Bar News

The journal of the NSW Bar Association

DISPENSING WITH THE RULES OF EVIDENCE

Summer 1990

Published by: NSW Bar Association
174 Phillip Street, Sydney NSW 2000

Editor: R.S. McColl

Assistant Editor: P.M. Donohoe Q.C.

Editorial Committee: A.H. Bowne; G.D. McIlwaine, R.B. Phillipps

Many thanks to Margaret Morgan for her considerable assistance in the compilation of this magazine.

Produced by: The Business Link
7 Gunjulla Place, Avalon NSW 2107
Phone (02) 918 9288

Printed by:
Robert Burton Printers Pty. Limited
63 Carlingford Street,
Sefton NSW 2162

Credits: Photo page 17 Courtesy of Warner Bros and Village Roadshow

Cover: by Rod Clement

Contributions are welcome, and should be addressed to the Editor, R.S. McColl, 7th floor, Wentworth Chambers, 180 Phillip Street, Sydney NSW 2000

ISSN 0817-0002

in this issue...

Bar Notes

Queen's Counsel for 1990

The following barristers have been appointed Queen's Counsel by the Governor-in-Council, effective from 1 November 1990.

In order of seniority:

	1.	DOWD, The Hon. John Robert Arthur
(QLD)	2.	DAVIES, Geoffrey Lance
(Vic)	3.	GILLARD, Eugene William
(QLD)	4.	JACOB, Robin Raphael Hayim
(QLD)	5.	DRUMMOND, Douglas Paton
(Eng)	6.	TACKABERRY, John Antony
(QLD)	7.	CROOKE, Gary William
(Vic)	8.	ARCHIBALD, Alan Cameron
(QLD)	9.	LYONS, Peter James
(Vic)	10.	ROBSON, Ross McKenzie
(S.A.)	11.	TILMOUTH, Sydney William
(R.S.A.)	12.	JACOB, Marcus Sonny
(Vic)	13.	MOSHINSKY, Ada
(Vic)	14.	RITTER, Gordon Raymond
(Vic)	15.	MARTIN, William John
(Vic)	16.	GARDE, Gregory Howard
(Vic)	17.	CRENNAN, Susan Maree
(W.A.)	18.	O'CONNOR, Robert Kenneth
	19.	RUMMERY, George Richard
	20.	ANDERSEN, Desmond Christopher
	21.	O'REILLY, John Kevin
	22.	RAMAGE, Malcolm Carmichael
	23.	POULOS, James
	24.	McDOUGALL, Robert Calder
	25.	MACONOCHIE, John Edwin
	26.	O'RYAN, Stephen Richard
	27.	TIMBS, John Andrew
	28.	IRELAND, John McClemont
	29.	HAYLEN, Wayne Roger
	30.	DONOHOE, Paul Michael
	31.	SULLIVAN, Alan John

Law Council Executive

Following the resignation of Bruce Debelle QC upon his appointment to the bench of the Supreme Court of South Australia, the Executive resolved (with the agreement of all constituent bodies) to appoint John Mansfield QC, of Adelaide, to the Executive.

The Executive now comprises:

President:	Alex Chernov QC (Melbourne)
President-Elect:	vacant
Vice-President:	David Miles (Melbourne)
Treasurer:	Robert Meadows (Perth)
Immediate Past-President:	Mahla Pearlman AM (Sydney)
Member:	Geoffrey Davies QC (Brisbane)
Member:	Stuart Fowler (Sydney)
Member:	John Mansfield QC (Adelaide)
Secretary-General:	Peter Levy

Bar Council 1991

The office-holders for the 1991 Bar Council are:

President:	B.S.J. O'Keefe Q.O., Q.C.
Vice Presidents:	J.S. Coombs Q.C.
	D.M.J. Bennett Q.C.
Honorary Secretary:	R.S. McColl
Honorary Treasurer:	B.H.K. Donovan Q.C.

Australian Institute of Judicial Administration

Mr Justice Beaumont was elected as Chairman of the Australian Institute of Judicial Administration at its Annual General Meeting in August. Mt Justice Clarke was elected as Deptuty Chairman. After his election Mr Justice Beaumont said:

> "It is often said that it is the angle of vision that matters. In judicial administration the comment is particulary pertinent. In this area, the points of view of the judiciary, practitioners, court administrators, executive officials and academics are often quite different. Yet there may be some message of truth in each. A major part of the work of the Institute is to encourage, and use, the interchange of ideas from all these standpoints. The diversity is reflected in the conposition of our membership and our council. For this reason the Institute welcomes the ideas and suggestions that are put to us by our members."

The Institute is about to commence an investigation of the impact of the system of cross-vesting among Australian superior courts. ❑

District/Local Court Jurisdictions to Increase

The NSW Cabinet has approved an increase in the jurisdiction of the District Court to $250,000.

The Local Court's jurisdiction in respect of damage to a motor vehicle will be increased to $50,000 and to $25,000 in respect of general claims.

No date for the commencement of these chagnes has been determined. ❑

Interest on Damages/Interim Payments

The Government is to amend s.94 of the Supreme Court Act and s.83A of the District Court Act so that the right to interest will be retained, save where the plaintiff has failed to accept a reasonable offer of settlement, and the amount awarded by the Court, without the addition of interest, is less than 10% higher than the highest offer made by the defendant.

The Court will retain a discretion to award interest if the special features of the case warrant it.

The Supreme and District Courts are to be given a discretion to order interim paymehts on the application of a plaintiff in a common law claim for damages.

The legislation will be based on existing English legislation to the like effect. ❑

From the President

In an age of change, the law has no special immunity. Major changes in both substantive and procedural law have already been effected to Australian legal systems which had not changed significantly for decades, sometimes longer. Just as change in other fields is often cost-driven, so too in the case of changes in the law.

An additional factor underlying much of the change, particularly in procedure, has been the need to speed up justice. The cry that "justice delayed is justice denied" is common. The Bar has recognised the importance of its role in expediting the judicial resolution of disputes between citizens. It has done this by waiving, for a limited period, its traditional and soundly based opposition to the appointment of acting and other temporary Judges and by co-operating in the arbitration system which has been introduced in the Supreme, District and Local Courts. This co-operation by the Bar with the judiciary, together with the allocation of additional resources by the State Government to the Court system, has significantly reduced the waiting time in all Courts, but especially in the Supreme Court and the Local Court.

Whilst the saving of time and money in the administration of justice is a laudable reason for change, it should not be the sole objective. Quality is important as well as quantity. The rights of individuals, be they against each other or in relation to the State, must remain at the forefront. In other fields of endeavour "quick and cheap" are often associated with poor quality. In the law this would result in the rights of individuals being downgraded. The Bar has a duty to ensure that this does not occur.

One area of cost and time-saving which is presently under way is the virtual abolition of civil juries. This has been put forward as a palliative which will be reviewed when Court delays have been reduced to acceptable limits. However, there is a real danger that what occurred in the United Kingdom in the 1930s will be repeated here. Civil juries were abolished in the United Kingdom because of economic considerations. The improvement in the economy in the United Kingdom did not, however, lead to their restoration.

One of the strengths of the common law has been the involvement of the community in the administration of justice. The community brings to the law its knowledge of community affairs as well as Australian common sense. Involvement of lay people in the law also means that the Courts, as a matter of policy, tend to keep the law relatively simple and understandable. This is not just a matter of plain English in contracts and in statutes. It relates to the formulation of principles which are the basis of the Common Law. In an age of increasing community involvement and participation it is extraordinary that the reformers of the law are moving it in the opposite direction and are doing so under the banner of "progress".

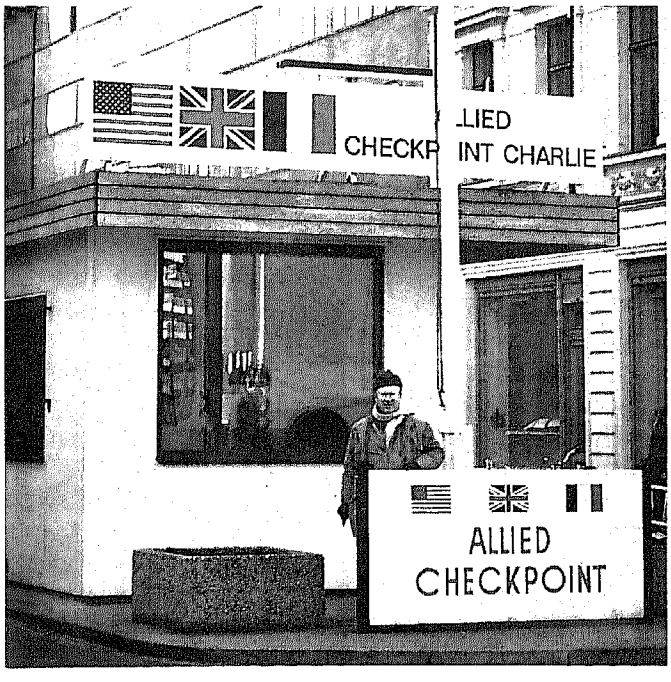
The elimination of juries in personal injury cases may well be a step in their more general elimination. There is considerable pressure from the media, as evidenced by the continuing campaign by the legal correspondent of the Herald, to abolish juries in defamation cases. This may well be associated with the disapproval by the community of his form of writing which was so forcefully expressed in a substantial verdict against him in a defamation action. Governments must be cautious and the Bar vigilant to ensure that sectional interest groups and individuals do not have their way in relation to juries.

The desirability of involving the community in the determination of cases involving injury to the person is no less than in cases involving injury to the reputation. At the present time plaintiffs seem not to want juries because it is said that juries are not as generous as judges. Defendants on the other hand want them. This is a complete reversal of the situation which prevailed 25 years ago when plaintiffs regarded juries as generous and Judges as less so. The truth may well be that juries represent a community response to the problem of damages. The community pays the damages. Should it not have a role in the process of the awarding of damages.

There is also pressure from some sectors of the executive to eliminate juries in special categories of criminal cases. Corporate crime is the prime example. The argument is that things are too complex for juries to understand, hence the number of acquittals. A review of the cases rather suggests a different explanation. A substantial number of these prosecutions have been dismissed at the preliminary hearing stage. This points to inadequacies of a fundamental kind in the Crown cases. To eliminate juries in this field would be to create a precedent for their elimination in other areas of crime which will be said to be just as important as corporate crime, the hope being that the judiciary may make up for inadequacies in the Crown case in a way in which the citizens of our community are not prepared to do. Such an approach is a slight upon the judiciary, as well as upon the good sense of the average Australian who sits on a jury.

Times are changing. The response of the Bar should be to accept that some change is necessary and to direct that change in a way which, whilst having regard to cost and time, recognises that peoples rights are the most important factor in the administration of justice. By ensuring such a recognition the Bar will fulfill its duty to be "servants of all". ❑

Barry O'Keefe QC



The (Chill) Winds of Change

In the Autumn issue, Bar News drew the Bar's attention to Practice Note 61 which warned grimly of the introduction of Part 33 rule 8B, the effect of a breach of which was said to be that counsel and practitioners who failed to notify the Registrar of the Supreme Court of certain matters "will usually be ordered to pay personally any costs thrown away ..." *Bar News* is unaware of any case to date where such an order has been made.

Now the Government proposes to take a further step. In early November Cabinet resolved that the Supreme and District Courts are to be given a discretion to impose costs sanctions to be borne personally by legal representatives whose serious conduct or neglect causes serious delay in the resolution of claims. Although full details of the rules designed to effect this change are not yet available, the purpose, according to an officer of the Attorney-General's department, is to enable the Court to impose such costs sanctions without the requirement for a separate hearing. While it is easy to imagine the frustration of both the Government and members of the judiciary at court-time lost, where legal practitioners have apparently failed to prepare a case and seek an adjournment or where a step in a court-directed timetable has not been taken in time, it is ironic that in times when natural justice is dished out to one-and-all, left, right, and centre in large dollops, the legal profession is not (apparently) perceived as an appropriate beneficiary of its principles. It is hoped that occasions for the exercise of this new power will be few.

In a variation on a much the same theme the Court of Appeal has said (*W Dazenko Structural & General Engingeering Pty Limited v Fraser Hrones & Company Limited* unreported, 5 October 1990):

"(a) It is essential that parties and their legal advisors engaged in cases in the Building and Engineering list and in similar lists should understand the directions given to secure the speedy and efficient disposal of cases must be substantially and promptly complied with and that special fixtures mean just that. Litigants and their solicitors cannot presume either upon the indulgence of trial judges or of this Court to rescue them from defaults or delays of their own creation.

(b) That prejudice to litigants from delays cannot always be met or fully met by orders for costs or orders allowing interest on sums fully met by orders for costs or orders allowing interest on sums found to be due. It was pointed out that as long ago as 1917, Cullen CJ said in *Conroy v Conroy* [1917] 17 S.R. 680 at 684-685 that to adopt such a principle would mean that 'a litigant who is a man of means could always purchase his own time for the hearing of a case brought against him, and a party without means must await his adversary's convenience for the decision of his rights'.

(c) That at a time when the Courts of this State are under considerable pressure due to delays in the hearing of cases and the volume of litigation, the adjournment of cases which have been specially fixed for hearing involves prejudice to persons other than the litigants in question."

The interaction of these principles and the proposed costs sanction is clear. ❑

Dispensing with the Rules of Evidence

Mr Justice Giles considers the consequences which flow when a Tribunal is not bound by the rules of evidence.

Writing in 1947, Maguire said -

> "... a student of evidence must accustom himself to dealing as wisely and understandingly as possible with principles which impede freedom of proof. He is making a study of calculated and supposedly helpful obstructionism."[1]

The thrust of the chapter in which this appeared was that the rules of evidence were generally concerned with excluding relevant evidence, rather than evaluating the evidence which was let in - regarding as relevant evidence anything which had a logical tendency to establish one way or another the contested issues of fact. The description of the rules of evidence as exclusionary of probative material is generally accepted, see *Cross on Evidence* stating that by those rules "the law of evidence declares that certain matters which might well be accepted as evidence of a fact by other responsible inquirers will not be accepted by the courts".[2]

Why should relevant evidence, probative evidence, evidence upon which we may act in everyday life, be excluded? Thayer espoused a theory of evidence by which

> "... the rules of evidence should be simplified; and should take on the general character of principles, to guide the sound judgment of the judge, rather than minute rules to guide it. The two leading principles should be brought into conspicuous relief, (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it."[3]

Thayer attributed the complexity of the exclusionary rules as they had in fact developed largely to the jury system, the rules being intended to withhold from the jury evidence "likely to be misused or overestimated by that body".[4] Morgan preferred to attribute it to the adversary system, to the perceived significance of the giving of evidence on oath and its testing by cross-examination.[5] Whatever their origin be, as the rules developed each must have been thought a justifiable exclusion of relevant evidence, and the justification need not have been the same in each case. Some rules are justified, at least today, on naked policy grounds: for example, the exclusion of evidence of communications made without prejudice, or of communications entitled to legal professional privilege or public interest privilege, is based on the view that it is preferable, on policy grounds, to keep those communications from the tribunal of fact even at the expense of deciding the issues of fact without what may be very significant material.

The result is that the rules of evidence control the tribunal of fact in arriving at its decision by excluding probative material from the material on which the decision is made - the "calculated and supposedly helpful obstructionism" to which Maguire refers. Some rules traditionally treated as rules of evidence go beyond this (for example, presumptions and burden of proof), depending upon one's definition of the law of evidence and where the line is drawn between the law of evidence and substantive law.[6] In this paper I am primarily concerned with the exclusionary rules, but it must be remembered that there are other so-called rules of evidence which are not exclusionary rules.

II

In changed circumstances, the justification once seen for an exclusionary rule may lose its force; with changed social perceptions a policy once seen as compelling may no longer be seen in the same way. The obvious example is the questioning of the hearsay rule - for instance, recognition of changes in the way in which business is carried on and business transactions are recorded has led to modification by statute to allow for the admission of hearsay (even multiple hearsay) via business records, and the rule has been considered by a number of law reform bodies with differing recommendations.[7] Conversely, an exclusionary rule may be deliberately added, such as the extension of privilege to religious confessions.[8]

---

1 Maguire, *Evidence: Common Sense and Common Law*, at 10-11.

2 *Cross on Evidence*, 3rd (Aust) ed, at 1.

3 Thayer, *A Preliminary Treatise on Evidence at the Common Law*, at 30; for a modern treatment, see the framework of the rules of evidence formulated by McNamara. "The Canons of Evidence - Rules of Exclusion or Rules of Use?" 10 Adel L Rev 341.

4 Ibid at 266.

5 Morgan, *Some Problems of Proof under the Anglo-American System of Litigation*, at 106-17; "The Jury and the Exclusionary Rules of Evidence" (1937) 4 Univ of Chicago L Rev 247.

6 See the discussion in the Australian Law Reform Commission Report on Evidence (ALRC 26) vol 1 at 13-23. The discussion includes distinguishing between the rules controlling what evidence may be received and rules controlling the manner in which evidence is received, but both result in the exclusion of evidence.

7 Including the Australian Law Reform Commission (ALRC 26) and the New South Wales Law Reform Commission (LRC 29). In *Walton v R* (1989) 63 ALJR 226 at 229-30 Mason CJ seemed to reject strict application of the rule and to prefer an evaluation of the reliability of the evidence, perhaps signalling judicial modification to meet current circumstances and perceptions.

8 *Evidence Act* 1898 (NSW) s. 10, added by *Evidence (Religious Confessions) Amendment Act 1989* (NSW).

Alterations thus made are but tuning of the established rules of evidence in a way thought to be desirable. The recent wide-ranging examination of the law of evidence by the Australian Law Reform Commission expressly assumes the continued existence of rules of evidence.[9] The tribunal of fact is still controlled in arriving at its decision by rules of evidence, albeit altered rules of evidence. Sometimes the more radical step has been taken of dispensing entirely with the rules of evidence.

By this I have in mind more than the provisions in s. 82 of the *Supreme Court Act 1970* (NSW) and its equivalents elsewhere: they are subject to limitations the scope of which is still being worked out.[10] One provision which may come readily to the practitioner's mind is that in s. 19(3) of the *Commercial Arbitration Act* 1984 (NSW), which has its counterparts in other States and Territories:

> "(3) Unless otherwise agreed in writing by the parties to an arbitration agreement, an arbitrator or umpire in conducting proceedings under an arbitration agreement is not bound by rules of evidence but may inform himself or herself in relation to any matter in such manner as the arbitrator or umpire thinks fit."[11]

In New South Wales the same step has been taken in curial, as distinct from arbitral, decision making. Pursuant to Pt. 72 of the rules a question or questions arising in proceedings, or even the whole of the proceedings, may be referred to a referee for enquiry and report. After consideration of the report, the court may adopt it. Part 72 r 8(2) provides that the referee may conduct the proceedings under the reference in such manner as he thinks fit, and that in conducting proceedings under the reference he is not bound by rules of evidence but may inform himself in relation to any matter in such manner as he thinks fit.

While practitioners may now more frequently encounter a tribunal which is not bound by the rules of evidence, that is nothing new. There are a great many tribunals, both Commonwealth and State, with functions including the decision of contested issues of fact, the legislation for which provides that the tribunal shall not be bound by the rules of evidence. Many of the tribunals would be regarded as administrative tribunals, but others - such as consumer claims or small claims tribunals - determine disputes between adversaries and tend to adopt the procedures of an adversary hearing. Some of the tribunals exercise disciplinary jurisdiction and their decisions on issues of fact will have more than monetary or material significance. The Australian Broadcasting Tribunal, lately much in the news, is not bound by the rules of evidence and may inform itself as it thinks fit.[12] Particularly important is the Administrative Appeals Tribunal, which in the exercise of its significant role in reviewing decisions under Commonwealth legislation is not bound by the rules of evidence and can inform itself in such manner as it thinks fit.[13] Appeals to the Federal Court from the Administrative Appeals Tribunal have helped to illuminate how a tribunal not bound by the rules of evidence can conduct itself. There are far too many such tribunals to list here, but with the widening dispensation with the rules of evidence comes the need to ask what that dispensation means.[14]

III

Why has the step been taken of dispensing entirely with the rules of evidence? Undoubtedly a major reason has been to avoid what is seen as the technicality of the rules of evidence and the expense, inconvenience and delay which may flow from their application.[15] Sometimes no more is said than that the rules of evidence require the exclusion of evidence which is highly reliable and credible[16], but that is a reason for modification of the rules rather than their wholesale rejection. It does not necessarily follow that the justifications for excluding probative material which brought about the rules are no longer to be recognised. Many tribunals are either composed of non-lawyers or deal with parties who are not represented by lawyers (or both), and it is simply not practicable to insist on compliance with the rules of evidence. That, rather than the view that the rules of evidence work injustice by excluding probative material, may be the substantial reason for dispensing with the rules of evidence.[17] It should not be assumed that a body of rules developed over centuries and reviewed and selectively modified by legislation is an instrument of injustice. Hence a statutory direction that a tribunal is not bound by the rules of evidence does not mean that no rules excluding otherwise probative material can be or will be applied: it means that the tribunal is not required to apply them by force of the law of evidence.

---

9 ALRC 26 at 7.

10 In s. 82(1)(a), in relation to no bona fide dispute or undue expense and delay. In other jurisdictions the provisions are in rules of court: 0 40 r 5 (Victoria); 0 20 r 2 (Queensland); 0 78 r 1 (South Australia): 0 40 r 2 (Tasmania); Os 29, 30 and 36.2 (Western Australia). In the Federal Court see 0 33 r 3 and in England 0 38 r 3.

11 *Commercial Arbitration Act* 1984 (Victoria); 1985 (Western Australia and Northern Territory); 1986 (South Australia and Tasmania).

12 *Broadcasting and Television Act 1942*, s. 25 (2).

13 *Administrative Appeals Tribunal Act* 1975, s. 33(1) (c).

14 Leading the discussion is the essay by Professor Campbell, "Principles of Evidence and Administrative Tribunals", in Campbell and Waller (eds), *Well and Truly Tried*, at 36-87, the particular assistance of which I gratefully acknowledge.

15 But query whether that would call for a more limited remedy such as s. 82 of the Supreme Court Act.

16 For example *R v Deputy Industrial Injuries Commissioner ex parte Moore* (1965) 1 QB 456 at 484.

17 This can be seen in the Law Reform Commission (NSW) Report on Commercial Arbitration (LRC 27) at 134: "It was oppressive as well as unreal to put on a conscientious arbitrator a duty which, to the knowledge of the parties, he was not equipped to perform."

IV

The following questions arise where the tribunal of fact is expressly not bound by the rules of evidence.

First, is the freedom from the rules of evidence complete, or must the tribunal nonetheless pay some regard to those rules as rules of evidence?

Secondly, what is meant for this purpose by the rules of evidence? Is the only test for the evidence which the tribunal may receive that of relevance, or do some of the exclusionary rules traditionally regarded as rules of evidence still control it?

Thirdly, is there some other principle controlling the tribunal of fact in arriving at its decision, such that the freedom from the rules of evidence does not leave it unfettered in its reception of relevant evidence?

I suspect that these questions shade into each other, but they provide a focus for what follows.

V

In *R. v War Pensions Entitlement Appeal Tribunal ex parte Bott* [18] the tribunal received and read a medical report on Bott's condition, and declined to permit cross-examination of the doctors. The grounds of an application for mandamus included that the evidence used against Bott (the report) was not on oath and the witnesses (the doctors) were not produced for cross-examination. The majority (Rich, Starke, Dixon and McTiernan JJ) discharged the order nisi. Evatt J dissented, and said in his reasons:

> "Some stress has been laid by the present respondents upon the provision that the tribunal is not, in the hearing of appeals, 'bound by any rules of evidence'. Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of enquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'."[19]

His Honour did not say what rules of evidence might have to be borne in mind, or how they should be borne in mind although they did not bind "as such", in order to administer "substantial justice". Was His Honour bringing the rules of evidence in by the back door?

In the United States there had developed a "legal residuum rule" under which a tribunal not bound by the rules of evidence could receive and act upon evidence not admissible in a court of law, but there still had to be in the evidence upon which its decision was based "at least a residuum of evidence competent under the exclusionary rules".[20] In the 1916 case in which the rule originated, *Carroll v Knickerbocker Ice Co*[21], the only evidence of a block of ice falling on Carroll was hearsay, and he failed in his claim to compensation because the tribunal interpreted the provision that rules of evidence were not binding as still requiring a residuum of "legal evidence"[22] to support the claim. Clearly enough this result could have been reached on the ground that, although admissible, the hearsay evidence was not persuasive when weighed against the other evidence (or even alone), but the error was made of saying that evidence other than "legal evidence", standing alone, could never be sufficient.

Later cases in the United States all but abolished the legal residuum rule, commencing with *Richardson v Perales* in 1971.[23] That rule really did not apply, of course, at the stage of reception of evidence, but rather at the stage of evaluation of evidence when making a decision. But it did require regard to the rules of evidence as rules of evidence governing admissibility. I doubt that Evatt J in *Bott's* case [24] had it or some similar principle in mind; as I will later suggest, his Honour was concerned with the manner in which the medical report was dealt with rather than its admissibility.

Certainly there does not seem to be any such rule in Australia. It is not consistent with the majority judgments in *Bott's* case.[24] In *Pochi v Minister for Immigration and Ethnic Affairs* [25] Brennan J, speaking as President of the Administrative Appeals Tribunal, cited the passage from the judgment of Evatt J in the course of a discussion not of the reception of evidence, but of its evaluation, and inferentially rejected the legal residuum rule:

> "The Tribunal and the Minister are equally free to disregard formal rules of evidence in receiving material on which facts are to be found, but each must bear in mind that 'this assurance of desirable flexible procedure does not go so far as to justify orders without a basis in evidence having rational probative force', as Hughes CJ said in *Consolidated Edison Co v National Labour Relations Board* (1938) 305 US 197, 229. To depart from the rules of evidence is to put aside a system which is calculated to produce a body of proof which has rational probative force, as Evatt J pointed out ... That does not mean, of course, that the rules of evidence which have been excluded expressly by the statute creep back through

---

18 (1933) 50 CLR 228.

19 (1933) 50 CLR 228 at 256.

20 *Young v Board of Pharmacy* 462 P 2d 139 (1969) at 142.

21 218 NY 435 (1916).

22 218 NY 435 (1916) at 440.

23 402 US 389 (1971); and subsequently *Califano v Boles* 443 US 282 (1979) and *Johnson v United States* 628 F 2d 187 (1985). For a more sympathetic treatment of the legal residuum rule see Schwartz, *Administrative Law*, at 338-46.

24 (1933) 50 CLR 228.

25 (1979) 36 FLR 482.

a domestic procedural rule. Facts can be fairly found without demanding adherence to the rules of evidence."[26]

After referring to a statement of Lord Denning that tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law[27], his Honour continued:

> "It was thought, at one time, that the *Consolidated Edison* judgment (1938) 305 US 197 required that some legal proof had to be adduced, and that hearsay evidence alone could not support an adverse finding ... But in *Richardson v Perales* (1971) 402 US 389 the *Consolidated Edison* case was construed in this way: 'The contrast which the Chief Justice was drawing ... was not with material that would be deemed formally inadmissible in judicial proceedings but with material "without a basis in evidence having rational probative force". This was not a blanket rejection by the Court of administrative reliance on hearsay irrespective of reliability and probative value. The opposite was the case.'

The majority judgments in *Bott's* case show that the Tribunal is entitled to have regard to evidence which is logically probative whether it is legally admissible or not ... There is no reason why logically probative hearsay should not be given credence. However, the logical weakness of hearsay evidence may make it too insubstantial in some cases, to persuade the Tribunal of the truth of serious allegations."[28]

It may be said with some confidence that where a Tribunal is not bound by the rules of evidence, it is not required to pay regard to legal admissibility - to rules excluding probative material - whether at the stage of reception of evidence or at the stage of its evaluation. At the stage of reception of evidence, the criterion is whether the evidence is relevant or probative - not, of course, whether it necessarily establishes or controverts the fact or facts in issue, but whether either alone or taken with other evidence it tends to do.[29]

VI

But is that so with respect to all rules of evidence? The answer seems to be a definite no. The Tribunal is not bound by some rules of evidence but remains bound by others.

Some rules of evidence which would otherwise operate to exclude probative material are undoubtedly dispensed with. A clear case is the hearsay rule. Few would not agree that it can operate to exclude relevant material of substantial probative value. It is a rule of evidence which falls within a dispensation with the rules of evidence, and a number of the illustrations which I later give when referring to natural justice involved hearsay evidence. It cannot be stated more clearly than in *Wajnberg v Raynor*[30] where the Tribunal was the Town Planning Appeals Board, and McInerney J said:

> "The direction that the Tribunal should not be 'bound by the rules of evidence' but that it may 'inform itself on any matter as it thinks fit' obviously frees the Tribunal from many of the restrictions imposed on ordinary courts by the rules of evidence. Some of those restrictions are directed to the medium of proof of facts, eg the rule against hearsay evidence will be found when analysed to prohibit a certain medium of proof of the existence of some fact or facts. Plainly the Appeals Tribunal is not similarly limited."[31]

Other fairly clear cases can be suggested. One is what has become known as the rule in *Hollington v Hewthorn*[32], whereby a conviction is inadmissible in later civil proceedings to prove the facts on which the conviction is founded. The rule has been abrogated by statute in a number of jurisdictions, and has been extensively criticised.[33] Only part of its rationale, that involving fairness to a party against whom the conviction is tendered but who was not involved in the earlier proceedings, would favour the retention of this rule in the face of a dispensation with the rules of evidence. In *re Habchi and Minister for Immigration and Ethnic Affairs*[34] and again in *re Barbaro and Minister for Immigration and Ethnic Affairs*[35] Davies J (as President of the Administrative Appeals Tribunal) regarded a conviction as evidence, but not conclusive evidence, of criminal conduct warranting deportation - not just the fact of conviction but the facts on which the conviction was founded. It was said that this view had been taken consistently in the Tribunal.

---

26 (1979) 36 FLR 482 at 492.

27 *T A Millar Pty Ltd v Minister of Housing and Local Government* (1968) 1 WLR 992 at 995; see also *Kavanagh v Chief Constable of Devon and Cornwall* (1974) 1 QB 624 at 633.

28 (1979) 36 FLR 482 at 493.

29 Relevance itself is not without difficulty, both in divergent legal statements of what constitutes relevance and in application of any given statement: see the discussion and works cited in ALRC 26, vol 1 at 44-5 and Eggleston, "The Relationship between Relevance and Admissibility in the Law of Evidence" in Glass (ed) *Seminars on Evidence*. This paper does not attempt to explore the difficulties.

30 (1971) VR 665. Earlier cases to the same effect (leaving aside the United States cases which I have mentioned) included *Wilson v Esquimault and Nanaimo Railway Co* (1922) 1 AC 202 at 213; *MacLean v The Workers' Union* (1929) 1 Ch 602 at 621; *R v Deputy Industrial Injuries Commissioner ex parte Moore* (1965) 1 QB 456 at 484, 488; and *T A Millar Ltd v Minister of Housing and Local Government* (1968) 1 WLR 992 at 995.

31 (1971) VR 665 at 678.

32 *Hollington v F Hewthorn & Co Ltd* (1943) 1 KB 587.

33 For its rationale and its critics see ALRC 26 at 44.

34 (1980) 2 ALD 623.

35 (1980) 3 ALD 1.

Another fairly clear case is the rule requiring proof of the contents of a document by production of the document, subject to exceptions where secondary evidence is permissible. That is commonly (though erroneously[36]) regarded as an aspect of the "best evidence" rule. In *Wajnberg v Raynor*[37] McInerney J gave the "best evidence" rule as one of the rules which a Tribunal free from the rules of evidence would be entitled to disregard.

There are cases where it is not so clear, but the position is probably the same. There is a degree of difficulty in asking whether the rules governing the reception of opinion evidence fall within a dispensation with the rules of evidence, since they are themselves obscure. What is an opinion as distinct from evidence of fact is not easy to determine.[38] The rules concentrate rather on when opinion evidence will be admitted (non-expert or expert) than on when it will be excluded.[39] For present purposes, it can be said that :

(i) a non-expert's evidence of his opinion will be excluded if it is no more than his inference from facts of which he can give direct evidence, but may be admitted if the facts and the inferences cannot realistically be separated;

(ii) an expert's evidence of his opinion will be excluded unless he has expertise in a recognised field of knowledge within which his evidence falls;

(iii) maybe, neither will be permitted to give an opinion involving a legal standard or on the "ultimate issue" which the court has to decide.

To the extent that there is an "ultimate issue" exclusion, there does not seem to be any good reason why a Tribunal not bound by the rules of evidence should not receive the opinion of an expert on the ultimate (factual) issue for its decision. Often the Tribunal will be composed of an expert or experts in the relevant field of knowledge, and the supposed danger of a court paying undue regard to the expert's opinion on the ultimate issue will not exist. Where the opinion is that of a non-expert, involving no more than an inference from facts of which he can give direct evidence which the Tribunal can just as readily make, there are said to be good reasons to permit the evidence to be received, namely that freeing the witness from artificial constraints lets him express his thoughts rationally and that "the expression of inferences and opinions by lay witnesses when they are in a position to contribute informed ideas not in the traditional form of facts can assist the court considerably"[40]. Where the opinion is that of an expert outside his expertise, or outside any recognised field of knowledge, the test of relevance may be thought to provide sufficient control.

In *re Kevin and Minister for the Capital Territory*[41] the applicant sought a review of the Minister's determination of the unimproved value of land. The Minister's valuer had relied on certain comparable sales. The applicant, who had no valuation expertise, analysed and relied on other sales said to be comparable. Ultimately the Administrative Appeals Tribunal (Mr R K Todd, Senior Member) felt unable to rely on the applicant's opinion, and preferred that of the Minister's valuer. The reasons are a little equivocal. At one point it was stressed that the applicant's opinion evidence, though inadmissible under the exclusionary rules, had been heard, and that "the question ... is not one of admissibility but of the weight to be accorded to such evidence."[42] At another point it was said that expert evidence could be given by a qualified person, but that the Tribunal could not rely on the supposition of the parties and it was "not appropriate" for an applicant to offer his non-expert opinion as a fact.[43]

Perhaps in the case of opinion evidence there is no simple answer. No Tribunal would welcome having unhelpful expressions of personal opinion thrust upon it; but many would welcome opinions, even of lay persons stating their inferences, or persons without clear expertise, where the opinions would help to understand and decide the disputed issues of fact. A test of relevance firmly applied may in practice suffice, and the mysteries of the rules governing the reception of opinion evidence should be put aside.

I mention at this point rules which, although in a sense procedural, nonetheless may result in the exclusion of probative material.

First, is it a rule of evidence that evidence of what a person saw, heard or did should be received by personal testimony? Is it a rule of evidence that a person whose evidence is received should be available for cross-examination? Test it this way: in curial proceedings, otherwise than by consent, could one party simply proffer a written statement of his evidence, have it received, and decline to be cross-examined? Could this happen before a Tribunal not bound by the rules of evidence?

The answer to the last question seems to be that it could: it would be open to the Tribunal to receive and act upon the material in the statement. This may be due more to the provision that the Tribunal may inform itself as it thinks fit which usually accompanies a dispensation with the rules of

---

36 *Cross on Evidence*, 3rd (Aust) ed, at 75, 1008 et seq.

37 (1971) VR 665 at 678.

38 See for example *R v Perry* (1982) 28 SASR 119.

39 There have recently been useful discussions in Gillies, "Opinion Evidence" (1986) 60 ALJ 597, Doyle, "Admissibility of Opinion Evidence" (1987) 61 ALJ 688 and Arnold "Expert and Lay Opinion Evidence" (1990) 6 Aust Bar Rev 219.

40 ALRC 26 at 407.

41 (1979) 2 ALD 238.

42 (1979) 2 ALD 238 at 242.

43 (1979) 2 ALD 238 at 243; cf Whitmore (1981) 12 Federal Law Review 117 at 119:
"I object very strongly to the exclusion of evidence by the expert opinion rule. Surely the qualifications of the witness go to weight and in many circumstances it is a fact that non-expert opinion might be as good or better than so called expert opinion. I might add that this is especially so in relation to matters like valuation of land and environmental issues."

evidence than to the dispensation itself. As to receipt of a written statement, see *re Hampton* [44], where Crisp J in the Supreme Court of Tasmania was "re-hearing" an inquiry not bound by the rules of evidence, and considered himself free to use and act upon a magistrate's notes. His Honour said, however, that although that might be permissible he would "be slow to allow recorded material to displace the obvious advantages of following the preferable course of having the relevant matters ventilated by personal testimony".[45] *Bott's* case[46] itself illustrates a Tribunal receiving and acting upon a written statement (the medical report) without personal testimony from the doctors, and Rich, Dixon and McTiernan JJ said that it was for the Tribunal to decide when it would exercise its power of taking evidence on oath, and that it was not required to act on sworn testimony only.[47] Starke J said that the Tribunal was not bound to obtain the opinion in the medical report on oath and that whether cross-examination should take place upon that opinion was entirely a question for the discretion of the Tribunal.[48] In *T A Millar Ltd v Minister of Housing and Local Government*[49] it was said that while the Tribunal had to observe the rules of natural justice, that did not mean that the evidence (there first-hand hearsay) had to be tested by cross-examination - it only meant an opportunity of commenting on it and contradicting it.[50]

Secondly, there are rules concerned with the order of presentation of evidence, with when evidence is permitted in re-examination, with when cases may be re-opened, and with when rebutting evidence may be called. These matters arise in the course of receipt of evidence, and can have important consequences if they result in the Tribunal proceeding to its decision on the issues of fact without evidence significant for that decision. To this extent they are exclusionary rules. These rules are distinct from rules relating to the burden of proof which arise when evaluating the evidence which has been admitted. It is proper to say that on the modern approach a liberal use of discretion generally prevents the exclusion of significant evidence, and the ability of the Tribunal to inform itself as it thinks fit will give an ample discretion.

One would expect that a Tribunal free from the rules of evidence and enjoined to inform itself as it thought fit would not be bound by these rules, although of course they may provide it with guidance. That seems to be so. In *McDonald v Director-General of Social Security*[51] there was discussion in the Full Federal Court of whether a legal onus of proof arose in proceedings before the Administrative Appeals Tribunal, in the course of which Woodward J said:

> "The use outside courts of law of the legal rules governing this part of the law of evidence should be approached with great caution. This is particularly true of an administrative Tribunal which, by its statute 'is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate'. Such a Tribunal will still have to determine practical problems such as the sequence of receiving evidence and what to do if it is unable to reach a clear conclusion on an issue, but it is more likely to find the answer to such questions in the statutes under which it is operating, or in considerations of natural justice or common sense, than in the technical rules relating to onus of proof developed by the courts. However, these may be of assistance in some cases where the legislation is silent."[52]

But there are rules of evidence - at least rules so called - which would require the exclusion of probative material by a Tribunal notwithstanding that it was not bound by the rules of evidence.

Although it is traditionally treated as an exclusionary rule of evidence, the presently perceived rationale for the rule whereby a witness can not be compelled to answer any question if it would tend to expose him to conviction for a crime would apply in the case of a Tribunal not bound by the rules of evidence to much the same extent as in curial proceedings. Sometimes the relevant legislation itself preserves the privilege against self-incrimination.[53] In the absence of legislative direction, it seems that the privilege against self-incrimination is not a rule of evidence within a dispensation with the rules of evidence. The privilege was described in the High Court in *Pyneboard Pty Ltd v Trade Practices Commission*[54] as "too fundamental a bulwark of liberty to be categorised simply as a rule of evidence applicable to judicial and quasi-judicial proceedings"[55], and was treated as a common law right which will not be taken away "unless the legislative intent to do so clearly

---

44 (1965) 7 FLR 353.

45 (1965) 7 FLR 353 at 356-7.

46 (1933) 50 CLR 228.

47 (1933) 50 CLR 228 at 244; see also *ex parte Smith re Russo* (1971) 1 NSWLR 184 at 187 where Jacobs JA, with whom Manning and Moffitt JJA agreed, regarded the Tribunal as free from the rules of evidence and held that there was no obligation to take evidence on oath.

48 (1933) 50 CLR 228 at 250.

49 (1968) 1 WLR 992.

50 (1968) 1 WLR 992 at 995 per Lord Denning MR, Danckwerts and Edmund Davies LJJ agreeing at 996; in *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 589 Brennan J seems to have accepted this position.

51 (1983) 6 ALD 6.

52 (1983) 6 ALD 6 at 9.

53 For example, the Trade Practices Tribunal is not bound by the rules of evidence (*Trade Practices Act* 1974, s. 103 (1)(b)), but it is a reasonable excuse for a witness before it to refuse to answer a question that it may tend to incriminate him (ibid s. 161(2)).

54 (1983) 152 CLR 328.

55 (1983) 152 CLR 328 at 340 per Mason ACJ, Wilson and Dawson JJ; from their Honour's decision, they preferred this description to the alternative view of the privilege as but a rule of evidence regulating the admissibility of evidence in judicial and quasi-judicial proceedings.

emerges whether by express words or by necessary implication".[56] In *R v Australian Broadcasting Tribunal ex parte Hardiman*[57] the court was concerned with the course of proceedings before a Tribunal which "is not bound by legal rules of evidence and may inform itself on any matter as it thinks fit"[58], but in the joint judgment of Gibbs, Stephen, Mason, Aickin and Wilson JJ it was said that "in an appropriate situation" a witness before the Tribunal "should be advised of his privilege against self-incrimination and he may exercise that privilege".[59]

Legal professional privilege is also traditionally treated as an exclusionary rule of evidence, but again the rationale given for it can be seen as equally applicable in the case of a Tribunal not bound by the rules of evidence as in curial proceedings. The majority in the High Court must have so seen it in *Baker v Campbell*.[60] At least two of the minority regarded the privilege as part of the rules relating to the giving of evidence[61], and thus as confined to judicial and quasi-judicial proceedings. The majority view was otherwise, and Dawson J stated explicitly -

> "To view legal professional privilege as no more than a rule of evidence would, in my view, be to inhibit the policy which supports the doctrine. Indeed, now that there appears to be a tendency to compel the disclosure of evidence as an adjunct to modern administrative procedures ... it may well be necessary to emphasise the policy lest it be effectively undermined."[62]

Hence it seems that legal professional privilege can be claimed before a Tribunal notwithstanding that the Tribunal is not bound by the rules of evidence. Claims to such privilege have been upheld in the Administrative Appeals Tribunal in *re Peric and Commonwealth Banking Corporation*[63] (query as a matter of discretion rather than obligation) and *re Greenbank and Secretary, Department of Social Security*[64] (apparently as a matter of obligation).

Public interest privilege will commonly arise in the course of production of documents rather than at the stage of admissibility of evidence. Its rationale involves balancing the public interest in protecting the State from prejudicial disclosures and the public interest in the free availability of information to enable justice to be done.[65] If the former is to prevail, it should prevail before a Tribunal not bound by the rules of evidence just as before a court. Accordingly, it is suggested that public interest privilege also is not one of the rules of evidence falling within a dispensation with the rules of evidence.

Some other so-called rules of evidence can be seen to be not truly rules of evidence at all. They will continue to apply notwithstanding that the Tribunal is not bound by the rules of evidence. I take two examples.

First, the materials to which regard may be had in the interpretation of statutes or instruments are sometimes spoken of as regulated by rules of evidence, and texts on evidence commonly deal with such so-called rules. They are really substantive rules. A Tribunal free from the rules of evidence is not thereby free from the constraints otherwise governing reference to extraneous materials for the purposes of interpretation. Certainly the Administrative Appeals Tribunal takes this view: see *re Bayley and Commissioner for Superannuation*[66] -

> "As a matter of principle, there must be one approach to the interpretation of statutes. Whether one agrees or disagrees with the rules that have been evolved, they have in fact been evolved and it is simply not open, in our opinion, to administrators (which includes the Tribunal) to adopt an approach in relation to statutory interpretation that departs from the rules of law laid down for the interpretation of statutes by the courts. The Tribunal's position in this regard is unaffected by the provisions of s. 33(1) of the Administrative Appeals Tribunal Act 1975 (Cth)."[67]

As was said by Mason J in *South Australian Commissioner for Prices and Consumer Affairs v Charles More (Aust) Ltd*[68], speaking of a provision that the Credit Tribunal was not bound by the rules of evidence:

> "However, here we are concerned with a problem of statutory interpretation, not with a question of evidence. It cannot be rationally supposed that by this provision Parliament intended to authorise the Tribunal to place an interpretation upon statutes which differs from that placed upon them by courts."[69]

---

56 (1983) 152 CLR 328 at 341.

57 (1980) 144 CLR 13.

58 *Broadcasting and Television Act* 1942, s. 25(2).

59 1980 144 CLR 13 at 34.

60 (1983) 153 CLR 52 per Murphy, Wilson, Deane and Dawson JJ.

61 (1983) 153 CLR 52 at 68 (Gibbs CJ); 76 and 80 (Mason J); Brennan J at 101 regarded it more as a rule regulating production of documents than admissibility.

62 (1983) 153 CLR 52 at 132. Compare McInerney J in *Wajnberg v Raynor* (1971) VR 665 at 678, suggesting that insofar as the rules of evidence "embody restriction based on some policy of the law, such as common law privileges of witnesses from disclosing certain facts", the Tribunal would be free to disregard those restrictions.

63 (1984) 7 ALN N2.

64 (1986) 9 ALD 338.

65 *Sankey v Whitlam* (1978) 142 CLR 1, *passim.*

66 (1979) 2 ALD 307.

67 (1979) 2 ALD 307 at 315.

68 (1977) 14 ALR 485.

69 (1977) 14 ALR 485 at 507; see also Gibbs J at 493-4.

This would seem obvious, but the contrary was argued in the High Court, and even in the judgment of Barwick CJ the language used was that of "introducing into evidence" the extraneous materials.[70] The position must be the same for the interpretation of instruments. At bottom, it is a question of relevance: if regard can not be had to extraneous materials, they are legally irrelevant.

Secondly, a number of cases refer to issue estoppel as a rule of evidence[71], while in other cases it is referred to as a rule of law.[72] Both *res judicata* and issue estoppel are treated (together with other estoppels) in texts on evidence: thus in *Cross* it is said that an estoppel prevents a party from placing reliance on or denying the existence of certain facts and that "This justifies the treatment of estoppel as an exclusionary rule of evidence".[73] In *Commonwealth of Australia v Sciacca*[74], referred to below, it was said in a joint judgment of Bowen CJ, Sheppard and Morling JJ that issue estoppel "operates to prevent evidence being tendered".[75]

Treating estoppel (of any kind) as an exclusionary rule of evidence is a dangerous illusion. In *Minister for Immigration and Ethnic Affairs v Daniele*[76] the Minister had contended that the Administrative Appeals Tribunal was bound to accept a conviction and the facts underlying it; the Tribunal had held that it was entitled to examine for itself all facts including those necessarily found by the jury. After pointing out that issue estoppel was not applicable to criminal proceedings[77] Fisher and Lockhart JJ went on to say -

> " Issue estoppel, generally but not universally seen as a rule of evidence, can not have any place in proceedings of the Tribunal, and is, to the extent that it is a rule of evidence, expressly excluded by the provisions of s. 33 of the Administrative Appeals Tribunal Act."[78]

With the greatest of respect to their Honours, this was having a bet each way. In *Commonwealth of Australia v Sciacca*[79] the Administrative Appeals Tribunal had held that an application for compensation was not barred by issue estoppel or *res judicata* arising from earlier proceedings. The Full Court referred to the passage from the judgment of Fisher and Lockhart JJ and said:

> "If the view is taken that issue estoppel is a rule of law (which may now be the more acceptable view), that would not conclude the matter, as it is apparent from what was said by their Honours, because of the administrative nature of the Tribunal and the provisions of s. 33(1)(b) of the Administrative Appeals Tribunal Act which directs the Tribunal to conduct its proceedings, so far as possible, without formality and technicality. A finding by an administrative Tribunal will not give rise to an issue estoppel."[80]

There may be some confusion here: there was no question of an earlier finding of an administrative Tribunal. Their Honours thought that even if it be a rule of law the doctrine of issue estoppel may not apply, but it was unnecessary to decide the matter. Whether or not this be so, it is suggested that issue estoppel was certainly not excluded by the provision that the Tribunal was not bound by the rules of evidence. The policy behind *res judicata* and issue estoppel - finality of litigation[81] - would call for the application of the doctrines of *res judicata* or issue estoppel if the matter before a Tribunal was, or included, re-opening a claim or issue previously determined. This should be so regardless of whether or not at times effect has been given to that policy in the name of a rule of evidence, and neither *res judicata* nor issue estoppel should be regarded as a rule of evidence for the purpose of dispensation with the rules of evidence.[82]

---

70 (1977) 14 ALR 485 at 490.

71 *Humphries v Humphries* (1910) 2 KB 531 at 536; *Marginson v Blackburn Borough Council* (1939) 2 KB 426 at 437; *Discount & Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR 598 at 603.

72 *Mills v Cooper* (1967) 2 QB 459 at 468-9; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 614-5.

73 *Cross on Evidence*, 3rd (Aust) ed at 119.

74 (1988) 78 ALR 279.

75 (1988) 78 ALR 279 at 283.

76 (1981) 39 ALR 649.

77 See *R v Storey* (1978) 140 CLR 364.

78 (1981) 39 ALR 649 at 654.

79 (1988) 78 ALR 279.

80 (1988) 78 ALR 279 at 283.

81 *Jackson v Goldsmith* (1950) 81 CLR 446 at 446; *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 507-8.

82 Common law estoppel - estoppel in pais or estoppel by conduct - has been described as a rule of evidence *(Low v Bouverie* (1891) 3 Ch 82 at 105; *Dawson's Bank Ltd v Nippon Menkwa Kabushiki Kaisha* (1935) LR 62 Ind App 100 at 108; *Maritime Electric Co v General Dairies Ltd* (1937) AC 610 at 620; *Discount & Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR 598 at 603; *Hood v Commonwealth of Australia* (1968) VR 619). In *Queensland v The Commonwealth* (1977) 139 CLR 585 at 615 Aickin J disagreed with this view, and it has also been described as a rule of substantive law *(Canadian & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* (1947) AC 46 at 56). In *Moorgate Ltd v Twitchings* (1976) 1 QB 225 at 241 Lord Denning MR described it as not a rule of evidence, not a cause of action, but "a principle of justice and equity". For present purposes it must be a rule of substantive law and not a rule of evidence. It can not be the case that a defence of estoppel would be available if the claim were brought in a court but not if it were brought in an arbitration.

To attempt a summary, the exclusionary rules regarded as rules of evidence fall into three classes. Some which operate to exclude probative material fall within a dispensation with the rules of evidence, and the material will be open to be received by the Tribunal. Others which so operate will not fall within the dispensation, and the Tribunal will remain bound by them. Others again are truly not exclusionary rules of evidence, and the Tribunal will remain bound by them. There are many, many so-called rules of evidence additional to the few I have mentioned. It is necessary to look beyond the label to determine the class into which any so-called rule of evidence falls. The few words by which the rules of evidence are typically dispensed with are deceptively simple.

VII

There remains a powerful control over the reception of evidence by a Tribunal which is not bound by the rules of evidence. That is that the Tribunal must not in its reception of evidence deny natural justice to the parties. This seems to be what Evatt J had in mind in the passage from *Bott's* case[83] which I set out much earlier - the manner in which the Tribunal received the medical report and acted upon it without permitting cross-examination did not, in his Honour's view, afford "substantial justice".

What natural justice (or as it is now called, procedural fairness) requires depends upon the particular circumstances. Since the circumstances can be so various, it is not particularly profitable to go to particular instances, but some illustrations can be given and some comments can be made. It is, of course, necessary also to pay regard to any particular direction given by statute or delegated legislation as to the procedure of the Tribunal.

Obviously enough natural justice will require that the Tribunal hear both sides, at least where it is appropriate to have a hearing, or give both sides the opportunity of commenting on the material before the Tribunal.[84] If the Tribunal informs itself in the absence of the parties, at least as a general rule it must give the information so obtained to the parties to permit them to express their views upon it.[85]

Commonly, natural justice will require that the opposing party be allowed to test the evidence by some form of cross-examination.[86] But natural justice does not necessarily require testing by cross-examination (see *Bott's* case)[87], and fairness may be met by an opportunity to contradict and comment.[88] Even to the contrary: in *Bushell v Secretary of State for the Environment*[89] Lord Diplock suggested that cross-examination might be unfair as "over-judicialising" an administrative enquiry.[90]

Natural justice may go so far as to require that evidence which is relevant nonetheless be excluded because it would be unfair to admit it. For example, in *re Pacific Film Laboratories Pty Ltd and Collector of Customs*[91] the Administrative Appeals Tribunal rejected the tender of the transcript of a tariff enquiry because it would be unfair to have regard to it when the applicant had had no opportunity to cross-examine those who appeared before the enquiry. With this may be compared *re Barbaro and Minister of Immigration and Ethnic Affairs*[92], where Davids J admitted the Woodward Report (the Royal Commission into Drug Trafficking) for its findings in relation to the applicant although the applicant had not appeared before the Commission. Another example comes from *R v Hull Visitors ex parte St Germain (No 2)*[93] where it was said by the Divisional Court that although the Tribunal could receive hearsay evidence, the overriding obligation to provide a fair hearing could mean that if the original source of the evidence was not available for cross-examination the Tribunal might have to exclude it.[94]

Hence the point made earlier that a statutory direction that a Tribunal is not bound by the rules of evidence does not mean that no rules excluding otherwise probative material can be or will be applied. The Tribunal does not have to receive all probative material proffered to it (although of course affording

---

83 (1933) 58 CLR 228.

84 *R v Deputy Industrial Injuries Commissioner ex parte Moore* (1965) 1 QB 456 at 476, 490.

85 *Xuereb v Viola* (1989) 18 NSWLR 453 at 464 (a case of a reference under Pt 72 of the rules); *Wajnberg v Raynor* (1971) VR 665 at 678.

86 *R v Australian Broadcasting Tribunal ex parte Hardiman* (1980) 144 CLR 13, esp at 34-5, although in part put on the ground that the Tribunal had failed to fulfil its statutory duty by precluding itself from enquiry rather than on grounds of natural justice; *Barrier Reef Broadcasting Pty Ltd v Minister for Posts and Telecommunications* (1978) 19 ALR 425.

87 (1933) 50 CLR 228.

88 *R v Deputy Industrial Injuries Commissioner ex parte Moore* (1965) 1 QB 456; *T A Millar Ltd v Minister of Housing and Local Government* (1968) 1 WLR 992; *Kavanagh v Chief Constable of Devon and Cornwall* (1974) 1 QB 624.

89 (1981) AC 75.

90 (1981) AC 75 at 95.

91 (1979) 2 ALD 144.

92 (1980) 3 ALD 1. In *Gardiner v Land Agents Board* (1976) 12 SASR 458 at 474 Walters J suggested that hearsay evidence should not have been received to prove serious allegations; query whether this is a confusion between admissibility and weight, and his Honour later seems to have adverted more to weight in questioning (at 475) whether the evidence had sufficient probative value to found the tribunal's decision.

93 (1979) 1 WLR 1401.

94 (1979) 1 WLR 1401 at 1409-10; cf. *R v Commission for Racial Equality ex parte Cottrell* (1980) 1 WLR 1580 at 1588.

natural justice will not necessarily mean refusal to receive evidence - the unfairness may be met by adjournment or in some other way). But any exclusion will be by force of the general principle of natural justice rather than the detailed rules of evidence. I throw up for discussion the position where a statute is cast in inclusory terms, such as s. 14B of the *Evidence Act* 1898 (NSW) whereby a statement in a document "shall ... be admissible ..." if certain conditions are satisfied. Can the Tribunal refuse to receive the statement if it considers natural justice so requires? I suggest that it can, because the statutory provision is just as much a rule of evidence as an exclusionary rule, and if that be so a Tribunal not bound by the rules of evidence is in a quite different position from a court. It is to be hoped that this is only a hypothetical question.

Has there been achieved something like Thayer's ideal, whereby everything logically probative is received unless excluded by particular exclusions based on sound policy (eg the privileges) or the general principle of natural justice? The rules of evidence may provide guidance upon when particular attention to fairness in the tribunal's fact-finding is required, but the task of the Tribunal will not always be easy. Opinions can differ on what procedural fairness requires, and the scope and content of natural justice is certainly not static. However, where a decision has been entrusted to a Tribunal not bound by the rules of evidence and (usually) empowered to inform itself as it thinks fit, it would be wrong to let exclusionary rules analogous to rules of evidence creep back in under the guise of rules of procedural fairness.

VIII

Although beyond the immediate scope of this paper, it is appropriate to note an emphasis in what natural justice may require at the stage of evaluation of the evidence rather than its reception. The emphasis is that the decision of the Tribunal may be open to challenge for denial of natural justice if the decision is not based on evidence. Dispensation with the rules of evidence does not mean liberty to decide the issues of fact on a whim, and natural justice may be the way to a remedy if that is thought to have occurred.

The emphasis began in the judgment of Diplock LJ in *R v Deputy Industrial Injuries Commissioner*[95], where his Lordship said:

> "Where, as in the present case, a personal bias or mala fides on the part of the deputy commissioner is not in question, the rules of natural justice which he must observe can, in my view, be reduced to two. First, he must base his decision on evidence, whether a hearing is requested or not ...
>
> In the context of the first rule, 'evidence' is not restricted to evidence which would be admissible in a court of law ... The requirement that a person exercising a quasi-judicial function must base his decision on evidence means no more than it must be based on material which tends logically to show the existence or non-existence of facts relevant to the issues to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above."[96]

In *Minister for Immigration and Ethnic Affairs v Pochi*[97] (the appeal from Brennan J sitting as President of the Administrative Appeals Tribunal) Dean J said:

> "... the Tribunal was bound, as a matter of law, to act on the basis that any conduct alleged against Pochi which was relied upon as a basis for sustaining the deportation order should be established, on the balance of probability, to its satisfaction by some rationally probative evidence and not merely raised before it as a matter of suspicion or speculation or left, on the material before it, in the situation where the Tribunal considered that, while the conduct may have occurred, it was unable to conclude that it was more likely than not that it had."[98]

Deane J joined with Diplock LJ in regarding this as an aspect of natural justice, and said that it would be surprising and illogical if the rules of natural justice were restricted to the procedural steps leading up to the making of the decision and were completely silent as to the basis on which the decision itself might be made:

> "There would be little point in the requirements of natural justice aimed at ensuring a fair hearing by such a Tribunal if, in the outcome, the decision maker remained free to make an arbitrary decision."[99]

His Honour took this up in *Australian Broadcasting Tribunal v Bond*[100], saying that a duty to afford natural justice extends to the actual decision-making procedure or process and the steps by which the decision is made, and that it is breached if the findings of fact on which the decision is based are unsupported by probative material.[101] But Mason CJ (with whom Brennan J agreed) said of a number of cases postulating a "no sufficient evidence" test that it remained to be seen whether they conveyed more than a "no probative evidence" test, and in relation to whether natural justice required that the decision be based upon material tending to show facts consistent with the finding noted that the approach "has not so far been accepted by this Court".[102]

---

95 (1965) 1 QB 456.

96 (1965) 1 QB 456 at 487-8.

97 (1980) 31 ALR 666.

98 (1980) 31 ALR 666 at 685.

99 (1980) 31 ALR 666 at 689.

100 (1990) 64 ALJR 462.

101 (1990) 64 ALJR 462 at 482

102 (1990) 64 ALJR 462 at 477-8.

Whether these aspects of natural justice will come to be accepted, and what they may lead to, are certainly beyond the scope of this paper. Lord Diplock's judgment would not justify any more than that there be some evidence (which may or may not be admissible according to the rules of evidence) supporting the decision of the Tribunal: his Lordship continued in the passage which I set out above:

"If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue."[103]

Natural justice would require that the decision be based on evidence even if the Tribunal were bound by the rules of evidence. Although insistence on natural justice is not confined to a Tribunal which is not bound by the rules of evidence, perhaps the future will see a widening of natural justice as an alternative control over the Tribunal of fact in arriving at its decisions, in part a substitute for the control once worked by exclusionary rules of evidence. ❑

A Commentary

P.M. Donohoe QC comments upon Mr Justice Giles' paper

These comments refer to the paper of His Honour Mr. Justice Giles delivered to the New South Wales Bar Association on 8 October 1990. There is, however, a difference in emphasis. His Honour's paper examines the law in circumstances where the rules of evidence have been dispensed with, for example, by the provisions of a statute. Drawing upon His Honour's analysis, these comments focus upon the dynamics affecting the judgment which, in modern practice, counsel is frequently called upon to make as to whether or not to dispense with the rules of evidence.

Common occasions include on an application for a direction under Part 72 Rule 8 of the Supreme Court Rules (which deals with conduct of proceedings by a referee) and s.19(3) of the Commercial Arbitration Act 1984 (which deals with evidence before an arbitrator or umpire). In pursuit of seductive simplicity I have posed ten questions and added some of my own comments.

1. *What (if anything) do I know of the tribunal's capacity and disposition to assess what is logically probative? (sections I & II, section V, section VIII).*

Thayer's Theory is based on evidence that is "logically probative". This reference to logic conceals the fact that the probative effect of evidence is derived in part from logic but in large measure from a catalogue of unstated assumptions derived from experience. Informality gives greater scope for the influence of the adjudicator's personal experience. Judges bound by the rules of evidence are usually more alert than lay adjudicators, to the importance of exposing such prejudices.

Once the rules of evidence are dispensed with counsel, in my view, must be especially sensitive to the duty to the Tribunal and exercise more than usual restraint: the liberty the relative informality is a temptation to depart from principle and proper conduct.

2. *What is my assessment of the tribunal's capacity*
(i) to assess what is irrelevant; and
(ii) to contain my opponent?
(section II, section IV and section VI).

The formal rules of evidence require constant reference to the issues and the rejection of the irrelevant. With less formality more material tends to be admitted with the paradoxical consequence that the less experienced adjudicator is burdened with the greater bulk of evidence.

A garrulous opponent (assuming oneself to be the embodiment of brevity) can confuse the Tribunal and prolong the proceedings. Furthermore, the rule as to the finality of answers to collateral questions and the provisions of s.56 of the Evidence Act 1898 (limiting cross examination) provide important restraints which one may wish to invoke against certain opponents.

3. *Do I know what I am dispensing with if I agree to dispense with all of the rules of evidence?*

It is significant that Wigmore's Treatise on Evidence contains 2,597 paragraphs! I refer to this simply to illustrate the vast body of law which may be dispensed with. Suppose counsel were asked to consent to dispensing with the rules of equity or the statutory duty of employers, how would one react? I suspect that most counsel would be reluctant to consent to a wholesale dispensation with a vast body of law developed over a number of centuries. The Law Reform Commission, in its interim report No. 26 on Evidence, adopted an ad hoc approach in its Draft Evidence Bill. Clause 141 is in the following terms:-

"141. (1) The court may, if the parties consent, dispense with the application of any one or more of the provisions of -
(a) Division 3 of part II; or
(b) Division 2,3,4,5,6,7 or 8 of Part III, in relation to particular evidence or generally.

(2) In a criminal proceeding, the consent of a defendant is not effective for the purposes of sub-section (1) unless -
(a) the defendant is represented by a legal practitio ner; or
(b) the court is satisfied that the defendant under stands the consequences of giving the consent.

(3) In a civil proceeding, the court may order that any one or more of the provisions mentioned in

[103] (1965) 1 QB 456 at 488.

sub-section (1) do not apply in relation to evidence if -

(a) the matter to which the evidence relates is not genuinely in dispute; or

(b) the application of those provisions would cause or involve unnecessary expense or delay.

(4) In determining whether to exercise the power conferred by sub-section (3), the matters that the court shall take into account include -

(a) the importance of the evidence in the proceed ing;

(b) the nature of the cause of action or defence and the nature of the subject-matter of the proceed ing;

(c) the probative value of the evidence; and

(d) the powers of the court, if any, to adjourn the hearing, to make some other order or to give a direction in relation to the evidence."

The provisions referred to in Cl.141(1)(a) and (b) deal with the manner of giving evidence, documents, hearsay, opinion evidence, admissions, evidence of judgments and convictions, evidence of character and prior conduct, and identification evidence.

4. Do I wish to cross-examine or oppose cross-examination? (section V, section VI and section VII).

Cross examination, in some circumstances, is the only way to expose the truth and yet tribunals, not bound by the rules of evidence, demonstrate a distaste which sometimes amounts to active discouragement of cross-examination: see *R v The Australian Broadcasting Tribunal; ex Hardiman* 144 CLR 13. The practical implications from the point of view of experienced counsel require no further elaboration.

5. Are the rules of evidence which facilitate proof and make admissible facts which might otherwise be inadmissible to be dispensed with? (section VI). Referring to the Evidence Act 1898 for example: s.6 (compellable witnesses), s.11 (communications during marriage), s.12 (persons may be examined without a subpoena) s.14CE (business records) s.15A (proof of seal signature and official character dispensed with) s.15A (proof of service of statutory notice etc) s.16 (public books and documents) ss.20-29 (judgments etc.) s.30 (birth deaths and marriage information) s.32 (companies incorporation Evidence Act 1905 [Cth.]) s.6 (proof of public books and documents) and 10A (proof of statistics).

The provisions referred to above especially those of s.14CE are of immense practical utility. For example, a statement in a document which satisfies the requirements of s.14CE is, subject to s.14CP (which deals with unfairness), admissible as a matter of right. By dispensing with the rules of evidence counsel may be watering down that right so that admissibility becomes a matter of discretion. Similarly proof of the statistics under the provisions of the Evidence Act 1905 (Cth.) is a matter of right if the statutory provisions are satisfied. One may speculate that most adjudicators, not bound by the rules of evidence, would admit such statistics but those waters are unchartered whereas s.10A of the Evidence Act 1905 provides a clear course to admissibility.

6. Do I wish to dispense with the hearsay rule in respect of the evidence of all witnesses or some only? (section VI)

This question requires no comment.

7. Is an expert likely to be called whose connection with the dispute is so close that her professional detachment may be impaired? (section VI)

"These witnesses are usually required to speak, not to facts, but to opinions; and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them." Taylor on Evidence cited by Windeyer J. in *Clarke v Ryan* 103 CLR 486 at 509.

8. Do I wish to rely upon or ignore the rule as to the finality of answers to questions on collateral issues?

This rule, superbly debunked by the late Irving Younger, is essentially a practical rule to stop time being wasted. Judges are experienced in its practical application but inexperienced tribunals find it extremely difficult to understand. Professor Younger concluded that this is because the rule cannot be understood, and it is simply a matter of experienced judgment as to what is important. I emphasise experience because the inexperienced lay tribunal is disposed to admit rather than to reject evidence with consequent delay, confusion and cost.

9. Do I know if I am abandoning privilege? (section VI)

The learned analysis in the paper demonstrate the unsettled law in this area of fundamental importance.

10. Am I content to limit principles of appeal to the rules of natural justice? (sections VII & VIII)

The principles of appeal based upon the rules of natural justice are directed to procedural fairness. One might ask will the client be content with a fair hearing or does he want the right answer as well?

CONCLUSION

These comments are intended to do no more than highlight matters which counsel should address if placed in the position of advising on the decision to dispense with the rules of evidence. I have, in recent years, seen proceedings conducted without the rules of evidence with spectacular success: but I should add, that in those cases there was complete trust and co-operation between counsel involved. ❑

Public Presumptions, Private Doubts: Presumed Innocent and The Burden of Proof

Peter Hutchings reviews Scott Turow's latest film and book.

(Our) decisions have respected the private realm of family life which the state cannot enter.
Prince v Massachusetts, 321 U.S. 158, 166 (1944), an opinion of the United States Supreme Court (epigraph to *The Burden of Proof.*)

Time magazine has described Scott Turow as the "Bard of the Litigious Age". A one-time deputy U.S. prosecutor and now partner in a Chicago law firm Sonnenschein Nath & Rosenthal, Turow has made another public career for himself in the rather private realm of literature. "Private" since, however publicly promoted and discussed it may be, a book's consumption and pleasures are always a private experience.

This tension between public and private is at the core of *Presumed Innocent* (both book and film) and *The Burden of Proof.*

Indeed, it is a tension which threatens to dissolve the lines between public and private, between guilt and innocence, as the publicity material for Alan J. Pakula's film of *Presumed Innocent* suggests: "Attraction. Desire. Deception. Murder. On one is every completely innocent."

What becomes obvious here is that the film is much more explicit in its cynicism about the presumption of innocence, especially when that presumption is seen to allow someone to get away with murder.

In both *Presumed Innocent* and *The Burden of Proof* basic principles of the American justice system become hollow ironies. Justice is a public presumption, and it is only in the "private realm of family life" that justice is any more than a presumption, that it is, in effect, "just".

Turow has stated that:

"I do regard the law as a noble calling, but I can't shake the notion that the law is coming up short in its inability to deal with intimate human situations."

Some of us might think that it is a strange demand of the law that it deal with "intimate human situations" especially when it seems to be structured around divisions between public and private. What may be legal in private - for instance among consenting adults - is not legal in public.

Wemmick, the lawyer's clerk in *Great Expectations*, is a classic example of the kind of split personality resulting from the inter-dependent cults of public realm and private sanctuary. Wemmick is able to provide Pip with one sort of advice in the office and another sort of advice at home, and Dickens provides an hilariously grotesque description of his transformations from corporate Mr Hyde to domestic Dr Jekyll in the course of walking home.

The Burden of Proof establishes this inviolable "private realm" as the locus of a privilege similar to that of the presumption of innocence.

Sandy Stern arrives home from a business trip to find that his wife Clara has committed suicide after withdrawing $850,000.00 from her substantial trust funds. As he attempts to comprehend this personal tragedy, his brother-in-law and client Dixon Hartnell is the subject of a Grand Jury investigation. Hartnell is apparently guilty of some trading irregularities on the futures exchange, and the investigation comes to involve Stern's entire immediate family.

In fine, the plot hinges upon the corruption of the law that ensues from the attempts to use the law for personal reasons. A point touched upon by one of the characters in *Presumed Innocent*, Raymond Horgan, in the course of his testimony concerning his former Chief Deputy Prosecuting Attorney Rusty Sabich:

> "The public should know that things are being done for professional, not personal reasons."

This principle underlies the legal chicanery of both stories. For all that the Sandy Stern of *The Burden of Proof* is somewhat different to the Sandy Stern of *Presumed Innocent*, both defence cases involve the highlighting of an apparent or actual obscuring of the differences between personal and professional motivations. Sabich notes of Prosecuting Attorney Tommy Molto that:

> "Tommy has become the kind of prosecutor that the PA's office too often breeds: a lawyer who can no longer make out the boundaries between persuasion and deception, who regards the trial of a lawsuit as a series of gimmicks and tricks."

In *The Burden of Proof* it is U.S. Attorney Stan Sennett who cannot seem to distinguish between public and private, who uses the Stern family against both Sandy and Dixon in a manner that Assistant U.S. Attorney Sonia Klonsky cannot stomach.

> "It's not disembodied principles to him. It's a grudge."
> "Sonny, there are no disembodied principles in the practice of law." He spoke with some weight. "There are human beings in every role, in every case. Personalities will always matter."
> "It was over the line. The way he handled it."

Turow's scepticism concerning the uses to which the law may be put, is most sharply concentrated upon the institution of the Grand Jury. It is not just that there is nothing grand about its jurors - ordinary, often unemployed people who pay little attention to the proceedings - but that it appropriates to the law the privileges of privacy.

"The grand jury, [Stern] explained, was convened to investigate possible federal crimes. ... The proceedings were secret. Only the witnesses who testified could reveal what happened. If they chose to."

Subjects of Grand Jury investigation need not be alerted to the charges being prepared against them, nor are they represented by counsel. Furthermore, as Alejandro Stern

informs Dixon Hartnell:

> "Inside the grand jury room, the burden of proof on the government is minimal - they merely need to convince a bare majority of the jurors that there is probable cause to believe that a crime has taken place. The prosecutors may introduce hearsay, and the target and his lawyer have no right to learn what has taken place or to offer any refutation. It is not what you would describe as evenhanded."
> "I'd say," answered Dixon. "Whose idea was this?"
> "The framers of the Constitution of the United States," answered Stern. "To protect the innocent."

This is the issue most closely focussed upon in this book, although it is part of the earlier book: there the relaxed burden of proof is met by the presumption of innocence. Turow's concern is with the manner in which the privacy - or secrecy, the more general term for privacy in the public sphere - of this legal instrument makes it amenable to the kind of abuse depicted in *The Burden of Proof.*

Australian law - both Federal and State - provides for no such statutory lightening of the burden of proof, but there has been the development of a practice of deciding that the weight of evidence need be less in prosecutions of public figures. An unwritten Caesar's wife clause. Such an approach to prosecution - as formulated by Ian Temby QC - is based upon some idea that "public" figures are deserving of a qualitatively different legal status, that they should be investigated "in the public interest" upon lesser grounds than would normally be required of a "private" investigation. It is an idea that might draw some of its justification from the anomalies of our libel laws which tend to be biased in favour of public figures.

But Turow's difficulties with the American justice system, and with the conflicts of public and private, seem to resolve themselves into some sort of privatised version of the law. The only escape clause from the legal complexities of the case against Hartnell - which Stern himself is drawn into when he is subpoenaed to appear before the Grand Jury - is, finally, a private one, dependent upon personal networks within the various agencies of the law.

In all of this there appears to be some sort of nostalgia for an uncorrupted, wholly private form of existence. As Paul Gray wrote in Time:

> "What sets Turow's opinion apart from run-of-the-mill sour grapes is what he has made of it: serious fictional portraits of the present moment, when moral authority is collapsing and the law has become, for better and worse, the sole surviving arena for definitions of acceptable behaviour. Disputes that once might have been resolved by fisticuffs or a few intense minutes in the confessional or private negotiations between squabbling clans now tend to wind up as lawsuits. " (Paul Gray, *"Burden of Success," Time*, June 11, 1990.)

Consciously or not, Gray's account of the situation addressed in Turow's fiction smacks of a yearning for "old-fashioned values", even as it recalls the words of another lawyer-turned-novelist, Sir Walter Scott:

> "The wrath of our ancestors ... was coloured *gules*; it broke forth in acts of open and sanguinary violence against the objects of its fury: our malignant feelings, which must seek gratification through more indirect channels, and undermine the obstacles which they cannot openly bear down, may be rather said to be tinctured *sable*. But the deep ruling impulse is the same in both cases; and the proud peer, who can now only ruin his neighbour according to law, by protracted suits, is the genuine descendent of the baron who wrapped the castle of his competitor in flames, and knocked him on the head as he endeavoured to escape from the conflagration." (*Waverley*, Ch.1.)

On this account, the "Litigious Age" has been with us for some time (*Waverley* was first published in 1814). And so, in line with Turow's individualist predilections, *The Burden of Proof* puts the "baron" back into "robber" the promise back into "parole", with its portrayal of Dixon's chivalric attachment to promises:

> "For Dixon, like the others on the exchanges, his word given was exalted. To someone's back a knife could be freely applied, but a deal made eye to eye could not be broken."

Alan J. Pakula's film of *Presumed Innocent* - superbly cast, acted, scripted and directed - foregrounds this issue of a personal compact with the law. The film opens and closes in an empty courtroom, as the voice of Rusty Sabich (played by Harrison Ford) relates one man's version of the American justice system. As the camera focusses upon the empty jurors' chairs of solid wood and leather, we are introduced to the personal elements of the law: its prosecutors, its defendants, its jurors.

In crafting a gripping film from a bestselling book, the film-makers had no mean task. Nothing in cinema could replicate the impact of the book's first person narrative, nor could its surprises be repeated (even if the press kits contained an adjuration that reviewers not reveal the ending). So what the film does is do what cinema can do better than literature: it focusses upon the reactions of those involved in this case. The reactions of accusers and accused, of their family and associates, of judge and jury.

And nowhere is this technique more gripping and effective than in the scene in which all is revealed, a scene in which two people discuss the crime and react to one another's words in almost motionless close-up.

The decorums of cinema echo some of the complexities of the law with which Turow's texts engage. In effect, cinema is constituted by some of the blurring of distinctions between public and private. Cinema is at once a very public spectacle, yet it deals with the personal as it focusses upon how people look when they act or are acted upon.

Something of that blurring is evident in the closing of *Presumed Innocent*. Back in the empty courtroom we hear Rusty Sabich's voice reiterate his opening address. He tells us that: "There was a crime, there was a victim and there is punishment...".

Whose crime, which victim, whose punishment? The suggestion (which needn't be elaborated here) is that the answers to these questions will be found - not in the empty courtroom - but in the hollow sound of Harrison Ford's rendition of Rusty's voice. ❑

Verdict on the Malaysian Bar

Nick Cowdery QC reports on the judgment of the Supreme Court of Malaysia in Manjeet Singh Dhillon's case.

On Sunday, 21 October 1990 a general election was held in Malaysia. It was called at short notice but had long been expected. The Prime Minister, Dr Mahathir, was returned with his two-thirds majority intact.

As soon as the result was clear the Supreme Court of Malaysia (the Federation's highest court) listed for judgment the matter of *Attorney-General, Malaysia v Manjeet Singh Dhillon*, in which judgment had been reserved on 7 June (see *Bar News*, Spring 1990, pp 9-11). The date for judgment was twice put back, until on Monday 5 November it was delivered.

By majority (2:1, the presiding judge dissenting) the Court found that the Vice President of the Malaysian Bar (then Secretary) was in contempt of court by his statements in an affidavit affirmed on 25 April, 1989. The affidavit was made expressly on behalf of the Bar and filed in support of an application by the Bar that the Lord President (the Federation's highest judicial officer) be himself dealt with for contempt for his actions on 2 July 1988. On that day he had sought to prevent the holding of a special sitting of the Supreme Court at which an urgent application, to which he (as Chairman of a Tribunal then sitting) was the respondent, was to be heard.

The offending parts of the affidavit are set out in the Spring report.

Each of the judges delivered a separate judgment. The senior judge in the majority, Dato' Mohamed Yusoff bin Mohamed SCJ stated that he had read the final judgment of the dissentient Tan Sri Dato' Harun M Hashim SCJ "last Saturday morning" - i.e. on 3 November. Datuk Gunn Chit Tuan SCJ stated he had read both of the other two judgments. Harun SCJ's judgment was the longest and most closely reasoned (although still somewhat confused).

After hearing submissions on penalty (in which the Attorney-General pressed for a custodial sentence) the Court adjourned briefly. Only the judges in the majority returned. They imposed a fine of $M5,000 (about $A2,400) in default three months' imprisonment.

The Attorney-General then asked for costs and suggested forcefully and repeatedly that Harun SCJ return to court to deliberate on that matter. Yusoff SCJ announced that all three had earlier discussed the question of costs and that he would take responsibility for the matter. The Court ordered that each party pay its own costs.

The fine was paid by the Bar Association.

The Judgments

Elsewhere (see the December issue of *Australian Law News*) I have described the judgments as a muddle (which the Shorter Oxford English Dictionary defines as, inter alia, "intellectual bewilderment"; "a confused assemblage"). They are full of false trails, notions raised and abandoned, internal inconsistencies. Particularly is that so in the case of the majority, being indicative of haste.

The only common ground in all three judgments appears to be:

1. A finding that the relevant common law which applies to such a case is exemplified by the decision in *R v Gray* [1900] 2 QB 36 which identifies two classes of contempt of court:

   (a) "any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority"; and

   (b) "any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts".

The former is "scandalising" a judge or court and is "subject to one and an important qualification. Judges and Courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court".

> ***" The judgments ... are full of false trails, notions raised and abandoned, internal inconsistencies"***

2. An expressed need to make allowances for "local circumstances" in Malaysia - but without identifying what "social conditions" (in the words of Gunn SCJ) were relevant or how they bore on the issue.

Yusoff SCJ held that both classes of contempt had been established; the Lord President could not have been in contempt because the sitting on 2 July, 1988 was unlawful (a conclusion also reached by Harun SCJ, dissenting); justification or honest intention could not be a defence, but a guilty intention must be found - [I have some difficulty with that, too] - and was present [despite the uncontroverted evidence of the Respondent to the contrary - he was not cross-examined].

Gunn SCJ held that the contempt was of the first class in *R v Gray*; a defence of justification was available but not made out because the criticisms went beyond "what any litigant could honestly and reasonably ... consider to form the basis of a serious and genuine argument in the proceedings" (citing *R v Collins* [1954] VLR 46); a guilty intention was established by reason of the Respondent's intention to affirm the affidavit which in fact contained statements "causing unwarranted and defamatory aspersions on his character, which could be considered to be scurrilously abusive of the Judge". He cited (then apparently discounted) the words of Atkin L.J. in *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322 at 335:

> "The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in

malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

Harun SCJ conducted a thorough examination of the events of 1988 and concluded that the Lord President had not been in contempt because the special sitting was unlawful; he held that the Resondent's criticisms were defamatory; the Bar may well have been in contempt for stirring up publicity about events but it was not on trial; but the Respondent was not in contempt because the Lord President had not been acting in his judicial capacity. [Why the "mere abuse" he found had occurred did not fall into the first class of contempt in *R v Gray* is anybody's guess; but perhaps it needs to be remembered that this was the judge who in 1987 declared the Prime Minister's political party, UNMO, an illegal organisation and who subsequently was supported by the Bar in the face of vigorous political attack. It is perhaps ironic that he received the honour Tan Sri on the King's birthday which fell during this trial.)

Comment:

The "muddle" is to be found in:

1. The difficulty in characterising the alleged contempt as falling into one or other or both of the classes identified in *R v Gray*;

2. The uncertainty over the mental element or intention required for either or both classes;

3. The basis for finding a relevant guilty intention;

4. The conflict over whether or not justification could be a defence;

5. The doubt about whether the offended judge must have been acting in a judicial capacity - and what that means.

Overshadowing the propositions advanced in all judgments is an even more sinister feature: the "local circumstances" held (without more) to require "a stricter view of matters pertaining to the dignity of the court "(in the words of Yusoff SCJ). The qualification comes from section 3 of the *Civil Law Act*, 1956 which applied to Malaysia the common law of England as it was on 7 April, 1956 "subject to such qualifications as local circumstances render necessary". The phrase seems to have been regarded by the Court as giving it licence to make up its own mind, without evidence or argument, about:

1. what local circumstances are relevant;
2. how they are to be interpreted; and
3. what influence they will have on the application of the common law.

In fact, they (whatever they were) were regarded as requiring an even greater restriction on free speech - guaranteed under the Constitution - than contempt law already imposed.

Questions:

What action, if any, will the Attorney-General now take against the Malaysian Bar, or against Manjeet Singh Dhillon, its Vice-President?

What do the judgments (and the manner of their preparation and delivery) say about the independence of the judiciary in Malaysia?

What do the judgments say about the future of the rule of law in Malaysia? Just what are the "local circumstances" in Malaysia?

How secure is the future and the independence of the Malaysian Bar?

We should watch for the answers. ❑

Resiling with (Some) Dignity

"The language of the Selective Service Act can be interpreted consistently with this history of our international contentions. I think the decision of the Court today does so. Failure of the Attorney General's opinion to consider the matter in this light is difficult to explain in view of the fact that he personally had urged this history upon this Court in arguing Perkins v. Elg, 307 US 25 83 L ed 1320 59 S Ct 884. Its details may be found in the briefs and their cited sources. It would be charitable to assume that neither the nominal addressee nor the nominal author of the opinion read it. That, I do not doubt, explains Mr. Stimson's acceptance of an answer so inadequate to his questions. But no such confession and avoidance can excuse the then Attorney General.

Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. See Chief Justice Taney, License Cases (US) 5 How 504, 12 . L ed 256, recanting views he had pressed upon the court as Attorney General of Maryland in Brown v. Maryland (US) 12 Wheat 419, 6 L ed 678. Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, "The matter does not appear to me now as it appears to have appeared to me then." Andrews v. Styrap (Eng) 26 LT NS 704, 706. And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: "My own error, however, can furnish no ground for its being adopted by this Court ... " United States v. Gooding (US) 12 Wheat 460, 478, 6 L ed 693, 699. Perhaps Dr Johnson really went to the heart of the matter in his dictionary - "Ignorance, sir, ignorance." But an escape less self-depreciating was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." If there are any other ways of gracefully and good naturedly surrendering former views to a better considered position, I invoke them all." ❑

(Justice Jackson concurring in McGrath v. Kristensen (1950) 340 US 176-178)

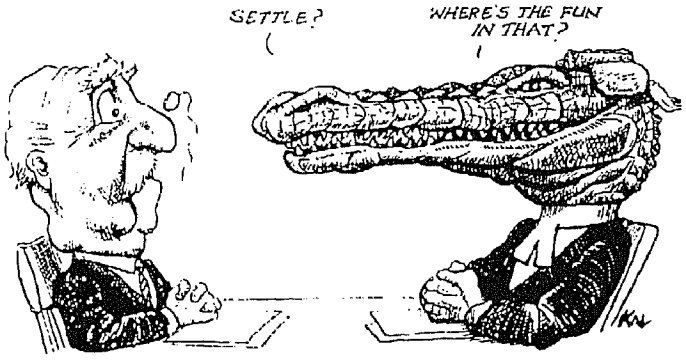
Alternative Dispute Resolution for Barristers

A Paper Delivered at the A.B.A. Conference, Darwin 4th July, 1990 by the Hon Mr Justice de Jersey of the Queensland Supreme Court.

I have been a public advocate of ADR for some years. It is easy to be. ADR is founded in no more than common sense. It is justified on this principal basis - it restores the focus to mediated settlement, a focus lawyers had come to ignore. I will not talk about the methods of ADR, or about its advantages and disadvantages. Those are the subject of an immense amount of discussion in the literature. I have myself spoken so many times on those matters, that if I do so again I may be tedious. I prefer therefore to concentrate more generally on the position of the Bar with respect to ADR, and two particular aspects: first, why, apart from its common sense justification, the Bar must embrace ADR; and second, how an alliance between the Bar and ADR affects the Bar's traditional role.

Why should the Bar embrace ADR?

First, the wrong reason. There is enormous public support for the trend towards ADR. A great amount of publicity has reminded litigants that they can resolve their disputes short of trial. They can save money and time. They can minimise damage to business relationships. Unfortunately, the public perception of lawyers is that they are primarily interested in taking matters to court: as the public sees it, because they thereby earn more money. Lawyers have been traditionally shy about settlement negotiations. To engage in such things has somehow been contrary to the ethos of the Bar. In all of these circumstances litigants have I think become somewhat distrustful of lawyers. That attitude has been augmented by the enthusiasm for Judges to talk about settlement in open court. Now they frequently do so. They are even bold enough to suggest that certain cases be taken to dispute resolution centres outside the court. The many pledges of support by business and commercial concerns for bodies like the A.C.D.C. confirm my feeling that many litigants want something new; something cheaper, something quicker, but something which will nevertheless give them a satisfactory and just result in the end.



In these circumstances, lawyers who plough on in the traditional way do so at their peril. The peril is that they will lose their clients. They will end up with dissatisfied clients. Word will get around. They will be perceived to be interested principally in large fees. I think that a clear sighted recognition of the ADR trend is important to the future of the Bar.

That is the wrong reason: matters of survival.

The true reason why the Bar should embrace ADR is that doing so will further the interests of the public. The rationale for the Bar's privileged position in society is that it exists to serve a vital public interest. Unfortunately at the moment it is not serving that interest to a large extent. That is because fees are so high that middle income earners are denied recourse to the courts. The trend towards ADR raises the prospect of some reduction in the cost of legal services. There is a real advantage here which the Bar should be quick to seize. If adopting the mechanisms of ADR reduces the cost of dispute resolution then it may enhance the public perception of the Bar, as well as increasing the Bar's capacity to serve the very interest for which it exists.

It is disappointing that the Bar has been tardy about pursuing this new trend. The Bar in Brisbane has recently set up an ADR facility. But participating in that is not inexpensive for the client. I cannot help thinking that a large part of the Bar's current tolerance for ADR is inspired by fear that it will otherwise lose part of its remunerative domain. Why not offer a facility for which the charge is merely nominal? It would be a great exercise in public relations.

I feel however that the particularly relevant role with relation to ADR, is for the individual, not for the Bar as a collective body. It is the individual barrister who should be turning his mind to negotiation. Experience in civil sittings indicates that many cases are still coming to court where there has been minimal attempt at negotiation. Many cases still settle at the court door, or after the case has been going for only a short while. What a waste of money.

When I was running the Commercial Causes List in Queensland, my mediation conferences were a great success with the clients. They loved them. And the procedure was so simple! They enhanced the settlement rate dramatically, accelerating settlements to a point in the litigation where great expense had not been incurred, where delay had not been suffered, and where relationships were not irreparably fragmented.

The Bar could organise attempts at mediation quite easily. Why not ask a senior to express a view on a case, however informally? He might even be prepared to do it for nothing.

That is why the Bar should embrace ADR: because it will truly help the litigants, and it will enhance the Bar's prospect of fulfilling the reason for which it exists. On a less altruistic level, it will help the Bar survive.

How then would an alliance between the Bar and ADR affect the Bar's traditional role?

As I have said before, the role of the Bar is to ensure access to the law for all. If utilising ADR mechanisms will lead to lower fees, then obviously the achievement of that role is assisted. Likewise if dispute resolution is accelerated.

Resort to ADR does involve some departure from the traditional role of barristers. It involves a concentration on ending the case as quickly and cheaply as possible, rather than

a focus on taking it to court and having the ultimate battle royal. Many sensible barristers have always considered the prospect of settlement at an early stage. But many have not. Many have engendered in their clients such a firm belief in the rightness of their cause that vindication in court has been the only acceptable way of bringing things to an end. This is not just the Bar's fault. Legal training also, with its concentration on the adversarial model, has contributed to this shackling of lawyers to their traditional role as gladiator in the court room. There is a great need to introduce flexibility and to do it soon. As I have said, it is simply a matter of common sense.

Desirably, a barrister should rarely go to court. I rarely see in court the barristers whose court performance I admire the most. That is very significant. To my mind the most successful barrister is the one whose clients most frequently settle. Such an approach perhaps leads to a less exciting life for the barrister, but much more fulfilling results for the clients.

Concentrating on ADR does not, to my mind, mean giving over to some new fangled fashion. All it means is diverting the focus away from the court room, back to the possibility of securing, by some reasonably satisfactory means, an early resolution, with a minimum of fuss and expense. There should be a renewed focus on, mainly, mediation. That is what the clients want. Changing one's tack should, for the barrister, be relatively painless.

Settlements at the court door are about the most depressing thing I experience as a Judge. I know that the parties have incurred all their costs, they have suffered all their delay, they have entrenched all their acrimony. Human resources have been wasted, human relationships fractured: although the lawyer has certainly nevertheless benefited. What a hollow result.

There is an alternative. Lawyers are so heavily criticised these days. In this area, there is still time to show a true willingness to serve that vital public interest and not be preoccupied with a narrow private one.

Bodies like the A.B.A. and the individual Bar Associations can adopt policies and express views about these things. But the real thrust must come from the individual barristers representing their clients. There is benefit here not only for the client but for the barrister as well. ❑

Legal Entrapment

"Fun is fun, but these lawyer jokes may be getting out of hand. We were frankly amazed to see how far anti-lawyer sentiment had gone on reading recently of the actions of the Virginia legislature. Before adjourning, the Virginians came close to passing a bill that would have established an attorney-hunting season. The State Game Board was ordered to study if it should classify lawyers as a nuisance species as well as establish regulations for trapping them. But the Virginians apparently wanted to make the hunt sporting. The use of cash as bait was prohibited, as was shouting "whiplash" or "ambulance" in order to trap the attorneys. This is really disgusting. Where are animal rights people when you need them?" ❑

"Section 92" in Europe

The two great issues presently facing European lawyers are the impending introduction of a single European market and the clamour from Eastern European countries to develop free market economies and join in. Both issues were treated in detail at the recent Strasbourg Congress of the International Union of Lawyers. Strasbourg was the obvious location for such a conference because of its location at the geographical and political heart of Europe.

The Conference was opened in typical French fashion, with a myriad of speeches, including speeches from the President of the European Parliament, the Vice President of the European Commission (Sir Leon Brittan) and the French Minister of Justice. The first working session of the Conference was led by Lord Alexander of Weedon QC who spoke on the challenges facing lawyers as we approach the year 2000.

I found greatest interest in sessions devoted to the proposed single market in Europe and the events currently taking place in Eastern Europe. A highlight was papers by East and West German lawyers on the fusion of their two legal systems.

In a paper I gave, I was able to point out that, notwithstanding the apparent remoteness of Australia from the heady events now taking place in Europe, we might be able to offer some assistance on issues that must arise as Europe moves closer to a single market. After all, we travelled the same path nearly a century ago. I know from David Vaughan QC, of the Inner Temple, who is the leader of the English EEC Law Bar, that s.92 cases are regularly referred to in the European Court and in other Courts in which free market problems arise for consideration.

There was an Australian contingent of more than 20 delegates and spouses at the Conference. The social programme included a river cruise one evening followed by a formal dinner at the Palais de L'Europe (the European Parliament). Day trips for spouses and those absenting themselves from the Conference included Baden-Baden and the castles of the Rhine. The last day of the Conference was given over to day trips to Colmar, along the Route du Vin, and to Freiberg in Germany. During the Conference I was appointed to the Comité de Direction (Executive Committee) of the UIA and will shortly be attending a meeting of the Comité in Paris followed by a visit to Budapest, at the request of the Hungarian Bar Association, with a UIA delegation. Other meetings of the Comité de Direction for the coming year are scheduled in Morocco, Rome, Toledo and Mexico.

The next Annual Congress of the UIA will be held in Mexico from 28 to 31 July 1991. The Conference should be well attended by American, as well as European lawyers. The programme includes sessions concerned with trade and investment between America and the Pacific, together with sessions relating to international litigation and arbitration, international civil procedure, and other matters of interest to barristers. Prior to the Mexican Conference the UIA is holding a Symposium in Rome at Easter on freedom of religion and beliefs. The symposium includes a Papal reception.

Anyone interested in joining the UIA, or attending either the Symposium in Rome or the Conference in Mexico, can make arrangements through me at 7/180 Phillip Street, Sydney 2000 (DX 399). ❑ Garry Downes QC

An Issue Not Easy to Accommodate

Twenty years ago the New South Wales Bar was, both corporately and collectively, accommodated in reasonable comfort within the various walls of Wentworth-Selborne Chambers. Since then, such growth within the profession has taken place as to render that building inadequate to house any more than roughly 26% of those in practice (see the figures on page 9 of the Association's 54th Annual Report). Geographical diversity in the form of the proliferation of "outside" chambers has followed as an inevitable consequence. With it, unfortunately, there has occurred a fragmentation of the bar to the point, seemingly, where many of its members do not consider the activities of the Bar Association, nor its ruling body, the Bar Council, to be of any particular "relevance" to their daily activities. This indifference has been exemplified by the comparatively low number of votes cast at the annual elections and, more recently, by the failure to achieve a quorum at an extraordinary general meeting convened to consider proposals for the alteration of the constitution of the Council. Ironically the number of candidates for election would have been more than ample to make up a quorum.

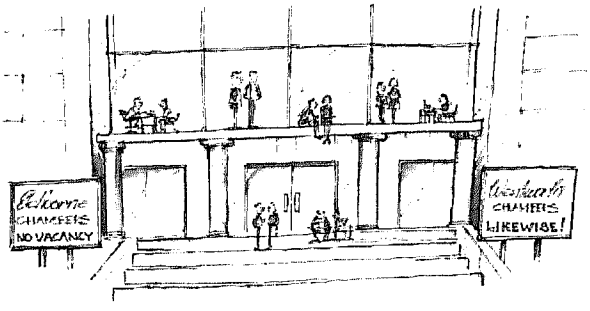
In the Annual Report, the President drew attention (on page 2) to the accommodation problems with which the Association itself is now confronted, indicating that the solution to them "will be neither easy nor cheap". Obviously all members will be called on, in one way or another, to pay for that solution, however it may be devised. A general meeting will no doubt be called in due course to consider the issue. Given the sensitivity of the hip pocket nerve there is little likelihood that it will not attract a quorum. Indeed it may itself prove the President's point.

The issue may well test the question of whether or not the apparent apathy of many counsel to the affairs of their profession reflects a lessening in the collegiate spirit of the bar and a converse emergence of attitudes of singular self interest. One hopes that the negative will be demonstrated.

Sadly, however, there is evidence abroad that the contrary may be so. Ever escalating overheads, and a corresponding necessity to devote effort to the pursuit of income to meet expense may be said to warrant concentration on individual rather than collective concerns. The impact of inflation on barristers' outgoings is doubtless as capriciously various as it is on other costs within the community. It is difficult, therefore, to say with confidence that outgoings are now proportionately greater than receipts as has been the case in the past. What cannot be denied, however, is that the most significant item of outlay to any newcomer to the bar is the capital required for the acquisition of chambers. One can only wonder how many capable people have been precluded from joining the bar's ranks because of this financial impediment. The phenomenon of paying substantial premiums for the privilege of becoming a member of a given floor has developed within this state, but not elsewhere in Australia. That development has been quite dramatic in the past twenty years. Before 1970 it was virtually unknown.

The practice has little, if any, rationale. Some proponents claim justification for it on the ground that in the case of Wentworth-Selborne, where the idea originated, an asset in the form of part ownership of realty is involved. But this appears to overlook the fact that the shares held by the occupants of that building are non equity, entitling their holders to no more than a return of their paid up (i.e. par) value in the event of a winding up (or reduction of capital). Other advocates of the "system" consider it to be so entrenched as to be incapable of demolition even by a gradual process of reversal. Others still are sufficiently unashamed as to claim that their chambers are an unassailable item of property and at that saleable for a substantial sum. Thus the bar has seen the emergence of "traffickers" in shares; chamber hopping has proved for some to be a much more lucrative activity than chamberwork.

The legacy of the 1980s is presently hard felt. Lending by financial institutions against will-o-wisp "securities" at high interest rates has had a significantly adverse effect on the nation's economy. As the community generally struggles to adjust its priorities to a new order which excludes such activities, so too a case may exist for the bar to consider disowning the custom mentioned in favour of its collective interests as a whole. Perhaps the point may be the subject of discussion at the suggested general meeting in due course. ❑ D.E. Grieve QC



Dear Editor,

In the Spring 1990 publication of Bar News there appears a drawing of a judge sitting with a gavel at his left elbow. I have always considered this implement to be an auctioneer's or chairman's hammer, as defined in the Oxford Illustrated Dictionary 1984, and unrelated to the administration of law. The Oxford English Dictionary 1989 describes it as a president's mallet or hammer.

The gavel has now been embraced by the media as something representing litigation. The Australian Broadcasting Corporation, when presenting news on Channel 2, frequently shows a gavel as an illustration for an item involving court proceedings. In at least two ABC dramas I have observed a NSW Supreme Court judge, when there was a commotion in court, pick up a gavel and beat upon the bench with it. Has anyone seen a British or Australian judge use a gavel or have one available for use?

I would prefer litigation to be illustrated by the scales of justice rather than by an implement which could imply that a verdict is knocked down to the highest bidder.

Evan Bowen-Thomas

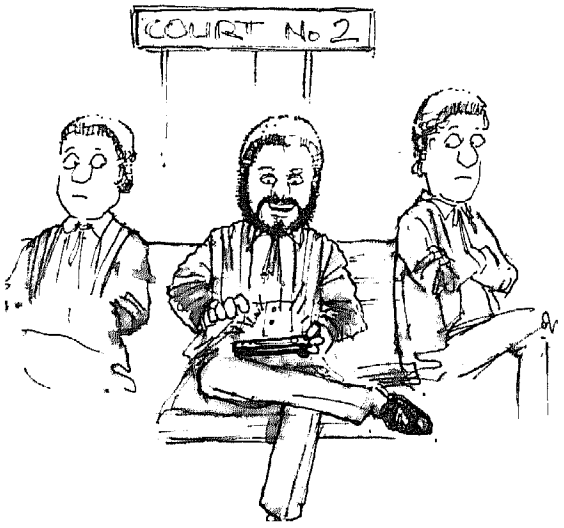
Computer Games for Barristers

The faculty-based structure of legal education in Australia has tended to produce a division between persons interested in humanities and persons interested in sciences with a very strong bias towards the former class among lawyers. It may well be that new courses combining science and law will reverse this trend. This is probably one of the main reasons for the reluctance of many barristers to computerise.

It is necessary today for barristers to realise that they can no longer expect to practise effectively without a computer on their desks. It is a source of constant amazement to me that not all barristers work at computer screens. The purpose of this article, however, is not to preach but to suggest one way in which a person who is otherwise computer illiterate can at least attain the right frame of mind by learning to love his or her computer. That method is computer games.

Computer games can be played either on one's desktop computer or, while one is waiting outside a court for one's case to come on, on a laptop. They can be played in very short periods of time and most games can be "saved". This means that one can spend two minutes on a game and then do something else (even something else on the computer) while preserving that game at the stage one had reached.

Computer games fall into a number of categories.



The first, and most familiar, are the "arcade games". These are games like "space invaders" of a type which one sees in every amusement arcade. They are useful for training the reflexes and they have the advantage that they do not require a high level of intellectual capacity. The disadvantage is that most of them make a noise (although this can be turned off on some computers) with the result that one's secretary or, worse still, one's colleagues or solicitors, may realise that one is playing games.

The second type, particularly recommended for common lawyers and others who need to cross-examine persons with different thought processes to themselves, are adventure games. A typical adventure game involves a simple picture on the screen showing that one is in prison, in the desert, in the jungle, in a room of a haunted house, or some other such situation with certain objects, some immovable and some movable. One may normally give the computer one of three types of command. These are:

(a) directional (U, D, N, S, E, W), in which case one moves to an adjoining room or area;
(b) possessory, in which case one takes or drops a movable object which, if taken, comes with one when one moves; or
(c) active (doing something to or with some movable or immovable object on the screen).

Commands of the first type usually involve one of the six letters I have indicated, commands of the second type involve the simple verb "get" and "take" or "drop" plus the single word for the movable object and commands of the third type involve a verb and a noun (e.g. open window, drink water, kick John).

The way the game works is that there is a critical path of actions and moves which are required to achieve the desired objective. That objective may be to escape from prison, to find buried treasure, to solve a murder, to capture a ghost or any of hundreds of other possibilities. There are even some pornographic games the aims of which can be imagined.

The skill which is required is to ascertain the command which the programmer has required as the one which will result in your achieving something. Sometimes this involves a little bit of imagination, for example in one game ("Escape from Rungistan") in order to escape from a prison one needs to "call guard" and then "order meal". The meal includes a piece of cheese which one must use to "feed mouse". The mouse then trots up tamely so that one can "take mouse". At a much later stage in the game, after one has escaped from the prison, one needs the mouse to distract a cat which is guarding a door. Another item on the tray is some candy. One needs to climb up to the bars (having obtained strength to "move bed" by proceeding to "eat steak") and then one must "offer candy" to a small boy who comes to the bars. He hands over a spade in exchange and there are no prizes for guessing what one does with the spade. The whole process is one of pitting one's wits against the programmer.

A third type of game is an adaptation of a familiar card game or board game. There are large numbers of programs available which will play bridge, poker, blackjack, chess, draughts, monopoly, noughts and crosses, solitaire, chinese checkers and literally hundreds of other less familiar games. The vast majority of these can be played by one person. The speed of modern computers is such that with most of them (except the more advanced chess games) the computer's moves are virtually instantaneous. This means that one does not have the frustration that one often has in real life playing a game against a slow opponent. In addition, with many of the games, one can adjust the computer to play at any of a range of degrees of skill. Like most barristers, I like to win and I therefore tend to set the computer to a level below the standard at which I play.

In addition, most modern computer games are designed so that employees in large corporations can play them without their bosses knowing. They have a "boss" key which enables one, by depressing a single key, to shift instantaneously from the game to a screen filled with impressive looking work materials. By the time the boss has got within eyesight of the machine, the employee appears to be hard at work. One word of warning - make sure you use the boss key on every possible occasion - you don't want your secretary or your clerk finding out what you have on your computer and playing computer games while you are in court. ❑

David Bennett QC

Enforceability of Alternative Dispute Resolution Clauses

Robert Angyal considers Allco Steel (Queensland) Pty. Ltd. v Torres Strait Gold Pty. Ltd. & Ors. which casts doubts on the utility of some dispute resolution clauses.

1. Introduction

A recent decision of the Queensland Supreme Court raises questions about the enforceability of contractual clauses requiring parties in dispute to use alternative dispute resolution techniques to attempt to resolve their dispute. Those techniques include:

. negotiation
. mediation
. conciliation
. independent expert determination
. mini-trial.

A recent example of such a dispute clause is the NSW Law Society's model dispute resolution clause, published in the *Law Society Journal* for June 1989. (reproduced on page 27). It is in the same form as the type of arbitration clause long known as a *Scott v Avery* clause (named after the decision of that name reported at (1856) 5 HLC 811, 10 ER 1121). Like a *Scott v Avery* clause, it provides (paragraph 1.1) that in general a party may not commence court proceedings (or arbitration) unless it has first complied with the dispute resolution procedure set out by the clause. The obvious intent of the drafters of the clause is that parties in dispute should be required to attempt to resolve their dispute by means other than litigation or arbitration before resorting to the latter techniques.

2. The Allco Steel Decision

The decision that raises questions is *Allco Steel (Queensland) Pty Limited v Torres Strait Gold Pty Ltd & Ors* (Master Horton QC, unreported, Supreme Court of Queensland, No. 2742 of 1989, 12 March 1990).

The primary question that arises is whether, if a party in dispute commences proceedings or arbitration without first complying with a disputes clause, the Court will give effect to the clause.

The dispute considered there arose from a contract for construction by the plaintiff of gold extraction equipment for the defendants. The contract, under the heading "Disputes", said:

> "(a) In an case, [sic] any dispute or difference shall arise between the Torres Strait Gold and the contractor ... then the aggrieved party shall give to the other notice in writing setting out in full the detailed particulars of the dispute or difference. Upon receipt or issue of the notice, Torres Strait Gold shall give written notice to the contractor, appointing a date, time and venue for a conciliation meeting to be held to discuss in detail the dispute or difference ...
>
> (b) If at the conclusion of the conciliation meeting the parties fail to resolve the dispute or difference either party may give to the other, within 14 days a notice stating that at the expiration of 30 days it will proceed to have the dispute or difference referred to a Court of competent jurisdiction ... and at the expiration therefore [sic] may so proceed." (*Allco Steel* at p.3)

A dispute arose between Allco Steel and Torres Strait Gold apparently arising from Torres Strait Gold forming the view that Allco Steel would be unable to meet its contractual obligations. Allco Steel commenced proceedings under the contract and the matter came before Master Horton on the defendants' application for a stay of the action. For the reasons discussed below, the stay was refused.

The first important thing to note about the decision is that Torres Strait Gold (the present defendant) had earlier commenced litigation against Allco Steel under the contract without, apparently, having complied with the disputes clause. An application was made to the Court and an order was made by Ambrose J that no further steps be taken in the action except as ordered and that the parties should proceed to conciliation in accordance with the disputes clause (*Allco Steel*, at 3) an order of Ambrose J on 16 September 1988 in Supreme Court proceedings no. 3438 of 1988. In other words, it appears that litigation was commenced before there had been compliance with the disputes clause; an application was made to the Court for enforcement of it; and it was enforced.

Allco Steel and Torres Strait Gold then had two conciliation meetings. They did not result in resolution of the dispute and following the second meeting Allco Steel wrote to Torres Strait Gold foreshadowing litigation. That litigation was commenced and it was in the context of that litigation that an application was made by Torres Strait Gold and the other defendants for a stay of the action brought by Allco Steel. It was that application which led to the Court's decision that no stay would be granted on the basis of the disputes clause.

On the face of it it, therefore, when the application for a stay was made to Master Horton, the disputes clause had already been enforced by the Court and apparently complied with, with the result, one might have expected, that the plaintiff, having given notice that it intended to commence litigation, would have been free to do so. But according to the report of the decision, this point seems not to have been taken by anyone.

Master Horton reasoned first that the disputes clause, calling as it did for conciliation, was not an arbitration clause under the *Arbitration Act 1973* (Qld). Accordingly, decisions dealing with *Scott v Avery* clauses were, he held, of no relevance.

He then reasoned that, despite a clear breach by the plaintiff of its obligations to conciliate, the doctrine that the jurisdiction of the Court cannot be ousted dominated any other principle that would require the plaintiff to honour its contractual obligations under the disputes clause. He then relied on *Anderson v G H Mitchell & Sons Ltd* (1941) 65 CLR 543, where a unanimous Court, in a decision by Rich ACJ, Dixon and

McTiernan JJ, held, at p.548:

> "An agreement to refer disputes, whether existing or future, to arbitration could, apart from statute, be enforced only by an action for damages against the party who refused to carry it out."

Finally, he held that even if the Court had an inherent jurisdiction to grant a stay, the discretion to grant such a stay should not be exercised as it was "abundantly clear that the parties have taken up positions which effectively rule out the possibility of compromise and conciliation" (at 8).

He accordingly dismissed the application for a stay.

3. The Impact of Allco Steel on the Law Society's Model Dispute Resolution Clause

It apparently still is the law, as stated in *Anderson's* case that, apart from statute, Australian Courts can enforce an agreement to refer disputes to arbitration only by an action for damages against the party who refused to carry it out. The High Court's decision was applied in New South Wales in *Murphy v Benson* (1942) 42 SR (NSW) 66. More recently, the authorities have been discussed by Bright J in *Adelaide Steamship Industries Pty Limited v The Commonwealth of Australia* (1974) 8 SASR 425. His Honour there held:

> "... in my opinion the only power in either South Australia or New South Wales to stay an action on the ground of an agreement to refer disputes to arbitration is a statutory power" (at 439).

No doubt that is the reason that statutes such as the *Commercial Arbitration Act 1984* (NSW) expressly empower the Court to grant a stay of proceedings where there is an agreement to arbitrate (Sections 53[1] and 55[1]) and expressly abrogate the right to sue for damages for breach of an arbitration clause (Section 53[3]).

The law in England may be different. In their leading text, *Commercial Arbitration* (2nd ed. 1989) Sir Michael Mustill and Mr Boyd QC say (at 461):

> "As a matter of its own affairs, the Court has an inherent power to stay any action which it considers should not be allowed to continue. This power is independent of any specific powers conferred by statute. We submit that this power could, in an appropriate case, be employed to deal with an action brought in breach of an agreement to arbitrate. It is frequently invoked where the action in England constitutes a breach of an agreement to submit disputes to the exclusive jurisdiction of a foreign Court, and there is no difference in principle between such an agreement and one which requires the submission to be to an arbitration." (Footnotes omitted.)

Whatever the English situation, the Australian law seems to be as stated in *Anderson's* case. But that is not the end of the matter. The sort of agreement to refer disputes to arbitration discussed in *Anderson's* case was a simple arbitration agreement, not a *Scott v Avery* clause.

The clause considered in *Anderson's* case stated:

> "Should any dispute arise hereunder between the purchaser and vendor the matter shall be settled by arbitration in the usual manner ... within 20 days of the date nominated herein for delivery to be given and taken." (65 CLR at 548)

By contrast, a *Scott v Avery* clause usually provides that no action may be brought until an arbitration has been conducted and an award made or, alternatively, that the only obligation of the defendant is to pay the sum the arbitrator awards. (See Mustill and Boyd at 161.)

It is abundantly clear that Australian courts will give effect to a *Scott v Avery* clause. *Anderson's* case itself is authority for that proposition. The High Court there unanimously held that, although a simple agreement to refer disputes to arbitration will not prevent a party from commencing proceedings, a contract "so framed that it would produce no unconditional liabilities, no liabilities which did not depend upon the award or determination of arbitrators, referees or other third parties gives ... no complete cause of action until an award or determination has been obtained" (at 549). Further, the Court said:

> "... an agreement which in point of expression makes arbitration a condition precedent, not to the liability or cause of action, but to the right to bring or maintain an action, is construed as affecting, not the jurisdiction or remedy, but the obligation ..." (at 550)

and therefore will be enforced by the Court.

The High Court recently unanimously agreed that *Scott v Avery* clauses were enforceable: *Codelfa Construction Pty Limited v State Rail Authority of NSW* (1982) 149 CLR 337 per Mason J (with whom Stephen, Aickin and Wilson JJ agreed on this point) at 368 and per Brennan J at 422.

The question, therefore, that really arises from the *Allco Steel* case is whether a disputes clause in the form of a *Scott v Avery* clause will be enforced by the Courts. In other words, will the Courts enforce a clause expressed to make the use of conciliation (or other alternative resolution techniques) a condition precedent to the ability of a party to the agreement to commence Court proceedings?

In *Allco Steel*, Master Horton accepted a submission by senior counsel for the party opposing a stay that cases dealing with *Scott v Avery* clauses had no relevance. But it is unclear whether he accepted that submission because the disputes clause was not an arbitration clause or, on the other hand, because he found a relevant distinction between an arbitration clause of the *Scott v Avery* type and a disputes clause modelled on *Scott v Avery*.

Whichever line of reasoning the learned Master adopted, it is submitted with respect that, if he proceeded on the basis that the disputes clause was in *Scott v Avery* form, the result reached was not correct. If the distinction drawn was between disputes clauses and arbitration clauses, there is an inherent illogicality in refusing to apply the many decisions enforcing *Scott v Avery* clauses to a disputes clause because it is not an arbitration clause, and then refusing a stay on the basis of *Anderson's* case, which dealt with arbitration clauses.

DISPUTE RESOLUTION

1.1 Unless a party to this agreement has complied with paragraphs 1-4 of this clause, that party may not commence court proceedings or arbitration relating to any dispute arising from this agreement except where that party seeks urgent interlocutory relief in which case that party need not comply with this clause before seeking such relief. Where a party to this agreement fails to comply with paragraphs 1-4 of this clause, any other party to the agreement in dispute with the party so failing to comply need not comply with this clause before referring the dispute to arbitration or commencing court proceedings relating to that dispute.

1.2 Any party to this agreement claiming that a dispute has arisen under this agreement between any of the parties to this agreement shall give written notice to the other party or parties in dispute designating as its representative in negotiations relating to the dispute a person with authority to settle the dispute and each other party given written notice shall promptly give notice in writing to the other parties in dispute designating as its representative in negotiations relating to the dispute a person with similar authority.

1.3 The designated persons shall, within ten days of the last designation required by paragraph 2 of this clause, following whatever investigations each deems appropriate, seek to resolve the dispute.

1.4 If the dispute is not resolved within the following ten days (or within such further period as the representatives may agree is appropriate) the parties in dispute shall within a further ten days (or within such further period as the representatives may agree is appropriate) seek to agree on a process for resolving the whole or part of the dispute through means other than litigation or arbitration, such as further negotiations, mediation, conciliation, independent expert determination or mini-trial and on:

(a) The procedure and timetable for any exchange of documents and other information relating to the dispute;
(b) Procedural rules and a timetable for the conduct of the selected mode of proceeding;
(c) A procedure for selection and compensation of any neutral person who may be employed by the parties in dispute; and
(d) Whether the parties should seek the assistance of a dispute resolution organisation.

1.5 The parties acknowledge that the purpose of any exchange of information or documents or the making of any offer of settlement pursuant to this clause is to attempt to settle the dispute between the parties. No party may use any information or documents obtained through the dispute resolution process established by this clause for any purpose other than in an attempt to settle a dispute between that party and other parties to this agreement.

1.6 After the expiration of the time established by or agreed under paragraph 4 of this clause for agreement on a dispute resolution process, any party which has complied with the provisions of paragraphs 1-4 of this clause may in writing terminate the dispute resolution process provided for in those paragraphs and may then refer the dispute to arbitration or commence court proceedings relating to the dispute.

If, on the other hand, the distinction drawn by the Court was between a conciliation clause modelled on *Scott v Avery* and an arbitration clause in *Scott v Avery* form, this seems like a distinction without a difference. As a matter of principle, a disputes clause drafted in the form of a *Scott v Avery* clause (namely, one which postpones the ability to commence proceedings until after dispute resolution has been attempted) should, like a *Scott v Avery* clause, operate as a valid postponement of the right of access to the Court. The reasoning behind the many authorities enforcing *Scott v Avery* arbitration clauses seems to be equally applicable to a disputes clause in this form.

In any event, given the disputes clause under consideration in the *Allco Steel* case, it was not entirely clear that it was considered to be of the *Scott v Avery* type, because the Court seemed to rely on the holding in *Anderson's* case dealing with arbitration agreements not of the *Scott v Avery* type. *Allco Steel* thus apparently is not authority for the proposition that a conciliation clause of the *Scott v Avery* type is unenforceable.

When one considers the Law Society's model clause, it is clear that it is intended to work a postponement of the right of access to the Court. Paragraph 1.1 of the model clause provides in part:

> "Unless a party to this agreement has complied with paragraphs 1-4 of this clause, that party may not commence Court proceedings or arbitration relating to any dispute arising from this agreement except where that party seeks urgent interlocutory relief in which case that party need not comply with this clause before seeking such relief."

and paragraph 1.6 provides:

> "After the expiration of the time established by or agreed under paragraph 4 of this clause for agreement on a dispute resolution process, any party which has complied with the provisions of paragraphs 1-4 of this clause may in writing terminate the dispute resolution process provided for in those paragraphs and may then refer the dispute to arbitration or commence Court proceedings relating to the dispute."

If the *Allco Steel* decision is not authority for the proposition that a disputes clause in this form (that is, in the *Scott v Avery* form) is not enforceable, such a clause should, as a matter of principle, be enforceable for the same reasons that *Scott v Avery* clauses have long been held to be enforceable.

While there does not appear to be any Australian authority directly on point, there is at least one recent American decision supporting this proposition. In *Haertl Wolff Parker, Inc v Howard S Wright Construction Co* (1989, WL 151765 D. Ore., 4 December 1989), the United States District Court for the District of Oregon dismissed a law suit which had been commenced by a party in breach of a contractual provision calling for disputes to be first submitted to a designated third party for a recommendation. The plaintiff argued that because the third party could make only a non-binding recommendation, which either party could ignore, it was not obliged to refer the dispute to the third party before commencing proceedings. That argument was specifically rejected by the Court and the provision enforced.

There appears to be no reason why a similar result should not follow in Australian Courts, thus giving to a clause like the Law Society's model dispute resolution clause the same operation as a *Scott v Avery* arbitration clause.

Finally, a word should be said about how such a clause operates. According to Mustill and Boyd:

> "A *Scott v Avery* clause does not prevent the parties from bringing an action in the High Court. A writ issued in respect of the matter falling within the clause is not irregular or a nullity; and if, for example, a defendant waives the right to insist on an award, the action proceeds in the normal way. The effect of the clause is not to invalidate the action, but to provide a defence; and since the effect of the condition precedent is to prevent any cause of action from arising until an award has been obtained, there is no ouster of the jurisdiction of the Court, since there is nothing to oust. It has been said that such a clause 'postpones but does not annihilate the right of access to the Court'." (at 162, footnotes omitted)

4. Summary of Conclusions

(i) The disputes clause considered in *Allco Steel* apparently was enforced by Ambrose J of the Queensland Supreme Court.

(ii) *Allco Steel* holds that a disputes clause that is like a simple arbitration clause will not be enforced by means of a stay of proceedings.

(iii) *Allco Steel* is apparently not authority for the proposition that a disputes clause in *Scott v Avery* form is not enforceable.

(iv) As a matter of principle, a disputes clause in *Scott v Avery* form should be enforceable as a defence to Court proceedings concerning the dispute to which the clause relates.

(v) The Law Society's model dispute resolution clause clearly is in *Scott v Avery* form and should therefore be enforceable in this manner. ❑

Hang 'Em From the High Trees: Denning Supports Death Penalty

Former Master of the Rolls Lord Denning, the erstwhile promoter of "High Trees" estoppel and of a variety of constructive trusts has never been a stranger to controversy. Now he has hit the British headlines again, in an interview couched in "the famous Hampshire voice" but delivering itself of trenchant statements on the death penalty, juries, prominent judicial figures, homosexuals and illegitimacy.

Not surprisingly, his comments, made in an interview with *The Spectator* in August, have generated a number of outraged Letters to the Editor and various other comments.

The comments made by Lord Denning include:

On Marriage: "I think that one of the most deplorable things today is that the institution of marriage is going down. No end of people living together without being married. No end of one-parent families. They're never called bastards or illegitimate - those are words which are not allowed to be used, if you please."

On the Death Penalty: "It ought to be retained for murder most foul. We shouldn't have all these campaigns to get the Birmingham Six released if they'd been hanged. They'd have been forgotten, and the whole community would have been satisfied."

On Sentencing People to Death: Q: "It must have felt terrible when the black cap was put on your head?" A: "Not really ... there could always be a reprieve if it was a proper case."

On the Jury: "In my young days juries were all middle-aged, middle-class and middle-minded, to use Devlin's phrase. The present system of random juries may lead to random justice. Look how bad it is for these fraud cases, the Guinness trial, all that sort of thing. The jury aren't bright people, they aren't versed in accounts ... I'd have a panel of suitable jurors. I'd let names be nominated if you please by trade unions and the like, by big employers, by the banks. In other words, I'd have a list of respectable, responsible citizens. I wouldn't have every Tom, Dick or Harry, as they do now."

On Legalising Homosexuality: "Oh, I don't mind 'em not being put in prison, but I hate it being put on a par with other things. And lesbianism - Oh no! I'm still against it."

On Legal Fees: Q: "Isn't it a terrible indictment of the legal system that barristers charge such high fees that people can't any longer afford to defend their interests in law?" A: "Yes ..."

The comments not only sparked off a number of outraged responses, but also thoughtful comment by Marcel Berlins on the abolition by Lord Mackay of the Kilmuir Rules forbidding British judges to talk to the press. The article predicts, among other things, that such freedom will lead to public disclosure of judicial prejudices on a number of social and political issues.

❑ Richard Phillipps

Restaurant Reviews

Food with a View

Readers may recall an earlier review of the Dining Room at the Cricketer's Arms Hotel. Merroneys at The Quay apartments first floor is the latest and up market venture of this stylish restaurateur.

The views of course are stunning, the food absolutely first class. The House champagne by the glass was Laurent Perrier, the White Jarra Hill, the Red Penfolds Kalimna 1986.

Old Paul Merroney favourites such as raw beef with deep fried onion rings, fish and chips (thick and perfectly cooked) are interspersed with new and exciting ideas.

The party of the second part had chilled asparagus soup creamy and rich followed by fillet of pork roasted with garlic shallots and peas. I had roast tomato and spring onion salad dressed with a light virgin olive oil and white wine vinegar and superb. Then a rare sirloin in a pool of brilliant bearnaise sauce with fresh tarragon and a brown sauce underneath, with just the so special House chips.

The Downside? Very noisy at 9.30 pm on a Thursday night. It is bright and modern and sound just reverberates. Carpet, wall hangings and some plants would help.

The service was superb and $100 for two including drinks seemed very reasonable. Book early: this classy join is doing very well and it took three attempts to get in for my second visit.

❑ John Coombs

Celestial

15 Bligh Street, Sydney

Cuisine: Chinese (mainly Cantonese but also a Peking & Szechuan style).

Phone: 233 3871
Cards: AX BC DC MC VC
Hours: Lunch - 12.00 pm to 3.00 pm Mon-Fri
Dinner - 5.30 pm to 10.30 pm Mon-Sun

Norwich House conceals a secret deep within. However the secret to which I am referring is not a well kept one as anyone venturing in during the "short adjournment" will find. The secret is the Celestial Restaurant which is proving popular with city diners and deservedly so.

Members of the Bar have traditionally shown support for Chinese restaurants; Harmon's V.I.P. and the Emperor's Choice (latterly known as "The Emperor Strikes Back") come to mind. Certain barristers may have fond, if perhaps hazy, memories of long Friday lunches at those establishments. The Celestial is no exception and hospitality abounds.

The Celestial has successfully completed its first 12 months of trading (usually the most hazardous for new restaurants) and continues to win new custom.

Diners entering from Bligh Street could be excused for thinking that they were proceeding into the basement carpark. It is necessary to descend two flights of stairs to reach the bar and dining area. For first timers the trip can be spectacular.

Inside the building the owners have recreated an ornamental garden complete with waterfall, lake and tea houses. It is possible to dine either overlooking the lake, in an elevated teahouse, in private rooms or in the main dining chamber. All preferences are catered to as well as all tastes.

The food is moderately priced for a Chinese Restaurant in the City and the value is enhanced by the elaborate surroundings and the efficient and attentive service. House specialties include butterfly king prawns ($16.80), pork spare ribs with plum sauce ($11.50) and special sizzling steak served with piles of sliced onions (definitely not for those returning for a conference!). For the more adventurous gold and silver fish (ie: coral trout fillet stir-fried with snow peas) or fried frog legs are available.

The wine list is modest in reds although more extensive in whites with the median price around $22.00 per bottle. As usual the Chardonnays are expensive given the quality but bargains may be found among the varietals. I leave the choice to readers.

My tip is to go there and experience the sensation.

❑ Stuart Diamond

One Question Too Many

The dangers of asking one question too many in a fairly common situation were emphasised by a ruling on evidence recently given by a Federal Court Judge sitting in Brisbane. In the course of a section 52 case, the applicant had annexed to a long affidavit by its managing director a photograph which was particularly injurious to the defendant's case. The affidavit innocuously said that a photograph of the subject property as at a certain date was annexed and marked with the letter "Z". When counsel for the respondent objected on the ground of hearsay, the Judge ruled that admissibility of the photograph should be deferred in order to see whether it was within the witness' s own knowledge. The witness was not asked about the matter by counsel in chief but counsel cross-examining asked the following questions:

Q. Did you take the photograph being exhibit "Z"?
A. No.
Q. Have you ever seen the building the subject of that photograph?
A. No.
Q. Indeed, have you ever been to Cairns?
A. No.
Q. So when you said in paragraph 38 of your affidavit that annexure "Z" was a photograph of the shop taken on 18th August, that was just what someone had told you?
A. Yes.

He then objected to annexure "Z".

Sydney counsel for the applicant successfully argued that, although the photograph was quite inadmissible until ten seconds ago the last question got it in. The last question was objectionable on the basis of hearsay but, counsel for the applicant not having objected, the hearsay was in and the photograph was therefore proved.

His Honour (we think correctly) admitted the photograph on the basis of the last question.

Bar News would be interested in any comments as to the correctness of the ruling. It stands, however, as a warning against asking one question too many in a situation where this is frequently done. ❑

Which Computer: IBM or Macintosh?

When buying a computer, one of the more heartstopping decisions a barrister or solicitor has to make is whether to buy a Macintosh or an IBM-compatible. This choice is comparable in its importance and wide-ranging consequences to the choice between a Mercedes and a BMW (the author is German, so no other makes are in the running). It is not an easy choice, but the writer has long ago decided in favour of Mercedes - sorry, IBM-compatibles - and will now try to give a number of rational reasons to support his strong bias.

Many claims regarding reliability, ease-of-use etc. are made by the relevant manufacturers; therefore without a more penetrating (biased) analysis of the benefits and deficiencies of each machine, the first-time computer buyer may make a decision (buying a Macintosh!!!) based on advertising and promotion, rather than on their real needs.

The author feels that both machines have merit in different areas. It is fortunate that there is such strong competition between the two incompatible standards, because this allows a clear winner - everyone. Each side is striving hard to counteract any advantage the other side has. Therefore any differences tend to be temporary - but still relevant.

In general, barristers have very standard computing needs, mainly wordprocessing. The exception is document search and retrieval.

Document search and retrieval currently consists of these areas:

a. Online searches (Info One, Lexis etc). For this application both Macintosh or IBM-compatible are suitable.
b. Litigation Support. The two best products for litigation support are WordCruncher from Scantext and Evidence from Justlaw Computers. These products are only available on IBM-compatibles. There is also a host of other software for any conceivable litigation support need on the IBM products; the product on the Macintosh, 'Sonar', is only a middleweight compared to the heavyweight WordCruncher and Evidence.
c. CD-ROM products. Here IBM-compatibles probably have the biggest advantage. The range of CD-ROM products available is much smaller on the Macintosh than on IBM-compatibles. Only on IBM-compatibles is there access to the current range of legal CD-ROM products, i.e. Info One (unreported judgments) and Diskrom (Corporations Code and code taxation legislation). There are moves to make some of these products available on the Macintosh in the future, but the author expects that the range of products will remain smaller.

Secretarial Support

Currently a majority of secretarial staff use IBM-compatible machines; therefore buying incompatible hardware will cause difficulties on a day-to-day basis as much time and energy will be wasted in translating data from one machine to the other.

If temporary help is required for wordprocessing, spreadsheets, programming, or any other application, it is easier to find available staff trained on IBM-compatibles than Macintosh.

Suppliers

IBM-compatibles are manufactured by many different companies. The Macintosh is only available from one supplier, Apple Computers.

Upgrading

An IBM-compatible can always be upgraded quite easily. Upgrading a Macintosh is only relatively easy with the Macintosh II - which costs $10,000 or more. The low-end models present significant difficulties in this area.

Ease-of-use

Until the Macintosh came along, a mouse attached to a computer was considered to be the perfect tool for all humans with three or more hands. The Macintosh deserves a lot of credit for showing that the 'WIMP' interface (Windows, Icons, Mouses [sic!] and Pull-down-Menus) is vastly superior to an empty screen with a little flashing dot at the top.

The Macintosh's huge advantage in this area has dropped with the advent of Microsoft Windows 3.0 for IBM computers. Windows 3.0 has many of the benefits of the Macintosh but is also able to work with all the existing software on IBM-compatibles. Now, neither side has a significant advantage in this area.

New Products

The Macintosh market is a niche market, i.e. the Macintosh is mostly used for Desktop Publishing. New products - with sometimes fantastic improvements - for Desktop Publishing tend to appear first on the Macintosh. However, any company which creates a new product which is not specifically for Macintosh's niche (Desktop Publishing) will first design the product for IBM-compatibles and only much later, after the produce has become very successful, will it possibly be moved onto the Macintosh. Current examples are WordCruncher software, the best database programs, faxboards and most of the hot new software dreamt up in the attic by twenty-year-olds. (This is how many universally used software products began their life.)

Laptops

The Macintosh portable is heavy, over 7 kg, and expensive. In comparison, the latest crop of IBM-compatible laptops easily fit into a briefcase and weigh less than 4 kg. These so-called note-book size laptops (for example, the Compaq LTE 386SX20) are fully-fledged computers.

In the author's opinion, for simple about-town driving - I mean legal applications - like word processing and elementary litigation support, it doesn't matter which product a barrister chooses. Very often, as with a Mercedes and a BMW, in many ways it is an emotional decision.

However, after some time of using a computer most barristers are looking for more demanding applications. Then the choice of a Macintosh can be akin to the realisation that only Mercedes also produce trucks. ❑

Christoph Schnell is the Managing Director of Scantext, a company providing computer services to barristers and judges. He can be reached on (02) 261 4511, 185 Elizabeth Street, Sydney NSW 2000.

Thoughts About the Role of Juries in Civil Actions

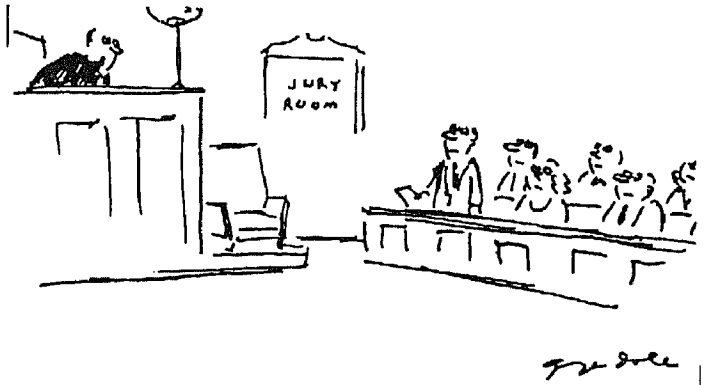
J W Shaw QC MLC considers the Government's proposals to reform, yet again, the jury system.

Recent statements of the New South Wales Attorney-General, Mr John Dowd QC, have raised the perennial debate as to the utility of the jury in determining questions of fact in civil litigation. Save for exceptional categories (such as defamation) the New South Wales government proposes to abolish the general right of a litigant to a jury trial whilst preserving a right to apply to the Court to requisition a jury in a particular case. In practice, the judge entertaining such an application is unlikely to be persuaded that, in the ordinary course of events, a jury is necessary. The Attorney contemplates that the jury will be abolished "in most civil cases".

Whilst the New South Wales suggestion has precedents in England, it will provoke a traditionalist response from the legal profession: the argument that the jury as the determiner of fact and the arbitrator of damages is integral to the justice system. The defence of the jury's role is not knee-jerk conservatism. Both arguments of principle and anecdotal material lend support to the notion that citizens have an important role to play in the courts.

The English satirical magazine *Private Eye*, itself plagued by large jury libel verdicts, has pointed to the important role of the coroner's jury in dealing with the inquest into the deaths of 200 people killed in the P & O ferry disaster at Zeebrugge in March 1987. According to *Private Eye*:

> "... arrayed against a battery of top lawyers for P & O and the ferry officers was one rather nervous junior barrister for the families of the bereaved, who argued hesitatingly that the coroner's jury might like to bring in a verdict of unlawful killing. The P & O barristers exploded with indignation. They were joined by [the coroner] himself who summed up in the most categorical way against an unlawful killing verdict. The jury promptly returned a verdict of unlawful killing.
>
> The whole episode proved to the legal establishment how very unsafe juries can be and how the majesty of the law can be imperilled by a handful of ordinary people who are too easily swayed to sympathy at the thought of 200 innocent travellers unnecessarily killed."



"The verdict should be guilty or not guilty. There's no provision for guiltyish."

In New South Wales, the introduction of the jury system was the product of long struggle by the colonists, beginning as early as 1791 but culminating in the establishment of the jury trial as the normal mode for the disposition of factual issues at Common Law by the end of the nineteenth century. New South Wales fought for "the privilege of the Common People of the United Kingdom", trial by jury, believing in the (perhaps hyperbolic) language of *Blackstone's Commentaries* that the jury was the "sacred bulwark of the nation".

Since then, tension has emerged from time to time between the virtues of the jury system and considerations of efficient, speedy trials.

In 1961, Wallace J (later President of the Court of Appeal) advanced an argument for the modification of the jury system "in the interests of expedition" (35 ALJ 124). And in 1965, government in New South Wales legislated to provide that running-down cases would normally be tried by a judge alone - the *Law Reform (Miscellaneous Provisions) Act* 1965.

Apart from running-down cases, Section 89 of the *Supreme Court Act* 1970 provided special circumstances in which the jury could be displaced - where prolonged examination of documents, scientific or local investigation rendered the jury inconvenient, the proceedings were in the Commercial list or where all parties consented.

In 1987, a judge of the New South Wales Supreme Court, Clarke J, pointed to the problem of plaintiffs who were dying or very ill and to the tendency of defendants nowadays to apply for a jury. His Honour thought there was a need for trial judges to be given a broader discretion to sit alone where urgency was required (*Peck v Email Limited* [1987] 8 NSWLR 430).

Hence, the government, in 1987, amended Section 89 of the *Supreme Court Act* 1970 to enable the Court (in proceedings other than those involving fraud, defamation, malicious prosecution, false imprisonment, seduction or breach of promise of marriage) to order "that all or any issues of fact be tried without a jury".

But, in *Pambula District Hospital v Herriman* [1988] 14 NSWLR 387, the Court of Appeal ruled that it was not open to a judge to apply universal considerations to the dispensation application (for example, to hold that it was more efficient or shorter to conduct a case in the absence of a jury) but rather that the judge must address the facts, necessities and justice of a particular case. Moreover, the onus was on the party applying for trial without jury to demonstrate that the other party should be deprived of that mode of proceeding. There was a prima facie right to jury trial.

It is this existing entitlement that the present proposals would challenge. It is timely, then, to reflect upon the conventional defence of the role of the jury.

Many practitioners would argue that the advantages of a civil jury are that:

. non-lawyers comprising the jury can reflect the economic and social climate (community values) more accurately than the judges. They bring to bear the quality of varied experience to the resolution of factual disputes. Legal historian, Sir William Holdsworth, described the jury's role as "constantly

bringing the rules of law to the touchstone of contemporary common sense";

. citizens are involved in the legal process; justice is not seen as a closeted, incestuous determination, but as part of an open, democratic society. One American commentator (K M Magill, in a 1987 article in the *Cooley Law Review*) has claimed that "juries are one of the few truly democratic institutions in our society, and when they rise to the occasion and internalise and apply the law as given regardless of perceived external pressures or internal feelings, they reconfirm the viability of democratic institutions";

. litigants are more inclined to perceive the jury's verdict as legitimate - "the jury has spoken" reflects the notion of a fair trial by the peers of the contending parties;

. juries have advantages as judges of fact - they can resolve "hard cases" without setting legal precedents, and efficiently draw a line between acceptable and unacceptable behaviour;

. the jury is a traditional attribute of British justice. It was Lord Justice Atkin who in 1922 said that trial by jury is "an essential provision of our law. It has been the bulwark of liberty, the shield of the poor from the oppression of the rich and powerful" (*Ford v Blurton* (1922) 38 TLR 801 at 805.

Against these factors it is not of overwhelming consequence that contemporary juries award verdicts less than the judges, and that defendants actively seek jury trial. This is a cyclical matter. In the 1960s, juries were more generous than the judges - and the insurance companies agitated against them. Perhaps this just shows a greater sensitivity of the populace to the economic pressures of the day.

Of more importance is the argument that juries unduly delay the finalisation of the case. New South Wales judges have commented that the delay in hearing a non-jury matter was four years from its setting down for trial whereas the delay in a jury trial was nearly six and a half years.

But is this difference sufficient to justify a structural change to the system of real significance? Have other avenues for expediting trials been sufficiently explored?

These questions are particularly relevant in a context where the jury can be dispensed with if the circumstances of a particular case warrant that course being adopted.

In 1926, H V Evatt argued that "the jury system should never be modified or cut down unless a very strong case is made". So far, the New South Wales government has not met that test. The argument is relatively barren of empirical or other material demonstrating a pressing need for change. Of course, the sensible observer will remain open to persuasion on this issue, free from dogmatic commitment. A strongly expressed view within the Bar favours change. Experienced Common Law jury advocates tell of wrongly rejected liability claims, difficult to correct on appeal; of an excessive propensity to find contributory negligence defences made out; of substantial under-calculation of compensation. More insidiously, suggestions are made about adverse results for ethnic plaintiffs as the result of racial prejudice. These complaints must be properly considered in the course of rational public debate, and balanced against the arguments favouring the jury's role in civil actions.

The jury is still out on these innovations. ❑

SUPREME COURT OF NEW SOUTH WALES

Appointment of Circuit Sittings for 1991

Court	Commencing Date	Duration of Sittings
Albury	Monday 8th July (Civil)	2
Armidale	Wednesday 3rd April (Civil)	1
Bathurst	Monday 14th October (Civil)	2
Broken Hill	Tuesday 11th June (Criminal & Civil)	3
Coffs Harbour	Monday 29th April (Criminal)	4
	Monday 2nd September (Civil)	2
Dubbo	Monday 11th February (Criminal)	4
	Monday 11th November (Civil)	2
Goulburn	Tuesday 29th January (Criminal & Civil)	3
Grafton	Monday 19th August (Civil)	2
Griffith	Monday 22nd July (Civil)	2
	Monday 5th August (Criminal)	4
Lismore	Monday 16th September (Civil)	2
Narrabri	Monday 2nd September (Criminal)	3
Newcastle	Monday 4th February (Civil - Jury)	4
	Monday 4th March (Criminal)	3
	Wednesday 3rd April (Civil - Non Jury)	2
	Monday 22nd April (Criminal)	4
	Monday 20th May (Civil - Jury)	3
	Monday 17th June (Civil - Non Jury)	2
	Monday 8th July (Criminal)	3
	Monday 29th July (Civil - Jury)	3
	Monday 2nd September (Civil - Non Jury)	2
	Monday 14th October (Criminal)	3
	Monday 4th November (Civil - Jury)	3
Orange	Monday 28th October (Civil)	2
Tamworth	Monday 8th April (Civil)	2
Wagga Wagga	Monday 24th June (Civil)	2
Wollongong	Monday 11th February (Civil - Jury)	3
	Monday 4th March (Criminal)	8
	Monday 29th April (Civil - Non Jury)	2
	Monday 27th May (Civil - Jury)	3
	Monday 17th June (Criminal)	9
	Monday 19th August (Civil - Non Jury)	2
	Monday 2nd September (Criminal)	5
	Monday 14th October (Criminal)	5
	Monday 18th November (Civil - Jury)	2

The fixed vacation begins on 20th December 1991 and the first day of term in 1992 will be 3rd February.

Young One

Coram: *Young J.*

Young J: *Is there any appearance for the defendant?*

Oakes: *No your Honour.*

Young J: *Then it's just you against me!*

Sixty New Barristers Take the Plunge ... and Swim

Philip Greenwood risked life and limb subjecting sixty new barristers to a 3 week full time reading course - and lived to tell the tale! Now read on.....

"Dear Greenwood,

You bastard!

In three weeks I went from an (apparently) normal person to a sleep-deprived, drunken wreck. I think this is called becoming a barrister. This is all your fault.

The worst thing is, I actually enjoyed it ... "

This was one of the cards that I received from the motley crew of sixty readers who went through the August program. A scrappier, less disciplined band you've never seen. These good-for-nothings ranged in age from 26 to 53 years (average age 36 years).

Here they were, coming to the greatest profession on earth, and complaining about being asked to work a mere 20 hours each day.

Little did they know that they were about to embark on one of the most highly sophisticated, carefully prepared and developed, technologically advanced programs of education presently available to the civilised world. The greatest living advocates in Australia (and hence, probably, the world) had banded together to fight the forces of evil.

In an explosive start, the readers were exposed to O'Keefe QC, Tobias QC, the Attorney General, the Solicitor General, Mr Justice Giles and Bennett QC in quick succession.

On the second day, Gee QC, Donohoe QC, Maconachie QC, Greenhill, Levy and a psychologist talked about:

"Documents: how to get them into evidence and make sure they stay there"

"The hearsay rule: what it really means, how to apply it and how to get around it"

"Opinion evidence: the five golden rules"

"Special rules for crime"

"The dreaded prior inconsistent statement"

"Refreshing memory properly"

"The standards of proof: like shifting sands"

"Inferences: making sure the judge draws the right one"

"The reliability and unreliability of eyewitness testimony: now you see it, now you don't"

The turning point came at 4 pm that day. Now it was the readers' turn to do some performing. In they went to courts 7 A-G in the Supreme Court. The teeth started chattering, the knees started shaking, the fingers started fiddling. All the bravado seemed to have subsided. It was time for the performance. Just a simple exercise of tendering a business record, refreshing memory and dealing with a prior inconsistent statement. Well, we thought it was simple. The response of one of the most experienced solicitors in the group was telling:

"For fifteen years I have done litigation and have been sitting behind barristers tendering documents. They just seemed to hand them up to the judge and they became exhibits. I've never had to think about how it happens and how difficult it can be."

Next morning it was on again. Donohoe QC on Affidavits, Horler QC on Bail and Pleas of Guilty, and Coombs QC on Communication. And in support, we had a little human hand grenade, Marvin Ocker, from Melbourne, to talk about the ins and outs of chunking and neolinguistic programming. By the end of that session in the magnificent Parliament House auditorium, they were splattered all around the walls.

Ms Divine shows her shoe ...

But more was in store. "Witness Preparation" with Nicholas QC, "Interlocutory Applications" with Collins QC, "The Role of Junior Counsel" with Sackar QC, and then it was time again for another performance.

This time to appear on an interlocutory application. The brief to appear in the Supreme Court had arrived late, as usual. The instructing solicitor, the barrister's lifeline, had gone on holidays, as usual. And no, an adjournment would not be granted, as usual. And yes, the video camera was pointed at you to make you feel as uncomfortable as possible, as usual.

The use of a video recorder is an ingenious form of torture devised by the Americans and adopted by the Victorians. In terms of breaking spirit, it was remarkably effective.

The next day the readers were entertained by Mr Justice Rogers on the Commercial Division, Sir Lawrence Street on ADR, Sheller QC on "Preparation and Presentation of a Legal Argument" and the Chief Justice on "Styles of Advocacy". At the end of that day, submissive and wimpering, they were led into the Bar Common Room and the Bar Council bought them a drink.

It was the end of the first week. Court 19A, which had been generously made available by the High Court for most of the lectures, had become known as "Room 101".

For two more weeks, the process continued. Day in, day

out, they toiled away. Ethics, Examination in chief, Cross examination, Equity, Juries, Criminal trials, Subpoenas, the Local Court, the District Court, the Coroners Court (including the morgue for those who were curious), the Family Court, the Federal Court, the Land and Environment Court, Addressing the court and much, much more.

Then it was time for the grand finale. It was time to run a case in court, all day, in front of a Supreme Court judge.

They had had the brief for over two weeks and they still screamed "More time".

Half the readers had received briefs to appear for either the plaintiff or the defendant in a straightforward common law case: *Blue Fantasy Motel Pty Limited v Reliable Fire Insurance Ltd* (author, Kelly).

Ms Simper, the proprietor of the Blue Fantasy Motel at Kings Cross, had suffered a fire at her premises and had claimed on her insurance policy. The insurer had denied liability, claiming that the fire had commenced minutes after the policy expired and in any event was started by a marijuana cigarette. Tilly Divine, a local "dancer", had been "using" the room at the time that the fire started. She had been "with" a new friend she had met who said he was a well-known politician. Constable Bryden had been off duty at the bar opposite and broke into the room when he saw the fire. His sensitive nose was able to detect a sweet, pungent aroma. Mr Barry was a well-known politician but was in bed nearby with his wife at the time.

The other half of the readers received an equity brief, which was, as usual, a little less colourful: *Re Calthrop* (author, Einstein QC).

Before his death, Mr Calthrop had enjoyed the attention and affection of a younger housekeeper, Mrs Montgomery. He enjoyed it so much that he gave her a lot of his wealth. After his death, his relatives were not delighted to find that his estate was less than expected so they sought to set aside the gifts that he had made to Mrs Montgomery. The cleaner, Mrs Holly, was happy to say how manipulative Mrs Montgomery had been. Dr Labb attested to the deceased's fragile state of health before his death. But Mrs Montgomery was staunch in her affections for the deceased, as well as his money, and the solicitor, Mr Lilley, with a bit of a conflict, agreed he had given some independent "advice".

Justices Powell, Kearney, McLelland, Hodgson, Cohen, Brownie, Loveday, Badgery-Parker, Sully and Yeldham QC agreed to suffer for a whole day, as did many members of the junior Bar who acted as instructors and associates at the hearings. Almost all of them had been bribed by the fact that the witnesses' roles were being played by willing and talented young actresses and actors from NIDA. Little more needed to be said.

The hearing commenced at 10 am. As the morning proceeded, a new threat emerged (which should have been fully foreseen) - the Yeldham factor. There was every danger that the case before his Honour would conclude a good three hours ahead of the rest.

The judges, associates and instructors were entertained in the Bar Common Room at lunch. I can no longer remember how many times I was asked by the judges whether or not the actresses would be invited for drinks afterwards. But the best was yet to come.

Mr Justice Brownie nearly suffered retinal detachment when "his" Tilly Divine entered the witness box. Mr Justice Badgery Parker was no less subtle. He inquired of his Ms Divine about the shoes she was wearing at the time of the incident. No one with experience was unaware of his intentions. And Ms Divine obliged in the witness box by raising her very long leg above her head to show her shoe. It was a breath taking performance by the loud-mouthed, gum-chewing Ms Divine.

Following the hearing, a dinner was held at the Forbes Restaurant for all the readers and actors and their partners and we had the benefit of John "Country" Tankred and his delightful, but unrepeatable, Bengal tiger joke. Stories of what happened after the dinner with at least one actress are yet to be corroborated.

The three weeks together had been an education for all concerned. It had been hard, but everyone seemed to agree it had been a success. Commitment replaced apathy and there was a far keener understanding of how much there is to know.

What was very special was the camaraderie which had developed between the readers. We need more of this generally.

Congratulations to the motley crew and my thanks for your co-operation. ❑

P.H. Greenwood

Especially Particular

Coram: *Hunt J, Defamation List (19 October 1990)*

His Honour: *(to unidentified solicitor)*
Don't you really think asking a request: "State specifically the identity of the persons said to be unknown" is excessive?

Book Reviews

Commercial Leases - W.D. Duncan

The Law Book Company, 1989
Recommended Retail Price $39.50

"A lease is not intended to be either a mental exercise or an essay in literature; it is a practical document dealing with practical situations". Danckwerts L.J. in *Levermore v Jobey* (1956) 1 WLR 697 at 708.

Despite three years spent as a registration clerk at the Land Titles Office my first real introduction to commercial leases occurred in a new job as a legal officer in the late '60s. Because the existing texts did not help I had to return to my old haunts at the Land Titles Office and search the Register for all the important leases entered into by the major property developers in the C.B.D. of Sydney.

This searching was designed to overcome a practical situation caused by new legislation which enabled my employer to enter into purchase lease transactions as a new means of investment. I never did discover whether my instructions were intended to overcome a lack of knowledge so we could imitate our competitors or to find out what the market in Sydney could bear. Many of those then secrets are now contained within the covers of Duncan's book. Had this book been published when I was a newcomer struggling with commercial leases I would have been saved a lot of sweat and tears, if not blood!

The theme for the text is its practical application for lease specialists. As the author maintains in the preface, there were previously few Australian texts dealing exclusively with commercial leases.

The book has 17 chapters, all headed in a realistic way. There is also a full index, table of cases and statutes together with a very useful comparative table of State statutes.

The initial chapter, "Negotiations", covers a very important aspect of commercial leasing. Often it is not until a solicitor produces a first draft of a lease that the prospective tenant realises the full extent of the financial obligations already agreed or undertaken in the lease. In addition, as is pointed out in this chapter: "Whilst there are 'usual' or expected conditions of any commercial lease there is no standard form and thus a solicitor's duty in perusing a lease is higher than that of perusing a standard contract: *Walker v Boyle* (1982) WLR 495 at 507-508 per Dillon J."

It should also be remembered that in a commercial lease the parties are more likely to be of equal bargaining power. In this context the "Rent and Review" chapter provides a detailed treatment as to what rent is and how it is to be distinguished from other payments. This is an important section. It details the obligations on the parties to act in a proper commercial manner to ensure the rent review proceeds according to the lease.

With the current move to outside chambers and more barristers renting chambers, the Bar has a keen interest in being better informed about commercial leases. Because of the informal way in which the business of chambers tends to be conducted barristers need to have a personal involvement in rent review clauses contained in the lease of chambers. This section of the book is essential reading for barristers.

The coverage in this chapter of other issues: "Expert or Arbitrator - who to appoint?" or: "Commonly used expressions to define Rent Review" will be a valuable aid in resolving disputes, or in finding the leading case on the issue as a starting point in litigation.

The detailed treatment of the covenant to "Repair" is welcome. Moreover the contrast between "Repair" and "Renewal and Improvement" is of value to the busy practitioner who may have to advise on the run. The succinct treatment of the common exclusion from liability in the repair covenant of "Fair Wear and Tear Expected" is also helpful.

Other specific chapters include: "Outgoings", "Quiet Enjoyment", "Assignment", "User", "Insurance", "Options", "Default", "Determination of Lease other than by Forfeiture", "Recovery of Possession upon Forfeiture", "Guarantee of Lease". Finally, a chapter of miscellaneous matters rounds off the book.

This book contains, from a N.S.W. practitioner's point of view, much material that is specific to Queensland particularly its many references to the *Retail Shop Leases Act* 1984 (Qld). The author admits to it having a "distinctly Queensland flavour", nevertheless as the Brisbane Line slowly recedes into the past it will become an increasingly more valuable asset to the chambers library. ❑

Garry McIlwaine

Trusts and Powers - D. Maclean

Law Book Company 1989
Recommended Retail Price $37.50

In any jurisdiction other than N.S.W. this book would sell itself entirely on its merits. It has merit enough. In three chapters, over approximately 125 pages, it deals concisely with a number of problems which arise principally (but not only) in the realm of discretionary trusts. As the title suggests, the book focuses on trusts and powers of appointment. The first chapter deals with the kinds of powers that trustees of discretionary trusts are permitted to hold, and the nature and extent of rights of beneficiaries. The second chapter deals with tests applied to determine whether powers and discretions have been validly exercised. The third chapter deals with the equitable doctrine of fraud on a power. Throughout are detailed references to English and Australian authorities, old and new.

The book opens with a worthy, polite Foreword from Sir Zelman Cowen, and an equally appropriate and polite Preface from the author, in which the Victorian Bar is acknowledged as having contributed to the scholarly environment necessary for such a work to be written. Anywhere but in N.S.W. such an introduction would be enough to pave the way for the solid, technical stuff that follows. Not in N.S.W. We have been spoilt. We expect to be entertained as well as enlightened.

What this book lacks is an introduction in the style of Meagher JA's Foreword to the recent reprint of Pollock & Wright's nineteenth century classic, *Possession in the Common Law* (reprinted by Law Press in 1990). A few colourful historical references to Sugden or Farwell *On Powers* (books written by Conservatives), culminating in a broad sideswipe at

sociologists, "progressive" lawyers, women barristers and (heaven forbid) the President of the N.S.W. Court of Appeal would help sell this book. Like Pollock & Wright, it attracts the description "pure scholarship". In N.S.W., we know that's not enough; a little colour helps market even a good book!

Maclean's book should form part of any reasonably extensive library on trusts, taxation, succession or property law. It assumes a basic familiarity with concepts of discretionary trusts and powers of appointment. Its primary role for most readers is likely to be as a supplement to standard texts on the Law of Trusts. It should not lightly be consigned, or limited, to that role. It is a text able to stand alone. It is written in a style able to provide insights, or references to the main authorities, on each of the topics its chapters cover. In any case in which trustees and beneficiaries are at odds, or in which questions arise as to the proper exercise of discretionary powers, the book may offer direct assistance, practical or theoretical. Its publication does credit to the Australian Bar, even without an introduction in the N.S.W. tradition. ❑ G.C. Lindsay

New Journals

The plethora of specialised publications increases. 1990 has seen the launching of four new journals, all published by the Law Book Company. They are the Australian Dispute Resolution Journal, the Public Law Review, the Intellectual Property Journal and the Journal of Banking and Finance. All will, undoubtedly, become indispensable for practitioners in those fields. ❑

Motions and Mentions

New Barristers' Committee

The New Barristers' Committee was again very active in 1990. One of the main projects for this year was the initiation and carrying out of highly successful cross-admissions between the Bars of Victoria and New South Wales. On 6th April, a large group of Victorian Barristers was admitted to the Supreme Court of New South Wales and were that night entertained at a dinner in the Common Room.

A speech was made by Toomey QC, Chairman of the New Barristers' Committee, welcoming "the Mexicans" which was responded to by Gavan Rice of the Victorian Bar.

Meanwhile, all of the Victorian documentation for the New South Wales group was organised by the Committee and a group admission of thirty Barristers occurred on 7th May in Melbourne. In response to the New South Wales dinner, the Victorian Bar Council hosted a lunch for the newly admitted members.

Further group admissions were planned, but New South Wales and Victoria have both instituted a system of paper admissions so that travel to Victoria will no longer be necessary.

In addition, the Committee carried on the very successful wine tastings from last year. A total of six wine tastings have been held in the last two years and all have had large numbers attending.

Following the "Meet the Professions Night" held by the Bar Council in the Common Room on 6th August, the Committee has also established close contact with the Macquarie University Law Society and welcomes further contact in the future.

In addition to these and other activities of the Committee, all of the seven elected individuals of the Committees have sat on various Committees of the Bar Council. The Committee, however, in particular, appreciated and accepted an invitation to the Fees Committee to make submissions concerning various aspects of scale fees.

The number of elected members of the Committee was increased from four to seven this year. The appointed members were Toomey QC (Chairman), Street and Simpson. The elected members were Reuben, Lakeman, Gormly, A.J.P. Reynolds, B. Donnelly, M. Gracie and Confos. ❑

Free Library

The Bar Council is now able to offer free of charge, on a continuing basis, a wide range of loose parts of reporting services, journals, etc. to those members of the Bar of less than three years' standing.

The parts generally comprise complete volumes and will be distributed on a first come, first served basis. Anyone wishing to take advantage of this scheme should register their requirements with Ross Wishart of Australasian Legal Library Services on Phone (02) 918 9416 or Fax (02) 918 0881 or DX 9041 Mona Vale.

Thanks are due to the many people who have generously donated their surplus parts. Please keep them coming - they are very much appreciated.

Hong Kong Litigation Conference 1991

The second Hong Kong Litigation Conference will be held at the Marriott Hotel, Central, Hong Kong commencing on Sunday 17 March 1991 and ending on Friday 22 March 1991. The conference is organised jointly by Bernard Gross QC and Mr Dominic Williams, solicitor.

Papers to be presented will cover a range of topics including developments in Australian negligence law 1980-1990, occupier's liability, medical negligence litigation, commercial arbitration and conflicts of laws relating to contracts.

Speakers will include Bernard Gross QC, Antony Whitlam QC, Anthony Puckeridge QC, Glen Miller QC and Peter Semmler. It is only a coincidence that the Hong Kong rugby sevens championship is to be held on Saturday 23 March and Sunday 24 March 1991.

Information concerning the conference can be obtained from Creative Conference Management, 295 Parramatta Road, Glebe, NSW 2037. Phone (02) 692 9022 Fax (02) 660 3446. Bookings close on 31 January 1991. ❑

The Downing Centre Library

A library has been established at the Downing Centre complex to which access will be available to both practitioners as well as the judiciary. There are already fourteen courts for the Local Courts in the Downing Centre and an additional sixteen courts for the criminal jurisdiction of the District Court will be operating when the complex opens. Funding for the Downing Centre Library was provided, in part, by the Law Foundation of New South Wales. ❑

Julius Stone Scholarships

An appeal has been launched to provide funds for the Julius Stone Memorial Postgraduate Scholarships in Law. The appeal was launched during a seminar on international law convened by the Australian Branch of the International Law Association. The scholarships are to be offered by the University of New South Wales in memory of Professor Stone who spent thirteen years in the Law School of that University.

The President of the Court of Appeal, Mr Justice Kirby, spoke at the launch and paid tribute to Professor Stone. He pointed out that *Province and Function of Law* published by Professor Stone in 1946, was most forward looking, having foreseen the changes in statutory interpretation, administrative law, the secularisation of divorce law, the development of pluralism in society, with anti-discrimination legislation, new attitudes to tax avoidance and the foundation of law reform commissions. He said the real impact of Professor Stone upon the law and legal institutions in Australia was only now being felt in full measure.

The purpose of the Julius Stone scholarships is to provide for postgraduate research tenable at the University of New South Wales Law School All may contribute to the fund which establishes the scholarships by writing to Professor Ivan Shearer, Julius Stone Memorial Committee, Law School, University of New South Wales, PO Box 1, Kensington. NSW 2033. ❑