and more pleasant of the two) with Phil Wotton, solicitor of Phillips Fox, and a number of judges from the Family Court, District Court and Compensation Court together with some wives and partners, toured Scottish, Ulster and Irish golf courses. Also in the group was Eric Moorhouse, a friend of Cook J., who kindly assisted with some of the organisational aspects of the tour.

On 17th and 18th July we played the Kings and Queens courses at Gleneagles Hotel in Perthshire. The Scottish Open had been played over the Kings course a week or so prior to our visit and both courses were in immaculate condition.

Overnight we stayed at the magnificent Gleneagles Hotel and dined together in the impressive dining room. During dinner a piper played on several occasions - McClellan QC, who it is understood traces his ancestry to Scotsmen of high birth, and Maconachie who is also of Scottish ancestry but for reasons best known to himself is not prepared to disclose more than that, were then seen to cry into what they believed to be Haggis but which was in fact fruit cake. Perceiving that these pseudo-hairy chested distant cousins of Rob Roy McGregor couldn't handle malt whiskey, Callaway (the younger and more pleasant of the two) whose ancestry is obviously Irish (despite the fervent and understandable denials of his father, Callaway QC (the much older and less pleasant of the two) was heard to mumble something about Scotsmen being Irish fishermen who had gone away one day and got lost.



'Silver Waiter'

On 19th July we were entertained at "a day of golf" at Muirfield - the seaside links course of the Honourable Company of Edinburgh Golfers - as the guests of the Edinburgh Bar.

36 holes of foursomes were played punctuated by a 2 1/2 hour (!) lunch the after effects of which caused the ball to run very much more freely (if somewhat inaccurately) across the greens during the afternoon round. The New South Wales Bench and Bar succeeded by four matches to one. Callaway (the younger and more pleasant of the two) was a clear winner in the "club throwing in the heavy rough" competition.

On the evening of 20th July, after a day spent watching the British Open at St. Andrews, we were wonderfully dined by the Scottish Bar, after drinks in, and an inspection of, the magnificent Advocates Library in Parliament Square. A silver waiter has since been delivered to our Scottish hosts in thanks. (see photo)

On 21st and 22nd July many of our party returned to St. Andrews to watch the Open while several others masochistically subjected themselves to later afternoon games on Edinburgh golf courses.

On 24th July we had the great privilege of playing the Old Course at Royal Troon, the 1989 Open course on the west coast of Scotland, as well as Portland, the secondary course at that club. Great interest was shown in the 18th hole where Greg Norman comprehensively threw away that Open championship with an over ambitious drive which landed in a bunker that went half way to China.

Muirfield and Troon gave us an insight into Scottish society - at Muirfield women were reluctantly allowed on the golf course but refused entry to the clubhouse; Royal Troon were somewhat more consistent in their attitude - women were not permitted on the Old Course, or in the clubhouse, and any enquiries by them as to the presence or otherwise of a gentleman in the clubhouse were not responded to or, it seems, even acknowledged. Maconachie was heard to remark that it seemed to be quite a reasonable and appropriate response to such intrusions.

Before travelling to Ulster we had the good fortune to play at Prestwick, the venue for the first British Open 119 years ago - an old fashioned course with a number of holes, including par threes, which require one to play to the green when there is between the golfer and the green a hill up to 100 feet high denying sight of, and in most cases delivery of the ball to, the green. Different!

Then came Ulster - what an extraordinary place it is. Armoured personnel carriers and armed soldiers in the streets, fortified check points on roads, and a Supreme Court building in a sealed off road, defended (literally) by armed British Soldiers some of whom were located in what could only be described as a bunker, and the bomb blasted building itself clothed in scaffolding and razor wire.

We played a much superior Ulster Bar team over the magnificent Dunluce Links of the Royal Portrush Golf Club in County Londonderry and were comprehensively beaten in every match. The rugged beauty of the course defies adequate description. In what seemed to us a howling gale but which was to the locals a gentle zephyr, we struggled over terrain that would have caused battlefields of the Crimean war to be declared "unplayable".

The next day, 27th July, our touring party played alone at Royal County Down and there experienced the only rain of the whole tour. However, not even rain could spoil the pleasure of playing on such a challenging and beautiful golf course.

That night we were royally entertained in the library at the Supreme Court. The hospitality of the Ulster Bar was magnificent and to top it all off they presented us with a crystal fruit bowl, suitably inscribed to mark the occasion of our visit. That beautiful article will find its place in the common room shortly.

The evening finished at our hotel at about 4 a.m. No report of the last half of the evening is possible because no-one present had any, or any sufficiently sober, recollection of events.

We travelled from Belfast through County Armagh, past a permanent and very serious British Army checkpoint on the main road out of Ulster (tank traps, blast deflectors, machine guns and all) to Dublin. There we played the Dublin Bar at Woodbrook and the golfing party was entertained to dinner at the golf club by our Irish hosts. Another magnificent night was had but it is sad to report that again we were comprehensively beaten in the golf match.

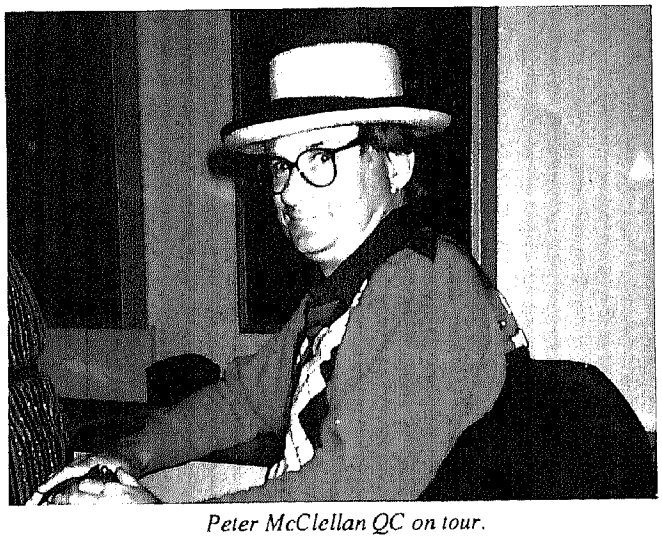
Thereafter we toured the southwest of Ireland and played the magnificent links courses at Waterville, Bally Bunion and La Hinch.

We had the opportunity both on and off the links to appreciate the splendour of the region - it is indeed a most beautiful place.

On the last night that we were together, at Newcastle on Fergus we dined as a party at a castle where the food and surroundings were magnificent. The walk back to our hotel involved a hike through a golf course during which Hughes, Heron D.C.J. and their wives (all of whom joined for the Irish section of the tour), took a wrong turn and were found by some local wandering aimlessly along a country road, away from the hotel. All deny Irish ancestry; that matter has not yet been resolved. It has been suggested that Kenny QC determine the issue.

One disappointing feature of our 2 1/2 weeks away was that Francey was a late withdrawal from the touring party, after he had done so much work to arrange it. Our collective thanks to him.

An open invitation has been extended to the wonderful people we met in Britain and Ireland to come here to play golf and it is sincerely hoped that a contingent will be here in the foreseeable future. ❑



Peter McClellan QC on tour.

Communicating in Mediations

Courts are being called upon by the Law Council to set up mediation programs. Mediation is an art in itself. Neuro-linguistic programming techniques may help you master the art.

Lawyers and barristers are often called upon to conduct mediations, both officially and unofficially.

One of the primary obstacles to successful mediation is that clients often do not say what they mean, either about the problem, or about their desired outcomes.

Few books or courses on mediation deal explicity with how to surmount these obstacles. Neuro Linguistic Programming is a model of communication derived from studies of **verbal and non-verbal** behaviour of successful therapists, mediators and other communicators whose job is to effect change.

Non-verbal behaviour comprises some 80% of our communication. A mediator needs to recognise the non-verbal signals that a verbal message is incomplete or inaccurate. The mediator's non-verbal behaviour, coupled with appropriate questions can then elicit the real needs and desired outcomes of both clients as well as any hidden agendas or conflicts of interest.

A second obstacle is misleading language. Do you or your clients:

- Hallucinate what is in the other's mind? ("He doesn't want me to have ... ." How do you know that?)
- Make unspecified assumptions? ("There is no way it will work." What do you mean by "work"?)
- Leave important parts of the process unspecified? ("I want everything to be fair." "What's 'everything'; what's fair?")
- Over-generalise? ("All...are... ." "All?")
- Distort reality? ("It's vital!" "You'll die without it?")
- Delete relevant information? ("We never got along." "Not even in the beginning?")

NLP provides a metamodel of verbal communications to recognise and challenge these patterns.

A primary obstacle to implementation of the mediated agreement is that it is sometimes interpreted differently by the two parties. A mediator needs to elicit and include in the agreement, the criteria of both parties. For example, "sell the house" can mean different things to different people unless the questions "How, when, by whom, for how much, etc." have been adequately answered.

An overriding principle of NLP is accurate perception and behavioural flexibility. No fixed pattern of behaviour will work every time. You have a box of tools. What cues do you watch and listen for so you know which tool will undo the nut in a given situation? ❑

Michael Grinder, National Director for Neuro Linguistic Programming in Education (USA) and a member of the Oregon Mediation Association, will present a two day seminar on NLP in Mediation, September 20-21. For more information: phone Dr Lindsey Smith (042) 67 5366 or Andree Maddox on (02) 357 2245.

Barristers Educating Barristers

In May 1990, the Bar Council adopted a somewhat "radical" proposal to revise the Bar Reading Course by introducing a three week, full time segment at the commencement of the program.

The three week segment has two core themes:

1. concentrating on barrister skills, rather than the substantive law; and
2. providing discussion and the sharing of ideas rather than providing formal lectures in a teacher/student environment.

The course has been designed to be stimulating for persons coming direct from law school or experienced solicitors alike. It is innovative in presentation and content.

For the most part, the sessions are conducted by experienced counsel who are also capable presenters. Over 40 such Counsel are involved.

However, the important role that the judiciary can play in the education of the Bar has not been overlooked. The readers attend a large number of courts to meet and hear from the judges directly about practice in their courts.

Nor has the role of disciplines outside the law been overlooked. Experts in communication and psychology provide invaluable guidance to readers regarding, for example, the reliability of evidence, jury selection and persuasion, practice management and negotiation skills.

An integral part of the course is continual assessment and assistance. The readers are divided into groups of ten and allocated a "group master" who is a senior junior. The role of the group master is to:

1. generally be available to answer questions and assist the readers;
2. receive and discuss with the readers pleadings, interrogatories and advices submitted by the readers;
3. review the presentation by readers of applications made to the court; and
4. act as "instructing solicitor" in relation to a mock trial.

During the course the readers are presented with a number of briefs to appear to make applications to the court. Such briefs include bail applications, pleas in mitigation, applications for security for costs, strike-out applications, infant settlement, etc. The hearings are conducted in court before judges, masters or experienced counsel. Each application is video recorded. At the conclusion of the application the "judge" provides comment on the content of the submissions. The reader then leaves the court, with her/his video, and immediately reviews her/his presentation with his group leader.

Another "golden thread" through the course is the brief to appear on a final hearing. The brief to appear is delivered to the readers on the first day of the course and the hearing takes place on the last day of the full time segment. That brief provides the immediate incentive to absorb the material available during the course and apply it at the hearing.

The hearing in the first course was a Supreme Court action by a motel proprietor seeking to recover under its insurance policy as a result of a fire on the premises. The insurer refused indemnity and joined as a party the person who allegedly negligently started the fire. The hearing lasted all day and each of the parties called two witnesses. The matter was heard in the Supreme Court, with each counsel robed, and with a judge or senior practitioner presiding. NIDA actors participated as the witnesses.

Following the three week segment, lectures and workshops are held for the following nine weeks on two afternoons each week. Those lectures included Recommended Continuing Legal Education lectures for the whole Bar. They provide an opportunity for senior and junior practitioners alike to learn about distinct areas of practice which they may wish to develop in the future. Again the lectures are presented by barristers experienced in the particular field and involve discussion rather than formal lectures. ❑ P.H. Greenwood

Book Review

Business Law (2nd ed.) Peter Gillies, Federal Press, 1990; 803 pages

This is the second edition of this work published in December 1989. The first edition was published in June 1988.

The title of this work by Mr Gillies perhaps does not precisely reflect the nature of the work. It is a wide-ranging introduction to the Australian legal system, the sources of law in Australia, federalism and a wide range of other topics of law bearing upon the conduct of business in this country. There are chapters on the law of torts, criminal law, as well as the more familiar topics in such a work: contract law, sale of goods, principal and agent, partnership, property, intellectual property, bailment, consumer protection, credit law, insurance law, bills of exchange, banking law, bankruptcy, the Trade Practices Act and the law of employment. The work also has chapters on basic principles of trust and succession.

The work is principally a student text. While the book's role is perhaps limited for practitioners who specialise in the area of commercial law, it should be said that the author has a gift of expressing himself with precision and clarity.

Even practitioners who regularly practice in commercial fields rarely have cause to constantly keep themselves abreast of recent developments in all the topics covered by this book. There will be few who could not make regular use of this work when delving into fields not regularly touched upon in their practice.

As a student text, or a work for people in business, the work is an invaluable source of basic principle, easily found by reason of the clear layout of the work and easily understood by reason the clear and lucid expression of the author. ❑ James Allsop

Behind the Dingo Fence

Now that the gate has been opened by Street (1989) 63 ALJR 715 and by Roberston (1989) 63 ALJR 769 and interstate barristers may be admitted in Queensland (albeit conditionally) it would seem appropriate for those appearing in Queensland to adopt whatever local courtesies are observed in that State.

It is not, of course, necessary to be admitted in Queensland in order to have a right of appearance in every case. In cases which have been transferred to the Supreme Court of Queensland under the cross-vesting legislation, a barrister or solicitor has the same entitlement to practice in relation to the transferred proceedings as if the court to which the proceedings are transferred were a Federal Court exercising Federal jurisdiction. (See, for example, s 5 (8) *Jurisdiction of Courts (Cross-vesting Act 1987)* (NSW)).

Even in proceedings commenced in the Supreme Court of Queensland, where those proceedings raise questions of Federal jurisdiction, a person entitled to practise as a barrister or solicitor in any Federal court has a right of appearance (s.55B(4) *Judiciary Act* 1903). It has been held by the Supreme Court of Queensland, in a commercial cause in which there was a defence and cross-claim raising allegations of breaches of the *Trade Practices Act* 1974, that New South Wales counsel has a right of appearance by dint of s. 55B(4) of the *Judiciary Act (Austral Mining Constructions Pty. Limited v. Mount Arthur Molybdenum NL*, 6 March 1989, (unreported)). Further, such right of appearance extends to the whole of the proceedings and not just that part of it dealing with the Federal matter.

One of the local courtesies, which is followed (to this observer's eye) almost without exception, is the order in which counsel are seated at the Bar table. The most senior takes his or her place on the right (as one faces the Bench) and the most junior on the left, irrespective of whether appearing for the plaintiff or defendant.

Seniority, except in the case of senior counsel, is determined by the date of admission in the Supreme Court of Queensland. In the case of senior counsel, seniority is according to the date and time of their commission in Queensland as Queen's Counsel. (Rule 43, Barristers' Admissions Rules, 1975).

Normally this would not present a problem. Recently admitted interstate counsel, relying upon their admission in Queensland to appear, must take their place on the left hand side of the Bar table, no matter how experienced or senior they may be in their own state.

An obvious consequence is that a very junior Sydney barrister may in Queensland be more senior than a Sydney barrister his or her senior.

However, in cases which have been transferred under the cross-vesting legislation, and in cases where the court is exercising some element of Federal jurisdiction, the practitioner does not need to rely upon being admitted in Queensland in order to appear. It would seem in such cases that one should nevertheless adopt the local practice. The person having greater seniority in a Federal court would quite properly be seated on the right, even although he or she may be the most junior barrister in the Supreme Court of Queensland. (This is what in fact happens when interstate Counsel appear in the Federal Court in Brisbane).

Since politeness requires that one adopt the local courtesies, it may be prudent for all persons intending to appear in Queensland to obtain the Queensland Law Almanac. (Perhaps it is too sensible a solution, now that the final gate is open, for there to be a common admission to all States once one is admitted in one State). ❑ David Lloyd

Circuit Food

To the cramming assault of 1989 on the health of the Common Law Circus practitioners was added in 1990 the exquisite touch of overlapping. On the last day of the first week in Lismore, the air was full of briefs as the regulars set off for Tamworth.

Fortunately comfort was at hand in the continuing high standard of the restaurants. Harts in Lismore, The Rocks at Byron Bay, the Power House in Tamworth and Seafood Mama's and Café Cézanne in Coffs all held their high ratings. The Cellar Bistro in Tamworth moved up with a brilliant Chilli Muderab and Cocos in Coffs hits the list this year because of great improvement: seafood salad was Roche's favourite and I got the best steak and kidney pie this year.

But the Ringmaster's Award for Star of the Circus this year goes to Carrington House in Newcastle. Seven minutes by car from the Top of the Town, it provides elegant surroundings and attentive but not obsequious service. As soon as we sat down we were brought tiny bowls of dry roasted chick peas and "Phillips" olives in a spicy oil and red wine dressing with fresh herbs, chilli and lemon peel. The olives had not been stored in brine so were not salty or bitter at all. Wonderful palate awakeners and not too much: for a moment I thought too little.

The party of the fourth part and I chose to have three entrées. The first consisted of 10 Port Stephens oysters not *two* but five years old and therefore large and luscious. The dressing was of old balsamic vinegar, a little olive oil and a touch of saké. The combination was delicious and the addition of baked capsicum slivers was complementary.

Next a salad of lambs brains and avocado. The brains were blanched not fried, so soft, moist and without the competing flavour of cooked oil. The brains were sliced in alternate layers in a tossed salad with the slices of ripe avocado. A tomato vinaigrette dressing of gentle discretion was added to the delicate flavours.

Last a home made brioche with *hot* Italian sausage and oysters in a red wine butter sauce. This was a tasty treat.

All of this was enhanced by the Carrington's own campagna style bread, wholemeal, grainy and nourishing! The glass of house white was a Taltarni Blanc de Pyrénées from Central Victoria and a bottle of WA's wonderful Ashbrook 1984 Cabernet topped it all off.

The Newcastle regulars Stitt, Capelin, and the gang regularly take the private room. I thank them for recommending this quality establishment. ❑ John Coombs

It is interesting to observe the two types of lawyers: those that have computers and those that think that they'll wait a little longer to see if they are really going to catch on. The latter accept, although, that for some or in certain circumstances they are appropriate but not for them right now.

As technology progresses and increasingly more "user-friendly" programs become commercially available from your local computer shop, a point is being reached where we pass from tools for the sake of scientific advancement, to tools for people to use. This progression has inspired new life into the industry. Soon the days will be gone when we saw computers marketed for "computer people". We will see computers marketed for people.

IBM has initiated this trend in the United States with their decision to market their new home computer line, the PS/1 machines, through such giant retail outlets as Sears and others.

Apple's assault on the home computer market came even before there was a "home computer market". Indeed, they started at home and it was five years until Apple revealed their dream of a "computer on every desk". The dream was unique in that they implied a *usable* computer on every desk; one that could be used by everybody.

The state of the art is approaching a point where computers are surpassing a threshold of utility. We are entering a new phase as personal computers become far more "usable". In this respect, the introduction of Microsoft's new graphical interface, Windows 3.0 has been an important leap forward in the computer world.

The graphical user interface (GUI), such as that found on an Apple Macintosh or (now) on an IBM computer with Windows 3.0, is also termed an "Icon Environment", wherein objects are represented by little pictures (the icons) and are accessed by a pointing device, usually a mouse, thus removing the need to remember and type in complicated commands as in the old DOS environment. You simply "point-and-shoot".

Let me explain the advantages more clearly by way of example. For some time now there have been the dial-up services like Lexis, Link, Info-one and so on. These services can be accessed from a computer with a simple communications package. The searches can be down-loaded and stored in the PC or be printed on a local printer. Now, with Windows 3.0 or a Macintosh, this information can be directly imported into your favourite word processor for manipulation or document generation.

In a similar fashion, court transcript which is becoming more and more readily available on computer media can be searched as usual with Sonar or WordCruncher but now can be run alongside a word processor, so that when a phrase is found, it can be transferred directly into the new document. All this is possible because one may run a word processor in one window and a communications program in another and cut-and-paste between the two.

The real advantage of all of this to the end lawyer will be increased production *per unit of time*. And as one silk has commented to me on many occasions, "time is everything to a barrister...".

I would suggest that the Apple Macintosh machines still possess an advantage over their IBM rivals. Although Windows 3.0 means a consistent interface, that does not extend to within the programs or applications. Apple still holds the lead here with most applications looking and feeling alike. The gain here: a shorter learning time to become familiar with new applications, thus further productivity.

All things considered, the old axiom that the right time to buy is when its the right time for you still holds, however, with these latest enhancements, the right time for you may be here a lot sooner, if it hasn't arrived already, of course. ❑

Andrew Macintosh

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" I know there was a poor turnout for the cake stall, but don't you think you were a little extreme? "

Honesty in Advocacy

O'Keefe QC: Just take the unstressed, quietly living, regularly exercising, positive mental attitude, low cholesterol, careful diet, low blood pressure person, who has always been thin, they still have heart attacks?

Witness: I have many patients like that in my practice. Some of them have severe coronary artery disease and some have none. I do not know why they are different. Some of them - pardon?

O'Keefe QC: It was suggested by Mr Francey that they are probably all smokers.

Morling J: I thought you were describing Mr Francey.

O'Keefe QC: Certainly not me, your Honour. ❑

(Australian Federation of Consumer Organisations v. Tobacco Institute of Australia, Federal Court of Australia)

Mid-Year Reports from Committees

Accident Compensation Committee

The work since November has consisted of continued involvement in the Workcover Committees and liaison with Government for a restoration of "real" Common Law rights to the workplace. As well, a drive for return of redemption rights to workers has continued.

In addition, the Committee has prepared reports for the Attorney General and the Bar Council on amendments to the Limitation Act, proposals for "medical misadventure" legislation, proposals for general tort law reform, particularly in the damages area. Close co-operation with the Law Society Council and its committees in this area has been maintained.❑

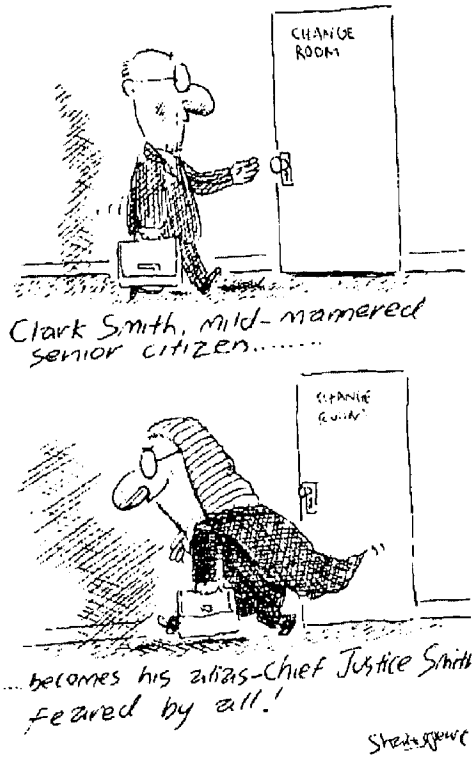
Common Law Listing & Liaison Committee

This committee dealt by negotiation with procedural and other complaints in respect of quasi judicial and judicial officers. Its Chairman also represented the Bar in the Delay Reduction Committee. The co-operation of the Bar in providing Acting Judges and the introduction of case flow management techniques and the holding of Issues and Listing Conferences close to the date for hearing have markedly improved turnover and reduced delays.

During 1989, 1,627 Common Law matters were disposed of compared with 787 in 1988, an increase of more than 100%.

Personal Injury case delays by December 1989 are said to be 2 years and 5 months, compared with 4 years in December 1988.

The Committee is also actively complaining at the overlapping of circuits in mid-year. ❑



Family Law Committee

The Committee has continued to meet on a regular monthly basis. The Committee members include Twigg QC, who is also on the executive of the Family Law Section of the Law Council of Australia, A.J. Young, who is Bar Council representative on the Legal Aid Review Committee, Trench from the Parramatta Bar, Simpson, Bar Council and Lakeman, New Barristers Committee. The other members are Rose QC, Ainslie-Wallace, Scott Mitchell and O'Ryan.

One main function undertaken by the Committee is to provide regular liaison with Judges, other committees and members of the profession.

Members of the Committee have regularly attended the Judges' Quarterly Meetings discussing with the Judge Administrator and other Judges of the Court questions of concern by practitioners and matters of practice and procedure.

Members of the Committee have also participated in family law conferences including the Fourth National Family Law Conference at the Gold Coast in July this year and also a Family Law Conference at Bali.

The Committee had considerable contact with the Legal Aid Commission during the year and in particular with the review of the Legal Aid Scale applicable to family law practitioners.

A further matter undertaken by the Committee this year is the proposed provision of a newsletter to family law practitioners to give greater feedback in respect of matters being dealt with by the Committee.

The major matters dealt with by the Committee during the year were the following:

1. The October, 1989 amendments to the Family Law Act introduced pleadings. Problems are still being experienced in relation to pleadings and Answers and Cross Applications. Further difficulties of interpretation of the Rules arise from differing approaches to providing particulars. One approach has been in accordance with equity practice that a pleading should be so precise, particulars are not required (*American Flang v. Rheem* 80 WN (NSW) 1294). The other approach (said to be the common law approach), is to provide only sufficient particulars to enable the issues to be identified.
2. The Legal Aid Commission conducted a review of its policies in the payment of legal aid to Counsel, this culminating in a decision in April this year to pay Counsel's fees on a legal aid basis at a rate of 80% of the Supreme Court, Equity scale.
3. The Committee has been concerned with the review of the powers and procedures of Judicial Registrars now sitting in the Sydney and Parramatta Registries.
   The Committee was also concerned in the question of the delegation of power under the amendments to the Family Law Act held to be valid in *Harris and Caladine (1990)* FLC 92-130.
4. Stage 2 of the Child Support Scheme has come into operation effective from 1st October 1989. The Committee was concerned with the evaluation of the scheme and

in particular, to ensure that the administrative assessment of maintenance contribution be subject to judicial review so as to ensure that special circumstances of individual cases could be considered.

5. Ongoing matters of procedure in relation to rolling lists, short causes lists and long causes lists are continually before the Committee and in particular, in respect of the Committee's liaison with the Judges at the Judges' Quarterly Meetings.
6. The Committee reviewed the proposed amendments in the *Family Law (Amendment) Bill 1990*. This Bill proposes to make significant amendments in relation to the handling of child abuse allegations, the effect of step-parent adoption applications, authorisation under the Family Law Act for entry, search and arrest and various other matters relating to stamp duty and the implementation of the Bill.
7. The Committee was concerned with the special position of Court Counsellors as witnesses both in relation to the preparation of reports under Section 62A of the Act and as witnesses before the Court. The Committee is endeavouring to review the present procedure so that the parties' representatives may have greater contact with the Court Counsellors to discuss both the evidence they propose to give and possible resolution of custody disputes.
8. The Committee has been instrumental in changing the procedure on entry to the Courts so that practitioners use identification cards rather than being searched.

Finally, the Committee wishes to welcome the Honourable Mr. Justice Rowlands as the Judge Administrator of the Eastern Region, Family Court of Australia. The Committee through its representative at the Judges' Quarterly Meeting looks forward to working with Mr Justice Rowlands in improving the practice and procedure in the Registries under his administration. ❑

Fees Committee

Cancellation Fees

This remains a problem area. Many complaints and enquiries are received from solicitors. Disputes over cancellation fees are becoming more common.

If a barrister wishes to charge a cancellation fee, it is essential that an appropriate arrangement should be made with a solicitor. Such an arrangement should be specific, although there may be circumstances in which a prior course of dealing will suffice.

There is no reason why the required terms of such a fee cannot be reduced to writing and sent out to solicitors in the ordinary course of negotiating a fee.

Legal Aid Criminal Fees

As anticipated last year, the Legal Aid Commission has again increased fees paid for criminal work. This is the third consecutive year of substantial increase, and the Legal Aid Commission is to be applauded for making the appropriate budgetary allowance at a time when it has not been easy to do so.

Fees Recoveries

The Fees Committee has suffered embarrassment on a number of occasions recently because of the failure of complainant barristers to include relevant material with their complaint documents. Moreover, some complaint documents do not come in an ordered fashion.

Having regard to the substantial increase in fee complaints, the committee does not have the time to sort out unordered or incomplete material.

It should also be remembered that the committee will require reasons why it should attempt the recovery of stale fees, i.e. fees owing for four years or longer. Early complaints are encouraged.

Scale Fees

In the past, the Supreme Court, District Court and Compensation Court have had jurisdiction over the fixing of fee scales with regard to the recovery of costs and fees upon a party/party basis. Amendments to the Legal Profession Act have removed that jurisdiction from the Courts and given it to the Legal Fees and Costs Board. As reconstituted, the Board has two barrister members.

A new scale of loadings will soon be gazetted following examination by the Board, and an application for an increase in the scales has recently been made to the Board at the direction of the Bar Council.

Arbitrations

The number of fees arbitrations continues to grow, both in number and complexity. It is gratifying that so many senior practitioners make themselves readily available to serve as arbitrators. ❑

Finance Committee

The size and complexity of the Bar's budget in recent years has led to the formation of the Finance and Office Committee. This committee meets as needed but at least 4 times a year. The Committee members include the Treasurer and the Senior Vice President. Also on the Committee are a small number of members of the Council, with the Registrar and the Financial Controller, Judith Grattan and Richard Kelynack from our accountants usually in attendance. The nature of the services we provide has contributed to this complexity. They are required both by statute and by the standards needed by those we serve. Thus we now have a full time Education Officer, Michelle Goodwin, and Helen Barrett has taken on the office of Professional Affairs Director which involves almost full time administration of the Professional Conduct Committees, the Tribunals and any investigations to be carried out. This structure has enabled younger office members to take on delegated responsibility in the areas of education, conduct and

standards, and finance. I hope that the contribution made by all those people is appreciated by all of us.

The Bar's Caterer, Mr John Close, has now established his kitchen on an independent footing. He now caters for many functions including those for members at their homes. He has been very favourably received in these jobs.

Members will note that in this year's budget an allowance has been made for a contingency fund. There are many areas of law reform emerging and it is necessary for the Bar to assist in a substantial way. At present there is the Cost of Justice Inquiry. It is expected that continued funding of our submissions to these enquiries and reforms will be needed.

Finally I must emphasise the need to have your fees lodged for practising certificates by the last working day of May each year. Many members applied after this date. This causes difficulties to such an extent that it is likely that next year certificates for late applicants will not be issued in time.

❑ B.H.K. Donovan QC

Commercial Legal Aid Committee

The main activity of this Committee during the year has been the development of the Commercial Legal Aid Scheme. Two more cases have been accepted this year and both are proceeding satisfactorily. Details of the scheme have been published in "Bar News". While it has not been operating on a grand scale, the scheme has assisted in solving the gap left by the reluctance of Legal Aid to operate in the commercial field. It is confidently expected that, in view of the present state of the economy, a number of leaders of the Australian business community may become clients of our Legal Aid during the next year. ❑

Legal Aid (Civil) Committee

The saga of fee levels for Legal Aid work has dominated. Funding is decreasing in real terms and although the administration costs consumers less per dollar than it used to, it still takes too much. The question of compulsory 5 days Pro Bono and Legal Aid work is under anxious and active consideration.

Negotiation for much more prompt payment has had significant effect and co-operation between the Bar's representatives and the Commission is much improved. ❑

Rules Committee

There have been a number of minor changes to the rules during the year, none significant enough to justify an annual report.

The major project presently being embarked upon by the Rules Committee is a complete redraft of the rules. In the course of this process we are working with Queensland and South Australian Rules Committees which are redrafting their own rules. It is hoped to produce a set of rules which will be fairly standard throughout Australia.

It is appreciated that this would involve the disadvantage that the existence of standard rules will provide some sort of pressure against the frequent changes which have been made in the past. This should not be the case, however, as the rules will not be identical but merely more similar than they have been to date.

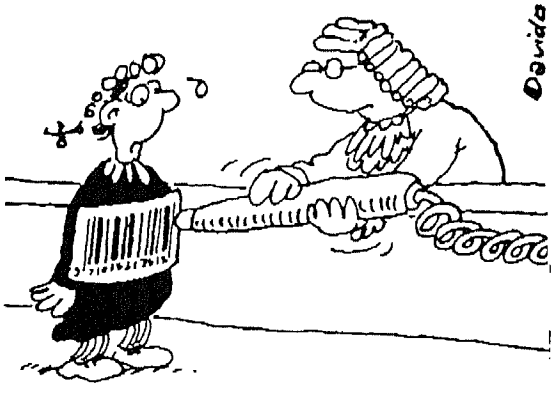
One thing which has been of interest to the Committee in studying interstate rules is to observe the extent to which the clerking system in Melbourne permeates the Victorian rules. There are express rules, for example, forbidding gifts to clerks by barristers and forbidding a clerk to engage in solicitation on behalf of barristers. There are also rules suggesting that the norm is for a fee to be negotiated through a clerk. In Queensland, on the other hand, there are no clerks at all.

The redraft should be completed before the end of the year. ❑

Professional Conduct Committee No. 3

Generally speaking, it has been "business as usual" for the Committee in 1990 in the sense that the number and subject matter of the complaints considered or currently under consideration have not differed materially from the past.

However, one case should be mentioned. It arose under rule 4. The barrister in question had, during the course of the proceedings in which he was briefed, formed a close personal relationship with his client. The complaint was made, not by the client nor the solicitor, but by the adversary party. The barrister did not, in any subjective sense, consider that his professional independence was in any sense compromised. Indeed, he maintained, as did his client, that he had argued the case to a very satisfactory end result. Nonetheless the Council, after considering the Committee's report, determined that rule 4 is to be construed strictly so as to oblige counsel to reject or return a brief whenever there exists an association or relationship such as might impair his or her impartial judgment. ❑



The Bar Code of Conduct

Motions and Mentions

Staggering Statistics

The 1989 Annual Review of the Supreme Court dealt with elsewhere in this issue points out that filings in the Court of Appeal in 1989 amounted to 754 in total while in the Court of Criminal Appeal 621 appeals were filed.

These statistics pale into insignificance when compared to the statistics of filings in Californian courts during 1989. According to the *1990 Judicial Council Annual Report to the Governor and the Legislature*, total filings in Californian courts during the 1989 financial year fell slightly below the 18 million cases recorded in 1988. Superior Court criminal filings totalled 13,486 while Municipal and Justice courts reported 222, 243 felony filings in the same period (92% jump since 1980).

18,508 appeals were filed in the State Courts of Appeal although this included 6,210 criminal appeal filings.

Little wonder that the annual cost of California's judicial system was $1.3 billion or 1.5% of total State and Local Government budgets.

An overview of the United States presents even more dramatic statistics. 98 million new cases were filed in the nation's state courts during 1988 according to the *State Court Caseloads Statistics: 1988 Annual Report* with trial court filings accounting for the bulk of the litigation with 16.9 million civil cases, 11.9 million criminal cases, 1.4 million juvenile cases and 68.2 million traffic or other ordinance violation cases.

Not surprisingly, the report noted that many States experienced difficulty keeping pace with the inflow of new cases. ❑

1990 Australian Young Lawyer of the Year Awards

Since 1987 the Australian Young Lawyers Section has conducted annual Young Lawyer of the Year Awards. The objectives of the Awards are to encourage and foster young lawyers' sections, committees and associations and individual young lawyers throughout Australia to establish and institute programmes for the benefit and assistance of the profession and/or the community, and to provide recognition of the programmes initiated.

The Awards have also been extended to include recognition of an individual's contribution over a number of years to the profession and/or the community.

The major prize for the Awards is an Apple Macintosh SE personal computer and printer.

Application forms and the rules governing the Awards are available from the AYLS Section Administrator, Law Council of Australia, GPO Box 1989, Canberra ACT 2601 or DX 5719 Canberra.

Nominations will close on Thursday 4 October 1990 and the winners will be announced on Sunday 4 November 1990 at the Australian Young Lawyers Section Weekend Seminar, Ballarat, Victoria. ❑

International Commission of Jurists (ICJ)

Australia Section

The ICJ, which has consultative status with the United Nations, is based in Geneva. The Australian Section (all Sections are semi-autonomous) was established in 1958 and since 1983 has been open not only to lawyers but to all interested persons. Most of its members are, however, qualified lawyers.

Its objects include the protection of the rule of law and the promotion of the observance of human rights and fundamental freedoms.

The President is John Dowd, MP. Members include Kirby P., Professor G. Nettheim, Einfeld J., judges, senior and junior counsel, solicitors and legal academics.

The Section council meets in Sydney monthly - members are welcome to attend. The range of interests is broad: from the British abandonment of Hong Kong to the Fijian crisis, from the suppression of Tibetan culture to human rights abuses in the Philippines, Malaysia and Bangladesh. Its activities include missions to problem areas to gain information at first hand.

Membership is $40 p.a. To join this important and active organisation with concerns close to the hearts of all lawyers contact the Secretary General, David Bitel, on 283 1333 or DX 166. ❑

Loose Parts Scheme

Response to the recently announced Bar Council loose parts program has been somewhat disappointing. To refresh your memory, the aim of the scheme is to collect on an ongoing basis loose parts of reports, journals and digests which are superfluous to your current requirements and to allocate them free of charge to your colleagues who have less than three years standing at the Bar. We need your support to make it work.

To make arrangements for collection of parts, or to be included as a recipient, contact Ross Wishart of Australasian Legal Library Services on phone (02) 918 9416, facsimile (02) 918 0881 or DX 9041 Mona Vale. ❑

Law Society of Western Australia - Winter Conference

The Law Society of Western Australia will be holding a Winter Conference at Broome's new resort, Cable Beach Club, from Sunday 30 September to Saturday 6 October 1990. Theme of the conference is "A New Decade - Economic Opportunity vs. Environmental Awareness" and topics include legal issues surrounding preservation of the environment and problems facing developers as well as financial planning and superannuation. For further information contact Mrs Judy Jones, Membership Services Officer, Law Society of Western Australia, GPO Box A35 Perth W.A. 6001. Telephone (09) 221 3222 or facsimile (90) 221 2430. ❑

Family Law and Rights in Asia

LAWASIA has formed a Family Law and Family Rights Section.

The inaugural Chairman of the Section is Stuart Fowler, who is also Chairman of the Family Law Section of the Law Council.

Mr Fowler, Chief Justice Nicholson of the Family Court of Australia, and Mr Rod Burr (Deputy Chairman of the Family Law Section) made up the Steering Committee responsible for establishing the new LAWASIA Section.

The regional members who have been nominated to either the Executive or Council include:-

Professor Ram Singh (India), Professor Mehrun Siraj (Malaysia), Mrs Yoshida and The Hon. Judge Aiko Noda (Japan), Mr Bruce Andrews (New Zealand), Mr Altaf Khan (Bangladesh), Ms Jacqueline P. Leong QC, (Hong Kong) and Ms C.F. Wang (Taipei).

The Section's brief involves the Section in promoting and protecting the human rights of families and in particular the rights of children by the processes of monitoring, discussion, the exercise of influence, public condemnation and, where appropriate, public commendation.

It is the hope of the LAWASIA Council that its Family Law and Family Rights Section can encourage all the nations in the region to adopt and implement the United Nations Convention of the Rights of the Child.

Additionally the Section is asked-by the processes of dissemination of information and by facilitating discussion and dialogue-to spread an understanding of the diverse laws relating to the family and children throughout the region. There is an increasing mobility of population within the region and it is important that there be a wider understanding of the cultural and legal heritage of the region.

Partly because of that mobility and partly because of the different views taken by nations in relation to their citizens, the Section will try to promote, so far as is possible, comity amongst courts and harmony of laws in the region.

The Section proposes to establish committees within LAWASIA's member nations. Similar steps will be taken as new members join LAWASIA.

The new Section plans to:

- Publish a family law and family rights magazine which will promote the maintenance and protection of the rights of children;
- Produce a significant work on the laws of each of the member countries in so far as they impact on children and their rights, marriage, divorce and the family;
- Encourage systems whereby the decrees and orders of courts in other jurisdictions may be both recognised and enforced;
- Encourage dissemination of information on the problems of domestic violence and on the status of women and children;
- Consider the problems of the abduction of children and international child adoption.

The Section proposes to hold a biennial conference on family law and family rights and it is hoped that the first such conference might take place in Malaysia in 1991.

Further information about the Section, and membership, is available from Mr John Healy, Secretary General, LAWASIA, G.P.O. Box A35, Perth. WA. telephone (619) 221 2303 Facsimile (619) 221 2430. ❑

Labour Law Seminar

LAWASIA'S Standing Committee on Labour Law will hold a seminar in New Delhi from 28 to 30 September 1990.

It is expected that judges, lawyers and academics from all parts of the LAWASIA region will take part.

Subjects to be discussed include the political aspects of labour disputes, discrimination and equal opportunity, the right to work, law and policy on unorganised labour and workers' participation.

The committee is planning to publish for the seminar a volume containing labour law information to assist the discussions.

Further information about the seminar can be obtained from the chairman of the committee, Dr Anand Prakash, 22-A Mahant Building, Asaf Ali Road, New Delhi, 110002, India. (Telephone 731 868). ❑

Aviation Law Association

The 1990 annual conference of the Aviation Law Association will be held on 18th and 19th October, 1990 at the Hyatt Regency, Sanctuary Cove.

Contact Cindy Last, K.K. Travel, 1st floor, 627 Chapel Street, South Yarra, Vic, 3141. Telephone (008) 33 4143 Facsimile (03) 824 0619 ❑

Maritime Law Conference

The Maritime Law Association of Australia and New Zealand Annual Conference will hold a conference from October 14 to 18, 1990 in Auckland, New Zealand.

For further information contact Association Secretary, David Loadman on telephone (03) 609 1555 Facsimile (03) 609 1600 or the State Branch Secretary Mr. Tim L'Estrange on telephone (02) 229 8765 Facsimile (02) 233 7022. ❑

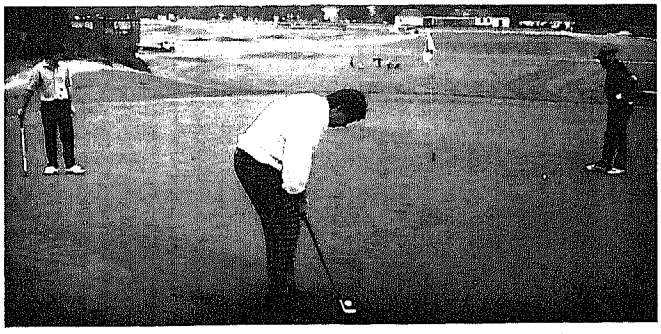
This Sporting Life

Golf - Bench & Bar v. Services

Snow still lay on the ground in Lithgow being lashed by gale force Westerlies as 22 intrepid Bench and Bar golfers teed off at Elanora Country Club in the annual match against the Services. As a consequence, scoring proved difficult although a clear sky and sunshine made a pleasant enough day for a round of golf and one encouraging an appreciation for the warm soup and coffee laid on for morning tea and the roaring fires warming the clubhouse in the afternoon.

In the result, the Bench and Bar was narrowly ahead until the late return of a card recording a miserable 16 points by a team including a District Court judge who will remain unnamed (but possibly not unidentifiable). This low score had the effect of converting a narrow margin into a comprehensive loss although the Bench and Bar did manage to salvage the B Grade trophy. Somewhat curiously, in these circumstances, the Bench and Bar returned the best card of the day by Judge Gallen and Neil Francey on 44 points with the best runner-up score as well being recorded by Rod Skiller and Ken Earl. In addition, Rod Skiller won the A Grade long drive with Judge Sinclair and another Bench and Bar member picking up the nearest pin.

Unfortunately, numbers from both the Bench and Bar and the Services were down on recent years, not so much because of the cold weather on the day but perhaps the fact that last year's event was cancelled due to several months of heavy rain, and possibly because the date is not convenient particularly as the July vacation is not so widely recognised. In addition, the date this year fell in the middle of the school holidays. As it turned out, very few members of the Bench and Bar stayed on for what proved to be an enjoyable formal meal and post-dinner camaraderie. Participation in one of these black tie/mess dress dinners is an experience well worth sampling and a tradition not to be lost. It is intended to play next year's match toward the end of July and notification of the selected date will be given early next year to enable as many players as possible to participate. ❑



Maconachie putts on somewhere in the Northern Hemisphere (this has nothing to do with this item....see page 25).

Cricket

The Bar Cricket team followed its exciting win against the Solicitors at North Sydney Oval with mixed results in the interstate clashes against the Victorian and Queensland Bar teams.

The team travelled to Melbourne for its annual match against the Victorian eleven on 24 March. The game was held in unexpectedly balmy conditions at the picturesque Fitzroy-Doncaster Cricket Ground. The Victorians won the toss and sent New South Wales in to bat, and achieved early success, with the result that New South Wales were 3/28 at the end of 16 overs from the Victorian opening bowlers, Harper QC, and Connor. A solid partnership between Hamman (34) and Laughton (45) restored some respectability, but then, despite the seniority of Gyles QC and the panache of Poulos, a steady flow of wickets saw a modest total of 145 off 40 overs with only Hastings (18) reaching double figures. After a pleasant lunch, the Victorians batted confidently and looked comfortable at 5/112, but steady bowling by Laughton and Naughtin saw the Victorians slump to 8/137. Unfortunately they were able to scramble the few runs remaining and thereby gain possession of the trophy for the following year.

We played host to the Queensland eleven at the Bradman Oval at Bowral on 28 April, in pleasant conditions after a week of steady rain. In order to enable the team to display its character, the skipper, having won the toss, decided to bat on a moist wicket. Harris and Wilkins, until injured (as usual), showed their mettle by batting stoutly in the difficult conditions and then Laughton (51) and Foord (69) batted for almost all of the remaining overs to take the score to 153 off 40 overs. Laughton completed a fine series after being a major contributor in each of the games played. Foord again displayed his class by batting until the last over and by playing a wide range of shots in challenging conditions.

After lunch the guests batted on a firmer wicket but were never in the chase for the target, eventually being all out for 101. Naughtin had the useful figures of 4/4 from 6 overs and Levick (2/11) and Hamman (1/18 off 9 overs) gave the batsmen little respite. The team fielded well and Ireland kept wickets with his usual finesse.

The experiment of playing out of town so that both the home and visiting teams and spouses and friends could reside at the same establishment was a success with a pleasant dinner on Saturday night and lunch at the home of Collins QC on Sunday. Special thanks go to Collins for his efforts in securing the use of his magnificent Bradman Oval and Museum and for his hospitality on Sunday. Thanks also go to Maiden who showed great skill and persuasive powers in securing accommodation for all players and interested spectators in Bowral for the weekend. ❑ Peter Hastings.

Hockey One

On 24 March the New South Wales Legal Eagles team, which included some members of the New South Wales Bar and substantially more New South Wales solicitors, met the Victorian Bar and a team of Victorian solicitors at the Victorian State Hockey Centre at Royal Park.

The Victorian Bar managed to field a team containing only barristers, which was, rather obscurely entitled "Bar None". The Legal Eagles team was, disappointingly, only able to recruit two members of the NSW Bar: Masterman QC and

Bellanto QC. The Legal Eagles were eliminated in the first round, going down 4-1 to the Victorian "Bar None" team and 3-1 to the Victorian solicitors' team. Not surprisingly, no report of this event filtered through to Bar News and it was not until a crowing report of the event appeared in Victorian *Bar News* that the editor was even aware the event had taken place and conducted enquiries.

Peter Callaghan, until comparatively recently a member of our Bar and now a solicitor, reported that the match was organised through the initiative of the Victorian Bar and was timed to coincide with the cricket match between the New South Wales and Victorian Bars in Melbourne (another match which has not reached the Editor's ears until minutes before deadline, presumably because, again, the Victorian Bar defeated the New South Wales Bar).

Despite the minor involvement of the New South Wales Bar in the "Legal Eagles" team, their participation is described as "enthusiastic" and "prominent". Masterman QC is said to have been in one of his particularly talkative moods and to have made a most vocal contribution to all matches, including the matches between the two Victorian teams which resulted in a draw.

By way of background the "Legal Eagles" team was formed by, amongst others, Meares QC in the late 1950s and has played each season since then as the lowest grade team with Gordon Club. Apart from Meares QC it has included over the years Holland J., Barbour DCJ., Newton DCJ., Masterman QC, Gyles QC, Graham QC, Bellanto QC, Collins QC and G.H. Johnson. For many years until 1987 there were annual hockey matches between Bar and solicitors' teams with the Bar currently holding the Noonan Trophy, having retrieved it from the solicitors with a long awaited win in 1987. Unfortunately the Bar seems to have regarded this success as enabling it to retire from the fray and the Bar has been unable to put together a hockey team since then. It would be disappointing if this contest was allowed to lapse.

Anyone interested in forming part of a revived Bar Hockey Team should contact either Masterman QC or Bellanto QC. There are to be return matches against the Victorian Bar and the Law Institute in Sydney in 1991. It would be a good idea to get a team together in time to be able to field a Bar team totally against the Victorian Bar to avenge the recent defeat.❑

Letter to the Sporting Editor

Dear Editor,

Re: Cricket: "Bar Routs Solicitors (Just)" and "a swat to couch shot corner" - Bar News Autumn 1990

I've not been a real cricketer but have been a cricket devotee most of my life-(I've seen a part of every Test played on S.C.G. since 1924).

Until a few years ago I was a player and later a spectator in the NSW Bar v. Queensland Bar matches played in Sydney and Brisbane.

My memory allows me to hear almost "instant replays" of the "mock" broadcasts of the England v. Australia tests of the early 1930s in which Charles Moses, Bernard Kerr (now both deceased) and Alan McGilvray participated. Before them Monty Noble and Johnny Moyes figured prominently in commentaries. Mel Morris (Victoria) was a well known voice during the bodyline days of 1932/33. Later (post war) Arthur Gilligan and Victor Richardson ("Arthur and Vic") were the "pathfinders" to a host of cricket commentators, from England and Australia, some of whom are heard to this day.

I've heard them all and seen most of them, but never, repeat never, have I heard anyone of them describe a shot as "a swat to couch shot corner"!!

In making this admission I regret I've sacrificed any chance of getting a free ticket to the next Bar v. Solicitors match.

"IT MUST HAVE BEEN A TYPESETTING ERROR".

Dudley Williams
6 June 1990

Cycling Day

The inaugural Legal Cycling Day was held on 6 May 1990 for family and friends of members of the Bar, Allen Allen & Hemsley, Mallesons Stephen Jaques and Frechill Hollingdale & Page in the Cattai area with a start at the historic Ebbenezer Church. Approximately 130 enthusiasts participated. The long course was a testing 60 kilometres in warm conditions, while a shorter course over 16 kilometres was available for the less energetic. The Bar contributed 30 cyclists including clerks, family and friends and featuring a hard core of Austin, Cotman, Hastings, Loveday, O'Loughlin, Pembroke, Regattieri and Robson.

Those who could still sit down afterwards enjoyed a pleasant lunch provided by the citizens of Ebbenezer in the attractive church grounds aptly adjacent to the graveyard.

The Clarence Street Cyclery generously provided a maintenance crew and donated a bicycle as a prize for a raffle, the proceeds of which went to the Spina Bifida Unit of the Children's Hospital.

Encouraged by the success of the day, the organisers have promised a re-run at about the same time next year.

❑ Peter Hastings